IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 39922/06

DATE: 3 FEBRUARY 2010

In the matter of:

A[...] M[...] D[...] B[...]

ID: 6[...]

(MARRIED OUT OF COMMUNITY OF PROPERTY)

For the voluntary surrender of her estate

JUDGMENT

MOLOPA J

The Applicant has launched an application for the surrender of her estate in the hands of the Master of the High Court.

The Applicant contends that her liabilities amount to R4 618 061.86 whereas her assets amount to R1 990 000. thus leaving her with a shortfall of R2 628 061.86. **refer pages 9 and 10 of the paginated papers read with paragraph 10 of the Founding Affidavit ("FA").**

The application is opposed by the intervening creditor. An[...] D[...] B[...] ("The intervening creditor"). The intervening creditor is married to the Applicant out of community of property, and the parties are apparently involved in a divorce action.

The intervening creditor avers that the Applicant brought the application for the surrender of her estate merely to prejudice him and so that she can free herself from her debts and/or to shun away from her obligations/liabilities... Further, that the applicant is not bone fide in her application. On the other hand the

Applicant contends that the intervening creditor is merely abusing the process of the court and that he is opposing the application merely to settle the divorce proceeding between the parties.

The intervening creditor further contends that the Applicant has not played open cards with the court in so far as her assets and the value thereof are concerned: further that the Applicant has other investments and assets which cannot be easily traced by a curator, unless he or she (the curator) can have first hand information.

The intervening creditor has attached as Annexure A to his opposing affidavit, a settlement agreement between, amongst others. Randbond Finance (Pty) Ltd ("Randbond"). Applicant's company i.e. 2nd Defendant under case No. 8982/2004. (the Applicant having been a member and/or Director of Randbond). and the Plaintiffs therein. **Refer pages 54 - 60 of the paginated papers,** in terms whereof the intervening creditor as the spouse of the Applicant stands surety, and undertakes, amongst others, to deliver some property to the value of R210 000 to the Plaintiffs therein on behalf of the Applicant and/or Randbond. towards the dissolution of Applicant Randbond's debt.

The intervening creditor contends that he. as surety has performed in terms of the settlement agreement aforesaid, and that he is a creditor of the Applicant and consequently has a right of recourse against the Applicant in the sum of R210 000.00; further that the Applicant owes him other monies from a cost order he obtained against the Applicant in an interdict which he succeeded in setting aside in 2004. He contends that the Applicant has not given him (as a creditor) notice of the sequestration as required by the provisions of the Insolvency Act, 24 of 1936. as amended ("The Act"). Looking at the statement of debtor's affairs the name of the intervening creditor (A De Beer) does not appear on the list of the creditors given notice of the surrender; refer pages 14 and 23 of the paginated papers. Section 4 of the Act requires the Applicant to give notice to all creditors: this in my view would include the intervening creditor herein.

It appears from the settlement agreement aforesaid that the Applicant owes a balance of R990 000.00 to the Plaintiffs therein since the intervening creditor has settled the amount of R210 000. 00. the total amount owed was R1 200 000.00. The intervening creditor contends that the Applicant has brought this application to free herself from her obligations in terms of the settlement agreement aforesaid, and in the process to leave the intervening creditor (as surety) in the lurch so that he alone (as surety) can remain with the obligations in terms of the settlement agreement aforesaid.

The Applicant's application was published in the Government Gazette and the Beeld newspaper on 17 November 2006. **refer to pages 19 and 20 of the paginated papers,** three (3) weeks after the settlement agreement aforesaid was signed i.e. 25 10/06. The intervening Creditor contends that the Applicant only started making arrangements plans for the surrender of her estate shortly (3 weeks) after the settlement agreement had been entered into so as to shun her responsibilities thereto, leaving him in the lurch as surety, as already stated above and that thus, the Applicant is not playing open cards i.e. not being candid with the court.

The intervening creditor avers that the Applicant has hidden a lot of her assets, which she has not disclosed to the court, such as her jewellery and wedding ring to the value of approximately R200 000.00. to which the Applicant has replied and stated that the interv ening creditor has confiscated her jewellery aforesaid, which is disputed by the intervening creditor. I may mention that the Applicant never dealt with this issue of her jewelleiy in her FA and/or statement of affairs. On pages 10 and 12 (Annexure II of the statement of affairs) of the paginated papers the Applicant has stated that she has **no movable assets,** save for those mentioned in Annexure V of the statement of affairs, paginated page 15, as assets pledged/hypothecated or subject to right of retention. •The Applicant inserted "NIL" in the statement of affairs where provision is made for details of moveable assets, and she does not deal with this aspect at all in her FA.

Serious allegations have been raised by the intervening creditor, one of which is that the Applicant is owed money (R30 000.00) by one Conrad De Swardt. which is denied by The Applicant, who avers that she has written off the debt in question, refer par 4.3 p43-44 read with par 6.3 p82 of the paginated papers. Mr Conrad De Swardt however confirms that she does owe the Applicant the sum of R30 000.00. refer p96 of the papers. She has stated under oath in her FA and/or statement of affairs that she does not have Debtors.

The intervening creditor further deals in his affidavit with the issue of Applicant having hidden some of her monies by investing it in the names of her daughters A[...]-M[...] and R[...]-M[...]. The Applicant is silent on this issue, she does not deal with it at all save for a bare denial of the allegations in her Replying Affidavit ("RA”). Refer par 4.5 p44 read with par 6.3 p82 of the paginated papers. Also the intervening creditor avers that in an attempt to conceal her assets, the Applicant has bought motor vehicles for her sons of which she is the owner thereof, refer par.4.12 p47, this is obviously denied by the Applicant, save that she did buy the vehicles for her sons, refer par6.10 p84.

Another contentious issue on the Applicant's concealment of monies is that of money (-r_R192 000.00) having been paid to some Werda Fourie Attorneys shortly before publication of the Applicant' surrender and the money aforesaid being withdrawn in cash on 16 November 2006. a day before publication of the surrender in the Government Gazette and the Beeldt newspaper on 17 November 2006. refer par 4.9 p 46 of the paginated papers. The Applicant does not dispute this but contends that this money belonged to her mother. Mrs Bester and a Mr Scheepers. **refer par 6.7 p83** of the paginated papers. However, a cheque in the amount of R192 500.00 is paid out to one A M Erasmus, (not Bester and/or Scheepers) by Werda Fourie Attorneys: **refer Annexure “C” p69 of the paginated papers.** Neither Mrs Bester nor Mr Scheepers nor Fourie Attorneys filed any confirmatory affidavit confirming the Applicant's contention. There is no explanation by the Applicant who actually A M Erasmus aforesaid is.

In so far as the issue of a flat belonging to the Applicant having been registered in her mother's name (as part of her concealment of her assets, it is questionable how the Applicant can afford to finance/buy the property for her mother while she claims to be insolvent. She does not deal with when the flat was bought, how it is being financed, whether she is paying a bond for it or not. There is simply no clarity at all.

There are a lot other allegations of concealment of assets by the Applicant, refer **par.4.12, 4.13, 4.17 pgs 47-50** of the paginated papers. There is no explanation why and/or how the Mercedes Benz C270 with registration letters and number NDH 267 GP which is being used/driven by the Applicant is in the name of one Mr Wimpie Nel as alleged by the Applicant, refer **par 6.13.3 p85** of the paginated papers. Neither is there any documentary proof such as registration documents nor any confirmatory affidavit from Mr Wimpie Nel explaining this issue.

There are various other issues raised by the intervening creditor which have not. in my view, been answered to satisfactorily by the Applicant, refer **par.4 p42-51** read with **par.6 p81-86** of the paginated papers. I have not dealt with all of them but this does not mean that these are not important or that they have not been considered.

Of more importance also is the fact that in her founding affidavit, the applicant does not disclose that she earns an income, she only admits this in her RA after the intervening creditor has brought this to the attention of the court. She states in **par. 10 p8** of the paginated papers that "Ek het <u>seen</u> inkomste". She is clearly not being candid with the court. i.e. not playing open cards with the court in this regard. After the issue of her income is brought to light by the intervening creditor who avers that he offered her employment for remuneration of R30 000.00 pm. **Refer par.4.10 p46**.....she. only then in her RA for the first time states that she gets an income of R10 000.00 pm from her deceased husband's monthly pension, refer par.6.8 p83.

The Applicant further mentions, only in her RA. after the issue was raised by the intervening creditor that she has a boat which she has not declared in her statement of affairs, that she derived some income from the boat which she alleges she had sold to one Mr Nico Wessels. She states in **par.6.11 p84** that “...Mnr Wessels het gemelde boot aan my geleen om mense uit te neem vir bootritte en sodoende ¯n inkomste te genereer....’\ surrender of an estate involves, amongst others, a financial enquiry, it was incumbent upon the Applicant to disclose her income in her FA and not to wait until the issue is raised by an intervening creditor, who happens to be her husband and thus in a position to know a lot about the Applicant. This clearly shows that the Applicant is not bona fide and has not been candid with the court from the beginning.

It is trite that in sequestration applications, especially with voluntary surrenders there should be full disclosure of all material facts. From her response to the allegations by the intervening creditor the court is not satisfied that there has been full disclosure by the Applicant. It is essential that before the surrender of an estate can be accepted it must appear from the statement of debtor’s affairs that the debtor's liabilities exceed his/her assets, i.e. that the estate is in fact insolvent. A court cannot be a rubber stamp merely because an applicant has brought an application for the surrender of his/her estate. The court has to exercise its discretion judiciously, and in order to enable a court to do this the Applicant must be candid. See *Ex parte Hayes* 1970 (4) SA 94 (N) at 96A-C.

On the serious allegations by the intervening creditor, of concealment of assets by the Applicant taken together with the Applicant's response on the papers before court, it cannot, on a balance of probabilities, be said that the statement of affairs, **Annexure “A” to the FA** is a true reflection that the Applicant's liabilities exceed her assets. On this basis alone this court cannot accept the surrender of the Applicant's estate. However, on all the evidence before this court, it cannot be said that the Applicant played open courts and took the court into her confidence, and most importantly it cannot be said that her liabilities exceed her assets. In fact, on a balance of probabilities her assets are much more than her liabilities. I am persuaded that indeed the Applicant did not disclose all her assets, including her debtors.

Under the circumstances the court cannot accept the surrender of the Applicant's estate.

The application is accordingly dismissed with costs.

Molopa J

JUDGE OF THE HIGH COURT