IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 59461/2009

DATE: 5 MAY 2010

In the ex *parte* application of:

OPPERMAN JOHANNES MARTHINUS Applicant

(Identification Number 6[...])

For voluntary surrender of his estate

JUDGMENT

MAKGOKA, J

[1] This is an application by the applicant for the surrender of his estate in terms of section 4 of the Insolvency Act 24 of 1934. When the matter was mentioned on 19 March 2010, two creditors appeared through counsel, objecting to the relief sought by the applicant, on a simple basis that the applicant had failed to disclose certain material facts pertinent to the application. I stood the matter down and allowed counsel to file heads of argument on limited issues, which I would deal with in a moment.

[2] The two objecting parties are, on one hand, Mr and Mrs Van der Heyde ("the van Heydes"), and Firstrand Bank, on the other. The Van der Heyde's basis of objection is the failure by the applicant to disclose that they had, on 17 March 2010, obtained judgment against the applicant in an amount of R625 000.00. (The judgment was pending on the date on which the applicant's affidavit was signed).

[3]Firstrand Bank is a secured preferrent creditor in respect of a mortgage bond granted in its favour by the applicant. It opposes the application on the basis that should the judgment obtained by the Van der Heydes be taken into consideration in calculating the dividend, the benefit to creditors would be significantly be smaller. Secondly, the objection is that the applicant failed to display utmost good faith required in ex *parte* applications. I am grateful to counsel for their helpful written arguments in this regard.

[4] After hearing brief argument by all three counsel I stood the matter down and requested counsel to submit written argument, limited to the following questions: First, what effect does publication has on pending litigation and secondly, what effect does the judgment obtained by the Van Heydes have on the present application.

[5] With regard to the first question, it is clear from the unambiguous provisions of section 5(1) of the Act that what is halted, is the execution process, and not the litigation itself. As to what effect the judgment has on the present application, it is significant to note the following: although the judgment had not been granted as at the date of the signature of the founding affidavit in the present case, the applicant was well aware of the debt that later gave rise to the judgment. That the applicant failed to disclose the said debt as a contingent debt, must be viewed in very dim light.

[6] In addition, it emerged after this application was set down that one of the companies which the applicant stated his shareholding therein as one of his assets in his balance sheet, Redlex 315 (Pty) Ltd, had been in voluntary liquidation since 14 October 2009. This aspect too, was not disclosed in his application. It has been repeated that in ex *parte* applications, a full and frank disclosure of all facts is expected of applicants. See *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

[7] The failure of the applicant to disclose the very material facts as discussed above, erodes considerably, in my view, the *bona fides* of the applicant. I would therefore dismiss the application on this basis alone.

[8] There is another basis on which the application should be refused. That relates to the valuation of the immovable properties. In *Ex Parte SA Obunjala & Five Similar Applications* (Case No.: 53146/2009, Gauteng North, Pretoria, unreported), Bertelsman J comprehensively dealt with the aspect, and how valuations in these circumstances should be carried out. The valuation method used in this application is far short of the requirements set out in the said case.

[9] For this additional reason the application should be dismissed. The intervening creditors are entitled to their costs. Their intervention assisted in placing the true facts before court. The applicant must bear their costs.

[10] I therefore, make the following order:

1. The application for voluntary surrender is refused.

2. The applicant is ordered to pay the costs of both the first and second intervening parties.

T. M. MAKGOKA

JUDGE OF THE HIGH COURT

Date of hearing : 24 March 2010

Judgment Delivered : 5 May 2010

For the Applicant : Adv. A. J. Swanepoel

Instructed by : *M. Jordaan Attorneys,* Pretoria

For the Intervening Party: Adv. A. Van der Westhuizen

Instructed by : (Attorney's name not supplied)

For the Second Intervening Party: Adv. M. Basson

Instructed by : (Attorney's name not supplied)