REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

10/7/2014.

Case number: 61678/2013

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

2014-06-27
DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED	**INTERVENING CREDITOR**
and	
ACKERMAN, ADELE	**APPLICANT**
In re the *ex parte* application of	
ACKERMAN, ADELE	**APPLICANT**

J U D G M E N T

HIEMSTRA AJ

[1] The applicant, Ms Adele Ackermann, applies for the acceptance of the voluntary surrender of her estate in terms of s 6(1) of the Insolvency Act, 34 of 1936 (the Act). ABSA Bank Limited (ABSA) applies for leave to intervene in the application and to oppose the application. The applicant has conceded at the outset that ABSA may intervene and oppose.

[2] I shall refer to the intervening creditor as ABSA.

[3] The founding affidavit in ABSA's application to intervene serves simultaneously as an answering affidavit in the main application.

[4] The parties have entered into three home loan agreements, all secured by mortgage bonds over the immovable property of the applicant. The applicant also incurred other debts. The applicant fell into arrears in respect of her monthly instalments. She explained that she is a freelance teacher and part-time bookkeeper. She has four dependent children and her income is insufficient to service her debt. She has been unable to secure full-time employment.

[5] In her founding affidavit, the applicant alleged that she had complied with the formal requirements of s 4 of the Act by giving all the requisite notices and attaches proof thereof. She also gave notice of the application to the South African Revenue Service within seven days of publication of the application in the Government Gazette in accordance with Act 69 of 2002. She attached an affidavit by an employee of her attorneys confirming that she had seen to the compliance with the requirements

of the legislation. The applicant made all the submissions necessary for the relief that she seeks.

[6] ABSA's opposition of the application is based on the following submissions:

1. The valuation of the property is deficient.
2. The applicant did not comply with the formal requirements of the Act.
3. The applicant did not make full and frank disclosure of her financial position by failing to disclose the full extent of her liabilities;
4. The surrender of the applicant's estate will not be in the interests of creditors;
5 The applicant is not in fact insolvent.

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[7] I shall deal with each of the submissions.

Valuation of the property

[8] The property was evaluated by a certain Lorindi van Dyk, a registered valuer in terms of the Property Valuers Profession Act 47 of 2000. ABSA did not challenge her qualifications to submit expert evidence on the subject, but criticised the method she had used in evaluating the property. However, ABSA did not submit its own valuation or evidence from an expert who is qualified to challenge Ms van Dyk's expert opinion. I shall therefore have no regard to this unsubstantiated attack on the valuation.

The formal requirements of the Act

[7] ABSA denies in broad terms that the applicant had complied with the prescriptions of s 4 of the Act and its counsel submitted in his Heads of Argument that that is one of the grounds for opposing the main application. It is, however, nowhere stated in

which respects the applicant has failed to comply. As I have already said, the applicant set out in her founding affidavit that she has complied with the requirements and attached proof thereof. I accept therefore that the applicant has complied with the formal requirements of the Act.

Full and frank disclosure of applicant's financial position

[8] The applicant alleged in her founding affidavit that the balance on the mortgage bonds was R502 120.16 at the time of deposing to her affidavit. ABSA, on the other hand claimed that the outstanding balance was in fact R496 729.70. This amount is confirmed in a Certificate of Balance issued in terms of the loan agreements between the parties. ABSA claims therefore that the applicant had overstated her indebtedness by R5 390.42. This, according to ABSA, amounts to a failure to make full and frank disclosure of her financial position. It was submitted on behalf of ABSA that the applicant had deliberately overstated her indebtedness in order to bolster her submission that she is insolvent.

[9] The applicant conceded in her replying affidavit that she had overstated her indebtedness by R5 390.42. She apologised for the error and insisted that it was made in good faith. I accept that the applicant had made an error. She could not have thought that the discrepancy would remain undetected. I find that the error was made in good faith and will accept for the purposes of this judgment the figure supplied by ABSA.

Interests of creditors

[10] In this Division a dividend of 20 cents in the Rand is regarded as adequate benefit to creditors in the event of voluntary surrender. Counsel for the applicant has demonstrated by means of comparative calculations that based on an indebtedness of R502 120.16 (the figure alleged by the applicant) the dividend to creditors would be 22 cents in the Rand, while on an indebtedness of R496 729.70 (the figure alleged by ABSA) the dividend would be 25 cents in the Rand. Therefore, on both scenarios there would be benefit to creditors.

The insolvency of the applicant

[11] Mr Kock, on behalf of ABSA, submitted that it is an absolute requirement that the estate of an applicant for voluntary surrender be actually insolvent in that his or her liabilities exceed the value of his or her assets. He submitted that the applicant's estate is not in fact insolvent. This submission is based on the contention that the applicant's evidence is to the effect that her liabilities exceed the forced sale value (FSV) of her property, but not the market value. Mr Kock argued that the market value (MV) of the property is its real value and that it should have been taken into account in determining the solvency of the applicant.

[12] According to an annexure to the valuation of the fixed property, submitted by the applicant, the definition of MV as laid down by the International Valuation Standards Committee is the following:

"The estimated amount which a property should exchange on the date of the valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."

The annexure further states that FSV

"is a credit term used by financial institutions for what bond lenders expect a property to reach if sold after repossession. As a rule of thumb, this is around 70% of the market value."

[13] In this case the valuer estimated the MV of the property at R805 000 and the FSV at R644 000 (80% of the MV). Based on the FSV of the applicant's assets her liabilities exceed her assets by R15 597.58. On a calculation based on the MV of the assets, the applicant's assets exceed her liabilities by R144 402.42.

[14] This submission, however, finds little favour in our law. There are older decisions that appear to support the proposition, but proper analysis and later decisions do not bear this out. Wessels J held in *Ohlson's Cape Breweries Ltd v Totten*[1] that

"The word 'insolvent' must be taken to mean that the liabilities of the debtor, fairly estimated, exceed the value of his assets, fairly valued."

This passage does not state that the value referred to is necessarily the MV. Later decisions place it in its correct context.

In many cases the courts have in the context of voluntary surrender of estates accepted the surrender where it appeared from the evidence that the debtor was unable to pay his debts, in other words, where he had been found to have been commercially insolvent, as opposed to actually insolvent.[2] The authors of Meskin, *Insolvency Law* para 3.2 says:

"But the mere fact that the evidence adduced by the debtor disclosed that the value of his property exceeds the amount of his liabilities is not decisive against him where it is established that nevertheless he is without funds to pay his debts in full and it is improbable that such property will realise sufficient for such purpose."

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[1] 1911 TPD 48 at 50
[2] *Ex parte Fouche* 1956 (2) SA 116 (O); *Ex parte Deemter* 1962 (2) SA 228 (E); *Ex parte Barrable*1931 NPD 303

A full bench of the Natal Provincial Division in *Ex parte Harmse*[3] held that this passage correctly states the law.

[15] The identical issue came before the South and North Gauteng High Courts recently. In *Firstrand Bank Limited v M.W. Engelbrecht & Another: In re Ex parte Engelbrecht & Another*[4] and *ABSA Bank Ltd v Lochenberg & Another: In re Ex parte Lochenberg & Another*[5] DTvR du Plessis AJ and Keightly AJ respectively found that there is no authority for the proposition of Mr Kock and held that in fact the FCV is the appropriate measure to determine insolvency for the purpose of surrender of an estate.

[16] Berman J held in *ABSA Ltd v Rhebokskloof (Pty) Ltd & Others*[6] held that the "primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up because it is commercially insolvent is whether or not it has liquid or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that that the company's assets, fairly valued, far exceed its liabilities; once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345 (1) (c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up."

This case was decided in the context of a company being wound up, but there is no reason why the rationale should be different in the context of voluntary surrender. In the present case it is clear that the applicant will not be able to meet her obligations when they fall due. In fact she had already fallen in arrears with many of her obligations. She is in severe financial distress. She makes use of various credit cards and

[3] 2005 (1) SA 322 at 324 E - G
[4] Case No.: 3084/13, judgment dated 10 May 2013 (Johannesburg)
[5] Case No.: 61888/13, judgment dated 16 May 2014 (Pretoria)
[6] 1993 (4) SA 436 (C) at 440

personal loans to make ends meet. This situation is spiralling out of control. Even if she may not be actually insolvent today, she will be so within months, if not weeks.

[17] I find that the applicant has made out a case for the surrender of her estate. ABSA, as the intervening creditor, has clutched at straws to stave off the sequestration of the estate, but I can see no economic rationale of its opposition to the application.

1. The surrender of the estate of the applicant as insolvent is accepted and the estate is placed under sequestration in the hands of the Master of the High Court

2. The costs of this application up and until 22 October 2013 shall be costs in the administration of the estate.

3. The intervening creditor is ordered to pay the costs of the application as from 23 October 2013 up and until the granting of this order.

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	26 May 2014
Date of Judgment:	27 June 2014
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