

SOUTH AFRICA / JUDGMENT

Groenewald (M377/2022), Ex parte [2023] ZANWHC 121 (21 July 2023)

[2023] ZANWHC 121**COURT**

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

M377/2022

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**IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAFIKENG
CASE
NUMBER: M377/2022**

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In

**the ex parte application
of:** SONNE-MARI
GROENEWALD
(For
the voluntary surrender of her estate)

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 15h30PM on 21 July 2023.
ORDER
The
application for the voluntary surrender of the estate of the applicant is dismissed.

JUDGMENT

PETERSEN J

Introduction

- [1] This ex parte application came before me on the Unopposed Motion Roll on 25 May 2023, for the voluntary surrender of the estate of the applicant. The applicant is legally represented by Phillip Markgraaf Attorneys c/o Herman Scholtz Attorney (correspondent attorney).
- [2] In a judgment handed down on 6 December 2022 in re various ex parte applications for the voluntary surrender of estates, this Court stated that it found itself in a position supererogation, having to address the issues identified in 2018 in various judgments related to applications of this nature.
- [3] The present application was postponed on no less than five (5) times before it came before me on 25 May 2023, essentially for the filing of a supplementary affidavit to address the marital status of the applicant and anomalies with the dates on the Masters certificate.
- [4] As in previous matters addressed in the judgment of December 2022, the formal statutory requirements in the application has been met. Similarly, at issue in the present application is the substance of the facts relied on by the applicant. The facts set out by the applicant as to why she finds herself financially distressed, with the amount of debt amassed predominantly through loans from financial institutions suffers from a dearth of information.
- [5] The applicant at paragraph 4 of the founding affidavit states the reasons for her insolvency and concludes that she finds herself in an insolvent state. Detailed proof of the alleged insolvency is said to be set out in the Statement of Affairs attached to the founding affidavit. The Statement of Affairs, however, echoes the terse reasons for the alleged insolvency at Annexure VII.
- [6] The following is stated at paragraph 4 of the founding affidavit:

“By misfortune and without fraud or dishonesty on my part, I have become insolvent. The reasons for my insolvency are evidence from the detailed statement contained in annexure VII of my statement of affairs which is attached hereto as Annexure “A” and which reasons are hereby repeated for sake of completeness. I was involved in a major car accident in 2018 and had substantial medical costs due to serious injuries. In 2020 with the outbreak of the Covid pandemic my employer stopped paying salaries. In June 2020 the company was liquidated, and I lost my employment and income. The subsequent loss of income because of these events caused my debts to escalate drastically. I am employed again but my income is insufficient to cover expenses and I experience monthly shortfalls. I am therefore not in a position to pay my debts.”

- [7] The applicant has no immovable property and moveable property valued at R24 000.00 and debts said to be totalling R80 145.00. The debts include loans from FNB and Direct Axis in the amount of R68 965.00 and R9350.00 respectfully. An amount of R1830.00 is due to Edgars.
- [8] The joint nett household income of the applicant and her husband with whom she is married out of community of property is R35 121.15. The joint monthly household expenses are said to total R35 406.00. It is rather peculiar that the applicant has applied for the voluntary surrender of her estate with no application by her husband, predicated on their joint income.
- [9] The applicant states that she was involved in a very serious accident causing her to amass substantial medical expenses. The value of such expenses are not reflected in the founding affidavit. No mention is made of any claim from the Road Accident Fund flowing from the applicant's serious injuries sustained in the motor vehicle accident she alludes to in the founding affidavit.
- [10] The possibility of debt review is dismissed in a single paragraph as not being viable according to her attorney. Nothing is about approaching the creditors for payment re-arrangements either.

Discussion

- [11] In the unreported judgment of Ex Parte: V and V and Ex Parte P and P[1], this Court stated the following:

“The voluntary surrender of an estate should be a remedy of last resort and considered in exceptional circumstances. Experience in the motion court has taught that these applications are often designed to avoid indebtedness to creditors, predominantly financial institutions. The Legislature alive to the realities of the uncertainties of economic life faced by consumers enacted the NCA. The Act was clearly designed as set out in the Purpose of the Act, Section 3 “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by- ... promoting responsibility in the credit market by- encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by consumers; ... (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations”

Our courts have always viewed sequestration as a remedy of first choice to be counter-productive. In Ex parte Van Den Berg 1950 (1) SA 816 (W) Ramsbottom J likened the “machinery of sequestration to distribute a very small amount to creditors ... after paying the costs of realisation and the cost of administration ‘as using “a sledgehammer to break a nut”. See too Gardee v Dhanmanton Holdings 1984 (1) SA 1066. These decisions emphasized the route of general litigation rather than the elaborate mechanism of sequestration with its high costs. The NCA offers the most cost-effective remedies to those who find themselves over-indebted.”

[12] The applicant approaches this Court with the remedy of voluntary surrender being sought as the first choice. In *Ex Parte Arntzen*[2] which has resonated with the Courts in most of the Divisions of the High Court Gorven J said:

“2. The test for voluntary surrender applications is set out in Section 6 (1) of the Act which, apart from requiring compliance with s 4, provides as follows:

‘If the court is satisfied ... that the estate of the debtor in question is insolvent, that he 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 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.’

3. There is no dispute that the estate of the applicant is insolvent. That leaves two issues for determination before the discretion granted by s 6(1) can be exercised. The first is to determine whether the applicant owns realisable property sufficient to defray all costs of the sequestration and the second is to determine whether the sequestration of the applicant's estate will be to the advantage of creditors.
4. Both of these aspects require the court to be satisfied. The applicant must discharge the onus to satisfy the court on a balance of probabilities. In particular, the test relating to advantage to creditors is more strictly framed than that for the provisional sequestration of a debtor's estate which only requires the court to be of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated. It is also more strictly framed than that for the final sequestration of a debtor's estate which only requires the court to be satisfied that there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated. In s 6(1), the court must be satisfied that it will be to the advantage of creditors if the debtor's estate is sequestrated.
5. Courts have long required an applicant in voluntary surrender applications to make a full and frank disclosure.³ This arises at least in part from the stringent test referred to above. It is quite clear that without a full and frank disclosure, the court cannot be ‘satisfied’ as to the above two criteria in particular. The required high level of disclosure is also affected, in no small measure, by the fact that the application is ordinarily brought on an *ex parte* basis as is the present one. There is ample authority that applications brought on that basis require the utmost good faith.⁴ The principles were succinctly stated by Le Roux J in *Schlesinger v Schlesinger* in a rescission application as follows:

‘(1) in ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;

2. *the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and*

3. the court, apprised of the true facts, has a discretion to set aside the formal order or to preserve it.'
6. In voluntary surrender applications, the need for full and frank disclosure is accentuated by the fact that, despite the practice of such applications being brought on an ex parte basis, they do not fulfil the criteria for true ex parte applications.

In true ex parte applications the applicant is the only person who is interested in the relief which is being claimed. In such applications, notice only to the registrar of the court is required.⁶ In voluntary surrender applications, on the other hand, creditors, to name only one category of persons, have a very real interest in the outcome of the application. For them the outcome of the application spells the difference between the prospect of recovering the applicant's full indebtedness and the prospect that recovery will be reduced by virtue of sequestration.

...

Just over a decade ago, the various divisions of the High Court 'cracked down' or 'tightened up' on so-called friendly sequestration applications which were described as beginning to constitute a 'cottage industry'. In Mthimkhulu it

was said that, in many cases, there was 'a very grave suspicion of collusion'.⁹ As a result, practice guidelines were laid down in this division for such applications. In essence what was required was full and frank disclosure along with clear proof of the necessary facts. The proof of the indebtedness giving the applicant locus

standi generally required documentary proof. In addition, a full and complete list of the assets of the respondent was required,

including a valuation by a qualified person containing cogent reasons for arriving at the valuation, both for movable and immovable

property. As was commented at the time, the claimed value of household furniture and effects and second hand motor vehicles, which

were often relied upon to constitute an advantage to creditors, often bore 'no relationship to their true value'.

10. Reference was made to the number of matters where a final order was granted and 'the friendly creditor makes no effort to have a trustee appointed or to prove his claim, no creditor takes steps to prove a claim because of a fear of contribution, the debtor waits for the dust to settle and with his old creditors off his back carries on business as normal'. In situations such as this, the sequestration of the debtor's estate cannot be said to have been to the advantage of creditors. Such applications constitute an abuse of the process of court and undermine the rights and interests of creditors. The only person who benefits is the debtor, often at the expense of creditors.

11. Voluntary surrender applications have begun to proliferate in this division. A fledgling cottage industry has reared its head. As was the situation with ‘friendly’ sequestrations in Mthimkhulu, many of these take a standard form with almost identical averments and are drafted by a small set of attorneys who have chosen to specialise in such applications. In most cases the estate is small, as is the case in the present application. In many of them, confronted by the requirement that all the costs of sequestration must be defrayed from the estate and it must still be shown that sequestration would be to the advantage of creditors, a formula has arisen to reduce these costs. The applicant states that a friend or relative has undertaken to pay the costs of the applicant’s attorney and that the attorney concerned will not look to the estate for his or her costs. Just such an averment is made in the present application.
 12. I take the view that there is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in ‘friendly’ sequestration applications. Therefore the need for full and frank disclosure and well founded evidence concerning the debtor’s estate is even more pronounced. There are a number of reasons for this, some of which have been foreshadowed in the discussion above. I shall mention only some. First, the applicant tends to focus on the formal requirements of s 4 of the Act and does not seem to appreciate the need to satisfy a more rigorous test than for sequestration applications at both provisional and final stages as regards advantage to creditors. Secondly the court must perforce, in most instances, rely on the founding papers. This brings into play the peculiar characteristics mentioned above of voluntary surrenders being brought as ex parte applications. Thirdly, no collusion between friendly creditor and debtor is necessary since it is the debtor who is the applicant and has a more direct interest in the application succeeding and understanding of the genuine position than the friendliest of creditors. Voluntary surrender applications therefore require an even higher level of disclosure than do ‘friendly’ sequestrations if the court is to be placed in a position where it can arrive at the findings and exercise the discretion set out in s 6(1) of the Act.”
- [13] The present application considered through the prism of the aforesaid authorities demonstrates that there are simply insufficient or inadequate facts placed before this Court on why voluntary surrender has been preferred over debt review or approaching the creditors for debt restructuring; and why the voluntary surrender of the applicant’s estate should be preferred. I am not convinced that the applicants remedy at this stage lies in the costly sequestration process where the greater benefit lies in the sequestration costs.
- [14] I am not convinced on the paucity of facts set out by the applicant that the acceptance of the estate of the applicant would be to the advantage of the creditors and accordingly decline to exercise my discretion in favour of ordering the surrender of the estate in the hands of the Master of the High Court.

Order

[15] In the result the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT

For the Applicant: Adv C Zwiendelaar Instructed by: Phillip Markgraaf Attorneys c/o Herman Scholtz Attorney Lanric 59, Shippard Street MAHIKENG Date of Hearing: 25 May 2023 Date of Judgment: 21 July 2023

[1] Case Numbers M408 AND 409/2018 at paragraphs 11 and 12.

[2] 2013 (1) SA 49 (KZP); See Ex Parte: E and Another 2015

(1) SA 540 (GP). at paragra

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