

SOUTH AFRICA / JUDGMENT

In the Ex Parte Application of David Makopole Mashengwama (2305/2021) [2021] ZALMPPHC 41 (28 July 2021)

[2021] ZALMPPHC 41**COURT**

Limpopo High Court, Polokwane

BEFORE

GC Muller

CASE / FILE NUMBER

2305/2021

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****DIVISION, POLOKWANE)****REPORTABLE:**

YES

OF

INTEREST TO THE JUDGES: YES

REVISED

CASE

NO: 2305/2021

IN

THE EX PARTE**APPLICATION OF:**

DAVID

MAKOPOLE

MASHENGWANA

APPLICANT

JUDGMENT**MULLERJ:****[1]**

The applicant applied to court to accept the voluntary surrender of his estate on 10 June 2021. The statement of affairs did lay open at the office of the master in Polokwane for 14 days from 17 May 2021. The applicant resides at Lebowakgomo in which district there is no Master's office. The statement of affairs did not lay open for inspection at the office of the magistrate at Lebowakgomo as required by section 4(5) and 4(6) of the Insolvency Act^[1] which provides:

"4(5) If the debtor resides or carry on business as a trader in any district...wherein there is no Master's office, the petitioner shall also lodge a copy of the said statement at the office of the magistrate of the district, or, if the petitioner resides or so carries on business in a portion of such district in respect of which an additional or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate."

4(6) The said statement shall be open to the inspection of any creditor of the debtor during the office hours for a period of fourteen days from a date to be mentioned in the notice of surrender."

[2] The attorney who prepared the application on behalf of the applicant submitted an affidavit together with the application in terms whereof he has stated that the applicant himself presented the statement of affairs to the civil clerk (Mr Madisha) at the office of the magistrate Lebowakgomo to have the statement of affairs lay open from 17 May

2021. The clerk refused to accept the document under the pretext that there is no one at the office that deals with such matters. Thus, when the application was moved in court a request was made by counsel that the application for surrender be accepted without the statement of affairs having laid for inspection and without the required certificate issued by the magistrate.

[3]

The request was rejected on the basis that the court cannot and will not condone a deliberate failure by a state official to accept the statement of affairs and to cause such document to lay open for 14 days at the office and thereafter issue a certificate to that effect as required by the Insolvency Act. It was held in *Ex Parle Proxenos*^[2] where there were two locations where court may be held within a district, that the statement of affairs must lay at the place where the magistrate for the district is ordinarily located:

"In my judgment then the schedules were not properly lodged as the required by section 4 (5) of the Act. This failure to comply with the requirements of the Act is not in my view a formal defect which the Court can condone. (cf. Ex Parle Mandelstam, 1949

(3) SA 1210 (O); Ex Parle Osman 1924 CPD 199; Ex Parle Loubscher supra)."[3]

[4] In Ex Parle van der Merwe[4] the Court following Osman and Proxenos supra explained:

"The notices of his intention to apply for the surrender of his estate duly appeared in the Government Gazette and in a newspaper which in fact circulated in the Pretoria and Piet Retief areas. These notices set out that that the statement of his affairs would lie for inspection only at the offices of the master at Pretoria. They did not lie for inspection at the offices of the magistrate at Piet Retief. It seems clear that since he has been residing in Piet Retief he has not incurred any liabilities there and this is the reason why the schedules did not lie for inspection at the offices of the magistrate in Piet Retief. In view of the fact that that he now resides in the Piet Retief district it is necessary in terms of section 4 (5) of the Insolvency Act, 24 of 1936, that his statement of affairs should also have lain for inspection at the office of the magistrate at Piet Retief. This omission is not a formal defect."[5]

[5] The court has consistently held that non-compliance with section 4(5) in instances where the statement of affairs had not lain for inspection in the district where the applicant is resident is not a formal defect and cannot be condoned. Such a defect is a material defect of an imperative provision of the statute. The purpose of the section, most importantly, is to allow creditors in the district where the applicant resides a means and opportunity to speedily inspect the statement of affairs to verify whether they are included in the list of creditors and, if so, to form an opinion of the values and bad debts of the applicant and to decide whether the application should be opposed or to consider whether claims should be filed. Creditors who are not disclosed in the statement of affairs are also provided with the opportunity to consider what steps they wish to take. That object is defeated when creditors are told that the statement will lie open for inspection at the office of a particular office of a magistrate for a specific period when it is not the case.

[6] Section 157(1) of the Insolvency Act provides:

"Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court."

[7] This court issued an order similar to the order issued in the case of Ex Parle Proxenos, namely, that the application be postponed until 20 July 2021 to enable the statement of affairs to lie for inspection at the office of the magistrate Lebowakgomo in the usual manner and that notice thereof be given to all creditors by registered post.

- [8] The attorney for the applicant in a supplementary affidavit filed after the application was postponed again urged the court to condone the failure of the statement of affairs to lay for inspection at the magistrate court at Lebowakgomo. What he in really ask of this court is to condone the failure by a state official to its duty to comply with the Act. I firmly believe the court has no power to condone such a deliberate failure. The court cannot be held at ransom by state officials who have elected, for whatever reason, not to do what the statute require them to do. Section 157(1) is not applicable to such a situation.
- [9] However, the failure of the statement to have lain open for inspection in my view not a formal irregularity. It is a peremptory requirement that the statement of affairs must lie open for inspection in the office of the magistrate in the district where the applicant resides. As stated before it is a mechanism that has been put in place for the benefit and protection of the creditors of a debtor when such a debtor bona fide applied to surrender his estate within the framework of the Act.[6]
- [10] It is not clear why the officials at the magistrate of the district where the applicant resides refused to comply with the statutory duty placed upon them by the Act. It may, on the one hand, be that officials are poorly trained or not trained at all with regard to their duties, functions and services which they must render which, no doubt, include functions in terms of the Insolvency Act such as allowing the statement of affairs to lay for inspection and to issue a certificate to that effect. On the other hand, it may be dereliction of their duties. The latter seems more probable. The attorney in his letter to the court manager has pointed out what is required by the Act. If any uncertainty after receipt of the letter remained with the court manager, such uncertainty could easily have been cleared up by enquiries made to other offices or even at the regional office of the department of Justice in Polokwane or at the very least a reading of section 4 the Insolvency Act. This kind of dereliction of duty is deplorable. It leaves an applicant with no recourse. As far as service delivery is concerned it undermines public confidence in the public service which at the best of times leaves much to be desired and in the rule of law and is a contravention section 9 and section 195(1) of the Constitution. The public, when they make use of the mechanisms which the Act provides, should be able to rely on public servants to fulfil their duties without delay and with the professionalism that is expected and is required of them. The failure by the responsible officials of the magistrate Lebowakgomo to comply with their statutory duty rendered the Insolvency Act useless and the application futile.

[11]

Despite the order which is clear, the refusal to allow the statement of affairs to lay for inspection persisted without any acceptable reason. This court must apply the mailed fist instead of the velvet glove to force the officials of the magistrate at Lebowakgomo to do their statutory duty in terms of the Insolvency Act.

ORDER

(1) The judgment and order together with the statement of affairs of the applicant must be served on the Court Manager Ms Agnes Selaoelo Ntini and the civil clerk Mr Madisha, personally..

(2) They are both called upon to ensure;

2.1 that the statement of affairs of the applicant lay open for inspection at the Magistrate Lebowa kgomo for 14 days from 10 August 2021-27 August 2021.

2.1 That a certificate to that effect be issued after expiry of the relevant period.

(3) They are ordered to appear in this court on the 2 September 2021 10h:00 to advance reasons why they should not personally jointly and severally pay the wasted costs occasioned by the postponements of this application as a result of their failure to comply with their duties in terms of the provisions of the Insolvency Act to cause the statement of affairs to lay open for inspection.

(4)

If this order has not been complied with on the return date they must advance reasons why they, in addition, should not be held in contempt of court and why a term of 2 months imprisonment should not be imposed on each of them.

(5) A copy of this judgment must be forwarded to Director-General of Justice and Constitutional Development for attention and to take whatever steps that are necessary.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

[1] Act 24 of 1936.

[2] 1953

(4) SA 593 (O) 595.

[3] 1927 CPD 159.

[4] 1964

(3) SA 246 (T).

[5] 246-247A.

[6] Ex Parte Harmse 2005

(1) SA 323 (N).

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