REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO. 3085/13

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

9/05/2013
DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED **Intervening Creditor**

and

FURTAK, BORIS UMBERTO **Respondent**

IN RE:

EX PARTE:

FURTAK, BORIS UMBERTO **Applicant**

JUDGMENT

DTvR DU PLESSIS : AJ

1. The applicant is married out of community of property. He brought an *ex parte* application for the surrender of his estate in terms of the Insolvency Act, 24 of 1936 (as amended) ("the Act"). It is not in dispute that he has complied with all the formal requirements for voluntary surrenders as required in terms of the Act.

2. The intervening creditor ("the creditor") brought an application to intervene and for the application for voluntary surrender to be dismissed. The creditor is the holder of a mortgage bond over the immovable property of the applicant, which mortgage bond was registered as security for monies lent and advanced by the creditor to the applicant in terms of a written loan agreement. The creditor has an obvious interest in the application.

3. In their replying affidavit to the application to intervene, the applicant denied that the creditor had *locus standi* to intervene. Mr Kotze, who appeared for the applicant, could not provide any cogent reasons for this denial and did not persist therewith. In the premises I granted the creditor leave to intervene. The matter thereafter proceeded on the merits of the application for voluntary

surrender.

4. The applicant raised, as a point *in limine*, that the deponent to the creditor's affidavit lacked the necessary *locus standi* to sign documents on behalf of the bank. Much was said about this issue in the affidavits. However, it is the attorney acting for a party who must be authorised so to act. There is no need for any other person, whether a witness or not, to be additionally authorised.[1]

5. It is irrelevant whether the deponent had been authorised to depose to the founding affidavit.[2] The proper remedy for a party who wishes to challenge the authority of a person allegedly acting on behalf of the applicant, is to dispute the authority in terms of Rule 7 (1) of the rules of this court.[3]

6. Over and above these considerations the creditor showed the authority of the deponent in the replying affidavit. There is therefore no merit in this point and it is dismissed.

7. The test for voluntary surrender applications is set out in section 6(1) of the Act which, apart from requiring compliance with section 4, provides as follows:

"If the court is satisfied ... that the estate of the debtor in question is insolvent, that he owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and

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1 Eskom v Soweto Town Council 1992 (2) SA 703 (W) at 705E
2 Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624G-I
3 Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at 206H

make an order sequestrating that estate."

8. The applicant has shown that he is factually insolvent. That leaves two issues for determination before the discretion granted by section 6 (1) can be exercised. The first is to determine whether the applicant owns realisable property sufficient to defray all costs of sequestration, and the second is to determine whether the sequestration of the applicant's estate will be to the advantage of creditors.

9. Both of these aspects require the court to be satisfied. The applicant must discharge the onus to satisfy the court on a balance of probabilities. In particular, the test relating to advantage to creditors is more strictly framed than that for the provisional sequestration of a debtor's estate, which only requires the court to be of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated. It is also more strictly framed than that for the final sequestration of a debtor's estate which only requires the court to be satisfied that there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated. In terms of section 6 (1) the court must be satisfied that it will be to the advantage of creditors if the debtor's estate is sequestrated.[4]

10. In this regard the value of the immovable property is crucial. The value thereof should be established by an independent valuator to persuade the court that

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[4] Ex parte Arntzen (Nedbank Ltd as intervening creditor) 2013 (1) SA 49 (KZP) at paras 3 & 4

there is a prospect that the free residue of the insolvent estate will render some real advantage to the insolvent's creditors.[5]

11. In Ex parte Matthysen et uxor (First Rand Bank Ltd intervening)[6] Southwood J observed the following:

"It is well settled what an applicant for voluntary surrender must do to prove that his/her sequestration will be to the advantage of creditors. In Nell v Lubbe 1999 (3) SA 109 (W) at 111D – G Leveson J stated the position as follows:

> *'The purpose of furnishing a sworn valuation is therefore to establish the price that is likely to be realised from the sale of the property on what is called a forced sale so that it can be determined that there will be a free residue available for creditors and advantage to creditors is thereby established. A practice has therefore grown up in this Division (I cannot speak for others) whereby a sworn valuation is furnished by an expert witness, usually, as in the present case, an estate agent. He expresses an opinion with respect to the price that the property will fetch. Normally the opinion of a witness is not receivable in evidence. But the opinion of an expert witness is admissible whenever, by virtue of the special skill and knowledge he possesses in his particular sphere of activity, he is better qualified to draw inferences from the proved facts than the Judge himself. A Court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it. But the court is not a rubber stamp for acceptance of the expert's opinion. Testimony must be placed before the Court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. S v Gouws 1967 (4) SA 527 (E); S v Govender and Another 1968 (3) SA 14 (N). The Court will not blindly accept the*

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5 Ex parte Steenkamp supra
6 2003 (2) SA 308 (T) at 311J – 312G

assertion of the expert without full explanation. If it does so its function will have been usurped.'

In Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) at 371G – H Wessels JA emphasised the necessity for the facts to be established and the reasons to be disclosed in the following passage:

'As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

In Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke 2000 (4) SA 116 (C) at 124F–I the Full Court of the Cape Provincial Division expressly endorsed the approach of Leveson J in Nel v Lubbe(supra) and found it to be equally applicable to applications for voluntary surrender."

12. The requirements with which a valuation must comply, were set out comprehensively by Bertelsmann J in Ex Parte Ogunlaja & others[7], as follows:

"[12] … a valuator should take the following aspects into consideration when preparing an assessment of the probable value of a stand or building:

(a) The original sales price of the property;

(b) The bond the bank was prepared to register against the property;

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7 [2011] JOL 27029 (GNP)

(c) *The size of the property;*

(d) *The condition of the property;*

(e) *The location of the property;*

(f) *The demand for property in the area;*

(g) *The access that is available for the public to and from the property;*

(h) *The improvements to the property and the condition thereof;*

(i) *Consultations with local agents focused upon the specific area.*

[13] ...

[14] ...

[15] *The valuator functions as an expert. As was underlined by Southwood J, his or her evidence is opinion evidence that is only admissible in respect of matters in which the court cannot come to a finding on its own without the guidance of a person whose specialist knowledge provides the basis for a correct finding. The expert's opinion does not, however, substitute the court's own finding on the issue in question. It merely supplies the factual basis upon which the court may come to the correct conclusion (Michael & another v Linksfield Park Clinic (Pty) Ltd & another 2001 (3) SA 1188 (SCA) at 1200C – 1201H; Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE) at 410G – 411D).*

[16] *An expert can only provide guidance to the court if his or her evidence complies with strict requirements in order to be acceptable. These are the following:*

(a) *The expert must have sufficient knowledge and experience in his specialist field to be recognised as a person of standing among her or his professional colleagues;*

(b) *The expert must be fully familiar with, and adept at applying the standards and procedures of his profession and its practices;*

(c) *The expert witness should be completely independent of the litigants and their legal representatives and should formulate his or her opinion without – if such is possible – knowledge of, and certainly without regard to, the result the litigant wishes to achieve by the employment of the expert's services. In the case of insolvency proceedings the expert should be completely in the dark regarding the amount that the insolvent's assets will have to be disposed of in a forced sale situation in order to guarantee an advantage to creditors;*

(d) *An expert witness must be able to provide cogent reasons for her or his conclusions and must be able to explain, in clear and logical terms, the manner and fashion in which he or she came to hold the view that is presented as the expert's opinion. The facts that informed the opinion must be recorded objectively and as fully as possible. Any formula that is applied or followed in the process of investigation and assessment must be identified, explained in detail and reasons must be provided for the choice of the particular formula under the given circumstances;*

(e) *It is self-evident that an expert must be honest and beholden only to his or her duty to assist the court in the search for the truth, without regard for the consequences that the true facts may have for the applicant in whose matter the expert was employed to give evidence."*

13. The valuation on which the applicants rely is by Mr Johannes Petrus Snyman, who is the only member of Hennops Waardeerders CC. In his affidavit he says that he has "more than sixteen years of experience in valuation (sic) of fixed and movable assets for sale/termination/dissolving of business purposes and further more (sic) for Liquidation and Sequestration purposes."

14. In terms of his valuation, he indicates that the basis therefor is "invariably market value" and that no reasonable comparable sales could be found in the area. He further states that according to a deeds office valuation search the expected high and low values are between a certain band and that the forced sale value would be determined at a lesser percentage than the market value. Despite the fact that there is a fairly reasonable demand for properties in the area, he has consulted with two agents that focus on the area and they agree with the valuation. This is, of course, hearsay as the identity of these alleged agents are not disclosed nor are confirmatory affidavits by them annexed to the application.

15. On his version, there were no comparable sales. However, despite this he states that there is a fair demand for undeveloped land in the area. This is a contradiction that is not explained. The deeds office valuation is not annexed to his affidavit and there is no explanation for the difference of R100 000,00 between the market value and the forced sale value.

16. Our courts have on many occasions held that the most acceptable method of valuation is by reference to comparable sales.[8] The valuator provides no explanation for the statement that no reasonable comparable sales could be found in the area. He does not provide details of the steps that he took to

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8 Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality 1989 (2) SA 670 (C) at 676H – 678B; Minister van Waterwese v Von During 1971 (1) SA 858 (A) at 871A; Scher & others NNO v Administrator, Transvaal 1990 (4) SA 545 (A) at 548; Minister of Water Affairs v Mostert & others 1966 (4) SA 690 (A) at 723E

obtain such information. As stated above, this is also contradicted by the allegation that there is a fair demand for properties in the area.

17. What is even more alarming, is that a similar matter was argued before me simultaneously with this application. The attorneys acting for the applicants in both applications are the same and they have made use of the same expert. The reports are nearly identical, save for the values attached to the immovable properties. In the other matter, under case number 2013/3084, the immovable property is situated in Witpoortjie, Roodepoort. I find it highly improbable that in both cases there were no comparable sales. As has been pointed out in Ex parte Bouwer and Similar Applications[9], the practice of reports being verbatim copies of each other detracts significantly from the reliance that can be placed upon the expert opinion.

18. The report further fails to mention the original sales price for the property and the access available to the public to and from the property. There is also no cogent reasons for his conclusions and no explanation as to whether a formula was used to determine the forced sale value. If so, such formula should have been explained. If not, there is no basis on which the court can find that the forced sale value is a proper value as no explanation is provided as to how it was determined.

19. In the Ogunlaja-matter[10] Bertelsmann J held that proof of physical inspections of immovable properties ought to be provided by way of photographs and a

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9 2009 (6) SA 382 (GNP)
10 Supra, at paragraph 38

detailed description of the physical condition in which each property was found, as well as the effect that the physical appearance of the property has upon the valuation thereof. Needless to say, none of these requirements were met in this application. It follows that the valuation report falls short of demonstrating an acceptable measure of expertise and consequently no proof was provided that the liquidation of the assets of the insolvent estate would render an advantage to creditors.

20. Mr Meintjes, who appeared for the creditor, has also relied on the non-disclosure of material facts by the applicant as a reason why the application should be refused. Insofar as it is necessary it should be mentioned that the creditor has also shown, with credible evidence, that the expected dividend to creditors will only be 4,31 cents in the rand. This is based on the creditor's valuation of the immovable property, which valuation does not fall foul of the same problems as that of the applicant's expert. However, because of my finding that the applicants have failed to show an advantage to creditors, it is not necessary to examine these grounds in any detail herein.

21. In his replying affidavit the applicant indicated that, if the court concurred with the creditor's view that there would be no advantage to creditors, than "a certain family member of mine deposited a further R75 000,00 *ex gratia* into the trust account of my attorney of record as a contribution to assist me, this must not be seen as an asset in my estate as this amount will only be released by my attorney to the appointed trustee and if the Honourable Court

finds that this amount is necessary for the granting of my voluntary surrender application."

22. Mr Meintjes argued that this allegation was an implied admission that there was no advantage to creditors. The payment was obviously held out as an incentive for the court to grant the voluntary surrender. The applicant's problem, however, is that the money is expressly not part of his estate. There would therefore be no obligation on his attorney or the unknown family member to pay the sum to the trustee as it does not vest in the estate. This payment can therefore not assist the applicant to overcome his problem.

23. For these reasons it follows that the application should be refused.

24. In the premises I make the following order:

1. Leave is granted to the intervening creditor to intervene and oppose the *ex parte* application of the applicant for the voluntary surrender of his estate;

2. The costs of the application to intervene shall be costs in the application for voluntary surrender;

3. The application for voluntary surrender is hereby refused, with costs.

DTvR DU PLESSIS: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant/Respondent: D J Kotzé 083 734 4744

C Hartzberb 082 411 5374

Instructed by:

On behalf of the Intervening Creditor: Adv. Meintjes 083 557 0207

Instructed by:

Dates of Hearing: 3 May 2013

Date of Judgment: 10 May 2013