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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4041/2019

In the matter between:

J J

Applicant

and

A J

Respondent/Intervening Party

HEARD ON: 5 DECEMBER 2019

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 9 JANUARY 2020

- [1] This is an application in terms of the Insolvency Act 24 of 1936 for the voluntary surrender of the Applicant's estate. Section 6(1) of the Act provides that, if the court is satisfied...

"That the estate of the debtor in question is insolvent, that he owns realizable 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 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] The wording of this section makes it clear that the court is vested with a discretion to either accept or reject the surrender of the estate, even if the court is satisfied on all the points mentioned above. This discretion must be exercised judicially¹.

- [3] It appears from the papers filed by the Applicant in the present application that he is 42 years old and employed as an electrician by JFJ Electrical Group (Pty) Ltd, Bloemfontein. His current wife is the sole director and shareholder of this company, where he earns a salary of R15 000-00 per month. He claims that he became insolvent due to circumstances beyond his control, and that he is unable to pay his creditors now and in the future. He is of the opinion that his sequestration will be to the benefit of his body of creditors as a whole.

- [4] In his founding affidavit, the Applicant explains that his only assets consist of a half undivided share in a residential property in Langenhoven Park, Bloemfontein, and an amount of R 50 000 -00

¹ See *Ex Parte Hayes 1970 (4) SA 94 (NC)*

cash that was made available by his wife. If the value of the property and outstanding amount of the mortgage bond on the property is considered, his half share in the property is worth R 166 314-27. The applicant further points out that, save for SA Homeloans, he has no other preferent creditors, and that he owes his concurrent creditors the total amount of R 302 868-67. Having regard also to the fact that the costs of the sequestration would be in the region of R 61 900-00, the amount available to the creditors would be R 104 414-27, resulting in a dividend to them of 34c in the Rand.

- [5] It is clear to this Court that the half share in the property represents the only asset on which the Applicant can count in presenting a case for his sequestration. Without that half share, there would be very little available for distribution amongst the creditors. In this regard, the Applicant explains that the property in question is currently registered in the name of himself and his ex-wife, the Respondent in the application. Before the divorce, the property was their common home. They were divorced in August 2015, and in terms of a Deed of Settlement signed by the two of them at the time, the Respondent obtained his fifty percent undivided share in the property. In terms of the Deed, the Respondent accepted liability for the payment of the full monthly bond payments on the property, which amounted to some R 15 000-00 per month. Those payments she has made since the divorce up to the present time.
- [6] Also in terms of the Deed, the applicant had to sign the transfer documents on request to enable the Respondent to transfer the

Applicant's half share into her name. According to him, the Respondent had failed to effect the transfer because she has been placed under debt review, and therefore she does not qualify for a mortgage loan with which she would be able to settle the outstanding amount owing on the present bond. Despite these circumstances, he contends, the property is still registered in both their names, and therefore he is still the owner of his half share, which entitles him to put up that half share as an asset in the present proceedings.

- [7] As could be expected, it is this half share which became the bone of contention in the proceedings. When the Respondent got wind of the *ex parte* application of the applicant for his voluntary surrender on the terms set out in the application, she intervened in the proceedings as a Respondent by agreement between the parties. She subsequently filed an opposing affidavit to the application.
- [8] In her affidavit, the Respondent states that she has a direct interest in the application as far as the undivided share still falls within the Applicant's estate and in as far as he intends using it for the benefit of his creditors to the detriment of herself. His share in the property should not be considered to determine what his assets amount to, because she had obtained a right to the whole of the property in terms of the Deed of Settlement, which was made an order of court, she asserts. She further confirms that the property can presently not be registered in her name, because she's under debt review. She also confirms that she had been paying for the full bond instalments per month for a number of

years, and for this reason, it would be unfair to her if the Applicant's creditors should now benefit from the property that she is paying for. The Respondent further says *"I am trying hard to pay off all my creditors so that I can be taken out of debt review and the property eventually be registered in my name"*, she says.

- [9] The Respondent further points out that the property in question is her primary residence and that of her two sons, born of the marriage between herself and the Applicant. For that reason, she contends, the property has more value to her than can be expressed in any valuation. Should the Applicant be sequestrated, the property will be sold. As a result, her right to accommodation and to own her own property will be infringed, she says.
- [10] Having regard to all of the facts and circumstances of this case, it would appear that a sale of the property will be the only meaningful way in which money will become available for distribution amongst the Applicant's creditors. This fact has to be weighed up against the reality that the Respondent has acquired a personal right in the property, which right precedes any right that the Applicant's creditors may have in the property. Moreover, the sequestration order may possibly have the effect of an eviction order against the Respondent and her children, with inevitable negative consequences for them. Should this happen, the Respondent may end up with nothing more than a concurrent claim for damages against the insolvent estate.

- [11] In these respects the Court also has to be mindful of the provisions of Section 26 of the Constitution. Section 26 provides for the fundamental right to adequate housing. Section 26(3) protects the homeowner and ensures judicial oversight before an order of eviction may be issued. It basically has the effect that all possible alternatives have to be considered before an eviction is ordered.
- [12] In the present case, there appears to be such alternatives which would protect the Respondent's personal right and her right to adequate housing. These are the alternatives provided by the National Credit Act 34 of 2005. As was stated by Binns-Ward, AJ (as he then was) in ***Ex Parte Ford and Two Similar Cases***², an applicant should explain why his financial problems should not more appropriately be addressed by using the mechanisms of the said Act, instead of the relief afforded in terms of the voluntary surrender remedy under the Insolvency Act. Here the Applicant has already applied for debt review in the past, and a court order was granted in this respect. The Applicant, however, merely states in his replying Affidavit that he does not pay a monthly fee to his debt counsellor, without providing this Court with any further information. It must be assumed, then, that there is nothing preventing the Applicant to pursue his debt counselling and/or restructuring process to finality in order to pay his creditors. That appears to be a far better option in all circumstances than a sequestration, which would have a devastating effect on the Respondent and her children.

- [13] The following order therefore made:

² 2009(3) SA 376 (WCC)

1. The application is refused with costs, including the costs incurred by the Respondent in opposing the application.

P.J. LOUBSER, J

For the Applicant:

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