REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Before the Hon. Mr Justice Bozalek

Hearing: 29 April 2016
Judgment Delivered: 24 May 2016

In the ex parte applications of:

ANGELIQUE MARLENE CONNOWAY	**Case No: 5873/2016**
JUANITA RUITERS	**Case No: 6168/2016**
LEON TAYLOR & 1 OTHER	**Case No: 6167/2016**
SA-AIT AND NABAWEYA JOSEPH	**Case No: 6166/2016**
PETER DAVID EDGE	**Case No: 6002/2016**

JUDGMENT

BOZALEK J

[1] Before me are five applications for voluntary surrender all of which were unopposed and moved in Third Division on 29 April 2016. In four of the five cases the applicant was represented by counsel instructed by the same firm of attorneys as were responsible for a batch of applications dealt with in a judgment I handed down on 18 September 2015, *Ex parte Concato and Four others* [2015] ZAWCHC 136 (September 2015); [2016] 2 All SA 519 (WCC).

[2] More than seven months have passed since that judgment and since I last dealt with the unopposed roll in Third Division. Notwithstanding the grave reservations I expressed in that judgment regarding applications for voluntary surrender brought in a standardised and batch form by that firm, very little, it seems to me, if anything, has changed and these applications are still being brought in significant numbers. These four applications appeared on a roll of only 71 matters. Assuming the same degree of prevalence on each day the roll is called, this amount to some 20 matters a week or 80 a month, all brought by the same firm. Although this figure is obviously a very rough estimate it affords some idea of the volume of these applications.

[3] As mentioned little in the format has changed and each application projected a dividend of between 16 to 18 cents in the rand. None of them featured any major moveable asset let alone immovable property. Rather the estates sought to be surrendered comprises most, if not all, of the applicants' worldly goods. There is one change, however; whereas in all the matters dealt with in *Ex parte: Concato* no mention was made of the applicants' clear intention to purchase his/her estate back from the trustees, (without physically surrendering same), this intention is now made clear. As stated in *Ex Parte: Concato,* I have little if any doubt that it is the prospect of this outcome which has motivated and given rise to these applications.

[4] The same valuator and the same method of valuation has been utilized in each case and more than adequate provision has been made for the attorneys' fee, including minor disbursements, in amounts ranging between R14 000.00 and R15 000.00. The portions of the applications dealing with the reasons for the applicant falling into a state of insolvency are again, highly coloured and in many instance it strains credulity that so many misfortunes could befall one person. No explanation is given as to how, on the one hand the applicants intends to purchase their estate back by way of payment by

instalments, yet on the other hand will presumably finance the costs and disbursements of the sequestration process upfront.

[5] All the reservations which I expressed in *Ex Parte: Concato* regarding the bona fides of these applications and in particular whether they hold any advantage for creditors remain valid. Again, even though the applicants sought to surrender all their household goods, no waiver of their rights in terms of sec 82(6) of the Insolvency Act are contained in the papers.

[6] Not unexpectedly, given the production line nature and volume of these applications by this firm of attorneys, all the technical requirements for the voluntary surrender of an estate are met in each case.

[7] Once again, notwithstanding the general reservations which I have, each application clearly falls to be considered on its merits which I proceed to do.

MS AM CONNOWAY – CASE NO 5873/2016

[8] According to the statement of affairs, the applicant's estate comprises total assets valued at R41 300.00 with concurrent liabilities of R90 668.61 and the estimated dividend is 17 cents in the rand. The applicant's liabilities consisted of six creditors, the largest being in an amount of R38 153.16, a debt owed to a *'family member'*. No proof of this debt is furnished. The applicant states that she approached a debt counsellor but they advised that her surplus funds, R3 000.00 per month, were too small to justify using the National Credit Act's remedies. This does not strike me as credible or correct advice. The movable assets which the applicant seeks to surrender (and then buy back) comprise electronic goods and furniture. In his report the Master states he cannot comment on the stated values of the assets as the trustees still have to do their own valuations of the items listed. He draws the Court's attention to its powers in terms of

sec 3(3) of the Insolvency Act to examine the petitioner or the petitioner's attorneys and refers to *Ex Parte: Crafford* and *Ex Parte: Napier* (reported on SAFLII as Crafford v Crafford and another (19421/13, 19422/13 [2014] ZAWCHC 14 (13 February 2014).

[9] In argument counsel submitted that it lies within the Court's discretion to order that the goods to be surrendered be sold by way of auction and the monies placed in a fund for the benefit of creditors. I have reservations about issuing such an order, however, where the applicant has brought the application without a waiver in terms of sec 82(6) and on the clear understanding that she hopes to repurchase her assets by way of payments in instalments. If the assets are sold for much less than the forced sale valuation, probably in itself optimistic, the applicant will have the worst of both worlds.

MS J RUITERS – CASE NO 6168/2016

[10] According to the applicant's statement of affairs her movable assets have a forced sale value of R62 000.00 whilst her liabilities amount to R188 709.24, leaving a deficit of R126 709.24. The dividend to creditors is projected at 18 cents in the rand. The Master states that he really does not know whether the acceptance of this application would be an advantage to creditors. Given that the applicant also expresses the hope that she will be able to purchase her goods back from the trustee, presumably by way of instalments, I share the Master's evident doubts as to whether there will be any real advantage to creditors. Even if a dividend in this amount is notionally achievable since it will only trickle through to any proved creditors over a period of years. The applicant advises that her monthly income exceeds her expenses by R1 931.38. Leaving aside the costs of the sequestration, in itself amounting to some R27 000.00, applying the full surplus to this debt each month will take her approximately three years to purchase her estate back at the forced sale value.

[11] The applicant's liabilities comprises the outstanding balance on loans from some 28 commercial lenders. Her explanation for how she fell into insolvency is a tale of nine years of borrowing money from Peter to pay Paul. The *'household items'*, being the estate which she seeks to surrender, comprises furniture and approximately 20 electronic appliances. These include four television sets, one hi-fi, two cell phones, two computers, a tablet and an iPad. This array of luxury items is difficult to square with the heart-rending story of privation and financial misfortune over a nine year period recounted by the applicant. On the terms of the financial arrangements which she envisages reaching with the trustee the applicant will retain all these goods in return for a monthly instalment and be entirely divested of her creditors.

[12] As in the case of other applicants the applicant states that she is convinced that her creditors will give effect to threats to take legal action against her but obviously none of them has yet done so, otherwise proof thereof would have been furnished. The applicant makes fleeting mention of contacting a debt counsellor only to be advised that her salary was hopelessly too little to utilise the remedies available to her in terms of the National Credit Act. This hardly seems credible since here salary is almost R13 000.00 per month and her surplus funds nearly R2 000.00 per month.

MR L TAYLOR AND MRS A TAYLOR: CASE NO 6167/2016

[13] The applicants are married in community of property and seek to surrender their estate, household effects with a forced sale valuation of R70 000.00. Their liabilities amount to R249 922.30, leaving a deficit of R179 922.30. The dividend projected for creditors is 16 cents in the rand. The total sequestration costs are estimated at no less than R28 525.98 with the attorneys costs, including minor disbursements, amounting to R14 819.00.

[14] The applicants' assets comprise household furniture, appliances and electronic equipment, the latter including two television sets, one home theatre system, one hi-fi system, two refrigerators, two freezers and an array of cell phones, laptops and tablets. According to the applicants' statement of their affairs their monthly expenses outweigh their monthly income by only R427.86 but an amount of R7 000 will be available if the applicants stop making monthly payments to their debt counsellor. In this latter regard the applicants state that notwithstanding paying approximately R7 000.00 per month since October 2013 the amount that they owe is higher than their liabilities at the commencement of the debt arrangement scheme. No explanation is provided for this paradox nor is any documentation furnished relating to their debt review or restructuring.

[15] The applicants' liabilities consist in the main in the outstanding balances of monies loaned from institutions, totalling just less than R250 000.00. Notwithstanding this parlous state of affairs the applicants state that they propose to purchase their estate back from the trustee with the support of family, friends and employers. No details are furnished of precisely who will furnish this support, in what form or why this support cannot rather be used to reach an accommodation with their creditors.

[16] The Master again recommends that resort be had to the provisions of sec 3(3) of the Insolvency Act, no 24 of 1936 (as amended) which provides that the Court may direct the petitioner or any other person to appear and be examined before it declines the surrender. I take this to be an expression of scepticism on the part of the Master as to the bona fides and/or merits of their application, more particularly as to whether it holds any advantage to creditors.

MR S JOSEPH AND MRS N JOSEPH: CASE NO 6166/2016

[17] The applicants are married in community of property and seek to surrender an estate comprising of only movable assets with a forced sale valuation of R55 000.00 against liabilities totalling R157 575.14. This leaves a deficit of R102 575.14 and the projected dividend to creditors is 17 cents in the rand. The Master expresses scepticism that the acceptance of the application would furnish an advantage to creditors.

[18] The applicants lay claim to a total income in the form of their respective pensions in the amount of R2 820.00. Yet they state that their expenses amount to no more than R1 500.00 per month, being only groceries and transport, leaving them with a monthly surplus of R1 320.00. Even though the applicants state that they enjoy assistance from their children, I find these unsubstantiated figures very difficult to credit. The main liabilities which the applicants have amount to approximately to R150 000.00 worth of outstanding loans to two banks. The estimated costs of the sequestration amounts to R26 779.48, including attorney's fees in the amount of R14 430.00. The applicants' assets comprise household furniture, appliances and electronic items including two television sets, and four sewing machines valued at nearly R10 000.00. They state that with the help of their family members and friends they intend to purchase their assets back from their trustee. No details of this promised support are given nor why it cannot be utilised to reach an accommodation with their three creditors. They advise further that they approached a debt counsellor but according to him a debt review or reconstructing could not assist them. No further explanation for this advice is given.

[19] The Master states that he *'really (does) not know'* whether acceptance of the application would be of advantage to the creditors.

GENERAL

[20] Although the Master recommends, in several of these matters, that the Court utilise its powers in terms of sec 3(3) of the Insolvency Act, he does not state what the purpose or focus of such examination would be. In requesting the Court to examine some petitioners in terms of sec 3(3) of the Act the Master referred to *Ex parte: Crafford & Ex parte: Napier* (reported on SAFLII as *Crafford v Crafford and Another* (19421/13, 19422/13) [2014] ZAWCHC 14 (13 February 2014) and *Ex Parte: Bezuidenhout and Ex Parte: Pieterse* (1858/2014, 1859/2014 [2014] ZAECPEHC 60 (19 August 2014.

[21] I have considered these judgments which deal with questionable practices on the part of an attorney and a valuator in voluntary surrender applications. Neither of those parties are involved in the present matters. The examinations brought to light a series of irregularities and led, in the case of the particular attorney involved, to disciplinary action against him. On balance, I have decided, at this stage, not to invoke the procedure in sec 3(3) of the Act. As mentioned by counsel, the Master has not specified in what respect he believes the petitioner/s (or the petitioners' attorney) should be examined and, secondly, although the applications may have no merit, there are only limited indications of questionable practices being adopted. It is worth noting, however, that in *Ex parte: Bezuidenhout* it was brought to light that the applicants in both those matters found themselves in the hands of their attorney after conducting an internet based search and coming across an entity called Green Debt which promised a debt free resolution of their financial problems. In essence it offered sequestration by way of voluntary surrender as a solution to their problems. The applicants made telephonic contact with the offices of Green Debt and, after being encouraged to fill in an application for assistance, paid a fee to Green Debt and were informed that an attorney would contact them in due course.

[22] Significantly one of the creditors in the present Taylor matter is Green Debt, in the amount of R1 770.00 for services rendered. On the probabilities the Taylors found themselves in the hands of their attorneys, Messrs Etienne Genis and Company, using the same route. This adds another undesirable feature to one (or perhaps more) of these voluntary surrender applications *viz* that there is a *'middle man'* earning fees through referring persons in financial straits to attorneys who *'specialise'* in these applications. In *Ex Parte: Bezuidenhout* Goosen J stated as follows regarding this aspect:

> *'Before turning to the merits of the application it is appropriate to comment on the circumstances in which these cases came to be brought and the manner in which they were conducted. The applicants in these two matters were clearly desperate people heavily burdened by debt and desperate to resolve their situation. These are precisely the sort of people for whom the machinery created by the National Credit Act exists. Their desperation led them to a web based entity which, it appears, is not a registered debt counsellor in terms of the provisions of the National Credit Act. They were made to pay a fee, R6800 in the one case and R7200 in the other, in order to "resolve" their financial difficulties. The result was an application for voluntary surrender initiated via a complex web of relationships in which dubious evidence is placed before a court in order to persuade that court to grant the relief. Provision is made in the calculation of the possible dividend payable to creditors for the payment of the attorney's fees out of the estate. The result in effect is a further depletion of the financial resources available to creditors.'*

[23] In my view the above sentiments regarding an intermediary apply to the Taylors' application whilst Goosen J's views regarding the applicability of the National Credit Act apply to all the matters under consideration.

CONCLUSION

[24] In my view, for the same general reasons as I set out in *Ex Parte: Concato,* these applications are fatally flawed. Even if I am wrong in this general conclusion, for the various specific reasons set out above in relation to each case, I consider that the

applicants have failed to demonstrate that their applications are bona fide, that they have made full disclosure and, most importantly, that the voluntary surrender of their estates will produce an advantage to creditors.

[25] In the result all four applications are dismissed.

PETER DAVID EDGE: CASE NO 6002/2016

[26] This application for voluntary surrender, in which the applicant is represented by different attorneys, stands somewhat apart from the applications with which I have just dealt.

[27] He seeks to surrender an estate comprising assets which he values at R65 800.00 and liabilities amounting to R225 000.00, leaving a deficit of R159 150.00. After making provision for the total costs of sequestration in the amount of R30 000.00, the applicant projects a possible dividend of 15 cents in the rand.

[28] The application has procedural or technical flaws. In the first place the applicant's notice of voluntary surrender appeared both in the Government Gazette and in a newspaper on 11 March 2016. This date was approximately 31 court days, or approximately 60 ordinary days, before the application was set down for hearing in Court. Subsection 4(1) of the Insolvency Act requires the notices to be published not more than 30 days and not less than 14 days before the date stated in the notice of surrender. It is common cause that the reckoning of days is not to be computed with reference to court days and therefore the notices were served well outside of the time period of between 14 and 30 days.

[29] According to the commentary in Meskin's Insolvency Law (Butterworth) (3-8 issue 44), this irregularity amounts to a formal defect and as such can be condoned. In

this determination the first question is whether the defect has caused or may have caused prejudice, presumably to creditors. I should imagine that the prejudice in such a instance is that, given such lengthy notice, creditors may have forgotten or lost interest in presenting themselves at court to oppose the application for surrender. In the present matter there is no indication of any such prejudice having been suffered but there again, given its nature, there seldom, if ever, will be.

[30] The second defect in the papers is that the assets comprising the applicant's estate have not been properly valued. In *Nel v Lubbe* 1999 (3) SA 109 W Levenson J held, in the context of a sworn valuation of immovable property by an estate agent, that testimony must be placed before the court of the facts relied upon by the expert for his opinion, as well as the reasons upon which it is based.

[31] It goes without saying that the qualification of the valuator who expressed an expert opinion must be established. Something more than a *'bold assertion of value'* is necessary. In *Ex Parte: Ogunlaja and Others* [2011] JOL 27029 (GNP), Bertelsman J endorsed the approach by Levenson J in *Nel v Lubbe* and stated further:

> *'It is necessary to add that the nature of the valuation report is such that, in the absence of a reliable method of calculation of the value of the immovable properties, the Court is left with the uncomfortable impression that the valuator and the applicant or the applicant's legal representatives, are too close to one another to allow the preparation of an independent expert's report. The thought is difficult to dismiss in these applications, and in many others the court has seen over the past two to three years, that the valuator is fully aware of the value that needs to be certified for assets in every individual insolvent estate to ensure that the papers reflect a conclusion that an advantage to creditors is assured if the surrender is accepted…'*

[32] In the present matter all that there is in support of the valuation is a list of the assets, very briefly described, with a monetary value attributed to them. This list then bears the stamp of LF Schneider t/a JJ Reitstein and an address in Woodstock. In

manuscript is written *'I have examined the contents of his house and agree that this is a fair valuation of these assets'* followed by a signature. Mr LF Schneider, or whoever made the valuation, does not state what his/her qualifications are, what experience he/she has had in the valuation of movable property and nor does he/she furnish any further details relating to the valuation such as the condition of the goods or his/her reasons for arriving at the valuation. I should mention also that these assets comprise a wide variety of goods including sports equipment, computers and office furniture, various artworks, tools, equipment and other furniture.

[33] It is not even stated whether these goods are valued on a forced sale basis. Neither the applicant's affidavit nor the statement of affairs which he lodged sheds any further light on these questions.

[34] A further defect in the application is that provision for the costs of the sequestration amounts to an estimate in the form of a globular sum with no breakdown into attorney's fees or disbursements at the various statutory tariffs which apply. It is thus not possible to evaluate this estimate or the allegation that these costs will not exceed R30 000.00.

[35] Based on the valuation provided, inadequate as it is, the applicant's estate is a very limited one and will be depleted, if the valuation of assets is realised, by approximately 50% to pay for the costs of the voluntary surrender application and the administration of the insolvent estate. The projected dividend, which obviously is based upon the already questionable valuation being reasonably accurate, is only 15 cents. I have grave doubt whether even this dividend will ever be achieved.

[36] Finally, for good measure the applicant has failed to even raise the question of whether he had utilised or considered utilising the procedures in the National Credit Act,

namely, that of debt review and debt restructuring, with a view to resolving the financial difficulties in which he finds himself.

[37] The Master appears to express doubt that the projected dividend will be advantageous to creditors and recommends that the applicant be examined in terms of sec 3(3) of the Insolvency Act, but once again without an indication of what point would be served by such an exercise.

[38] Taking into account the various shortcomings which I have referred and to the extremely limited prospect that there will be an advantage to creditors, I consider that the application for voluntary surrender cannot succeed.

[39] The application is accordingly dismissed.

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BOZALEK J

APPEARANCES

For the Applicants in *Cases 5873/2016; 6168/2016; 6167/2016; 6166/2016*	Ms J Foster Instructed by: Ettiene Genis & Kie
For the Applicant in *Case 6002/2016*	Mr D Rabie Instructed by: VGV Inc