IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2024-003235

Date of hearing: 1 August 2024

Date delivered: 15 August 2024

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

~~(3) REVISED~~

DATE: 15/8/24

In the ex parte application of:

DONALD STUART MC BRIDE **Applicant**

JUDGMENT

SWANEPOEL J:

[1] This is an ex parte application for the rehabilitation of the applicant.

[2] The applicant sought voluntary surrender of his estate in 2019 and his estate was sequestrated by order of this Court on 16 January 2020. According to the founding affidavit in this case, the reason reported in the voluntary surrender application was the fact that the applicant's salary had not kept up with his monthly expenses. He could not, he said, obtain better employment, and the shortfall between his expenses and his income caused him to take out loans to cover the difference. Eventually he realized that he was insolvent, resulting in the voluntary surrender of his estate.

[3] Apparently, the applicant had previously sought the assistance of a debt counsellor under the National Credit Act, 34 of 2005 ("the NCA"). He said that he was unsuccessful in his attempts. He said that he was unable to obtain relief under the NCA, firstly, because he did not earn enough to make payments to his creditors, secondly, because not all of his creditors were creditors in terms of credit agreements, and thirdly, because he could not afford the fees of a debt counsellor.

[4] The applicant reportedly had assets worth R 70 000.00 at the time of his sequestration, and he reported liabilities of R 156 304.91. His assets were comprised only of movable property. His liabilities, as reflected in the Statement of Debtor's Affairs were the following:

[4.1] Woolworths:	R 21 643.01
[4.2] Woolworths (revolving credit):	R 20 365.54
[4.3] Standard Bank:	R 29 172.57
[4.4] FNB (revolving loan):	R 25 421.14
[4.5] FNB (personal loan):	R 26 398.87
[4.6] FNB (credit card):	R 18 777.80
[4.7] Discovery (credit card):	R 11 326.16
[4.8] HES Attorneys:	R 11 326.16
[4.9] RCP (revolving credit):	R 1 099.42
[4.10] J Zurich:	R 1 000.00
Total liabilities:	R 156 304.91

[5] When I compared the liabilities reported in the Statement of Debtor's Affairs with the First and Final Liquidation and Distribution

Account that had lain for inspection for this application, the claims proven against the applicant's estate amounted to R 545 029.93, which were made up as follows:

[5.1] FNB (monies lent):	R 35 703.00
[5.2] FNB (monies lent):	R 28 317.66
[5.3] FNB (monies lent):	R 6 020.80
[5.4] FNB (monies lent):	R 44 277.44

[5.5] FNB (monies lent):	R 25 610.17
[5.6] FNB (monies lent):	R 171 150.96
[5.7] Truworths (services):	R 1 123.67
[5.8] Standard Bank of SA:	R 153 393.15
[5.9] Standard Bank of SA:	R 79 433.08
Total proven claims:	R 545 029.93

[6] Ultimately, after the deduction of administration costs and legal fees, there was R 31 557.95 available for distribution to creditors, leaving a shortfall of R 513 471.98.

[7] Section 6 (1) of the Insolvency Act, 24 of 1936 reads as follows:

> "(1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of his sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate."

[8] The important passage above for purposes of this judgment is emphasized above. The sequestration will only be granted if it is to the advantage of creditors. An advantage to creditors may manifest in many ways. It may be that all creditors will obtain some advantage if the estate is sequestrated (net necessarily monetary in nature), whereas if the order were not granted all may be lost. In this Division, as a general rule of thumb (albeit not cast in stone), the applicant must show that, after taking into account the administration costs there will be a dividend to creditors of no less than 20 cents in the Rand. It is expected of an applicant to prepare a Statement of Affairs which sets out in full what assets the applicant owns, whether the assets are movable or immovable, and whether any bills, bonds or other securities are due to the applicant. A list of creditors must be provided which includes the name and address of the creditor, the nature of the claim against the estate, and the amount of the claim.

[9] It is when one compares the liabilities of the estate as against its assets, that one can calculate whether the sequestration would be to the advantage of creditors. The Statement of Affairs must lie for inspection by creditors in the Master's Office, and where applicable, in the Magistrate's Office of the District where the applicant resides. The Statement of Affairs must lie for inspection for no less than 14 days.

[10] The Statement of Affairs is intended to inform creditors of the applicant's financial affairs, and therefore it must be drawn with great accuracy. If it is not drawn properly, a Court may refuse to accept the surrender of the estate.[1] In *Fesi and Another v ABSA Bank Ltd*[2] the Court held that in an application for surrender of an estate, the normal rules relating to *ex parte* applications apply, in other words that the applicant must observe the utmost good faith and should disclose all relevant facts, whether they advance the applicants case or not.

[11] In my view there is a particular burden on an applicant in a surrender application to ensure that all relevant facts are disclosed to the Court. The reason for that view is that, generally, the only person who understands fully the financial affairs of the estate is the applicant. The Court is completely reliant on the truthfulness of the applicant when it considers the application.

[12] That brings me to this particular matter. If one considers that the value of the claims proved against the estate amounted to R 545 029.93, as opposed to the liabilities that were disclosed by the applicant in the Statement of Affairs in the amount of R 156 305.91, it is obvious that the applicant did not fully disclose his liabilities. When I asked counsel for the applicant to address me on the discrepancy, counsel could not provide me with an explanation. I therefore removed the application from the roll, and I made an order to the following effect:

> [12.1] The application may not be re-enrolled until the applicant has filed an affidavit explaining the discrepancy between the liabilities disclosed in the applicant's statement of affairs dated 14 March 2019 in the sum of R 156

[1] Ex Parte Berman 1972 (3) SA 128 (R)
[2] 2000 (1) SA 499 (C)

304.91 and the total claims proven in the sum of R 545 029.93. The aforementioned affidavit shall be filed with the Registrar of Swanepoel J within 30 days.

[12.2] This order is to be served on the Master of the High Court, and upon the trustee, Retha Stockhoff.

[12.3] The Master and the trustee are requested to consider the discrepancy between the reported liabilities, and the claims actually proven, and to comment by way of a supplementary report on whether the Court should exercise its discretion to rehabilitate the applicant, given the abovementioned discrepancy.

[12.4] This order, and the application for the applicant's rehabilitation, shall be served by Sheriff on all of the creditors who proved claims against the applicant's insolvent estate.

[12.5] Should the application be set down again, the date shall be arranged with the registrar of Swanepoel J, who shall hear the matter further.

[13] The applicant filed a supplementary affidavit which said that applicant had applied for debt rescue under the NCA on 5 March 2018. All of his creditors were notified of the application and the conclusion was reached that the applicant was in fact overindebted. The applicant's debt counsellor allegedly negotiated a restructuring plan with the creditors who were then paid monthly until November 2018. It then became apparent that the applicant was so over-indebted that he could not sustain the necessary monthly payments.

[14] The applicant says that he requested account balances from the debt counsellor, and that he used those figures to complete the Statement of Affairs. The applicant says that he is not educated in law or banking procedure, and that he relied upon the figures given to him by the debt counsellor in order to complete the Statement of Affairs.

[15] This version differs from the version given in the surrender application, where the applicant said that he could not go under debt review as he did not qualify because he did not earn enough money, he could not afford the debt counsellor's fees, and his debts were not all credit agreements.

[15] The applicant suggests that some of the claims may not be valid, but does not provide a basis for that suggestion. There is no evidence that the applicant, having been made aware of the difficulties that the Court has with the Statement of Affairs, made any enquiries with the trustees to ascertain whether the claims were valid or not. I must accept that the claims were in fact proper. The applicant also produced five certificates of balance from First National Bank that total R 139 929.07, suggesting that that amount was the total owing to the bank at the date of sequestration. There is no affidavit by the bank official to support this averment.

[16]1 The applicant held six accounts with First National Bank. The certificates now produced do not reflect the largest account, amounting to R 171 150.96, with account number 4[...], and the supplementary affidavit does not deal with this account. There is therefore no explanation for the applicant's failure to disclose this account in the surrender application. There is also no explanation whatsoever for the applicant only reporting a liability of R 29 172.57 to Standard Bank, whereas the claims proven by Standard Bank amounted to R 232 826.23.

[17] I find it extremely difficult to believe that any person could have such little grasp of his financial affairs. I accept that an applicant may make an error, but in this case the "error" resulted in the applicant under reporting his liabilities by a factor of 3.5. In my view it is much more likely that the applicant's liabilities were purposely understated in order to create the illusion that there would be an advantage to creditors. For that reason, I intend to refer this matter to the Director of Public Prosecutions for investigation.

[18] Even if I am wrong on this finding, at best for the applicant he was extremely negligent in the manner in which he approached the matter. It was incumbent on the applicant to ensure that the most accurate figures possible were provided to the Court. He clearly failed in that duty.

[19] The unfortunate result of this episode is that only R 31 557.95 was available for distribution to creditors after administration costs and legal costs. In fact, the applicant's attorney was paid R 22 250. Not much less than the entire body of creditors received in aggregate.

[18] Courts have refused to grant rehabilitation orders in cases of fraud, recklessness, and where there has been a false Statement of Affairs, or where assets have been overestimated in the Statement of Affairs.[3] I can see no reason why the same should not apply where an applicant misstated his liabilities in order to obtain a sequestration order.

[19] I make the following order:

[19.1] The application for rehabilitation is refused.

[19.2] The Registrar of this Court is requested to forward this judgment to the Director of Public Prosecutions for consideration.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION ,PRETORIA

Counsel for the appellant:	**Adv. R Loibner**
Instructed by:	**Petrus Steyn**
Date heard:	**1August 2024**
Date of judgment:	**15 August 2024**

[3] Ex Parte Friedman 1925 GWL 19