

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

**Case no: 2015/2012
Date heard: 13.9.2012
Date delivered: 29.11.2012**

In the *ex parte* application of:

**JOHLI ELIZABETH CAVE VAN EEDEN
Identity number:**

Applicant

and

For the surrender of her estate:

ABSA BANK

First Intervening Creditor

ETIENNE DU TOIT

Second Intervening Creditor

JUDGMENT

TSHIKI J:

[1] In this matter applicant filed an application for the voluntary surrender of her estate on the grounds that due to circumstances beyond her control and without any fraud on her part she became insolvent and that she is still currently insolvent.

[2] The application has been opposed by two of her creditors Absa bank, as well as Mr Etienne du Toit both of whom have been granted leave to intervene.

[3] On the date of hearing of the application Mr Mullins appeared for the applicant, Mr Dyke represented Absa, the first intervening creditor, and Mr du Toit appeared in person. Initially Mr Gajjar was to appear for the Nedbank another

intervening creditor, however, before the matter was argued, he withdrew the intervention by his client.

[4] It is common cause between all the parties that applicant is unable to pay her debts. The only relevant issue before me is whether it would be in the interests of the applicant's creditors to grant the applicant's request.

[5] Voluntary surrender was designed to benefit the debtor's creditors and not to release the debtor from his or her liabilities (***Epstein vs Epstein*** 1987 (4) SA 606 (C)). It follows, therefore, that the debtor has to disclose to the Court all the information which is relevant to enable the Court to find that the voluntary surrender will be to the benefit of the creditors. It is imperative that this information must be disclosed in the debtor's founding affidavit and not in the replying affidavit in response to the answering affidavit of the intervening creditors.

[6] The Court can accept the surrender of the debtor's estate only if the debtor has succeeded in showing the following requirements to the satisfaction of the Court. Namely:

[6.1] That the prescribed formalities have been duly observed;

[6.2] That the applicant's estate is in fact insolvent.

[6.3] That the applicant owns realisable property of a sufficient value to defray all costs of sequestration which will be payable out of the residue of the estate (*Mars – The Law of Insolvency in South Africa 9th ed p 72*).

[7] The intervening creditors have attacked the manner in which the applicant has attempted to comply with the provisions of section 6(1) of the Insolvency Act 24 of 1936 (the Act). Applicant in her founding affidavit fails significantly in disclosing the specific amounts in figures as to how much of the properties she was involved with Mr du Toit is due to her either in value or otherwise and very little information about the value of the property she keeps or owns jointly with Mr du Toit is due to her. This information is important for the purpose of complying with the provisions of section 6(1) of the Act in order to comply with the requirements mentioned in para 6 above.

[8] Mr du Toit has disclosed, particularly in paragraph 3 of his affidavit, that some of the properties which applicant claims to be her property is jointly owned by them. These properties have not been specifically mentioned by applicant in her founding affidavit as she was obliged to do so.

[9] Applicant has also not disclosed in her founding papers that a judgment was granted against her in the sum of R561 498.94 and this information is important to be disclosed in the founding affidavit because it goes into the roots of the application for insolvency.

[10] The value of the properties she allegedly jointly owns with Mr du Toit is being challenged by the latter. This creates a state of uncertainty and inaccuracy as to the value of the property that belongs to her. It is also important to mention that in 2011 under case no 3062/2011 one Mathew Adams launched an application for the sequestration of the applicant herein in respect of which a provisional order of sequestration was granted. In my view, applicant should have disclosed this

information in her founding papers, irrespective of the reason for the withdrawal of the application. It is also relevant to, *inter alia*, her status at the time when she was provisionally sequestrated in respect of such proceedings.

[11] I agree with Mr Dyke for the first intervening creditor, that the following information should have been disclosed by the applicant in her founding papers:

[11.1] Significant debts and her financial affairs as well as her source of income inclusive of her monthly income.

[11.2] The judgment debt of R561 498.94 granted against her in her capacity as surety.

[11.3] The value and extent of her claims in respect of the second intervening creditor (Mr du Toit) in respect of the bonds repayments.

[11.4] She has not disclosed, in specifics as to *quantum*, her indebtedness to Mr du Toit. This should include her involvement in C Shell (Pty) Ltd of which she has admittedly a shareholder and director.

[12] It follows, therefore, that failure to disclose these significant facts which include properties and the estate of the applicant have a bearing on the applicant's *bona fides* which affect her genuineness in her application for voluntary surrender of her estate. In application proceedings the applicant stands and falls by his or her founding affidavit. An applicant cannot make his or her case in the replying affidavit. In this case her duty to disclose all the relevant facts relates to the founding papers. Had there been no intervening creditors, this Court would on the face of it, have been obliged to grant the final order of voluntary surrender of the applicant's estate herein and on the basis of the information in her founding affidavit. This would have

been so because the Court would not have had the slightest idea about the valuable and important information which was only disclosed after further affidavits by intervening creditors were filed in Court. The applicant's conduct herein cannot be condoned by accepting her replying affidavit as supporting her case. The fact that the applications for voluntary surrender are brought *ex parte* is reason enough for the applicant to disclose all material facts which might affect a Court in coming to a [just] decision. (***Ex parte Bouwer and Similar Applications*** 2009 (6) SA 382 GNP; see also ***Schlesinger v Schlesinger*** 1979 (4) SA 342 (W) at 349 (A)).

[13] As for the failure to disclose her salary amount goes to the root of the application for the financial enquiry which should be determined by the Court in insolvency applications. The disclosure of the current income of the applicant is significant in this regard. In ***Ex Parte Bouwer and Similar Applications*** *supra*, Makgoka AJ at 385 para 5 remarked as follows:

“The attitude of the applicants seems to be that, once the formal requirements have been complied with, the Court should grant the application if the applicant's liabilities appear to exceed their assets. I do not agree with this approach. The Court is not a rubber stamp. The Court still has a discretion which must be exercised judiciously. In order to enable the Court to do so, the applicant must be candid. See *Ex Parte Hayes* 1970 (4) SA 94 (NC) at 96 A-C.”

[14] For the above reasons I am not convinced that the applicant herein has complied with the substantive requirements contained in section 6(1) of the Insolvency Act. Nor has she complied with Rule 6 governing application proceedings. Applicant has not met those requirements in a full and frank manner and, therefore, has not made out a proper case for the surrender of her estate in her founding affidavit. Those facts which she ought to have disclosed in the

founding affidavit are fundamental to the application for surrender of her estate and her failure to disclose them, even if she has mentioned some in her replying affidavit, cannot be condoned.

[15] Therefore, the application is hereby dismissed with costs.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the applicant	:	Adv Mullins
Instructed by	:	Theo Kitshoff Attorneys PORT ELIZABETH

For the first intervening creditor	:	Adv Dyke
Instructed by	:	Mollenaar & Griffiths Attorneys PORT ELIZABETH

For the second intervening creditor	:	Mr du Toit In person
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