

SOUTH AFRICA / JUDGMENT

Maritz; Ex Parte Le Roux (M472/2023; M583/2023), Ex parte [2024] ZANWHC 127 (2 May 2024)

[2024] ZANWHC 127

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M472/2023; M583/2023

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IN THE HIGH COURT HIGH
COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NUMBERS: M472/2023
M583/2023

Reportable:

NO
Circulate
to Judges: NO
Circulate

to Magistrates:

NO
Circulate
to Regional Magistrates: NO
In

the ex parte application
of: JACQUES FRANCOIS
MARITZ
APPLICANT
Identity
Number: 7[...]
and
PATRICIA LE
ROUX
APPLICANT
Identity
Number: 6[...]

Coram: Petersen J

Heard: 07 March 2023
The
judgment was handed down electronically by circulation to the
applicants' representative via email. The date and time
for hand-down is deemed to be 02 May 2024 at 12h00.

Summary: Application for voluntary surrender of estate where application
previously dismissed by the Court – applicable principles
and
discretion of the Court restated – respective applicants
supplementing previous dismissed applications but still failing
to
make a full and frank disclosure – discretion of this Court
resultantly not exercised in favour of surrender of the estates.
ORDER
The
respective applications for the voluntary surrender of the estates of
the applicants is dismissed.

JUDGMENT

PETERSEN J

Introduction

- [1] The respective applications for the voluntary surrender of the estates of the applicants follows shortly on the dismissal of previous applications by the applicants for the voluntary surrender of their estates.
- [2] It should be emphasized that the applicants have not appealed the orders handed down in the previous applications. The applicants instead have approached this Court with applications which have been supplemented in circumstances where applications for postponement to supplement the failed applications was refused.

- [3] In penning this judgment, it evinces a sense of supererogation, in circumstances where the principles applicable to such applications as enunciated in a plethora of judgments emanating from the various Divisions of the High Court and this Court, have spoken decisively on such applications.

Background

Case Number: M427/2023

- [4] The applicant previously brought an application for the voluntary surrender of his estate under case number M185/2023, which application was postponed on 1 June 2023 to 20 July 2023. The matter was postponed for the applicant to file a supplementary affidavit explaining what happened to a vehicle which was repossessed by Wesbank. On 20 July 2023, this Court dismissed the application and refused the filing of any further supplementary affidavits.
- [5] The applicant contends that this Court took issue with the fact that he had no movable property. The applicant in the present application asserts that he does not indeed own any movable property as he sold his movable property to pay his creditors. The movable property currently in his household is said to be the property of his wife to whom he is married out of community of property. The applicant further contends that save for the vehicle, which was repossessed by Wesbank, the only other motor vehicle in the household belongs to his wife.
- [6] The applicant further contends that this Court raised the question where the applicant and his family would reside if the immovable property in which they presently reside were to be sold. On that score the applicant contends if this application were granted, he would make an arrangement with his curator to continue residing at the immovable property until the property is sold. This, he contends would avoid the property being ransacked; and that the property would be maintained in a neat condition. In the event of the property being sold he would search for a rental place that suits their budget.
- [7] Save for the aforesaid assertions of the applicant on the contentions said to have been raised by this Court in the previous application, nothing material has changed in the application. Save for the fact that the applicant maintains that he is unable to pay his debts, he makes a broad allegation that he has recently been receiving “a lot of phone calls from my creditors demanding an arrangement with a higher payment and some creditors are demanding the full outstanding payments. I'm not in a position to pay my creditors and provide for my family and my day-to-day living expenses. I therefore decided to apply for the voluntary surrender of my estate.”

Case Number M583/2023

- [8] The applicant previously brought an application for the voluntary surrender of her estate under case number M473/2022, which application was dismissed on 07 October 2022.

[9] The applicant contends that this Court took issue with the following aspects:

“2.1 When the voluntary surrender application is granted, the creditors would receive 0.26c in the Rand.”

2.1.1 In *Ex parte Ogunlaja & Others*, 920110 JOL 27029 (GNP), at para 9, the court directed that a true advantage to creditors should be a minimum of 20 cents to the Rand.

In this instance the advantage to creditors are 26 cents to the Rand.

2.2 “Alex Schneider, a private person, I borrowed money in the amount of R11 000.00 (ELEVEN THOUSAND RAND).”

2.2.1 Alex Schneider was informed of my application for voluntary sequestration and asked to institute a claim against my estate. He informed me that he does not wish to go through all the administration in filing a claim against my insolvent estate and would therefore write off my debt as bad debt.

2.3 ‘Information provided regarding when the loans where obtained was vague and not specific enough.’

2.3.1 More complete reasons for insolvency are given below in paragraph 3.”

Discussion

[10] In terms of the Insolvency Act 24 of 1936 (‘the Act’), an applicant in an application for the voluntary surrender of his/her estate must comply with certain procedural requirements as set out in section 4 of the Act, and certain substantive requirements as set out in section 6 of the Act.

[11] In both applications at hand, no issue can be taken with compliance with the section 4 procedural requirements. In fact, that was the position in the previous failed applications.

[12] The issue in the applications under consideration is with the substantive requirements. The applications beg the question whether sufficient facts demonstrative that the estates of the applicants is insolvent, that the applicants own realizable property of a sufficient value to defray all costs of the sequestration which will in terms of the Act be payable out of the residue of his estates; and that it will be to the advantage of the creditors of the applicants if their estates are sequestrated.

[13] The main bone of contention is with the last of these substantive requirements, whether it will be to the advantage of the creditors of the applicant if their estates are sequestrated. The test is not whether it would to the advantage of the applicants to proverbially

get their creditors off their backs contrary to what was said in *Ex Parte Pillay*; *Mayet v Pillay* 1955

(2) SA 309 (N) at 311 E that:

“The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors.”

[14] The sentiments expressed by this Court in Ex Parte Groenewald (M377/2022)

[2023] ZANWHC 121 (21 July 2023) at paragraphs 11 to 14 remain apposite. The sentiments expressed in Ex Parte: Cloete (1097/2013) 2013] ZAFSHC 45 (5 April 2013) at paragraphs 9 to 21 with reference to Ex Parte Arentzen (Nedbank Limited as intervening creditor) 2013

(1) SA 49 (KZP), paragraph 5 are equally apposite.

[15] The test to establish whether it is to the advantage of creditors that the estate of an applicant be sequestrated is more stringent in cases of voluntary surrender than in other sequestration applications. It is therefore imperative that an applicant in such applications should make a full and frank disclosure as the utmost good faith is required.

[16] The present applications seek to address concerns raised in the previous failed applications in what can only be described as an abuse of process considering the fact that the indulgence of a postponement was refused in those applications.

[17] The sentiments expressed by Daffue J at paragraphs 26 and 27 in Ex Parte Cloete where it applies to the peculiar facts of Mr Maritz application, resonate with me and I align myself therewith:

“[26] I find it highly improbable that applicant would go so far to sell his and his child’s beds and other household

properties, but failed to sell the very asset that is on his version worth much more than the outstanding balance due to the bank. The circumstances cry out for frank and candid disclosure.

[27] As mentioned this is a typical situation where the applicant should have utilised the benefits of the NCA in order to settle his debts in a manner in accordance with a court order obtained from the magistrate’s court. In such a way he would be protected against harassment by creditors while creditors on the other hand would eventually receive full payment of their claims. Contrary to such a factual scenario, granting of the application for voluntary surrender will benefit applicant only to the detriment of his creditors.”

[18] The sentiments expressed by Daffue J in Botha v Botha (4457/2016) [2016] ZAFSHC 194 (17 November

2016) at paragraphs 30-33 in a friendly sequestration are equally apposite to the application of Mr Maritz:

“[30] This is the typical situation where the debtor should have sold his immovable property by private treaty in order to settle the

mortgagee’s claim, or if that was not possible due to no interest from prospective, willing and able buyers, to arrange with

the mortgagee to sell the property on his behalf. The same applies to the Mazda LDV which should have been handed back voluntarily to the secured creditor. The expensive machinery of the Insolvency Act should not be applied in friendly sequestrations where it is clear that concurrent creditors will not receive any dividends at all, or at best an insignificant dividend.

[31] The National Credit Act, 34 of 2005 (“the NCA”) has been promulgated to the benefit of inter alia over-indebted debtors and/or persons to whom reckless credit was provided. Part D of Chapter 4 of the NCA – i.e. sections 78 to 88 – sets out in detail the steps to be taken to assist these debtors. This is a typical case where respondent, if he elected not to act as mentioned in the previous paragraph, should have pursued his rights of debt review under the NCA in order to obtain a court order in terms whereof his debts to commercial creditors be paid in instalments in an organised matter through the applicable debt review and court processes. In such a case it might have been possible to retain possession of the LDV and the residential property by extending the terms of repayment and have that made an order of court.

[32] Although I am not immune to the hardship and emotional stress caused to debtors due to financial

difficulties, especially in the present uncertain times, I am more so mindful of the fact that our insolvency law should not be applied to the extent that the rights of debtors take precedence over creditors and especially concurrent creditors’ rights. In most insolvency matters concurrent creditors suffer severely insofar as they often do not even lodge claims and rather opt to write off their claims. This is not what was intended by the legislature when the Insolvency Act was promulgated.

[33] I conclude by repeating that applicant failed to prove that there was reason to believe that it would be to the advantage of creditors, especially concurrent creditors, if respondent’s estate was sequestrated. Therefore the application was dismissed and the rule nisi discharged.”

[19] The applicant Mr Maritz seeking a proverbial second bite at the cherry, has still failed in demonstrating that the surrender of his estate would be to the benefit of his creditors. Save for the very broad allegation, which is a signature allegation in applications of this nature that creditors are all but hounding him, this Court is not privy to a call log of the numerous phone calls alleged by Mr Maritz. The Court is also not furnished with detailed statements from the creditors to appreciate the extent of the inability to service the debts. Ms Le Roux similarly fails to set out with specificity the nature of the debts and steps taken by her creditors to recover same.

[20] It is further not explained by Mr Maritz why he has not taken steps by private treaty to sell the immovable property, rather than relegate same to the curator that will be appointed upon his estate being sequestrated.

- [21] From experience in the Motion Court creditors painstakingly keep record of debts due to them. The applicants should be in a similar position as such information should be within the knowledge of the applicants. A comparative analysis with creditors who are obliged to follow the letter of the law set out in the National Credit Act 38 of 2005 to applications for voluntary surrender under the full and frank disclosure narrative would demonstrate the detail required by such creditors to prove their claims in action proceedings. These creditors are required to adduce proof of the agreements, detailed statements of account and certificates of balance, amongst others, to satisfy a court that the relief they seek should be granted. Conspicuously absent from applications for voluntary surrender under the substantive requirements, is such detail. It simply does not avail to fire a broad salvo alleging that the creditors are hounding the applicants. After all, how can a Court satisfy itself that an applicant in a voluntary surrender is so over indebted that this remedy as a remedy of last resort is merited. The mere parroting of outstanding balances due to creditors simply does not suffice. Neither does an affidavit from a debt counsellor which simply states that an applicant does not qualify for debt review.
- [22] It is further unsurprising as a manifestation of applications of this nature, that the creditors whom the applicants allege would benefit from their sequestration never surface. The ineluctable deduction must be that reckless credit lending may surface, in which case the applicants may be seized with a remedy in terms of the NCA.

Conclusion

- [23] The applicants' have failed to make a full and frank disclosure of material facts as in their previous applications. The present applications constitute nothing more than an abuse of the court process.

Order

- [24] In the result, the following order is made:

The respective applications for the voluntary surrender of the estates of the applicants is dismissed.

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES:

FOR THE APPLICANTS' : ADV B RILEY Instructed by: KING JORDAAN SWART INC C/o Herman Scholtz Attorneys Lanric 59, Shippard Street Ext MAHIKENG

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