

Practice Directive 61
IN THE HIGH COURT OF NAMIBIA

Case Title: SOUTH AFRICAN AIRWAYS SOC LIMITED V JAMES ROBERT CAMM	Case No: HC-MD-CIV-ACT-DEL-2016/02479
	Division of Court: HIGH COURT(MAIN DIVISION)
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Date of hearing: 21 FEBRUARY 2020
	Further arguments: 18 MARCH 2020
	Delivered on: 20 MARCH 2020
Neutral citation: <i>South African Airways Soc Limited v Camm</i> (HC-MD-CIV-ACT-DEL-2016/02479) [2020] NAHCMD 103 (20 March 2020)	
Results on merits: Merits were considered	
The order: Rule 43 Application: Namflex Pension Fund (the Tenth Defendant) is substituted with Alexander Forbes Namibia Retirement Fund (Pension Section) as Tenth Defendant. Default Judgment application: Default judgment is granted against the First, Second and Seventh Defendants jointly and severally, the one paying first to absolve the others, in the following terms: <ol style="list-style-type: none">1. Payment in the amount of N\$ 13 265 298.05;2. Interest at a rate of 20% per annum calculated from 19 August 2013 until date of payment in full;3. Cost of suit including such cost as occasioned by the employment of one instructed and one instructing counsel. As against the Tenth Defendant <ol style="list-style-type: none">4. The Tenth Defendant is hereby authorized and ordered in terms of section 37D of the Pension Funds Act 24 of 1956, to deduct from the First, Second and Seventh defendants as former members of the Namflex Pension fund now known as the Alexander Forbes Namibia Retirement Fund (Pension Section) as follows:	

- 4.1 In respect of the First Defendant (James Robert Camm), an amount of N\$ 196 488.46.
- 4.1 In respect of the Second Defendant (Sonya Petrina Nanuses), an amount of N\$ 683 452.46.
- 4.3 In respect of the Seventh Defendant (Juanita Sonya Klassen), and amount of N\$1 078 035.74.
5. The Tenth Defendant is hereby authorized and ordered in terms of section 37 D of the Pension Fund Act, 24 of 1956 to pay the amounts prayed for in 4.1, 4.2, and 4.3 to the Plaintiff or its nominees.

Further conduct of the matter:

6. The case is postponed to **03/04/2020** at **09:00** for Status hearing.
7. The remaining parties must file a joint status report wherein the further conduct of the matter is dealt with. Said status report must be filed on or before 31 March 2020 to enable the Managing Judge to issue further directions from Chambers.

Reasons for orders

[1] The application before me is an application for default judgment. The plaintiff is only moving for default judgment against the first, second and seventh defendants.

[2] The pleas of the first, second and seventh defendants (herein the defendants) were struck out in terms of Rule 53 (2) (c) of the Rules of Court on 11 September 2019¹.

Background

[3] During March 2009 and September 2013 the defendants were employed by the plaintiff in various positions at the plaintiff's Windhoek office. The first and the second defendants were employed as Customer Sales Agents and the seventh defendant was employed as the Country Manager.

[4] During 19 August 2013 to 23 August 2013 the plaintiff, through its finance department in South Africa conducted an investigation into irregular and high baggage expenditure claims by the Windhoek Station.

[5] A further independent forensic investigation was conducted by the plaintiff's insurers during April 2014 and the results were provided to the plaintiff. The plaintiff, after coming to have knowledge of the results

¹ *South African Airways SOC Limited v Camm* (HC-MD-CIV-ACT-DEL-2016/02479) [2019] NAHCMD 341 (11 September 2019).

of the aforementioned investigations, came to realise that extensive fraud, theft and irregularities in respect of and involving fraudulent baggage claims had taken place at the plaintiff's Windhoek office during the period concerned.

[6] The plaintiff makes the allegation that the defendants, jointly and severally, and while all the time assisting one another, acted as follows:

- a) The defendants from time to time represented to the plaintiff that a lost baggage claim had been registered on the international baggage tracking system known as 'WorldTracer';
- b) The defendants generated false 'WorldTracer' claim reference numbers and would then use the 'WordTracer' reference number to generate false claims in order to authorize the procurement of quotation for the replacement of a fictitious passenger's lost luggage. The defendants would misrepresent to the plaintiff that a fictitious passenger's luggage was damaged beyond repair and the basis of this a quotation was obtained and represented to the plaintiff for payment for the replacement value of the fictitious luggage;
- c) At all material times and in the course and scope of the plaintiff's business the plaintiff used an internal control document when disbursing cash, referred to as an 'AW307'. The defendants would assist each other in signing off on the AW307 (which was issued on the strength of the fraudulent quotation) and also in distributing the cash to the fictitious passenger in order to replace fictitious luggage;
- d) After the cash was distributed a false tax invoice for the fictitious baggage purchase was obtained and presented to the plaintiff, following which one of the employee defendants would submit an 'SAA Expense Authorization' form together with the AW307 form and false invoice to the financial supervisor for approval. The fraudulent expenditure was then approved and paid out. The false invoices were obtained from vendors who were not registered by the plaintiff. The Finance officer, Finance Supervisor and Country Manager were well aware of which vendors were recognised by plaintiff.
- e) At all material times, the defendants were aware and/or ought to have been aware that the SAA Expense Authorisation form had to be completed by a Finance Officer, recommended by a Finance Supervisor and approved by the Country Manager.
- f) The defendants shared the proceeds of the unlawful activities equally between themselves.
- g) The defendants, when acting as they did, acted jointly and severally all the time being aware of each other's fraudulent actions and assisting each other to defraud and steal from the plaintiff. As a result of the defendants' actions and/or omissions and/or misrepresentation

and/or fraudulent activities and/or theft the plaintiff suffered damages in the amount of N\$ 13 265 298.05.

The application

[7] In support of the application for default judgment the plaintiff filed comprehensive affidavits and supporting documentation.

[8] The plaintiff advanced an argument that the court should grant judgment jointly and severally on the basis of common purpose principle.

[9] Mr Jones argued that the defendants were all employed by the plaintiff and were able to misappropriate large sums of money. He argued the defendants acted jointly and severally with a common purpose.

[10] Mr Jones submitted that the principle of common purpose also applies to civil claims and more specifically in respect of delictual claims where joint wrongdoers can be regarded as having acted in common purpose.

[11] The court was referred to *McKenzie v Van der Merwe*² where the legal principle of common purpose in civil setting was under consideration by the Appeal Court. Mr Jones argued that if the court have regard to the *modus operandi* of the defendants in the matter in casu, as set out in the affidavits before court, it shows that this large sum of money could not be misappropriated if the defendants did not work together. The claims were all submitted at the plaintiff's Windhoek office and not at the airport as one would expect in respect of lost or damaged luggage. The defendants made use of vendors that are not recognized vendors to obtain tax invoices for the fictitious claims and it was established that these so called vendors do not exist. It also appears that the majority of the 'vendors' used were also fictitious businesses.

[12] Mr Jones argued that the court must accept the facts as set out in the affidavits as correct and by doing so the court must accept that there were substantial checks and balances in place regarding outflow of cash which had to be applied by, for example the seventh defendant before money was paid out.

² 1917 AD 41.

The applicable law

[13] The object of the enquiry before me is to establish civil liability for the consequences of the defendants' actions. The first principle to keep in mind in considering this application for default judgment is that the court must accept the allegations as set out in the particulars of claim as proven or at least as admitted.

Principle of common purpose

[14] The facts in *McKenzie v Van Der Merwe* are that the plaintiff instituted action to recover the value of certain stock taken and for damages done to his farm by the defendant while in a rebellion and acting in concert with other persons also in the rebellion. The evidence showed that the defendant was an assistant commandant of the rebel forces and on several occasions during November 2014 bodies of armed rebels had come to the plaintiff's farm, cut his wire fences, and taken away stock. There was nothing implicating the defendant directly in the acts in question or to show such acts had been done by his orders or by the men in his commando, but one of the defendant's subordinates had lent a cart to two rebels who were members of another commando, for purposes of taking sheep from the plaintiff's farm³.

[15] The appeal was based on two grounds, ie: (1) that every person who takes part in a rebellion is civilly liable for the act of every other rebel, provided that the acts in question were done for the furtherance of the rebellion, and were reasonably for that purpose and (2) that in any event the defendant is responsible for the acts of the men under his command, and is therefore liable to the plaintiff for the loss of the sheep carried off in the car which was lent by one of his field cornets for that purpose.

[16] The court was divided on the outcome in this matter but both the minority and the majority endorsed the principle that a person is delictually liable if he aids and abets another to commit a delict. Solomon JA, with whom De Villiers AJA and Juta AJA concurred⁴, expressed the law on the point as follows:

'Under the *Lex Aquilia* not only the persons who actually took part in the commission of a delict were held liable for the damage caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed. To a similar effect is the passage which was quoted from *Grotius* (3, 32, 12, 13) that everyone is liable for a delict "even though he has not done the deed himself, who has by act or omission

³ *Supra* footnote 2 at 41 vide Head Note.

⁴ Innes CJ decided the matter on a different basis and did not touch directly on the point.

in some way or other caused the deed or its consequence: by act, that is by command, consent, harbouring, abetting, advising or instigating".⁵

[17] On the facts, the majority held the defendant not to be liable.

[18] In a dissenting judgment C.G. Maasdorp JA said on that point of law that:

'According to the Digest (47, 2, 54, 4), "he who knowingly furnished instruments for stealing is liable, although he did not counsel the theft." This law we find laid down also by Van der Linden (2,1,8), and *Matthaeus*, in his work on Crimes (1, 11). Here the writers speak of crimes from which a civil liability for damages arises. In *Voet* (47, 2, 7) special mention is made of the liability of a person who lend a thief a ladder, well knowing what it was to be used for.'

[19] In *Cipla Medpro v Aventis Pharma (139/12) Aventis Pharma SA v Cipla Life Sciences*⁶ the court confirmed the position as set out in the *McKenzie* matter as follows (with reference to para 16 above):

'[35] The principle is not confined to inducing or aiding and abetting the commission of a delict. In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* it was held to be a delict for a person to induce another to breach a contract. Van Dikhorst J expressed it as follows: 'A delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof. *Solomon v Du Preez* 1920 CPD 401 at 404; *Jansen v Pienaar* (1881) 1 SC 276; *Isaacman v Miller* 1922 TPD 56; *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 215.'

[36] In *Esquire Electronics Ltd v Executive Video*⁷ a submission that for there to be an infringement of a trade mark there must be use by the alleged infringer personally or through his servant or agent was disposed of by this court as follows: 'I do not think that this argument has any merit. The modern law of trade mark infringement is statutory, but its origins are to be found in the common law rule that it is an actionable wrong, ie, a delict, to filch the trade of another by imitating the name, mark or device by which that person has acquired a reputation for his goods (see *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 97). A delict is committed not only by the actual perpetrator, but by those who instigate or aid or advise its perpetration. See *McKenzie v Van der Merwe* 1917 AD 41 . . .'

. . . .

[39] I think it is plain from *McKenzie*, and the authorities relied upon in that case, that, upon ordinary delictual principles, it is unlawful to incite or aid and abet the commission of a civil wrong, and I do not think it matters whether it is a wrong at common law or whether it is a wrong created by statute.'

⁵ *Supra* at 51.

⁶ (138/12) [2012] ZASCA 108 (26 July 2012).

⁷ 1986 (2) SA 576 (A).

[20] It is clear from the *Cipla Medpro* matter that the principle of common purpose within the civil context is still as applicable today as it was a century ago and I cannot fault Mr Jones' argument in this regard.

Joint wrongdoers or concurrent wrongdoers?

[21] In *Visagie v Government of The Republic Of Namibia And Others*⁸ our Supreme court discussed joint liability and contribution at common law as follows:

[65] Our common law recognises two types of wrongdoer: joint or concurrent⁹. The former are persons who commit a delict jointly in pursuance of a concerted effort or in furtherance of a common design¹⁰. Concurrent wrongdoers on the other hand are persons whose independent wrongful and unlawful conduct are combined to produce the harmful consequence¹¹. In both instances, the wrongdoers are jointly and severally liable for the harm caused¹². No right of contribution exists as between joint wrongdoers¹³ although in respect of concurrent wrongdoers such a right is recognised.¹⁴

[22] For purposes of this ruling the court directed a further question to the plaintiff's legal practitioner to address the court on whether the defendants in the matter are joint wrongdoers or concurrent wrongdoers.

[23] Mr Jones, in his additional written argument, advance the point that the question of whether the defendants are joint or current wrongdoers will be determined by the pleadings and the evidence eventually. I was further referred to *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*¹⁵ where the court found as follows¹⁶:

[10] At common law a distinction is drawn between joint wrongdoers and concurrent wrongdoers. (The latter are sometimes referred to as "several" wrongdoers. Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers, on the other hand, are persons whose independent or "several" delictual acts (or omissions) combine to produce the same damage. It was accepted¹⁷ that, subject always to there being an intact chain of causation, one concurrent

⁸ 2019 (1) NR 51 (SC).

⁹ *Naude and Du Plessis v Mercier* 1917 AD 32 and *McKenzie v Van der Merwe* 1917 AD 41.

¹⁰ *Gray v Poutsma and Others* 1914 TPD 203.

¹¹ *Union Government (Minister of Railways) v Lee* 1927 AD 202 at 226 – 227.

¹² *Toerien v Duncan* 1932 OPD 180; *Naude supra* at 38 – 40 in case of joint wrongdoers; and in the case of concurrent wrongdoers: *Union Government supra* at 226 – 227.

¹³ *Allen v Allen* 1951 (3) SA 320 (A) at 327.

¹⁴ *Hughes v Transvaal Associated Hide and Skin Merchants (Pty) Ltd and Another* 1955 (2) SA 176 (T) at 179 – 180.

¹⁵ 1998(2) SA 667 (W).

¹⁶ All the references omitted.

¹⁷ *Union Government (Minister of Railways) v Lee* 1927 AD 202.

wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum*.'

[24] What can be taken from the *Nedcor* matter is that joint wrongdoers are liable jointly and severally whereas concurrent wrongdoers are liable *in solidum* (a whole, an entire or undivided thing). I do agree with Mr Jones that the importance of the distinction between these types of wrongdoers is seemingly of importance to the wrongdoers themselves, *inter partes*.

[25] To determine the status of the defendants in the matter in casu I will consider the particulars of claim as well as the ample affidavits filed in support of this application.

[26] From reading the particulars of claim it is clear that the plaintiff pleaded that the defendants acted in concert or in furtherance of a common design which is consistent with joint wrongdoers. Further to the particulars of claim I have considered the affidavits filed and it is clear that none of the defendants could conclude the relevant claims without assisting one another or without being aware of what was done or without being aware of what the other was doing. There were clear finance policies and procedures in place which the defendants were aware of or ought to reasonably have been aware of. The plaintiff had a clear expense authorization process with a number of checks and balances that had to be followed for the disbursement of funds. As a result a baggage claim had to be completed by a Finance Officer, recommended by a Finance Manager and approved by the Country Manager. It is clear from facts that the defendants are joint wrongdoers.

[27] As joint wrongdoers the defendants committed the delict complained of by acting in concert or in furtherance of a common design and I am satisfied that the plaintiff has made out its case on the papers.

[28] My order is therefor as set out above.

Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicant	Respondents
Adv JP Jones Instructed by Ellis Shilengudwa Inc	Unopposed