IN THE HIGH COURT OF SOUTH AFRICA,

(NORTH GAUTENG, PRETORIA)

Case Number 53894/2013

In the ex *parte* application of:

CHARMAINE PURDON
ID NO: 720……. Applicant

J U D G M E N T

MAKGOKA, J

[1] This is an application for the rehabilitation of the applicant's estate, which was sequestrated by an order of this court made on 23 February 2011. No claims were proven against her estate afterwards. All formal requirements of the application have been met. The applicant has complied with s 124(2) of the Insolvency Act 24 of 1936 regarding publication in the *Government Gazette* signifying her intention to bring this application. The Master and the Trustees have filed their respective reports in which they raise no objections for the rehabilitation of the applicant's estate.

[2] The applicant, who is a widow, states the reasons for her sequestration as follows:

> 'After my husband's death, I relocated from Plettenberg Bay to Pretoria, where I got employment. I tried to pay the escalating debts, but my salary was not enough to cover all the debts. As a result, I fell behind with payment of my accounts and was sequestrated.'

(my translation from Afrikaans)

[3] As a matter of routine when preparing for rehabilitation applications, I caused to be retrieved, and perused the sequestration file - from which it appears that the applicant's estate was sequestrated at the instance of one Jean Evelyn Lucille Lamont (Lamont). The applicant did not oppose that application, in which Lamont alleged that she and the applicant had an oral agreement during November 2009 in terms of which she loaned R50 000 to the applicant to set up a hair salon.

[4] Lamont further alleged that the applicant failed to comply repay the amount in monthly instalments of R10 000 from May 2010, as agreed, but had instead committed acts of insolvency in terms of ss 8(a), (c) and (d) of the Act, hence the application for 'compulsory' sequestration. Lamont averred that the sequestration of the applicant's estate would be to the benefit of creditors. In support of that supposition, Lamont alleged that according to deeds registry search, the applicant was an owner of immovable property.

[5] In terms of s 127(2) of the Act, the court has a discretion to grant or refuse an application for rehabilitation. The insolvent has no right to be rehabilitated in any particular situation. The discretion is dependent upon the conduct of an insolvent in relation to the business affairs which led to his insolvency. See for example *Ex parte Hittersay* 1974 (4) SA 326 (SWA) at 326H-327D and *Ex parte Fourie* [2008] 4 All SA 340 (D) paras [23] - [25],

[6] As stated earlier, there were no claims proven against the applicant's estate, and it is not difficult to fathom the reason therefor. There were no assets in the applicant's estate. The applicant states that at the time of sequestration, she had no assets at all, while her liabilities were R50 000. Therefore, a very real risk of a contribution being levied against

creditors, existed. Indeed, a contribution of R5110 was levied against the applicant in terms of s 14(3) of the Act, which was paid.

[7] The immovable property mentioned in the sequestration application is not part of the final liquidation and distribution account. I can safely assume that the applicant did not own such immovable property, otherwise the trustees would have easily established that. On that assumption, the court was clearly misled. Had it been brought to the attention of the court that the applicant did not own immovable property, nor any other assets for that matter, the application for sequestration would clearly have been refused on the basis that it would not be to the advantage of creditors, as no dividend would accrue to them at all.

[8] I am mindful that this allegation was not made by the applicant, but by supposed creditor, Lamont. However, the applicant was served with the application. If this allegation was incorrect, the applicant had a duty to place the correct facts before court. She conveniently chose not to do so, and in the process she was implicit in the misleading of the court. She can therefore not now expect the assistance of this court without properly explaining this aspect. On this basis alone the application should be refused.

[9] An application for rehabilitation is not a formality. It requires frankness and a full disclosure of all relevant facts. At the very least, the applicant has to satisfy the court of three aspects. First, a full and frank disclosure of the circumstances that led to his or her sequestration. Second, a demonstration that he or she had learnt lessons from the insolvency, and third, that he or she is rehabilitated and ready to re-enter the commercial world and the economic mainstream. For the latter requirement, it does not suffice that since sequestration, the insolvent had lived strictly on a cash basis. That is a forced, natural, and intended, consequence of insolvency, and it is by no means an indication of prudence on the part of the applicant for which he or she should be applauded.

[10] The attitude of many applicants in this Division, as aptly demonstrated in the present application, is to place the barest minimum details before court, coupled with generalised statements. This is clearly not sufficient. In the present application, for example, the applicant has not stated how differently she would approach factors that led to her sequestration. She does not seem to appreciate that the sequestration of her estate had not resulted in any advantage to her creditors. If rehabilitated, the applicant, freed of her debts, would 'cock a snook' at her creditors and start on a clean state, incurring more debts. Indeed, of the reasons she seeks rehabilitation of her estate, the applicant states that she needs to obtain credit in the form of a home loan.

[11] In addition, on the papers as presently framed, I am left to speculate as to (i) whether or not the applicant owned immovable property at the time of sequestration, and (ii) the particulars about her salon business. It worth noting that the above aspects are mentioned nowhere in the applicant's affidavit supporting rehabilitation. They appear from the sequestration file. It is therefore clear that the applicant has not made a full and candid disclosure of material aspects of her estate.

[12] Without laying down any rule of practice in this regard, I am of the view that the court should not be required to search for and peruse the sequestration file for supplementary information when considering a rehabilitation application. The rehabilitation application should be fulsome and self-contained.

[13] Another disquieting feature of the application is that Lamont, who was vigorous in her quest to sequestrate the applicant's estate, simply disappeared from the scene once the sequestration order was granted, as she herself did not lodge a claim with the trustees for the amount allegedly owed to her by the applicant. This, in my view, points to collusion, which was lucidly explained by Satchwell J in *Esterhuizen v Swanepoel and Sixteen Other*

Cases 2004 (4) SA 89 (W) at 91G-92D:

> The collusion is frequently found in the following pattern of behaviour or *modus operandi:*
>
> (a) A debtor owes money, frequently in significant amounts(s), to creditors(s) who expect and rely upon the anticipated repayments of this outstanding debt. The debtor cannot make payment of the debt;
>
> (b) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to "aid or shield [the] harassed debtor' from his genuine and perhaps demanding creditors(s). *(Epstein v Epstein* 1987 (4) SA 606 (C))
>
> (c) A friend or relative masquerades as a 'creditor' then avers that the 'debtor' has not only failed or refused to repay this 'debt' but has written a letter advising of his inability to pay the 'debt';
>
> (d) An act of insolvency in terms of s 8 (g) of the Insolvency Act 24 of 1936 has now purportedly been committed and the 'creditor' proceeds with sequestration proceedings against the 'debtor';

(e) This 'friendly' application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied and, with the connivance of another, the insolvent has been 'enabled to escape payments of his just debts'.

[14] What is explained above is exactly what transpired in the lead-up to the application for the 'compulsory' sequestration of the applicant, as more fully set out in paras [3] and [4] above. This is a strong pointer to collusion, which is an abuse of the process of this court. The abuse of the insolvency process, albeit in different contexts, has been discussed in a number of cases.[I]

[15] To avoid any manipulation or abuse of the process, I take a view that an applicant for rehabilitation is obliged to demonstrate how the sequestration of his or her estate had been to the advantage of creditors, and if it had not, the reasons therefor. It should make no difference that the sequestration resulted from voluntary surrender or compulsory sequestration, for, in both instances, the benefit to the body of creditors, is the overarching and key consideration. Courts have a particular responsibility to ensure that people who have in the past failed in managing their

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[I] See for example: *Ex parte Hittersay* (*supra*); *Ex parte Steenkamp and Related Cases* 1996 (3) SA 822 (W); *Ex parte Mattysen et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T); *Esterhuizen v Swanepoel and Sixteen Other Cases (supra)'. Ex parte Kelly* 2008 (4) SA 615 (T); *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP); *Huntrex 337 (Pty) Ltd t/a Huntrex Debt Collection Services* v *Vosloo and Another* 2014 (1) SA 227 (GNP). See also Bertelsmann *et al: Mar's Law of Insolvency in South Africa* 9ed at p63.

financial affairs, and in the process caused financial loss to others, are not without more, unleashed back into the economic mainstream.

[16] Back to the present application. I have already remarked that the applicant has not made any explanation of her ownership, or otherwise, of immovable property and her business activities. She has thus shown lack of candour. What is more, she has not demonstrated that she had learnt any lessons from the circumstances which led to her sequestration, and how differently she would manage her financial affairs, if rehabilitated. She seems oblivious to the fact that her sequestration has caused total loss to her creditors, to the extent that no claims were proven against her estate, for the reasons mentioned earlier.

[17] In summary, I am not satisfied that the applicant has met the test set out in *Kruger v The Master and Another NO; Ex parte Kruger* 1982 (1) SA 754 (W) at 762A, which Slomowitz AJ stated as follows:

> 'As have been at pains to point out, what the Master should asked himself was not whether the applicant's insolvency causes him hardship, which it patently does, but rather whether the applicant had shown that he had shown that he was indeed a man who had rehabilitated himself in the sense that he understood her obligations to society in general and the business world in particular, or whether, in all the circumstances, she needed the lesson of time.'

[18] I am of the view that the applicant needs the lesson of time. For this, and other reasons discussed above, I am of the view that I should exercise my discretion against the applicant at this stage. The application for rehabilitation should be refused at this stage.

[19] Before I conclude, I need to mention a disturbing aspect. There is a growing practice in this Division, in terms of which applicants whose applications for either voluntary surrender or rehabilitation had been refused by the court, simply re-launch such

applications, on the same papers, but under a different case number, without mentioning that an earlier application had been refused.

[20] Often such applications are brought by the same firms of attorneys, and in some instances the same advocates are briefed. The hope is obviously that the application would serve before a different Judge, who might view the application differently and grant it. This is an unethical practice, and legal practitioners who engage in it would, without fail, be reported to their relevant professional bodies.

[21] The following order is made:

1. The application for the rehabilitation of the applicant's estate is refused.

T.M.'MAtCGOKA JUDGE OF THE HIGH COURT

DATE OF HEARING : 28 NOVEMBER 2013

JUDGMENT DELIVERED : 24 JANUARY 2014

INSTRUCTED BY : *CASSIE FOURIE ATTORNEY,* PRETORIA