REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA CASE NO: 2333/2012

In the Ex Parte application of:

GLEN MURRAY ARNTZEN Appellant

NEDBANK LIMITED Intervening Creditor

JUDGMENT

GORVEN J

1]This application is for an order sequestrating the estate of the applicant by way of voluntary surrender in terms of the provisions of sections 3 to 6 of the Insolvency Act 24 of 1936 (the Act). It was brought on an *ex parte* basis. Nedbank Limited (Nedbank) was granted leave to intervene as an interested party, being the major creditor of the applicant. It is not in issue that s 4 of the Act was complied with, save that the Act provides that the notice of surrender must be posted to the South African Revenue Service (SARS) whereas the application, including the notice, was served at the offices of SARS. This is a formal defect as envisaged in s 157(1) of the Act. It was conceded that there had been substantial compliance and certainly no substantial injustice resulted. Nothing further therefore need be said on the matter.

2]The test for voluntary surrender applications is set out in Section 6 (1)

of the Act which, apart from requiring compliance with s 4, provides as follows:

'If the court is satisfied … that the estate of the debtor in question is insolvent, that he owns realisable property of a sufficient value to defray all costs of the 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.'

3]There is no dispute that the estate of the applicant is insolvent. That leaves two issues for determination before the discretion granted by s 6(1) can be exercised. The first is to determine whether the applicant owns realisable property sufficient to defray all costs of the sequestration and the second is to determine whether the sequestration of the applicant's estate will be to the advantage of creditors.

4]Both of these aspects require the court to be satisfied. The applicant must discharge the onus to satisfy the court on a balance of probabilities. In particular, the test relating to advantage to creditors is more strictly framed than that for the provisional sequestration of a debtor's estate which only requires the court to be of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated.[1] It is also more strictly framed than that for the final sequestration of a debtor's estate which only requires the court to be satisfied that there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated.[2] In s 6(1), the court must be satisfied that it will be to the advantage of creditors if the debtor's estate

1 The relevant parts of s 10(1)(c) of the Act provide as follows: ' If the court… is of the opinion that *prima facie*… there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated… it may make an order sequestrating the estate of the debtor provisionally.'
2 The relevant parts of s 12(1)(c) of the Act provide as follows: 'If… the court is satisfied that… 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.'

is sequestrated.

5]Courts have long required an applicant in voluntary surrender applications to make a full and frank disclosure.[3] This arises at least in part from the stringent test referred to above. It is quite clear that without a full and frank disclosure, the court cannot be 'satisfied' as to the above two criteria in particular. The required high level of disclosure is also affected, in no small measure, by the fact that the application is ordinarily brought on an *ex parte* basis as is the present one. There is ample authority that applications brought on that basis require the utmost good faith.[4] The principles were succinctly stated by Le Roux J in *Schlesinger v Schlesinger*[5] in a rescission application as follows:

'(1) in *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;

2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and

3) the court, apprised of the true facts, has a discretion to set aside the formal order or to preserve it.'

6]In voluntary surrender applications, the need for full and frank disclosure is accentuated by the fact that, despite the practice of such applications being brought on an *ex parte* basis, they do not fulfil the criteria for true *ex parte* applications. In true *ex parte* applications the applicant is the only person who is interested in the relief which is being claimed. In such applications, notice only to the registrar of the court is

3 *Ex parte Swart* 1935 NPD 432 at 433; *Berrange NO v Hassan & another* 2009 (2) SA 339 (N) at 354A-B.

4 This was said to be trite in *Phillips & others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para 29.

5 1979 (4) SA 342 (W) at 349A-C (his emphases). This dictum has been consistently approved and applied. See *United Enterprises Corporation & another v STX Pan Ocean Company Ltd* [2008] 3 All SA 111 (SCA) at para 17, *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at 428I-429B. An order arising from a voluntary surrender application brought *ex parte* has also been set aside where there were material non-disclosures. See *Ex parte Mattysen et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T) at 316D-E.

required.[6] In voluntary surrender applications, on the other hand, creditors, to name only one category of persons, have a very real interest in the outcome of the application. For them the outcome of the application spells the difference between the prospect of recovering the applicant's full indebtedness and the prospect that recovery will be reduced by virtue of sequestration.

7]This is presumably why, in voluntary surrender applications, notice to creditors is required. Unlike the situation where the creditor is cited as a respondent in an application, however, service of the application papers is not required.[7] Neither do creditors have the same time available to decide whether or not to oppose the application. Two forms of notice are given to creditors. First, the notice of surrender in the statutory form which advises of the date of the application and the date from which a statement of the applicant's affairs will lie for inspection at the relevant office or offices must be published in the Government Gazette and a newspaper circulating in the district in which the applicant resides. The publication must take place not more than 30 days and not less than 14 days from the date of the application. Secondly the notice of surrender giving the same information must be delivered or posted to each creditor whose address is known within 7 days of publication in the Gazette. Depending on when they receive the posted or delivered notice, and depending on whether the applicant has published only 14 days prior to the application, creditors may only be left with a few days to inspect the statement of the applicant's affairs so as to decide whether or not to intervene in the application.

8]From this, it is clear that in voluntary surrender applications creditors are required to be more alert, proactive and must respond more quickly in

6 Rule 6(2) of the Uniform Rules of Court.
7 Section 4(1)–(6) of the Act.

assessing whether or not to intervene than if they had been a party to the application. If they wish to form a clear view of the application, they need to inspect the statement of affairs and, if this does not provide sufficient detail, to locate and inspect the application itself, all within a limited time period. This contrasts with the position in a normal application where the respondents receive service of the application papers and all that they need to do is to read the papers in order to form the same view. It does not require great imagination to realise that many, if not most, creditors do not have the resources to routinely and timeously follow up on notices of surrender sent to them by post. Even if they follow up, they may well decide that it is not worth throwing good money after bad by intervening and opposing the application. This may be particularly so in relatively small estates where their prospect of recovering legal costs, even if they successfully oppose the application, is remote. This renders creditors peculiarly vulnerable to voluntary surrender applications which, at a superficial level, make out a case that sequestration is inevitable. In such a case an overburdened court, confronted with an unopposed application, may not scrutinise the application as carefully, and thus become aware of material non-disclosures, as it would do if it were opposed. A further reason for requiring a higher level of disclosure in voluntary surrender applications, is that an outright order can be given on the first appearance in court whereas, in most sequestration applications, a provisional order precedes a final order in a two stage process.

9]Just over a decade ago, the various divisions of the High Court 'cracked down' or 'tightened up' on so-called friendly sequestration applications which were described as beginning to constitute a 'cottage industry'.[8] In *Mthimkhulu* it was said that, in many cases, there was 'a very grave

8 *Mthimkhulu v Rampersad & another (BOE Bank Ltd, Intervening Creditor)* [2000] 3 All SA 512 (N) 514*b-c*, 516*d-e*.

suspicion of collusion'.[9] As a result, practice guidelines were laid down in this division for such applications.[10] In essence what was required was full and frank disclosure along with clear proof of the necessary facts. The proof of the indebtedness giving the applicant *locus standi* generally required documentary proof. In addition, a full and complete list of the assets of the respondent was required, including a valuation by a qualified person containing cogent reasons for arriving at the valuation, both for movable and immovable property. As was commented at the time, the claimed value of household furniture and effects and second hand motor vehicles, which were often relied upon to constitute an advantage to creditors, often bore 'no relationship to their true value'.[11]

10]Reference was made to the number of matters where a final order was granted and 'the friendly creditor makes no effort to have a trustee appointed or to prove his claim, no creditor takes steps to prove a claim because of a fear of contribution, the debtor waits for the dust to settle and with his old creditors off his back carries on business as normal'.[12] In situations such as this, the sequestration of the debtor's estate cannot be said to have been to the advantage of creditors. Such applications constitute an abuse of the process of court and undermine the rights and interests of creditors. The only person who benefits is the debtor, often at the expense of creditors.

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

9 At 516*b-c*.
10 *Mthimkhulu* at 517*b-h*.
11 *Mthimkhulu* at 517*e-f*.
12 *Mthimkhulu* at 514*g-h*.

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.

12]I take the view that there is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in 'friendly' sequestration applications. Therefore the need for full and frank disclosure and well founded evidence concerning the debtor's estate is even more pronounced. There are a number of reasons for this, some of which have been foreshadowed in the discussion above. I shall mention only some. First, the applicant tends to focus on the formal requirements of s 4 of the Act and does not seem to appreciate the need to satisfy a more rigorous test than for sequestration applications at both provisional and final stages as regards advantage to creditors. Secondly the court must perforce, in most instances, rely on the founding papers. This brings into play the peculiar characteristics mentioned above of voluntary surrenders being brought as *ex parte* applications. Thirdly, no collusion between friendly creditor and debtor is necessary since it is the debtor who is the applicant and has a more direct interest in the application succeeding and understanding of the genuine position than the friendliest of creditors. Voluntary surrender applications therefore require an even higher level of disclosure than do 'friendly' sequestrations if the court is to be placed in a position where it can arrive at the findings and

exercise the discretion set out in s 6(1) of the Act.

13]It is therefore appropriate, at the very least, to require compliance with those guidelines set out in *Mthimkhulu*[13] which can be applied to voluntary surrender applications. Where documents are available to support the averments made, these should be put up. Courts should require admissible evidence in support of these applications rather than bare averments by the applicant or pieces of paper supposedly supplied by persons who express opinions on the value of assets unsupported by affidavits, cogent reasoning or relevant qualifications. Adapting what was said in relation to 'friendly' sequestration applications by Conradie J,[14] 'a Court should be forgiven for requiring rather more…[in making out a case]…than it might otherwise do'. An applicant 'should present sufficiently detailed evidence to satisfy a sceptical Court'[15] that he has satisfied the requirements of s 6(1) of the Act and that the discretion of the court should be exercised in favour of the applicant. As was said by Holmes J, 'The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors.' [16]

14]In the founding affidavit, the simple case is made out that the applicant has two assets; an immovable property and a motor cycle. He says their values are R650 000 and R33 500 respectively, giving total assets of R683 500. Against this he states that his total indebtedness is R828 888.85. Nedbank is owed R746 584.88 from 4 accounts, of which R524 535.32 is secured by a mortgage bond and the rest of his creditors are together owed R82 303.97. He states the costs of sequestration to be

13 At 517*b-h*.
14 In *Craggs v Dedekind, Baartman v Baartman & another, vanJaarsveld v Roebuck, van Aardt v Borrett* 1996 (1) SA 935 (C) at 937E-F.
15 *Craggs* at 937F
16 In *Ex parte Pillay; Mayet v Pillay* 1955 (2) SA 309 (N) at 311.

R45 495. He therefore calculates that, after the secured debt is satisfied and the costs of sequestration deducted, a sum of R113 469.68 will remain to meet concurrent creditors' claims of R304 353.53, giving a dividend of just over 37 cents in the rand. Nedbank gives a different picture. It puts up a sworn, fully motivated, valuation for the immovable property by a professional valuer registered as such under the Valuers' Act 23 of 1982 stating that, on a forced sale basis, the property would fetch a maximum of R600 000. Nedbank also states that the actual amount outstanding for the secured debt as at 1 May 2012 is not R524 535.32 but R536 631.37, along with interest from that date at 7.5% per annum. It says the costs of realising the immovable property and the motor cycle on insolvency are R92 505 and R8 021.45 respectively. In addition, the costs of the applicant's attorneys of R22 500 and costs of advertisements and 2 postponements should be added. It calculates, as a result, that, after all the costs of sequestration were paid, an amount of R640.78 would be available for distribution to the concurrent creditors giving a dividend of substantially less than 1 cent in the rand. Depending on what is in fact realised, it says, there is a danger of a contribution if the intervening creditor proves a claim.

15]Even ignoring the obvious disputes reflected above, the present application simply fails to pass muster.[17] I need mention only a few unsatisfactory aspects. In the first place, the value placed on the immovable property in the founding affidavit is based on a letter unsupported by any affidavit from the person concerned. The letter is addressed by an estate agent 'To Whom it May Concern'. The letter states that the value is 'based on the present Comparative Market Analysis of property sales in Richmond' and that the agent has been

17 As will appear from the balance of the judgment, in the view I take of the matter, it is not necessary to resolve these factual disputes.

marketing houses in the area since 2006 and has lived in the area for 37 years. No mention is made of comparable sales, no description at all is given of the improvements to the property and it does not state whether this is a market value or one based on a forced sale. It was only after the intervening creditor challenged all of this that the estate agent deposed to an affidavit in reply which sets out some of the relevant factors needed to arrive at a valuation and says that the value she attaches 'reflects the amounts (sic) that would be realised from a sale through insolvency, or at least an amount very close to this'. Since the applicant's case should be made out in a founding affidavit, especially in an *ex parte* application, and since even the reply does not deal with a forced sale value, this approach comes nowhere close to what is required.

16]There are additional problems. One of these relates to the value the applicant attaches to the motorcycle. Once again, a document is put up in support of this without the author deposing to an affidavit, without indicating why the author qualifies to give the expert opinion relied upon and without any reasons being furnished for arriving at that value. The document also says it is a 'fair market value' for a 'voetstoots' sale. Further, bare averments are made as to the costs of sequestration, including an 'Attorney's taxed bill of costs' for R22 500 without any basis being laid for such averments or any bill of costs being put up. As for the bill of costs having been taxed, this cannot have been taxed for the present application and the relevance is therefore not at all clear. After Nedbank challenged this and other aspects of the founding affidavit, the applicant in reply indicates that his attorney's costs 'have been settled by a friend as a gift' and will not be claimed from his estate.

17]The founding affidavit says that certain creditors have issued demands

for payment but does not say which ones have done so. In reply the applicant for the first time discloses that he has pursued his rights for debt review under the National Credit Act No 34 of 2005 (the NCA). He does not say which debts are included or excluded from this process when on the face of it, only one of his debts, for R7 814,93, may not fall within the ambit of the NCA. He does not say what stage the debt review process has reached, whether any order has been made under s 87 of the NCA or whether a debt counsellor has indicated that any of his debts may have resulted from reckless credit extension, thus potentially relieving him of some of his indebtedness.[18] All that is stated is that Nedbank terminated the debt review process and the notice from Nedbank doing so reflecting this is put up. The notice of termination deals with only two of the accounts held with Nedbank; a loan account and his credit card, and gives as a reason for termination that no payments had been received. From a different annexure put up by Nedbank, it becomes clear that the loan obligation which was terminated was what the applicant refers to in his statement of affairs as a personal loan. This means that, if he applied for debt review in respect of all his debts, the home loan and vehicle finance agreements with Nedbank and all the debts to his other creditors are still subject to the debt review process and, if he maintains his obligations, they cannot be terminated by way of s 86(10) of the NCA.[19] As was stated in *Collett*,[20] one of the purposes of the NCA is that all responsible consumer obligations which fall under the NCA are satisfied.[21] The status of the debt review process has an obvious bearing on whether the remaining debt may be rearranged by agreement or a court order. The

18 In *Ex parte Ford & Two Similar Cases* 2009 (3) SA 376 (WCC), an adequate explanation was required why, when much of the debt fell within the ambit of the NCA and it seemed that credit had been granted recklessly, the various applicants failed to avail themselves of the remedies available under that Act.
19 *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA) at para 14.
20 At para 10.
21 Based on s 3(i) of the NCA.

failure to deal with this fully constitutes yet another serious lacuna in the application.

18]Even disregarding the debt review process, a factor as to whether it can be said that there will be an advantage to creditors is whether, despite the applicant being insolvent, the indebtedness is likely to be liquidated over time if the income of the applicant exceeds expenses. Such a situation would clearly redound to the benefit of creditors since they would receive the full amount due to them. The disclosure concerning income and expenditure is therefore highly relevant, particularly in small estates such as that of the applicant or those where there is a relatively small difference in value between the assets and liabilities. It would also affect considerations of the advantage to creditors if a trustee on insolvency would be able to utilise s 23(5) of the Act to apply any excess income to the settlement of claims against the estate.

19]Unfortunately the level of disclosure of his monthly income and expenses also falls well short of what is required. It is riddled with a lack of clarity and at least apparent contradictions which cry out for full and candid explanations. He states, in the founding affidavit, that he is employed as a utility services auditor and annexes a copy of what he terms his last salary advice which, he says, shows income of R21 000. He annexes a schedule of monthly income and expenditure (the schedule) which shows his average income to be R21 000 and his expenditure to be R21 014, excluding sundries. These averments and documents give rise to a number of difficulties. In the first place, what is put up as his salary advice reflects the applicant as a commission agent earning a commission and not a salary. Commissions earned will vary from month to month as the applicant himself states in the reasons for insolvency set out in his

statement of affairs. Only one commission statement is put up and no information is given as to what he earned over a more extended period of time so as to support the averment as to his average income.

20]Secondly, whereas, in the schedule he reflects his gross income as R21 000 from which he deducts R5 570.45 as PAYE, R265 as UIF and a vehicle instalment including insurance of R6 000, the commission statement reflects his gross income as R27 110. Thirdly, the commission statement shows deductions of R1 000 as a 'Bakkie instalment repayment' and tax of R4 635 to arrive at a nett amount of R21 475.53. Tax has therefore already been deducted and should not be reflected as an additional expense in the schedule. Fourthly, his claimed expense for PAYE of R5 570.45 on a gross income of R21 000 in the schedule is higher than the tax actually deducted in the commission statement based on a gross income of R27 110.53. Fifthly, as regards the vehicle instalment of R6 000 reflected as an expense in the schedule, R1 000 has been deducted from his commissions. He does not explain whether the R6 000 is an additional instalment he is obliged to pay or a duplicated expense. On the face of it, he will have available the amount for PAYE of R5 570.45 and the additional R1 000 deducted for a vehicle instalment, thus having just more than R6 500 each month to liquidate his indebtedness.

21]The difficulty does not end there. In his statement of affairs, attested on 13 March 2012, he states that his vehicle was hijacked at the end of January 2012 and, as a result, he has been unable to work since then. This is not dealt with or updated in his founding affidavit deposed to 13 days later or indeed in his replying affidavit. In addition, the commission statement put up is for the month of February 2012. There is no indication

that the commissions in question were earned in any month other than February. He does not explain how he earned commission in February if he was unable to work. If he earned commission in February after his vehicle was stolen and his ability to earn commission was impaired by the loss of his vehicle, it begs the question whether his commissions in the preceding months were substantially higher giving a higher average income which could be applied to liquidate his indebtedness. If he had put up a number of recent commission statements, it would have assisted in resolving this issue. In addition, the commission statement reflects that, as from 23 December 2011, he has had a new bank account with ABSA Bank Limited. This account is not reflected in his statement of affairs or any affidavit as an asset or as a liability. It is not mentioned at all and, as a result, there appears to have been a non-disclosure since the probable inference to draw is that his commission is deposited into this account each month. It is therefore not possible to establish whether the applicant will be able to trade himself out of his debt.

22]As a result of all of the above, I am not satisfied that the applicant owns realisable property of sufficient value to defray all costs of the sequestration which will, in terms of the Act, be payable out of the free residue of his estate. I am also not satisfied that it will be to the advantage of his creditors if his estate is sequestrated. Since neither of these findings can be made, the question of the exercise of my discretion does not arise since findings in favour of the applicant on these issues are necessary precursors to the exercise of any discretion.[22] It will be apparent from this

22 I have found no authority regarding the nature of the discretion to be exercised in voluntary surrender applications. At the stage of a provisional order in an application for sequestration opposed by the debtor, Wallis J conceived that the discretion granted to the court is one involving a power combined with a duty as was dealt with in *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473H-474E and approved in *South African Police Service v Public Servants' Association* 2007 (3) SA 521 (CC) at para 17. See *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at para 27 where he said, 'In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the

that I am of the view that the applicant has failed to make out a case for the voluntary surrender of his estate.

23]In the result, the application is dismissed and the applicant is directed to pay the costs occasioned by the intervention of the intervening creditor.

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respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.' It seems to me that, in voluntary surrender applications, a different approach may need to be considered, not least because the debtor is the applicant rather than the party opposing the application. In addition, a creditor brings sequestration applications and this indicates the attitude of at least that creditor. It seems that a more general approach has in fact been applied by the courts but without any discussion as to the nature of the discretion. See, eg, *Ex parte van den Berg* 1950 (1) SA 816 (W) at 817-818; *Ex parte Ford & Two Similar Cases* fn 18 at paras 18-21.

DATE OF HEARING:	13 September 2012
DATE OF JUDGMENT:	28 September 2012
FOR THE APPLICANT:	JM White, instructed by MORNET ATTORNEYS
FOR THE INTERVENING CREDITOR:	LE Combrink, instructed by VAN HULSTEYNS ATTORNEYS, locally represented by ER BROWNE INC.