

SOUTH AFRICA / JUDGMENT

Stodel v Nedbank Limited (47597/2014)

[2015] ZAGPPHC 952 (5 November 2015)

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COURT

North Gauteng High Court, Pretoria

BEFORE

MALI AJ

CASE / FILE NUMBER

47597/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 47597/2014

DATE:

5 NOVEMBER 2015

In the matter

between:

EDWARD

STODEL.....APPLICANT

And

NEDBANK

LIMITED.....INTERVENING

CREDITOR

JUDGMENT

MALI AJ

- [1] This is an opposed application for voluntary surrender of the estate of the applicant, by the intervening creditor.

- [2] The applicant's indebtedness to the intervening creditor arises from the loan agreement secured by the mortgage bond registered in favour of the intervening creditor, being Nedbank Limited. The applicant's indebtedness amounts to R1, 497 068.60

COMMON CAUSE FACTS

- [3] On 1 September 2014 the applicant applied to this honourable court for an order placing his estate in the hands of the Master of the High Court, ("the Master"). The applicant alleged that he was factually insolvent and unable to pay his debts. He further alleged that it would be in the interests and benefit of the creditors that his estate be placed in the hands of the Master.
- [4] The applicant's insolvency is due to his dismissal from his employment as a result of his sickness, and for the period between the end of 2011 until the end of 2013, he remained unemployed. When he regained employment at the end of 2013 he could not afford to pay his debts because the debts had escalated.

THE ISSUE TO BE DETERMINED

- [5] The issue to be determined is whether the applicant's voluntary surrender of his estate would indeed be in the interests and benefit of the creditors that his estate be placed in the hands of the Master.

ANALYSIS

- [6] In terms of section 6 of the Insolvency Act 24 of 1936, ("the Act") the substantive requirements for the voluntary surrender are the following:
- 6.1 that the debtor is insolvent;
- 6.2 that the debtor owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of the debtor's estate; and
- 6.3 that it will be to the advantage of creditors.
- [7] According to the High Court Motion Procedure: A Practical Guide authored by Joffe and others, Service Issue 8 June 2015 at 4-22; the dividend that is usually acceptable as adequate in the Gauteng North Province is 20c in the Rand. Furthermore the guide prescribes a formula for calculation of the dividend in respect of immovable property. The formula stipulates that from the value of the immovable property the amount of the outstanding bond must be deducted.

- [8] In casu the applicant's calculation resulting in a dividend of 60c in the rand did not take into consideration the deduction of the amount of the outstanding bond. The value of the immovable property is R950 000.00, the secured debt on immovable property is R1, 497 068.60. It is trite law that the intervening creditor is a secured creditor and must receive preferential treatment from other creditors.
- [9] In respect of movable assets the applicant owns a motor vehicle valued at R144 700.00. There is secured debt on the motor vehicle of R226 154.00. Even when taking into account the other movable property of the applicant valued at R200 000.00 there is a remarkable shortfall of R696 738.40

[10]The applicant could not dispute the above facts which are pertinent to the calculation of dividend. It is trite that the calculation leads to the determination of whether there is an advantage for the creditors.

[11]In Ex Parte Shmukler-Tshiko and thirteen other cases (2013) JOL 2999 (GSJ) it was held;

“the onus of establishing that all requirements is upon the debtor, and that this onus is more onerous in voluntary surrender applications

because the debtor himself should have all essential information available and be in a position to make full disclosure to the court. Essentially, debtors must demonstrate a reasonable expectation that a sequestration will exceed the likely proceeds of ordinary execution. Unless the debtor does that, the laborious and substantially more expensive remedy of sequestration can hardly be thought to be advantageous.

[12]In Ex Parte Bouwer & others (2010) JOL 25443 Mokgaka AJ stated that;

“A trend has developed in this division, in terms of which the 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 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 judicially. 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”.

[13]The sentiments expressed above were shared by Gorven J in Ex parte Arntzen (Nedbank Limited Intervening) 2013 (1) SA 49 (KZP). It was held that;

“in such cases an overburdened court, confronted with an unopposed application, may not scrutinised the application as carefully, and thus become aware of material non- disclosures, as it would do if it were opposed. A further reason for requiring a higher level of disclosure in voluntary surrender application....”

[14]It is not in dispute that the applicant is indeed insolvent. However the court cannot be seen to be simply endorsing the application without considering the impact to other affected parties. Therefore the begging question is whether the applicant owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of the his estate; and that the surrender of the estate will be to the advantage of creditors. As depicted in paragraph 9 above the answer is in the negative because there is there is a significant shortfall of R696 738.40.

[15]According to the applicant his major and realisable asset is the immovable property. As indicated above the immovable property for all practical intent and purposes is the property of the bank/ intervening creditor, a creditor with preferential status. I find that the applicant does not own realisable property of sufficient value to defray all cost of sequestration, which will be payable out of the free residue of the applicant's estate.

[16]Furthermore the sequestration of the applicant's estate will not be to the advantage of the creditors of the applicant. The applicant did not make a full and frank disclosure of his financial position and the applicant did not comply with the formal requirements prescribed in the Insolvency Act.

17.1. The application is dismissed with costs.

MALI AJ

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

Counsel for the Applicant: Adv HCJ VAN RENSBURG

Instructed by: Corne Myle Attorneys

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Instructed by: Edelstein Van der Merwe Inc

Date of Hearing: 07 September 2015

Date of Judgment: 05 November 2015

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