IN THE NORTH GAITING HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 24420/12

In the *ex parte* application of:

BERNARD BEKKER First Applicant

MAGDALENA MARIA BEKKER Second Applicant

(1) REPORTABLE: YES / ~~NO~~

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

11/06/12
DATE

SIGNATURE

JUDGMENT

Tuchten J:

1 This is an application brought under s 3 of the Insolvency Act, 24 of 1936 by a husband and wife married in community of property for the surrender of their estate. Under s 6 of the Act, the court may accept the surrender if satisfied that the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all the costs of sequestration which will in terms of the Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

2 Because this application has been brought *ex parte*, the applicants are under a duty to the court to show the utmost good faith. A failure to disclose fully and fairly all material facts known to them may lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone. *Schlesinger v Schlesinger* 1979 4 SA 342 W 348E-350B. An applicant who approaches the court *ex parte* must disclose all facts known to him or her, however prejudicial they may be to the applicant's case.

3 There is no doubt that on the papers the applicants are insolvent. They say that their debts amount to R285 000 and that the value of their assets is R175 000. Of that amount, R5 000 (exactly) is said to be the value of their few remaining household items. The remainder relates to a piece of ground, erf 985 Southport Extn 2, Port Shepstone.

4 The applicants live in Pretoria and the Port Shepstone ground was bought when, in good times, they could afford to do so. They hoped to build a house on it. They bought it on 5 June 2006 for R220 000 and, they say, registered a bond with Nedbank for R170 000. They say further that the amount owed to the bondholder was on 22 March 2012 (exactly) R250 000. There are no supporting documents to corroborate the improbable assertion that the bondholder allowed the

amount owing to it to exceed the amount of its security or, if the assertion is true, why the bondholder allowed this to happen.

5 The issue in this case is whether the applicants have shown that the value of the ground is sufficient upon realisation to defray the costs of sequestration and to result in a benefit to concurrent creditors which in this case translates to a reasonable dividend. The practice of this Division in such cases is that a dividend of at least twenty cents in the rand must, save in exceptional cases, be demonstrated on the papers.

6 The applicants allege that the forced sale value of the ground is R250 000. The only evidence in this regard is that of a candidate valuer and his "mentor", a professional valuer, both of Pretoria, where the applicants' attorney practises. The actual valuation was done by the candidate. The candidate claims to have actually visited the ground on 3 March 2012. The candidate and the professional valuer proceed to claim that on the same day, they prepared and signed a written valuation, for which they, or the professional valuer, will be paid a fee of R9 000 out of the balance of the monies available after payment of the bondholder and certain preferential costs.

7 There is no explanation why the attorney did not use the services of a valuer in Port Shepstone or its environs, why the candidate had to travel to Port Shepstone to look at a vacant stand and how the candidate and the professional valuer managed to prepare and sign the valuation in Pretoria on the same day that the candidate travelled back from Port Shepstone.

8 A photograph is attached to the valuation documents but there is no allegation that the photograph was taken by the candidate or while he was at the property or even that the photograph depicts the ground. I shall however assume that the vacant property in the photograph is in fact the ground.

9 The method of valuation is said by the candidate to be based on certain comparable sales. None of these sales was apparently within the personal knowledge of the candidate although he says that he has attended various auctions of properties in the vicinity of the Hibiscus Coast and Southport Extn 2. But the candidate does not say when he attended these auctions or testify to any specific transaction in recent times within his own knowledge.

10 Instead the candidate relies on an undated valuation report compiled by Lightstone, an organisation or entity which is not described in the papers. The essential document within the Lightstone report is a list of twenty properties in Southport, Bendingo and Sea Park transferred during the period 2010 to 2012 for prices varying from R221 to R1 068 per square metre. Of these, for no reason disclosed on the papers, the candidate says that two are relevant. These two properties fetched R708 and R640 per square metre respectively. Whether they are improved or unimproved is not stated. Whether they, and the ground in question, are in a more or less desirable part of Southport is not stated. Why the properties which fetched lower prices per square metre were not regarded by the valuators as comparable is not explained.

11 Based on these data, the candidate concludes that the market value of the ground is R450 000. The ground is described in the Lightstone report as being in extent 1 071 square metres (registered) and 1 118 square metres (cadastral), so the estimated value is between R406 and R420 a square metre. Why there are two measurements is not explained. Nor is it explained whether the Lightstone valuations are based on the registered extent or the cadastral extent.

12 The candidate says in his report that he considered six sources of information in the determination of market value, Lightstone, "S.A.P.T.G - Dataverkope", the Pietermaritzburg Deeds Office, "Elendomsagente/Ontwikkelaars - Southport", Jonker on valuations in South Africa and Davis Langdon's property and construction handbook 2011 on replacement values.

13 The candidate then proceeds to conclude that the property has a forced sale value of R250 000. Why this should be so is not explained.

14 The candidate then proceeds to say something in his report which I think is rather curious. He says that for the sake of thoroughness, he tested his valuation by means of the "GC89 metode (ook bekend as die Stapelmetode)", by which an individual value is attached to each item, eg dwelling house, swimming pool, fences and ground value separately.

15 But this ground is said to be empty of any improvements. There was thus simply no room for the application of this method and the assertion by the candidate that he tested his valuation by this means cannot be true.

16 The valuation proffered by the applicants for these reasons does not inspire confidence but the position is far worse for the applicants when the evidence produced is tested against the probabilities.

17 Market value is the price likely to be paid by a willing buyer to a willing seller. For the determination of a market value, there must be evidence of a market. The crucial question is whether there are willing buyers for this particular piece of ground. That there existed in the past willing buyers and willing sellers for other pieces of ground is only evidence from which an inference relating to this specific piece of ground might, or might not, be drawn on the facts. This brings me to what I regard as the greatest weakness in the applicants' case.

18 The applicants have been in financial trouble since February 2009, due to the weakened economy and world wide recession. This invites the question whether the applicants have tried to sell the ground. But the papers are silent in this regard. The court should not be left to speculate on this important question. Either the applicants attempted, unsuccessfully, to sell the ground or they decided not to try to sell it. Either way, they owed a duty to the court to explain what they did, or did not do, in this regard. Similarly, I think it is to say the least strange that no evidence has been produced by local estate agents to testify to whether they have buyers on their books for vacant stands in

Southport Extn 2. There is no indication why the candidate or the professional valuer did not seek information from the most obvious and reliable source, ie the applicants themselves, and did not produce evidence emanating from the estate agents whom one would expect to be active in the market, if such there is, for vacant ground in Southport Extn 2.

19 In all the circumstances, the most probable inference is that the applicants have tried, unsuccessfully, to sell the ground. This fact, if true, will be potentially destructive of the evidence of the valuers.

20 Finally, I want to refer to the financial distribution plan presented by the applicants to show how the proceeds of the ground (and the moveables) would be allocated. On the assumption that the ground and the moveables will realise R175 000, the applicants assert that after payment to the bondholder of the preferent part of its claim (R170 000) and costs there will be a balance of R25 804,50 available for distribution to creditors. The anticipated costs include R15 000 to the auctioneer, R9 000 to the valuer and R15 000 to the attorneys acting for the applicants. No evidence has been produced to establish that the applicants' creditors would not be financially better off if they were left to take such steps in execution as they were minded rather than invited to accept the cold comfort of a speculative dividend.

21 Continued experience in the unopposed motion court in this Division has led me to conclude that an unholy industry has arisen, which capitalises on the misery of ever increasing numbers of people who, because of the difficult financial times in which we live, are unable to live within their means, very often through no fault or no great fault of their own.

22 This industry offers debtors the alluring prospect of escaping the attentions of their creditors in return for handing over what remains of their patrimonies. The services of the same valuers, week after week, are retained to produce a result which, on paper and after manipulation of the figures, indicates that an acceptable benefit to creditors will be achieved. But then the appointed trustee files a liquidation and distribution account which in many instances does not result in any dividend at all to creditors.

23 In our procedural system, there is more often than not no opposition as such to a particular application for surrender. This is at least partly because it is generally not financially worthwhile for a concurrent creditor to incur the expense of the intervention in and opposition to such an application. There are, however, fairly frequent interventions by bondholders. In my experience (some two years) I have not heard

or heard of a case in which, after such an intervention, a debtor has persuaded the court to accept the surrender of his estate.

24 In my opinion, therefore, a court should evaluate critically the evidence provided of values of assets in the estate sought to be surrendered and consider in this context whether the debtor has provided the court with all material evidence on this issue which is within his knowledge. I do not think that a debtor who omits to disclose fully what efforts he has made to sell the assets which he claims will provide the free residue which can be distributed to the benefit of concurrent creditors and what he has been offered for these assets can be said to have made a full and fair disclosure of all material facts known to him.

25 Tested against the criteria I have discussed, the applicants have not persuaded me that they have made a full and fair disclosure of all material facts known to them or that there will be a benefit to creditors from the surrender of their estate. The application is dismissed.

NB Tuchten
Judge of the High Court
11 June 2012
Delivered 24.12.12

For the applicant:
Adv P de Klerk
Instructed by Herman Esterhuizen Smalman Attorneys
Pretoria