

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4808/09

In the matter between:-

JACK HARRY MULLER

Applicant

(Identity Number:
(Married out of community of property)
(For the voluntary surrender of his estate)

HEARD ON: 22 OCTOBER 2009

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 12 NOVEMBER 2009

[1] These were motion proceedings. The matter came before me by way of an ordinary application in the unopposed motion court. The applicant applied for the voluntary surrender of his estate.

[2] The notice of motion, supporting affidavit and annexures thereto, were served on the Master of the High Court. On 25 September 2009 the Master issued the certificate in terms of section 4(6), Insolvency Act, 24 of 1936 in which he certified that the statement of the applicant's affairs was lodged on 11

September 2009; that it lied in that office for 14 days for inspection and that no objections were submitted.

- [3] The applicant owes the total sum of R248 396,26 to various creditors. The only asset he appears to have is a 2002 Nissan LDV. The approximate value thereof is R100 000,00. He still owes Absa Bank R95 000,00 on the motor vehicle. Therefore, the sum of his total liabilities exceeds that of his assets by R243 396,26 (R248 396,26 – R5 000,00). He has virtually no source of income, it would appear. He is, in fact, clearly insolvent.

- [4] At paragraph 6.10 of his affidavit he stated:

“Ek is adviseer dat daar vir doeleindes van administrasiekoste ongeveer R20 000,00 in my boedel beskikbaar moet wees. Ek beskik nie oor sodanige vrye oorskot nie.”

- [5] The Master's report was filed on 25 September 2009. At paragraph 4 thereof the Master stated:

Volgens my berekening is hier R0-00 beskikbaar vir verdeling tussen skuldeisers en word hier nie aan die praktyksreël van R0-10 voldoen nie.”

- [6] The applicant averred that he desired to surrender his estate for the benefit of his creditors. Paragraph 4 of his affidavit reads:

“4.

Ek is begerig om my boedel af te staan vir die voordeel van skuldeisers en sal dit slegs tot voordeel van die skuldeisers strek indien my boedeloorgawe aanvaar word en wel om die volgende redes:

- 4.1 Van my skuldeisers het reeds dagvaarding teen my uitgereik vir die bedrae wat aan hulle verskuldig is en sommige het reeds vonnis teen my geneem.
- 4.2 Indien enige skuldeiser daarin sou slaag om 'n bate te vind en te verkoop, sal daardie skuldeiser bo my ander skuldeisers bevoordeel word.
- 4.3 Indien my boedeloorgawe egter aanvaar word en 'n kurator aangestel word, sal die kurator in staat wees om toe te sien dat geen skuldeiser bo 'n ander bevoordeel word nie.
- 4.4 Ek voorsien nie dat daar enige finansiële voordeel vir enige bepaalde skuldeiser sal wees hierin nie, maar bevat dit die verdere voordeel vir skuldeisers dat**

hulle nie onnodige verdere kostes aangaan en regsuitgawes aangaan ten opsigte van 'n skuld wat hulle in elk geval nie kan verhaal nie. Dit sal dus die voordeel hê dat daar minstens regsekerheid is ten opsigte van elke skuld."

- [7] The question in the case is whether, in these circumstances, the court can accept the applicant's application for the surrender. Mr. Cillie contended, on behalf of the applicant, that although no dividend will be payable to the creditors, the sequestration of the applicant in these circumstances will be to the advantage of his creditors in the sense that they will save valuable time, energy, resources and money by not endeavouring to recover their various debts anymore from the debtor who is as poor as a church-mouse.
- [8] He stressed that any civil attempts by the creditors to enforce their claims against the applicant entailed further financial losses in pursuit of debts which they could not, in any event, recover. Therefore he submitted that there would be a real financial advantage to the creditors if the applicant was voluntarily sequestrated.

- [9] It is incumbent upon a debtor who applies for the surrender of his estate to prove, not only that his estate is insolvent but in addition that the sequestration thereof will be to the advantage of his creditors. This is a basic principle of the Law of Insolvency. See Sharrock *et al*: **Hockly's Insolvency Law**, p. 15 sixth ed 1996.

“For sequestration to be to the advantage of creditors it must ‘yield at the least, a not negligible dividend’ (per Selke J in *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N) 111). If, after the costs of sequestration have been met, there is no payment to creditors, or only a negligible one, there is no advantage (*London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D);...”

- [10] In **HILLHOUSE v STOTT; FREBAN INVESTMENTS (PTY) LTD v ITZKIN; BOTHA v BOTHA** 1990 (4) SA 580 (W) a dividend of 1.6 cents in the rand was held to be insufficient, in other words, too negligible to warrant the compulsory sequestration of the debtor. *In casu* we are concerned with a voluntary surrender where the dividend is not trivial but completely naught. In this division the practice rule requires an absolute minimum dividend of 10 cents in a rand to validate the acceptance of a voluntary surrender. Anything

marginally less than this benchmark dividend is unacceptable. There is no room for deviation, however small the shortfall may be. The practice rule has obviously not been met in the instant case.

[11] The applicant acknowledged that the body of creditors, as a whole, will derive no real financial benefit from the acceptance of the surrender. See paragraph 4.4. The difficulty I have with Mr. Cillie's submission is that the advantage to the entire body of creditors collectively taken as a single entity (*concursum creditorum*) has to be derived from the free residue of the debtor's estate but there is none *in casu*. Where creditors decide to write off such debts as irrecoverable bad debts, they merely do damage control without actually deriving any real financial advantage from the debtor's estate. The contention is, therefore, fundamentally flawed. In the absence of a proven real pecuniary advantage which is not less than the prescribed minimum, I am unable to come to the debt ridden applicant's rescue, however penniless he may be.

[12] The authors Sharrock *et al*, *supra*, on p. 15, paragraph 2.2.2 correctly state the legal position as follows:

“A logical result of the requirement that the debtor must own sufficient property to meet the costs of sequestration is that a debtor who has no assets and only liabilities cannot surrender his estate. In *Ex parte Collins* 1927 WLD 172, the court refused to grant an application for surrender because the debtor had only liabilities, in spite of the fact that the costs of sequestration had been guaranteed to the Master. An estate comprising only liabilities may be *compulsorily* sequestrated (*Miller v Janks* 1944 TPD 127).”

- [13] In the instant case the applicant has paid nothing to the Master to cover or guarantee the costs of administering the surrender. This court has held more than three decades ago that if the free residue is insufficient to pay for the administration costs of the sequestration, then the court must refuse to grant an application for the surrender. (**EX PARTE SWANEPOEL** 1975 (2) SA 367 (O)) No case has been made out to justify any departure from that principle. I am therefore inclined to refuse the application. In the instant case the financial situation of the applicant is very hopeless. The free residue is zero. Mr. Cillie conceded during the course of argument that he could find no authority where there was no free residue whatsoever but the relief granted.

[14] For the reasons mentioned above, I have come to the conclusion that no case has been made out for the grant of the relief sought.

[15] Accordingly, the application for the voluntary surrender of the applicant's estate is refused.

M.H. RAMPAL, J

On behalf of applicant:

Adv. H.J. Cillie
Instructed by:
Giorgi & Gerber
BLOEMFONTEIN

/sp