IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED …… ……	**Case number: 40832/2014** **Case number: 38600/2014**

In the ex parte application of:

KACHELHOFFER, TRACY ANDREA **Applicant**

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. In the unopposed Motion Court of Monday, the 16th February 2015, an ex-parte application came before me as matter number 43 on the roll, being ex-parte, Tracy Andrea Kachelhoffer, case number 40832/14. I heard counsel on this matter and refused the application.

2. By notice in terms of Rule 49(1)(c), dated 19th February 2015 and stamped 20th February 2015, I was asked to provide written reasons for the order which I had made on the 16th February. However this notice refers to case number 38600/14, also in the matter of Tracy Andrea Kachelhoffer, applicant.

3. Accordingly I have done a little research. It appears that the first matter, case 38600/14 was deposed to by way of affidavit on 15th October last year, set down for hearing on 30th October (i.e. 2014) and was withdrawn before her Ladyship Mayat. Thereafter a new application was instituted being case number 40832/14, with an affidavit signed on the 7 November 2014 and set down for hearing on the 4th December 2014 when his Lordship, Mr Justice Monama, noted that creditors were present and the matter was postponed to the 29th January 2015 with costs reserved.

4. On the 29th January 2015 the matter came before his Lordship, Mr Acting Justice Madima, it was noted that ABSA was present in court. The matter was postponed and his Lordship ordered that papers were to be served on creditors on or before the 16th February. I note that this was done because the file placed before me contains a tear sheet from the Star newspaper and also records that the papers were sent by couriers to two of the debtors, Foschini and Woolworths.

5. On the 16th February 2015, case number 40832/14 came before me and I dismissed the application.

6. I have perused the two separate applications and I can find minimal difference between the applications and nothing material in nature. I fail to comprehend why there are two separate applications under two separate case numbers. I note that I have been requested to provide reasons in respect of case 38600/14 which of course is not an application I heard. I am acting on the assumption that the attorney who made the request intended that I give reasons in the matter which I did hear, namely case 40832/14.

THE INSOLVENCY ACT

7. In so far as a voluntary surrender is concerned, one must have regard to Section 6 of the Insolvency Act 24 of 1936, which deals with surrender of an estate. That section obviously requires that the debtor be insolvent. It is the duty of the Court to determine whether there really is insolvency and whether or not there are other remedies than insolvency available as well as to insure that the surrender is of advantage to creditors and not debtors.

8. It is important to note that our courts, in scrutinising insolvency applications or voluntary surrenders, have indicated a number of factors to which a Court should have regard.

9. It is trite that neither the creditors nor the debtors nor the Court should prefer insolvency proceedings above litigation and execution in the ordinary course. In *Ex-*

Parte Van Den Berg 1950 (1) SA 816 (N) it was stated: "To use the machinery of sequestration to distribute amongst these (concurrent) creditors the small amount which might be available from the sale of the immovable property after paying the costs of realisation and the costs of administration of the estate is really to use a sledgehammer to break a nut" and further "proceedings for voluntary surrender should not be used for the purpose of avoiding a debt." In another matter, *Gardee v Dhanmarton Holdings* 1978 (1) 1066 (N) it was stated that insolvency is "an elaborate means of execution and because of its costs an expensive one" and further it is "a laborious and substantially more expensive remedy".

10. In scrutinising the papers it is frequently useful to determine whether the debtor/ intending insolvent has made any attempts whatsoever to settle indebtedness or whether she prefers, as the first option insolvency and therefore avoidance of all repayments.

11. We are always to bear in mind that insolvency proceedings do not exist for the benefit of distressed or harassed debtors. In *Mayet v Pillay* 1955 (2) SA 309 (N) it was stated, "the machinery of voluntary surrender was primarily designed for the benefit of creditors and not for the relief of harassed debtors". In *Hillhouse v Stott* 1990 (4) SA 580 (W) reference was made to respondents who were "anxious to be sequestrated to obtain welcome relief from misery". Finally in *Ex-Parte, Steenkamp and related cases* 1996 (3) SA 822 (W) there was reference to an application for sequestration and accomplishment for what the Court called "The Mission" because "the debtor is relieved of his misery and may safely cock a snook at his creditor".

12. The applicant should demonstrate some reasonable expectation that a sequestration will exceed the likely proceeds of ordinary execution "unless he does that the laborious and substantially more expensive remedy of sequestration can hardly be thought to be advantages" (*Mamacos v Davids* 1976 (1) SA 19 (C) it is 20C; *Gardee supra* at 1070 A).

Advantage to Creditors

13. Section 6(1) requires a Court to be "satisfied ... that it will be to the advantage of creditors of the debtor if his estate is sequestrated."

14. In the present instance, I have been informed that this debtor, this applicant, has already had action instituted against her by one of her creditors. It appears from the notes on the two court files that creditors have indeed shown an interest in this matter, at least one creditor was present in court on one or more occasions, and the Court ordered that notice be given to all relevant parties.

15. The authorities to which I have referred are a timely reminder that insolvency proceedings have at the heart, advantage of creditors and not advantage of the insolvent. Sufficient facts must be furnished to this Court in order for it to be able to come to a rational or a reasonable belief that the sequestration will be to the advantage of creditors. In *Hillhouse*, to which I have already referred numerous authorities are cited.

16. As to what is the advantage to creditors, we have much guidance. In a broad sense, the court should find that the sequestration "would secure some useful purpose" (see *Hillhouse supra* at 585E). An act of insolvency is an insufficient reason on its own for the belief that sequestration of an estate will be to the advantage of creditors (see *Gardee supra* at 1070G).

17. The notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditor's advantage unless it suits them better than any feasible and reasonable alternative course. (See *O' Flaherty & Co v Meiklejohn* 1940 NPD 371at p371; *Gardee supra* at 1070C).

18. There is of course also the possibility that through the Act's machinery "impeachable transactions, the concealment of assets and other irregularities are detected, exposed and remedied with the result that the single creditor eventually recovers more than ordinary execution would have yielded" (See *Gardee supra* at 1069A) and of course the applicant could indicate in the papers why this is thought to be a possible outcome.

19. Where the only question is that of financial advantage, then there should be a "not negligible pecuniary benefit" or "not negligible dividend" (See *Gardee supra*; *London Estates Pty Ltd v Nair* 1957 (3) 591 N; *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) 109 N; and *Ex-Parte Kelly* 2008 (4) SA 615 (T)).

COSTS

20. In her founding affidavit the applicant states that she estimates the costs of the proposed voluntary surrender of her estate to be in the region of the sum of R160 000 (one hundred and sixty thousand rand). Regrettably, these are not the costs which were subsequently calculated in the papers attached to her affidavit. At page 104 of the papers it appears that the total costs of this surrender, valuations, auctioneering and the application etcetera will amount to the total sum of R358 975 (three hundred and fifty eight thousand nine hundred and seventy five rand).

21. It is of some concern to this Court that the applicant seeks to surrender her estate at a cost of general administration and implementation of this surrender on close on

R360 000 (three hundred and sixty thousand rand) when one evaluates the amount which will be available to the creditors in her estate.

22. At page 105 of the papers, there is an indication that there will be a sum of R371 503 (three hundred and seventy one thousand five hundred and three rand) available "as total free residue after secured claims". Immediately thereafter is indication that the total costs of R358 975.80 (three hundred and fifty eight thousand nine hundred and seventy five rand and eighty cents) are to be deducted leaving a "total amount available" for division of R12 527.20 (twelve thousand five hundred and twenty seven rand and twenty cents). This would suggest at page 105 of the papers that this Court is asked to sanction administration and other costs of R358 975 (three hundred and fifty eight thousand nine hundred and seventy five rand) in order to free up R12 527 (twelve thousand five hundred and twenty seven rand) for distribution amongst creditors.

23. There is some confusion at page 105 of the papers, because under a subheading "advantage to creditors" it is noted that there is an amount of R934 000 (nine hundred and thirty four thousand rand) divided by concurrent liabilities expressed as a percentage amounts to 30% payment. The document concludes, proudly announcing that there will be a dividend of "R0.70" (seventy cents) in the rand. I do not understand these calculations, I do not understand how the total amount available for division of R12 000 (twelve thousand) suddenly makes available R0.70 (seventy cents) in the rand as a dividend; however I will deal with that later.

24. At this stage I am simply commenting that I find it unconscionable that nearly R360 000 (three hundred and sixty thousand rand) will be spent on costs instead of paying creditors.

25. I cannot find that expenditure of costs in this amount can be to the advantage of secured or concurrent creditors when so little is available for division amongst the creditors.

ASSETS

26. There are two immovable properties. The first is apparently the former matrimonial home situate at Erf 49 Kelland Township, and is known as the Shashi property. The second is a piece of immovable property (apparently a vacant stand) in Leisure Bay.

27. In so far as the Shashi property is concerned the documentation in this surrender application states the value to be R1 200 000 (one million and two hundred thousand rand). That is based on a very detailed valuation prepared at the instance of the attorney in this matter. The Municipal valuation is more than twice that

amount at R3 020 000 (three million and twenty thousand rand).

28. The Leisure Bay property is valued at R100 000 (one hundred thousand rand) and again the valuation prepared for purposes of this application is extremely detailed.

29. I note that the Leisure Bay property is owned as to a half share by this applicant and that she owns the Shashi property in its entirety.

30. Essentially the arithmetic adds up as follows: The two properties are worth R1.3 million (R1 300 000) rand at an unknown date. At a date prior to deposing to this affidavit launching this particular application November 2014, there were two bonds, one to First National Bank of R252 000 (two hundred and fifty two thousand rand) and one to ABSA in an amount of R3.2 million (R3 020 000). The total bonds are claimed to be in the amount of R3.4 million (R3 400 000).

31. Since I do not know the dates at which these calculations were done, I must briefly express my concern. The affidavit before me is dated the 7th November 2014 (that is under case number 40832). However an earlier affidavit of 15th October 2014 sets out that the mortgage bonds are in exactly the same amount. No allowance was made at the time of deposing to these affidavits for the monthly increases in the value of the bond. Perhaps that concern is explained by the deponent's affidavit where she indicates, that she is paying a bond on a monthly basis. At page 102 of her papers she indicates that she is paying the ABSA bond of R25 531.80 (twenty five thousand five hundred and thirty one rand and eighty cents) per month.

Shashi Property and Divorce

32. The Shashi immovable property is registered only in the name of this applicant, Tracy Andrea Kachelhoffer. The property is therefore hers to deal with and to dispose of as she chooses.

33. The facts before me are that she is paying some R25 000 (twenty five thousand rand) per month in respect of the ABSA bond. She is also paying rent for a property in Parkwood in an amount of R7 800 (seven thousand eight hundred rand) per month. The mind boggles. Why is she paying such a large amount in respect of the bond and a not insignificant amount in respect of rental? This is certainly a duplication of expenses.

34. The applicant and her former husband, Mr Kachelhoffer entered into an agreement of settlement which was made an order of Court when they became divorced. The relevant portions of the agreement of settlement are found at pages 28 and 29 of these sequestration proceedings. It is recorded that Ms Kachelhoffer (who was the

plaintiff in the divorce action) is the 100% owner of the immovable property. It is recorded that the immovable property will remain registered in her name. What is then recorded is "the defendant is currently residing in the property and shall vacate the premises upon such date as the divorce order is granted or as agreed in terms of a written rental agreement that the parties at their election may agree to".

35. According to page 17 of these papers the decree of divorce was granted on the 30th August 2013. The upshot is that either Ms Kachelhoffer (the applicant) should be living in the property or she could have placed tenants in the property who would give her a monthly rental, thereby assisting her to pay off the bond or she could, of course, have attempted to sell the property.

36. Instead her former husband, Dawie Kachelhoffer, is apparently living in the property for free.

37. At page 96 onwards of the papers appear some photographs taken by the valuer. It appears that Dawie lives like "a pig". The rear of the house has a lot of debris lying around and his clothes are hanging on the line. However in the main room of the house there is equipment, clothing, furniture, rubbish and files laying higgledy piggledy all over the floor of this living room. It is not possible to use the room for any useful purpose. At page 98 one sees that the bathroom is virtually destroyed.

38. Essentially Dawie Kachelhoffer is living for free in this property, apparently doing nothing to maintain it or doing nothing to ensure that it is kept in a reasonable condition. This is totally contrary to the agreement of settlement which was made an order of Court. Why he lives there for free I cannot imagine.

39. The applicant in this matter has a remedy available to her which will greatly assist with her present financial predicament. First, she could live in the house, pay the bond and therefore save herself monthly rental of R7 800 (seven thousand eight hundred rand) per month. Secondly, she could evict Dawie, her former husband and place tenants in this property who at least will make a contribution towards the monthly bond repayments to ABSA which she apparently currently bears alone. That would certainly assist not only her but would also assist all her various creditors who if this surrender application had been successful would have received very little by way of funds.

AVAILABLE RESIDUE

40. I have indicated that, according to this application, the applicant's total assets are in the region of R1.3 million (R1 300 000) whilst her mortgage bonds total in the region of R3.5 – 4 million (R3 500 000 – 4 000 000). She calculates that once the secured

creditors have been paid (namely FNB and ABSA) there will be a balance outstanding to them in the region of the sum of R2 million (R2 000 000), which will fall into the concurrent liabilities.

41. On her calculations she estimates that the total liabilities will then be R2.7 million (R2 700 000), that the free residue is the sum R371 000 (three hundred and seventy one thousand rand) and she then claims that there will be a dividend of some R0.70 (seventy cents) in the rand.

42. I find this very difficult to comprehend. After all her own papers as I have already indicated refer to "an amount available" of R934 000 (nine hundred and thirty four thousand rand).

43. In short the arithmetic is not entirely convincing that there would indeed be, from an available residue a dividend payable of R0.70 (seventy cents) in the rand.

EXPENSES

44. At page 102 of the papers, the applicant sets out her various living expenses. I have already referred to the fact that she is paying both a monthly rental for a property in Parkwood as well as a monthly bond instalment. The two cannot continue. She must either live in the house or she must have a tenant in the house, but she cannot pay both rental and not live in the house but expect her various creditors to be prejudiced as a result.

45. There are in addition certain other monthly payments. There is a retirement annuity, there is a gym payment, there is cosmetics, spending money, petrol, and maintenance. I suspect that all of these could be reduced. I do not know why she is spending R7 800 (seven thousand eight hundred rand) on renting in Parkwood when in fact there are (to my personal knowledge) townhouses available in at least one complex (Doorset Place) in Parkwood available at a rent of R5 000 (five thousand) per month.

46. The school fees for her daughter are claimed to be R3 716 (three thousand seven hundred and sixteen rand) per month, I do not know what school her daughter attends. Clearly it is a private and rather expensive school. I doubt very much that the employees of her creditors (whom she proposes will not be paid in full) can afford to send their children to a school costing R3 716 (three thousand seven hundred and sixteen rand) per month.

47. I am very well aware that when Woolworths, Foschini's, Vodacom, Banks, Gyms and other business enterprises have bad debts which are not going to be paid because of

the sequestration of debtors that employees are retrenched because such businesses have to downsize. Accordingly this kind of school expense seems to me hardly to be one that will assist or be to the advantage of creditors.

48. What does cause me some concern are the monthly expenses as I see them set out in the applicants banking account at pages 58 onwards of the papers. This is her cheque account statement for the month of June 2014. Presumably this was the most recent cheque statement available at the time she deposed to her first affidavit.

49. In one month this applicant made purchases at the Full Stop Café, the Trieste Café, Simply Asia, Steers Steakhouse, Fournos Bakery, Pizza Express, Coffee Care, The Whippet, Yume, and the Jolly Rodger Bar. Some of these were visited more than once. Over and above such expenses, or luxuries, she made purchases at Video Spot, Toys R US, and she had her nails done and her hair done. Lifestyle expenses were repeated more than once.

50. Some of these liabilities which appear in these papers are not banking liabilities they are liabilities to Foschini, DSTV, Woolworths, and Vodacom.

51. If the applicant had indeed taken steps to reduce her monthly expenses (particularly the luxuries) and increase her monthly income (by renting out this house) she might already have paid off her Foschini, her Woolworths, her DSTV and her Vodacom indebtedness.

52. Instead she chose to become sequestrated and to "seek relief from her misery" (*Hillhouse supra*).

CONCLUSION

53. I am not satisfied that an advantage to creditors has been proven. I am not satisfied that steps have been taken to prefer other action above insolvency proceedings. I am not satisfied that this sequestration application is launched with the benefit of creditors rather than the relief of the applicant in mind.

54. It was for these reasons that I refused to make an order for sequestration.

55. The applicant was represented by counsel in court.

56. We did not discuss the issue of costs. I note however that on the 4th December 2014 costs were reserved by Judge Monama, creditors being present. I note that on the 29th January 2015 a postponement was granted by Acting Judge Madima and costs

were ordered on an attorney and own client scale, creditors being present.

57. I can see no reason why the reserved costs and the costs on the attorney and own client scale should not fall within the order that I have made. Since the voluntary surrender is refused, these costs are not paid out of an insolvent estate but, of course, will be paid by the applicant herself.

58. In the result I confirm the order that I made on the 16th February 2015.

DATED AT JOHANNESBURG 23rd FEBRUARY 2015

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SATCHWELL J

Attorneys for Applicant: Frese, Moll & Partners
Dates of hearing: 16th February 2015
Date of judgment: 23rd February 2015