

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 752/2014

In the ex parte application of

JOHN WILLIAM SNOOKE
ID NO: [...]

Applicant

JUDGMENT BY: DAFFUE, J

HEARD ON: 24 APRIL 2014

DELIVERED ON: 27 JUNE 2014

I. INTRODUCTION

[1] The applicant, John William Snooke, married out of community of property, applies for rehabilitation of his estate, but this is clearly wrong: an estate is sequestrated, but an insolvent person is rehabilitated. In reality he seeks his rehabilitation in accordance with s 124(3) of the Insolvency Act, 24 of 1936 (“the Act”).

- [2] This is an unopposed application. Both the Master and the remaining trustee have no objection to granting of relief. When the matter came before me initially on 13 March 2014 I raised certain concerns which have now been addressed although not to my satisfaction.

II. **APPLICANT'S INSOLVENCY**

- [3] On 2 December 2010 applicant's application for the voluntary surrender of his estate was accepted.
- [4] On 15 December 2010 Ms E M van Wyk consented in writing to taxation of the bill of costs of applicant's attorney in her absence.
- [5] Taxation of the bill of costs took place on the same day whereafter the Taxing Master affixed his *allocatur* to the bill. The total amount of the taxed bill is R40 229.99. Not a single sent has been taxed off. I refer to this issue later again.
- [6] In a first report in the present application the assistant Master reported that the Master had appointed Ms Van Wyk and Mr T J H Potgieter as provisional trustees on 28 December 2010. They were eventually finally appointed as trustees on 11 April 2011. If this information is correct, Ms Van Wyk consented to taxation of the bill of costs prior to her appointment as provisional trustee. Nothing turns around this, save that I have serious concerns about the amount of costs taxed out to which I shall return later. In my view Ms Van Wyk would have frowned upon the excessive fees

charged if she took the trouble to scrutinise the bill of costs, which she in all probabilities failed to do.

- [7] There is no indication which creditors nominated Ms Van Wyk and Mr Potgieter for appointment as provisional trustees, if they were indeed nominated. What is apparent is that they were finally appointed by the Master after the first meeting of creditors where no voting took place as no claims were proved.
- [8] No creditors lodged any claims against the insolvent estate and consequently no claims were proved. Therefore this application is brought in accordance with the provisions of s 124(3) of the Act.

III. SECTION 124(3) OF THE INSOLVENCY ACT 24 OF 1936

- [9] By far the majority of rehabilitation applications are brought in terms s 124(2)(a) of the Act in that claims were proved against the insolvent estates of the applicants and in circumstances where creditors were not paid in full. Such applicants have not been sequestrated previously and have not committed any of the offences stipulated in s 124(2)(c) of the Act. Such applications may be brought once a period of four years from date of sequestration has lapsed on condition that a period of twelve months since approval of the first and final liquidation and distribution account has lapsed.

[10] As mentioned, *in casu* no claims have been proved against the insolvent estate and consequently s 124(3) applies which subsection reads as follows:

“(3) After the expiration of a period of six months as from the sequestration of an estate, the insolvent concerned may apply to the court for his rehabilitation-

(a) if he has, not less than six weeks before making the application, given to the Master and to the trustee, if any, of his estate notice in writing, and published in the Gazette a notice of his intention to make the application; and

(b) if, at the time of making the application, no claim has been proved against his estate; and

(c) if he has not been convicted of an offence mentioned in paragraph (c) of subsection (2); and

(d) if his estate was not sequestrated under any law prior to the sequestration which he desires to end.”

IV. THE FACTUAL MATRIX

[11] It is common cause that applicant complied with the formalities prescribed by s 124(3) in that:

11.1 A period of six months has lapsed since 2 December 2010;

11.2 He has given 6 weeks written notice to the Master and trustee (Mr Potgieter passed on in the meantime and notice was given to Ms Van Wyk);

11.3 Notice of intention to apply for rehabilitation was also published in the Gazette not less than 6 weeks prior to hearing of the application;

- 11.4 No claims have been proved against the insolvent estate;
- 11.5 He has not been convicted of any of the offences referred to in s 124(2)(c) of the Act;
- 11.6 He was not sequestrated prior to the present sequestration.

[12] In order to understand the difficulty I have in granting relief, it is regarded apposite to consider the history of the matter and I shall deal with that in the following paragraphs.

[13] As mentioned, the matter first came before me on 13 March 2014 whereupon it was postponed to 17 April 2014. I ordered as follows:

- “1. Die aangeleentheid word uitgestel na 17 April 2014.
- 2. Mev Van Wyk, die kurator, moet volledig verslag doen aan die hof en die Meester voor 31 Maart 2014 en haar kuratorsverslag destyds aan skuldeisers gestuur aanheg met haar aanbevelings oor die bewys van eise.
- 3. Die Meester word versoek om ‘n aanvullende verslag uit te bring na aanleiding van die kuratorsverslag.
- 4. Verlof word aan applikant verleen om sy stukke aan te vul.”

On 17 April 2014 the matter came before Ebrahim J who postponed it at the request of applicant’s counsel to 24 April 2014 when the matter was again considered by me. I considered the trustee and Master’s supplementary reports, the application papers as amplified and counsel’s submissions whereupon I decided to reserve judgment.

- [14] In order to achieve the acceptance of the surrender of his estate applicant arranged for payment in the amount of R65 000.00 to be made into the Guardians' Fund at the Master's office. This cash amount was, as stated under oath, applicant's only asset, notwithstanding the fact that he referred to himself as a self-employed contractor who either worked for commission or for his own account. On his version he had no other assets. I find it hard to believe that he did not even own a wheelbarrow. However this is water underneath the bridge as he was sequestrated.
- [15] In his statutory statement of affairs attached to his application for voluntary surrender applicant stated under oath that there were ten creditors in his estate, five claims by Standard Bank in respect of different accounts, one each by Absa, Nedbank, Massmart (Game), RCS debt collectors and a private person, Mr S Levin. The total debts amounted to R448 339.18.
- [16] Everyone with knowledge of the rules of practice in the Free State High Court would have no difficulty to understand what has happened here. This court has until May 2013 in terms of its rule 9(4) approached provisional sequestration and voluntary surrender applications on the basis that the sequestration and administration costs will amount to R20 000.00, unless proved otherwise. These costs include the taxed sequestration costs, the trustee's remuneration, Master's fees, security bond premiums, advertisements costs to be incurred by the trustee and ancillary costs. In order to

show that the sequestration would be to the benefit of creditors proof is generally required in this division that a dividend of 10c in the Rand will be payable to concurrent creditors.

[17] Applicant stated under oath in his voluntary surrender application that R65 000.00 less R20 000.00 equalled R45 000.00 and if this was divided by R448 339.18 (the total of the claims of concurrent creditors as alleged) 10 cents in the Rand dividends would be paid to concurrent creditors. He has been represented in both applications for voluntarily surrender and rehabilitation by the same attorney, Mr JJM Coetzee of Bloemfontein. Obviously the attorney made the calculations on behalf of his client and he also filed a confirmatory affidavit in support of applicant's founding affidavit. I have no doubt that Wright, J, who granted the voluntary surrender application, accepted the *bona fides* of applicant and his attorney.

[18] Although the applicant, corroborated by his attorney, stated under oath on 24 November 2010 that the sequestration and administration expenses could be taken to be R20 000.00, on 15 December 2010, less than a month later, the bill of costs was taxed in an amount of R40 229.99 which is more than double the total amount of sequestration and administration costs on which the calculations were made. The taxed costs eventually paid to the attorney amounted to 62% of the total estate. All other costs pertaining to the administration of the insolvent estate still had to be added. I am not concerned with a review of the taxation, but need to

reiterate what I found in **Ex parte Cloete**, application 1097/2013, a judgment delivered on 5 April 2013. I mentioned in **Cloete** that information obtained from the Taxing Master indicated that bills of costs in similar applications were taxed in the region of between R18 000.00 and R22 000.00. Immediately after that judgment had been pronounced rule 9(4) referred to above was amended in terms whereof the amount of sequestration and administration costs was increased from R20 000.00 to R30 000.00.

[19] The reasons advanced in the supplementary affidavits in this application to justify the excessive sequestration costs taxed out in the voluntary surrender application are unacceptable. At the time when the affidavits in the voluntary surrender application were deposed to it must have been clear, if it was indeed the case, that the costs would be enormous and much higher than usually taxed out in unopposed applications. The court was not informed accordingly in 2010, but, instead, applicant's attorney relied on the costs used as a benchmark as contained in rule 9(4) referred to *supra*, being R20 000.00. If Wright, J was informed of the excessive amount that would be claimed as sequestration costs later, he would in all probability and bearing in mind the above practice not grant the order for acceptance of applicant's voluntary surrender.

[20] If applicant's attorney really had to do all the work charged for, the court should have been informed that the

sequestration and administration costs would be much higher than usual in which event the application might have been dismissed. I do not intend to consider each and every item in the bill of costs, but shall concentrate on a few items by way of example. Some items do not have anything to do with the application, but with events prior thereto. The attorney charged R2 556.00 for drafting and finalising of the statement of affairs consisting of twelve pages in addition to his consultation fee and fees for perusal of detailed information from the client and lists of creditors, R639.00 for attendance *ad jurat* and discussion of the statement of affairs and R516.00 for perusal of the statement of affairs. The statement of affairs is a printed document also available as a soft copy on the internet and the only information added thereto were the client's names and identity number, cash of R65 000.00 (the asset), the names and addresses of the ten creditors and the amounts of their claims, the brief reasons for insolvency and the client's personal information such as his wife's names and his marital status. Any prudent typist could have inserted this information on the form within fifteen minutes. The attorney instructed counsel to argue the application. Counsel's fee is a moderate R700.00. He also had to peruse the application papers, but in addition had to prepare for the hearing and await his turn in the Motion Court. The attorney claimed R426.00 for consultation with counsel to discuss the application before the hearing, but strange as it may sound, counsel did not charge anything.

[21] My second greatest concern relating to the sequestration costs is that the attorney charged R1 704.00 for attending Court – two hours in total – when the application was heard. There is no reason why he should have attended court all that time especially when he perused the court roll earlier as he said he did. However my greatest concern is the fees and expenses claimed in respect of letters written and received. This was a simple application for voluntary surrender with a cash amount on hand and ten claims by five creditors. Applicant was under debt review prior to the application and the names and addresses of all creditors would surely be known to him, or could easily be obtained from the Magistrates' Court or from the particular debt counsellors. It is not as if creditors never send out letters of demand or statements of account. Debtors often play hide and seek with their creditors, but the converse is not true. The attorney claimed in items 54 to 60 that he wrote letters containing 29 pages, received letters containing 17 pages, sent and received 38 pages of faxes, sent and received 79 pages of e-mails, made 80 telephone calls, received 19 calls and sent and received 7 SMS messages. I find this unacceptable and improbable. The total amount of his fees and expenses in respect of these items only is R12 626.25 of which telephone calls made amounted to R7 536.00.

[22] I am concerned about the excessive legal fees charged. It appears that the attorney is guilty of overreaching notwithstanding the fact that the bill of costs has been taxed and approved. The attorney has pulled wool over the court's

eyes. An abuse of the process of voluntary surrender has taken place. Applicant received relief which would probably not have been granted if the true facts were placed before the court. The Law Society of the Free State should investigate the matter. The explanations in the supplementary affidavits filed at my request in this application did not impress me at all. It is matters like these that have the public at large and politicians up in arms and why the legislature considers measures all the time to curb legal costs as is *inter alia* apparent from the Legal Practice Bill. Initially the trustees paid an amount of R20 000.00 to the attorney towards his fees and expenses and the balance was only paid after the second meeting of creditors when it was evident that no claims had been proved. Ms Van Wyk did not explain this strange behaviour although she was not requested to do so. I can only assume that there was indeed a concern that creditors might object to the extraordinary high costs and once it became clear that no claims had been proved, the full bill was settled.

- [23] In my view the correct approach to follow is that of the Gauteng North Division of the High Court. Southwood, J's judgment, writing for the full bench in **Ex parte Kelly** 2008 (4) SA 615 (T), is with respect laudable. In view of the importance of the matter I quote extensively from paragraphs 7 to 13: "[7] The total fees claimed amounted to R37 742,21 and the total expenses claimed amounted to R30 987,21: grand total R68 729,42 (instead of the R9550 alleged in the application). At the taxation the trustee appointed in the insolvent estate objected to the amounts

claimed in the two bills of costs on the ground that they exceeded the amount of the legal costs stated in the application for surrender. The attorneys contended that the figures alleged in the application merely provided an indication of the legal costs. After hearing argument the taxing master allowed the amount alleged in the application together with VAT: ie R10 887. This decision gave rise to this review of taxation.

[8] The applicant's notice of review in terms of rule 48 requests the taxing master to prepare a stated case relating to the two bills of costs. The notice alleges that the taxing master erred -

- (a) By not taxing the bills but simply fixing a global amount for both accounts; and
- (b) by not taxing the accounts in the normal course.

[9] On 10 March 2006 the taxing master provided his stated case in which he concedes that he erred in not taxing the bills and only allowing the fixed amount. He states that the bills of costs should be subject to normal taxation in terms of rule 70 of the Uniform Rules of Court. Understandably, the applicant agrees.

[10] In his report in terms of rule 48(5)(b) the taxing master expands on his stated case. He refers to the principal contentions of the parties at the taxation which have been referred to. His view now is that the correct approach is that the taxing master must consider each item of the bill presented to him and decide whether the amount claimed is reasonable subject to an order by the court limiting the fees which the attorney can claim from the insolvent estate. Even in that case the taxing master will consider the individual items in the bill. If the total of the fees and expenses is less than those alleged in the application then that is what the taxing master will allow. If the total is greater than the fees and expenses alleged in the application then only the amounts alleged will be allowed.

[11] Where the applicant's attorney presents to the court an application for voluntary surrender or sequestration in which allegations are made that the costs of the sequestration will amount to a stated figure, and the court grants that application, it does so in the belief that those figures are correct and that the dividend will be paid. Even though the court

does not make an order that the attorneys' fees and expenses are to be limited that is the clear assumption on which the order is made. It is therefore essential that all funds received by the attorney from the applicant and all funds held by the attorney on behalf of the applicant and all expenses incurred in connection with the application must be disclosed.

[12] In the light of the allegations in the application regarding the attorneys' costs, and the necessity for limiting these costs to arrive at the dividend alleged, the order must be understood to contain such a limitation - see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D - H; *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715F - I. In addition the application must be understood to contain an undertaking by the attorney to limit his fees and expenses to those stated in the application. The attorney makes a representation to the court that his fees and expenses in the application will be limited to those alleged. On the strength of that representation the court grants the order. It would make a mockery of the whole procedure if the attorney could then claim other fees and expenses far exceeding those alleged. The present case is a good example. The two attorneys now claim, as the costs of sequestration, almost seven times the fees and expenses alleged in the application. The trustee points out that if the full amount of the bills of costs is allowed concurrent creditors will not receive any dividend and may have to pay a contribution. It also seems to be unprofessional conduct on the part of the attorney to do this. However it is not necessary for present purposes to make a final finding in this regard.

[13] Obviously it will lend certainty if the court granting a sequestration order where the attorneys' fees are stated to be a fixed figure orders that they be so limited for purposes of taxation. But that does not detract from the finding that even in the absence of such an order they are to be limited as set out in the application.

[14] The application to review the taxation of the bill of costs is dismissed and the allocatur is confirmed in the figure of R10 887.” (emphasis added.)

[24] Bertelsmann, J, in relying on the **Kelly** judgment *supra* severely criticised the approach of legal representatives in voluntary surrender and sequestration applications of relying on an estimate of costs to be taxed in future and suggested that it was unacceptable and should no longer be allowed. See: **Ex parte Ogunlaja** [2011] JOL 27029 (GNP). The learned judge continued as follows at paragraph 42 and 43 with which *dicta* I agree fully: “[42] By making provision for a later taxation, the attorney introduces an element of uncertainty into the process of calculating the advantage to creditors. Empirical studies have shown that bills of costs are presented for taxation that reflect a multiple of the amount that was provided for in the application under oath, and that was factored into the calculation of the existence of an advantage to creditors. This represents another abuse of the process of voluntary surrenders and unopposed sequestration applications. Attorneys who prepare applications of this nature are bound by the estimate presented in the papers as a realistic expectation of the costs involved in the process, subject of course to the court’s power to limit the legal representative’s costs to a lower figure in order to ensure a true advantage to creditors. [43] If the procedure laid down in **Kelly**, *supra*, is ignored in future, the court may be compelled to issue punitive costs orders.” (emphasis added.)

[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.

- [26] No trustee shall in future consent to taxation of an attorney's bill of costs in these kind of applications if it appears that the costs to be taxed would be more than the costs relied upon

in the particular application and the Taxing Master's attention is particularly drawn to the full bench decision in Kelly *supra*. The Master and his personnel are expected to ascertain in each case when a liquidation and distribution account is presented for approval whether there was indeed compliance with the prescripts set out herein. This judgment should be brought to the attention of all Free State attorneys, members of the local Society of Advocates, the Master and his personnel as well as all practitioners that are being appointed as trustees from time to time in this division. It is untenable that misrepresentations are made to judges, especially in unopposed and *ex parte* matters, thereby persuading them to grant orders which should never have been granted. See: Schlesinger v Schlesinger 1979 (4) SA 343(W) at 348E – 350C.

- [27] The applicant did not attend the first meeting of creditors although he apologised for his absence. No claims were proved at this meeting. The Master decided to finally appoint the trustees in the circumstances.
- [28] The second meeting of creditors was advertised to be held on 8 June 2011. *Ex facie* the Master's supplementary report, the trustees sent their report to creditors on 27 May 2011 and less than the prescribed period of at least 14 days prior to this second meeting. Mr Potgieter who apparently handled the day-to-day administration of the estate therefore caused the notices to creditors to be sent out of time. The

applicant failed to attend the second meeting and did not tender an apology.

- [29] The trustees' report technically complied with s 81 of the Act, but in my view they did nothing to appeal to creditors to lodge claims. Creditors were not informed that there was no possibility of any contributions being payable should they file claims. Ms Van Wyk indicated in her supplementary report that the position of the insolvent estate pertaining to assets and liabilities were set out fully in their trustees' report. These were the cash on hand in the amount of R65 000.00 and the total amount of concurrent creditors in the amount of R448 393.18 I referred to above. However, there is no indication in the report as to the approximate sequestration and administration costs and it would be impossible for any concurrent creditor to ascertain whether there would be a free residue and that dividends would be payable. I would have expected the trustees to report that there was no fear of any contribution bearing in mind the costs known to them at that stage. This is a small estate and they should have stated that at least R15 000.00 to R17 000.00 would be available for payment of dividends to those creditors that might prove claims. The standard type of report, merely regurgitating the wording of the Act, was not in the interest of creditors. It was reported that the insolvent did not keep any books or records. I find it astonishing that this was not investigated any further and reported to creditors as the insolvent's failure might even be a transgression of s 134 or even s 132 of the Act.

[30] Ms Van Wyk became aware of a creditor, Mr S Levin, with a claim of R76 967.02 who intended to prove his claim. In her supplementary report she stated that she informed the creditor that he had to pay for the costs of a special meeting and ancillary costs. Surely that would have discouraged any creditor to request a special meeting insofar as there was no indication as to what the costs of the special meeting entailed and whether or not it would be worthwhile for that meeting to be arranged and a claim to be proved. If detailed facts were provided Mr Levin would probably have proved his claim and received a dividend in excess of 20c in the Rand if no other creditors proved claims.

[31] R17 905.15 has been paid into the Guardians' Fund, being the amount available after deduction of all sequestration and administration costs. If applicant's application for rehabilitation is successful, this amount shall be paid to him in accordance with the provisions of s 116 of the Act. That being the case, the only people that would have benefitted from the sequestration of his estate would be his attorney, the trustees and applicant in particular. Such outcome is not what the legislature had in mind as it is no doubt so that sequestration must primarily be to the benefit of creditors and not insolvent persons.

V. FURTHER STATUTORY PROVISIONS AND LEGAL PRINCIPLES

[32] I have already dealt with the provisions of s 124(3) of the Act and shall in the next paragraphs deal with certain other provisions and legal principles laid down in the authorities. Section 129(1) of the Act stipulates the consequences of rehabilitation of an insolvent person to be the following, i.e. (a) to put an end to his sequestration or put otherwise, to eliminate his status as insolvent, (b) to relieve him of every disability resulting from the sequestration and (c) most importantly, to discharge all debts which were due or the cause of which had arisen before sequestration and which did not arise out of any fraud on his part. Section 129(2) states that if a person is rehabilitated based on the provisions of s 124(3) of the Act, such order shall have the effect of reinvesting the insolvent with his estate, the effect being, *in casu*, that the amount of R17 905.15 in the Guardians' Fund shall be paid out to applicant in accordance with the provisions of s 116 of the Act if his application succeeds.

[33] An insolvent has no right to be rehabilitated and the court's powers in this regard are clearly discretionary. It may refuse the application, postpone it or grant it, either unconditionally or subject to certain conditions. See: s 127(2) of the Act and *inter alia* **Ex parte Fourie** [2008] 4 ALL SA 340 (D &CLD) at paras [22] to [25] and **Ex parte Le Roux** 1996 (2) SA 419 (C) at 423 & 424. The essential enquiry is whether in the light of all the relevant facts, i.e. the applicant's interests, the interests of creditors, whether or not they have proved claims, and the commercial public at large, applicant is a fit

and proper person to participate in commercial life free of any constraints and disabilities. The onus is on the applicant to show that the discretion should be exercised in his favour.

- [34] Although our courts have over the decades accepted that certain procedural defects in rehabilitation applications should be regarded as formal defects in terms of s 157(1) of the Act, the authorities are clear that non-compliance with s 125 of the Act is fatal. In terms of this section an applicant must not less than three weeks before applying to the court for his rehabilitation furnish the Registrar of the particular court with security in the amount of R500.00 for the payment of the costs of any person who may oppose the rehabilitation and be awarded costs by the court. I refer to the following authorities, although several other judgments have been reported in the law reports over the years: **Ex parte Van der Walt (1)** 1964 (1) SA 234 (O) at 235B; **Ex parte Niedziella** 1948 (2) SA 1024 (W) at 1025; **Ex parte Lewis** 1990 (1) SA 480 (C) at 483B in particular; **Ex parte Elliot** 1997 (4) SA 292 (W) at 294G and **Ex parte Van der Merwe** 1963 (1) SA 268 (O) at 271. The section presents a requirement totally independent of the other requirements applicable to rehabilitation applications in s 124(1), (2), (3) or (5) of the Act. Thus, even when all proven claims have been paid in full (s 124(5), or when no claims have been proved (s 124(3), security must be furnished. In **Van der Walt**, *supra*, Smit JP found that a postponement of the application for rehabilitation to allow the period of three weeks to lapse "... will, however, not purge the default." In that case the application

was brought in terms of s 124(5) of the Act insofar as creditors who had proved claims had been paid in full. Although notice of the application to creditors was not even a requirement in such instance, as is the case today as well, the court held that compliance with s 125 remained peremptory.

[35] In **Ex parte Mason** 1981 (4) SA 648 (D&CLD) Didcott J (as he then was) accepted that he was bound by the judgment of the full bench of that province to the effect that the requirement of s 125 was peremptory and non-compliance therewith could not be excused as a mere formal defect in terms of s 157(1) of the Act. He discussed the differences in approach as to whether the application for rehabilitation should merely be dismissed in such a case, or rather be postponed in order to allow the three weeks period to run its course. He opted for the second option and adjourned the application instead of dismissing it. I deal with the learned judge's reasons *infra*.

[36] In **Muller v Vrystaat Ko-operasie Bpk** 1967 (1) SA 334 (O) the applicant applied for rehabilitation and an order declaring that certain immovable property, which he inherited during his insolvency, vested in him. Vrystaat Koöperasie Bpk, by far the biggest creditor in the insolvent estate, failed to lodge a claim against the insolvent estate, but opposed the application for rehabilitation and the declaratory order. The court found at 336A that the creditor failed to prove a claim against the insolvent estate, that its claim had become

prescribed and that it could not lodge any further claim against the estate. Therefore it did not have a legal right to object to the relief sought as it was not entitled to share in the proceeds of the inheritance. In **Ex parte Grobbelaar** 1977 (4) SA 584 (O) the above conclusion was criticised by two judges of this division who declined to follow the judgment. The court found that all creditors, whether or not their claims were proved, and also those creditors whose claims had become prescribed, were entitled to be heard and to oppose the application for rehabilitation and a declaratory order relating to vesting of assets in the applicant.

- [37] In **Ex parte Curry** 1965 (1) SA 392 (C) Watermeyer J was prepared to condone short notice of the application for the rehabilitation as a formal defect and stated as follows at 393B:

“The publication of notice in the Gazette is required for the information of creditors. In this case no order is asked for vesting any assets in the applicant, so it would only be proved creditors who would be interested in the application. But, as I have said, no creditor proved a claim in this estate, so it would seem that the object of the section would not be defeated by the fact that short notice was given in the Gazette. It seems to me, therefore, that, in the special circumstances of this case, I can regard this as a formal defect, and the rehabilitation will be granted.”

- [38] If it was really the intention of the legislature to assist creditors in opposing applications for rehabilitation, it should

have been mindful of the high costs of litigation and the fees generated by attorneys and counsel in the High Court. Pretorius, AJ, a former senior attorney with decades of experience of High Court litigation, stated the following in **Ex parte Theron** 1999 (4) SA 136 (O) at 146F:

“Dit kan aanvaar word dat, inaggenome die bestaande Hooggeregshof tarief, hierdie bedrag (the R500.00 security) beswaarlik ‘n druppel in die emmer sal wees.”

- [39] As stated a court has a discretion in accordance with the provisions of s 127(2) of the Act to either dismiss an application, or postpone it or to grant the application unconditionally or subject to certain conditions. In **Ex parte Vermeulen** 1934 WPD 178 the court ordered that a further dividend be paid to a creditor who failed to prove his claim, although the claim had already become prescribed. See also **Ex parte Matthee** 1975 (3) SA 804 (O) at 810.

- [40] Section 44(1) of the Act may not appear to be relevant at this stage, but bearing in mind the order that I have in mind, it is quoted. It reads as follows:

“44 Proof of liquidated claims against estate

- (1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim

in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.”

VI. EVALUATION OF THE APPLICANT’S APPLICATION

[41] I doubt whether applicant is a suitable candidate to be rehabilitated, but I might have been prepared to, subject to what is stated *infra*, grant an order of rehabilitation if the free residue of his estate had been distributed amongst creditors, even if they received as little as five or ten cents in the Rand each. As it turned out no one proved a claim against the insolvent estate. It is not the trustees’ obligation to lodge claims on behalf of creditors, in particular the unwilling, careless and/or stubborn. I am not convinced that the creditors could be labelled as such *in casu* for the reasons advanced in paragraphs 23 to 25 *supra*.

[42] Although creditors, especially financial institutions, are often prepared to write off debts instead of incurring further costs by proving claims in the hope that mere minimal dividends be paid to them, it cannot be disregarded that *in casu* creditors did not receive proper notice of the second meeting of creditors as the assistant Master confirmed in the supplementary report. One can just imagine, with the short notice received by especially financial institutions with their

head offices in Johannesburg, and bearing in mind the magnitude and volumes of accounts held by them, that by the time the notices came to the attention of the relevant personnel there would be no time left to complete claim documents and send them to Bloemfontein timeously. There is at least one creditor, a private individual, Mr S Levin, who showed an interest in proving a claim. However he was in all probabilities discouraged and/or could not take an informed decision in this regard insofar as he was told to take responsibility for the costs to be incurred without knowing the extent of such costs and the probable dividend that might be payable to him.

[43] Although the trustees' report to creditors complied strictly speaking with the provisions of s 81(1) of the Act, I find the following disturbing and am of the view that the reasonable creditor reading the report, which was circulated later than stipulated in s 81(1) bis, would not be able to take an informed decision whether or not to prove a claim:

43.1 It is clearly stated that the amount due to preferent creditors was unknown and therefore none of the concurrent creditors would be in a position to consider whether it would be worthwhile to prove a claim.

43.2 The trustees failed to establish whether or not books and records were kept by applicant. He was a contractor, being paid commission and apparently from time to time working for his own account, although he was also unemployed at a stage prior to his insolvency. However in terms of the provisions of s 134 of the Act,

he was most probably a person that might reasonably be expected to keep record of his transactions. It must therefore be accepted that the trustees failed to investigate if commission and/or other amounts were due to the insolvent at that stage.

43.3 The estate consisted of R65 000.00 cash only and was really one of those that should never have been sequestrated if the high legal costs are considered. The sequestration and administration costs were known or could reasonably have been ascertained by the trustees at the stage when the report to creditors was circulated. It would be appropriate to inform creditors that there was no fear of a contribution being payable by those who proved claims, but this they failed to do.

[44] The applicant and his wife are still residing in the same dwelling, to wit 19C Milner Road, Bayswater, Bloemfontein. They live in an upmarket neighbourhood. On his version he did not own any assets, save for the cash amount of R65 000.00, when his application for voluntarily surrender was accepted. On his own version he still owns no assets at all, save for clothing to the value of R2 000.00. He earns a gross monthly salary of R30 000.00 and his wife has an income of R1 200.00 per month. It is apparent that they have children and that they can afford a domestic servant. Applicant is still a contractor as was the case in 2010 when he was sequestrated.

[45] There is no indication on the papers who is the owner of the immovable property and household goods and furniture. When applicant was sequestered the property of his wife, with whom he is married out of community of property, vested in the trustees until such time as it was released in accordance with the provisions of s 21 of the Act. There is no indication as to what transpired after sequestration and/or whether s 21 has been properly complied with in the circumstances. It is not known what the extent of the wife's separate estate was in 2010 and what it is today. On all probabilities much of the debt incurred by applicant was to support his family and to purchase household goods and other movable assets. Chances are that his wife has accumulated a reasonable estate to the detriment of applicant's creditors. This should have been investigated by the trustees. Applicant is directed to make a full and detailed disclosure in this regard. The family's monthly fuel expenditure is R2 000.00, but there is no word said about the mode of transport and/or ownership in vehicles. I find it hard to believe that applicant can carry out his work as contractor without transport, or is it a case where assets have been acquired through a trust, company or close corporation? The circumstances call out for answers.

[46] It appears to me as if it is business as usual for applicant and his wife. Nothing has changed insofar as their situation is concerned, except that the applicant got rid of debts close to half a million Rand. I am not at this stage convinced that applicant has learnt the lessons of insolvency or that he has

an appreciation for the hardship his insolvency has caused creditors and especially a private individual such as Mr Levin. My attitude may change if all available funds in the insolvent estate, less costs to be incurred, are distributed to creditors and if applicant is prepared to supply more detail with reference to what I mentioned herein.

[47] It is possible that applicant may argue and/or request his trustee to object to the proving of claims by creditors at this stage in that their claims have become prescribed. He has a reversionary right in the estate insofar as if no claims are proved and he is eventually rehabilitated, he would be entitled to the balance left in the Guardians' Fund. Whoever of my colleagues might deal with the application in future, will consider the application bearing in mind the wide discretion with whom he or she is clothed, but speaking for myself, such action will not advance applicant's case.

[48] No creditors proved any claims against the insolvent estate *in casu* and I would be prepared to align myself with the judgment in Muller, *supra*, but I am bound by the Grobbelaar judgment. I am of the view that applicant's creditors have no right to oppose the application for rehabilitation and it would be non-sensical *in casu* to rely on strict compliance with s 125 of the Act based on the aforesaid *dictum* of De Villiers J in Muller, *supra*. However, as was the case with Didcott J, I am bound by the *stare decisis* doctrine, but believe that this issue should be reconsidered in the appropriate forum soon in an endeavour

to do away with an impractical requirement. The absence of any proved claims was the reason for condoning the defect in *Ex parte Curry*, *supra*. In my view logic dictates that this reasoning should be applied to non-compliance with s 125. I fail to understand why non-compliance with the requirement of s 125 can never be excused, alternatively why an application may not be postponed to allow the three week period to expire.

- [49] Rule 70 of the Uniform Rules of Court stipulates that the prescribed fee for taking of instructions by an attorney is R235.00 per 15 minutes or R940.00 per hour to which 14% VAT has to be added amounting to R1 072.00 for an hour's consultation. On all probabilities no attorney will be prepared to become involved in opposed litigation on behalf of a client in the High Court based on security of R500.00 provided for in s 125 without financial backing or the payment of a substantial deposit. Few, if any, creditors will be prepared to take the chance of instructing an attorney to oppose an application for rehabilitation on their behalf solely based on the possibility that they might be entitled to recoup an amount as small as R500.00 if successful. *In casu*, as is the case in most other applications for rehabilitation, the applicant has still no assets and a costs order against him would be meaningless. Only those creditors with the financial means and appetite to become embroiled in opposed litigation in the High Court, based on principle as the saying goes, may decide to oppose rehabilitation

applications. I agree fully with the remark of Didcott J in Mason, *supra*, at 648G that

“... no modern creditor seems likely to think much of the security demanded, or to set great store by it when he makes up his mind whether or not to enter the lists.”

I also endorse his approach at 651C, i.e.

“The creditor who is not a character from some fairy tale protects his interests by keeping in touch with the application’s progress and, once his opposition to it is serious, by joining the fray.”

In any event one very seldom comes across opposed rehabilitation applications *per se*, although applications for rehabilitation where vesting of assets in the applicants are sought, are opposed from time to time.

- [50] Initially the Act provided for security to be given in the amount of £25, or put otherwise, R50.00. In 1981 this amount was increased to R500.00. This is 33 years ago and the present day value of R500.00 is R7 377.00 according to the actuaries Human and Morris quoted by Christo Potgieter in **The Quantum of Damages in Bodily and Fatal Injury Cases: Quick Guide: Quantum Conversion Tables and Medical Diagrams**, 2014 ed. at 202. If security in such amount was to be furnished, it might be argued that s 125 deserved to be retained as a requirement and adhered to strictly. Presently it is meaningless and places an

unnecessary obstacle in the path of applicants whose applications for rehabilitation should rather be considered based on substance instead of technicalities which is too often the case. Even if the section is to be retained, it is high time that the effect of non-compliance therewith be reconsidered on the basis that such non-compliance might be condoned in terms of s 157(1), especially where claims have been paid in full or where no claims have been proved against the insolvent estate.

[51] In addition, it is surely not primarily the responsibility of creditors to oppose applications for rehabilitation. If the trustee of an insolvent estate has properly complied with his functions and reported fully to the Master and creditors in respect of the administration of the insolvent estate, the trustee and/or the Master would be in a much better position than any creditor to place relevant facts before the court without having to incur legal fees in opposing the application in order for it to exercise its discretion judicially.

[52] By the time this application was heard on the 24th April 2014 a further five weeks had expired since the initial application date, to wit the 13th March 2014 on which earlier date a period of three clear weeks had not lapsed since the filing of security. However by the 24th April 2014 the period of three weeks has expired. If non-compliance with s 125 was my only concern on the 13th March 2014, I would have followed the course adopted by Didcott J in Mason, *supra*, as I am convinced that his criticism of the leading judgment in this

division by Smit JP in Van der Walt, *supra*, is valid. I am of the opinion, for the reasons advanced by Didcott J in Mason, *supra*, at 650C-E and 651A-F, that Van der Walt has been decided incorrectly.

[53] I am not prepared to grant applicant's application for rehabilitation and in the process being instrumental in him receiving an amount of R17 905.15 which should in the first place have been distributed to his creditors. However there is no reason to dismiss the application at this stage.

[54] There is no application before the court for an order in terms of the *proviso* to s 44(1) of the Act. Bearing in mind the wide discretion afforded me, it appears to be appropriate to postpone the application for rehabilitation for a certain period with instructions to the trustee to hold a special meeting of creditors and timeously inform all creditors of such meeting with an invitation to file their claims. Creditors should in particular be informed that there is no fear of a contribution being payable, that R17 905.15 less the costs of holding the special meeting as well as redrafting of the liquidation and distribution account and ancillary costs, an estimate of such costs to be provided, is available for distribution as dividends. This will enable creditors to make informed decisions as to the amount of the free residue available for distribution as dividends. In particular, the creditor Mr Levin should be contacted through his attorneys, Messrs Lovius Block. The costs to be incurred by the trustee shall be paid

from the available funds kept in the Guardians' Fund and creditors should be advised accordingly.

VII. ORDER

[55] Wherefore the following orders are made:

1. The application is postponed to 27 November 2014.
2. The trustee is directed to forthwith convene a special meeting of creditors in accordance with the directions set out in paragraph 54 of this judgment.
3. The trustee and the Master are directed to file supplementary reports before the next hearing of the application and leave is granted to applicant to supplement his papers.
4. The Registrar is directed to forward a copy of this judgment to the Chief Executive Officer of the Law Society of the Free State to enable the Society to investigate and to take appropriate action against applicant's attorney, if so required, particularly in respect of the comments in paragraphs 14 to 26 of the judgment.
5. The Registrar is also directed to forward copies of this judgment to the Master and the trustee, Ms EM van Wyk.

J.P. DAFFUE, J

On behalf of applicant: Adv JC Coetzer
Instructed by:
JJM Coetzee
Victor Coetzee Inc
BLOEMFONTEIN

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