REPORTABLE

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

Coram: **Montzinger AJ**

Heard: **29 October 2021**

Delivered: **26 November 2021**

In the ex parte applications of:

DONOVAN STEERS Case No: 12167/21

STEPHANUS JOHANNES MARTINUS COETZER Case No: 17067/21

FRANCINA CATHARINE MARIA COETZER Case No: 14603/21

DESIREE CHERIE LYNERS Case No: 9557/21

For the voluntary surrender of their respective estates

Case No. 15530/21

In the application of:

JACOBUS P LESSING Applicant

and

ESTELLE OOSTHUIZEN Respondent

For the friendly sequestration of the respondent's estate

JUDGEMENT

(DELIVERED BY E-MAIL ON FRIDAY 26 NOVEMBER 2021)

MONTZINGER AJ,

[1] This judgement concerns four ex parte applications seeking orders of voluntary surrenders and one friendly sequestration[1]. These applications came before me in the unopposed motion court roll on 29 October 2021.

[2] I expressed scepticism about the merits of the applications considering the judgement in this division of *Ex parte: Concato; Van Staden; Goliath and Another; Oberholzer; Botha*[2] and similar judgements from other divisions dealing with the potential abuse involving applications of this kind. All the matters before me were to some extent open to the same criticism expressed in at least the judgement of *Ex Parte: Concato.* I requested the legal representatives to file written submissions, which they did.

[3] It would be a redundant exercise to point out again the possible abuse that from time to time can rear its head when these kind of applications appears regularly and in a decent quantity on the unopposed motion court rolls. The law reports are bursting with judgements[3] that intended over the last twenty years to address and govern the perennial problems presented by voluntary surrender and friendly sequestrations.

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[1] In the first three matters the applicants are represented by Riaan De Kock & Co, in the fourth application the attorneys are R Hendricks and Associates, while in the friendly sequestration the applicant is represented by Johann Viljoen Attorneys.

[2] [2016] 2 All SA 519 (WCC); 2016 (3) SA 549 (WCC)

[3] *Ex parte Steenkamp and Related Cases* 1996 (3) SA 822 (W); *Ex Parte Mattysen Et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T); *Ex Parte Kelly 2008* (4) SA 615 (T); *Ex Parte Ford and two others* 2009 (3) SA 376 (WCC); *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382

[4] Considering the guidelines contained in the mentioned judgements, it is inconceivable why legal practitioners still neglect to take greater care in preparing these applications. An application properly presented will assist the court to consider each application on its own merits and give substance to its judicial oversight role and the exercise of its discretion.

The applicable principles

[5] The substantive requirements for a voluntary surrender in ss 6(1)[4] of the Insolvency Act[5] are: (i) that the debtor is insolvent, (ii) that the debtor owns realisable property of sufficient value to defray the costs of sequestration to be paid from the free residue of the estate, and (iii) that it will be to the advantage of creditors. In addition to the requirements applicable to a voluntary surrender, ss 9(1) of the Insolvency Act requires prove of a claim of not less than R 100.00 where a creditor seek to sequestrate a debtor.

[6] The onus of establishing the requirements in ss 6(1) and ss 9(1) of the Insolvency Act is upon the debtor and creditor respectively. The onus is more onerous in voluntary surrender applications because the debtor himself should have all essential information available and be in a position to make full disclosure to the court. See *Ex Parte Shmukler – Tshiko and thirteen other case* (2013) JOL 2999 (GSJ).

(GNP); *Ex Parte Arntzen* 2013 (1) SA 49 (KZP); *Ex Parte Cloete* (1097/2013) [2013] ZAFSHC 45 (5 April 2013); *Ex Parte Erasmus and another* 2015 (1) SA 540 (GP); *Ex Parte Fuls and others* 2016 (6) SA 128 (GP)

[4] To be read with s 4 of the Insolvency Act

[5] 24 of 1936

[7] Ultimately, the Court's duty is to ensure that the process is conducted in accordance with the law and that the interest of the general body of creditors are given due and proper consideration[6].

[8] More than 20 years ago the Court in *Mthimkulu*[7] laid down the minimum requirements for the application for sequestration of a debtor by a "friendly" creditor. These were inter alia: (i) sufficient proof of the applicant's *locus standi;* (ii) sufficient documentary proof of the debt; (iii) reasons should be given for the fact that the applicant had no security for the debt; (iv) a full and complete list of the respondent's assets and acceptable evidence upon which the court could determine their true market value; (v) in case of immovable property, the valuer should prove his qualifications to make the valuation and his experience.

[9] During 2012 the approach in *Mthimkulu* was endorsed by the court in *Ex parte: Arntzen*[8]*.* The judgements of *Mthimkulu* and *Ex parte: Arntzen* have since formed the backbone of subsequent judgements echoing the warning that a court should be alert to the potential of abuse involving friendly sequestrations and voluntary surrenders.

[10] The case law has also expressed a strong view that a court considering these applications should insist that a debtor employ other alternative debt relief measures before seeking resolution of over indebtedness in the more drastic solution of insolvency. Three judgements have expressed their views on alternative debt review measures and emphasised that insolvency should be a last resort and not be used to

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[6] *Ex Parte Rhode and 8 similar*
[7] [2000] 3 All SA 512 (N)
[8] *(NedBank Limited as intervening creditor)* 2013 (1) SA 49 (KZP) at paragraph [12],

free debtors from liability to the disadvantage of creditors. See inter alia *Ex parte Ford & Two Similar Cases*[9]*; Ex Parte Cloete*[10] *and Ex Parte Fuls*[11]*.*

[11] The collective effect of the three above mentioned judgements are that if much of the debt of the applicant falls within the ambit of the NCA[12], the applicant is obliged to set out comprehensively why they should not avail themselves of the remedies provided in ss 86 – 88 of the NCA. In essence court must be satisfied why, when regard is had to the advantage to creditors requirement, sequestration should be preferred over debt-review.

[12] A Court's duty to exercise its discretion, whether to grant or refuse the order, is only engaged when it is satisfied that all the conditions prescribed for the grant of a voluntary surrender or provisional order of sequestration are satisfied[13].

Evaluation of each application

[13] This Court is satisfied that all of the applications comply with the notice requirements for a voluntary surrender or friendly sequestration as prescribed by the provisions of the Insolvency Act. The applications fall short on the rest of the requirements. I will highlight the unique characteristics of each application and apply the guidelines and principles emphasised in *Mthimkulu* and *Ex parte Arntzen* and other case law.

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[9] 2009 (3) SA 376 (WCC)
[10] (1097/2013) [2013] ZAFSHC 45 (5 April 2013)
[11] 2016 (6) SA 128 (GP)
[12] National Credit Act, 34 of 2005
[13] See *Ex parte Arntzen* par 22 and summary of legal position at footnote 22

Donovan Steers – Case No. 12167/21 (voluntary surrender)

[14] Mr Steers is 46 years old and married out of community of property. He records liabilities totalling some R92 188.51 all arising from credit extensions. He believes that there are enough assets in his estate of a sufficient value to cause a free residue to defray all costs of the sequestration. He claims the free residue will fully satisfy the claims of the creditors as they will receive an acceptable dividend. The mentioned movable assets are household furniture and appliances with a value ascribed to them by way of a sworn valuation.

[15] Mr Steers asserts that he has always been responsible with managing his money but towards the end of 2017 he bought a second hand vehicle from a friend for R 35 000.00 cash. However, he was living of his credit cards. Towards the end of 2019 both him and his wife's vehicles broke down which cost him R 22 000.00. He also had to assist his adolescent child with computer studies. When the Covid-19 pandemic came around he took another hit of R 40 000.00 for three months during the lockdown. He attempted debt review but he does not find this as a suitable solution as the payments kept increasing and creditors demanded increased instalments. His wife cannot assist him as she is also financially stretched.

[16] There are several puzzling aspects and omissions in Mr Steers's papers. There is absolutely no mention about his wife's financial situation. Section 21(1) of the Insolvency Act provides for the additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, until a trustee has been appointed. In terms of ss 21(2) the assets of the solvent spouse can only be released

on application and after compliance with certain requirements. A court must have regard to the estate of the solvent spouse as he / she can simply claim return of all of those assets. The same assets on which the insolvent spouse relied to achieve his sequestration on the promise that the assets will be sold to the advantage of his creditors. The failure to engage with the financial position of the solvent spouse is material and justifies refusal of the application. Although they are married out of community of property this is a relevant factor this Court must consider.

[17] Furthermore, what cries out for an explanation is the applicant's ability to always have access to substantial cash windfalls when the situation requires it. On at least two occasions he required substantial cash and he managed to procure it. The reference to a 'hit of R 40 000' is not explained. Did he had to pay or raise this money or is this as a result of unemployment? This was not explained.

[18] An extract from the applicant's list of liabilities under debt review was made available. According to this extract the total payment the applicant is required to make totals R 3 922.00 to settle most of the creditors listed in the statement of affairs. It does seem that the applicant is actually able to use the debt review mechanism effectively. I deduct this as the applicant does not state in his statement of affairs whether his wife pays half of the household expenses, like she does with the rental. If that is the case then Mr Steers' apparent monthly deficit almost disappears.

Mr and Mrs Coetzer – Case no. 1460321 & Case no. 17067/21(voluntary surrender)

[19] These two applications involve a husband and wife respectively 49 and 39 years old, married out of community of property. Their respective stories in the founding affidavits are identical. Their financial difficulties started during 2013 when a family member demanded repayment of a loan, in the amount of R 400 000.00, they incurred to purchase an immovable property. They had to sell their house and rent a more expensive place and started living of loans and credit card debt. Their respective debts totals R 97 004,53 and R 103 159.68 respectively.

[20] Mr Coetzer was retrenched during 2013 and remained unemployed for nine months. He finally got employment again (presumable still in 2013 or sometime in 2014) but was retrenched again. Seven months later (by now presumably 2015) he was again employed. Two years later, presumably 2017, he was mistakenly dismissed. The story, with many unexplained unknowns and blanks in the narrative, continues and concludes with him currently being unemployed but pursuing his own landscaping business.

[21] Mrs Coetzer's affidavit is simply a copy of her husband's. Although she is employed as a bookkeeper, she attributes her financial situation to the misfortune that had befall her husband.

[22] This Court is not satisfied with the level of financial disclosure. Mr Coetzer alleges that *'we'* had to go under debt review. Unfortunately, the affidavit is silent on whether the *'we'* means both him and his wife. The Court is in the dark what the current

status of the debt review process is and or whether the current debt was incurred after a previous debt review process.

[23] A further worrying factor is that according to the valuator of the movable assets the applicants own quite a significant amount of valuable furniture. This is at odds with the narrative of misfortune that has permeated the Coetzers since 2013. It rather indicates either poor financial management or disguised finances or an attempt to use insolvency to prejudice persistent creditors. It seems to me the Coetzers' situation can be addressed by exploring alternative debt relief measures.

Desiree C Lyners case no. 9557/21(voluntary surrender)

[24] Ms Lyners is an unmarried 37 year old and is indebted to various creditors in the amount of R 127 605.51. She seeks relief from her creditors and believe voluntary surrender is the only manner in doing so. The reasons for her insolvency and justification for the relief is encapsulated in a mere three paragraphs. These are that the debt review process has been ongoing and that she has been unable to reduce her debt liability and also cannot afford an increase in the monthly debt review payment.

[25] The application fails on this basis alone. Ms Lyners is currently in a debt review process, she has failed to make full disclosure of the extent of that process. At least a report or some explanation from the debt counsellor or even Ms Lyners regarding the debt review process would have sufficed. This Court is not inclined to rescue Ms Lyners from a debt review process. She also fails to explain how she, although apparently in financial ruin, is able to have R 8000.00 in cash.

[26] The lack of material detail leaves the court in doubt whether full and frank disclosure was made.

Lessing v Estelle Oosthuizen & 1 other – case no 15530/2021(friendly sequestration)

[27] Mr Lessing, as the applicant, seeks to sequestrate Mrs Oosthuizen, on the basis that it is a friendly sequestration. Mrs Oosthuizen is a self-employed 66 year old and married out of community of property with her husband Mr Anton Oosthuizen, who is also joined as a respondent. Mr Lessing and Mrs Oosthuizen are 'business associates'. Mrs Oosthuizen owes Mr Lessing R 18 000.00 and is indebted to a few financial institutions. Her total indebtedness amounts to R 142 873.77.

[28] Mr Lessing's claim is based on an acknowledgement of debt signed by Ms Oosthuizen on 11 December 2020. Apparently, he gave her an amount of R 18 000.00 in cash, which she undertook to pay back in monthly instalments over six months, but failed to do.

[29] The same criticism expressed in the Coetzer applications is relevant here. Although married out of community of property the application is silent on the financial situation of Mr Oosthuizen, the second respondent. Mrs Oosthuizen has no discernible movable assets accept furniture and paintings to the value of R 10 250.00. However, she does have access to a cash amount of R 45 000.00. How she came in possession of this amount is not explained.

[30] The application does not inspire a sense of bona fides. The e-mail exchange where Mrs Oosthuizen apparently disclose her inability to pay Mr Lessing is exceptionally formal for people who claim to be business associates. The only reasonable inference is that the communication was orchestrated to path the way for a sequestration application.

[31] The applicant's attorney is Johann Viljoen & Associates practising as such at 7 Niblic road, Somerset West, while Mrs Oosthuizen's attorney is Jacques van Niekerk Attorney practising as such at Unit S02 Parc du Links, Niblick road, Somerset West. It appears that these firms are in the same building or in close proximity. In fact, Mr Jacques van Niekerk commissioned the affidavit of Mr Lessing.

[32] I need to point out that if Mrs Oosthuizen use the R 45 000.00 she can settle Mr Lessing's R 18 000.00 and the Standard bank debt in full and more then 50% of the ABSA debt. Her financial position will immediately be significantly better. If her indebtedness persist then an alternative debt relief mechanism should provide the answer. The option to rather pursue sequestration is simply not warranted.

[33] This application fails for a lack of full and frank disclosure and an apprehension regarding the bona fides of the application.

The valuation of movable property

[34] This Court is not compelled to blindly accept the assertion of an expert without a full explanation[14]. My biggest concern in all of the applications is the method of valuation in order to attach a value to the movable assets. In the first three applications a company by the name of Aruana Valuers, represented by Mr Clive Errol Francis is used. This gentleman has done all the valuations in the applications of Mr Steers and the Coetzers as well as all other voluntary surrender applications brought by the firm Riaan de Kock & Co Inc, that came before me on 13, 15 and 26 October 2021.

[35] The Aruana valuations do not instil a sense of integrity and accuracy to a level that this Court can safely grant these orders. Mr Francis allege that he did the valuation on various dates in the presence of the applicants, seemingly at the applicants' residences. However, Mr Steers and the Coetzers do not confirm this in their affidavits.

[36] Unfortunately, the valuation reports each contains a standard regurgitation without substance. They contain the same standard allegations. The critical sentence reads: *'…I have visually inspected the assets of the applicant, in her / her presence…'* No explanation is given what is meant with 'visually inspected'. However, even if the phrase 'visually inspected' can be given its most advantageous interpretation the valuation itself falls far short, in light of the doubt courts have expressed with regards to these boiler plate like valuations.

[14] See *Nel v Lubbe* [reference]. Also Ex Parte: Bouwer and Similar Applications of how insolvency practitioners aim to paint a rosy picture. One of the manners to colour the picture is obviously to obtain favorable valuations.

[37] In respect of all the applications the valuations do not provide the court with a coherent expose of the methodology employed in valuing the assets. The assets are simply categorised by attributing a qaulity to them, without an explanation of the reasoning behind the categorisation. There is no comparative pricing of similar goods or an indication of what these type of assets achieved at recent auctions. There is no explanation what is meant with a 'force sale' value. Household goods and furniture notoriously fail to achieve the elaborate values ascribed to them in these valuations[15].

[38] In the Steers application the valuation of the motor vehicle is inadequate. The criticism the court expressed in *Ex Parte Cloete*[16] is equally applicable here. The valuation contains no indication that the valuations or sales of comparable vehicles were considered. One would have expected Mr Francis to take pictures of the vehicle and to show on his valuation report the condition of the tyres, the interior, the exterior and whether the vehicle was fitted with extras such as radio and air-conditioning.

[39] To further illustrate the difficulty with the valuations I point out that in the Lyners application the Lenovo Laptop is valued at R 6 000.00. Electronic goods are highly depended on brand name, specification and the year model to attain a certain value. For R 6 000.00 a consumer can buy a new laptop, depending on the model, the specs etc. So why will this laptop reach such an amount at an auction on the basis of a force sale? The same criticism applies to all the valuations in these applications. The categorisation of the assets as 'Good', 'Fair', 'Average' is not helpful to determine

[15] *Ex parte Erasmus and Another* 2015 (1) SA 540 (GP) – par 4
[16] Par 29

whether the valuations of the different assets are realistic. This Court cannot attach any probative value to the valuations[17].

[40] Since the valuation forms the primary basis upon which all the applications are premised my criticisms lead me to a conclusion that there is simply no bona fide, reliable and detailed information before me. These valuations appear to be adapted into some pre-determined formula designed only to achieve a favourable result. I am thus not satisfied that the applicants, in all the applications, own realisable property of sufficient value to defray all costs of the sequestration which will, in terms of the Insolvency Act, be payable out of the free residue of his estate. Consequently, there can be no talk of advantage to creditors.

Conclusion

[41] I find that in all the applications the applicants have failed to make full and frank disclosure, failed to convince the court that realisable assets to defray the costs of the sequestration are available and that creditors will be advantaged. Considering these findings, the question of the exercise of my discretion does not arise since findings in favour of the applicants on these issues are necessary precursors to the exercise of any discretion.

[17] The fact that the valuer has confirmed the report under oath is not sufficient. A court is not compelled to believe simply because an allegation is on affidavit. See *Sibiya v Director- General: Home Affairs and Others*, *and 55 related cases* 2009 (5) SA 145 (KZP) at page 170 G – I

[42] The applicants have all also failed to adequately explain their preference to voluntary surrender or friendly sequestration over the elaborate and sophisticated mechanism of debt review provided in the NCA. The following order is issued:

All of the applications are refused.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Attorney for Mr Steers and the Coetzers:	Riaan de Kock & Co
Attorney appearing:	Mr P Myburgh
Attorney for Ms Lyners:	R Hendricks & Associates
Counsel for Ms Lyners:	Adv A D Koester
Attorney for Mr Lessing:	Johan Viljoen & Associates
Counsel for Mr Lessing	Adv J T Benade