

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-DEL-2018/02220

In the matter between:

THE TOWN COUNCIL OF GOBABIS

PLAINTIFF

and

DELPHAN MBUERE

DEFENDANT

Neutral citation: *The Town Council of Gobabis v Mbuere* (HC-MD-CIV-ACT-DEL-2018/02220) [2021] NAHCMD 441 (30 September 2021)

Coram: USIKU, J

Heard: 29-30 March 2021; 1 April 2021 and 24 June 2021

Delivered: 30 September 2021

Flynote: Delict – breach of fiduciary duty arising from an employment relationship – Damages suffered by plaintiff as a result of misappropriation by the defendant of monies owned by the plaintiff – Court finds that plaintiff has discharged its *onus*.

Summary: The plaintiff sues the defendant for breach of fiduciary duty arising from an employment relationship between the parties. The plaintiff alleges that the defendant breached that duty in that he misappropriated monies belonging to the plaintiff and that consequently the plaintiff suffered damages in the amount of N\$65 000. The court finds

that the plaintiff has discharged the *onus* resting on it and grants judgment in favour of the plaintiff.

ORDER

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) Payment in the amount of N\$65 000;
 - (b) Interest on the aforesaid amount at the rate of 20% p.a. from the date of this judgment to the date of final payment;
 - (c) Costs of suit.
 2. The matter is removed from the roll and regarded finalized.
-

JUDGMENT

USIKU, J

Introduction

[1] This is a delictual action instituted by the plaintiff, against the defendant, for the recovery of damages suffered by the plaintiff as a result of alleged breach of fiduciary duties by the defendant, stemming from an employment relationship between the parties.

[2] In brief, the plaintiff pleads that, between 31 March 2015 and 2 December 2015, the defendant misappropriated or stole a total cash amount of N\$65 000, owned by the plaintiff.

[3] The plaintiff further pleads that, the defendant was responsible for the re-counting of money at cash-up, completion of a bank deposit slip or book and ensure that all the money collected is deposited into plaintiff's account on the next day, following the collection of the money.

[4] The plaintiff alleges that the defendant entered figures of less amounts, on the bank deposit slips, than the actual cash collected on a particular day, and misappropriated the balance.

[5] As an employee, the plaintiff pleads, the defendant owed the plaintiff a fiduciary duty and was obliged to act in plaintiff's best interest and show utmost good faith at all times and desist from intentionally or negligently doing anything that would cause plaintiff to suffer loss or damages.

[6] By acting as he did, the plaintiff pleads, the defendant failed to discharge his duty of care to the plaintiff and as a consequence, the plaintiff suffered loss or damages in the amount of N\$65 000.

[7] The defendant defends the action and denies any wrongdoing on his part.

[8] In support of its claim, the plaintiff called one witness, namely Fillemon Makili ("Mr Makili"). The defendant testified himself and called no further witnesses.

Plaintiff's case

[9] Mr Makili testified that he is employed by the plaintiff in the position of Strategic Executive: Finance and Information, since 26 May 2009. The defendant was at the material time employed by the plaintiff in the position of Debtors Accountant. The Debtors Accountant supervises the Accounts Controller and two cashiers. The key performance areas of the Debtors Accountant as contained in his job description, include:

- (a) attendance to daily bank reconciliation, verifying and reporting irregularities detected on the bank reconciliation to the Strategic Executive: Finance and Information;
- (b) billing and collecting revenue. In this regard the defendant was required to compare the total figures in the plaintiff's bank account, investigate discrepancies and take necessary corrective steps.

[10] In terms of a document titled 'Municipality of Gobabis Manual Procedure and Control Measures Over The Cash Counters and Bank Reconciliation', the following control measures are prescribed:

- (a) shortage of cash must be reported to the Strategic Executive: Finance and Information, on the same date on which such shortage occurred;

- (b) cash for the specific day must be counted for that day, recorded in the Daily Banking Control Sheet, recorded in the Deposit Bank and locked in the safe inside the strong-room, waiting for the next day to be collected by authorized security officers responsible for cash-in-transit;
- (c) each cashier must count his or her cash collected and the cash collected must confirmed and verified by their supervisor in the presence of the cashiers, in order to determine the correctness of the balancing over or shortages before the cash is consolidated;
- (d) the supervisor must complete and reflect the correct total cash collected for the day as reflected in the cash-up till slip for the pre-paid vending machine and the BIQ audit trail report. The supervisor must record his/her name on the deposit slip, before signing the deposit slip;
- (e) the supervisor must insert all the cash collected into the security cash box together with deposit book, seal it in the presence of both cashiers and put it in the lockable safe inside the strong-room, for collection on the next day by authorized security officer responsible for cash-in-transit.

[11] During the months of May and June 2017, it came to light that some cash bank deposit amount was unaccounted for. An investigation was conducted which revealed certain financial irregularities.

[12] A number of persons, including the defendant, were identified as suspects in the theft of the money which was unaccounted for. Three employees were suspended from work pending the investigations. At that stage, the defendant had already resigned from the employment of the plaintiff.

[13] The investigations revealed the following:

- (a) on 31 March 2015, the BIQ cash up till slip reflected a total amount of N\$152 286.40 as collected. The Daily Banking Control Sheet for this specific day could not be found. However, the deposit slip, which was completed and signed by the defendant, reflected only a net amount of N\$137 286.40 as collected. A shortfall of N\$15 000 is unaccounted for;
- (b) on 27 July 2015, the Daily Banking Control Sheet was completed and signed by the relevant cashier(s), reflecting a total amount of N\$100 093.26 as collected. This was supported by the corresponding BIQ cash-up till slip. The

deposit slip, which was completed and signed by the defendant, reflected only a net amount of N\$90 093.26 as collected. A shortfall of N\$10 000 is unaccounted for.

- (c) on 2 November 2015, the BIQ cash up till slip reflected a total amount of N\$127 171.80 as collected. The Daily Banking Control Sheet for that day could not be found. However, the deposit slip, which was completed and signed by the defendant, reflected only a net amount of N\$107 171.80 as collected. A shortfall of N\$20 000 in cash was unaccountable for.
- (d) on 2 December 2015, the BIQ cash up till slip reflected the amount of N\$91 928.62 as collected. This was supported by the corresponding Daily Banking Control Sheet. However, the deposit slip, which was completed and signed by the defendant, reflected only a net amount of N\$71 928.62 as collected. A shortfall of N\$20 000 was unaccounted for.

[14] According to Mr Makili, the defendant never informed him of any shortage.

The defendant's case

[15] The defendant confirmed that he was employed by the plaintiff in the position of Debtors Accountant and resigned from employment sometime in January 2016.

[16] During his employment, Mr Makili was his direct head. The defendant states that he did not have a contract of employment which specifically laid out his duties and obligations. According to him, he only received an appointment letter before he commenced his duties.

[17] While so employed, the following documents were used to ensure accuracy and correctness of the daily revenue:

- (a) the BIQ till slip (which was printed before cash-up);
- (b) the Cash Control Sheet (which had to be signed by the two cashiers and the defendant as the Debtors Accountant);
- (c) the cash deposit slip;
- (d) the daily bank reconciliation (which had to be assessed and signed by Mr Makili).

[18] The defendant could only fill in the Daily Deposit Slip after the Cash Control Sheet had been signed off by the two cashiers and himself and the Deposit Slip has to correspond with the BIQ till slip.

[19] According to the defendant, Mr Makili reviewed his (the defendant's) work daily and if there were discrepancies, he (Mr Makili) would have noticed them the same day. Mr Makili disputed his aspect.

[20] The defendant further stated that he would not have completed a deposit slip without there being a corresponding Daily Banking Control Sheet, completed and signed by the two cashiers and himself.

[21] In regard to the N\$15 000 which was unaccounted for, in respect of the revenue collected on 31 March 2015, the defendant pleaded that the amount which the plaintiff claims has prescribed in terms of the Prescription Act. On this aspect, evidence led on behalf of the plaintiff indicates that the investigations which revealed the financial irregularities and the possible culprits, were only concluded about June 2017. That evidence has not been contradicted, therefore, the defence of prescription has no merits.

[22] As regards the N\$10 000 which was unaccounted for, in respect of the revenue collected on 27 July 2015, the defendant states that he did not sign the Daily Banking Control Sheet for that day, but admits having completed and signed the bank deposit slip.

[23] Regarding the N\$20 000 which was unaccounted for, in respect of the revenue collected on 2 November 2015, the defendant admits having completed and signed the bank deposit slip but pleads that he has no knowledge of how the discrepancy between the BIQ cash-up slip and the money deposited came about.

[24] In regards to the N\$20 000 which was unaccounted for, in respect of the revenue collected on 2 December 2015, the defendant admits having completed and signed the bank deposit slip, but pleads that he has no knowledge of how the discrepancy between the BIQ cash-up slip and the money deposited, came about.

[25] The defendant maintained that he did all his duties diligently at the material time and did his utmost best to advance the best interests of the plaintiff.

Analysis

[26] In the present matter, the plaintiff elected to pursue its claim in delict. The elements of delict are: an act (or omission), wrongfulness, fault (intent or negligence), harm and causation.¹

[27] In regard to the N\$15 000 which was unaccounted for, in respect of the revenue collected on 31 March 2015, I am satisfied that the plaintiff has discharged its *onus* on the balance of probabilities that the defendant has wrongfully and intentionally misappropriated the aforesaid money, the property of the plaintiff. The evidence led by the plaintiff shows that the misappropriation and the identity of the culprit(s) only came to the attention of the plaintiff on or about June 2017 when the relevant investigations were concluded. Therefore, the defence of prescription, put forth by the defendant has no merits and stands to be rejected.

[28] I am also satisfied that the plaintiff has discharged its *onus* on the balance of probabilities, in regard to the N\$10 000 which was unaccounted for, in respect of the revenue collected on 27 July 2015, that the defendant wrongfully and intentionally misappropriated that money. Evidence led on behalf of the plaintiff indicates that the Daily Banking Control Sheet for that day as well as the BIQ cash-up till slip, reflected a total amount of N\$100 093.26 as collected. The defendant completed the bank deposit slip in the amount of N\$90 093.26 only. On the evidence, the probabilities are that the defendant misappropriated the shortfall of N\$10 000. The defendant's defence to the effect that he did not sign the Daily Banking Control Sheet for that day is meritless. Even on the defendant's own version, it is inappropriate to enter on the bank deposit slip an amount inconsistent with the amount reflected on the BIQ cash-up till slip and the Daily Banking Control Sheet.

[29] Similarly, I am satisfied that the plaintiff has discharged its *onus* on the balance of probabilities that the defendant wrongfully and intentionally misappropriated the N\$20 000 which was unaccounted for, in respect of the revenue collected on 2 November

¹ *First National Bank of Namibia Ltd v du Preez* (HC-MD-CIV-ACT-CON-2017/01020) [2019] NAHCMD 360(6 September 2019) reasons released on 30 September 2019 para 112.

2015, as well as for N\$20 000 which was unaccounted for, in respect of the revenue collected on 2 December 2015.

[30] The aforesaid conduct of the defendant was wrongful and as a result thereof, the plaintiff suffered loss in the amount of N\$65 000.

[31] I am therefore of the opinion that the plaintiff is entitled to the relief that it seeks.

[32] In the result, I make the following order:

1. The court grants judgment in favour of the plaintiff against the defendant in the following terms:
 - (a) Payment in the amount of N\$65 000;
 - (b) interest on the aforesaid amount at the rate of 20% p.a. from the date of this judgment to the date of final payment;
 - (c) costs of suit.
2. The matter is removed from the roll and regarded finalized.

B USIKU
Judge

APPEARANCES:

PLAINTIFF:

Mr I Gebhardt
Of Ileni Gebhardt & Co. Inc.
C/o Shikongo Law Chambers
Windhoek

DEFENDANT:

Mr T Nanhapo
Of Brockerhoff & Associates Legal Practitioners
Windhoek