

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 1869/2015

DATE: 26 March 2015

In the ex parte application of:

PETRUS JOHANNES VAN DYK

Applicant

Identity Number: [...]

For the voluntary surrender of his estate

JUDGMENT

[1] This matter came before me in the unopposed motion roll of 25 February 2015. It stood down to my next unopposed roll (week starting 23 March 2015) to allow counsel for the applicant to file heads of argument on the question that I posed to him during argument on whether there is any modern authority¹ on the question of forfeiture of salary with a view to establish a benefit to creditors as envisaged in section 6(1) of the Insolvency Act, 24 of 1936 (as amended) (“the Act”).

[2] According to his Statement of Affairs that was filed with the Master of the High Court, the estate of the applicant comprises of only movable assets, consisting of household items with an estimated value of R37 660.00.

On calculation, the dividend that would accrue to creditors from the free residue of his estate amounted to “Oc per Rand”. He refers to it as “negligible”

[3] By his own admission, applicant stated in paragraph 8.1 of his affidavit that the movable assets “are not of sufficient value to afford creditors a non-negligible dividend or advantage to my creditors”

[4] The crux of this matter is what applicant stated further in paragraph 8.1 that *“However, if this application is granted, I will be placed in the position to easily afford monthly payments of R2, 900. 00 to my insolvent estate in terms of Section 23(5) of the Insolvency Act”*

[5] In the subsequent paragraphs, applicant stated the following:

" 8.2 Accordingly, should my application be granted, I herewith irrevocably undertake to assist either the Master or my Trustee in anyway possible to give effect to the forfeiture of a portion of my income, being no less than R2, 900.00 per month, in terms of Section 23(5) of the Insolvency Act². I herewith also consent to the deductions being made in favour of my trustee for distribution amongst my creditors as opposed to realization of my inadequate unencumbered assets.

8.3 I am aware that there is always a risk that I might lose my job at any time in the future, but the relevant risk exist regardless whether the application is granted. In any event my Trustee would ensure that the implementation of Section 23(5) is re-instituted after I had once again obtained employment.

8.4 I am also fully aware that the repayment period would run until the rehabilitation of my estate and that I will not be able to apply for said rehabilitation unless 4 years (48 months) have lapsed since my sequestration, except on the recommendation of the Master of the High Court³. Furthermore I realize that neither the Master nor any of my creditors can or may be compelled to agree to my rehabilitation after the expiration of the required period.

[6] I adjourned the proceedings at the time (25 February) to allow counsel for the applicant to bring the authorities referred to in the paragraphs quoted above. I had sight of the McKechnie judgment as well as the book (Mars: The Insolvency Law) referred to in footnote 2 above.

The relevant paragraph of the Mars book reads as follows:

- ... It has been held in the past that it would be to the advantage of creditors to accept the surrender where a debtor receiving a salary undertakes to make available to creditors a portion of his salary in terms of *the Act*⁴. In recent times, this option has seldom been exercised as such an order is very difficult to police and payment of a portion of the salary usually tendered to be made in monthly installments, delays the liquidation of the insolvent estate. If it is accepted at all, the contributions that accrue to the insolvent estate will have to be administered by the trustee in terms of the provisions of section 23(5) of the Act.....“

[7] Counsel for the applicant filed his heads of argument two days later. It is a four-page document that does not say anything new that he did not say during his oral submissions in court. In fact, it did not assist me at all because the reason I allowed the matter to stand down further was to allow him to do further research on the matter.

Under case law, he only referred me to the McKechnie case .

[8] On the positive side, the standing down of the matter afforded me an opportunity to consider the matter and do my own research on the development of the law in this regard.

I considered the judgment in the matter of Ex parte Cloete that is referred to in the applicant's affidavit. The closest I could establish that may be relevant to the issue in question is in paragraph 25 of the judgment where **Dafue J** stated the following

“[25] Applicant's failure to disclose his income and expenditure is highly relevant, particularly insofar as the total of the concurrent claims is relatively small. If the income and expenditure were fully disclosed, it might have had an effect on considerations pertaining to the advantage to creditors. If a sufficient amount was available for the trustee to be appointed to utilise section 23(5) of the Insolvency Act to apply such excess income, I might have been persuaded to grant the application on condition that applicant could also overcome my difficulties with the other apparently insurmountable problems referred to herein. However there is a dearth of evidence in this regard.

I do not see how this judgment supports applicant's contentions though.

[9] According to his pay slip, applicant earns a gross income of R16 200.00 from which it is deducted tax, UIF and Provident Fund. His nett salary is R13107.99.

[10] Other than the policing of the court order issues that were identified in the Mars (Bertelsmann et al) book, there are serious uncertainties of life that I have to consider in order to exercise my discretion .

Most of these have been identified by the applicant in his affidavit, namely, security of job tenure and delays in finalizing the administration of the insolvent estate.

[11] In order to assess the reality of these uncertainties, the applicant's own career path is relevant. Although he does not state the exact periods, it is noteworthy to mention that at some point his employment contract at the Air force was not renewed. He then worked for his brother in Nelspruit doing what he refers to as "peace jobs"⁵. He found another job, but was retrenched. He spent some time without a job. He then moved to Pretoria where he found another job. It is not clear from the papers whether it is the current job at

Malanseuns where he is a Manager or an earlier one.

[12] Although there is no full disclosure of his employment history, it is clear from the sketchy details provided that applicant has not had a stable employment history. He also did not disclose whether he is qualified in any trade or profession.

[13] It is a real possibility when considering his employment history that what he acknowledged as a risk of losing his job is a real possibility.

[14] Bertelsmann et al, in the same book also refer to *favourable* and *unfavourable* circumstances that would influence a court in considering whether to accept a voluntary surrender of an estate. In paragraph 3.34 (at page 77), the learned authors stated amongst others the following :

"The fact that the assets are of little value and the debtor is in receipt of a substantial salary out of which he might gradually pay his creditors, will be regarded as a negative indication because the court will normally be reluctant to accept the surrender conditionally on his paying a portion of such salary to his trustee. It is a negative indication that the debtor intentionally fails to make a full and frank disclosure of his affairs"

[15] The applicant is relatively young and apparently in his second marriage and his son from his previous, now deceased wife lives with him and his new wife. His disclosed expenses are minimal, being rent, water and lights, transport, medical aid, groceries and school fees.

[16] He does not mention whether he has children with his new wife or not . In fact there is very little information to enable me to assess whether his needs are likely to change, thereby making it impossible for him to adhere to his undertaking to pay a monthly installment to the Trustee.

[17] Another consideration is the delay in finalizing the administration of the insolvent estate. In essence, supposing the applicant does not lose his job and he makes regular payments, the Trustee will only be able to draw an account after 48 months.

This, in my view is not in the interest of the creditors.

[18] Section 23(5) of the Act provides as follows:

*(5) The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment **which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him**, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this*

subsection, to any part of the insolvent's remuneration due to him at the same time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee, (highlighted for emphasis)

[19] The question of whether the applicant would at anytime in the future require additional funds to take care of himself and his dependants is in my view relevant.

As I have already stated, I do not know whether he is qualified in any trade or profession to assess the probabilities of his job tenure. His family needs too may change. The question that arises then is whether the Master may lawfully deprive him of the protection afforded by section 23(5) or whether applicant would be bound by his undertaking.

In the context of section 82(6)⁶, **Landman J**⁷ held that the waiver was impermissible as the provisions were enacted for the benefit of both debtors and the public.

At page 418 paragraph {67} the learned judge held as follows;

“Taking into account the vital importance of the inalienable right to human dignity of the applicants and indeed whatever dependants they may have and the right to work or trade, coupled with the purpose of excepting basic necessities, I am of the view that the applicants may not waive their entitlement”

[20] I align myself with the reasoning and conclusions of Landman J because indeed as he pointed out, there are constitutional considerations such as the applicant's basic right to food.

At some point, the Master may be required to consider whether the undertaking to make a monetary contribution to his insolvent estate overrides the applicant's rights and obligations to provide for himself and his family.

[21] In my view, and taking into account the constitutional developments in our country, I don not think that the authority of **Ex Parte McKechnie** would still stand. The applicant in this matter (and other applicants in similar matters) makes these undertakings specifically to increase the value of their assets with a view to establish a benefit for creditors.

[22] Section 6(1) of the Act provides as follows:

“(1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent that he owns realizable property of a sufficient value to defray

all costs of 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.

[23] It is common cause that the applicant does not own realizable property of a sufficient value to defray all costs of the sequestration out of the free residue .

The undertaking to make a contribution from his salary into the insolvent estate is in my view impermissible, not only in view of the risks associated with policing of the order and delays in finalizing the administration of the estate, but also in view of the constitutional challenges that may arise should the applicant at any stage in the future require the amount for the basic needs of his family.

[24] Under the circumstances, I make the following order:

[24.1] The application for voluntary surrender of the estate of the applicant is dismissed.

TAN MAKHUBELE

Acting Judge of the High Court

APPEARANCES:

Applicant: Advocate Jaco Van Heerden

Instructed by: Dionne Lamprecht Attorneys

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¹Other than Ex parte Mckechnie WLD 45

²footnote in paragraph 8.2 " Ex parte McKechnie 1938 WLD 45, Mars: The Law of Insolvency, 9th Edition, Bertelsmann et al, p.75, para 3.30, Ex parte Cloete (1097/2013) ZAFSHC 45 para 25;

³footnote in the paragraph 8.4 " Section 124(2) -Final paragraph

⁴footnote in the book " 252: Ex parte McKechnie WLD 45:

⁵He did not elaborate, but I accept that he probably meant odd jobs.

⁶whether the protection afforded by this section may be waived by an applicant for voluntary surrender of an estate. In many applications I have seen and judging from the law reports, the new trend is for applicants to insert a paragraph in their application that they waive this protection.

Section 82(6) reads as follows: “from the sale of the moveable property shall be excepted the wearing apparel *and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale*”

⁷Ex Parte Kroese and Another 2015 (1) SA 405 (NWM)