IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

18 / 03 / 2016
DATE

SIGNATURE

CASE NUMBER: 10136 / 2015

18/3/2016

In the matter between:

VICTOR MUEL FERREIRA GRAVATO N.O. APPLICANT

AND

GERT NICOLAAS PETRUS CLOETE INTERVENING PARTY

JUDGMENT

MAVUNDLA, J.

[1] The applicant issued an ex parte application for the voluntary surrender of his estate in this Court in February 2015. The interviewing party is a creditor of the applicant, and became a party to the proceedings and was granted leave to file an answering affidavit by way of the Court order granted by Malope –Sethosa J on the 11 August 2015.

[2] The intervening party obtained judgment against the applicant in the amount of R326 488. 44 plus interest and costs on the 2 February 2015. The applicant's indebtedness to the intervening party is common cause.

[3] The intervening party opposed the surrender of the applicant's estate, contending, *inter alia*, that the application should be dismissed for the reason that:

3.1 firstly there was noncompliance with s4(3) of the Insolvency Act;

3.2 Secondly there was failure to fully disclose material facts, if disclosed demonstrate that the applicant's estate is solvent.

3.3 accordingly the surrender of the estate is not brought bona fide but to avoid the applicant's creditors.

[4] Whilst it was conceded on behalf of the applicant that there was noncompliance with s4(3) of the Insolvency Act, it was submitted that the applicant has substantially complied with the Act and the Court should exercise its discretion and condone the relevant noncompliance.

[5] In so far as the non-disclosure is concerned, it was submitted that the applicant has since disclosed the relevant material facts and the surrounding circumstances, and

some of the assets not disclosed were of insignificant value and would not have made any difference in the calculation of the value of the applicant's assets. The court was urged to take into account the fact that the dividend calculated by the applicant is in the amount of 47 cents in the rand and significant and to the benefit of the creditors.

[6] The applicant attached to his affidavit as annexure "CVDB1" which is the statement of debtor's affairs, **reflecting**:

6.1 his movables property, furniture, stock-trade etc. total an amount of: R969, 500. 00

6.2 outstanding claims amount to deficiency of an amount of: R563, 500. 00

6.3 totalling an amount of: R1533000. 00.

This annexure"CVDB1" is in a form of an affidavit duly signed by the applicant, save that it was, however, not deposed to before a commissioner.

[7] Section 4(3) provides that: "The petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act. The statement shall contain particulars for which provision is made in the said Form, shall comply with any requirements therein and shall be verified by affidavit (which shall be free from stamp duty) in the form set forth therein."[1]

[8] In the matter of *Commercial Union Assurance Co Ltd v Clarke*[2] the Appellate Division held that: "The basic test, in deciding as to the imperative nature of a provision, is whether the Legislature expressly or impliedly visits non-compliance with nullity. See *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (AD) at p. 594C; *S v Khan* 1963 (4) SA 897 (AD)

[1] Ex Lombard 1921 CPD 422.
[2] 1972 (3) SA 508 (AD) at 517.

at p.900B; *Essack v Pietermaritzburg City Council and Another* 1971 (3) SA 946 (AD) at 962A-C. In applying that test, --

"each case must be dealt with in the light of its own language, scope and convenience of adopting one view rather than other."

[9] The word "shall" according to the South African Concise Oxford Dictionary expresses a strong assertion or intention; or an instruction or command. The meanings referred to herein can, in my view, either be peremptory or directory, depending in the context the word is used. In this regard it is apposite to cite the matter of *Blou v Lampert and Chipkin NN.O. and Others*[3] where the Court held that:

"Fundamentally it is essentially a question of intention whether or not the Legislature intended non-compliance with the provisions to render a composition invalid. The use of the word "shall" is a strong indication, in the absence of considerations pointing to another conclusion, that the Legislature intended disobedience to be visited with nullity; Messenger of Magistrate's Court, *Durban v Pillay* 1952 (3) SA 678 (AD) at p682,683; Feinberg v Pietermaritzburg *Liquor Licensing Board* 1953 (4) SA 415 at pp419, 420. A consideration pointing to another conclusion would be present in the case where the provision is couched in positive language as opposed to negative form and there is no sanction added in the case the requisites are not carried out. There is then a presumption in favour of an intention to make the provision only directory according to the test supplied as usefully guide."

[10] In the matter of *Ex parte Henning*[4] the Court held that the purpose of the requirements provided in s4 (3) is to provide the creditors and the public an opportunity to be aware of the position of the debtor's financial affairs and enable them to take a decision as to how best they can protect whatever interest they might be having in the estate to be surrendered. Non-compliance with the requisites in s4(3) serve an important function as demonstrated, *inter alia*, by the fact that the Legislature provided in terms of s8(f) that it would be an act of insolvency if the statement of affairs are in essential respects incorrect or incomplete. Defective

[3] 1970 (2) SA 185 (TPD) at 208GF-G.
[4] 1981(3) SAS 843 (OPD) at 852E-G.

compliance of these provisions would ordinarily result in the failure of the surrender application, unless the Court finds that such noncompliance is not material. The conclusion referred to herein above; demonstrate, in my view that the relevant section, although couched in peremptory term, is however directory, affording the Court discretion to condone the noncompliance, depending on the nature of noncompliance.[5] This conclusion is consistent with what was held in the matter of *Kritzinger v Moreletta v Motorhawe-Projek*[6] that s4(1) et 4(2) of the Insolvent Act, although couched in peremptory terms is directory; *vide inter alia*, the authorities therein cited, *inter alia*, *Ex Parte Hetzler*[7] It would be strange that a different conclusion would apply in respect of s4(3) than in in respect of ss 4(1) and 4(2).

[11] Section 4(3) requires that the statement of affairs must be per an affidavit. This affidavit stands alone and independent from the affidavit, as *in casu*, upon which the application for the surrender is premised. An affidavit is a written statement sworn to by the deponent in the presence and before a commissioner of oath who has authority to take such oath. The commissioner must state underneath his name that the deponent has sworn before him that he or she understands the oath and considers it binding upon his conscience. In this regard *vide Goodwood Municipality v Rabie;*[8] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*[9]. *In casu*, it is clear that the applicant did not depose before a commissioner of oath and consequently the document can hardly be regarded as an affidavit, or substantially complying with the requirements of an affidavit, as prescribed by Regulations Governing the Administration of an Oath or Affirmation R1258 gg21 July 1972. In my view, in circumstances as *in casu*, the Court cannot in the exercise of its discretion condone a defect which is materially flawed. *In casu*, in my view, there is simply no affidavit and there is therefore nothing to condone. The

[5] The judgment is in Afrikaans and this is my translation, as understood the judgment.
[6] 1994 (2) SA 717 (T).
[7] 1969 (3) SA 90 (T).
[8] 1954 (2) SA 404 (C) at 406B-F
[9] **1999 (2) SA 279 (T) at 336A-B.**

application, in my view, therefore stands to be dismissed on this noncompliance only.

[12] The applicant, *in casu,* conceded that he failed to disclose the fact that he owned immovable property situated at Portion 2 of Erf 746, Melodi Extension 28, Madibeng Local Municipality, North West as well as three firearms at the time of launching the application. The failure to disclose the immovable property he ascribed it to having forgotten that the property was not yet transferred to the new owner.

[13] It is significant to note that the relevant immovable property was sold for an amount of R875 000. 00 per deed of sale concluded on 12 March 2015. The applicant's founding affidavit was deposed to on the 5 February 2015. I find it improbable that the applicant could have forgotten that the property had not as yet been transferred to the new owner, when he deposed to his affidavit earlier. It is also significant that at the launch of his application he failed to disclose this property, nor file a supplementary affidavit disclosing the sale and the amount thereof. I am of the view that the applicant has not been candid with this Court with the issue of this immovable property and the amount realised from the sale. Either way, the value of the house or the amount realised from the sale thereof, should have been disclosed and would have significantly altered the sum total of the value of his assets. This would have shown that the applicant is not insolvent. The firearms were not valued by an expert. The assertion of the applicant that the value of the firearms is meagre is not persuasive because he is not an expert. The immovable property as well as the firearms ought to have been valued by an expert valuator. The learned authors in Mars: The Law of Insolvency in South Africa[10], stated, *inter alia,* that: "...Immovable property sold but not yet transferred by the debtor must be included....No assets should be omitted merely because they are hypothecated, or regarded as worthless. The surrender may be refused if assets are omitted ..." Consequently this Court is not satisfied that a

[10] page 60.

full and frank disclosure has been made and therefore conclude that the application stands to be dismissed for this reason as well.

[14] In the premises the application for the surrender of the estate of the applicant is dismissed with costs.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE	**: 16 / 03 / 2016**
DATE OF JUDGMENT	**: 18 / 03 / 2016**
APPLICANT`S ADV	: ADV D.R. DU TOIT
INSTRUCTED BY	: HARTZENBERG INC
INREVENING PARTY`S ADV	: ADV S. MENTZ
INSTRUCTED BY	: CHRISTO BEKKER INC