IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 3/3/2009

REPORTABLE

IN THE *EX PARTE* APPLICATIONS OF:

NAME	CASE NUMBER
L BOUWER	56240/08
B G KHANYILE	56241/08
M J SPEELMAN	56249/08
W VERHAGEN	56264/08
A J B MARKS	56392/08
W TROLLIP	56468/08
P PUCCI	56469/08
J J SEKGAPHU	56474/08
K L PATHER	56476/08
L A PATHER	56477/08
B SMITH	56478/08
B K SMITH	56479/08
R HARTZENBERG	56462/08

J DU PLESSIS	56482/08
H F C DU PLESSIS	56483/08
N JOUBERT	56484/08
D DU PLOOY	56485/08
S D SEROKE	56486/08
S S B SEROKE	56487/08
C A NHLAPO	56652/08
H GROBELAAR	56718/08
H CROUS	56860/08
L MAY	57028/08
P L TALJAARD	57332/08
W T PRICE	57333/08

JUDGMENT

MAKGOKA, AJ

[1] "*The administration of insolvent estates has over the years developed into a very lucrative and therefore very competitive profession. The pressure has therefore increased to identify debtors whose sequestration or liquidation may render a lucrative return to lawyers, trustees, liquidators, valuators and auctioneers. Advertisements in the media canvassing debtors who are desirous of*

ridding themselves of their financial burdens have become commonplace. This has increased the risks for debtors and creditors alike. Debtors who might be able to meet their obligations if they were given the opportunity to properly arrange their affairs, are pressurised into opting for insolvency proceedings instead, often if not always losing their homes and motor vehicles as a result thereof, suffering the consequences of a bad credit record for many years thereafter.

0n the other hand, insolvency practitioners are tempted to present a rosy picture of the debtor's affairs that bears little semblance to reality, resulting in an estate being declared insolvent that renders little or no dividend for creditors once the fees of the various participants in voluntary surrender proceedings have been deducted and the administration costs have been paid.

Such abuses of the process have led the courts to insist ever more stringently on exact information regarding the debtor's affairs being placed before them and to demand a realistic calculation of the potential dividend." Bertelsmann *et al*: Mars: *Law of Insolvency in South Africa*, 9th ed, p63.

[2] The above encapsulates the essence of this judgment. There are different applications for voluntary surrender of the applicants' estates in terms of the Insolvency Act, 24 of 1936 ("the Act"). The applications all came before me in the unopposed motion court. I had certain reservations about one or the other aspect in each of them. However, common to all the concerns I had, were the following: the reasons for insolvency were inadequate and tersely stated; the applicants all alleged they owned no moveable assets; no particulars of income and expenditure were furnished; inadequate evidence in valuation reports.

[3] The requirements which must be observed before the court may accept the surrender of the debtor's estate, are procedural and substantive. The procedural requirements are set out in section 4 of the Act, which makes provision for publication of notice of surrender in a newspaper circulating in the district in which the debtor resides, as well as in the *Government Gazette*. Furthermore, the section requires the applicant to give notice to creditors, trade unions and employees, if applicable. Lastly the applicant is required to lodge a statement of his/her affairs at the office of the Master and/or the magistrate, as the case may be. This statement of affairs must indicate, among others, the debtor's property, both moveable and immovable, as well as a detailed statement of cause of the debtor's insolvency.

[4] The substantive requirements are set out in section 6(1) of the Act. I will revert to this aspect later in the judgment.

[5] A trend has developed in this Division, in terms of which applicants for surrender of estates provide the court with the barest of detail in their applications. 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 (N) at 96A-C.

[6] The fact that these applications are brought *ex parte*, is reason enough for the applicants to disclose all material facts which might affect a court in coming to a decision. See *Schlesinger v Schlesinger* 1979 4 SA 342 (W) at 349A.

[7] With regard to non-disclosure of income, it suffices to state the obvious. Surrender of an estate involves, among others, a financial enquiry. In my view, for the court to determine whether the acceptance of surrender of an

estate would be to the advantage of creditors, regard should be had to various factors, among which the current income of the applicant. In *Fesi and Another v Absa Bank Ltd* 2000 1 SA 499 (C), the following was stated at 502H-I:

> "*The applicants did not disclose their present salaries … (M)r Botha argued that salaries were not assets and that there was no duty on applicants to disclose them. There can be no merit in Mr Botha's argument. It disregards the 'good faith' expected of applicants in ex parte applications …*"

[8] At 504J and 505A LUSU, J continued:

> "*I do not accept that a dividend of R0.13 in the rand is to the advantage of creditors in circumstances where I am not told what the applicants earn and how it is consumed in paying for their other responsibilities. In Ex parte Van den Berg 1950 1 SA 816 (W) at 818 RAMSBOTTOM, J went as far as to suggest that the benefit to creditors could even arise from the earnings themselves …*"

[9] As indicated above, no moveable assets or income (where applicable) were furnished by any of the applicants. In each application, the applicants

inserted "nil" or zero in the statement of affairs where provision is made for details of moveable assets. Apart from that, the reasons for insolvency have been stated in very sketchy and bald terms, providing the barest of detail. Examples thereof are: "due to the current economic climate, I am insolvent"; "my income has been halved"; "ek het 'n besigheid wat nie gewerk het nie". In my view such statements can hardly be regarded as detailed.

[10] With regard to moveables, I am not persuaded that all the applicants do not own some realizable household effects and furniture. Granted, there might be instances where moveable property had been attached in execution. Under those circumstances one would expect the applicants to set out such particulars in their affidavits. In the absence of such explanation, the court is left to speculate.

[11] At this point, I am satisfied that each of the applicants in these applications, has failed to disclose:

(i) the detailed reasons for their insolvency;

(ii) their moveable assets; and

(iii) their income and expenditure.

0n this basis, I would dismiss the applications.

[12] Contemplative that I might be wrong in the conclusion I have arrived at, I turn now to consider the substantive requirements. These requirements are set out in section 6(1) of the Act as follows:

> "*If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of the creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and may make an order sequestrating that estate.*"

[13] It becomes apparent then that the key consideration is the advantage to creditors. The concept "advantage to creditors" in this context means that there is a reasonable prospect that sequestration will result in some pecuniary benefit to the creditors. See *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D) at 591G and *Epstein v Epstein* 1987 4 SA 606 (C) at 609D-E, as well as *Ex parte Kelly* 2008 4 SA 615 (T) at 617B-C.

[14] In instances where the applicant owns property, as is the case in the present applications, the applicant has to establish a forced sale value of such property.

[15] The applications of Trollip, Sekgaphu, Pucci, Pather K L, Pather L H, Smith B, Smith B K, Du Plessis J, Du Plessis H F C, Joubert, Du Plooy, Marks, Hartzenberg, Seroke S D, Seroke S S B and Grobelaar and another.

Each of the present applications is accompanied by a valuation certificate prepared by an estate agent, Ms Lorindi van Dyk. All the valuation certificates, save for the erf numbers and owners, are for all intents and purposes, identical. They are all confirmed by an affidavit, wherein Ms Van Dyk describes herself as "an expert in the field of valuing moveable as well as immovable assets".

[16] She further states that she attends auctions on a weekly basis and has thorough knowledge of market trends. She specifically works with insolvency auctions and she attends same on a weekly basis for the last three years.

[17] As regards the specific properties in the respective applications, Ms Van Dyk mentions the following:

"*This particular property, being (description of the property) is being valued at RXXX which is consistent with a FORCED SALE VALUE in this particular area. When arriving at the above amount, I have also taken into consideration the higher interest rate of 14.5% as increased recently by all commercial banks.*

The building is sturdy with no visible cracks or leaks. The inside floor and wall covering is neat. Security in the house is above average which adds to the valuation. The garden is neat and well-kept. The property is situated near amenities such as shops and churches."

[18] The valuation statement is standard for all applications. As is apparent from the quoted portion, Ms Van Dyk does not lay a basis for the amounts ascribed for valuation on each property, nor does she state how she arrives at such an amount. No mention is made of prices paid for comparable prices in the same areas at forced sales during or about the same period. In my view the valuation certificates in these applications are bald assertion of values. The fact that they are almost *verbatim* the same, creates doubt whether the properties were indeed inspected individually. A proper approach to valuations was stated in *Nell v Lubbe* 1999 3 SA 109 (W) by LEVESON, J at 112A-B as follows:

"*(T)he proper approach is for the expert to furnish in evidence the detailed facts upon which the opinion is based and the reasons for forming the opinion expressed.*

It is not for me to lay down every facet of the evidence which must necessarily be adduced. Always relevant will be the prices for comparable properties in the same area at similar forced sales held at or about the same time.

Also material is the fact that the valuator has attended such sales and has personal knowledge of the prices fetched. If not able to do that, he should at least be in a position to depose to the fact that he has made an inspection of relevant title deeds in the Deeds 0ffice and has recorded therefrom the prices fetched for similar properties under similar circumstances. Naturally, appropriate descriptions of the improvements will have to be furnished so that the value can be assessed on a comparable basis. All that material should be recorded in an affidavit …"

[19] In my view, the valuation certificates in the present applications fail to meet the minimum requirements set out above. As a result, the dividends which the applicants allege would accrue to the creditors, are as unreliable as the

valuations upon which they are based. The court is therefor unable to determine whether there would be advantage to creditors. In my view therefore the applications should be refused.

[20] The applications of L Bouwer, B G Khanyile, M J Speelman, W Verhagen and C A Nhlapo

In these applications, the valuation certificates were prepared by Ms Melanie Botha. The valuation reports are identical save for property description and ownership. In the application of Bouwer, for example, Ms Botha states the following:

> "
>
> *3.*
>
> *Ek bevestig dat die inhoud van my waardasie korrek is en wil die volgende eerbiediglik aan die Agbare Hof voorhou:*
>
> *4.*
>
> *Ek het reeds verskeie veilings van eiendomme in die omgewing van Claremont (Pta) bygewoon. Die prys behaal vir die gemelde eiendom val derhalwe binne my persoonlike kennis en wete.*

5.

Ek het opdrag ontvang van David Traub Prokureurs om die eiendom geleë te gedeelte 5 van Erf 128, Claremont (Pta), Registrasie Afdeling: JR, City of Tshwane Metropolitaanse Munisipaliteit, Gauteng, beter bekend as Marketstraat 1054, Claremont te evalueer en waardeer welke bedrag op 'n geforseerde grondslag moet geskied.

6.

Ter verduideliking van my waardasie in die onderhewige saak wens ek eerbiediglik die volgende aan die Agbare Hof voor te hou:

<u>METODE VAN WAARDASIE:</u>

6.1 Die waardasie is uitgevoer op 13/11/2008.

Die opemarkwaarde van die onderhawige eiendom beloop R990 000,00. 0p 'n veiling sal die eiendom minder behaal as wat die werklike opemarkwaarde is.

Ek het die onderhawige eiendom dus op 'n baie konserwatiewe basis waardeer vir 'n bedrag van R900 000,00

(geforseerde waarde) hoewel ek van mening is dat 'n hoër prys behaal kan word.

6.2 *<u>GC 69 Metode:</u>*

Ter wille van volledigheid word voorgenoemde waarde ook getoets deur van 'n GC 69 metode gebruik te maak. Dit is ook bekend as die Stapelmetode waar 'n individuele waarde aan elke afsonderlike item geheg word, byvoorbeeld, Woonhuis, Swembad, Heinings en grondwaarde afsonderlik. Sowat 99% van alle residensiële waardasies vir verband doeleindes vir finansiële instellings word ook op hierdie basis gedoen.

6.3 *<u>Versekeringswaarde:</u>*

'n Versekeringswaarde word ook in die verslag getoon om die vervangingswaarde op datum van waardasie aan te toon. Die versekeringswaarde vermeld in die verslag, is op dieselfde basis gedoen as wat finansiële instellings vir versekerings doeleindes verlang.

Geforseerde waarde:

Ek bevestig hiermee dat die waardasiebedrag soos weergegee in waardasie 12378 'n geforseerde mark waarde het. Ek baseer my opinie van die waardasiebedrag op bogenoemde eiendom op my sowel as my mentor se ondervinding en kwalifikasies soos bo uiteengesit."

[21] Attached to the affidavit of Ms Botha, is the confirmatory affidavit of Ms Botha's mentor, Mr Paul Johann de Villiers, as well as a document titled "Win Xfer – Deeds 0ffice Transfers", showing transfer details of various properties in Claremont, Pretoria, between 30 September to 24 0ctober 2008. No reference is made in the affidavit of Ms Botha as to the relevance of these transfers to the present application. It is not clear whether the document has been attached to prove transfer of the properties under similar situations. As a result, I am unable to attach any evidential value to the said document.

[22] The above method of valuation was, with respect, correctly criticised in *Ex parte Mattysen Et Uxor* 2003 2 SA 308 (T). Incidentally, in the said matter, the same valuation entity, CVM Valuations, was involved. Commenting on the similar method of valuation, SOUTHWOOD, J stated

the following at 314D-F in respect of almost identical valuation report prepared then by Ms Combrink:

> "*She does not give any reasons why the applicants' fixed property would fetch more than R85 000,00. That is simply a bald statement. Her reference to the GC 69 method of valuation and insurance value is irrelevant. Ultimately, her valuation of R85 000,00 is a bald statement which is not supported by any facts or reasons. Standing on its own it proves nothing …*" I need not say more on this aspect.

[23] Applications of May and Price

In both these applications, as in the previous ones, no mention was made of moveable assets, no details of income were disclosed, and the reasons for insolvency were skimpy. Subsequent to the hearing, I received a supplementary affidavit in May's application, wherein the applicant stated that he did not own any moveable assets. All the property he uses, belonged to a Trust, of which he is a founder and a trustee, together with his wife, presumably.

[24] That did not change my view about full disclosure. It could well be that all his moveable property was donated to the Trust. He does not say so. As a

result, the filing of the supplementary affidavit does not take the matter further.

[25] In the application of Price, the applicant is a joint owner of 50% of seven immovable properties, the other half belonging to his wife, to whom he is married out of community of property. Half of the mortgage bonds for his half-share totals R2 379 548,48. He also owns two luxury vehicles, which he values at R520 000,00. He alleges that he does not own any moveable assets. I simply find it hard to accept that under the circumstances, the applicant does not own any moveable assets.

[26] In both these applications, the valuation certificates were prepared by Mr Gregory Cahi, a sworn appraiser. His certificates reflect the title deed particulars of the properties, improvements, "general information" and method of valuation. Under method of valuation, Mr Cahi states the following:

> "*The method of valuation used is the comparable method whereby recently sold properties in the area are compared.*"

[27] In respect of May's property he concludes as follows:

"*Before coming to my final appraisal and after careful investigation and discussion with the local property consultants and comparing apples with apples and the current prices, in my humble opinion I feel that R1 300 000,00 (ONE MILLION THREE THOUSAND RAND) represents the true and current force (sic) sale value for the abovementioned property.*"

[28] The affidavit purporting to confirm his valuation certificate, is not signed and commissioned by a Commissioner of 0aths.

[29] In respect of Price's seven immovable properties he concludes:

"*After careful research and consideration, to the best of my skill and knowledge and the current economic climate, it is my humble opinion that RXXX represents the true and current forced sale value.*"

[30] Clearly, Cahi's opinion is not based on any facts from which his conclusions can be made. His evidence is far worse, and falls short of the guidelines laid down in *Nell v Lubbe* and *Ex parte Mattysen, supra*. As a result, I would refuse surrender of these estates.

[31] Application of Taljaard

The applicant in this matter states the reasons for his insolvency as follows:

"*7.1 Ek was 'n bouer en het gebou.*

7.2 Weens die ekonomiese omstandighede bou ek nie meer nie en het ek nie meer 'n inkomste nie.

7.3 Ek kan nie meer my laste betaal nie."

[32] However, in paragraph 1 of his affidavit, he describes himself as follows:

"*Ek is tans werksaam as 'n besigheidsman vir my eie rekening …*"

[33] He further alleges that he has no property, either immovable or moveable. His liabilities are R100 000,00 owed to First National Bank and ABSA Bank in amounts of R34 000,00 and R66 000,00, respectively. He paid an amount of R21 000,00 into his attorney's account, for purposes of this application. He states that this amount was lent to him by a friend. That amount has not been factored in as a debt in his estate. He calculates dividend to the creditors in the amount of R0,11 after deduction of all costs.

If the amount of R21 000,00 were to be added as a debt, there would certainly be nothing left for his creditors.

[34] In my view the applicant in this matter has not been candid with the court and his sequestration would not yield any advantage to his creditors. I would thus similarly refuse the application for those reasons.

[35] Regard being had to all the factors in these applications, I am of the view that the surrender of the applicants' estates be refused. Because of the importance and implications of this judgment for insolvency practitioners and other role players mentioned in paragraph 1 hereof, I have given this judgment careful and considered attention.

[36] I therefore make the following order:

36.1 The following applications are refused:

1.	*Ex Parte* L BOUWER	case no 56240/08
2.	*Ex Parte* B G KHANYILE	case no 56241/08
3.	*Ex Parte* M J SPEELMAN	case no 56249/08
4.	*Ex Parte* W VERHAGEN	case no 56264/08
5.	*Ex Parte* A J B MARKS	case no 56392/08
6.	*Ex Parte* W TROLLIP	case no 56468/08
7.	*Ex Parte* P PUCCI	case no 56469/08

8.	*Ex Parte* J J SEKGAPHU	case no 56474/08
9.	*Ex Parte* K L PATHER	case no 56476/08
10.	*Ex Parte* L A PATHER	case no 56477/08
11.	*Ex Parte* B SMITH	case no 56478/08
12.	*Ex Parte* B K SMITH	case no 56479/08
13.	*Ex Parte* R HARTZENBERG	case no 56462/08
14.	*Ex Parte* J DU PLESSIS	case no 56482/08
15.	*Ex Parte* H F C DU PLESSIS	case no 56483/08
16.	*Ex Parte* N JOUBERT	case no 56484/08
17.	*Ex Parte* D DU PLOOY	case no 56485/08
18.	*Ex Parte* S D SEROKE	case no 56486/08
19.	*Ex Parte* S S B SEROKE	case no 56487/08
20.	*Ex Parte* C A NHLAPO	case no 56652/08
21.	*Ex Parte* H GROBELAAR	case no 56718/08
22.	*Ex Parte* H CROUS	case no 56860/08
23.	*Ex Parte* L MAY	case no 57028/08
24.	*Ex Parte* P L TALJAARD	case no 57332/08
25.	*Ex Parte* W T PRICE	case no 57333/08

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT

REPORTABLE:

EX PARTE APPLICATIONS:

1. L BOUWER CASE 56240/08 HEARD ON 12/12/2008
   ADV: J P F DE KLERK
   ATT: DAVID TRAUB ATTORNEYS, PRETORIA

2. B G KHANYILE CASE 56241/08 HEARD ON: 12/12/2008
   ADV: J P F DE KLERK
   ATT: DAVID TRAUB ATTORNEYS, PRETORIA

3. M J SPEELMAN CASE 56249/08 HEARD ON: 12/12/2008
   ADV: J P F DE KLERK
   ATT: DAVID TRAUB ATTORNEYS, PRETORIA

4. W VERHAGEN CASE 56264/08 HEARD ON: 12/12/2008
   ADV J P F DE KLERK
   ATT: DAVID TRAUB ATTORNEYS, PRETORIA

5. A J B MARKS CASE 56392/08 HEARD ON: 10/12/2008
   ADV R RAUBENHEIMER
   ATT: FRANCOIS UYS & ASS, PRETORIA

6. W TROLLIP CASE 56468/08 HEARD ON: 12/12/2008
   ADV R RAUBENHEIMER
   ATT: FRANCOIS UYS & ASS, PRETORIA

7. P PUCCI CASE 56469/08 HEARD ON: 10/12/2008
   ADV R RAUBENHEIMER
   ATT: FRANCOIS UYS & ASS, PRETORIA

8. J J SEKGAPHU CASE 56474/08 HEARD ON: 12/12/2008
   ADV R RAUBENHEIMER
   ATT: FRANCOIS UYS & ASS, PRETORIA

9. K L PATHER CASE 56476/08 HEARD ON: 12/12/2008
   ADV R RAUBENHEIMER
   ATT: FRANCOIS UYS & ASS, PRETORIA

10. L A PATHER CASE 56477/08 HEARD ON: 12/12/2008
    ADV R RAUBENHEIMER
    ATT: FRANCOIS UYS & ASS, PRETORIA

11. B SMITH CASE 56478/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

12. B K SMITH CASE 56479/08 HEARD ON: 12/12/08
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

13. R HARTZENBERG CASE 56462/08 HEARD ON: 10/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

14. J DU PLESSIS CASE 56482/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

15. H F C DU PLESSIS CASE 56483/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

16. N JOUBERT CASE 56484/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

17. D DU PLOOY CASE 56485/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

18. S D SEROKE CASE 56486/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

19. S S B SEROKE CASE 56487/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

20. C A NHLAPO CASE 56652/08 HEARD ON: 12/12/2008
ADV J P F DE KLERK
ATT: DAVID TRAUB ATTORNEYS, PRETORIA

21. H GROBELAAR CASE 56718/08 HEARD ON: 12/12/2008
ADV R RAUBENHEIMER
ATT: FRANCOIS UYS & ASS, PRETORIA

22. H CROUS CASE 56860/08 HEARD ON: 12/12/2008
ADV P GILLISEN
ATT: P J KLEYNHANS, PRETORIA

23. L MAY CASE 57028/08 HEARD ON: 10/12/2008
ADV I S FERREIRA
ATT: VAN GREUNEN & ACKHURST INC
C/O DU PLESSIS & MUNDT ATTORNEYS, PRETORIA

24. P L TALJAARD CASE 57332/08 HEARD ON: 12/12/2008
ADV R BRUINS
ATT: PIERRE KRYNOUW ATTORNEYS, PRETORIA

25. W T PRICE CASE 57333/08 HEARD ON: 12/12/2008
ADV G JACOBS
ATT: DE JAGER ATTORNEYS, PRETORIA