IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH

27/11/2014

Case No: A 920/12

In the matter between:

COENRAAD STRAUSS	**First Appellant**
ESTATE LATE J H SCHOEMAN	**Second Appellant**
And	
MARTHINUS JOHANNES VAN ZYL	**Respondent**

JUDGMENT

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1. This is an appeal with leave of the court *a quo* against a judgment awarding damages to the respondent as plaintiff against the appellants as defendants in the proceedings at first instance. The parties will be referred to as they were in the principal proceedings.
2 Plaintiff is Marthinus Johannes van Zyl, a businessman residing on the Farm Masbieker, district Gochas, Namibia.
3 First defendant is Coenraad Strauss, an adult man residing at 10 Mulberry Close, Dower Glen, Edenvale.

4. Second defendant is the deceased estate of the late J H Schoeman, in life residing at 4 Heliotrope Street, Kempton Park, Gauteng, represented by its executor.

5. Plaintiff sued the defendants in their capacity as the former trustees of the Strauss Family Trust ('the Trust') for damages said to have arisen from the breach of a contractual warranty given by the defendants in their capacity as trustees of the Trust. The defendants are *inter alia* alleged to have failed to observe a duty of care in their handling of the Trust's affairs in allowing the breach of the warranty to supervene, with the result that the plaintiff suffered pure economic loss.

6. The Trust was dissolved, according to the defendants' plea, on the 11th July 2001 by the Master of the High Court, some three years after parties entered into the agreement that ultimately was to give rise to the present litigation.

7. The Trust was the owner of all the issued and unissued shares of a company known as Bethal Boerderye (Edms) Bpk ('the company'), which shares it sold by way of a written agreement entered into upon the 7th March 1998 in Gobabis, Namibia to the plaintiff. The company was the owner of the farm Masbieker, which the plaintiff was keen to acquire as he owned adjoining land. Other than owning the farm, the company did not conduct any business.

8. The defendant, as trustees, gave certain warranties concerning the affairs of the said company in the written agreement, upon which guarantees the plaintiff relied when he entered into the transaction. These guarantees included the assurance that the company had complied with all legislation,

enactments, proclamations and by laws and especially with the provisions of the Companies Act and the Income Tax Act; that it did not have any undisclosed liabilities, that its books and financial statements were properly kept and that it did not have any tax liabilities for which no due provision had been made. The transaction was concluded within a day, but without either of the parties having access to the company's financial statements or books of account.

9. Plaintiff complied with all the obligations that the written agreement imposed upon him and became the only shareholder of the company in 1998, and also its only director on the 16th April 1998. However, he only appointed his own auditors on the 18th October 1999, with the result that the previous auditors, Price Waterhouse Coopers, finalised the 1998 financial statements on the 3rd November 1998, when they were signed by the first defendant and not by the plaintiff, and for the 1999 tax year on 1 September 1999. Only then did these auditors resign. Prior to doing so, they received the assessment for the 1998 tax year, and lodged a protest against the interest claimed by the Tax authorities, which protest was unsuccessful. Plaintiff remained unaware of these developments, while defendants were through first defendant fully informed of the tax claim, which remained unpaid.

10. Plaintiff alleged that the representations underlying the warranties referred to above were material and that he bought the shares in reliance upon the correctness thereof.

11. It is common cause that the Namibian Income Tax authorities claimed Income Tax to the tune of $N 65 885.75 for the tax year 1998. Plaintiff was

unaware thereof until a claim of $N 541 747, 42 was made during 2008 in respect of the said tax liability, which had now grown almost tenfold due to the accumulation of interest. By this time the Trust had been dissolved and plaintiff was allegedly unaware of the identity of the beneficiaries to whom the Trust's assets had been transferred upon the dissolution thereof.

12. Plaintiff sued for payment of the sum of N$ 541 747, 42, which amount has not yet been paid to the Namibian Tax authorities. It is alleged in the particulars of claim that the company was at all relevant times indebted in respect of the 1998 tax assessment and that the aforesaid contractual guarantees therefore apply to it.

13. Plaintiff advanced several causes of action in the particulars of claim:

a) That the defendants had given the warranties contained in the contract (apparently in their personal capacities when the contract was concluded). This claim was not persisted with;
b) Deliberate misrepresentation of the true state of the company's financial affairs. This claim was not pursued;
c) Defendants were alleged to be beneficiaries of the Trust and were enriched by the fact that the tax liability was not paid;
d) Defendants owed plaintiff a duty of care to ensure that the Trust paid all creditors before being finally dissolved. The Trust had received payment for the company's shares and was in a position to meet the tax liability, the absence of which they had guaranteed.

14. The duty of care is alleged to be and to have been owed to the plaintiff as a creditor of the Trust, which Trust was dissolved prior to the plaintiff becoming aware of the alleged breach of the contractual warranty. It was said in the particulars of claim that the claim arises from the fact that a company controlled by the Trust was still indebted to an unpaid creditor, the Namibian Tax Authorities, when its shares were sold to the plaintiff. Although the tax liability was owed by the company, the Trust was responsible for ensuring the payment thereof as one of the trustees was the company's director and the Trust owned all the shares during the relevant tax year. By dissolving the Trust without ensuring that creditors were paid, the defendants were alleged to have failed in their duty to ensure that existing creditors generally, and plaintiff in particular, were not left without recourse against the Trust, the debtor. (Prior to the Trust's dissolution the plaintiff was, at best, a potential creditor, but nothing turns on this nicety for purposes of this judgment.) Beneficiaries consequently received more than was their due when the Trust was dissolved and the Trust property was divided among them because the Trust did not cause the company to pay the tax through the trustee director. The full proceeds of the sale of the company shares accrued to the Trust. Had the company's tax debt been paid, it would have reduced the equity the Trust received.

15. The identity of these beneficiaries was unknown to the plaintiff, according to the averments in the particulars of claim.

16. It must be noted, however, that the plaintiff claims in the alternative that defendants were beneficiaries. Normally a claim against a Trust that cannot

be enforced because the Trust has ceased to exist may be pursued against the beneficiaries who may have been unduly enriched by having received more than would have been their due had the creditor's claim be satisfied by the trust. In the present case no claims were instituted against any beneficiaries because, so the plaintiff asserts, the defendants informed him upon his enquiry through his lawyers that they did not know who the beneficiaries were. There is no explanation why the plaintiff did not pursue his enquiries further by, e.g., applying the provisions of the Access to Information Act.

17. The defendants raised a plea of prescription, which was correctly dismissed by the trial court. The plaintiff was put to the proof of all his averments in the plea on the merits.

18 Plaintiff advanced the various causes of action set out above, the only one that was pursued and upheld by the court a quo being the duty of care allegedly owed by the defendants in their capacity as trustees to the plaintiff as creditor.

19. In order to succeed the plaintiff had to show that the defendants' failure to establish and liquidate the company's existing liability to the Namibian fiscus was a breach of duty to properly administer the Trust, that it caused loss - in this instance pure economic loss - and that the act or omission was negligent. In addition the defendant trustees must be held to have owed the creditor concerned a duty of care. Policy considerations must dictate that the plaintiff should be recompensed: Harms, JA in *Telematrix (Pty)Ltd t/a Matrix Vehicle*

Tracking v Advertising Standards Authority of South Africa [2006] 1 All SA 6 (SCA) at [11] -[15].

20. In *Fourways Haulage SA (Pty) Ltd v S A National Road Agency* 2009 (2) SA 150 (SCA), Brand JA said:

> *'As explained by Harms JA in Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) para 1, it means simply this: '"Pure economic loss" in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as loss of profit, being put to extra expenses or the diminution in the value of property.' (See also Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) 497I-498H; Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) para 14; Wille's Principles of South African Law 9 ed, (General editor: Francois du Bois) sv 'Delict' by Daniel Visser, 1105; Neethling, Potgieter & Visser, Law of Delict, 5 ed 268 et seq).'*

21. The interplay between wrongfulness and negligence in the context of pure economic loss was further explained by Brand J A as follows:

> *'....negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages (see eg Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) paras 12 and 22; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) para 12; Telematrix (supra) paras 13-14; Trustees, Two Oceans Aquarium Trust (supra) paras 10-12).'*

22. The identification of the policy considerations to determine the existence of a duty of care to prevent of pure economic loss was addressed thus:

> *'Does this mean we are back to the proposition that, in the field of pure economic loss, liability depends on the idiosyncratic views of the individual judge as to what is reasonable and fair? Fortunately, I think the answer must again be 'no'. In the first instance some degree of certainty is established by the identification of categories where liability will be imposed. In Telematrix (para 15) one such category was recognised, by way of example, with reference to the liability of collecting banks. Another example is to be found in Perre v Apand (paras 28-30) where liability for the failure to provide accurate information or advice – i.e. for negligent misstatements – was recognised as a category of liability for pure economic loss in the context of*

Australian law.(For the South African law on the topic of negligent misstatements, see eg Kern Trust (Edms) Bpk v Hurter 1981 (3) SA 607 (C); Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 568B-D; OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd 2002 (3) SA 688 (SCA) 695G-I.) I believe it can be predicted with confidence that in time further categories will become discernible and so the law will develop in an incremental way.

[22] Further insurance against uncertainty and unpredictability derives from the principle which was formulated as follows by Nugent JA in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) para 21: 'When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.' (See also eg Telematrix paras 15-16). In a case like the present where the claim for pure economic loss falls outside the ambit of any recognised category of liability, the first step is therefore to identify the considerations of policy that are of relevance. As part of the identification process assistance can of course be gained from previous decisions, both at home and abroad, as well as from the helpful analysis by academic authors such as those to which I have already referred.

[23] The policy consideration that immediately comes to mind is directly linked to the initial doubt as to whether pure economic loss should be actionable at all. That reason was referred to by Rumpff CJ in Administrateur, Natal v Trust Bank van Afrika Bpk (supra) – where this court eventually decided to cut the Gordian knot – (at 833A) as 'die vrees van die sogenaamde oewerlose aanspreeklikheid' (ie the fear of so-called boundless liability). In the light of this fear the relevant consideration is succinctly stated as follows by Gaudron J in Perre v Arpand (supra) para 32: 'The first policy consideration is the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class.' (See also eg Canadian National Railway Co v Norsk Pacific Steamship Co (1992) 91 DLR (4th) 289 at 359; M M Corbett 'The Role of Policy in the Evolution of our Common Law' 1987 SALJ 52 at 59.)

[24] From this consideration it follows, in my view, that liability will more readily be imposed for a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions. That is the reason why liability was imposed, for example, in Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D) 386D-H and not in Shell and BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA 1980 (3) SA 653 (D) at 659G-H. The present case self-evidently falls in the same class as Coronation Brick and not in the class of Shell and

BP. The loss claimed was suffered by a single plaintiff and is finite in its

extent. To illustrate the point: the position could very well be different if the plaintiff was a businessman who claimed for the loss he suffered because of a missed flight to London, being the loss of a lucrative business opportunity, owing to the closure of the road.

[25] But the absence of indeterminate liability itself will not automatically give rise to the imposition of liability. That much was expressly held in Trustees, Two Oceans Aquarium Trust para 20. The reason why this court refused to come to the aid of the plaintiff in that case, despite the absence of indeterminate liability, was that the plaintiff was in a position to avoid the risk of the loss claimed by contractual means (see para 24). Conversely, the plaintiff's inability to protect itself by contract was one of the policy reasons why this court decided in Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A) at 799H-J to impose liability on a collecting bank. Support for the same consideration is to be found in Australian cases where delictual liability was extended to plaintiffs who were said to be 'vulnerable to risk' because they were unable to protect themselves against the risk of the particular loss by other means (see eg Woolcock Street Investments (Pty) Ltd v CDG (Pty) Ltd (formerly Cardno & Davies Australia (Pty) Ltd) [2004] HCA 16 (para 80); Perre v Apand (supra) para 11 (Gleeson CJ) and para 50 (McHugh J). In the present case the Agency can, in my view, be said to be 'vulnerable' to the risk of the loss that eventuated because it could not readily protect itself against that risk by concluding a contract with every user of the toll road.

[26] Another policy reason why the extension of delictual liability is sometimes refused is that it would impose an additional burden on the defendant which would be unwarranted or which would constitute an unjustified limitation of the defendant's activities (see eg Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 321C-J; Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) paras 37-40; Road Accident Fund v Shabangu 2005 (1) SA 265 (SCA) para 18; X (Minors) v Bedfordshire County Council; [1995] 2 AC 633 (HL) at 750). The converse of this consideration appears from the statement by McHugh J in Perre v Apand (supra) para 50 that the imposition of liability would not 'unreasonably interfere with Apand's commercial freedom because it was already under a duty to [athird party] to take reasonable care'. That, I believe, is also the position in this case. Fourway's driver was already under an obligation towards other users of the road to drive with reasonable care. Imposing liability on him – and his employer – for economic loss resulting from his negligent driving would thus not foist any additional burden upon him at all."

23. The same Judge added in *Country Cloud Trading CC v MEC Dept of Infrastructure Development [2013]* ZASCA 161 (not yet reported, but recently confirmed by the Constitutional Court):

',,, our courts have since found their way open to acknowledge in express terms that wrongfulness, in the context of delictual liability, is determined by considerations of legal and public policy. This appears for instance from the following statement by the majority of the Constitutional Court in Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) para 122: 'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.',,,,I know that foreseeability of harm has in the past been recognised by this court as a factor in establishing wrongfulness (see eg Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) para 12). Nonetheless, I have some reservation about this approach, mainly because it is bound to add to the confusion between negligence and wrongfulness (see eg Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) para 18). Moreover, foreseeability is a requirement of negligence and also plays a role in the determination of legal causation. A defendant will therefore not be held liable for harm which was not foreseeable (see eg Fourway Haulage SA (Pty) Ltd supra paras 28, 34 and 35).
[28] I find this last mentioned consideration of particular significance in the present context. The import, as I see it, is this: since foreseeability of harm is a prerequisite for delictual liability in all cases, that feature cannot render the claim by Country Cloud deserving of special treatment. Imposition of delictual liability on the Department in this case will therefore as a general principle render contracting parties liable in delict for harm suffered by strangers which flows from the repudiation of their contracts. The realisation that this is so immediately raises a feature which is generally regarded as a strong pointer away from the imposition of delictual *liability, namely that of indeterminate liability. In fact, this consideration is directly linked to the very reason for the initial doubt as to whether pure economic loss should be*

actionable at all. If delictual liability were to be imposed on the Department for the loss suffered by Country Cloud, what about all others who lent money to Ilima? And what about Ilima's employees? And what about its subcontractors? And so the list of potential plaintiffs goes on and on. In argument counsel for Country Cloud was constrained to concede that there would be no difference in principle between these potential claimants, on the one hand, and Country Cloud on the other. What exacerbated that difficulty was counsels' further concession, rightly made, that there appears to be no reason why the claims of all these potential claimants would not be cumulative with one another and with the contractual claim of Ilima as well.

[29] The problems of limitation thus arising are reminiscent of those referred to by Schreiner JA in Union Government v Ocean Accident and Guarantee Corporation Ltd 1956 (1) SA 577 (A) at 585B-D. In that case the Government claimed for the loss it had suffered as a result of negligently inflicted injury to a Government employee (a magistrate). In explaining why this court declined to expand Aquilian liability beyond the injured person himself to those who may indirectly suffer harm as a result of the injury, Schreiner JA said (at 585F-H): 'Once one goes beyond physical proximity and considers the possibilities that may arise out of the relationships, contractual or other, between the physically injured person and other persons who may suffer indirectly, though materially, through his incapacitation, one is immediately met with the prospects of an unmanageable situation. It is easy to imagine the absurdities that would arise if all persons contractually linked to the injured person could sue the careless injurer for the loss suffered by them. The case was put to us of the injured building contractor who in consequence of his injury has to discontinue his contract, so that his employees and the building owner and the architect and his sub-contractors and their employees are all put to some loss.'

[30] A further consideration, which, in my view, weighs heavily against the imposition of delictual liability on the Department in the circumstances of this case, is the one that has become known in the context of wrongfulness as the plaintiff's 'vulnerability to risk'. As developed in our law under the influence of Australian jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the harm suffered by other means. What has by now become well established in our law is that the finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant (see eg Trustees, Two Oceans Aquarium Trust supra paras 23-24; Cape Empowerment Trust Ltd v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA) paras 28-30). The import of this consideration is best illustrated, I think, by McHugh J in Perre v Apand (Pty) Ltd (1999) 198 CLR 180 (HCA) para 118: 'Cases where a plaintiff will fail to establish a duty of care [or, wrongfulness in the parlance of our law] in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interference with its legitimate acts of trade. In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.' '

24. The trial court held that the plaintiff had established that a duty of care did in fact rest upon the trustee defendants toward the plaintiff as an unpaid creditor to ensure that his claim was recognised and satisfied before the Trust was dissolved. On appeal the defendants submitted that the trial court erred in

holding that a. duty of care did in fact rest upon the defendants towards creditors in general and the plaintiff in particular to ensure that their claims were paid before the trust was dissolved. Underlining the fact that trustees owe loyalty to the trust and it's beneficiaries, Mr Rip SC submitted that no duty of care toward creditors has been found to exist in the past and that there was no room to impose such a duty upon the person or persons charged with protecting the beneficiaries' interests.

25. In response Mr Van der Merwe compared the office of a trustee with various offices that are duty bound to protect the interests of third parties. He drew attention to the functions of a trustee or liquidator in insolvency to develop the thesis that trustees should be burdened with the duties of protecting the interests of creditors in similar fashion. The problem with this analogy is the obvious difference in the nature and purpose of the two offices. The South African insolvency regime is creditor driven. Trustees, liquidators and business rescue practitioners are obliged by statute to identify all creditors affected by their actions and are in turn directed, if not controlled, by the creditors of the estate or debtor they have accepted responsibility for. The office of the trustee controlling a trust has a fundamentally different function and the duties of her or his office imposes upon her or him diverge widely from insolvency and business rescue practitioners. The controller of the Trust must guard the interests of the Trust and its beneficiaries with greater diligence and dedication than his own affairs. It is self-evident that the interests of a trust and those of a (potential) creditor may, and usually will, conflict. In law, therefore, the trustee cannot be expected to protect the interests of beneficiaries and the Trust on the one hand, and simultaneously

those of the creditors on the other without creating an immediate conflict of interest. No duty of care can therefore be found to exist in respect of creditors' interests on the part of the defendants on this basis. The same applies to the position of a liquidator referred to by Mr Van der Merwe in the context of the decision of *Kommissaris van Binnelands Inkomste en 'n Ander v Willers en Andere* 1994 (3) SA 283 (A). Nor does the reliance upon *Callinicos v Berman* 1963 (10 SA 489 (AD) assist the plaintiffs, indeed, it underlines the fact that the existence of an alternative remedy stands in the way of the recognition of a duty of care to prevent pure economic loss.

26. The obligation to pay a creditor in *casu* arose from contract and did not arise from a negligent act that should be regarded as wrongful as a matter of policy.

27. Mr Van der Merwe also referred to the duties that rest upon the member of a close corporation to ensure that the latter's creditors are paid and who attracts personal liability for such debts if the close corporation is deregistered before the debt is extinguished. This liability does also not arise from a duty of care, but from a statutory duty to accept liability for debts that usually have arisen from contract. It is therefore no precedent for the imposition of a duty of care as contended for in this instance.

28. The example of liability being imposed upon fraudulent or delinquent directors in terms of section 424 of the former Companies Act is even less persuasive. Section 424 is applicable to persons who have acted recklessly or with fraudulent intent, and it imposes a statutory liability to force directors and others to compensate victims of fraud or recklessness. None of the elements are present in the matter at hand. 29. *Simplex (Pty) Ltd v Van der Merwe &*

Others NN.O. (Which appears to have been misquoted in the plaintiff's heads of argument) did not impose a duty of care upon trustees toward creditors of a trust, but held two trustees liable who personally were responsible for damage caused to a property they controlled. The reference to their position as trustees was, consequently, unnecessary and irrelevant as the act that caused damage had been perpetrated by them in their personal capacity. The decision is no authority for the existence of a duty of care toward creditors who are outsiders of the trust.

30. The reference to decisions such as *Peterson & Another NN.O. v Absa Bank Ltd* 2011 (5) SA 484 (NGP), holding that a duty of care rested upon banks to protect participants in commercial transactions against dishonesty and losses caused by negligent supervision of banking procedures is not in *pari materia* with a trustee tasked with the protection of Trust property. Different policy considerations must apply of necessity to the present position.

31. The argument that the defendants could recoup any amount they might have to pay to the plaintiff from the beneficiaries applies *a fortiori* to the plaintiff. The argument that the plaintiff did not know the identity of the Trust's beneficiaries and that it was impossible to establish the same is nullified by the fact that the defendants were forced to discover the Trust deed and to disclose the beneficiaries' particulars at the same time during the pre-trial proceedings. There is no explanation why plaintiff did not join the beneficiaries once their identity was made known, nor, as has been stated above, why no steps were taken earlier by reliance upon the Promotion of Access to Information Act 2 of 2000. There was – and is – an alternative action or remedy at the plaintiff's disposal. The beneficiaries *prima facie* received more

than was their due when the Trust's capital was divided among them unreduced by a suitable provision for company's unpaid tax liability. This sum should be capable of being recouped by an enrichment action based upon either the *condictio indebiti* or the *condictio sine causa*, see De Vos, Verrylingsaanspreeklikheid in die Suid-Afrikaanse Reg, p 175 to 177; *Glenrand MIB Financial Services (Pty) Ltd & Others v Van den Heever NO & Others* 2013 (1) SA 511 (SCA):

> '*The respondents also claim payment of the sum of R50 million from Financial Services on the basis of unjust enrichment. Although there is no general action based on enrichment in our law, it is generally accepted that for enrichment liability to arise there are a minimum of four requirements, namely: (1) the defendant must be enriched; (2) the plaintiff must be impoverished; (3) the defendant's enrichment must be at the expense of the plaintiff and (4) the enrichment of the defendant must be unjustified or sine causa.*' (Per Theron JA and Swain AJA (as he then was).

31. It is unnecessary to consider whether the recognition of the duty of care contended for by the plaintiff would lead to an unacceptable multiplication of potential actions and limitless liability. Suffice to say that it has not been established that policy considerations demand the recognition of a duty of care resting upon trustees of a trust to prevent pure economic loss being suffered by creditors of such trust. The appeal must therefore succeed upon this ground.

31. It remains only to add that the court a *quo* may have erred in awarding the full amount of the tax demanded by the Namibian authorities that has as yet remained unpaid, while there is still some uncertainty about the question whether the in *duplum* rule will be applied to the tax debt or not. It might have been more appropriate to grant a declaratory order that the defendants must reimburse the plaintiff for any amount eventually found to have been due and paid to the tax authorities. This is, however, only an *obiter* observation.

The following order is made:

The appeal succeeds with costs, including the costs of two counsel. The order issued by the court *a quo* is set aside and substituted with the following:

"The action is dismissed with costs, including the costs of two counsel."

Signed at Pretoria on this 26 day of November 2014.

E BERTELSMANN

For:

Judge of the High Court

M KUBUSHI

Judge of the High Court

M MODIBA

Acting Judge of the High Court