CASE NO. A 83/96

IN THE HIGH COURT OF NAMIBIA

In the matter, between

BAROTTI FURNITURE (PTY) LTD **APPLICANT**

versus

ROY MOODLEY **RESPONDENT**

CORAM: FRANK, J.

Heard on: 1996.03.08

Delivered on: 1996.06.19

JUDGMENT

FRANK, J.: This is a return day of a provisional sequestration order. When the matter was originally heard the respondent opposed the matter and filed a short answering affidavit. The respondent has now filed a further answering affidavit in which he deals in detail with the founding papers. The applicant has likewise thus filed two replying affidavits. Mr Botes appeared for the applicant and Mr Bloch for the respondent.

Mr Botes applied at the outset for the striking out of certain portions from respondent's second answering affidavit. This application was based on two grounds namely that the portions complained of were either hearsay evidence or contained matters that were argumentative and thus irrelevant.

As far as the hearsay is concerned it should be struck out as it is in any event inadmissible evidence and the question of prejudice- to the applicant does not arise (Wiese v Joubert, 1983(4) SA 182 (0) and Parents' Committee of Namibia v Nuioma, 1990(1) SA 873 (SWA) at 876 E.) As far as the other matters complained of are concerned I am not convinced that it should be struck out. Firstly, the reliance on the Conventional Penalties Act, Act 15 of 1962 had to be stated and the amplification as to why reliance was placed on this Act, although argumentative, was done very briefly and could not prejudice the applicant as it apprised him in more detail of the basis on which reliance would be placed on the Act. Secondly, the other matters complained of, although argumentative, sought to explain how respondent submitted the interpretation of the franchise agreement worked in practise and was also in my view not prejudicial to the applicant. Thus, on the second leg of the striking out, I am not allowing the application. In the result I grant an order in terms of paragraphs 1 and 3 of the notice to strike out. As far as the costs are concerned I just mention that the striking out application took up half an hour of the Court's time.

The rule nisi was obtained on an urgent basis and in respect of respondent's indebtedness and the extent thereof reliance was placed on three contracts in terms whereof it was alleged the indebtedness arose. These contracts were described as the Unavem contract, the Namibia contract and the Commercial Bank contract. Applicant stated in the founding papers the following prior to furnishing the

details involving these three contracts:

> "In the -limited time available, it has not been possible to do a full reconciliation of Respondent's account with Applicant to determine precisely what amounts are owing at present. However, a reconciliation of three major contracts was done, which clearly shows that Respondent is indebted to Applicant in a large amount. Details of this amount are set out below."

According to applicant the respondent is indebted to it in respect of the Unavem contract in an amount of R370 279.53. This amount includes a penalty of R95 134.80 for not ordering goods through applicant plus a further penalty of R95 134.80 being a penalty for late payment to applicant at the rate of 5% per month on the outstanding amount. According to applicant "Despite delivery of the goods to Unavem III no payment was forthcoming."

The respondent averred that various payments were made to the applicant in respect of this contract and annexes documentary proof to this affect. In reply the applicant admits that certain payments were made. Thus payments no longer disputed amounted to R108 658.78. It is thus apparent that applicant's averment that a reconciliation of this contract was done and that no payment was made in respect thereof was not correct. Furthermore, if the penalties in this matter are not taken into account as they were clearly based on the wrong assumption, i.e. no payment and a double penalty must surely, prima facie, be reduced in terms of the Conventional Penalties Act then it must be clear that even on applicant's own version the respondent's indebtedness to it on this contract was grossly overstated.

If the penalties are disregarded and the admitted payments are taken into account, then on applicant's version the indebtedness amounts to R71 351.15 on this contract.

With regard to the Commercial Bank contract the applicant alleges the respondent is indebted to it to the tune of R155 912.07. Once again this includes a penalty for not ordering the goods through applicant to the tune of R75 663.28. Once again the averment is made that "nor were the relevant amounts paid over to the Applicant." Once again applicant concedes in reply that its "reconciliation" that was done when these proceedings were launched were incorrect and now concedes it is not entitled to a penalty and that only R48 293.66 was owing under this contract. Applicant also concedes that payment in respect of his contract was indeed received contrary to the averment in the founding affidavit. Thus applicant admits receiving an amount of R3 583.12 in respect of this account and also admits having received the total amount averred by respondent namely R39 125.34 but avers it was unable to accept that this amount was in connection with this account but it was credited to respondent in general in respect of his overall account with applicant which included other contracts as well. Due to applicant's averment in its founding papers that it reconciled this contract and that no amount was paid in terms thereof by respondent which was clearly wrong and in view of applicant's non-admission in respect of the other payments it must be accepted that respondent paid applicant R39 125.34 in respect of this contract. The indebtedness to applicant thus is on

applicant's version R9 168.32. As with the Unavem contract the respondent's indebtedness to applicant in respect of this contract-was grossly overstated in the founding papers.

As far as the Namibian contract is concerned it is clear that respondent was awarded a tender by the Department of Works of the Government of Namibia. The total amount of this tender was for an amount of N$927 433.72 which is also the same amount in the South African currency i.e. rand. Applicant claims respondent is indebted to it in respect of this contract in an amount of R982 477.25. As it is common cause that none of the goods ordered in terms of this contract were ordered through the applicant the applicant avers that the cost price of the goods involved amounted to R476 930.70. Because this was not ordered through applicant this whole amount is claimed as a penalty. In addition this amount of R476 930.70 is claimed a second time as a penalty as the order was not reported to applicant. And on top of this a management fee and advertising contribution is claimed as if applicant was actually involved in the transaction. Thus the claim of applicant in respect of this contract exceeds the gross amount receivable by respondent.

Although the respondent accepted the penalties provided for in the franchise agreement to be fair and reasonable as is evidenced from the said agreement this does not preclude him from relying on the Conventional Penalties Act. In fact, prima facie, a case has been made out for a reduction in the Namibian contract, and in respect of the other contracts it is clear that in the one case it is now conceded that a

penalty was not applicable and in the other case it was wrongly calculated. Thus in respect of the Namibian contract one • cannot talk of a liquidated amount and the remaining penalty in respect of the Unavem contract cannot be quantified as the allegations relating to it in the founding affidavit was clearly wrong.

Thus if one quantifies applicant's claim based on its own papers, a liquidated claim of at most R80 519.47 (R71 351.15 + R9 168.32) was established on a balance of probabilities. If this claim is substituted for the one of R577 052 which was used by provisional trustees it is clear that the respondent is solvent by a substantial margin. According to this report the liabilities exceed the assets by R60 692 if allowance is made for a claim by the applicant to the tune of R577 052. This report also indicates that this liability is disputed by applicant. Even if applicant's own new reconciliation undertaken in reply which, according to it now reflects the correct position is taken without the penalty amount at face value, respondent is indebted to it to the tune of R397 507.50 which would still keep him solvent on the calculations of the provisional trustees. His assets would then exceed his liabilities as the difference between R577 052 and R397 507.50 is R179 544.50 which is far in excess of the current deficit of R60 692 and which would thus constitute a credit balance in excess of R100 000. I suspect it is for this reason that applicant knew it had to rely on penalties for it to establish the respondent's insolvency.

I am thus not convinced that the applicant established on a balance of probabilities that the respondent is in fact insolvent. I'now turn to deal with the submissions that the respondent committed acts of insolvency which would entitle applicant to the relief sought provided it is to the advantage to creditors (Wilkins v Pieterse, 1937 CPD 166 and Meskin & Co v Friedman. 1948(2) SA 555 (W)) . Mr Botes relied on two acts of insolvency namely that respondent made or attempted to make a disposition of his property which had or would have had the effect of prejudicing his creditors, or of preferring one creditor above another (see 8(c) of the Insolvency Act, Act 24 of 1936) and that he gave notice in writing that he was unable to pay his debts (section 8(g) of Act 24 of 1936) .

After respondent was awarded the Namibian tender he had to furnish a "non-performance" guarantee to the relevant department in an amount of N$92 743. This he was unable to do and he approached applicant to assist him. According to him a person acting on behalf of applicant said that he "would see what he could do and come back" to him as there was a deadline relating to the furnishing of the guarantee. According to the respondent he informed applicant about the deadline as well as of the fact that if applicant could not assist he would look elsewhere as he did not want to lose such a lucrative tender. As applicant did not respond he obtained a third party to furnish the guarantee. Basically it was agreed between the respondent and the third party that each would contribute R250 000 towards the project and that at the end of the tender each party would recover his

capital plus 50% of the net profits. It must be stated here that applicant avers it did in fact obtain a guarantee and annexes a document from Standard Bank to substantiate this averment. This document however is dated 2 days prior to the deadline and merely states that the bank is considering an application for such guarantee. The applicant does not state when this guarantee was furnished nor does it annex a copy of the guarantee. If regard is had to the numerous documents filed by applicant in other respects I would have expected a copy of the guarantee and at least the date thereof. In these circumstances the respondent's version must be accepted for the purpose of this judgment as far as this aspect is concerned.

In my view the contract respondent entered did not have the effect of prejudicing a creditor or creditors nor did it have the effect of preferring one creditor above another. This is so even if I accept that in concluding the agreement with the third party he made a disposition of property. Without the tender none of the profits would have been available to creditors. Because of the agreement there is money available to creditors which would not otherwise have been available. The agreement with the third party was not to the detriment of creditors but to their benefit. At the stage the agreement was concluded the third party was not a creditor.

In the original answering affidavit the following, inter alia, was stated by the respondent:

> "I admit that I am presently in a cash flow or liquidity problem, however this does not at all mean that I am not in a position to pay my debts.
>
> I at no stage indicated to Applicant or to any of my creditors that I am unable to pay my debts. In fact I had made acceptable arrangements with all my other creditors for the payment of what is due to them.
>
> In fact the present tender amounting to almost one million Namibian Dollars, will yield a substantial profit to me which will be far in excess of what I owe all my creditors."

Mr Botes in his heads of argument put his submission in this regard as follows:

> "If regard is had to the aforegoing, (i.e. the above quoted portion) as well as to all the other circumstances contained in the . . . answering affidavits, it is clear that the Respondent indeed indicated herein that he only will be able to pay his debts in future and more specifically after the said tender yielded a substantial profit. The only reasonable objective inference to be drawn from the aforegoing therefore is that the Respondent at this point in time is indeed unable to pay his debts."

In my view the passage in the answering affidavit taken at face value does not amount to an unambiguous notice that respondent is unable to pay any of his debts. He categorically states that his liquidity problem does not mean "that I am not in a position to pay my debts". Thus the arrangements with his creditors must have been such that those debts when they become due will be paid. The last paragraph when seen in this light is only an indication that his liquidity problem (which did not effect the payment of debts) will fall away in the near future which is an assurance that his liquidity problem will not deteriorate to the point where it will have the effect of rendering him

unable to pay his debts.

The next question that arises is whether there has been a written notice of inability to pay when the circumstances surrounding the above mentioned portion in the answering affidavit is considered as was in essence submitted by Mr Botes. Here it must be borne in mind that what was said by respondent appeared in an answering affidavit that was very brief and in an attempt to avoid the provisional sequestration order which was brought on an urgent basis. Mr Botes criticised the conduct of the respondent with regard to various matters, pointing out discrepancies between this original answering affidavit and the later one. Most of the criticisms had some merit but did not in my view take the matter of respondent's solvency or not or whether an act of insolvency was committed or not any further. The most telling criticism was the fact that respondent paid cheques which should have been paid directly to applicant into his own bank account and on certain invoices deleted the instruction that payment had to be made to applicant directly. Thus Mr Botes contended the respondent funded the continuation of his business with the applicant's money. In terms of the franchise agreement clients of respondent had to pay the purchase price of the goods directly to applicant. Applicant would then deduct its price from this amount plus the administration fee and advertising contribution and forward the balance which would represent respondent's share to him. There would thus invariably be a delay before respondent would get what was due to him. As was seen in the Unavem and Commercial Bank contracts,

payments were indeed made to applicant contrary to the contention in its funding papers. Thus, although it is clear that respondent acted in breach of the franchise agreement it is not clear that he funded his business with applicant's money as it is also a possibility that he, because of his admitted liquidity problems, decided that he would take his share upfront instead of waiting for the process as provided for in the franchise agreement. It is clear that respondent was less than open in his dealings with applicant but though this may even mean that he was dishonest and wanted to crook applicant it does not necessarily mean he was insolvent or committed an act of insolvency.

I may just mention in passing that applicant, when forced to admit the payments in respect of the contracts it relied on in its founding papers, changed tack in its second replying affidavit and made averments relating to a further and full reconciliation and a new alleged indebtedness. Mr Botes also strongly relied on portions of this affidavit in his submissions. The applicant however must stand or fall in this application on the basis it decided to bring this application namely the three contracts and the events surrounding those contracts.

In the result I am not satisfied that the applicant made out a case on a balance of probabilities that the respondent is insolvent or committed any act of insolvency and the rule is thus discharged with applicant to pay the costs.

FRANK, JUDGE

ON BEHALF OF "THE APPLICANT:	ADV L C BOTES
Instructed by:	Theunissen & Van Wyk
ON BEHALF OF THE RESPONDENT:	MR B BLOCH