IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 4457/2016

In the matter between:

JOHANNES BOTHA Applicant

and

MARIUS BOTHA Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 17 NOVEMBER 2016

REASONS

I INTRODUCTION

[1] This is the typical friendly sequestration where one relative tries his/her level best to rescue another from the jaws of creditors and in the process the court is more often than not provided with

incorrect, if not false, and/or unreliable evidence. This is a typical example.

II THE PARTIES

[2] Applicant is Mr Johannes Botha, a major male person residing in Ficksburg in the Free State Province. He is the father of the respondent, Mr Marius Botha who is resident and employed in Ladybrand, Free State Province. Respondent is married out of community of property.

III THE RELIEF CLAIMED

[3] A provisional sequestration order was granted on 29 September 2016 with return date 17 November 2016. The matter came before me in the unopposed motion court on Thursday 17 November 2016 when I was requested by counsel to grant a final order of sequestration.

IV THE ORDER OF 17 NOVEMBER 2016

[4] I dismissed the application and discharged the rule *nisi*, indicating that my reasons would follow. These are my reasons.

V SECTION 12 OF THE INSOLVENCY ACT, 24 OF 1936

[5] Section 12 of Act 24 of 1936 reads as follows:

"12. **Final sequestration or dismissal of petition for sequestration**

(1) If at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that -

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor.

(2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."

[6] It is common cause that even if all three requirements of s 12(1) have been met, the court still has an overriding discretion which may be exercised in favour of or against the applicant for sequestration. In friendly sequestrations it is often accepted that the respondent is clearly insolvent and/or has committed an act of insolvency, usually by way of a letter to the applicant in accordance with the provisions of s 8(g) of the Insolvency Act, indicating that he/she is unable to pay his/her debts. In most cases our courts accept the version of the applicant that he/she is indeed a creditor of the respondent in an amount in excess of R100,00 although several courts have frowned in the past upon such a bald statement without actual proof of a loan being

granted. I have my doubts about the veracity of applicant's statement *in casu,* but I shall afford him the benefit of doubt.

[7] The most critical requirement that is often not met is the advantage of creditors, it being the third requirement quoted *supra.* The Master's reports are not helpful at all in the vast majority of cases. It is time that the allegations of applicants in friendly sequestrations and voluntary surrender applications are considered carefully, specifically in respect of the calculations to show what dividends might be paid to concurrent creditors. The personnel of the Master's office are *au fait* with administration and sequestration costs as they on a daily basis have to consider liquidation and distribution accounts in insolvent estates presented to them for approval. They know what fees may be charged by trustees of insolvent estates, what the standard costs of auctioneers are, how Master's fees and premiums on security bonds are calculated and generally, what are the costs of advertising, bank costs, sequestration costs and other expenses.

[8] I shall make calculations *infra* of the dividends that might have been payable *in casu,* based on my own experience, but it should be expected of the Master to assist the courts in each and every application for sequestration (especially friendly sequestrations) and voluntary surrender applications. Section 9(4) of the Insolvency Act stipulates that before an application for a provisional sequestration order is presented to court the Master "may report to the court any facts ascertained by him which would appear to him to justify the court in postponing the hearing or in dismissing

the petition." Clearly, the word "may" is not indicative of a peremptory provision, but our courts have always insisted on a Master's report, at least before a final order is granted. Section 4(4), dealing with voluntary surrender applications, empowers the Master to direct the applicant to cause his property to be valued by a sworn appraiser and although s 4 is quiet about the filing of a report, the Master always files reports in these applications.

[9] I shall deal with the third requirement contained in s 12 herein and accept for purposes hereof that the first two requirements have been met.

VI RECENT JUDGMENTS

[10] I wish to refer from the onset to the *dictum* of Daffue, J in ***ex parte* Snooke** 2014 (5) 426 (FB) at para [25]:

> "[25] Bertelsmann et al, *Mars, The Law of Insolvency in South Africa,* 9th ed at 64 are of the view that it is a lacuna in our present legislation that no provision is made for judicial oversight of the actual results of the liquidation process. Judges are not informed whether the dividend that was held up to creditors in the application was in fact realised. I decided some time ago, when having to consider rehabilitation applications, to arrange for perusal of the applicable applications for voluntary surrender or sequestration to obtain personal knowledge of the allegations made under oath, and have no hesitation to state that the averments under oath in so-called friendly sequestration and voluntary surrender applications in order to prove advantage to creditors are far from the truth in many instances. My own experience, that sequestration in the majority of

> cases eventually turns out not to be to the advantage of creditors is no surprise at all. This much is apparent from a survey conducted more than three decades earlier. See: South African Law Commission *Review of the Law of Insolvency: Prerequisites for and Alternatives to Sequestration* (Working Paper 29 Project 63 (1989) and *Hillhouse v Stott* 1990 (4) SA 580 (W). Information obtained from the Pretoria office of the Master revealed that concurrent creditors received dividends in only 28.6% of the cases included in the survey, while creditors were liable to pay contributions in 40.6% of the cases. There is no reason to believe that the position in the Free State is remarkably different."

[11] I shall indicate *infra* that notwithstanding an allegation under oath that a dividend of 30 cents in the Rand would be payable to concurrent creditors *in casu*, such allegation is outright wrong and unfounded. In ***ex parte* Lorraine Jordaan** case no 386/2014 and four other similar matters, an unreported judgment of the Free State High Court by Daffue, J, delivered on 27 March 2014, the applicants' applications for voluntary surrender of their estates were dismissed. The abuse of process by some practitioners/applicants was addressed from paragraph [15] onwards with reference to several judgments of the High Court. I quoted extensively from the judgment of Daffue, J in ***ex parte* Cloete** 2013 JDR 0854 FB delivered on 5 April 2013, but deem it apposite to again quote paragraphs [9] to [21] of the **Cloete** judgment:

> "[9] Although section 4 of the Act requires a certain measure of notice to creditors, an application for voluntary surrender of an estate is in essence an ex parte application and that being so, an applicant in these applications should make full and frank disclosure as the

utmost good faith is required. See Ex Parte Arentzen (Nedbank Limited as intervening creditor) 2013 (1) SA 49 (KZP), para [5] with reference to the old established principles and case law cited in footnotes 3, 4 and 5.

[10] It has become fashion to launch applications for acceptance of surrender of debtors' estates, as is the case with the so-called "friendly sequestrations" with the main purpose to be to the advantage of debtors, but with the unfortunate disadvantage of creditors. This could not be what the legislature had in mind. Holmes J, (as he then was) stated many decades ago:

> 'The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors.'

See Ex Parte Pillay; Mayet v Pillay 1955 (2) SA 309 (N) at 311 E.

[11] I have encountered several similar applications in the unopposed motion courts in the recent past. In several cases the attorneys of first instance were from outside the Free State and particularly from Pretoria. In many cases the estates consisted of either one fixed property, or an asset such as a motor vehicle. Some of these applications I dismissed and others have been postponed at the request of the legal representatives of the applicants in order to supplement the papers, the eventual outcome of which is unknown to me as these were considered by my colleagues doing motion court duty at the time.

[12] In many of these cases the valuations of the assets were either doubtful, or the sequestration costs and the administration costs pertaining to the liquidation and distribution of the estates were incorrectly calculated, presenting a false picture of the actual costs and the probable dividends payable to concurrent creditors.

[13] Several judgments from various High Courts in South Africa have warned over the years against an abuse of process pertaining to friendly sequestrations as well as applications for voluntary surrender. I believe that it is necessary for the Free State High Court to add its voice to those voices in the other High Courts trying to prevent debtors from abusing the system to the detriment of

creditors and especially concurrent creditors who rely on the courts to ensure that the requirements of the Insolvency Act are met without the necessity of them intervening and opposing these kinds of applications. It is not surprising that intervening creditors are in by far the majority of cases banks or other secured creditors. Concurrent creditors and especially creditors with relatively small claims are not prepared to enter into a legal battle that may cost them more than the amount of their claims.

[14] Generally speaking parties resorted to "friendly sequestrations" in this division in order to achieve the sequestration of a debtor and voluntary surrender procedure was seldom utilised. Recently I have noted from personal experience an increase in voluntary surrender applications in this court. Apparently there is a much greater concern in KwaZulu Natal and this caused Gorven J to comment as follows:

'[11] Voluntary surrender applications have begun to proliferate in this division. A fledgling cottage industry has reared its head. As was the situation with 'friendly' sequestrations in Mthimkhulu, many of these take a standard form with almost identical averments and are drafted by a small set of attorneys who have chosen to specialise in such applications. In most cases the estate is small, as is the case in the present application. In many of them, confronted by the requirement that all the costs of sequestration must be defrayed from the estate and it must still be shown that sequestration would be to the advantage of creditors, a formula has arisen to reduce these costs. The applicant states that a friend or relative has undertaken to pay the costs of the applicant's attorney and that the attorney concerned will not look to the estate for his or her costs. Just such an averment is made in the present application.'

[15] In these applications, "friendly sequestrations" included, there is often doubt - an uneasiness - as to the relationship between the attorney and valuator or between the debtor and the valuator. In casu the valuator's business is located in Simontown, the attorney is from Pretoria and the debtor is resident in between in the Goldfields town of Virginia. Such factors should raise the eyebrows, especially where the valuator's fee is alleged to be R500,00 only and his report is of no assistance to the court.

[16] I am in full agreement with the dicta of Gorven J in Ex Parte Arentzen loc cit at paras [12] and [13] to the effect that voluntary surrender applications require an even higher level of disclosure than "friendly sequestrations" and that it is appropriate at the very least to require compliance with those guidelines set out in Mthimkhulu v Rampersad (BOE Bank Ltd, Intervening Creditor) [2000] 3 All SA 512 at 517b-h. Although the court in Mthimkhulu dealt with a "friendly sequestration", the guidelines can be applied in voluntary surrender applications as well, but also bearing in mind what is stated infra.

[17] In Craggs v Dedekind and three similar applications, 1996 (1) SA 935 (C) at 936 H, Conradie J referred with approval to the following remarks of Curlewis JP in Kerbel v Chames 1925 WLD 72 at 76-77:

> '… and one has a strong suspicion that in a very large number of sequestrations in this court, these sequestration proceedings are not for the benefit of the creditors, but are entirely for the benefit of the insolvent and are very often instituted by a friend to help the debtor out of his difficulties.'

Conradie J went on at 936J to 937A to refer to the fact that courts have warned over many years against neglecting the interests of creditors, but notwithstanding that, even then (in 1995) it was still a legitimate concern which should continue to engage the attention of the courts. Although the court dealt with" friendly sequestrations", the concerns pertaining to voluntary surrender applications are exactly the same.

[18] In Ex Parte Anthony en 'n Ander en 6 soortelyke aansoeke 2000 (4) SA 116 (C) Blignaut J dealt with seven separate applications for voluntary surrender. In all seven cases each estate consisted of one mortgaged immovable property and a few movables. The court's main concern was the advantage to creditors and Blignaut J, writing for the full bench, found that notwithstanding valuations obtained by the applicants in each case, they failed to prove that the valuations would be achieved in the event of forced sales. The court relied on the judgment of Leveson J in Nel v Lubbe

1999 (3) SA 109 (W) where the learned Judge was also confronted with a valuation which was nothing more but "a bold assertion of value".

[19] In Nel v Lubbe loc cit, Leveson J made it clear that a court will look to the guidance of an expert when it is satisfied that it is incapable of forming an opinion without it, but that the court is not a rubber stamp for the acceptance of the expert's opinion. It is important that evidence 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. The learned Judge went further:

'The court will not blindly accept the assertion of the expert without full explanation. If it does so its function will have been usurped.' (at 111G)

The manner in which expert evidence must be placed before the court is nothing new. Wessels JA put it as follows in Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft 1976 (3) SA 352 (A) at 371G-H:

'As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

[20] In Ex parta Ogunlaja and others [2011] JOL 27029 (GNP), Bertelsmann J endorsed the approach by Levenson J in Nel v Lubbe and went further to explain the applicable requirements regarding expert testimony in paras [15] and [16]. It is apposite to emphasise the following warnings in paras [35] to [39]:

'[35] 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 applicants, or the applicants' 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 the conclusion that an advantage to creditors is assured if the surrender is accepted …

[36] If this impression is correct, it is clear that the process of voluntary surrenders is being abused. …

[37] If the suggestion is allowed to take hold that certain valuators manipulate the true value of assets upward to persuade the court to accept applications such as the matters under consideration, the result must be a deep suspicion on the part of the court of any valuation report prepared by the valuators concerned.

[38] To prevent such an uncomfortable situation from arising, valuators should certify under oath that they prepared every valuation without any knowledge of the facts of the relevant application. In addition, proof of physical inspections of immovable properties ought to be provided by way of photographs and a detailed description of the physical condition in which each property was found, as well as the effect that the physical appearance of the property has upon the valuation thereof.

[39] The applicants themselves and the attorney acting for them should likewise confirm that the valuator was not made privy to the value that the assets in the estate must realise in order to constitute an advantage to creditors.'

Although the learned Judge referred to valuation of immovable properties only, I am of the view that photographs and a detailed description of the physical condition of movable property and motor vehicles in particular, property that are used on a daily basis, should be obtained as well.

[21] In Smit v Absa Bank Ltd [2011] JOL 27973 (GNP), Southwood, J also found that the applicants' valuation was completely defective as it did not comply with the requirements laid down in the case law. In

para [7] the court also frowned upon the allegation that the applicants' estate consisted of one immovable property only and mentioned the following:

'It is also difficult to believe that the applicants own no other assets. The overall impression is that the applicants have not taken the court into their confidence.'

Southwood, J in Ex Parte Mattysen ed uxor 2003 (2) SA 308 (T) adjudicated upon an application for voluntary surrender and made two relevant observations, one pertaining to the valuation of the immovable property and the other pertaining to the failure to make full disclosure pertaining to the sale of that property. Regarding the valuation the court found at p 316A that the affidavit of the valuator did not contain relevant facts or reasons, did not assist the court in any way and was nothing but "an exercise in futility". With reference to the failure to make full disclosure the court stated the following at 316E:

'Here it appears that there has been a deliberate misrepresentation of the facts. The probability is overwhelming that this was done with the assistance of the applicants' attorney. By the time the applicants' affidavit was made on 3 July the applicants would have been served with the summons, the warrant of execution/notice of attachment would have been served on them and the notice of sale in execution would have been published. Without an explanation it is highly improbable that they would not have known about this and informed their attorney accordingly.'"

[12] The requirements for the voluntary surrender of an estate and sequestration differ, but the principles referred to in the lengthy quotation apply *mutatis mutandis* to voluntary surrender applications and sequestration applications.

[13] In ***ex parte* Erasmus & Another** 2015 (1) SA 540 GP Bertelsmann, J stated the following in an application for

voluntary surrender of an estate in respect of the valuation of assets by valuers who failed to inspect the assets:

> "[10] It is self-evident that this 'valuation' is completely unacceptable.
>
> [11] It lacks, in the first instance, any semblance of an independent confirmation that the assets do in fact exist. No professional assessment of the assets' alleged value has taken place. It has been emphasised over and over again that a valuator's contribution to an application for voluntary surrender — and indeed to any forensic exercise — depends for its admissibility as opinion evidence upon the indisputable independence of the expert. Whatever information the so-called 'expert' valuator used to perform his function was neither obtained nor assessed or analysed by the witness. The applicant who purportedly provided the list of the assets and other information is no expert and hardly able to provide information regarding the age and condition of the assets for purposes of valuation thereof. Photos can easily be misleading and are in any event capable of being manipulated electronically, a fact of which a court can take judicial notice. There is, in addition, no affidavit by the applicant to confirm or to explain his role in this 'valuation'."

[14] In ***ex parte Concato* and similar cases** 2016 (3) SA 549 (WCC) Bozalek, J had to deal with multiple applications for voluntary surrender. Before considering several judgments on the topic he stated as follows in paragraph [7]:

> "It is, of course, open to any debtor to seek escape from financial difficulties via the route of voluntary surrender, provided that he or she is able to make a proper and bona fide case in compliance with the provisions of the Insolvency Act. Our courts have, over the decades, been wary of the potential for abuse in so-called 'friendly'

> sequestrations. It is increasingly recognised, however, that there is a great, or even greater, risk of abuse and the undermining of the interests of creditors in voluntary-surrender applications."

The learned judge also made the following comment in paragraph [38] and in my view the same applies to friendly sequestrations:

> "In these circumstances it seems to be that the interests served by such voluntary-surrender orders are those of professional persons involved, namely the attorneys, the valuator and the trustee, besides, of course, those of the insolvent him- or herself."

[15] Numerous problems and/or defects appear from the papers *in casu*. According to the founding affidavit respondent is the owner of immovable property consisting of a dwelling house in Ladybrand described as portion 2 of erf 213, also known as 49B Loop Street, Ladybrand, valued by C & D Thompson Auctioneers in the amount of R1 100 000,00 and a 2015 double cab Mazda LDW valued by the same auctioneers in the amount of R219 980,00. The inventory prepared by the sheriff in terms of s 19 of the Insolvency Act refers to these two properties as well as a Honda Quad Bike to the value of R10 000,00. No valuation was obtained of this item and there is no evidence that it is in working condition. Apparently respondent does not have any further assets.

[16] As mentioned, applicant is the respondent's father. According to him his son's financial position is well-known to him. He lent R60 000,00 to his son in December 2015 just after respondent

had lost his employment as operational manager in Lesotho. He earned R40 000,00 per month in that capacity. Respondent obtained new employment in January 2016, but his initial salary of R22 000,00 per month was decreased to R15 000,00 from 1 October 2016.

[17] Notwithstanding respondent's financial predicament and the fact that he is in much more serious financial trouble than a year ago, his father and creditor in the amount of R60 000,00 has now decided to demand payment of the loan. In order to adhere to the scheme embarked upon to obtain financial relief respondent wrote the customary letter to his father indicating that he was not in a position to settle his debts, thereby committing a deed of insolvency in accordance with s 8(g) of the Insolvency Act. I would have expected the converse to happen. A father who is prepared to lend money to his son when he is in serious financial trouble would rather write off the debt instead of claiming it when his son is finding himself in such dire financial straits. However, and notwithstanding this comment, the Insolvency Act provides for such measures to be taken. This kind of action is all too frequently experienced in friendly sequestrations.

[18] The valuations of the immovable property and the Mazda LDW were done by a Mr AM Thompson in his capacity as candidate valuer. His valuation reports were co-signed by his principal and registered valuer, Mr D de Hart. The business premises of C & D Thompson Auctioneers are situated in Bothaville *ex facie* their letterhead. This town is situated in the north-west of the Free State Province whilst Ladybrand is situated in the eastern Free

State, a substantial distance away from Bothaville. Both valuations were "allegedly" carried out on 14 September 2016. I say this insofar as I have not been placed in possession of the original valuation reports and original photographs and/or certified copies of supporting documents attached thereto. Furthermore, no confirmatory affidavits of these two persons have been attached to the application papers. Strictly speaking this evidence is in any event inadmissible.

[19] According to Mr Thompson he inspected the Mazda LDV on 14 September 2016, but strangely enough, the immovable property was never inspected at all although the valuations were both "allegedly" undertaken on 14 September 2016. I initially thought that a typing error could have crept in, but the words "no inspection was done" appear twice in the report. Notwithstanding this, the following allegation is made at the bottom of page 10: "The property is overall in a very good condition". How such a remark could be made by an expert in the particular circumstances escapes all logic.

[20] Mr Thompson tried to establish the market value of the immovable property by referring to two comparable properties situated in Ladybrand. There is no indication that he inspected any of these two properties and there would be no reason for him to do so bearing in mind that he did not even take the trouble to inspect the subject property. Any comparison is meaningless and should be ignored.

[21] The two valuers conducted a futile exercise and no value can be attached to any of the two valuations. However, I shall accept for purposes of the calculations to be made *infra* that it might be convenient to consider the forced sale values of the properties as indicated by Mr Thompson. The forced sale value of the immovable property is, contrary to the alleged market value of R1,1 million, only R850 000,00. The forced sale value of the Mazda LDV is, contrary to the alleged market value of R290 980,00, 70% thereof, to wit R153 986,00. Bearing in mind the definition of forced sale value provided by the valuer, there can be little doubt that the liquidation of assets during insolvency falls within the definition of forced sales. The trustee must liquidate as soon as possible and does not have the luxury of keeping property in the market for three to six months and making use of several estate agents who are all of them too willing to advertise the property to the best of their ability.

[22] It is in my view unacceptable that applicant did not employ the services of a valuer in Ladybrand or if such person was not available, an experienced estate agent residing and practising as such in the town of Ladybrand. Such person's evidence, given under oath, referring to comparable sales, providing the court with detailed information pertaining to the property market in Ladybrand at the time and his/her reasons for arriving at a valuation would be much more meaningful than the information placed before the court. A court looks to the guidance of an expert when it is satisfied that it is incapable of forming an opinion on its own, but it must always be remembered that the court is not a rubber stamp for the acceptance of an expert's opinion. In *casu*

there is just no expert opinion at all, bearing in mind what I have stated *supra*. I wish to reiterate the *dicta* in **Coopers SA (Pty) Ltd v Deutsche Gesellschaft**, **Smit v Absa Bank Limited** and **ex parte Mattysen *et uxor*** *supra*.

[23] It appears from the valuation report of the immovable property that the outstanding rates and taxes at that stage amounted to R5 554,00. The municipality is obviously a preferent creditor and the claim has to be paid in preference to concurrent creditors. Applicant did not take this into consideration at all. In order to prove to the court that sequestration would be to the advantage of creditors, applicant, probably assisted by his attorney, calculated that a dividend of 30 cents in the Rand would be payable to concurrent creditors once provision has been made for administration costs in the amount of R30 000,00. The reference to R30 000,00 emanates from the Free State Practice Directives and particularly rule 9.4.1 stating that all "applications for provisional sequestration and voluntary surrender will be approached by this Court on the basis that the costs of sequestration and administration will amount to R30 000,00" (which amount may be adjusted from time to time.)

[24] In his attempt to calculate the dividend of 30 cents in the Rand payable to concurrent creditors, applicant (or his attorney) must have assumed as follows. The immovable property will fetch R1,1 million, being its value from which is to be deducted R950 000,00, being the amount due to Standard Bank on mortgage bond, leaving a balance of R150 000,00. Once R30 000,00 administration costs are deducted, R120 000,00 will be available for distribution amongst concurrent creditors in the

total amount of R403 520,00. When I made the calculation based on these assumptions I arrived at a dividend of 29.7%.

[25] Major errors were committed in arriving at the dividend of 30 cents in the Rand. Whether this was done intentionally, negligently or due to incompetence does not have to be decided. I shall make appropriate calculations *infra*.

[26] Before I proceed to calculate whether any dividend would be payable to concurrent creditors, the following remarks are apposite. The respondent's debts to commercial creditors are stated in round figures, *inter alia* R405 000,00 owing to Wesbank (for the Mazda LDV), R70 000,00 to Standard Bank on an overdraft account, R55 000,00 to Standard Bank in respect of a personal loan, R25 000,00 to Absa on a credit card account and R950 000,00 to Standard Bank on the mortgage bond. There is no indication on what date these round figures were obtained. It is highly unlikely that these are recent and/or materially correct figures, including interest to date of the founding affidavit. The monthly instalment on a loan of R950 000,00 based on a nominal interest rate of 10% per annum is about R7 900,00 per month. Bearing in mind respondent's dire financial position over the last year, it is highly unlikely that he would have been able to settle his instalments as they fell due.

[27] In any event the claims of R5 554,00 in respect of rates and taxes and R2 500,00 in respect of salary are to be paid in preference to concurrent creditors. It was also not considered that portions of

the secured creditors' claims may become part of the concurrent claims as indicated in my calculations *infra.*

[28] Contrary to the calculations made by applicant and/or his attorney, the sum should read as follows and for purposes hereof I exclude costs such as Master's fees, premiums on security bonds, advertising costs, bank costs and other smaller expenses such as postages and petties.

Immovable property @		
forced sale value		850 000,00
Less 3% trustee's fees		
plus 14% VAT thereon	29 070,00	
Less 6% auctioneer's fees		
plus 14% VAT thereon	58 140,00	87 210,00
Payable to Standard Bank as the		
Mortgagee and secured creditor		R 762 790,00

Balance of claim, i.e. R950 000,00 – R762 790,00 = R187 210,00 to be regarded as a concurrent claim, unless the secured creditor is prepared to rely on its security only.

Mazda LDV at forced sale value	R153 986,00
Less 3% trustee's fees	
plus 14% VAT thereon if	
the vehicle is handed back to the	
creditor	8 777,00
Allocated to Wesbank	R145 209,00
The balance of the claim in the amount	

of R259 791,00 is to be regarded as a concurrent claim, unless Wesbank is prepared to rely on its security only.

Free residue:	
Assets	10 000,00
Liabilities:	
Administration & sequestration costs	30 000,00
Available for distribution	Nil
Concurrent creditors	671 055,00
Dividend payable	Nil

[29] Any concurrent creditor proving a claim against the insolvent estate would be held liable for a contribution towards costs. The sequestration and administration costs of R30 000,00 mentioned in the Practice Directive is payable out of the free residue, i.e. the proceeds of unencumbered assets. I have shown herein that it is irresponsible to rely on administrative and sequestration costs of R30 000,00 in order to calculate concurrent dividends without considering the fees of trustees and auctioneers that may be enormous. These costs would amount to about R100 000,00 *in casu*, notwithstanding the fact that respondent's estate is relatively small.

[30] This is the typical situation where the debtor should have sold his immovable property by private treaty in order to settle the mortgagee's claim, or if that was not possible due to no interest from prospective, willing and able buyers, to arrange with the mortgagee to sell the property on his behalf. The same applies to

the Mazda LDV which should have been handed back voluntarily to the secured creditor. The expensive machinery of the Insolvency Act should not be applied in friendly sequestrations where it is clear that concurrent creditors will not receive any dividends at all, or at best an insignificant dividend.

[31] The National Credit Act, 34 of 2005 ("the NCA") has been promulgated to the benefit of *inter alia* over-indebted debtors and/or persons to whom reckless credit was provided. Part D of Chapter 4 of the NCA – i.e. sections 78 to 88 – sets out in detail the steps to be taken to assist these debtors. This is a typical case where respondent, if he elected not to act as mentioned in the previous paragraph, should have pursued his rights of debt review under the NCA in order to obtain a court order in terms whereof his debts to commercial creditors be paid in instalments in an organised matter through the applicable debt review and court processes. In such a case it might have been possible to retain possession of the LDV and the residential property by extending the terms of repayment and have that made an order of court.

[32] Although I am not immune to the hardship and emotional stress caused to debtors due to financial difficulties, especially in the present uncertain times, I am more so mindful of the fact that our insolvency law should not be applied to the extent that the rights of debtors take precedence over creditors' and especially concurrent creditors' rights. In most insolvency matters concurrent creditors suffer severely insofar as they often do not even lodge claims and rather opt to write off their claims. This is

not was intended by the legislature when the Insolvency Act was promulgated.

[33] I conclude by repeating that applicant failed to prove that there was reason to believe that it would be to the advantage of creditors, especially concurrent creditors, if respondent's estate was sequestrated. Therefore the application was dismissed and the rule *nisi* discharged.

[34] The Registrar of this court is directed to send a copy of these reasons to the Master of the Free State High Court, Bloemfontein for consideration of the contents of paragraphs [7], [8] and [15] to [19] hereof and his obligation as stipulated in s 9(4) of the Insolvency Act, 24 of 1936.

J. P. DAFFUE, J

/eb