IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No's: 28761/16
36624/16
36626/16
36636/16
DATE: 23/6/2016

In the ex parte applications of:

MARIA CATHARINA FULS Applicant
(ID:…)

DIRK JOHANNES MALAN Applicant
(ID: …)

BAKOALIYE CHRISTABEL THULARE Applicant
(ID: …)

CARINA-MARI SCHOLTZ Applicant
(ID: …)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

….23/6/2016….. ……

DATE SIGNATURE

JUDGMENT

VAN NIEKERK, AJ

[1] The remedy available to an insolvent in terms of sections 3(1) of the Insolvency Act 24 of 1936, referred to as “voluntary surrender of Estate”, has been the subject of various judgments in different divisions of the High Court, and a recurring theme of these judgments is the one of abuse of that remedy to the detriment of creditors. In this regard see *E.P. Erasmus and Another* 2015 (1) SA 540 (GP) and the authorities referred to therein.

[2] In the Erasmus judgment referred to ***supra***, Bertelsmann J extensively quote from other judgments on the same topic, and highlight the various forms of abuse of the process, and the unacceptable features of these applications that have been repeatedly referred to by the Courts. Generally stated, Courts are faced with these applications on a daily basis, and the majority of these applications leave serious doubt whether the granting of the relief sought will be to the benefit of the creditors. In *E.P. Amtzen* 2013 (1) SA 49 (KZP) Gorven J referred to these applications as “….. a fledling cottage industry …”. Suffice it to say that the unacceptable features and abuse referred to in the aforementioned judgments have not disappeared and if anything, the “fledling cottage industry” has grown into a profitable one.

[3] The applications ***in casu*** are not different to those referred to in the other judgments referred to ***supra***. In three of the matters ***in casu*** the founding

affidavits are virtually identical and the same valuator was employed to value furniture and household goods at values, which, in my opinion is unrealistically optimistic, clearly intended to achieve the minimum dividend requirement of 20 cent in the rand. It is not surprising to note that in those applications, the same firm of attorneys represent the applicants. In all these matters in casu, the only realisable assets consists of moveable assets with minimal value. In all these matters there are lists of creditors, the nature and extent of which objectively illustrate that the reason for each of the Applicant's financial woes is the fact that they all to readily availed themselves of credit on offer, and did not proverbially cut their cloth according to their means.

[4] It is trite law that the Applicants should satisfy the court that the surrender of their estates will be to the advantage of their creditors. I am not satisfied that, on the objective facts as set out in each of the applications, and having regard to the remarks of Bertelsmann J. in paragraph 4 of the Erasmus judgment ***supra***, there is any prospect of an advantage to creditors in these applications.

[5] Aside from the aforesaid, I am of the view that the Applicants have failed to satisfy the requirement of proving an advantage to creditors, for the following reasons:

[5.1] Some 80 years after commencement of the Insolvency Act, the National Credit Act 34 of 2005 ("NCA"), with date of commencement being 1 June 2006, was enacted to inter alia promote a fair

marketplace for access to consumer credit, to generally regulate consumer credit, and to provide for debt re-organisation in cases of over-indebtedness.

[**Vide**: pre-amble to Act 34/2005]

[5.2] In terms of the NCA, a debtor is afforded various remedies when faced with a situation where the NCA apply and the credit consumer is unable to pay his/her debts. A consumer may even be completely relieved from his/her obligations in terms of a credit agreement if it is to be found that the credit was granted recklessly (Section 83 of the NCA). Most importantly, when a consumer is unable to comply with his/her obligations in terms of a credit agreement due to over-indebtedness, a mechanism is provided for in the NCA in terms whereof the consumer may apply for a remedy referred to in the NCA as “debt review” (Sections 85 and 86 of the NCA). In terms of this procedure, should it be found that a consumer is indeed over-indebted, a re-arrangement of the debtors obligations may be effected, which includes inter-alia a postponement of obligations in terms of a credit agreement, a restructuring of payments, or even an order that a credit agreement is reckless and thereby exonerating the consumer therefrom. (Section 83 of the NCA).

[5.3] This procedure in terms of the NCA is clearly in the interest of the debtor and the creditor, and to be preferred over the remedy in terms of section 3 of the Insolvency Act, for the reason that the debtor is relieved from financial strain, but is still required to meet his/her

contractual obligations, wholly or in part, and the creditor on the other hand has a better prospect of receiving at least a substantial portion of the outstanding liabilities owed to it by the debtor, if not all, albeit at a later stage. This is clearly a situation which is objectively far more advantageous to a creditor than the situation referred to in the judgments ***supra***, where the creditors often would not even consider to file a claim against the insolvent estate for fear of the risk of having to eventually contribute to costs.

[6] In my opinion it is therefore incumbent on an applicant in an application for voluntary surrender, where it is required to illustrate advantage to creditors, to make a full disclosure of at least the following:

[6.1] Whether or not the Applicant availed himself/herself of the procedures afforded in the NCA for debt review prior to the application being proceeded with, and if not, full reasons for such failure.

[6.2] A comprehensive report of the debt counsellor involved, explaining what procedures were followed, and whether or not the Applicant complied with any debt restructuring arrangements.

[7[In my opinion, it is difficult to foresee how an Applicant in an application for voluntary surrender of his/her estate would be able to convince a Court that the proper application and adherence to arrangements in terms of sections

86-88 of the NCA is not to be preferred in the interest of creditors, compared to the surrender of his/her estate.

[8] Where an application of this nature lacks averments in the respect as set out ***supra***, it does not comply with the requirement that the Applicant should satisfy the Court that it is in the interest of his/her creditors that the estate should be surrendered, and should accordingly be dismissed.

[9] ***In casu***, each of the Applicants listed creditors which ***prima facie*** appears to have entered into credit agreements with the respective Applicants which falls under the provisions of the NCA. No allegations are made in any of the applications to convince me that, in the circumstances, sections 3 of the Insolvency Act is to be preferred to the benefit of the creditors, instead of a proper application of debt relief in terms of NCA.

[10] In the premises the applications are dismissed.

PA VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT