IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2011-11-08

Case Number: 24086/10

REPORTABLE

In the matter between:

NICOLAAS JACOBUS SMIT Applicant

and

ABSA BANK LIMITED Intervening Creditor/Respondent

And in the matter between:

Case Number: 24088/10

ESRE SMIT Applicant

and

ABSA BANK LIMITED Intervening Creditor/Respondent

JUDGMENT

SOUTHWOOD J

[1] On 5 July 2010, the applicants, Nicolaas Jacobus Smit and Esre Smit, who are married to each other out of community of property and reside at 120 Lilian Ngoyi Street, Middelburg, Mpumalanga, each lodged with the registrar of this court an application for voluntary surrender in terms of section 3 of the Insolvency Act 24 of 1936 ('the Act'). Each applicant gave notice in the notice of motion that application would be made on 8 July 2010 for the acceptance of the surrender of the applicant's estate.

[2] For reasons which are not apparent from the records, the applications were postponed on 8 July 2010 (to 15 September 2010), on 15 September 2010 (to 26 November 2010), on 26 November 2010 (to 1 March 2011) and on 1 March 2011 (to 3 May 2011). On 28 April 2011 the Intervening Creditor, Absa Bank Limited, delivered to the applicants' attorney a notice of motion in each matter in which the Intervening Creditor gave notice that on 3 May 2011 it would apply to intervene in the application and that it would seek leave to file an answering affidavit. On 3 May 2011, without making an order that the Intervening Creditor was permitted to intervene or file an answering affidavit, the court postponed each application *sine die*. On 8 July 2011 the Intervening Creditor filed an opposing affidavit in each application. The applicants have not filed replying affidavits and despite having received notice of set down for the hearing of the applications in the opposed motion court on 7 November 2011 neither applicant has filed heads of argument. Neither applicant is represented at the hearing.

[3] In order to succeed in the application each applicant is required in terms of section 6 of the Act to satisfy the court *inter alia* that he/she owns realisable property of a sufficient value to defray all the costs of sequestration payable out of the free residue of the estate and that it will be to the advantage of his/her creditors if his/her estate is sequestrated. It is well-established that for sequestration of an estate to be to the advantage of creditors the applicant for surrender must show that a not negligible dividend will be paid to creditors – see ***Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke*** **2000 (4) SA 116 (C)** para 11; ***Ex parte Matthysen et Uxor (First Rand Bank Ltd intervening)*** **2003 (2) SA 308 (T)** at 316B-C; ***Ex parte Kelly*** **2008 (4) SA 615 (T)** para 3; **Mars** ***The Law of Insolvency in South Africa*** **9 ed Bertelsmann** ***et al*** paras 3.26 and 3.30. In this court it has been laid down that advantage to creditors requires that a dividend of at least 20 cents in the rand will be paid – see unreported judgment by Bertelsmann J in ***Samuel Adeleke Ogunlaja*** GNP Case Number 53146/09 19 January 2010 para 9.

[4] Surprisingly (in view of the case law and the passages in **Mars**) neither applicant alleged that the sequestration of his/her estate would result in a dividend of at least 20 cents in the rand. According to Nicolaas Johannes Smit's application (Case Number 24086/2010) his estate would pay a dividend of 16,33 cents in the rand and according to Esre Smit's application (Case Number 24088/2010) her estate would pay a

dividend of 10,84 cents in the rand. To arrive at these figures the applicants relied on a forced sale valuation of their only asset, the property where they reside, of R900 000 and a mortgage bond balance of R744 864. In support of the alleged forced sale value each applicant attached to his/her application a valuation by Altus Viljoen of Dominium.

[5] In seeking leave to intervene to oppose the applications and in its opposing affidavits the Intervening Creditor has pointed out that according to its own internal valuation the market value of the property was only about R850 000 and that the outstanding balance on the mortgage bond over the property was R873 540,22 and that if these values were applied to the applicants' own calculations there would be no dividend paid at all. It is clear that even if the applicants' valuation is accepted at face value there will be no free residue and therefore no dividend.

[6] The applicants' valuation is completely defective and does not establish the value contended for. The valuation does not comply with the requirements laid down in the case law – see e.g. ***Nell v Lubbe* 1999 (3) SA 109 (W)** at 111D-G; ***Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke supra*** at 124F-I; ***Ex parte Matthysen et Uxor (First Rand Bank Ltd intervening) supra*** at 311I-312G; ***Ex parte Samuel Adeleke Ogenlaja & Others supra*** paras 13-16 and 24-26. In particular it purports to make use of a comparable sales

method to determine the market value of the property but does not identify any sales and show why they are comparable. It also does not explain how the forced sale value is arrived at on the basis of any facts and circumstances set out in the valuation. It is also astonishing that the applicants' statements of affairs put a value of R800 000 on the property and the difference between this value and the value determined by Dominium is not explained. It is also difficult to believe that the applicants' own no other assets. The overall impression is that the applicants have not taken the court into their confidence. Finally, no attempt has been made to explain how the costs of five postponements have been taken into account in calculating the dividend.

[7] It is clear from the applications to intervene and the opposing affidavits that for the reasons set out therein the applications are fatally defective. This was brought to the applicants' attorney's attention on 28 April 2011. Notwithstanding this clear intimation the applicants did not withdraw the applications and tender the costs. They forced the Intervening Creditor to prepare for the application and come to court to ensure that the application was dismissed. In my view the applicants' persistence with the applications was vexatious and the court should mark its disapproval with appropriate costs orders – see ***In re Alluvial Creek Limited*** **1929 CPD 532** at 535; ***Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another*** **1997 (1)**

SA 157 (A) at 177D-F. However, the Intervening Creditor did not seek an order on the scale as between attorney and client.

[8] It is also clear that the applicants' attorney has not attempted to comply with the many judgments of this and other courts and established practice regarding what must be proved in applications for voluntary surrender. There is no reason why the applicants should be required to pay the attorney's costs and expenses and an order depriving the attorney of his costs and expenses will be made.

[9] The following order is made in each application:

I The intervening creditor is granted leave to intervene and file an opposing affidavit;

II The application is dismissed with costs;

III It is ordered that the applicant's attorney, Johan Nel Attorneys of 19 Beyers Naude Street, Middelburg, Mpumalanga, is not entitled to charge any fee or recover any expenses from the applicant for preparing the application and presenting it to court.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 24086/10

HEARD ON: 8 November 2011

FOR THE APPLICANT: No appearance

FOR THE RESPONDENT: ADV. C. RIP

INSTRUCTED BY: Van Zyl Le Roux

DATE OF JUDGMENT: 8 November 2011

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