

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING IN TERMS OF PRACTICE DIRECTION 61

Case Title: ALWYN PETRUS VAN STRATEN N.O and CHRIS BOTHA	PLAINTIFF DEFENDANT	Case No: I 3655/2015 Division of Court: Main Division Heard on: 17 August 2023
Heard before: Honourable Lady Justice Rakow		Delivered on: 21 November 2023
Neutral citation: <i>Van Straten N.O v Botha</i> (I 3655/2015) [2023] NAHCMD 755 (21 November 2023)		
Order: <ol style="list-style-type: none">1. The application for absolution is dismissed.2. Costs to be costs in the cause.3. The matter is postponed to 5 December 2023 at 15:30 for the fixing of trial dates for the continuation of the trial.		
Reasons for order:		
RAKOW J:		

Introduction

[1] This is an application for absolution from the instance in terms of rule 100(1) of the High Court Rules. The plaintiff is Alwyn van Straten N.O., an adult male appointed as Trustee in the insolvent estate of one J.H. Labuschagne and who conducts business under the name Executrust. The defendant is Chris Botha an adult male businessman.

Background

[2] By 1 October 2010, Mr Labuschagne's liabilities exceeded his assets. On several instances after this date, Mr Labuschagne made payments to the defendant. According to the joint expert report of Mr Mchardy and Ms Fourie, as from 4 October 2010, the defendant received N\$2 049 214.90. The allegation is that these payments were made by Mr. Labuschagne preferring the defendant above his other creditors. As such, these payments to the defendant are liable to be set aside in terms of s 30 of the Insolvency Act 24 of 1936.

Section 30 of the Insolvency Act 24 of 1936

[3] Section 30 reads as follows:

'Undue preference to creditors 30.

(1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the Court may set aside the disposition.'

[4] The result is that the trustee/liquidator bears the onus to establish the following:¹

¹ See *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 177 -180; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) p 1031 par [16] and *Pretorius' Trustees v Van Blommenstein* 1949 (1) SA 267 (O) at 278.

- (a) Disposition of the insolvent's property to the creditor (the defendant)
- (b) At a time when the insolvent's liabilities exceeded his assets
- (c) with the intention of preferring the defendant above another creditor
- (d) the defendant had indeed been preferred above the other creditor
- (e) the insolvent's estate is thereafter, sequestrated.

Discharging the onus

[5] The plaintiff's and defendant's experts met during the trial with the specific instruction to come up with a joint expert report. This report was handed up as exhibit "J". They were specifically tasked to determine whether Mr Labuschagne's liabilities exceeded his assets on t 1 October 2010 and whether he made any disposition to the defendant after 1 October 2010.

[6] The experts' findings, although not with the same amounts, found that Mr Labuschagne's liabilities exceeded his assets on 1 October 2010, the plaintiff's expert found to the tune of N\$7 403 899.67 and the defendant's expert to the amount of N\$2 588 712.25. On the second question they found that Mr Labuschagne indeed made dispositions in favour of the defendant to the tune of N\$2 588 712,25.

[7] There is no proof that Agra received any payment from Mr Labuschagne after 1 October 2010, but the defendant received various payments until February 2011. Therefore, the defendant was indeed preferred above Agra.

[8] The onus is on the plaintiff to establish on a balance of probabilities that the disposition was made by Mr Labuschagne with the intention of preferring the defendant. What is in dispute however, is whether Mr Labuschagne made these payments out of his own free will with the intention of preferring the defendant above another creditor. It is argued by the defendant that these payments were made under duress, as the defendant made Mr Labuschagne sign an acknowledgement of debt and he was therefore, forced to make these payments to ensure legal

action is not taken against him.

[9] It is also accepted that Mr Labuschagne, the insolvent's estate, was sequestrated after the disposition.

Arguments

[10] On behalf of the defendant it is argued that the cheques were post-dated cheques, handed to the defendant already in September 2010 and as such Mr Labuschagne had no control over these cheques any more, as they were now in the defendant's possession. He therefore were not 'acting' when the cheques were eventually paid.

[11] It was further argued that the N\$431 268.90 made from the profit sharing in the sale of cattle, that the defendant removed from the farm of Mr Labuschagne and which was subsequently sold. The money withheld by the defendant can also not be seen as a disposition made by Mr Labuschagne, because he never handed over the amount to the defendant.

[12] It is further argued that the cheque payments, even the few blank ones, were all made during ordinary business transactions and as such, there was no intention to prefer the defendant above other creditors.

[13] The plaintiff argued that it was clear that Mr Labuschagne preferred the defendant over Agra and this can be inferred from a number of things. He gave a full disclosure of his financial situation to the defendant which was not given to Agra. He signed sixteen post-dated and blank cheques in October 2010 which was handed to the defendant but none was handed to Agra. He signed at an early stage in October 2010 an acknowledgement of debt in favour of the defendant with the belief that it would safeguard him against possible legal steps to be taken by Agra. He further informed the defendant of a VAT refund and facilitated payment of such refund to the defendant. He further allowed the defendant to remove cattle from the farm Honigsberg, which profits were used to further pay down the debt he had with the defendant.

[14] The plaintiff pointed out that Mr Labuschagne in several respects clearly expressed the

intention of preferring the defendant over Agra at a time when both he and the defendant knew that he was factually insolvent in that his liabilities by far exceeded his assets.

Legal considerations

[15] The test to be applied by the court at this stage of the trial is: is there evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff?² Another approach, is to enquire whether the plaintiff has made out a prima facie case.

[16] In the case of *Bidoli v Ellistron T/A Ellistron Truck & Plant*³ the High Court of Namibia stated and approved the following test for absolution from the instance, at 453D-F:

‘In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) the Court of Appeal held that when absolution from the instance is sought at the end of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. The phrase ‘applying its mind reasonably’ requires the Court not to consider the evidence *in vacuo* but to consider the admissible evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.’

[17] In *Ramirez v Frans and Others*,⁴ this court dealt with the application and the principles applicable. Concerning case law, the following principles were extracted:

(a) (T)his application is akin to an application for a discharge at the end of the case for the prosecution in criminal trials i.e. in terms of s 174 of the Criminal Procedure Act — *General Francois Olenga v Spranger*⁵;

(b) the standard to be applied is whether the plaintiff, in the mind of the court, has tendered evidence

² *Gascoyne v Paul & Hunter* 1917 TPD 170. In *Gordon Lloyd Page & Associates v Riviera* 2001 1 SA 988 (SCA).

³ *Bidoli v Ellistron T/A Ellistron Truck & Plant* 2002 NR 451 HC.

⁴ *Ramirez v Frans and Others* [2016] NAHCMD 376 (I 933/2013; 25 November 2016) para 28. See also *Uvanga v Steenkamp and Others* [2017] NAHCMD 341 (I 1968/2014; 29 November 2017) para 41.

⁵ *General Francois Olenga v Spranger* (I 3826/2011) [2019] NAHCMD 192 (17 June 2019), *infra* at 13 para 35.

upon which a court, properly directed and applying its mind reasonably to such evidence, could or might, not should, find for the plaintiff — *Stier and Another v Henke*⁶

(c) the evidence adduced by the plaintiff should relate to all the elements of the claim because, in the absence of such evidence, no court could find for the plaintiff — *Factcrown Limited v Namibian Broadcasting Corporation*;⁷ .

(d) in dealing with such applications, the court does not normally evaluate the evidence adduced on behalf of the plaintiff by making credibility findings at this stage. The court assumes that the evidence adduced by the plaintiff is true and deals with the matter on that basis. If the evidence adduced by the plaintiff is, however, hopelessly poor, vacillating, or of so romancing a character, the court may, in those circumstances, grant the application — *General Francois Olenga v Erwin Spranger*; ⁸

(e) the application for absolution from the instance should be granted sparingly. The court must, generally speaking, be shy, frigid, or cautious in granting this application. But when the proper occasion arises, and in the interests of justice, the court should not hesitate to grant this application — *Stier and General Francois Olenga v Spranger (supra)*.’

Discussion

[18] It is clear from the requirements for s 30 of the Act, that indeed in this instance, a prima facie case was made out. From the discussion above, it is agreed upon by the experts that at the time of the disposition of Mr Labuschagne’s property to the defendant his liabilities exceeded his assets. There was also a case made out by the plaintiff to illustrate that the intention of Mr Labuschagne most probably was to prefer the defendant and in fact did prefer the defendant over Agra. It is also not disputed that the estate of Mr Labuschagne was in fact sequestrated afterwards.

[19] I am of the opinion that there is indeed a case made out which the defendant must answer and for that reason the court is dismissing the application for absolution.

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

⁶ *Stier and Another v Henke* 2012 (1) NR 370 (SC) at 373.

⁷ *Factcrown Limited v Namibian Broadcasting Corporation* 2014 (2) NR 447 (SC).

⁸ *Supra*.

1. The application for absolution is dismissed.
2. Costs to be costs in the cause.
3. The matter is postponed to 5 December 2023 at 15:30 for the fixing of trial dates for the continuation of the trial.

Judge's signature	Note to the parties:
RAKOW J Judge	Not applicable
Counsel:	
PLAINTIFF:	DEFENDANT:
R Heathcote (with him J Strydom) Instructed by Theunissen, Louw & Partners, Windhoek.	P Van Amstel (with him H Stolze) Instructed by Masiza Law Chambers, Windhoek.