IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

16/5/2014 .....

DATE **SIGNATURE**

Case No.: 61888/13

In the matter between:

ABSA BANK Intervening Creditor

and

LEON RUDOLPH LOCHENBERG First Respondent
PATRICIA LOCHENBERG Second Respondent

In re:

The *exparte* application of:

LEON RUDOLPH LOCHENBERG First Applicant
PATRICIA LOCHENBERG Second Applicant

with

ABSA BANK LIMITED Intervening Creditor

JUDGMENT

KEIGHTLEY AJ

INTRODUCTION AND ISSUES

[1] This is an application for the voluntary surrender of the joint estate of the applicants, who are married to each other in community of property.

[2] In terms of section 6(1) of the Insolvency Act, 34 of 1936 ("the Act"), a court may accept the surrender of an estate and make an order of sequestration if the court is satisfied that:

[2.1] The procedural requirements laid down in section 4 of the Act have been complied with;

[2.2] The estate of the debtor is insolvent;

[2.3] The debtor has realisable property of sufficient value to defray the costs of the administration of the sequestration to be paid from the free residue;

[2.4] It will be to the advantage of the creditors if the estate is sequestrated.

[3] By consent between the parties, Absa Bank ("the bank") was admitted as an intervening party in these proceedings. The bank is a creditor of the applicants. It holds two mortgage bonds in respect of two immovable properties owned by the applicants.

[4] The bank opposes the voluntary surrender of the applicants' estate. Initially the bank indicated that it would oppose the surrender of the estate on the basis that none of the requirements listed above had been satisfied. However, at the hearing of the matter counsel for the bank indicated that the issues placed in dispute had become significantly narrowed. The matter was argued before me on the basis that the bank contests only the following issues:

[4.1] First, the issue of whether the applicants are in fact insolvent.

[4.2] Second, whether the surrender of the estate would be to the advantage of the applicants' creditors.

[5] Originally, one of the key contested issues was the true value of the larger of the two properties ("the disputed property") held by the applicants. The applicants obtained a valuation of the disputed property from a valuator and used this in support of their application. This valuation pegged the forced sale value of the disputed property at R2,2 million, and the market value at R2,4 million. The bank disputed this valuation. It alleged in its opposing affidavit that the bank's valuator had placed a value of only R2 million on the property. On the basis of what the bank contended was the true value of the disputed property, the dividend payable to concurrent creditors would amount to only 16c

in the Rand, which is below the 20c in the Rand limit accepted in this Division, meaning that it would not be to the advantage of creditors to sequestrate the applicant's estate.

[6] As matters transpired, however, the bank did not persist in its contentions in this regard. This was because the bank conceded that the "valuation" it sought to rely on was not a valuation in the form required for admission by the court as evidence of the value of immovable property for purposes of proceedings of this nature. It was no more than a "*property inspection report*", which was stated specifically "*not (to be) an estimate of value and is only meant to determine the existence and exterior condition of the property.*" It was not a valuation made under oath, and was not based on a comparable sales basis. In the circumstances, the report did not comply with the requirements laid down by this court for the expert evidence of valuators in *Ex Parte Ogunlaja*.[1] In the circumstances, in my view, the bank correctly conceded that it could not rely on its report to dispute the valuation put forward by the applicants.

[7] Nonetheless, the bank argued that the applicants' valuation of the disputed property did not assist them, as they could not satisfy the court that they were insolvent. The bank advanced two contentions in support of this argument:

[7.1] It contended that if the market value of the disputed property relied on by the applicants was taken into consideration then the value of the applicants' assets was in excess of R 3 million, whereas the

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1 [2011] JOL 27029 (GNP)

agreed value of the applicants' liabilities was R 2, 9 million. This, argued the bank, demonstrated that the applicants were not insolvent.

[7.2] Furthermore, the bank contended that it was common cause that the applicants had overstated their indebtedness to the bank in their statement of debtors' affairs. The bank pointed out that the overstatements in question were substantial. The bank submitted that there may well be other creditors in respect of whom the applicants similarly had overstated their indebtedness. In the circumstances, the bank argued that on the information placed before this court by the applicants it is not possible for the court to determine their true state of insolvency or solvency.

[8] As regards the issue of the advantage to creditors, the bank submitted that if this court could not find that the applicants were insolvent, it followed that the surrender of the applicants' estate would not be to the advantage of the creditors.

[9] The fundamental question for me to consider is whether the applicants have shown that they are insolvent. If they have not, then their application for the surrender of their estate must fail. On the other hand, if I am satisfied that they have established that they are insolvent, then it must follow that I should grant their application for surrender. This is because, on the basis of the now uncontested value of the disputed property, the dividend payable to the

applicant's creditors will be 27c in the Rand, which is within the level required in this division.

HAVE THE APPLICANT'S ESTABLISHED THAT THEY ARE INSOLVENT?

[10] On the issue of whether the applicants have shown that they are insolvent, counsel for the bank submitted that the court should have regard to the market value of the immovable properties, and not the forced sale values. On this basis, as I indicated earlier, the bank contended that the value of the applicants' assets was in excess of R3 million, and their liabilities were only R2, 9 million.

[11] In response, counsel for the applicants submitted that it is incorrect to have regard to the market value of the applicants' assets for purposes of determining the applicants' insolvency. He submitted that the court instead should have regard to the forced sale value of the assets. In this regard, he referred to the unreported judgment in this division of the learned Mr Acting Justice du Plessis, in the case of *First Rand Bank Ltd v Engelbrecht*. In this case the learned judge held as follows:

> " ... *I could find no authority for the proposition that the market value of the property should be taken into account for purposes of determining solvency. In fact, it seems as if the only relevant value is the forced sale value of the immovable property.*"[2]

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2 Case no: 3084/13, judgment dated 10 May 2013

[12] If the forced sales values of the properties are taken into account the parties are agreed that the applicants' liabilities exceed the value of their assets.

[13] I can find no reason to justify a departure from the finding on this issue by this court in the *First Rand Bank v Engelbrecht* case. On the basis of the forced sale values of the properties, the dispute regarding the applicants' insolvency falls away.

[14] In any event, it seems to me that in order to satisfy myself on the question of the applicants' insolvency I should properly have regard to picture that is painted when all of the facts are taken into consideration. In this regard it is significant that there is no dispute that the applicants' financial woes arose after their business was forced to close as a result of the decline in the economy. Since then, both of the applicants have been unemployed. There is no dispute that they are without income and that they do not have the means to meet their monthly expenses. These stand at a figure in excess of R 10 000. 00 per month. It is also undisputed on the papers that the applicants are indebted to, not only the bank, but also a range of other creditors, including the South African Revenue Services. The applicants state that some of the creditors have threatened to institute legal action against them in view of their indebtedness. The applicants declared under oath that they are insolvent. They further declared that they are unable to make use of the debt review process because they are unable to afford the monthly payments required. It is also common cause that the applicants' indebtedness continues to escalate month by month in view of the interest attaching to their debts.

[15] The bank does not dispute any of these averments, nor does it seek to impute any ulterior motive on the part of the applicants in seeking the surrender of their estate.

[16] In the circumstances, and taking into account all of the facts included in the applicants application, I am satisfied that they have demonstrated that they are insolvent. It is one thing to point to the probable value of immovable properties held by the applicants and to question whether this value is equal to or more then the value of their liabilities. However, it is patently clear from a full conspectus of the facts before this court the applicants find themselves in insolvent circumstances.

THE OVERSTATEMENT OF INDEBTEDNESS

[17] As far as the overstatement of the applicants' indebtedness to the bank is concerned, I am satisfied that this does not prevent me from making a sufficiently accurate assessment of the applicants' financial state. While it is correct that the applicants initially overstated their indebtedness to the bank, this has been corrected in light of the certificates of balance presented by the bank and in the calculations presented to me. Furthermore, and despite the applicants' statement of affairs lying for inspection for the requisite period, no other creditors have come forward to complain that the debts due to them were overstated or to oppose the application for surrender on any other grounds.

[18] In addition, it is clear that the error on the part of the applicants in this regard was *bona fide* and, as I have already indicated, the bank does not suggest any

ulterior motive on the part of the applicants. In my view it is appropriate for me to take into account the fact that the applicants are individuals without the benefit of a financial department running their affairs. As such, and given the strained financial circumstances they find themselves in, it is perhaps understandable that their initial estimate of their indebtedness was inaccurate.

[19] For this reason I cannot accept the submissions made by the bank to the effect that this failure by the applicants to make full and frank disclosure of the indebtedness to the court is sufficient to nonsuit them in light of the *ex parte* nature of these proceedings. As counsel for the applicants pointed out, correctly in my view, although the application for the voluntary surrender of an estate is instituted on an *ex parte* basis, all of the applicants creditors were given notice of the application and had the opportunity to intervene before the matter came before the court. This being the case, the court was not solely reliant on the facts put before it by the applicants. In the circumstances, it seems to me that the inaccuracy in the applicants' estimation of their indebtedness is insufficient on its own to nonsuit the applicants. This is particularly so where, as in the present case, the correct facts were placed before the court on affidavit prior to the hearing.

[20] I should stress, however, that my finding in this regard should not be read as detracting from the duty on debtors to make every effort to place accurate and full facts before the court when they seek a surrender of their estates. Attorneys assisting them should also make every effort to ensure that as far as possible, accurate assessments are made regarding the value of the debtors'

liabilities. A failure to do so could lead to the dismissal of an application under section 6 of the Act in the appropriate case.

[21] As I have indicated, it is common cause that taking into account the applicants' corrected amounts of indebtedness to the bank, the applicants concurrent creditors will receive a dividend of 29c in the Rand. This is an acceptable level in terms of the practice in this division.

[22] For all of these reasons I am satisfied that the applicants have established that they are insolvent. It is not disputed that there is sufficient free residue to cover the costs of the surrender of their estate. It is also not disputed that the applicants have complied with the procedural requirements laid down in section 4 of the Insolvency act.

ADVANTAGE OF CREDITORS

[23] The only remaining question is whether the surrender of the applicants' estate will be to the advantage of the creditors. Clearly, there will be a financial advantage to creditors from the surrender of the applicants' estate. In addition, the surrender will establish a *concursus creditorum* for the benefit of the collective body of creditors. If the application is refused, on the other hand, it is likely that a number of concurrent creditors may receive nothing. I am satisfied, therefore, that there are reasonable prospects that sufficient pecuniary benefit will result to creditors and that, in addition, the creditors will benefit from the indirect advantages associated with the surrender of the estate.

[24] I am satisfied that the applicants have met all of the requirements prescribed in the Act for the surrender of their estate and that it is appropriate in this case for me to the to exercise my discretion in favour of the applicants.

[25] I accordingly make the following order:

[25.1] The surrender of the estate of the applicants as insolvent is accepted and their estate is placed under sequestration in the hands of the Master of the High Court.

[25.2] The costs of this application shall be costs in the administration of the estate.

R M KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING	:	8 MAY 2014
DATE OF JUDGMENT	:	16 MAY 2014
APPLICANT'S COUNSEL	:	B LEE
INSTRUCTED BY	:	MICHAEL SENEKAL ATTORNEYS
INTERVENING CREDITOR COUNSEL	:	C SPANGENBERG
INSTRUCTED BY	:	HACK STUPEL EN ROSS ATTORNEYS