



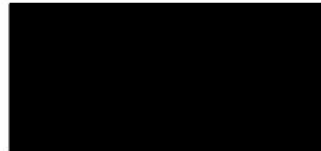
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

18 February
2022

DATE



SIGNATURE

CASE NUMBER: 46844/20

DATE: 18 February 2022

CHESTER STORMER BOAST

Applicant

V

NEDBANK LIMITED

First Intervening Party

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Second Intervening Party

JUDGMENT

KOOVERJIE AJ:

BACKGROUND

- [1] This is an application for voluntary surrender of the applicant's estate in terms of section 4 of the Insolvency Act 24 of 1936 ("the Act"). Such application has been opposed by Nedbank and Standard Bank, the first and second intervening parties respectively.
- [2] The issue for consideration is whether the applicant has satisfied the substantive requirements in terms of section 4 of the Act. The core contentions were that the dividend calculated and purportedly to the advantage of the creditors, remains unsubstantiated hence the application is not in the interest of creditors. Moreover, the sequestration application was aimed to delay the sale in execution of the immovable properties and thus constituted an abuse of the court process.
- [3] Initially the late filing of the applicant's answering affidavit was an issue. The applicant sought condonation in that regard. However at the hearing of the matter, the intervening parties did not oppose the condonation sought. I have considered the submissions proffered by the applicant and find that good cause has been shown. In light thereof condonation is granted for the late filing of the applicant's answering affidavit to the intervention application.
- [4] This matter was initially placed on the roll for hearing on 1 December 2020, whereafter the matter was postponed to 24 March 2021 making provision for the intervening parties, Nedbank Limited ("*Nedbank*") and the Standard Bank of South Africa Limited ("*Standard Bank*") to intervene.

- [5] On 24 March 2021 the matter was postponed once more to 15 July 2021 to permitting the applicant's creditors to file their intervention applications.
- [6] On 19 April 2021 Nedbank instituted an application for leave to intervene and opposed the applicant's surrender application. On 23 April 2021 Standard Bank instituted an application for leave to intervene in terms of which it also opposed the relief sought by the applicant.
- [7] On 2 June 2021 the applicant delivered his respective replying affidavits to Nedbank's and Standard Bank's applications for leave to intervene.
- [8] Both Nedbank and Standard Bank are secured creditors of the applicant and accordingly they have the necessary standing to oppose the relief sought by the applicant. Moreover as creditors, they could intervene at any stage of the proceedings.

THE APPLICANT'S CASE

- [9] The applicant submitted that it would be in the best interest of his creditors if his estate is sequestrated. He alleged that there are enough assets in his estate, after provision is made for the sequestration costs, to achieve the required dividend for the benefit of the respective creditors.
- [10] It would further be in the best interests of his creditors if a curator be appointed to manage his estate in order to acquire a fair and reasonable dividend between the

creditors. The acceptance of the surrender of his estate will prevent one creditor from being favored above the other.

[11] The applicant substantiates his case for sequestration on the following, namely:

- (i) He is married out of community of property with two minor children to care for. His wife, despite various attempts to seek employment, remains still unemployed;
- (ii) During 2016 after having sold his business he invested in the property market with the aim to generate income by renting the premises;
- (iii) However and even before Covid-19, his company struggled to make ends meet due to the lessees defaulting in their obligations. The applicant eventually managed to sell the building during 2020;
- (iv) He is currently not in a position to honour his monthly obligations towards his creditors as he does not have any income;
- (v) His two vehicles have already been repossessed and there was a massive shortfall on each of the vehicles after it was sold on auction.
- (vi) He has judgment against him for his non-payment of bond installments and an auction was scheduled for 15 October 2020.
- (vii) The applicant foresees that he will not be able to pay his debts in the future.

[12] The applicant contends that his total income at this stage is zero and his total debt amounts to R8,158,911.91 and that currently his family members are assisting him financially. With no income, he is unable to service his total debt, leaving him with a deficit of R115,241.08.

[13] There are two immovable properties in terms of which Standard Bank and Nedbank respectively are bondholders (i.e. secured creditors). The applicant relied on a valuator's valuation of the property submitting that such valuation is based on a market approach of comparable sales and took into account the forced sale values. He further contended that the valuator appointed by Nedbank undervalued the properties.

[14] He indicated that there is definite equity in the properties if he deducts the outstanding bond amounts from the value of such properties. There is benefit for the creditors should the estate be surrendered. The available dividend for distribution would be 21 cents in the Rand.

STANDARD BANK'S CASE

[15] Standard Bank is a judgment and execution creditor of the applicant in the aggregate sum of R5,934,342.66 (as per certificate of balance). A court order was granted by this court on 19 February 2020 in this regard.

[16] The court order relates to foreclosure proceedings instituted by Standard Bank against the applicant under case number 20789/2019 in relation to the Vlakfontein Property, over which Standard Bank holds a mortgage bond.

[17] As at 22 April 2021, the applicant was indebted to Standard Bank under the aforesaid court order in the aggregate sum of R5,934,342.66. Standard Bank is a substantial creditor of the applicant.

- [18] The applicant operated a home loan facility with Standard Bank under bank account number 21380097. On 16 July 2014, the parties concluded a home loan agreement in terms of which Standard Bank would loan and advance to the applicant the aggregate sum of 1.3 million (in addition to the 3.2 million already loaned to the applicant under the same home loan facility).
- [19] The combined loan was repayable by the applicant over a period of 240 months in initial monthly instalments of approximately R42,000.00 and was secured by three continuing covering instalments registered over the applicant's immovable property (Vlakfontein property).
- [20] In breach of the home loan agreement, and from approximately August 2017, the applicant failed to pay his monthly instalments, alternatively made sporadic payments. As at May 2019, the applicant was indebted to Standard bank in the aggregate amount of R4.9 million, with arrears of approximately R600,000.00.
- [21] As a result of the aforesaid breach Standard Bank instituted foreclosure proceedings against the applicant. The applicant opposed the foreclosure proceedings. However Standard Bank succeeded in the foreclosure application.
- [22] A writ of execution was subsequently issued on 5 March 2020 and served on 12 March 2020. The Vlakfontein property was subsequently attached on 19 March 2020. A first sale in execution of the Vlakfontein property was thereafter scheduled for 15 October

2020. The applicant was made aware of this sale in execution between 27 and 31 August 2020.

[23] It was submitted by Standard Bank that the purpose of the applicant's surrender application is merely to delay the sale in execution.

[24] In fact, the applicant instituted his surrender application as a last resort to avoid execution of the Vlakfontein property. The surrender application was instituted on the eve of the scheduled sale in execution. This step was to delay the eventual and inevitable execution of Standard Bank's judgment.

[25] Furthermore the surrender application contradicts the applicant's stance when he filed his answering affidavit in the foreclosure proceedings. Therein the applicant undertook to repay arrears after the 'commercial property' was sold. In this instance there is no benefit to creditors.

NEDBANK'S CASE

[26] During 2007 and at Boksburg, the Nedbank granted a loan to the applicant secured by a mortgage bond in the amount of R700 000.00 over the immovable property (together with an additional amount as security for the payment of the capital amount, interest, and costs). During 2010 and at Boksburg, Nedbank granted a further loan to the applicant secured by a mortgage bond in favour of Nedbank in the amount of R585 107.00 over the immovable property (together with an additional amount as security for the payment of the capital amount, interest, and costs).

- [27] The immovable property would therefore secure the applicant's indebtedness to the intervening creditor under the mortgage bonds, and the intervening creditor would be secured up to R1 285 107.00 plus the additional amount.
- [28] According to the applicant Nedbank is a secured creditor in the amount of R1,285,044.92 which was the full outstanding amount owing to Nedbank as at 2 October 2020.
- [29] In terms of the written contract between Nedbank and the applicant, the certificate of balance constitutes proof of the amount owing. As at 11 January 2021, the full outstanding balance owing, with regard to the immovable property, by the applicant to the intervening creditor, was R1 317 858.28 together with interest at a rate of 5.03% per annum, compounded daily and capitalised monthly.
- [30] The whole outstanding amount subsequently forms part of the Nedbank's secured claim against the applicants. As at 11 March 2021 the full outstanding balance owing escalated to R1 336 839.56.
- [31] Nedbank has an unchallenged real and substantial interest in the subject matter of the application.
- [32] In *Ex parte Ogunlaja & Others, [2011] JOL 27029 (GNP), at Para 9*, the court directed that a true advantage to creditors should be a minimum of 20 cents to the Rand. In this instance the advantage to creditors at 21c per Rand. It is noted that this calculation was effected on or about 2 October 2020 when the founding affidavit was commissioned.

- [33] It is Nedbank's case that the applicants have over valued their immovable property to arrive at the abovementioned dividend in the Rand.
- [34] It was further pointed out that the applicant failed to address the option of debt counselling in terms of the provisions of the National Credit Act, No. 34 of 2005. This mitigating step could very well be to the advantage of all creditors in the estate of the debtor.
- [35] The valuation presented by the applicant fell short of accurate and fundamental requirements. The immovable property was valued at R1,300,000.00 and no provision was made for a "market" value. No "comparable" sales were listed in such valuation.
- [36] It was further argued that the valuation reports lacked logical and substantial reasoning. It was pointed out that the formula applied was not identified and explained in detail, and no basis was provided for the formula used.
- [37] Furthermore, the valuation report lacked a proper analysis of the condition of the property. There appeared no explanation concerning the location of the property, the extent of demand for property in the area, the access the public might have to and from the property and no identification of any local agents with whom discussions were held regarding the probable price the properties would fetch upon auction.

- [38] In the *Ogunlaja* matter at para 14 the court emphasized that expert evidence must comply with strict requirements in order to be acceptable and stated further that:

“A valuator’s services are required in matters of this nature in order to provide independent expert advice to the court of a probable price that an immovable or movable asset forming part of an insolvent estate will realise when offered for sale during the liquidation process undertaken by the trustee who is appointed by the Master once the surrender is accepted.”

- [39] It was argued that there was no substantial proof that the liquidation of the assets of the applicant’s estate would render an advantage to creditors.

- [40] Nedbank obtained another valuation from WAMPACH. The valuator’s report indicated that the immovable property has a forced sale value of only R750 000.00, with an average market value of R1275 000.00. The municipal value is R1 700 000.00, and the valuer confirmed that the immovable property is a vacant land.

- [41] It was argued that should the court accept the forced sale values indicated by WAMPACH as the correct forced sale values of the immovable properties, and should the advantage for creditors be recalculated accordingly, then there would be no advantage for creditors.

- [42] More specifically Nedbank submitted that should the Nedbank’s valuation of the immovable property be accepted as the correct forced sale value of the immovable property, then and in such event there will be no dividend in the rand available for distribution amongst the concurrent creditors.

- [43] In such circumstances the amount available for distribution after deduction of costs of the sequestration would be depleted. There would not be enough assets in the estate to cover the costs of sequestration and there would be no assets available for distribution after the costs of sequestration is deducted.

ANALYSIS

- [44] It is trite that an applicant is required to comply with certain procedural and substantive requirements. The procedural requirements are set out in section 4 of the Insolvency Act, 24 of 1936 ("the Act") while the substantive requirements are found in section 6 of the Act.
- [45] For the purposes of judgment the procedural requirements have not been challenged. It is the substantive requirements that are in issue.
- [46] The substantive requirements that have to be satisfied are that the estate of the applicant is insolvent; the applicant owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of the Act be payable out of the residue of his estate; and will be to the advantage of the applicant's creditors if his estate is sequestrated.
- [47] The test to establish that it is to the advantage of creditors of the estate to be sequestrated is more stringent in cases of voluntary surrender than in sequestration applications.

[48] In terms of section 6 of the Act, the court must be satisfied that it will be to the advantage of creditors that the estate is sequestrated. By virtue of sections 10 and 12, a court may make an order sequestrating the estate of the debtor provisionally if it is *prima facie* of the opinion that there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated and in the case of final sequestration if the court is satisfied that there is reason to believe that it will be to the advantage of creditors on a balance of probabilities.

[49] There is an indisputable duty on every applicant to be transparent and honest to the court in every respect. Our courts have time and again pronounced on the importance of transparency and stated in *Ex parte Arntzen* 2013 (1) SA 49 (KZP):

“5. Courts have long required an applicant in voluntary surrender applications to make a full and frank disclosure. This arises at least in part from the stringent test referred to above. It is quite clear that without a full and frank disclosure, the court cannot be ‘satisfied’ as to the above two criteria in particular. The required high level of disclosure is also affected, in no small measure, by the fact that the application is ordinarily brought on an *ex parte* basis as is the present one. There is ample authority that applications brought on that basis require the utmost good faith. The principles were succinctly stated by Le Roux J in *Schlesinger v Schlesinger* in a rescission application as follows:

‘1. in *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a decision;

2. the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and

3. the court, apprised of the true facts, has a discretion to set aside the formal order or to preserve it.

...”

[50] Further in ***Ex Parte Cloete***, case no 1097/2013 [2013] ZAFSHC 45, 5 April 2013, the court emphasised that valuers are obliged to act conscientiously when furnishing their expert opinion of the value of assets that fall into an estate that is ought to be surrendered voluntarily. The court cited with approval authorities to that effect and made reference to:

[18] In ***Ex Parte Anthony en 'n Ander en 6 soortelyke aansoeke 2000 (4) SA 116*** (C) Blignaut J dealt with seven separate applications for voluntary surrender. In all seven cases each estate consisted of one mortgaged immovable property and a few movables. The court's main concern was the advantage to creditors and Blignaut J, writing for the full bench, found that notwithstanding valuations obtained by the applicants in each case, they failed to prove that the valuations would be achieved in the event of forced sales. The court relied on the judgment of Leveson J in ***Nel v Lubbe 1999 (3) SA 109*** (W) where the learned Judge was also confronted with a valuation which was nothing more but "a bold assertion of value".

[19] In ***Nel v Lubbe*** loc cit, Leveson J made it clear that a court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it, but that the court is not a rubber stamp for the acceptance of the expert's opinion. It is important that evidence must be placed before the court of the facts relied upon by the expert for his opinion as well as the reasons upon which it is based. The learned Judge went further:

"The court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped." (at 111G)."

[20] In ***Ex parte Ogunlaja and others*** ... the court endorsed the approach by Levenson J in ***Nel v Lubbe*** and went further to explain the applicable requirements regarding expert testimony in paras [15] and [16]. It is apposite to emphasise the following warnings in paras [35] to [39]:

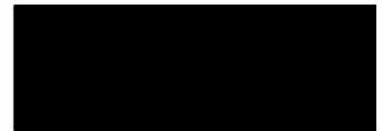
- [35] *It is necessary to add that the nature of the valuation report is such that, in the absence of a reliable method of calculation of the value of the immovable properties, the court is left with the uncomfortable impression that the valuator and the applicants, or the applicants' legal representatives, are too close to one another to allow the preparation of an independent expert's report. The thought is difficult to dismiss in these applications, and in many others the court has seen over the past two to three years, that the valuator is fully aware of the value that needs to be certified for assets in every individual insolvent estate to ensure that the papers reflect the conclusion that an advantage to creditors is assured if the surrender is accepted ...*
- [37] *If the suggestion is allowed to take hold that certain valuers manipulate the true value of assets upward to persuade the court to accept applications such as the matters under consideration, the result must be a deep suspicion on the part of the court of any valuation report prepared by the valuers concerned.*
- [38] *To prevent such an uncomfortable situation from arising, valuers should certify under oath that they prepared every valuation without any knowledge of the facts of the relevant application. In addition, proof of physical inspections of immovable properties ought to be provided by way of photographs and a detailed description of the physical condition in which each property was found, as well as the effect that the physical appearance of the property has upon the valuation thereof.*
- [39] *The applicants themselves and the attorney acting for them should likewise confirm that the valuator was not made privy to the value that the assets in the estate must realise in order to constitute an advantage to creditors."*

- [51] Having considered the papers and the argument before me, I am not satisfied that there would be sufficient value to defray all costs of sequestration and that there would be an advantage to the applicant's creditors if his estate is sequestrated.
- [52] In my view, the applicant has failed to proffer evidence challenging the intervening parties' contentions. It is noted that the applicant argued that Nedbank undervalued the properties. He does so without any substantiation. He specifically fails to address why reliance should be placed on his valuator's report.
- [53] In reply he merely submits that there is an advantage to creditors and it would be in the best interest of his estate to be surrendered. In my view, the valuation report relied upon by the applicant, does not meet the jurisdictional requirements as explained above. The report specifically falls short of demonstrating an acceptable measure of expertise, and consequently that no proof was provided that liquidation of the assets of the applicant's estate would render an advantage to creditors.
- [54] The formula applied or followed in the process of investigation, inspection and assessment was not identified and explained in detail and no reason was provided for the choice of the formula under the given circumstances.
- [55] As pointed out by Nedbank, the valuation report should have addressed the issues relating to the condition of the property, the location of the property, the demand for property in the area, the access the public might have to and from the property and further it does not identify any local agents with whom discussions were held regarding the probable price the properties would fetch upon auction.

[56] Moreover it cannot be ignored that the application was instituted on the eve before the sale in execution was to take place. The applicant was well aware of this fact. It was an opportunistic move on the applicant's part to deter the sale in execution.

[57] Consequently, the following order is made:

- 1. The application is dismissed;**
- 2. The applicant is ordered to pay the costs of the first and second intervening parties on a scale as between party and party.**



H KOOVERJIE

Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances:

Counsel for the applicant:

Adv I Kruger

Instructed by:

Erasmus Attorneys

Counsel for the first intervening party:

Adv B Lee

Instructed by:

Van Hulsteyns Attorneys

Counsel for the second intervening party:

Adv L. VR van Tonder

Instructed by:

Jason Michael Smith Incorporated Attorneys

Date heard:

20 October 2021

Date of Judgment:

18 February 2022