IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

17/7/15

CASE NO: 25539/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

17/07/15 [signature]
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED	Intervening Creditor
and	
CHRISTOFFEL WILHELM JORDAAN	First Respondent
SANDRA JORDAAN	Second Respondent

In the *Ex Parte* Application of:

CHRISTOFFEL WILHELM JORDAAN	First Applicant
SANDRA JORDAAN	Second Applicant

JUDGMENT

TEFFO, J

[1] The applicants seek an order for the voluntary surrender of their joint estates. They are married to each other in community of property.

[2] The application is complete and the procedural requirements have been met in terms of **section 4 of the Insolvency Act 24 of 1936 ("the Act").**

[3] Absa Bank Limited whom I will refer to as the "Intervening Creditor" brought an application for leave to intervene and opposes the application on the following grounds: –

3.1 There was a previous application by the same applicants under case number 45948/2013 which application was on 24 March 2014 struck off the roll due to the absence of an allegation regarding jurisdiction. The applicants withdrew the aforesaid application by notice without complying with the provisions of section 7(1) of the Act and also tendering the costs thereof to it.

3.2 According to the applicants' version in the application and the statement of affairs, they are not insolvent.

3.3 The applicants cannot utilise the same statement of affairs which they used a year ago for the previous application.

3.4 The applicants cannot make use of a valuation of property which was at the time, almost a year old.

3.5 The applicants in their replying affidavit make a recalculation of the advantage to creditors in terms of which there would be advantage to concurrent creditors in the amount of 8 cent per R1,00.

[4] The application for leave to intervene is not opposed.

[5] Section 6 of the Act reads as follows:

> *"(1) If the court is satisfied that the provisions of section 4 have been complied with, that the estate of the debtor in question is insolvent, that he owns realisable property of a sufficient value to defray all costs of 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 creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate.*
>
> *(2) If the court does not accept the surrender, or if the notice of surrender is withdrawn in terms of section 7, or if the petitioner fails to make the application for the acceptance of the surrender of the debtor's estate before the expiration of a period of 14 days as from the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor's estate, the notice of surrender shall lapse and if a curator bonis was appointed, the estate shall be restored to*

the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section 5."

[6] Section 7 of the Act provides as follows: –

"(1) A notice of surrender published in the Gazette may not be withdrawn without the written consent of the Master.

(2) A person who has published a notice of surrender in the Gazette may apply to the Master for his consent to the withdrawal of the notice, and if it appears to the Master that the notice was published in good faith and that there is good cause for its withdrawal, he shall give his written consent thereto. Upon the publication, at the expense of the applicant, of a notice of withdrawal and of the Master's consent thereto, in the Gazette and in the Newspaper in which the notice of surrender appeared, the notice of surrender shall be deemed to have been withdrawn."

[7] In *Absa Bank Limited v Ackerman, in re Ex parte Ackerman, 2014 JDR 1435 (GP)* in order to determine whether the applicant in a voluntary surrender application was insolvent, Hiemstra AJ held that in many cases courts have in the context of voluntary surrender of estates accepted the surrender where it appeared from the evidence that the debtor was unable to pay his debts, in other words, where he had been found to have been

commercially insolvent, as opposed to being actually insolvent [*Ex parte Fouche* 1956 (2) SA 116 (O), *Ex parte Deemter* 1962 (2) SA 228 (E)].

[8] In *Ohlson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50 the court held that the word "insolvent" must be taken to mean that the liabilities of the debtor, fairly estimated, exceed the value of his assets, fairly valued.

[9] The authors of Meskin, Insolvency Law para 3.2 made the following remarks: –

> *"But the mere fact that the evidence adduced by the debtor disclosed that the value of his property exceeds the amount of his liabilities is not decisive against him where it is established that nevertheless he is without funds to pay his debts in full and it is improbable that such property will realise sufficient for such purpose. A full bench of the Natal Provincial Division in Ex Parte Harmse 2005 (1) SA 322 at 324E-G held that this passage correctly states the law."*

[10] In *Schlesinger v Schlesinger 1979 (4) SA 342 (W) 394 A* it was held that due to the fact that an application for voluntary surrender is brought on an *ex parte* basis, that is reason enough for the applicants to disclose all material facts which might affect a court in coming to a decision.

[11] At paragraph 7 of its judgment, the court in *Ex Parte Bouwer* and similar applications 2010 JOL 26201 (T) the court said the following:

"With regard to non-disclosure of income, it suffices to state the obvious. Surrender of an estate involves, among others a financial inquiry. In my view, for the court to determine whether the acceptance of the surrender of the estate would be to the advantage of creditors, regard should be had to various factors, among which is the current income of the applicant."

[12] In *Fesi and Another v Absa Bank Ltd* 2000 (1) SA 499 (C) it was made clear that the present situation of the applicant needs to be presented to court. In paragraph 502H-I the following was said: –

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

[13] The *Nel v Lubbe* 1999 (3) SA 109 (W) 112A-B the court stated the following:

"Always relevant will be the prices of comparable properties in the same area at similar forced sales held at or about the same time. Naturally appropriate descriptions of the improvements will have to be furnished so that the value can be accessed on a comparable basis."

[14] In response to the contention by the Intervening Creditor relating to section 7(1) and (2) of the Act, counsel for the applicant referred the court to the judgment of *Ex Parte Viviers* et UXOR 2001 (3) SA 240 (T) where a submission was made on behalf of the appellant to the effect that previous notices of surrender could not be withdrawn before the present application was instituted because such "withdrawal" could not occur since, in terms of the provisions of section 6(2) of the Act, such notices have lapsed as a result of the passage of time as well as the fact that the court did not accept an earlier surrender of the applicant's estate. The court then held that the Intervening Creditor's submission required a proper understanding of the terms "to withdraw" and "to lapse". It further held that the dictionary meaning of "withdraw" was "to discontinue, cancel or retract", while that of "lapse was "to become void by non-fulfilment of a condition." The court arrived at the conclusion that it was clear that the previous notices of surrender became void because of failure to make the necessary application within the prescribed time limit. The issue for determination was whether it was possible to withdraw a notice which had already lapsed. The court then answered the question in the negative concluding that it was not possible to withdraw a notice that had lapsed. By so saying counsel for the applicants in the present matter argued that it was not possible to withdraw the previous notice of surrender as required by section 7 of the Act because it had lapsed. I find merit in this argument taking into account that after the notice of surrender was published in the Gazette and the newspaper, on the day of the hearing of the application, ABSA bank limited indicated its intention to intervene in the application. The matter was then postponed to 24 March 2014 on which date the application was again not heard but struck off the roll. At that time the period of fourteen days from the date specified in the notice of surrender to the date upon which the application

for surrender was to be made, lapsed while the applicants failed to make the application for the acceptance of the surrender of their estates. The notice for the surrender of the applicants' estates that was published in the Gazette and the newspaper has therefore lapsed. It would then have been impossible to withdraw the notice of surrender that has already lapsed in terms of section 7.

[15] At paragraphs 4.8 and 4.9 of their founding affidavit, the applicants aver that both their salaries combined equal to a total sum of R19 855,99 while their liabilities equal to R17 938,55. They contend that the Intervening Creditor has already alluded to the fact that they owe costs of the previous application estimated at R30 000,00. It was submitted that the fact that there is a surplus of R2 000,00 does not mean that they are not insolvent. They contrended that they are commercially insolvent as opposed to being factually insolvent. In their application the applicants alleged that they are not in a position to pay their debts. The fact that their assets exceed their liabilities with an amount of R2 000,00 can not be used against them where it is clear that they cannot pay their debts. I accept under the circumstances that they are commercially insolvent as against being factually insolvent (*Absa Bank Limited v Ackerman supra*).

[16] As regards the use of an old statement of affairs and a valuation of property, counsel for the applicant referred to the case of *Ex Parte Viviers supra* where the court had to determine whether it was legally permissible for an applicant to use the same statement of affairs in subsequent applications for a voluntary surrender of his estate. The court held that because there was no prohibition found in the Act against reusing the same statement of affairs for a subsequent application, there was no

reason to prohibit the applicant from using the same statement of affairs , facts and reasons for the applicant's insolvency in any event alleged to have remained unchanged. In so far as there is no prohibition in the Act of using the same statement of affairs in a subsequent application for the surrender of a party's estate, I will accept a statement of affairs that was used within a reasonable time in an application where the situation of the applicant has not changed.

[17] In the present application there is no allegation that the situation of the applicants had or had not changed. The statement of affairs used and the valuation report are almost a year old. Surely the situation of the applicants and the value of their properties could have changed in a year. Inflation is a factor after a year and the market value of the immovable property in the area could have either risen or gone down. I would accept the use of the valuation report and or a statement of affairs that are not unreasonably old. I find a year to be an unreasonably long period. Case law referred to *supra* is clear that recent salary advices and prices of comparable properties in the same area at similar forced sales held at or about the same time are determining factors to enable the court to arrive at a proper decision whether the acceptance of the surrender of the estate would be to the advantage of creditors. From the information disclosed in this application I am not satisfied that the applicants own realisable property of sufficient value to defray all costs of sequestration which in terms of the Act will be payable out of the free residue of their estate. I am also not satisfied that it will be to the advantage of their creditors if their estates are sequestrated. I therefore do not find it necessary to deal with the last ground for the opposition of the application by the Intervening Creditor. I am of the view that the applicants by failing to

disclose all material facts which might affect the court in coming to a decision have failed to make out a case for the voluntary surrender of their estate. The application should therefore fail.

[18] In the result I make the following order:

18.1 The application is dismissed with costs which costs include the costs of the previous application that was withdrawn.

M. J. TEFFO
JUDGE OF THE HIGH COURT
(GAUTENG DIVISION, PRETORIA)

HEARD ON : 4 November 2014
FOR THE APPLICANTS : Adv B Lee
INSTRUCTED BY : John Walker Attorneys
FOR THE INTERVENING CREDITOR : Adv R Raubenheimer
INSTRUCTED BY : Tim Du Toit & CO Inc
DATE OF JUDGMENT : 17 July 2015