Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF THE WESTERN CAPE CAPE TOWN

CASE NO. 21084/08

EX PARTE:
LIEZEL ELIZABETH FORD Applicant

In re: an application for the voluntary surrender of her estate

CASE NO. 1034/09

EX PARTE:
SONJA VENTER Applicant

In re: an application for the voluntary surrender of her estate

CASE NO. 1035/09

EX PARTE:
CORNELIUS JOHANNES FREDERICK BOTES Applicant

In re: an application for the voluntary surrender of his estate

JUDGMENT

delivered on 5 March 2009

BINNS-WARD, AJ

[1] Three applications in terms of the Insolvency Act, Act No. 24 of 1936, for the voluntary surrender of the respective applicats' estates came before me on the same day in the unopposed motion court.

[2] A consideration of the applicants' founding affidavits in each of the matters suggested that a considerable portion of each of their respective liabilities consisted of debt owed to financial institutions or money lenders, either by way of loans on overdraft or otherwise, or as a consequence of the extension of credit through credit card facilities. On the face of it therefore, it appeared on the papers that the major portion of each of the applicant's debt arose out of 'credit agreements' within the meaning of the National Credit Act, Act No. 34 of 2005, ('the NCA').[1] It was also striking on the papers how disproportionately high the amount of this type of debt was in each case in relation to the relatively modest incomes of the applicants. So, for example, the applicant in case no. 21084/08 had a net monthly income of R10 849,29, after standard deductions, at source, for matters such as medical aid and pension contributions. Notwithstanding this modest income, she disclosed credit card debt totalling 132 299.35 (spread over five different credit card accounts) and loans totalling R281 910.50 (from five different lending institutions). In addition, the applicant disclosed a debt of R37 748.85 owed to a commercial bank which she described as 'vehicle finance'. However, the indication that this debt is unsecured makes me believe that it does not arise out of a standard instalment sale or vehicle lease transaction, but is just another bank loan. A similar picture of gross over-indebtedness in respect of credit

agreement transactions presents on the other two applications under consideration.

[3] In each of the applications, the respective applicants made averments to the effect that they had 'become insolvent by misfortune and due to circumstances beyond [their] control, without fraud or dishonesty on [their] part.' One must assume therefore that in applying for the credit which came to constitute the unaffordable burden that drove the applicants to seek the acceptance of the surrender of their respective estates, the credit grantors involved were fully informed of the apparent limits of the ability of the applicants to service the debt, or could easily have ascertained the position had they made reasonable enquiries before granting the loan or credit facilities in question. This begs the question of how it was possible for the applicants each to be extended credit way beyond their ability to afford. The question is unanswered on the papers. I should mention in this respect that nothing in the evidence indicates, save for the applicant in case no. 1035/09, that any of the applicants' income was previously materially higher than it is now. In the case of the applicant in case no. 1035/09, who did previously enjoy a much higher income, the evidence is that he incurred most of his debt after his earnings had been diminished as a consequence of injuries suffered in a motor vehicle accident. Grounds for cogent suspicion of at least some degree of reckless credit extension therefore present themselves strongly on the disclosed facts in each of the applications.

[4] One of the objects of the NCA is the discouragement of reckless credit extension. The long title to the Act describes the statute as being intended to promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose, amongst other matters, to promote responsible credit granting *and* use and for that purpose to prohibit reckless credit granting and to provide for debt re-organisation in cases of over-indebtedness. Section 3 of the NCA provides amongst other things:

> 'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-
>
> (a)
>
> (b)
>
> (c) promoting responsibility in the credit market by-
>
> i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
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> ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
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> (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
>
> And
>
> (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'.

[5] *'Reckless credit* is defined in s 1 of the NCA as *'the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80'.*

[6] Section 80(1) of the NCA provides:

'A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or

b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

ii) entering into that credit agreement would make the consumer over-indebted.'

Sub-sections 81 (2) and (3) of the NCA provide:

'(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

a) the proposed consumer's-

i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

ii) debt re-payment history as a consumer under credit agreements;

iii) existing financial means, prospects and obligations; and

b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.'

[8] Section 85 of the NCA provides:

'Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-

a) refer the matter directly to a debt counsellor with a request that the debt

> counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
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> b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.'

[9] A consideration of the relevant provisions of ss 86 and 87 of the NCA makes it apparent that an evaluation by a debt counsellor pursuant to a request by the court in terms of s 85 of the Act can lead to the production of a recommendation by the debt counsellor to the magistrates' court, which is empowered on a consideration thereof to declare one or more of the consumer's credit agreements to be reckless credit. Attendant orders can be made setting aside all or part of the consumer's rights and obligations under those agreements, as the court determines just and reasonable in the circumstances; or suspending the force and effect of the credit agreements.[1]

[10] Having regard to the aforementioned features of all three of the applications, I called upon Mr *Heyns,* who appeared in each of the matters, to address argument to the court as to why the over-indebtedness of the applicants should not more appropriately be addressed using the mechanisms of the NCA instead of the blunter instrument afforded in terms of the voluntary surrender remedy under the Insolvency Act. I am grateful to counsel for the detailed written submissions that were subsequently furnished in response to my request.

[11] Mr *Heyns* pointed out that the legislature had been pertinently

1 See ss 86 and 87 of the NCA, read with ss 80 and 83.

cognisant of the Insolvency Act when it enacted the NCA. This much is apparent from the express amendment of s 84 of the Insolvency Act to the extent set out in schedule 2 to the NCA. Counsel stressed in this connection that the legislature had not seen fit to make any changes to the provisions of the Insolvency Act concerning voluntary surrender. Mr *Heyns* submitted that s 85 of the NCA was in any event not applicable in proceedings for voluntary surrender under the Insolvency Act. He argued that the operation of s 85 was dependant on the satisfaction of three requirements; viz. (i) the context of court proceedings, (ii) allegations in those proceedings of overindebtedness by a consumer under a credit agreement and (iii) consideration by a court in those proceedings of a credit agreement. While conceding that the first two requirements had been satisfied, he submitted that there were no credit agreements before the court in the current matters. The argument proceeded that the legislature had intended s 85 to apply only to cases in which the terms of a credit agreement were being considered by a court in the context of a resistance, on the grounds of over-indebtedness, by a credit consumer to a credit-grantor's claim for performance in terms of a credit agreement. In the latter respect counsel laid emphasis on the employment of the term 'a credit agreement' in the section in the singular.

[12] I am unable to agree with Mr *Heyns's* contention on the import of s 85 of the NCA. The language of s 85 is cast in very wide terms. The provision that a court may invoke it despite any provision of law or agreement to the contrary and in any court proceedings affords the

clearest indication of the intended wide ambit for the operation of the section. The limitation of the provision to proceedings in which a credit agreement is being considered does not imply that the proceedings in question are restricted only to those in which the enforcement of a creditagreement is the issue. The reference in s 85 to 'a credit agreement' in the singular is of no significance; see s 6 of the Interpretation Act, Act No. 33 of 1957.2

[13] The provisions of s 4 of the Insolvency Act require an applicant to make full disclosure of his/her assets and liabilities. The court must be fully informed of the applicant's proprietary situation. See *Mars, The Law of Insolvency in South Africa,* 9ed. Bertelsmann *et al.* at 3.15. An applicant for voluntary surrender must also satisfy the court that acceptance of the surrender of the estate in question will be to the advantage of creditors. These considerations, in a matter like any of the three applications before the court where the over-indebtedness is almost exclusively related to debt arising from credit agreements, require the court to take the existence and effect of those agreements into account. The word 'consider' has a broad connotation: in context it denotes that the court proceedings contemplated by the provision must be proceedings in which a credit agreement is taken into account as relevant matter. I think that it is obvious from my description in the opening paragraphs of this judgment that the applications before the court qualify as such proceedings.

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2 Section 6 of the Interpretation Act provides: ***Gender and number***
In every law, unless the contrary intention appears-
(a) words importing the masculine gender include females; and
(b) words in the singular number include the plural, and words in the plural number include the singular.'

[14] The fact that the NCA leaves the provisions of ss 4 - 6 of the Insolvency Act generally unaffected acknowledges that insolvency can arise in a great variety of circumstances, many of them quite unrelated to over-indebtedness arising out of credit agreements as defined in the NCA. Insolvents whose misfortune arises out of credit agreement transactions would be well advised, for the reasons that follow, to take into account the policy and objects of the NCA, and also the special remedies under that Act, before opting to apply for the surrender of their estates under the Insolvency Act rather than availing of the provisions under the NCA.

[15] In all three applications the applicants filed supplementary affidavits in which they confirmed having been made aware by their attorney of record of the court's desire to hear argument on the application of s 85 of the NCA in the context of the apparent character of their over-indebtedness. Each of them testified that they had indeed considered debt counselling, but set out in detail how financially impracticable an arrangement of debt repayment would be. In this regard they each set out in tabulated form how the application of their disposable income over the next seven years to service their current debt would leave them still heavily indebted at the end of the period. For the purpose of their calculations they assumed that all their outstanding debt bore interest at 15.5% per annum and that all of it was exigible at the instance of their creditors. I found these illustrations of little assistance in the circumstances.

[16] The NCA provides a wide range of remedial relief which can be tailored to the justice of the peculiar case; the possibilities extend from disallowance of the recovery of the debt if it is arises from reckless credit, to staying the accrual of interest thereon and ranking liability. There is no indication on the evidence in any of the three applications that proper consideration was given in the context of debt counselling to anything beyond an administered debt collection. In particular there is no indication that the debt counsellors who were engaged by the applicants gave any consideration to obtaining declarations of reckless credit in respect of any of the debts, as contemplated in terms of s 86(7) of the NCA.

[17] In view of the resistance by the applicants to assistance in terms of s 85 of the NCA in the context of these proceedings I have determined not to refer their credit agreement debt for investigation and report by a debt counsellor. It is nevertheless open to them to take the necessary steps that appear to be indicated under the NCA on their own initiative. I am, however, not disposed to exercise the court's discretion in favour of granting their applications for voluntary surrender in the context of their failure to properly explain why their credit agreement related debt is not amenable to administration under the NCA to their own benefit as well as that of those of their credit granting creditors who acted responsibly, as distinct from recklessly, in extending credit.

[18] In the exercise of my judicial discretion it has weighed with me that

the circumstances in which the applicants were able to obtain credit from financial and money-lending institutions to the extent demonstrated on the papers and their failure to avail of current more sophisticated remedies under the NCA legislation have been inadequately explained. It has also weighed with me that the demonstrated monetary advantage to creditors in a voluntary surrender in each case is marginal. The applicants' assets comprise little more than an assortment of second hand goods in respect of which the ability to realise the appraised value in a liquidation sale is quite uncertain.

[19] The argument advanced on the applicants' behalf that in essence it is for them to choose the form of relief that suits their convenience simply by mechanically and superficially satisfying the relevant statutory requirements under the Insolvency Act is a misdirected approach, especially where the grant of the selected remedy is discretionary. Cf. *Ex parte Hayes* 1970 (4) SA 94 (NC) at 96C.[3]

[20] To the contrary, it is the duty of the court, in the exercise of its discretion in cases like the current, to have proper regard to giving due effect to the public policy reflected in the NCA. That public policy gives preference to rights of responsible credit grantors over reckless credit grantors and enjoins full satisfaction, as far as it might be possible, by the consumer of all 'responsible financial obligations'.

[21] In the face of the argument advanced by Mr *Heyns* that the

3 'Die Hof is nie verplig om 'n boedeloorgawe te aanvaar indien al die statutere vereistes nagekom word nie, maar het steeds 'n diskresie, wat natuurlik regterlik uitgeoefen moet word. Om die Hof in staat te stel om dit te doen, moet applikant openhartig wees.' (per van den Heever J, as she then was)

applicants had a 'constitutional right' to acceptance by the court of the surrender of their estates, it also falls to be emphasised, that the primary object of the machinery of voluntary surrender is not the relief of harassed debtors; see *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 309 (N) at 311E (per Holmes J, as he then was). There is moreover a consonance between the objects of the relevant provisions of the NCA and the Insolvency Act; viz. 'not to deprive creditors of their claims but merely to regulate the manner and extent of their payment'. Cf. *Nel NO v Body Corporate of the Seaways Building* 1996 (1) SA 131 (SCA) at 138E. On the (incomplete) facts disclosed in the current applications I have been left with the impression that the machinery of the NCA is the more appropriate mechanism to be used.

[22] For the reasons given I do not consider that it would be consistent with the identified public policy considerations - most particularly the purposes of the NCA expressed in s 3 thereof, and quoted in paragraph [4], above - to grant the applications for voluntary surrender.

[23] In the circumstances the applications under case numbers 21084/08, 1034/09 and 1035/09

A. G BINNS- WARD

Acting Judge of the High Court