REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

In the ex parte applications of:

ANNALISA CONCATO	**Case No: 19753/2014**
WALTER JACQUES VAN STADEN	**Case No: 19756/2014**
MORNE REGINALD GOLIATH & 1 OTHER	**Case No: 19754/2014**
SCHALK WILLEM OBERHOLZER	**Case No: 19795/2014**
PIETER WERNER BOTHA	**Case No: 19755/2014**

Coram: **BOZALEK J**
Heard: **6 NOVEMBER 2014 & 25 FEBRUARY 2015**
Delivered: **18 SEPTEMBER 2015**

JUDGMENT

BOZALEK J:

[1] This judgment concerns five applications for voluntary surrender, all of which are unopposed. They were first called in Third Division (unopposed motion court) in late October 2014 and in each case the applicant or applicants were represented by the same firm of attorneys and counsel. The judge initially presiding expressed doubt, if not outright scepticism, regarding the merits of the applications arising out of their apparent

similarity and, in particular, the fact that in each instance it was contended that upon voluntary surrender a dividend of either 16 or 17 cents would accrue to creditors.

[2] In the light of the Court's comments counsel for the applicants sought a postponement in order to file a supplementary affidavit. The attorney acting for the applicants, Mr Etienne Genis, duly filed an affidavit responding to the above concerns raised as well as the fact that same valuator was used in each case to value the assets of the applicants.

[3] In his supplementary affidavit Mr Genis went to some lengths to describe the nature of his insolvency practice and the procedure which he adopted in handling such applications. He stated that he had developed an insolvency division within his practice which specialised in voluntary surrenders and that as a result many such potential matters were referred to him by a variety of persons. He emphasised that a full consultation was held and instructions taken from every such client. If clients indicated that they wished to persist with such an application detailed instructions were taken and a qualified valuator, Mr Clive Francis, was approached to value each such client's assets. Using this valuation Mr Genis calculates a provisional dividend which might be achieved upon voluntary surrender. This exercise enables him to weed out those clients who are not insolvent or the surrender of whose estates would produce such a low projected dividend that the application would not be feasible. In certain cases the provisional calculation indicated that the projected dividend would be no more than 10 or 12 cents in the rand. In some of these instances his firm would work at a reduced tariff in order to achieve a greater dividend, between 12 and 16 cents. Mr Genis referred to a judgment of this Court[1] where Gamble J sanctioned the capping of the same attorney's fees inter alia to ensure that the projected dividend was achieved. He advised that his firm usually strove to limit its fees to R9 000.00 in each application but that to

[1] *Ex parte: Rhode and 8 Similar Cases (Case 8214/2012, 20 September 2012)*

that sum had to be added the disbursements incurred in such matters. Regarding his firm's insolvency practice as a whole, Mr Genis advised that he received between six and 15 such instructions per month and this had been the case over the past four years.

[4] Regarding the uniformity in the format of the applications the simple explanation therefor was that each was subject to the same legal process and requirements. They were thus formulated to satisfy the Court that the provisions of the Insolvency Act, No 24 of 1936 were complied with, that there were assets adequate to cover the costs of the sequestration, that they would produce a sufficient dividend for creditors and, finally, in each case, to explain what had led to the applicants' insolvency.

[5] Dealing with his firm's relationship with the valuator, Mr Genis explained that it had previously used a Johannesburg valuator who had a branch office in Cape Town but this placed restrictions on the amount of work that the valuator was able to do and his efficiency. He had therefore sought a local valuator with an interest in doing the work which led him to the valuator whom it presently uses. Mr Genis averred that his firm's choice of this valuator was made on a purely professional basis.

[6] In conclusion Mr Genis contended that any suggestion that the applications were a *'scam'* was unfounded, that it was purely coincidental that in all five applications the projected dividend was either 16 or 17 cents and, in all probability, that this was because the applicants' estates were of the same size and a result of his firm's careful sifting of clients wishing to apply for voluntary surrender. The attorney gave a general assurance that his firm conducted a proper, lawful and ethical practice and that it relied in these applications on no documents which were inappropriate or which might mislead the Court.

PRINCIPLES APPLICABLE TO VOLUNTARY SURRENDERS

[7] It is, of course, open to any debtor to seek escape from financial difficulties via the route of voluntary surrender provided that he or she is able to make a proper and bona fide case in compliance with the provisions of the Insolvency Act. Our courts have, over the decades, been wary of the potential for abuse in so-called *'friendly'* sequestrations. It is increasingly recognised, however, that there is a great or even greater risk of abuse and the undermining of the interests of creditors in voluntary surrender applications. In such applications, as was pointed in *Ex parte: Arntzen (NedBank Limited as intervening creditor)* 2013 (1) SA 49 (KZP) at paragraph [12], the need for full and frank disclosure and well founded evidence is even more pronounced.

[8] In his comprehensive and carefully reasoned judgment Gorven J found that voluntary surrender applications require an even higher level of disclosure than do *'friendly'* sequestrations (paragraph [12]), the need for full and frank disclosure being accentuated by the fact that, despite the practice of such applications being brought on an ex parte basis, they do not fulfil the criteria for true ex parte applications (paragraph [6]). In the latter the applicant is the only person interested in the relief which is being claimed and notice is only given to the Registrar of the Court. In voluntary surrender applications, however, creditors have a very real interest in the outcome of the application which spells the difference between the prospect of recovering the applicant's full indebtedness and the prospect that recovery will be reduced by virtue of sequestration (paragraph [6]).

[9] After setting out the requirements and rationale for notice to creditors Gorven J commented as follows at paragraph [8]: *'From this it is clear that in voluntary surrender applications creditors are required to be more alert, proactive and must respond more quickly in assessing whether or not to intervene, than if they had been a party to the application'* and proceeded to make the following further observations:

> *'It does not require great imagination to realise that many, if not most, creditors do not have the resources to routinely and timeously follow up on notices of surrender sent to them by post. Even if they follow up, they may well decide that it is not worth throwing good money after bad by intervening and opposing the application. This may be particularly so in relatively small estates where their prospect of recovering legal costs, even if they successfully oppose the application, is remote. This renders creditors peculiarly vulnerable to voluntary surrender applications which, at a superficial level, make out a case that sequestration is inevitable. In such a case an overburdened court, confronted with an unopposed application, may not scrutinise the application as carefully, and thus become aware of material non-disclosures, as it would do if it were opposed. A further reason for requiring a higher level of disclosure in voluntary surrender applications, is that an outright order can be given on the first appearance in court whereas, in most sequestration applications, a provisional order precedes a final order in a two-stage process.'*

[10] Gorven J referred to the tightening up, just over a decade ago, in the various divisions of the High Court on so called *'friendly*' sequestration applications (paragraph [9]). He went on at (paragraph [12]) to furnish some of the reasons for his view that full and frank disclosure and well founded evidence was necessary in voluntary surrender applications. These included the failure of applicants to appreciate the need to satisfy a more rigourous test than for both the provisional and final stages of sequestration applications as regards the advantage to creditors, the fact that the Court had no alternative, in most instances, but to rely on the founding papers and the fact that since the debtor is the applicant he/she has a direct interest in the application succeeding.

[11] The learned judge concluded *'Voluntary surrender applications therefore require an even higher level of disclosure than do 'friendly' sequestrations, if the Court were to be placed in a position where it can arrive at the findings and exercise the discretion set out in sec 6(1) of the Act'.* In this regard he reasoned further (at paragraph [13]) that, in these circumstances, it was appropriate, at the very least, to require compliance with the guidelines set out in *Mthimkhulu*[2] which can also be applied to voluntary surrender

[2] Mthimkhulu v Rampersad and Another (BOE Bank Ltd, Intervening Creditor) [2000] 3 All SA 512 N

applications. One important such guideline is that *'…(c)are must be taken to put up a full and complete list of the respondent's assets and in particular and more importantly, to put up acceptable evidence upon which the Court can determine not only what their market value is prior to sequestration but what they will realise post sequestration at a forced sale … Very often a value is put to household furniture and effects and second hand motor vehicles which bear no relationship to their true value'*. See *Mthimkhulu* at 517 B – H.

[12] Gorven J referred to sequestrations where even the friendly creditor makes no effort to have a trustee appointed or to prove his claim, no other creditor takes steps to prove a claim because of a fear of contribution and the debtor waits for the dust to settle and, with his old creditors off his back, carries on business as normal, a situation referred to in *Mthimkhulu* at 514 G – H. In a comment which could equally apply to some voluntary surrender applications Gorven J stated (at paragraph [10]): *'In situations such as this the sequestration of the debtor's estate cannot be said to have been to the advantage of creditors. Such applications constitute an abuse of the process of court and undermine the rights and interests of creditors. The only person who benefits is the debtor, often at the expense of creditors'.*

[13] He went on (at paragraph [11]) to remark pertinently about voluntary surrender applications which '…*have begun to proliferate in this division. A fledgling cottage industry has reared its head. As was the situation with 'friendly' sequestrations in Mthimkhulu, many of these take a standard form with almost identical averments and are drafted by a small set of attorneys who have chosen to specialise in such applications. In most cases the estate is small, as is the case in the present application.'* I pause to observe that, in my experience, these remarks could be made with equal force as regards the proliferation of voluntary surrender applications in this Division in recent years.

[14] A further factor relevant to voluntary surrender applications is the relatively recent institution of machinery for debt relief in terms of the National Credit Act, No 34 of 2005 ('the NCA'). Generally speaking, these mechanisms provide for no immediate *'clean slate',* but rather for defaulting debtors to seek an agreement or order of Court rearranging their debt commitments to creditors and for reduced payments, often over an extended period. Therefore, although potentially offering substantial relief, such debt provisions might appear, to some debtors at least, as onerous in comparison to the attractions of surrendering one's estate particularly if this has little or no immediate effect upon one's living circumstances.

[15] The existence of these new debt relief measures and the frequent disregard thereof in some voluntary surrender or friendly sequestration applications has been previously noted in this Division. In *Ex Parte Ford and 2 similar cases*[3] in which three voluntary surrender applications in terms of the Insolvency Act were brought, an adequate explanation was sought by the Court why, when much of the debt fell within the ambit of the NCA and credit had been granted recklessly, the various applicants had failed to avail themselves of the remedies available under the NCA.

[16] The debt relief provisions of the NCA are of recent vintage and in deciding whether an advantage to creditor has been proved the Court must also bear in mind that the machinery for surrender is not necessarily to be preferred above that of execution in the ordinary course including that by way of the provisions of sec 65 of the Magistrates Court Act, No 32 of 1944. As was pointed out in *Ex Parte Pillay*[4] the fact that the debtor may consider such execution onerous or constitutes *'harassment'* to them has no relevance in relation to the merits of an application for surrender.

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[3] 2009 (3) SA 376 (WCC)
[4] 1955 (2) SA 309 (N) at 311

[17] As has been noted, the requirement that the Court must be satisfied that it will be to the advantage of creditors if the estate were to be sequestrated must be contrasted with the less stringent test for a provisional or final order, even in a friendly sequestration. This is fitting inasmuch as the debtor has complete knowledge of his own financial circumstances, which he is bound to disclose and accordingly bears the onus of proving, on a balance of probabilities, that there will be the requisite advantage to the body of creditors.

[18] Finally, a striking feature of most if not all the applications of this ilk which I have seen is that the debtor includes in the list of his/her realisable assets virtually every item of furniture and household equipment necessary for daily life. Section 82 (6) of the Insolvency Act precludes the sale of such goods although a debtor may renounce that protection in favour of his creditors in order to establish advantage to creditors[5]. Such a renunciation should, in my view, be explicit.

[19] In *Ex Parte Rhode and 8 similar cases* (supra) Gamble J dealt with nine applications for voluntary surrender in this Court which were also brought by the same firm of attorneys as act for the applicants in the present matters. As in the present matters all procedural requirements were met, no creditors had sought to intervene and in each case the assets identified by the various applicants comprised only movables and mostly household effects and furniture.

[20] Although Gamble J raised a number of queries regarding the applications, notably, that they were obviously being brought on a *'batch'* basis by the attorneys and that the valuation of second-hand furniture must remain *'very speculative'*, he ultimately granted orders of voluntary surrender in each instance. The judgment gives no indication what the projected dividends were in each case. Regarding the batch nature

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[5] See *Ex parte Anthony en 'n Ander en 6 soort gelyke aansoeke* 2000 (4) SA 116 (C) at 125

of the applications Gamble J considered (paragraph [23]) that it was neither *'appropriate [nor] fair to dismiss applications of this sort simply because the legal practitioner has sought to legitimately exploit an opportunity in a niche market'*. He added that what was important was *'to ensure that the process is conducted in accordance with the law and that the interests of the general body of creditors are given due and proper consideration'*. As far as they go, I have no difficulty with these propositions provided always that every such application is dealt with by the practitioner on its merits i.e. on the basis of reliable and, where appropriate, detailed information, is bona fide and is not being shoe-horned into some pre-determined formula designed only to achieve a favourable result.

[21] It would appear that in *Ex parte Rhode* the applicants' attorney had also alluded to the appointed trustee *'where possible (affording) the insolvent or his/her family an opportunity to buy the assets back'*. Gamble J posed (at paragraph [19]), in passing, the legitimate question as to exactly how the trustee agreed a *'buy-back price'* with the insolvent and where the insolvents found the money to fund this purchase. He noted (at paragraph [27]), furthermore, that in all the matters serving before him the applicants were entitled to retain a large number of their assets in terms of sec 82(6) of the Act as household furniture *'and other essential items of subsistence'*. It would appear that in each such instance, however, the applications had contained a waiver by the applicant/s of his or her rights under this section of the Act. It is a matter of concern that no such waivers are contained in any of the matters presently under consideration. This has implications for the bona fides of the applicants, a question to which I will revert.

THE SWORN VALUATIONS

[22] As has been noted in many recent judgments of the courts dealing with friendly sequestrations and voluntary surrenders, the question of the accuracy and integrity of

the valuation is of primary importance. In *Nel v Lubbe*[6] Levinson J, stated (at 111G), albeit in the context of the valuation of fixed property, that the court would not blindly accept the assertion of the expert providing the valuation without a full explanation. In *Ex Parte: Bouwer and Similar Applications*[7] Makgoka AJ quoted with approval (at paragraph [1]) from the 9th edition of Mars at page 63 as follows:

> *'On the other hand, insolvency practitioners are tempted to present a rosy picture of the debtor's affairs that bears little semblance to reality, resulting in an estate being declared insolvent that renders little or no dividend for creditors once the fees of the various participants in voluntary surrender proceedings have been deducted and the administration costs have been paid.*
>
> *Such abuses of the process have led the courts to insist ever more stringently on exact information regarding the debtor's affairs being placed before them and to demand a realistic calculation of the potential dividend.'*

[23] More pertinent to the present matters Bertelsman J, in *Ex parte Erasmus and Another*[8], observed as follows (at paragraph [4]):

> *'The probability that second hand furniture of uncertain age and quality will set an auction on fire is obviously slim. This has negative implications for any intended surrender of a small estate, because the proceeds of meagre possessions must cover the administration costs before the claims of preferred and secured creditors can be considered.*

In *Ex parte Snooke*[9] Daffue J, expressed approval for the view in Mars that it is a lacuna in our present legislation that no provision is made for judicial oversight of the actual results of the liquidation process. The learned Judge stated:

> *'Judges are not informed whether the dividend that was held up to creditors in the application was in fact realised. I decided some time ago, when having to consider rehabilitation applications to arrange for perusal of the applicable applications for voluntary surrender or sequestration to obtain personal knowledge of the allegations made under oath and have no hesitation to state that the averments under oath in so-*

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6 1999 (3) SA 109 (W)
7 2009 (6) SA 382 (GNP)
8 2015 (1) SA 540 (GP)
9 2014 (5) SA 426 (FB)

called friendly sequestrations and voluntary surrender applications in order to prove advantage to creditors are far from the truth in many instances. My own experience is that sequestrations in the majority of cases eventually turns out not to be to the advantage of creditors is no surprise at all. This much is apparent from a survey conducted more than three decades earlier…'

THE FURTHER CONDUCT OF THE MATTERS

[24] These matters came before me only after the applicants' attorney had filed his supplementary affidavit responding to the concerns expressed by the Court which initially heard them. After hearing argument from applicants' counsel on the merits of the applications. I remained troubled by the formulaic and often superficial nature of the applications and the striking similarities between them, not only in their format and general allegations, but in the projected dividend which, as mentioned, was invariably either 16 or 17 cents.

[25] As a general rule in this Division no voluntary sequestration order will be granted where the projected dividend is less than ten cents in the rand. However, even where the dividend is projected to be 16 or 17 cents, particularly where no fixed property or a major moveable asset is involved and achieving the dividend relies solely on the sale of household items, equipment and furniture, considerable doubt often remains as to whether even this level of dividend will be reached. With this concern in mind and in light of the fact that applicants' attorneys have a specialised insolvency practice in which applications for voluntary surrender are regularly brought in large numbers, it struck me that in considering whether the projected dividends would be achieved and whether such orders would be in the interests of creditors, it could well be of assistance were the applicants' attorney to furnish particulars of the outcome of similar applications in the recent past. In this manner, rather than relying solely on the applicants' subjective predictions and dividend projections, the Court would have the benefit of a retrospective view of the outcome of similar voluntary surrender applications and this might ultimately

allay any concerns that projected dividends would not be achieved or that no benefit to creditors would ensue.

[26] In the circumstances I postponed all the applications and directed the applicants' attorney to furnish an affidavit setting out the following particulars relating to all voluntary surrender applications brought by his firm in this Division in the final term of 2013 and the first term of 2014 provided that, if these numbered less than 30, the third term of 2013 should also be covered. The particulars sought were:

a) applicant's name and case number;

b) whether a trustee was appointed to the estate and, if not, the reason therefor;

c) the sale value of the assets in the applicant's estate and the projected dividend to creditors (both) as initially set out in the application;

d) whether the assets in the estate were sold and, if not, the reason therefor;

e) the value actually obtained upon sale of the assets in the applicant's estate after surrender;

f) the actual dividend paid to creditors and, if none was paid, the reason therefor;

g) whether any creditor was required to pay a contribution towards the costs of administration of the estate and, if so, how much;

h) any further information which the deponent considered might be relevant to the above questions.

[27] In due course a considerable amount of information in tabulated form was received and the Court is indebted to the applicants' attorney, Mr Genis, for the trouble taken. In his covering affidavit he described the procedure which generally follows the granting of a voluntary surrender order. In many respects the picture which emerges is a disturbing one. Firstly, it would appear that the initial step, the Master's appointment of a trustee, can take anywhere between two weeks to six months as a result of delays in that office. Thereafter the curator sends a circular letter to creditors giving a provisional report on the assets and liabilities in the estate. The first meeting of creditors follows

and should take place within a month but often takes many more months because of delays within the Master's office and the necessity to publish details of the meeting in the Government Gazette. A final appointment certificate is provided to the curator only after the Master has received the minutes of the first meeting. Once the curator has received his final appointment certificate he must arrange a second meeting of creditors within three months. In due course the curator is required to send a formal report by registered post to all known creditors in terms of sec 81 of the Act indicating all the assets and liabilities in the estate. Notice of the second meeting of creditors must also be published in the Government Gazette and in newspapers circulating in the area in which the insolvent lives. It is only at the second of meeting of creditors that the curator receives an instruction from creditors on how to deal with assets in the estate.

[28] For different reasons an analysis of all the cases reported on by the applicants' attorneys also reveals a disturbing picture. The report dealt with a total of 90 matters in which voluntary surrender orders were made between November and December 2012, in the final term of 2013 and the first term of 2014.

[29] Eleven (11) of these estates had a fixed property as an asset. In each of these cases there was a major secured creditor in the form of the mortgagee which proved a claim and which, in all probability, would be the only creditor to receive a dividend. Having regard to the total number of cases reported on it appear that the projected dividend to unsecured creditors was never more than 22 cents or less than 14 cents in the rand. In 40 of the 90 cases the projected dividend was 16 cents and in 26 cases 17 cents. Thus, strikingly, in percentage terms the projected dividend in 73% of the cases was either 16 or 17 cents in the rand.

[30] The most conspicuous feature revealed by the report, however, was that in the great majority of cases the arrangement eventually arrived at was that the insolvent

bought back the assets in his surrendered estate, almost invariably by way of payments in instalments.

[31] The first period reported on by the applicants' attorney dealt with applications brought in the last terms of 2013 and the first term of 2014. Of a total of 64 cases, eight involved estates including fixed property as an asset. Of the 56 remaining cases it is explicitly stated that the insolvent's movable assets were sold back to him in 50 of those cases. Of the remaining six cases in one instance it is unclear what the outcome was. In the remaining five cases, however, it is clear, principally through the fact that the amount recovered exactly matched the value attributed to the insolvent's estate by the valuator, that a similar arrangement was arrived at with the insolvent i.e. he or she purchased his or her assets back.

[32] The applicants' attorney then reported on applications for voluntary surrender in the period November/December 2012. These numbered 26 of which three involved estates having fixed property as an asset. An analysis of the outcome in the remaining 23 cases is somewhat complicated by the fact the applicants' attorney changed his method of reporting and made no mention of any cases where the creditors had resolved to sell the insolvent's assets back to him/her either by way of instalment payments or by way of a lump sum payment. Reading between the lines, however, it would appear that such an arrangement was reached in 20 of the remaining 23 cases, once again since in the vast majority the precise prior valuation placed on the insolvent's assets by the valuator had been recovered. In two such cases it is made explicit that such an arrangement was made. In the remaining three cases, although no mention of an auction is made, it would appear that the surrendered estate was sold but that a sum considerably less than the valuation sum was recovered.

[33] In summary, on an analysis of all the periods covered by the report the overall picture is that, out of a total of 79 cases in which there was no fixed property asset, the insolvent/s purchased back his/their assets in at least 70 such cases i.e. nearly 90% of the total. Furthermore, in the great majority of these instances it appears that the insolvent purchased his assets back by way of payment in instalments.

[34] The applicants' attorney felt constrained to explain the prevalence of this arrangement, mainly on the basis that the curator/trustee had recommended this option to creditors. Further, according to Mr Genis, it is in the best interests of creditors that an insolvent is given time to purchase his assets back by way of instalments. He reasoned that such assets have much more value for the insolvent at the estimated forced sale value than for other potential purchasers. This way, he opined, the insolvent retains his dignity, can make a positive contribution towards the economy and learns to budget monthly for the payment of these instalments. He also stated that where assets were purchased back by the insolvent in this manner there was no chance of a contribution having to be made by creditors because the monies which would ultimately be recovered would always be enough to meet the costs of the sequestration and the projected dividend. Mr Genis added that where, by contrast, an auction was held there was always the risk that no interest would be shown or the goods would be sold for such a low price that the costs of sequestration would not be covered and thus the creditors would receive no dividend. It should be noted, however, that judging by the report auctions are seldom, if ever, held.

[35] It is by no means clear to me, however, that such *'buy-back'* arrangements are always, or even in the majority of cases, in the interests of the body of creditors. Firstly, many creditors will not trouble to prove a claim. This is borne out by Mr Genis' report which in three instances reveals that of the monies recovered, portions thereof were paid into the Guardian's Fund because an *'insufficiency of claims'* were proved. In

another five cases, the entire proceeds recovered, in many cases quite substantial, were paid into the Guardian's Fund because no claims at all were proved.

[36] There are other reasons why these *'buy-back'* arrangements, carried out on the scale revealed in these applications, raise serious doubt as to whether they serve the interest of creditors. The assets are valued on a forced sale basis and yet, without any auction being held, the insolvent invariably purchases them back at this value and in most instances, by way of instalment payments over an extended period. Life goes on virtually unchanged for the insolvent. None of his household goods are removed and he/she continues to utilise and enjoy all his/her household goods and assets, until, in due course, he reaches an arrangement with the trustee to purchase them back, almost always by way of instalments. During this period the debtor is immune from his existing creditors by virtue of the voluntary surrender order which has been granted.

[37] Another disturbing aspect is what appears to be the virtually pre-ordained nature of the arrangement whereby the insolvent purchases his estate back. I find it highly improbable that the applicants' attorney is not aware that this arrangement will in all likelihood prevail upon the granting of a voluntary surrender order or that this very outcome is not discussed with the client prior to the application being brought. The percentage of cases in which the arrangement is reached (90%) is too great, in my view, to allow of any inference other than that the would-be applicants are fully apprised that if an order is granted they will be able to purchase their assets back at the forced sale valuation by way of monthly instalments. In other words, except where immovable property forms part of the estate, there is virtually a pre-determined outcome to all of the successful voluntary surrender applications brought in batches by the applicants' attorneys.

[38] In these circumstances it seems to be that the interests served by such voluntary surrender orders are those of professional persons involved, namely, the attorneys, the valuator and the trustee, besides, of course, those of the insolvent him or herself. The former earn fees and the latter are able to retain all their assets and then purchase them back, generally over time, at the forced sale valuation. This they achieve without being pestered by their creditors or without having to undergo the rigours of paying them by way of an arrangement or rescheduling made under the NCA.

[39] It does not appear from *Ex Parte Rhode* that Gamble J considered the question of whether an application for voluntary surrender could be said to be bona fide where all the indications are that its outcome, in the event of an order being granted, was virtually predetermined, namely, the insolvent buying back his assets at the forced sale valuation by way of instalments. Certain further fundamental questions raise themselves in this regard. Why is the forced sale valuation invariably used to determine the purchase price of the insolvent's household goods and furniture when no such forced sale is in fact taking place? In this regard it is also instructive that Mr Genis, in motivating for the '*buy-back'* arrangement, himself appears to have limited faith in forced sale values being obtained on auction. No light is shed on the question of whether the trustees seek to obtain a better price from the insolvent other than the forced sale valuation level. Is this not a case of the applicants *'snatching at a bargain'*? A further question remains how the insolvents, whose incomes are always eclipsed by their expenses, manage to find the resources to repurchase their household furniture and goods.

[40] One of the primary requirements for a voluntary surrender application to be successful is that it must be made bona fide. The facts which have been brought to light by the report from the applicants' attorney, lead me to conclude that these buy-back arrangements are largely pre-ordained. In none of the applications before me, however, was any mention of such an arrangement made by the applicant/s. I have little doubt

also that no mention of any such arrangement was made in the 90 cases which the report covers. In my view on this ground alone it can be concluded that the bona fides of these applications is open to serious doubt. At the least I would expect an applicant to disclose that he has been advised of the likelihood of such an arrangement and that he intends to take advantage thereof, if circumstances permit. Such disclosure, together with an explanation of how the applicant will finance such a re-purchase, would afford the Court an opportunity to realistically consider whether an order is in the interests of creditors or whether the application for voluntary surrender is merely a self-serving exercise.

[41] In the present matters it also does not inspire confidence that the same valuator is used in each instance and that his valuations follow the same format, namely, a pro forma affidavit, a table of the household goods and furniture, their estimated value and their condition being described as either *'average', 'fair'* or *'good'*. The valuator's affidavit refers only to a *'visual'* inspection of the assets. It is not stated when and where the inspection took place, leaving open the possibility that it was done by looking at photographs of the assets. Very sparse details of the goods are furnished and, other than these basic details, the valuations are unmotivated.

[42] Of course this is not to say that each and every arrangement whereby an insolvent purchases back his estate is not in the interests of creditors. Every case will have to be determined on its own merits. Obviously, moreover, care must also be taken not to confuse the role of the Court, which must grant or refuse an order of voluntary surrender, with that of the trustee who must dispose of any surrendered estate to the best advantage of, and on the instructions of, the creditors.

[43] Finally in regard to the grave reservations I have regarding the validity of these re-purchase arrangements, it stands to reason that if an applicant is prepared to

purchase his assets back at their forced sale valuation because of the value he attaches to them, he/she may very well be prepared to pay a premium above such a valuation. No explanation has been furnished by the applicants' attorney as to why curators and/or creditors appear never to negotiate with the insolvent for a higher purchase price than the forced sale valuation.

[44] I proceed now to consider the various matters on an individual basis.

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[45] In this as well as the other matters all the technical requirements for a voluntary surrender are met in the applicant's papers. She submits, based on a sworn valuation of her goods, and after making provision for the costs of the sequestration, that there is sufficient residue in her estate to pay an acceptable dividend to her creditors, namely, the inevitable 17 cents in the rand. The applicant records liabilities totalling some R290 000.00 all arising from short term credit extensions. Provision is made for attorney's costs in the amount of R14 132.98.

[46] There are several puzzling aspects and omissions in the applicant's papers, however. She furnishes a salary slip in support of her monthly income indicating that she earns commission on top of her basic salary but there is no explanation whether the commission earned in that particular month was greater or less than what she normally earns. The applicant also annexes a policy schedule to prove compulsory *'insurance',* the bulk of which is made up of motor vehicle cover in the amount of R225.49 per month, one of her monthly expenses. She also attributes R2500.00 to her monthly petrol expenses. In her statement of affairs the applicant makes reference to once having had a motor vehicle which was re-possessed by the bank. She then explains that she does have a motor vehicle but it was given to her by her brother. No explanation is furnished as to why this is not included in her list of assets.

[47] A sworn valuation of the assets in the applicant's estate, which appears to comprise the entire contents of her household, including bedroom and lounge furniture, is attached in the amount of R79 800.00. It includes four television sets and a wide variety of electrical appliances. Many of the main domestic appliances appear to be duplicated; for example there are four refrigerators or freezers and two microwaves. There is no explanation for this rather lavish array of electronic equipment and appliances. In her statement of affairs the applicant gives a confusing and, at times, contradictory account of how she was divorced and left with the responsibility of paying a bond on a house when her husband disappeared.

[48] As in many of the statements of affairs in these matters, much of the applicant's account is taken up with personal details, in this case relating to her marriage, which are entirely irrelevant to her financial position. The nature and quantity of this type of irrelevant personal material leaves one with the distinct impression that its purpose is simply to evoke sympathy for the applicant/s.

[49] Notwithstanding the plethora of irrelevant detail which the applicant furnishes, little detail of the employment which she presently enjoys is given nor how her income is made up other than as reflected in one payslip. Nor is any explanation given as to why the applicant has not used the provisions of the NCA to re-schedule her debts and pay monthly instalments to her creditors.

MR S.W OBERHOLZER: CASE NO. 19795/2014

[50] The applicant discloses assets in his estate of R70 000 odd, the bulk thereof comprising a motor vehicle valued at some R60 000.00. He gives his monthly salary as just less than R11 000.00 and his monthly expenditure as R13 305.00. It is unclear, however, by whom the applicant is employed and what his monthly income is. He states that he earns only on a commission basis. All that he attaches by way of proof of

earnings is a document entitled *'Benefit Report - Career'* indicating that he was paid just less than R11 000.00 in August 2014 by way of commission. It falls well short of satisfactory proof of his earnings.

[51] Notwithstanding the applicant's claim that he earns monthly income of only R11 000 odd he shows monthly expenditure of R2 766.00 on a medical aid fund and R3 500.00 per month on fuel. If the motor vehicle is sold on auction much of the last mentioned sum will be available to creditors. A utility bill is attached to show the monthly expense for utilities on a certain property. The cover page is missing, however, and details of how the applicant and his family are accommodated are sketchy in the extreme. The applicant declares that his wife pays the monthly house rent, also from commission earnings, but no details are given of her income or monthly rental.

[52] The great bulk of the applicant's debts, which he puts at R240 000 odd, is made up of short term credit. He projects a dividend of 17 cents in the rand to creditors. The applicant appears to state that he was subject to a debt rescheduling plan in terms of the NCA but advises that this was cancelled. The only supporting documentation furnished merely indicates that he was declared over-indebted in 2011. The applicant's statement of affairs is replete with historical and irrelevant detail regarding businesses that failed six years ago.

[53] According to the sworn valuation furnished the balance of the applicant's assets consist of some couches, a table, some benches, four beds, a washing machine, a cell phone and little else. Again there is no explanation of how he and his family will survive if these goods are sold.

MR P.W BOTHA: CASE NO. 19755/2014

[54] The applicant states that he is a production manager earning R6 785.00 per month. In total his creditors' claims amount to R164 000.00. He seeks to surrender an

estate with assets valued at R53 500.00 based on a projected dividend of 16 cents in the rand. The applicant's payslip indicates that he is an employee of a photography business and that a considerable portion of his salary is made up of commission. No explanation is given by the applicant of the basis upon which, as a production manager, he earns commission or what his monthly commission earnings are.

[55] Subtracted from his salary are deductions of R3000.00 per month in respect of a cash advance and a staff loan. The cash advance, presumably a once-off deduction, would indicate that his normal salary is at least R2000.00 more but this is left unexplained. The staff loan details appears to suggest that he is indebted to his employer in the amount of R40 000.00 odd. No such debt is reflected in his statement of affairs, however. That statement indicates that the applicant's total debt amounts to R164 000.00, all short term credit or goods sold and delivered.

[56] One of the major expenses the applicant lists is petrol at R2300.00 per month. No motor vehicle is reflected as an asset in the applicant's estate and he states that his wife pays for her own transport. Nor is there any indication that this vehicle may have been purchased on credit with ownership remaining vested in the seller or financier. The applicant gives a long and generalised account of a business which he once had which failed but without furnishing any dates or other relevant detail. Again, however, the statement of affairs is full of much irrelevant and sympathy-seeking detail. Although the applicant mentions an unsuccessful debt review process under the NCA no supporting documentation is furnished.

[57] As in many of the other applications the applicant's assets comprise only the major items of furniture and appliances which would be found in a family household. No explanation is given as to how the applicant, his wife or his children would survive were all these goods to be sold by auction, no doubt because this is not what is envisaged.

MR R. GOLIATH AND ONE OTHER: CASE NO. 19754/2014

[58] The applicants are married in community of property and seek to surrender their joint estate which is made up of household goods, furniture and equipment with an estimated forced sale value of R75 000.00. Their liabilities total R275 000.00 and are made up of short term credit from various suppliers and retail stores. They project a dividend of 17 cents in the rand. The applicants' combined income is some R17 000.00 per month. The first applicant's payslip reveals that he earns a small basic salary plus *'incentive'* monies which appear to be in the nature of commission since he is employed as a *'field marketer'*. He gives no explanation of what his commission earnings are, however. His expenses are set out but no proper vouchers are furnished.

[59] An amount of R2500.00 per month is attributed to the lease of a motor vehicle and insurance and a further R2500.00 per month for petrol but no vehicle forms part of the joint estate and no explanation is given as to why these expenses are incurred. Again there is no indication that the vehicle was purchased on credit either.

[60] The sworn valuation reflects the standard appliances, furniture and equipment to be found in a household but again no explanation is given as to how the family would exist without these goods which includes beds, a dining room table, lounge suite and major appliances. As noted by the Master in his report, the applicants do not state whether they rent or own the property at which they reside. No explanation is furnished as to how the applicants and their children will survive if all their assets are sold.

[61] The applicants state that they made an unsuccessful attempt at debt consolidation under the NCA but, strangely, were told by the consultant that they could not be helped because *'the premium'* would be too high and they state that they would also have to pay for years even if they could pay this premium. The explanation is unsatisfactory to say the least.

MR W.J. VAN STADEN: CASE NO. 19756/2014

[62] The applicant seeks to surrender an estate having assets with a sworn valuation of R37 900.00. These assets comprise household contents save for a vehicle which is valued at R13 700.00. Against this the applicant declares liabilities in the amount of R88 000.00 all being described as monies loaned. One creditor is given as a firm of attorneys, without explanation of how the applicant came to borrow monies from it. The applicant declares an income as a waiter of approximately R9 000.00 per month. The supporting payslip describes this as *'normal time payment'* but contains no figures for certain other categories of payment for which it makes provision. Although the payslip makes provision for deductions, none are reflected.

[63] After provision for the total costs of sequestration in the amount of R23 000.00, of which more than R12 000.00 comprises legal fees, the applicant projects a dividend of 16 cents in the rand. He gives no explanation of how he would live should all his household items be sold on auction, a further indication, in my view, that, no sale of the applicant's assets to any third party is envisaged.

[64] The applicant gives a vague account of being under debt review for a year but finding himself unable to pay the monthly premium of R4 800.00 per month. The only supporting documentation furnished indicates that the applicant was approved for debt review in July 2009. No explanation is forthcoming as to what transpired in this process in the intervening five years before the present application was launched. He states further in this regard, improbably, that three months prior to the present application all his creditors contacted him seeking increased premiums.

[65] The applicant's explanation for falling into financial difficulties is a mixture of generalised statements and irrelevant detail. Central to the explanation is the applicant's loss of his pub business. When one looks at the supporting documentation it would

appear that he lost this business some eight years prior to the launching of this application. The lapse of so much time renders that business' failure largely irrelevant to the applicant's explanation for his present financial difficulties.

[66] In another part of the applicant's explanation he states that he has lost his motor vehicle as a result of his financial difficulties. This is at odds both with his monthly expenses and his list of assets which includes a motor vehicle and fuel costs. In his report the Master notes that there is no proof of the applicant's indebtedness to the list of creditors set out in his statement of affairs.

CONCLUSION

[67] Having regard to the evidence concerning the outcome of scores of similar applications brought by the applicants' attorney over the past few years, more particularly those where the estates comprise only movable property consisting mainly of household furniture and goods, I have very little reason to doubt that the most likely outcome, should orders of voluntary surrender be granted herein, will be that the applicants will purchase back their assets at the forced sale valuation. Where they are unable to pay off this sum in one payment (in itself, a troubling contra-indication of insolvency) they will be afforded an opportunity to do so by way of instalments. In fact, I would go so far as to say that the probabilities are overwhelming that these applications were brought by the applicants with just such an outcome in mind. The result, in all likelihood, will then be that the applicants will continue to enjoy the possession and use of their assets but they will divest themselves of their creditors. In each case a substantial portion of each applicant's patrimony will be reduced by the fees which the attorneys will earn in each such application together with the fees of the other professional parties involved, including the valuator.

[68] Whether this outcome will serve the interests of the creditors, however, is most unlikely. Many creditors will no doubt not prove claims for the reasons given by Gorven J *in Ex Parte Arntzen*. In that event, whatever monies are recovered will be paid to the Guardian's Fund. Finally, in this entire process all the sophisticated debtor relief provisions created by the NCA will have been largely ignored. At best for the creditors, in the unlikely event that all prove claims, they will receive a dividend of no more than 16 or 17 cents in the rand. Even in such cases, the lengthy period between the granting of an order and the realisation of the estate, coupled with the fact that the forced sale valuations will generally only be paid by the applicants over time, means that the creditors will receive such dividends in paltry amounts, trickling in over years.

[69] For all these reasons I do not consider that the applications are either bona fide or that the orders of voluntary surrender will be to the advantage of creditors. My conclusion that the applications are not bona fide is informed also by the various shortcomings which I have identified in the applications as a whole including but not limited to the superficiality of the applications, the similarity in the averments made and the uncanny coincidence of the projected dividend being either 16 or 17 cents in the rand. Apart from these fatal defects, when regard is had to the lacunae in the individual applications, which I have set out above in some detail, I consider that the applicants have either not made full and proper disclosure of their affairs or have not employed, or properly utilised, alternative statutory measures to reach an accommodation with their creditors. I am therefore unpersuaded, ultimately, that it will be to the advantage of creditors that orders of voluntary surrender be granted.

[70] In the result each of the applications for voluntary surrender is refused.

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BOZALEK J

APPEARANCES

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