

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**Case No: HC-MD-CIV-ACT- OTH-2018/02642**

In the matter between:

**URSULA ESTER BLAAUW**

**PLAINTIFF**

and

**CHRISCHENDA AKIMI PALLAIS  
BANK WINDHOEK LIMITED**

**FIRST DEFENDANT  
SECOND DEFENDANT**

**Neutral Citation:** *Blaauw v Pallais & another* (HC-MD-CIV-ACT-OTH-2018/02642)  
[2021] NAHCMD 13 (27 January 2021)

**Coram:** PRINSLOO J

**Heard:** 22-23 September 2020; 6 November 2020

**Delivered:** 25 January 2021

**Reasons:** 27 January 2021

**Flynote:** Civil practice – Vicarious Liability – An employee who is clearly mandated to work within certain guidelines but decides to deviate from the scope of authority of his or her employer and the deviation is remotely detached from her

mandate – is solely responsible for his or her deeds. – An employer cannot be held vicariously liable for those deeds. – In that determination the court applied both subjective and objective tests and held that the employer was not vicariously liable for his employees' wrongfulness.

Summary: The plaintiff issued summons against the first and second defendant on 6 July 2018. The plaintiff claimed for payment against the first and second defendant jointly and severally (the one to pay the other to be absolved) for payment in the amount of N\$588, 044.70 which amount was amended during trial to N\$403 04.70 plus interest and costs for money misappropriated from her account by the first defendant who is an employee of the second defendant.

*Held that* when the first defendant acted on behalf of the plaintiff as her mandatary /mandate holder, she acted in her personal capacity as the plaintiff's agent and not in her capacity as personal banker.

*Held that* the first defendants conduct and nature of her duties are far and not remotely connected to her mandate from the plaintiff. It can therefore, be safely held that first defendant was on a frolic of her own and as such vicarious liability cannot and should not be extended to engulf second defendant in the circumstances.

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## ORDER

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The plaintiff's claim against the second defendant is dismissed with cost. Such cost to include the cost of one instructing and one instructed counsel.

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## JUDGMENT

### Introduction and background:

[1] The plaintiff, Ursula Ester Blaauw, issued summons against the first and second defendant on 6 July 2018. The plaintiff claimed for payment against the first and second defendant jointly and severally (the one to pay the other to be absolved) for payment in the amount of N\$588, 044.70, which amount was amended during trial to N\$403 04.70 plus interest and costs for money misappropriated from her account by the first defendant who was an employee of the second defendant.

[2] The first and second defendant entered their appearance to defend on 26 July 2018. However, the first defendant's legal practitioner withdrew his representation on 20 November 2018. As a result thereof only the plaintiff and the second defendant took part in the further conduct of the matter, and it would not appear that the plaintiff is pursuing the action against first defendant. This position might however change in light of the judgment that follows hereunder.

[3] The plaintiff's cause of action is premised on the fact that she had several bank accounts at the Mariental Branch of the second defendant from which money was misappropriated by the first defendant. It is the plaintiff's case that at all relevant times, the first defendant, Ms Pallais, was a senior credit clerk in the employ of the second defendant at the said branch and as such performed her duties at the second defendant, within the scope of her employment with the second defendant. In addition thereto the second defendant appointed the first defendant as the personal banker of the plaintiff.

### Plaintiff's case

[4] The plaintiff was the only witness who testified in support of her claim. Briefly Ms Blaauw testified that she has many business interests which ranges from being a bookkeeper for approximately 8 years to speculating in livestock and because of the nature of her speculator business she is frequently out of town. Ms Blaauw testified that the second defendant appointed Ms Pallais as her personal banker and Ms

Pallais provided her with advice regarding the management of her accounts and she trusted Ms Pallais with all her banking and financial matters. She testified that Ms Pallais came to her on 20 May 2014 and proposed that due to her not always being available to sign documentation and to approve necessary transactions, that she signs a mandate in Ms Pallais' favour on each of her respective bank accounts, which will enable Ms Pallais to sign on her behalf should she not be available. Ms Blaauw further testified that she believed that Ms Pallais was acting in her best interest in her capacity as the second defendant's employee.

[5] Ms Blaauw testified that she welcomed the proposal by Ms Pallais and therefore signed the mandates in her favour in respect of all her accounts. Ms Blaauw testified that she knew Ms Pallais in a personal capacity from the time she became a tenant in one of the flats she (the plaintiff) owned. She testified that Ms Pallais confided in her regarding her personal issues and that she at some stage lent her money. Ms Blaauw testified that she never thought Ms Pallais would abuse her position of trust to defraud her by drawing amounts from her accounts for her own use.

[6] According to Ms Blaauw a senior employee of the second defendant's Mariental Branch, one Mr Schroer, informed her that he believed that transactions on her accounts appeared to be irregular and she must investigate the transactions. Ms Blaauw testified that she investigated her accounts and found that an amount of N\$403 044.70 was misappropriated from her accounts by Ms Pallais. Ms Blaauw testified that she demanded that the second defendant compensate her for her loss because it was caused by the first defendant, who acted in the course and scope of her employment with the second defendant. Ms Blaauw further testified that the second defendant addressed a letter to her dated 8 March 2017 wherein it denied liability for any of her losses caused by Ms Pallais and provided her with the following reasons: (a) that there was a personal relationship between plaintiff and first defendant, (b) that the plaintiff provided the first defendant signatory powers for her accounts and (c) that the plaintiff therefore endorsed any amounts transferred by the first defendant from her accounts. Ms Blaauw testified that she did not accept the reasons provided to her by the second defendant and that led to the summons being issued against both first and second defendant to recover her monies. Ms

Blaauw further testified that Ms Pallais also stole from her daughter during 2014, subsequent to the signing of the mandates. On a question of the court the witness stated that she could not think why Ms Pallais would steal from her, and in spite of the incident regarding her daughter she did not cancel the mandates. During the course of the hearing the plaintiff provided the court with various documentation in support of her claim which were handed up and submitted as exhibits.

[7] Under cross examination Ms Blaauw confirmed that she employed a bookkeeper and that she paid tax for her various business-enterprises. The plaintiff confirmed that at the time when she signed the mandates in favour of Ms Pallais, Ms Pallais was not a personal banker but just a senior credit clerk. Ms Blaauw further confirmed that Ms Pallais could not have transacted on her accounts without the mandates in place. When confronted about how the second defendant would distinguish between authorized and unauthorized transactions the plaintiff chose not to comment to it.<sup>1</sup> The plaintiff further conceded that Ms Pallais was acting in her capacity as the plaintiff's agent. The plaintiff indicated that on occasions she would call Ms Pallais to withdraw money for her over the counter and she would then provide it to her. Ms Blaauw was further asked how she could distinguish between the transactions made by Ms Pallais on her instructions and those actioned without her authorization. Ms Blaauw was however unable to provide an answer to it<sup>2</sup>. The court inquired from the witness whether she instituted criminal proceedings against Ms Pallais to which she answered in the negative.

#### Second defendant's case

[8] In its plea the second defendant denied that the first defendant was acting within the course and scope of her employment with the second defendant<sup>3</sup> for the following reasons:

a) that as per the terms stipulated in the mandates given by the plaintiff to the first defendant on each of the relevant bank accounts of the plaintiff;

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<sup>1</sup> Transcribed record page 49 par 10.

<sup>2</sup> Transcribed record page 50 par 20.

<sup>3</sup> Second Defendant's Plea par 3.1.

b) the plaintiff has in so far the second defendant is concerned given authority to the first defendant to operate on the plaintiff's bank account on the plaintiff's behalf and to act as plaintiff's assignee in all matters and affairs;

c) the plaintiff has given assurance and bound herself in the mandates that all acts of the first defendant shall be binding upon the plaintiff;

d) the said authority in the mandate given by the plaintiff to the second defendant shall remain in force until the second defendant receives written notice from the plaintiff of alteration or cancellation thereof; and

e) that all relevant transactions that were conducted on the plaintiff's bank accounts were authorized, with the permission or consent of the plaintiff; alternatively deemed to have been so authorized, with the permission or consent of the plaintiff in accordance with the aforesaid Mandates<sup>4</sup>.

[9] The second defendant called two witnesses to testify in support of its case. The first to testify was Johann Kube Schroer. Mr Schroer testified that he is a Branch Manager of the second defendant's Mariental Branch and that he recalled that whenever Ms Blaauw called or visited the branch she would ask for the first defendant, Ms Pallais, to assist her with her banking needs. He testified that Ms Pallais rented a place from the plaintiff and that she collected and deposited rental money from the other tenants on behalf of Ms Blaauw. He testified that he was aware that at that time Ms Blaauw gave mandates in favour of Ms Pallais on her bank accounts, which mandates gave Ms Pallais authority to operate Ms Blaauw bank accounts on her behalf and to act as her agent in matters and affairs concerning these accounts.

[10] Mr Schroer testified that in terms of the mandates it remained in force until such time that the plaintiff provides the second defendant with a written notice of alteration or cancellation of the mandates. The witness testified that in spite of the misappropriation of money by Ms Pallais, Ms Blaauw failed to give written notice of cancellation of the respective mandates and testified that Ms Blaauw only gave a verbal cancellation during December 2015. The mandates were however cancelled on 16 December 2015. Mr Shroer testified that in terms of the mandates, Ms Blaauw gave signing powers to Ms Pallais to act on her behalf during the period 20 May

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<sup>4</sup> Second Defendant's heads of arguments page 4.

2014 up to 16 December 2015, which includes the period that the plaintiff claims for alleged misappropriated funds against the second defendant.

[11] Mr Schroer testified that the transactions during the period in question were duly authorized and signed by Ms Pallais on behalf of Ms Blaauw and this was done in accordance with the mandates. He testified that Ms Pallais was acting as the agent of Ms Blaauw and not as an employee of the second defendant. Ms Pallais acted in the stead of Ms Blaauw by giving instructions to the second defendant and/or signing on behalf of Ms Blaauw for any withdrawal and/or transfer from the accounts of Ms Blaauw. He further testified that as far as the second defendant was concerned it was satisfied with the assurances given by Ms Blaauw (in terms of the mandates) that she was bound by any transaction executed by Ms Pallais. He testified that all the relevant transactions on Ms Blaauw's account were authorized by the plaintiff's agent, Ms Pallais, who had the necessary permission or consent in terms of the mandates and the second defendant was entitled to rely thereon and act in accordance with instructions. On a question of the court regarding the bank's policy and procedure in respect of mandates given to banking staff the witness indicated that although it does not happen frequently that a client gives a banking official a mandate there is nothing in the policies and procedures of the bank that prohibits the granting of such a mandate.

[12] The second witness in support of the second defendant's case was Ms Salome Korf. She testified that she is currently the Supervisor: Customer Service at the second defendant's Mariental Branch and that during the period of May 2014, Ms Pallais approached her with the request that she should complete mandate documents for Ms Blaauw in favour of herself as she was handling the affairs of the plaintiff, Ms Blaauw. The witness testified that the first defendant rented one of the plaintiff's flats and they developed a close relationship. The witness also indicated that whenever Ms Blaauw called or visited the branch she would request Ms Pallais to assist her. She testified that at the time she was an Admin Support Clerk of the Mariental Branch and was responsible for the mandates (completing, signing, loading and removing same from the system) of that branch.

[13] Ms Korf testified that she knew of the transfers made by Ms Pallais because she was responsible for compiling the online transfer reports of the branch as every transfer would come to her at the end of the day. Ms Pallais would complete the transfer and then ask one of the second defendant's employees to do the transfer because Ms Pallais may not action the transfer. The witness testified that due to the relationship between the plaintiff and Ms Pallais and the mandates given, no one questioned the first defendant on her actions.

#### Submissions on behalf of the parties

##### *On behalf of the plaintiff*

[14] Mr. Grobler, on behalf of the plaintiff, in his heads of arguments, submitted at the onset as stated in the *Shikale v Universal Distributors of Nevada* that:

'it is expected of the plaintiff to prove its case at least prima facie. This means that if the plaintiff places sufficient evidence before the Honourable Court on any particular disputed issue, then defendant will attract the evidential burden (the duty to rebut) or the so called "weerleggingslas".'<sup>5</sup>

[15] Mr Grobler submitted that the following evidence of the plaintiff was undisputed:

'4.1 that the first defendant approached her on 20 May 2014 and proposed that the plaintiff grant her a mandate on each of her accounts to authorize her to sign all necessary documents and approve necessary transactions when the plaintiff is not available.

4.2 That she believed that the first defendant in her capacity as bank officer will always act in her best interest and for this reason signed the mandate in favour of the first defendant.'

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<sup>5</sup> Plaintiff's Heads of arguments page 2. *Shikale v Universal Distributors of Nevada* (2015 (4) NR 1065 p.1082 H).



[16] Mr Grobler submitted that the second defendant's case is based on conjecture and an attempt to discredit the evidence of the plaintiff. He submitted that the attempt to discredit the evidence of the plaintiff has nothing to do with the essential facts the plaintiff had to submit to prove her case, but only had a bearing to evidence on issues not related to prove her claim. In this regard, he referred to the case of *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd*<sup>6</sup> where it was held that "this court hesitates and is loath to condemn a witness because of her or her demeanour in a witness box. Consequently references to demeanour, if they are to carry any weight at all, should only back up conclusions reached by an objective assessment of the facts."

[17] Mr Grobler submitted that the relationship between the bank and a client is basically a contract of *mandatum* and he referred to the case of *Di Giulio v First National Bank of South Africa Ltd*<sup>7</sup> where the relationship between bank and customer was confirmed to be one of a contract of *mandatum*. He submitted that where a relationship of *mandatum* exists and that mandate is not honoured, the bank will be liable to the client for the breach. He submitted that the mandates provided to the first defendant by the plaintiff is nothing more than a reinforcement of the mandate between the client and the bank.

[18] On the issue of vicarious liability, Mr Grobler, submitted that the second defendant is liable for the actions of the first defendant on the accounts of the plaintiff in terms of the contract of *mandatum* between the second defendant and the plaintiff. He submitted that there can be no doubt that the first defendant whilst managing the accounts of the plaintiff with the second defendant was acting in the course and scope of her employment with the second defendant. He further submitted that according to authorities the bank will not be liable for the actions of the first defendant if the first defendant was on frolic of her own when she stole the money from the plaintiff. In this regard Mr Grobler referred to *K v Minister of Safety and Security*<sup>8</sup> where the following was held:

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<sup>6</sup> Plaintiff's Heads of Arguments page 6, *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd* (1996 NR 139 HC p 152).

<sup>7</sup> Plaintiff's Heads of Arguments page 6-7, *Di Giulio v First National Bank of South Africa Ltd* (2002 (6) SA 289 H-J).

<sup>8</sup> Plaintiff's Heads of Arguments page 8-9, *K v Minister of Safety and Security* (2005 (6) SA 419 CC p433 E-F and 434 A).

[24] The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The Courts have held that as long as the employee is acting 'within the course and scope of his or her duty' or is 'engaged with the affairs of his master' that the employer will be liable.' The principle of vicarious liability is not peculiar to our common law, but is also to be found in customary law rules. It is clear, therefore, that there is a deep seated sense of justice that is served by the notion that in certain circumstances a person in authority will be held liable to a third party for injuries caused by person falling under his or her authority. '

[19] Mr Grobler, further submitted that even where the bank official was guilty of fraud the bank can still be held vicariously liable as held in *Minister of Finance and other v Gore N.O*<sup>9</sup>. He submitted that in the present case the theft from the plaintiff's account, although it was for the benefit of the first defendant, "a sufficiently close link between the servants for his own interests and purposes and the business of his master" exists to make the master (second defendant) liable. He further submitted that the evidence that there was some or other relationship between the plaintiff and first defendant is irrelevant as there is in any event no facts that was placed before the Court that this relationship has any bearing on the fraudulent actions of the first defendant.

*On behalf of the defendant*

[20] Mr Van Zyl, on behalf of the second defendant, in his heads of arguments submitted that the objective, undisputed facts and the totality of the evidence (documentary and testimony) read with the relevant law supports the second defendants defence and dispels the plaintiff's claim, on a balance of probabilities, which is of course all that is required. In respect of onus, Mr Van Zyl referred to a passage as approved by the Supreme Court of Namibia in *Gamikaub (Pty) Ltd v Schweiger*<sup>10</sup> matter where the following was stated:

[12] In the second edition of the **Principles of Evidence** by Schwikkard and Van der Merwe it is stated, *inter alia*, at page 538 under the rubric "The Nature and Incidence of

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<sup>9</sup> Plaintiff's Heads of Arguments page 11, *Minister of Finance and other v Gore N.O* (2007 (1) SA 111 p.141 B).

<sup>10</sup> *Gamikaub (Pty) Ltd v Schweiger* (SA26/2005) [2008] NASC 18 (24 November 2008)

the Burden of Proof,' that "(T)he test for determining who bears the burden of proof as set out in *Pillay v Krishna 1946 AD 946*, is beguiling, for it rather begs the question which of the parties can properly be said to be 'asserting' or 'denying', as the case may be. Nevertheless, it usefully encapsulates the guiding principle, which is that the person who makes a positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo. Most often that will be the plaintiff, and the defendant will bear the burden of proof only in relation to a special defence.... ." (emphasis is supplied). And on page 539, dealing with the evidential burden, the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)* is cited in which Corbett, JA, is reported to have made the following statement at page 548:

"As pointed out by Davis AJA in *Pillay v Krishna 1946 AD at 952 – 3*, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In *Brand v Minister of Justice 1959 (4) SA 712 (A)* at 715 Oglivi-Thompson JA called it 'the overall onus.' In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal. This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea v Godart 1939 AD 16* at 28; *Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26* at 378 – 9.)."

[21] In respect of vicarious liability, Mr Van Zyl submitted that the onus rests on the plaintiff to allege and prove in addition to the usual allegations to establish delictual liability, the following requirements-

- 'a) there must be an employer- employee relationship ;
- b) the employee must commit a delict; and
- c) the employee must act within the scope of his employment when the delict was committed'

[22] Mr Van Zyl further submitted that a court seized with a matter to determine whether or not an employer is liable for a delict committed by its employee should first determine whether the facts concern the standard test of vicarious liability or the so-called deviation cases. While the former test is straightforward and traditional in nature, the deviation cases present both policy and jurisprudential difficulties in deciding whether or not the employer is vicariously liable.

[23] Counsel submitted that in respect of law of agency, it is trite that notwithstanding the fact that the agent is in breach of her contract with her principal, an agent who uses her power for her own and not her principal's purposes binds her principal to the third person. He submitted that the first defendant did not act within the course and scope of her employment with second defendant, because it did not form part of her employment with the second defendant to sign on behalf of clients and to give instructions on behalf of clients to the second defendant to withdraw and/or transfer fund from those clients' accounts. Mr Van Zyl submitted that it could not be said that the first defendant (referring to the first subjective questions) was at the relevant time busy with the affairs, or business, or doing the work of the employer, but that the alleged wrongful acts were done solely for the purposes of the employee and/or as agent of the plaintiff, which means that the employer (second defendant) would not be liable.

[24] Mr Van Zyl submitted that the second and objective questions is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for her own interests and the purposes and the business of the employer. In answering this question the second defendant states and in accordance with the mandates provided, the first defendant at the relevant times of providing the instructions for the withdrawals and/or transfers from the plaintiff's bank accounts, disassociated herself from the affairs of her employer when committing those acts and the nature and extent of deviation is critical and it cannot be reasonably held that the employee is still exercising the functions to which she was appointed, or still carrying out some instruction of her employer, the latter (second defendant) will cease to be liable.

[25] Mr Van Zyl, further submitted that in answering the general question whether liability should lie against the employer (second defendant) the court should have regard to whether the alleged wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. He submitted that vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong accrues therefrom, even if unrelated to the employer's desires. He submitted that on the evidence before this court the above questions do not arise in that the actions of the first defendant was as an agent duly appointed by the written mandates signed by the plaintiff and not acting at all the relevant times as an employee of the second defendant, meaning that the withdrawals and/or transfers did not occur as a result of any enhanced risk created by the employment of the first defendant by the second, but was directly as a result of the plaintiff providing the first defendant with the mandates.

[26] Mr Van Zyl submitted that in accordance with the provisions of the mandates and the law of agency, the first defendant acted in line with the authority provided by the plaintiff to her when she gave instructions (on behalf of and in the place of the plaintiff to the second defendant) for the relevant withdrawals and/or transfers and, hence whether or not the instructions are *mala fide* or given in fraud by the first defendant against the plaintiff, the plaintiff remains bound by those actions to the bank and the bank (as a third party) was entitled to have relied on those instructions received from the first defendant as the plaintiff's duly authorized agent. Counsel concluded by submitting that the plaintiff is not entitled in law to the relief she claims from the second defendant and therefore the plaintiff's claim should be dismissed with costs.

#### The legal principles and application to the facts

[27] The circumstance of the matter before me is quite unique. It involves a banking employee that dons the hat of employee on the one hand where she stood in an employer/employee relationship to the bank, i.e. the second defendant but also the hat of a mandatary/mandatory relationship with the plaintiff, Ms Blaauw.

[28] It is undisputed evidence that the plaintiff considered Ms Pallais as her personal banker and relied on her advice given to her in that capacity but the relationship between the plaintiff and the first defendant went beyond that. It would also appear that the plaintiff and the first defendant had a diverse relationship. They were friends who knew one another from as far back as 2001 and they were in a business relationship, over and above the client/banker relationship. The first defendant did not only rent a flat from the plaintiff, she also collected rent from the other tenants on behalf of the plaintiff. During 2015, Ms Pallais and her partner also rented a premises from the plaintiff from where they operated a bar. On a personal level the plaintiff was also a confidant of the first defendant, who confided in her about her personal and financial problems and the plaintiff lent Ms Pallais money to care for her son at times.

[29] In terms of her personal relationship with Ms Pallais, the plaintiff trusted the first defendant enough to sign mandates in the first defendant's favour in respect of all five accounts in the plaintiff's name and that of her close corporations.

[30] The plaintiff gave the first defendant extensive rights as a result of the mandates. For the sake of completeness I will replicate the mandate granted in favour of the first defendant:

**'MANDATE BY Ursula Ester Blaauw IN FAVOUR OF Chrischenda Akimi Pallais**

I have given my authority to **Chrischenda Akimi Pallais** to operate on my account on my behalf and to act as my assignee in all matters and affairs having reference to, or in any way connected with, my transaction with you, and for that purpose to sign all agreements and documents which may be necessary or expedient, and furthermore, without prejudice to the foregoing generality, as my assignee and on my behalf, to-

- (1) draw, sign and endorse cheques;
- (2) draw, accept and endorse bills of exchange and promissory notes;
- (3) negotiate for and take discounts and loans with or without security, and to pledge and/or cede any species of security for the repayment thereof, and to withdraw securities and to sign receipts therefore;
- (4) establish credit for others;
- (5) guarantee payment of any liability or indebtedness of others to you;
- (6) deposit or withdraw articles for safe custody and to sign acquaintances therefore;

- (7) invest money on Fixed Deposit, Special Deposit and/or Savings Accounts in my name with you to withdraw such money and to sign receipts in respect thereof;
- (8) provide and sign indemnities;
- (9) bind myself to you as security that, so far as you are interested or concerned all such acts of the **Chrischenda Akimi Pallais Chrischenda Akimi Pallais** (sic), shall be binding upon me and that the authority given to **Chrischenda Akimi Pallais** remains in force until you receive written notice by me of alteration or cancellation thereof.

This notice will also be effective at any other branch (es) of BANK WINDHOEK LIMITED to which the account may be transferred in future.'

[31] The fact that there was an employer-employee relationship and that a delict was committed by an employee of the second defendant is common cause between the parties. The issue that remains to be decided on is whether the first defendant was acting within the scope of her employment when she committed the delict and whether the second defendant should be held vicariously liable.

[32] Vicarious liability was summarised as follows in *F v Minister of Safety and Security*<sup>11</sup>:

'Vicarious liability means a person may be held liable for the wrongful act or omission of another even though the former did not, strictly speaking, engage in any wrongful conduct. This would arise where there is a particular relationship between those persons, such as employment. As a general rule, an employer is vicariously liable for the wrongful acts or omissions of an employee committed with the course and scope of employment, or while the employee was engaged in any activity reasonably incidental to it. Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This is generally regarded as the 'standard test'. The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as 'deviation cases'.<sup>12</sup>

[33] The test for vicarious liability was stated in the *Van der Merwe-Greeff v Martin and Another*<sup>13</sup> where the court quoted the following from the South African case of

<sup>11</sup> 2012 (3) BCLR 244 at 24 paras 40 and 41.

<sup>12</sup> *F v Minister of Safety and Security* 2012 (3) BCLR 244 at 254 paras 40 and 41.

<sup>13</sup> (2003/15150 [2005] NAHC 18 (27 June 2005).

*ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 372 (SCA)*, at 378 as follows:

[5] The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing work of, the employer... A master is not responsible for the private and a personal act of his servant unconnected with the latter's employment, even if done during the time of his employment and with permission of the employer. The act causing damage must have been done by the servant in his capacity *qua* servant and not as an independent individual.'

[34] The phrase 'within the course and scope of his or her employment' encompasses in the first place acts committed by the employee in the exercise of the functions to which he or she was appointed, including such acts as are reasonably necessary to carry out the employer's instructions.

[35] It is not always easy to determine whether or not an employee has abandoned his or her employers work. In this regard the courts approach is that they apply the "standard test" which enquiry is whether there was deviation, in other words, whether the employee is still engaged in his or her employer's business but at the same time also pursuing his or her own interest. Then the court must determine if the deviation was of such a degree that it can be said that in deviating the employee was furthering the functions to which he or she was appointed for or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee.<sup>14</sup> This principle was ably laid down in *K v Minister of Safety and Security 2005 (3) SA 179 (SCA)* at 183 C-G where Scott, JA stated:

'The legal principles underlying vicarious responsibility are well-established. An employer, whether a Minister of State or otherwise, will be vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his or her employment. Difficulty frequently arises in the application of the rule, particularly in so-called

<sup>14</sup> *Nghihepavali v Ministry of Agriculture Water and Forestry* (I 26-2014) [2016] NAHCNLD 51 (30 June 2016).



'deviation' cases. But the test, commonly referred to as the 'standard test', has been repeatedly applied by this Court. Where there is a deviation the enquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee. Notwithstanding the difficult questions of fact that frequently arise in the application of the test, it has been recognised by this Court as serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable.' (my emphasis)

[36] To deal with these situations our courts have created a test which can be found in the *Minister of Police v Rabie*<sup>15</sup>, which has been accepted in our jurisdiction in *Nghihepavali v Ministry of Agriculture Water and Forestry*<sup>16</sup>. The court in *Rabie* stated that the test has both a subjective and objective element:

'It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (cf *Estate van der Byl v Swanepoe*], 1927 AD 141, 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.'

[37] In the matter of *K v Minister of Safety and Security* (supra) O'Regan J cautioned against applying the second part of the test in a mechanistic way. O'Regan J referred with approval to *Bazley v Curry*<sup>17</sup> wherein the Canadian Court stated that courts should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.

<sup>15</sup> *Minister of Police v Rabie* 1986 (1) SA 117 (A).

<sup>16</sup> Supra at footnote 14

<sup>17</sup> *Bazley v Curry* 1999 Can LII 692 (SCC); [1999] 2 SCR 534 at para 26ff.

[38] I fully agree with the court's sentiments in this regard and that is why it so important that the court makes an evaluative judgment in each case and regard to all the circumstances at hand.

[39] In the matter before me the plaintiff trusted the first defendant apparently due to their history and friendship that they had. The plaintiff trusted the first defendant apparently against her better judgment as she did not withdraw or cancel the mandates in spite of the fact that it came to her knowledge shortly after signing the mandates in 2014 that the first defendant actually stole money from her daughter. She did not withdraw or cancel the mandates in spite of the knowledge that the first defendant had financial difficulties. The plaintiff retained the first defendant as her mandatary, who had the right to deal with her accounts as she wished. As a result of the mandates the first defendant dealt with the bank accounts as if it was the plaintiff in person. The moment the first defendant conducted any financial transaction with the bank she literally stepped into the shoes of the plaintiff. The first defendant would complete the withdrawal slip but could not process it the same as any other client. Another bank official had to process the transaction. When transacting the first defendant did it in terms of the authority granted to her by the plaintiff in terms of the mandate and not in her capacity as an employee of the bank.

[40] When the first defendant acted on behalf of the plaintiff as her mandatary /mandate holder, she acted in her personal capacity as the plaintiff's agent and not in her capacity as personal banker. The mandates as set out above clearly gave the first defendant the right to represent the plaintiff and in this instance the mandatary (first defendant) was the plaintiff's agent. The first defendant acted as a general agent who was authorised to act for the principal (plaintiff) in all banking transactions.

[41] Acting as an agent on behalf of the plaintiff was neither part of the first defendant's duties nor was it reasonably incidental thereto. When the plaintiff signed the Mandates she attracted the risk that was associated with such a mandate.

[42] The question is thus whether or not first defendant was furthering the interests of the second defendant when she misappropriated the money from the plaintiff's

account in accordance with the Mandates. Having considered the above, I am of the opinion that the first defendant's actions in this matter are completely detached from the expectations of second defendant in the circumstances. There is no sufficient link and/or connection that can qualify the first defendant to have been acting within the scope of her employment. First defendant's conduct and nature of her duties are far and remotely connected to her mandate from the plaintiff. It can therefore, be safely held that first defendant was on a frolic of her own and as such vicarious liability cannot and should not be extended to engulf second defendant in the circumstances.

#### Order

The plaintiff's claim against the second defendant is dismissed with cost. Such cost to include the cost of one instructing and one instructed counsel.

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J S Prinsloo  
Judge



## APPEARANCES:

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