

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case No: I 467/2012

In the matter between:

**ALWYN PETRUS VAN STRATEN N.O**

**1<sup>st</sup> PLAINTIFF**

**PROWEALTH ASSET MANAGERS (PT) LTD**

**2<sup>nd</sup> PLAINTIFF**

**(IN LIQUIDATION)**

**FRANK ALDRIDGE**

**3<sup>rd</sup> TO 89<sup>th</sup> PLAINTIFFS**

and

**NAMIBIA FINANCIAL INSTITUTIONS**

**1<sup>st</sup> DEFENDANT**

**SUPERVISORY AUTHORITY**

**SWART GRANT ANGULA**

**2<sup>nd</sup> DEFENDANT**

**Neutral citation:** *Van Straten N.O v Namibia Financial Institutions* (I 467/2012)  
[2022] NAHCMD 88 (4 March 2022)

**Coram:** Oosthuizen J

**Heard:** 20 October 2020 to 16 November 2020, 10 March 2021 to 11 March 2021, 30 April 2021, and 24 May 2021

**Delivered:** 4 March 2022

**Flynote:** Damages claim — pure economic loss — against juristic entity — vicarious liability of Namfisa for acts or omissions of its functionaries — contextual interpretation of section 31 of NAMFISA Act of 2001.

**Summary:** Plaintiff alleged that Namfisa, a juristic entity acting through functionaries, has a statutory duty of care to ensure that second plaintiff complies with its obligations as a financial institution registered by the Registrar of the Stock Exchange Act of 1985, who is the Chief Executive Officer of Namfisa. Plaintiffs alleged that Namfisa negligently failed to comply with its supervising duty and are liable for the losses sustained by second and third to 89<sup>th</sup> defendants (the Investors). First defendant (Namfisa) pleaded that section 31 of the NAMFISA Act shields Namfisa from liability.

*Held that*, having considered the provisions of the NAMFISA Act hereinbefore, one of the simple logical conclusions which need to be recorded, although superfluous, is that Namfisa (the Authority) cannot act or omit to act without the intervention of natural persons (the functionaries). It is a juristic creation. [47]

*Held that*, Namfisa is unable to act without individuals directing it, without functionaries to advance its objects, without individuals in its employ, without a Minister to regulate it, without a board who manage and control its affairs, without a legislative document which direct its affairs and without a Chief Executive Officer who is responsible for the day-to-day management and administration of Namfisa. [48]

*Held that*, Namfisa attracts vicarious liability through its functionaries only, i.e through the Minister, the board's members, its employees, advisors, its Chief Executive Officer and the members of the appeal board. [49]

*Held that*, Namfisa is unable to delegate any power, function, and duty without intervention of the Minister, the board or the Chief Executive Officer. [50]

*Held that*, there are no reserve non-delegable power, function, or duty outside the scope of the applicable legislation. All powers, functions or duties can only be exercised by natural persons on behalf of the Authority (Namfisa). [51]

*Held that*, the Authority exercises supervision over the business of financial institutions and over financial services. Namfisa (*per se*) does not regulate the business of financial institutions and financial services. That is in the domain of the Minister and the board in consultation with the Minister, and the Chief Executive Officer subject to directions from the board, acting on behalf of Namfisa due thereto that Namfisa cannot act without human intervention. [52]

*Held that*, section 31 qualify the indemnity it accorded the Minister, a member of the board or an alternative member of the board, a member of a committee, the Chief Executive Officer or any other employee of the authority or a member of the board of appeal by providing that they are not liable in respect of anything done or omitted to be done in good faith in the exercise of any power or the performance of any duty under the NAMFISA Act or any other law. The legislature responsible for the creation of Namfisa and the NAMFISA Act is deemed to have known that Namfisa cannot function without designated functionaries. [53]

*Held that*, the exemption from liability is however restricted to the mentioned officials' actions or omissions done in good faith in the exercise of any power or performance of any duty under the NAMFISA Act or any other law. If any one of the mentioned officials did not act or omit to act in good faith in the exercise of a power or performance of a duty under the NAMFISA Act or any other law, they would be liable and Namfisa would be vicariously liable. Arguably, if the Minister did not act in good faith in the exercise of any power or performance of any duty under the NAMFISA Act or any other law, Namfisa or the State could be vicariously liable. [55]

*Held that*, in the matter at hand Plaintiffs alleged that Namfisa had a statutory duty to care as well as a duty in common law to ensure that PAM complies with its obligations, which was imposed for the benefit of the company and those members of the general public who invested funds with the company. Plaintiffs further allege a

breach of the duty (wrongfulness) and negligence by Namfisa which resulted in financial losses to the company and Investors. [57]

*Held that*, assuming such a duty, breach thereof and negligence by Namfisa may exist (not finding), Namfisa as juristic entity can only act or omit to act through the persons (functionaries) mentioned in section 31. Their liability will introduce the liability of Namfisa, not the other way around. [58]

*Held that*, Namfisa may be vicariously liable for the losses incurred by the plaintiffs on condition that the functionaries mentioned in section 31 did not act or omit to act in good faith in the exercise of any power or the performance of any duty, inclusive of the statutory duty of care, under the NAMFISA Act or the Stock Exchanges Control Act of 1985 and/or the Inspection of Financial Institutions Act of 1984 and the common law. The same will apply if Namfisa's functionaries acted mala fide. [73]

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### **ORDER**

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1. Namfisa is not liable towards the Plaintiffs.
2. Plaintiffs' claims are dismissed with costs.
3. Plaintiffs shall pay the costs of Namfisa which shall include the costs of one instructing and two instructed counsel.

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### **JUDGMENT**

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OOSTHUIZEN J:

### Concise summary of the relevant parties to the proceedings

[1] First plaintiff is Alwyn Petrus van Straten N.O, a major male person in his nominal capacity as the appointed liquidator for Prowealth Asset Managers (Pty) Ltd in liquidation.

[2] Second plaintiff is Prowealth Asset Managers (Pty) Ltd in liquidation who retains *locus standi in iudicio* for purposes of the beneficial winding up of its affairs. It is referred to as "the company" or PAM.

[3] Third to 89<sup>th</sup> plaintiffs are referred to as "the Investors" whose claims are in the alternative to the claims of the company.

[4] First Defendant is Namibia Financial Institutions Supervisory Authority, hereinafter only referred to as "Namfisa", a juristic person established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act, Act 3 of 2001 (as amended by the State-Owned Enterprises Governance Act, Act 2 of 2006). Hereinafter Act 3 of 2001 shall be called the "NAMFISA Act".

4.1 The Chief Executive Officer of Namfisa also acts as the appointed Registrar pursuant to the Stock Exchanges Control Act, Act 1 of 1985 and the Inspection of Financial Institutions Act, Act 38 of 1984. These functions thus also fall within the course and scope of his employment with Namfisa. The Chief Executive Officer is referred to as "the Registrar."

4.2 Namfisa, in terms of the establishing Act and through the position of its CEO as Registrar under various statutes, is by virtue of section 3 of its establishing Act the body in overall superintendence of financial institutions in Namibia.

[5] Namfisa has admitted the particulars set out in para [4] above.

[6] No reference will be made to the remaining defendants as there remains no live *lis* with them

## Background

[7] On 1 August 2003 the Chief Executive Officer of Namfisa in his capacity as Registrar in terms of the Stock Exchanges Control Act (SECA) registered and licenced the company (2<sup>nd</sup> plaintiff, i.e. PAM) in terms of section 4(1)(f) of the Stock Exchanges Control Act and also approved the late Potgieter as the company's sole portfolio manager.<sup>1</sup>

[8] With the registration and licence the company (PAM) commenced to do business as an asset manager until its liquidation and received money from the Investors. As asset manager the company was a financial institution.<sup>2</sup>

[9] Paragraph 9 of the amended particulars of claim set out the requirements the company had to meet to be registered. The requirements was stipulated by the Registrar of Stock Exchanges.

[10] Paragraph 10 of the amended particulars of claim alleges that at the time of PAM's registration as an asset manager the Registrar knew or ought to have known that the company intended to solicit funds from the general public for onward investment; and more.

[11] Paragraph 11 of the amended particulars of claim then alleges that Namfisa (the juristic person created by section 2 of the NAMFISA Act) had a statutory duty of care pursuant to the NAMFISA Act, Stock Exchanges Control Act, 38 of 1984 as well as such duty in common law to ensure that the company (PAM) complies with its obligations. The duty, so it is alleged, was imposed for the benefit of the company and those members of the general public who invested funds with the company.

[12] Namfisa, in breach of the alleged duty, allowed the company to be registered notwithstanding the fact that the company failed to comply (with the Registrar's)

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<sup>1</sup> Paragraph 7 of the amended particulars of claim.

<sup>2</sup> Paragraph 8 of amended particulars of claim read with paragraph 12 thereof.

requirements for registration; and conduct operations from August 2003 up to March 2009 despite its failure to comply with the requirements as alleged.<sup>3</sup>

[13] In and as a result of Namfisa's negligence to properly supervise the conduct set out above the company, alternatively the Investors, alternatively further the company and the Investors suffered damages of N\$70 864 011 being monies of the company misappropriated by the deceased and in respect whereof the company is liable to the investors and those who invested with the company.<sup>4</sup>

[14] Due thereto that the deceased has been declared liable without limitations, the deceased estate is unable to meet the Investor's claims.<sup>5</sup>

[15] The Investor's claims have been admitted by Van Straten N.O against the company (PAM) in liquidation and the company is not able to meet the Investors' claims hence this action against Namfisa.<sup>6</sup>

[16] The damages (plaintiffs allege) were of the kind contemplated by the aforesaid Acts, alternatively was a foreseeable consequence of Namfisa's breaches aforesaid.<sup>7</sup>

[17] First defendant (Namfisa) denies, *inter alia*, that it had a statutory duty of care to ensure that second plaintiff complied with its obligations; that in the event the court found such a duty, Namfisa denies that a breach of such duty attracted delictual liability except if such breach is found to be wrongful as a result of bad faith.<sup>8</sup>

[18] Namfisa furthermore pleads that any omission or action by it found to contributed to the occurrence of PAM's and the deceased's irregularities, cannot be the basis for delictual liability unless bad faith is alleged and proven by the plaintiffs as contemplated in section 31 of the NAMFISA Act.<sup>9</sup>

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<sup>3</sup> Paragraph 12 of the amended particulars of claim.

<sup>4</sup> Paragraph 13 of the amended particulars of claim.

<sup>5</sup> Paragraph 14 of the amended particulars of claim.

<sup>6</sup> Paragraph 15 of the amended particulars of claim.

<sup>7</sup> Paragraph 16 of the amended particulars of claim.

<sup>8</sup> Paragraph 8 of first defendant's amended plea.

<sup>9</sup> Paragraph 9.6 of the first defendant's amended plea.

[19] Namfisa denies that it was negligent as alleged and denies that its alleged negligence caused the alleged damages.<sup>10</sup>

[20] Namfisa further denies liability because the investments by plaintiffs was a private contractual arrangement; plaintiffs were not induced to invest by Namfisa's supervisory functions; the *boni mores* of the community do not require compensation from Namfisa from public funds for fraud committed by deceased arising from a private transaction; and section 31 of the NAMFISA Act limits the liability of Namfisa to instances when the act or omission is done in bad faith.<sup>11</sup>

[21] In paragraph 108 of the parties' joint proposed pre-trial order one of the questions of law the parties agreed should be resolved was whether Namfisa can only be held delictually liable for any of its acts or omissions which may be found to have contributed to the irregularities committed by PAM and Potgieter (which is denied) if bad faith is proven by the plaintiffs as contemplated by section 31 of the NAMFISA Act.

[22] It is common cause between the parties that plaintiffs did not allege bad faith on the part of Namfisa. Plaintiffs depart from the premise that Namfisa as regulatory body was not expressly excluded from liability in section 31 of the NAMFISA Act.

[23] The Supreme Court also observed that neither Namfisa nor the Registrar under the Stock Exchanges Control Act and Inspection of Financial Institutions Act is referred to in section 31 of the NAMFISA Act.<sup>12</sup>

[24] The Supreme Court did not determine the statutory interpretation of section 31. It observed that section 31 would indicate that a breach of statutory provisions may be wrongful and that it does not include the liability of Namfisa within its reach. It however left the statutory construction open because it thought it inappropriate to determine at exception stage.

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<sup>10</sup> Paragraph 10.1 of first defendant's amended plea.

<sup>11</sup> Paragraph 10.2 of first defendant's amended plea.

<sup>12</sup> *Van Straten v Namibia Financial Institutions Supervisory Authority* 2016(3) NR 747 SC, Paragraph [98].



### Authority on interpretation

[25] Section 31 of the NAMFISA Act under the heading 'limitation of liability' provides: "The Minister, a member or alternative member of the board, a member of a committee, the chief executive officer or any other employee of the Authority or a member of the board of appeal is not liable in respect of anything done or omitted to be done in good faith in the exercise of any power or the performance of any duty under this Act or any other law."

[26] In *Total Namibia*<sup>13</sup> our Supreme Court has adopted the approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>14</sup> being that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually use.'

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<sup>13</sup> *Total Namibia v OBM Engineering and Petroleum Distributors* 2015(3) NR 733 SC, Paragraph [18].

<sup>14</sup> 2012 (4) SA 593 (SCA), paragraph 18.

## NAMFISA Act

[27] The objects of the NAMFISA Act is to establish an Authority to exercise supervision over the business of financial institutions and over financial services; to provide for the functions and powers of the Authority; and to provide for incidental matters.

[28] Section 2 established a juristic person to be known as the Namibia Financial Institutions Supervisory Authority.

[29] Section 3 provides for the functions of Namfisa. They are to exercise supervision in terms of the NAMFISA Act or any other law over the business of financial institutions and financial services; and to advise the Minister on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister.

[30] Section 4 set out the powers of Namfisa. Section 4(1) provides for the Commissions Act, Act 8 of 1947 to be applicable to Namfisa for purposes of any investigations in connection with the performance of the exercise of supervision and for the Chief Executive Officer to act as the Secretary of the Commission.

[31] Section 4(2) give the discretionary power to Namfisa to call on such persons as it may consider necessary to assist it in the performance of its functions (being supervision and advice); hire, purchase or acquire movable or immovable property it may consider necessary for its functions; enter into agreements with any person to perform its functions; insure itself against any loss, damage, risk or liability which it may suffer or incur; appoint employees to assist in the performance of its functions and to do anything which is necessary or expedient to perform its functions.

(Some powers were omitted as not relevant to the present exercise)

[32] Section 5(1) oblige the board to, in consultation with the Minister and subject to the provisions of the NAMFISA Act, and upon such terms and conditions as the

board, subject to section 22(3) of the State-Owned Enterprises Governance Act, 2006, may determine, appoint a suitable qualified person to be Namfisa's Chief Executive Officer. The Chief Executive Officer must, in accordance with the policy and directions of the board, be responsible for the day-to-day management and administration of Namfisa.

[33] In terms of section 5(6) the board may set aside or vary any decision of the Chief Executive Officer, except a decision lawfully conferring a right on any person.

[34] Sections 6 and 7 provide for the appointment and remuneration of employees by the Authority (Namfisa).

[35] Section 10(1) provides for a board of Namfisa which shall manage and control the affairs of the Authority (the juristic person in terms of section 2) and exercise the powers conferred and perform the duties imposed on the Authority by the NAMFISA Act or any other law.

[36] Section 14(1) provides for the first and subsequent meetings of the board. The Minister determine the first meeting.

[37] Section 14(3) - 14(9) provide for the constitution and operations of the board.

[38] Section 15 provides for the appointment of committees by the board.

[39] Section 17 oblige the board to consult the Minister in the exercise of powers conferred upon and the performance of duties assigned to it by the Act or any other law as the Minister may determine; and directly consult the Minister in connection with any other matter that the board wishes to bring to the attention of the Minister.

[40] Section 18 allows the board to make rules regarding committees; good management of the affairs of Namfisa and the effective execution of its functions; and generally regarding any matter which the board may consider necessary or expedient to regulate in order to achieve the objects of the NAMFISA Act.

[41] Part IV of the NAMFISA Act establishes a board of appeal and regulates its constitution and functions.

[42] Part V of the NAMFISA Act makes provision for financial matters.

[42.1] Section 25(1) obliges the Minister, on recommendation of the board, to impose levies on financial institutions by notice in the Gazette.

[42.2] Section 27(1) obliges the Chief Executive Officer to keep full and proper accounts and records of all moneys received or expended by the Authority and of all assets, liabilities and financial transactions of the Authority during its financial year.

[43] Section 29 of the NAMFISA Act provides as follows:

(1) The Minister may, subject to such conditions as the Minister may determine, delegate any power conferred upon him or her by this Act, excluding the powers conferred upon the Minister by sections 25 and 35, to the Permanent Secretary in the ministry responsible for finance, or to any other officer in that ministry.

(2) The board may -

(a) on such conditions as the board may determine, delegate to the chief executive officer or any other employee of the Authority any power conferred upon the board by or under this Act; or

(b) authorise the chief executive officer or any other employee of the Authority to perform any duty assigned to the board by or under this Act.

(3) The chief executive officer may -

(a) delegate to an employee of the Authority any power conferred upon the chief executive officer under this Act or by any other law, including a power delegated to the chief executive officer under subsection (2)(a); or

(b) authorise an employee of the Authority to perform any duty assigned to the chief executive officer by or under this Act or any other law.

(4) A delegation under subsection (1), (2)(a) or (3)(a) does not prevent the Minister, the board or the chief executive officer from exercising the power delegated.

(5) Anything done or omitted to be done by an employee of the Authority in the exercise of any power delegated or the performance of any duty assigned to him or her under subsection (3), shall be deemed to have been done or omitted to be done by the chief executive officer.'

[44] Sections 30 and 32 provide for confidentiality by all persons of information they have acquired in the performance of their duties or the exercise of their powers under the NAMFISA Act; and the abuse of the Authority's name.

[45] Section 33 criminalise contravention of sections 30 and 32.

[46] Section 35 authorize the Minister to make regulations. It reads:

'(1) The Minister may, after consultation with the Authority, make regulations relating to -

(a) the period within which a person who wishes to appeal against a decision of the chief executive officer must appeal against such decision;

(b) the manner in which a person referred to in paragraph (a) must appeal against a decision of the chief executive officer;

(c) the fees which a person referred to in paragraph (a) must pay in respect of an appeal;

(d) any matter which is by this Act required or permitted to be prescribed; and

(e) generally, all other matters which the Minister considers necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Regulations made under subsection. (1) may prescribe penalties in respect of a contravention of or a failure to comply with any provision thereof not exceeding a fine of N\$4 000 or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.'

### Contextual interpretation

[47] Having considered the provisions of the NAMFISA Act hereinbefore, one of the simple logical conclusions which need to be recorded, although superfluous, is that Namfisa (the Authority) cannot act or omit to act without the intervention of natural persons (the functionaries). It is a juristic creation.

[48] Namfisa is unable to act without individuals directing it, without functionaries to advance its objects, without individuals in its employ, without a Minister to regulate it, without a board who manage and control its affairs, without a legislative document which direct its affairs and without a Chief Executive Officer who is responsible for the day-to-day management and administration of Namfisa.

[49] Namfisa attracts vicarious liability through its functionaries only, i.e. through the Minister, the board's members, its employees, advisors, its Chief Executive Officer and the members of the appeal board.

[50] Namfisa is unable to delegate any power, function and duty without intervention of the Minister, the board or the Chief Executive Officer.

[51] There are no reserve non-delegable power, function or duty outside the scope of the applicable legislation. All powers, functions or duties can only be exercised by natural persons on behalf of the Authority (Namfisa).

[52] The Authority exercises supervision over the business of financial institutions and over financial services. Namfisa (*per se*) does not regulate the business of financial institutions and financial services. That is in the domain of the Minister and the board in consultation with the Minister, and the Chief Executive Officer subject to directions from the board, acting on behalf of Namfisa due thereto that Namfisa cannot act without human intervention.

[53] Section 31 qualify the indemnity it accorded the Minister, a member of the board or an alternative member of the board, a member of a committee, the Chief Executive Officer or any other employee of the authority or a member of the board of appeal by providing that they are not liable in respect of anything done or omitted to be done in good faith in the exercise of any power or the performance of any duty under the NAMFISA Act or any other law. The legislature responsible for the creation of Namfisa and the NAMFISA Act is deemed to have known that Namfisa cannot function without designated functionaries. The legislature knew as a fact that no function, power or duty under the NAMFISA Act can be exercised or performed without the functionaries mentioned in section 31. After all the legislature created, wrote and approved the NAMFISA Act.

[54] That then is the apparent reason why Namfisa, was not included in the wording of section 31 of the NAMFISA Act. It would have been superfluous.

[55] The exemption from liability is however restricted to the mentioned officials' actions or omissions done in good faith in the exercise of any power or performance of any duty under the NAMFISA Act or any other law. If any one of the mentioned officials did not act or omit to act in good faith in the exercise of a power or performance of a duty under the NAMFISA Act or any other law, they would be liable and Namfisa would be vicariously liable. Arguably, if the Minister did not act in good faith in the exercise of any power or performance of any duty under the NAMFISA Act or any other law, Namfisa or the State could be vicariously liable.

[56] Plaintiffs' submission that the legal duty of care whether it be statutory or derived from the common law, of Namfisa to regulate or supervise financial institutions in such a way that financial losses are prevented to investors or financial institutions, are not expressed in the NAMFISA Act. Such a duty apparently exists according to the Supreme Court. It can only be regulated and delegated by the Minister, managed and delegated by the board through its members or alternate members, managed and delegated by its Chief Executive Officer, exercised by an employee under delegation or supervised by the board of appeal through its members.

### Interpretation applied to the facts and the pleadings

[57] In the matter at hand Plaintiffs alleged that Namfisa had a statutory duty to care as well as a duty in common law to ensure that PAM complies with its obligations, which was imposed for the benefit of the company and those members of the general public who invested funds with the company. Plaintiffs further allege a breach of the duty (wrongfulness) and negligence by Namfisa which resulted in financial losses to the company and Investors.

[58] Assuming such a duty, breach thereof and negligence by Namfisa may exist (not finding), Namfisa as juristic entity can only act or omit to act through the persons (functionaries) mentioned in section 31. Their liability will introduce the liability of Namfisa, not the other way around.

[59] On 12 November 2020 lead counsel for Plaintiffs indicated to the Court that there is no evidence of anyone alerting Namfisa of any irregularities by PAM and/or Potgieter prior to Potgieter's demise.<sup>15</sup>

[60] This concession is an important factor because if such evidence existed and nothing was done by Namfisa's functionaries to address the irregularities, the good faith requirement for indemnity, would be in jeopardy.

[61] Section 31 does by necessary implication recognises that Namfisa might be liable for the failure to comply with its duty of care to prevent losses to PAM and the Investors as the Supreme Court has indicated<sup>16</sup>, but section 31 also expressly confirms the fact that Namfisa can only act or omit to act through its functionaries.

[62] In the premises it is not correct to submit that the inaction of Namfisa for five years constituted reckless conduct, therefore Namfisa should be liable.<sup>17</sup>

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<sup>15</sup> Bundle 4 of the Record Transcription of 12 November 2020, page 2.

<sup>16</sup> Van Straten, op cit, paragraphs [106] to [111].

<sup>17</sup> Plaintiff's first set of Heads of Argument on 15 December 2020, page 73, paragraphs 302 to 304.



[63] Reckless conduct was not pleaded by Plaintiffs. Negligent conduct was pleaded and assuming it was proved, it was not reckless. Reckless conduct may constitute actions or inactions which are not in good faith. Failure to properly supervise cannot be equated to reckless conduct or at worst, *dolus eventualis*, as submitted by Plaintiffs.<sup>18</sup>

[64] Lead counsel for Namfisa contended that once it is accepted that the officials listed in section 31 of the NAMFISA Act are protected there can never be a question of passing of liability from the servants to the master (Namfisa) on the basis of vicarious liability in circumstances where the officials (servants) are themselves shielded from liability. Counsel found support for this submission in the Australian jurisprudence;<sup>19</sup> and in the fact that Namfisa operates through functionaries as contended in Namfisa's supplementary arguments on 24 May 2021.

[65] Namfisa's pleas as set out in paragraphs [17], [18] and [20] supra refer to 'bad faith' as a requirement in section 31. One of the questions of law to be resolved by the Court by agreement between the parties, was whether Namfisa can only be held delictually liable for any acts or omissions which may be found to have contributed to the irregularities committed by PAM and Potgieter (which is denied) if bad faith is proven by the plaintiffs as contemplated by section 31 of the NAMFISA Act. *Vide* paragraph [21] supra.

[66] 'Bad faith' is not the express norm in section 31. I repeat that the listed functionaries in section 31 is exempt from liability if they acted or refrain to act in good faith while exercising any power or performing any duty under the NAMFISA Act or any other law. 'Bad faith' is the opposite of good faith.

[67] The reason for using the expression 'bad faith' is apparently because it is the opposite of good faith. Furthermore, Namfisa was confronted with a summons and amended particulars of claim which did not cite its Chief Executive Officer or the Registrar.

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<sup>18</sup> Refer footnote 17 above.

<sup>19</sup> *Commonwealth of Australia v Griffiths and Another* [2007] NSWCA 370, paragraphs 100 to 115, and *Bell v The State of Western Australia* [2004] WASCA 205 at [34], [76] to [77] as discussed in the Griffiths case.

[68] As a result of the Supreme Court's findings<sup>20</sup>, Namfisa's Chief Executive Officer, the Registrar of the Stock Exchanges Control Act of 1985 and the Inspection of Financial Institutions Act of 1984, was subsequently never joined as a necessary and interested party, which the Chief Executive Officer/Registrar was in terms of section 31, and did not partake in his/her own defence. The Court is not permitted to make an adverse finding of liability against the Chief Executive Officer/Registrar who was not cited nor represented. Without such a finding, vicarious liability of Namfisa does not follow under section 31.

[69] 'Bad faith' would be akin to mala fides. Mala fides imply that the Chief Executive Officer/Registrar did not act or omit to act in the exercise of any power or duty under the NAMFISA Act or any relevant law. In other words the Chief Executive Officer/Registrar will in such a case be personally, as opposed to ex officio, liable. Namfisa may still be vicariously liable due to the risk its employment created.

[70] Namfisa's pleas in the context of section 31 and paragraph [68] in order not to draw an onus on behalf of a person it did not represent, is understandable.

[71] The question of law (paragraph [65]) agreed between the parties to be determined by the Court, is determined in favour of Namfisa.

[72] Plaintiffs in their additional Heads of Argument filed on 30 April 2021 contended that Namfisa's contention in [64] is wrong. Plaintiffs argued that the Bell decision<sup>21</sup> was criticized by the Southern Properties<sup>22</sup> decision of an equal Court. The latter case concerns a non-delegable duty which was breached. The latter case had, it appears, two respondents, of which the first was the Executive Director of the Department of Conservation and Land Management (CALM) and the second the State of Western Australia. Conservation and Land Management employees lit a fire. Conservation and Land Management employees were protected by the Conservation and Land Management Act. The Court found that the Conservation and Land Management employees were exempted, "but that exemption from liability does not exempt the employer, the second respondent, because it breached its

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<sup>20</sup> Van Straten, op cit, paragraphs [60] to [75].

<sup>21</sup> Footnote 19 before, Bell was in WASCA.

<sup>22</sup> *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 (4 April 2012) at paragraphs 311 to 312.

personal non-delegable duty to ensure that its servants exercised reasonable care.” The case is distinguishable. The Conservation and Land Management employees were employees of the State of Western Australia, the second respondent. The State had the pronounced non-delegable duty. In the case at hand in this Court, neither the State nor the Chief Executive Officer/Registrar is a party. *Vide* paragraphs [51] and [65] to [71] *supra*.

[73] Section 31 of the NAMFISA Act contextually interpreted does not exclude Namfisa from liability. Namfisa may be held vicariously liable on the basis of its functionaries acting or omitting to act if their actions or omissions were not in good faith while exercising any power or performing any duty, inclusive of a statutory duty of care to ensure that the company (PAM, the second plaintiff) complies with its obligations, under the NAMFISA Act or any other law. Namfisa may also be held vicariously liable if its functionaries acted *mala fides* outside the scope of the enabling legislation, on the basis of the risk created by their employment.

[74] The expression of the phrase ‘any other law’ in the text and the context of section 31 and the case at hand, is interpreted as referring to the Stock Exchanges Control Act, Act 1 of 1985 and the Inspection of Financial Institutions Act, Act 38 of 1984, as well as the common law.

[75] Plaintiffs did not prove a lack of good faith by the Minister or the Chief Executive Officer/Registrar, neither did they prove bad faith.

[76] In the result Namfisa is not liable towards the Plaintiffs.

[77] Cost shall follow the result and plaintiffs' claims are dismissed with costs, such costs to include the costs of one instructing and two instructed counsel.

[78] Therefore, the following orders are made:

[78.1] Namfisa is not liable towards the Plaintiffs.

[78.2] Plaintiffs' claims are dismissed with costs.

[78.3] Plaintiffs shall pay the costs of Namfisa which shall include the costs of one instructing and two instructed counsel.

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G H Oosthuizen  
Judge

## APPEARANCES:

PLAINTIFFS: Mssrs Marais SC, Schickerling and Jacobs  
Instructed by Van Merwe-Greeff Andima Inc.  
Windhoek, Namibia

FIRST DEFENDANT: Mssrs Namandje, Phatela and Rukambe  
Instructed by Sisa Namandje Co & Inc.  
Windhoek, Namibia