


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	
10 JANUARY 25	SIGNATURE
DATE	

In the *ex parte* applications of:

Ex Parte: Nel M E case number: 094974/2024

Ex Parte: Lambrecht D M case number: 099273/2024

Ex Parte: Clarke B case number: 103517/2024

Ex Parte: Khuzwayo P E case number: 099376/2024

Ex Parte: Fleischer C E case number: 098532/2024

Ex Parte: Burger M case number: 094973/2024

Ex Parte: Currie B I case number: 091407/2024

Ex Parte: Ntuli D P case number: 113545/2024

Ex Parte: Hodgman J H case number: 113455/2024

Ex Parte: Wigget A G case number: 114126/2024

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **10 January 2025**.

JUDGMENT

KUBUSHI, J

[1] Several unopposed applications for voluntary surrender of estate (“the applications”), were before me in the unopposed motion court of 19 and 21 November 2024, without certificates from the Master of the High Court (“the Master”). As is practice in this Division, and I would assume in the other Divisions of the High Court as well, the certificate from the Master serves as proof that an applicant’s statement of affairs laid at that office for inspection by the creditors or any other interested person. The information placed before court, in explanation, was that the Master refused to issue the certificates because the Government Gazettes in respect of those specific statements of affairs were published late.

[2] Some of the applications were filed together with applications for condonation, asking the court for indulgence to accept the surrender of the respective estates without the Master’s certificate, because as they put it, the Master’s certificate is not a requirement in terms of the Insolvency Act (“the Act”).¹ The other applications sought an order condoning the late publication of the Government Gazettes on the ground that such delay was occasioned by the government printing works, which was experiencing difficulties, and that they had no control over that process. Whilst it should be noted that there were some applications where condonation was not applied for, at all.

[3] Due to the large number of applications involved, I decided to reserve judgment in all the applications and to direct counsel in all the matters to provide short written submissions in support of why the surrender of the respective estates should be accepted with the defects as already stated. I, in that respect, reserved the judgments

¹ Act 24 of 1936.

and directed counsel to provide written submissions. All counsel involved in the applications uploaded their respective written submissions on CaseLines, as directed. I am grateful for that.

[4] The matters that were on the roll for the two days on that week are the following:

- 4.1 *Ex Parte*: Hodgman J H case number: 113455/2024
- 4.2 *Ex Parte*: Nel M E case number: 094974/2024
- 4.3 *Ex Parte*: Lambrecht D M case number: 099273/2024
- 4.4 *Ex Parte*: Wigget A G case number: 114126/2024
- 4.5 *Ex Parte*: Clarke B case number: 103517/2024
- 4.6 *Ex Parte*: Burger M case number: 094973/2024
- 4.7 *Ex Parte*: Khuzwayo P E case number: 099376/2024
- 4.8 *Ex Parte*: Currie B I case number: 091407/2024
- 4.9 *Ex Parte*: Ntuli D P case number: 113545/2024
- 4.10 *Ex Parte*: Fleischer C E case number: 098532/2024

[5] The following applicants: M E Nel, D M Lambrecht, B Clarke, P E Khuzwayo and C E Fleischer were represented by Mr B Lee. For convenience, I shall refer to them as the first group of applicants. The arguments raised by their counsel in each of the written submissions are similar and shall be dealt with together. The written submissions are said to be filed for the sole purpose of addressing the issue relating to the rendering of the certificates by the Master. The applicants' counsel contends that the Master refused to render and sign the certificates of confirmation that the debtors' statements of affairs lay for inspection for a period of fourteen (14) days as indicated by the relevant advertisements in the Government Gazettes. The contention is that the advertisements for the present hearing ought to have appeared in the Government Gazettes on 25 October 2024, but only appeared on 8 November 2024. The Government Gazettes also stated that the statements of affairs will lie for inspection on 28 October 2024, and, in fact, the statements of affairs were filed with the Master on that date.

[6] It was further submitted that each of the statements of affairs did lie for inspection for a period exceeding twenty (20) days of which fourteen (14) days lapsed since publication of the respective Government Gazettes. And, since it is not a requirement in terms of section 4(3) of the Act that the Master issue a certificate, in that regard, the submission is that the court ought to grant the orders sought by the applicants in their respective notices of motion. In addition, the court was referred to the provisions of section 157(1) of the Act which authorises the court to remedy any invalidity done by reason of a formal defect or irregularity unless a substantial injustice has been done thereby, which cannot be remedied by any other order of court. There are no condonation applications filed, but in each application the attorney of record has filed an affidavit explaining why the Master's certificates are not filed with the respective surrender applications, being that the Government Gazettes were published late due to tardiness of the Government Printers.

[7] The following applicants: M Burger, B I Currie and D P Ntuli were represented by Mr W Venter. I shall, in the judgment, refer to them as the second group of applicants. The arguments in the respective written submissions are, also, the same and shall be dealt with together. It is stated in each of the applicants' Practice Directive that the Master's certificate has not yet been obtained, proof of lodgement has been uploaded to CaseLines and the attorney will upload the Master's certificate if obtained in time. No condonation is applied for in the respective applications, and, except as submitted in the written submissions, nowhere is there an explanation given why the respective Master's certificates were not obtained. In their respective written submissions, the applicants contend that the Government Gazettes were published twelve (12) days before the surrender applications were heard, which occasioned a delay of only two (2) days. They further argue that the shortened period of publication will not in any way prejudice the creditors or result in the deprivation of their rights. As a matter of fact, the shortened period is said to be in the benefit of the creditors by reducing the time during which the applicants' assets are shielded from possible auction. Relying on the decision in *Ex Parte Oosthuysen*,² the applicants contend that condonation could be granted in terms of section 157(1) of the Act.

² 1995 (2) SA 694 (T).

[8] The two last applicants, J H Hodgman and A G Wigget, were represented by Mr Johan Van Heerden of Johan Van Heerden Attorneys. I shall, in the judgment, refer to them as the third group of applicants. Similarly, the written submissions are the same and shall be dealt with in the judgment together. Each of the applicants have applied for condonation of the late publication of the Government Gazette. The applications are similar. The reason provided why the Master refused to issue the certificates in each instance is that the Government Gazettes were published late. The Government Gazettes were dated 25 October 2024, but only got to be published on 8 November 2024, which was eleven (11) days before the application was heard, instead of fourteen (14) days as provided for in the Act. There is thus a three (3) day delay. Each of the applicants submits that the statements of affairs were lodged with the Master for inspection on 28 October 2024. It was, thus, available for inspection from 28 October 2024 until, at least, 15 November 2024 when the founding affidavits for the condonation applications were commissioned, therefore, fulfilling the fourteen (14) day inspection period required by the Act. The applicants further submit that the creditors will not be unduly prejudiced by the delay in publishing the Government Gazettes. They, in this regard, raise several reasons but contend that the three (3) day delay falls under the *de minimis non curat lex* with no risk of prejudice to the creditors. They also submit that, in any event, the creditors would have come to know of the surrender application through the trustees who are always on the lookout for such publications, and the newspaper which was published on time. They contend, as well, that in the circumstances of their respective matters, condonation may be granted in terms of section 157(1) of the Act.

[9] The gravamen in all these applications, as already stated, is that they were each filed without the Master's certificates. The Master, it is said, refused to furnish the certificates by reason that the Government Gazettes in respect of all these applications, were filed late.

[10] I was, at the outset, faced with the challenge of the approach I should take when considering the surrender applications, that is, whether the applications that have specifically applied for condonation should be granted and the others refused or whether the second group of applications wherein the explanation filed with the application should be granted or whether in general all the applications ought to be granted. A further challenge that confronted me was the question of the non-

compliance, that is, whether the non-compliance to be condoned relates to the late publication of the Government Gazettes and/or the failure to file the Master's certificates with the applications.

[11] The starting point for the challenge faced by the applicants (and this court) is the Act's requirement that a notice of the application for the surrender of an estate should be published. The procedure for the said publication is regulated by section 4(1) of the Act, which provides that

"Before presenting a petition mentioned in section *three*, the person who intends to present the petition (in this section referred to as the petitioner) shall cause to be published in the *Gazette* and in a newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which his principal place of business is situate, a notice of surrender in a form corresponding substantially with Form A in the First Schedule to this Act. The said notice shall be published not more than thirty days and not less than fourteen days before the date stated in the notice of surrender as the date upon which application will be made to the court for acceptance of the surrender of the estate of the debtor".³

[12] In addition, the Act requires that the notice of surrender must state where and the date from which the debtor's statement of affairs will lie for inspection by creditors and interested persons. In accordance with the provisions of the Act, the statement of affairs must lie for inspection at either the Master's office, only if the debtor resides in a district in which there is a Master's office of the court in which the application for surrender is launched, or, if the debtor resides in another district, at the Master's office of the court in which the application is launched and at the magistrate's office of the district in which the debtor resides. If the debtor carries on business in another district other than the place of residence, another notice must also be given at the relevant Master's or magistrate's office of such district.⁴

[13] All the applicants argue that their failure to comply with the requirements of section 4(1) of the Act is that their respective Government Gazettes were published late and may be condoned in terms of section 157(1) of the Act. Their reliance on this section is on the basis that the section provides that 'nothing done under this Act shall

³ Section 4(1) as amended by s 3(a) of Act 16 of 1943 and by s 1 of Act 49 of 1996.

⁴ Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 9 ed (Juta & Co Ltd, Cape town, 2008) at 68 – 69.

be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court’.

[14] As mentioned earlier in the judgment, to reinforce their argument, some of the applicants referred me to the case of *Ex Parte Oosthuysen*,⁵ a full bench decision of this division which it is submitted, is the *locus classicus* in Gauteng for condonation under section 157(1) read with section 4(1) of the Act, and by which I am bound.

[15] The question that was dealt with in *Oosthuysen* was whether a court may accept the surrender of an estate if the notice of surrender is published more than thirty (30) days before the relevant date. The notice of surrender in that case was published thirty nine (39) days before the date stipulated for the hearing of the application. The court below held that this was fatal to the application and declined to accept the surrender. On appeal, the decision of the court below was upheld, the appeal court concluding that publication of a notice of surrender made prior to the thirty (30) days period could not be condoned.

[16] Section 157(1) of the Act provides that –

“Nothing done under this Act will be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.”

[17] Therefore, in terms of section 157(1) of the Act, failure to comply with the requirements of section 4(1) may constitute a formal defect or irregularity which may be remedied thereafter, unless thereby a substantial injustice is done which cannot be remedied by an order of court. It follows that where there is non-compliance with the provisions of section 4(1) of the Act, as is the case in the matters before me, there should be a defect or irregularity which may qualify as a formal one requiring no rectification within the meaning of section 157(1) of the Act, or as being one which may be rectified, as envisaged.

[18] There have been several cases where the effect of a defect in relation to the giving of notice of surrender as envisaged in section 4(1) of the Act and the court’s power in relation thereto, having regard more particularly to the provisions of section

⁵ Above n 2.

157(1) of the Act, were considered. The cardinal cases being the full bench cases in *Ex Parte Oosthuysen* of this Division and *Ex Parte Harmse*,⁶ of the KwaZulu - Natal Division.

[19] The two cases are not harmonious, with *Oosthuysen* holding that non-compliance with the provisions of section 4 of the Act, in circumstances where publication of the Government Gazette made prior to the 30-day period, could not be condoned. The court in *Harmse* rejected the decision in *Oosthuysen* and held that *Oosthuysen* should have found the failure to be a formal defect or irregularity as envisaged by section 157(1) of the Act, and therefore does not invalidate the application unless it caused a substantial injustice which could not be remedied by a court order. That court, further, proclaimed that for *Oosthuysen* to have held a notice of surrender published more than thirty (30) days before the date of publication to be invalid without deciding whether it amounts to a formal defect or irregularity, ignores the explicit language of section 157(1) of the Act.

[20] Of importance, however, is that both judgments do not deal with the question of how section 157(1) of the Act is to be applied when dealing with the issue of non-compliance with the provisions of section 4(1), that is, what are the powers of the court in relation to section 157(1) of the Act when a defect arises in relation to section 4(1) of the Act.

[21] The applicants who referred to *Oosthuysen*, relied heavily thereon in their respective submissions that the judgment is authority for the proposition that section 157(1) of the Act authorises a court to condone non-compliance with the provisions of section 4(1) of the Act. I am not in agreement with that proposition. I say so because except to lay out the approach to be followed in construing the provisions of section 4(1) of the Act which led to the court concluding that failure to comply with the 30-day period is not condonable, section 157(1) was not considered at all. The court, having found that failure to comply with the provisions of section 4(1) of the Act is fatal to the application, did not entertain the provisions of section 157(1) of the Act any further. That court, in my view, referred to section 157(1) of the Act in passing when analysing

⁶ 2005 (1) SA 323 (N).

the construction of section 4(1) of the Act and stated that regard should be had to section 157(1) of the Act when construing the Act as a whole.

[22] Moreover, the criticism levelled in *Harmse* by Magid J at the *Oosthuysen*'s decision that, to hold a notice of surrender published more than thirty (30) days before the date of publication to be invalid without deciding whether it amounts to "a formal defect or irregularity" ignores the explicit language of section 157(1) of the Act, which directs that a formal defect is not "to render invalid the conduct to which the defect relates unless the Court holds that it has caused a substantial injustice which cannot be remedied by the Court's order",⁷ indicates that *Oosthuysen* did not consider the application of section 157(1) of the Act, at all.

[23] The principles which are authoritatively enunciated in *Oosthuysen* are that, firstly, a notice that does not comply with section 4(1) of the Act is invalid; secondly, the approach to be followed in construing section 4(1) of the Act, is to establish the intention of the legislature rather than the ostensibly peremptory language of the section; and lastly, that the establishment of such intention "is to be ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular", and that, "in construing the statute as a whole, regard must be had to section 157(1) of the Act."⁸

[24] The purpose of section 157(1) of the Act, as I understand it, is to remedy any invalidity that may be occasioned by the conduct of the applicant in his/her application for the surrender of his/her estate, unless such conduct is visited by substantial injustice which cannot be remedied by an order of court.

[25] From the authorities I have been referred to by some of the applicants, the courts did not specifically deal with how section 157(1) of the Act should be applied in relation to non-compliance with section 4(1) of the Act. The court in *Harmse*, going as far as to indicate that section 157(1) of the Act should be considered when there is non-observance of section 4(1) of the Act. *Oosthuysen*, on the other hand, when analysing the construction of section 4(1) of the Act in conjunction with section 5 of the Act, held that "in construing the statute as a whole, regard must be had to section

⁷ *Harmse* above n 7 at para 17.

⁸ *Oosthuysen* above n 2 at 696A-C.

157(1) of the Act”. Both courts failed to set out the approach that a court should follow in applying the provisions of section 157(1) of the Act.

[26] There is, thus, no judicial authority and/or opinion about the precise meaning and effect of the provisions of section 157(1) of the Act. The question was left open, and it is for this court to provide guidance.

[27] Some of the applicants, in their attempt to give meaning to the decision in *Oosthuysen*, suggested the following approach that this court should follow in applying the provisions of section 157(1) of the Act, in the prevailing circumstances:

“Assess the purpose and legal effect and consequences of section 4(1) read in conjunction with section 5.

Determine whether non-compliance has caused prejudice and/or deprivation of rights to the APPLICANT’s creditors.

Grant condonation if no prejudice and/or deprivation of rights has been demonstrated.”

[28] It is not disputed that non-compliance with section 4(1) of the Act leads to invalidity. Section 157(1) of the Act authorises the court to remedy such invalidity if it is a formal defect or irregularity. It ought to be stated that while it is often said courts may “condone” the defects contemplated in section 157(1) of the Act, the choice of words seems misconceived. It is clear from the reading of the section that the court is not granted explicit authorisation to condone non-compliance, but rather to remedy any invalidity that emanates from the conduct of any applicant in a surrender application, then of course, if the conduct sought to be remedied does not prejudice anyone by substantial injustice.

[29] The author, *Meskin*, opines that conduct to which the provisions of section 157(1) of the Act applies is not capable of being condoned by the court but it is simply validated (because it is invalid) unless it has produced substantial injustice, in which event it remains invalid unless, the court considers that the injustice may be eliminated by its order. If it cannot be so eliminated, then the conduct is fatal to the application.⁹ This approach, in my view, is appropriate and goes along with the reading of the section.

⁹ Meskin above n 6 at p15-16(3) para 15.1.6.4.

[30] In light of the above stated approach, the first question ought to be whether the invalidity sought to be remedied is a formal defect or irregularity. The court in *Harmse*,¹⁰ held that –

“Indeed, it seems to me, again with the greatest of respect, that to hold that such a notice of surrender is ‘invalid’ without deciding whether it amounts to ‘a formal defect or irregularity’ is to accord no weight to the explicit language of s 157(1) of the Act. . . It is essential in the first instance to decide whether the premature advertising of the notice of surrender is a ‘formal defect or irregularity’. In my view a formal defect is one which relates to form or procedure rather than substance (*Ex parte Helps* 1938 NPD 143; *Meskin* (op cit para 15.1.6.4))”

[31] It is, thus, imperative that a determination of whether the conduct complained of is a formal defect or irregularity, be made. What then is meant by a formal defect or irregularity?

[32] In *Ex Parte Slabbert*,¹¹ the court defined a formal defect to mean the departure from a prescribed or established procedure.

[33] The author *Meskin*, in his discussion of the subject ‘Courts power in relation to formal defects and irregularities’,¹² followed this definition. The author states that –

“The word “formal” governs both “defect” and “irregularity”.

[34] The author further defines ‘formal defects and irregularities’ as follows:

“Whether particular conduct is formally defective or irregular . . . depends on whether it has involved “some want of a departure from, [the] prescribed or established form, whether or not that divergence affects the substance of the matter”, i.e., whether it is contrary to a requirement as to *the way in which something is to be done*, as prescribed by the Insolvency Act.”

[35] It is, thus, apparent that conduct is formally defective or irregular if it involves some want of departure from a prescribed or established form (procedure), that is, the way in which something is to be done, as the Insolvency Act prescribes.

[36] In the circumstances of the applications before me, section 4(1) prescribes publication of the notice of surrender in the Government Gazette be not more than

¹⁰ *Harmse* above n 7 at para 17.

¹¹ 1960 (4) SA 677 (T) at 681-2.

¹² *Meskin* above n 6 at p15-16(3) para 15.1.6.4.

thirty (30) days and not less than fourteen (14) days before the date stated in the notice as the date upon which the application will be made for the acceptance of the surrender. It is trite that as to the maximum periods of thirty (30) and fourteen (14) days respectively, the requirements have been held to be imperative and the court is not to accept a surrender unless the requirements have been strictly complied with.¹³ The notice should, amongst others, set out the day on which the application will be made and the period during which the debtor's statement of affairs will lie for inspection.

[37] It is, also, a requirement of the Act that a statement of affairs of the debtor be laid at the Master's office or the magistrate's office for inspection by the creditors or any interested person for a period of fourteen (14) days.

[38] All the applicants in this instance concede that publication of their respective notices of surrender in the Government Gazettes occurred much later than the date that it was intended for, that is, the respective Government Gazettes were published late. In respect of the applications pertaining to the first and third group of applicants the Government Gazettes were published three (3) days late; and with regards to the applications pertaining to the second group of applicants, the Government Gazettes were published two (2) days late.

[39] The late publication of the respective Government Gazettes resulted in the applicants' respective statements of affairs being laid for inspection not in correlation with the dates on which the Government Gazettes were published, hence the Master's refusal to issue the certificates in respect of those statements of affairs. The notices that were published in the Government Gazettes indicated that the statements of affairs will be laid for inspection with the Master for fourteen (14) days commencing from 28 October 2024. The statements of affairs were filed with the Master on 28 October 2024 as indicated in the notices, however, the Government Gazettes were publicised either two (2) or three (3) days late, giving the creditors or any interested person a lessor period for the inspection of the statements of affairs. Since the Government Gazettes were published on 8 November 2024, it can be assumed that

¹³ *Mars: The Law of Insolvency in South Africa* above n 4 at 50 and all the cases referred to in ft 25.

the creditors or any interested person only became aware on that day that the statements of affairs have been laid with the Master for inspection.

[40] Therefore, it is obvious that there was a deviation from the provisions of the Act. Firstly, there was a departure from the requirements of section 4(1) of the Act in that the respective Government Gazettes were published less than fourteen (14) days before the date stated in the notice as the date upon which the application will be made for the acceptance of the surrender. Secondly, there was a deviation in relation to the requirements of section 4(3) of the Act in that the dates on which the respective statements of affairs were laid for inspection at the Master's office did not correlate with the dates on which the Government Gazettes were published.

[41] As *Meskin* opines,¹⁴ correctly so, the provisions of section 157(1) of the Act, "do not apply at all to any conduct under the Insolvency Act which is defective or irregular conduct where the defect or irregularity is not a formal one (which conduct thus has such effect, in any, as ensues in law)."

[42] The question, therefore, is whether in the circumstances of the applications before me, the non-observance of the sub-sections of the Act in question, as stated above, amounts to formal defects or irregularities.

[43] In *Meskin's* opinion, "a failure in any respect to comply therewith, is a formal defect within the meaning of section 157(1) since it involves a departure from the form for the giving of notice prescribed by the Insolvency Act."¹⁵

[44] Since the determination of whether the defect or irregularity is formal depends on whether the conduct complained of consists of a deviation from the provisions of the Act, it is thus, obvious that the respective conduct in these applications amount to formal defects or irregularities. As earlier stated, the deviation is that the respective Government Gazettes were published late in contravention of section 4(1) of the Act, and the dates on which the respective statements of affairs were laid for inspection at the Master's office did not correlate with the dates on which the Government Gazettes were published, contrary to the provisions of section 4(3) of the Act. The Government Gazettes were dated 25 October 2024 but were instead published on 8 November

¹⁴ *Meskin* above n 6 at p15-16(3) para 15.1.6.4.

¹⁵ *Meskin* above n 6 at p14-12 para 14.3.2.2 A.

2024, which is two (2) days late for the second group of applicants and three (3) days late for the first and third group of applicants.

[45] These failures by the respective applicants to comply with the provisions of the Act, are formal defects within the meaning of section 157(1) of the Act since they involve a departure from the procedure required to give notice of surrender by means of the Government Gazettes, and to lay the statements of affairs for inspection in correlation with the dates on which the Government Gazettes were published, as prescribed by the Act.

[46] The question that follows is whether such formal defects can be remedied in terms of section 157(1) of the Act.

[47] Section 157(1) of the Act directs that a formal defect is not rendered invalid conduct to which the defect relates, unless the court holds that it has caused a substantial injustice which cannot be remedied by the court's order.

[48] It is, thus, important that before the formal defect or irregularity can be remedied, the court should first consider whether the conduct sought to be remedied does not cause substantial injustice.

[49] As the court in *Harmse* held –

“In enacting s 157(1) of the Act, the Legislature has in my opinion, clearly directed that a formal defect was not to render invalid the conduct to which the defect relates unless the Court holds that it has caused a substantial injustice which cannot be remedied by the Court's order. The injustice contemplated must be ‘substantial’ which, in my view, must relate to actual rather than potential, injustice and certainly not to speculative injustice.”¹⁶

[50] In the applications before me, the question is whether the failure by the respective applicants to publish their respective Government Gazettes in time and to lay the statements of affairs for inspection outside the date on which the Government Gazettes were published, caused any substantial injustice, to the creditors or any interested person.

¹⁶ Above n 7 at para 17.

[51] In response to this question, what ought to be considered is the purpose of the publications and the laying of the statements of affairs for inspection.

[52] As regards the purpose of the publication of the Government Gazettes, the court in *Oosthuysen* stated the following:

“To establish its purpose, s 4(1) must be read together with s 5, which deals with the legal effect of publishing a notice of surrender. Once a notice of surrender has been published in the Gazette, it becomes unlawful to 'sell any property of the estate in question, which has been attached under writ of execution or other process... 'and the Master becomes entitled, though not obliged, to appoint a curator *bonis* to 'take the estate into his custody and take over the control of any business or undertaking of the debtor...'. By the petitioner's act alone in publishing a notice of surrender, creditors are deprived of their right to execute against the debtor's property. It is to ensure that this interference with creditors' rights, with the attendant potential for abuse, does not endure for too long that a maximum interval between publication of the notice and the hearing of the application is provided for. As pointed out in *Ex parte Meyer* (supra):

'The subsection has been passed with a definite object which is sought to be obtained, viz the debtor should not be able to give long notice, months beforehand, and in that way keep creditors from levying execution and in the meantime dissipate all the assets.'

The period which the Legislature has thought fit to allow is clearly somewhat arbitrary. What is more important than the precise number of days, however, is that once notice has been published there should be certainty as to its effect. it would be untenable if creditors were left in doubt as to whether a proposed sale would be lawful, or if the Master was left in doubt as to whether he was entitled to appoint a curator.”¹⁷

[53] The respective applicants before me, contend that the late publication of the respective Government Gazettes did not prejudice the creditors or any interested person, but, instead, the delay worked in their favour as it shortens the period during which the applicants' assets are shielded from possible auction and that in any event, the difference of the delay in publication was trivial because there were very few days, with other applicants submitting that it should be regarded as *de minimis non curat lex*.

¹⁷ Above n 2 at 698A – E.

[54] I agree with the applicants' submissions in this regard. The late publication of the respective Government Gazettes does not in any way prejudice the creditors or any interested persons as submitted by the applicants. The non-observance by the applicants of the provisions of section 4(1) of the Act does not cause any substantial injustice as contemplated in section 157(1) of the Act.

[55] Having found that the non-compliance with section 4(1) of the Act by the respective applicants is a formal defect or irregularity, and that such defect or irregularity does not cause any substantial injustice to the applicants' creditors or interested persons, I hold therefore that the invalidity occasioned by the formal defect has been remedied in terms of section 157(1) of the Act.

[56] *Meskin* suggests that when that happens, it is not necessary to issue a court order as the invalidity is automatically remedied by the finding I have made in this regard. I agree with this submission. Why I agree with this submission will appear clear when I deal with the non-compliance relating to the statements of affairs.

[57] The purpose for having the statement of affairs laid for inspection by the creditors and interested persons is to afford each of the creditors information concerning the debtor's property and liabilities and of the cause or causes of the debtor's insolvency to enable such creditor to determine the attitude the creditor intends to adopt towards the application.¹⁸

[58] The applicants in this matter argue that even though the respective Government Gazettes were published late, the respective statements of affairs were laid for inspection for more than the required period of fourteen (14) days and that the Master should have issued the certificates. They contend, also, that the Master's certificate is not a requirement in terms of the provisions of the Act.

[59] The issuing of a certificate by the Master or the magistrate of the office at which the statement of affairs laid for inspection and the filing of same with the surrender application, has been in practice in this division for a very long time and has become a permanent feature of the surrender applications. The Master's certificate serves as proof that the statement of affairs was laid for inspection for a period of fourteen (14)

¹⁸ *Meskin et al 'Voluntary Surrender of Debtor's Estate' in Insolvency Law and its Operation in Winding Up* Issue 60 at p3-8(3 – 4) para 3.3.2 and the case referred to at fn 8.

days. It further serves an important function of informing the court as to whether there were any objections filed with the Master against the statement of affairs.

[60] Thus, there are two defects occasioned by the non-compliance with section 4(3) of the Act by the respective applicants. The first being whether the respective statement of affairs laid for inspection for a period of not less than fourteen (14) days at the Master's office, and whether there were any objections lodged with the Master's office against the respective statements of affairs.

[61] Even though the filing of the Master's certificate is not a requirement in terms of the Act, as contended for by the applicants, there must, however, be proof before court when the application is moved that firstly, the statement of affairs was laid open for inspection for a period of fourteen (14) days; and secondly, whether or not there were any objections thereto.

[62] That the statement of affairs had laid for inspection at the Master or magistrate's office for a period of fourteen (14) days may be easy to prove even without a certificate from the Master. The applicants in this matter contend that their respective statements of affairs had laid with the Master for more than fourteen (14) days. In support of this allegation, the applicants have filed proof of service of the statement of affairs on the Master. This, they say they can prove because they have a date stamp of the Master's office which indicates the date on which the Master's office accepted the respective statements of affairs. With this date stamp, they can show that the statements of affairs did lay for inspection with the Master for a period of over fourteen (14) days.

[63] It is my view that that conduct, as stated above, did not cause any substantial injustice to the creditors or any interested person. From the papers filed of record, I am satisfied that the applicants' respective statements of affairs lay for inspection for a period of fourteen (14) days or more, and that any creditor or any interested person who wanted to inspect the statements was given adequate time within which to do so. The difference of the two (2) or three (3) days occasioned by the delay in publishing the Government Gazettes is immaterial and cannot have caused the creditors or any interested persons any prejudice, in the circumstances.

[64] Although I received no submissions as to the effect of the dates that do not correlate as explained earlier in this judgment, I have already made a finding that such a defect is formal. The question that arises is whether there has been any prejudice

caused for any of the creditors or interested persons who might have filed an objection with the Master.

[65] It is my view that the court should not accept the surrender of an estate if it has not been informed that there was any or no objection filed with the Master's office. Without the Master's certificate, a court would not be able to determine such an issue. The certificate of the Master is, in this regard, fundamental in assisting the court to make an informed determination. A substantial injustice may be caused where it can later be found that there was an objection launched which did not come to the attention of the court when it accepted the surrender of an applicant's estate.

[66] Having made such a finding, the question is whether such a defect, which is visited by prejudice, can be remedied by any order of court.

[67] It is my view that as this is a formal defect, it can be remedied by an order of court. An order should therefore be made calling on the Master to issue the certificate indicating whether there was any objection filed with the office.

[68] The author *Mars* opines that if the Master's certificate has not been filed, or it omits to state whether objections have been lodged, the court may accept the surrender subject to a proper certificate being filed or postpone the application to enable the certificate to be filed. The author, however, suggests that the latter cause is clearly the better option.¹⁹ I agree with the latter cause.

[69] In *obiter*, I would also add that if I would have found that the non-compliance by the applicants, as stated above, was prejudicial to anyone and that it could not be remedied by any order of court, I would have made a finding that the non-compliance is fatal to the application and refused to accept the surrender of the applicants' respective estates.²⁰

[70] In conclusion, there are two defects in each of the applications before me. The first defect is the non-compliance with section 4(1) of the Act which has resulted in the late publication of the respective Government Gazettes.

¹⁹ *Mars: The Law of Insolvency in South Africa* above n 4 at 66 -67 and the cases referred to at fn 171 and 172.

²⁰ See *Mars: The Law of Insolvency in South Africa* above n 4 at 27 para 2.5. and Meskin et al 'Rehabilitation' in *Insolvency Law and its Operation in Winding Up* Issue 44 at p14-10 para 14.3.2 – although dealing with the process pertaining to rehabilitation, but the principle enunciated is apposite.

[71] The second defect is the contravention in terms of section 4(3) of the Act, which resulted in the failure by the respective applicants to file the Master's certificate together with the surrender application, which in turn caused failure by the court to be informed of whether or not there were objections filed with the Master. The defect, as such, is not the failure by the applicants to file the Master's certificates. The defect is in that the date on which the statements of affairs were lodged with the Master did not correlate with the date on which the Government Gazettes were published. As such, even though the statements of affairs were lodged with the Master on the date stated in the notice of surrender, but because the Government Gazettes were published two (2) and three (3) days late, the dates did not correlate, this in contravention of section 4(3) of the Act, hence the Master's refusal to issue the certificates.

[72] I find also that the defects stated above are formal defects or irregularities and that in regard to the late filing of the respective Government Gazettes, there is no substantial injustice caused to any creditor or interested person as envisaged by section 157(1) of the Act and the defect are simply validated without any necessity for the court to make any order.

[73] I, however, find that the non-compliance with section 4(3) of the Act as explained in the judgment above, which resulted in the Master's certificates not being filed with the surrender application as proof of whether or not there were objections filed with the Master in respect of each application, though it is a formal defect or irregularity, the defect can or has caused prejudice to any creditor or interested person who may have filed an objection to the statements of affairs. Nevertheless, I find that the defect can be remedied by a court order as provided for in section 157(1) of the Act, directing the Master to issue the certificates.

[74] It is trite that the acceptance of the surrender of an estate is in the discretion of the court hearing the application for such surrender, and the exercise of such discretion depends on the facts of each case. The court accepts the surrender of an estate only where it holds that each of the substantive requirements therefor has been established and that either there has been compliance with the provisions of section 4 of the Act or a failure in this regard is to be regarded as validated in terms of section 157(1) of the Act or such failure has been remedied in terms of an order of the court made accordingly.

[75] For purposes of this judgment, I accept that all the other formalities required in terms of section 4 of the Act have been complied with in each of the applications before me.

[76] In the circumstances I make the following order:

1. The Master of the High Court Gauteng Division is ordered to issue certificates indicating whether objections were launched in respect of the statements of affairs that laid for inspection in that office for the following applications:
 - 1.1 *Ex Parte*: Hodgman J H case number: 113455/2024
 - 1.2 *Ex Parte*: Nel M E case number: 094974/2024
 - 1.3 *Ex Parte*: Lambrecht D M case number: 099273/2024
 - 1.4 *Ex Parte*: Wigget A G case number: 114126/2024
 - 1.5 *Ex Parte*: Clarke B case number: 103517/2024
 - 1.6 *Ex Parte*: Burger M case number: 094973/2024
 - 1.7 *Ex Parte*: Khuzwayo P E case number: 099376/2024
 - 1.8 *Ex Parte*: Currie B I case number: 091407/2024
 - 1.9 *Ex Parte*: Ntuli D P case number: 113545/2024
 - 1.10 *Ex Parte*: Fleischer C E case number: 098532/2024
2. The applications are postponed *sine die*.

A handwritten signature in black ink, appearing to read 'E M KUBUSHI', is written over a large black rectangular redaction box.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

First group of applicants

Counsel for the applicants : Adv Brandon Lee

Instructed by : Michael Senekal Attorneys

Second group of applicants

Counsel for the applicants : Adv W Venter

Instructed by : Schoonraad Attorneys

Third group of applicants

Applicants' representative : Mr J Van Heerden

Instructed by : Johan Van Heerden Attorneys

Date of arguments : 19 & 21 November 2024

Date of judgment : 10 January 2025