

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO.: 8657/2023

(1)	REPORTABLE: NO.
(2)	OF INTEREST TO OTHER JUDGES: NO.
(3)	REVISED: NO.

2/5/2024

DATE

SIGNATURE

In the matter between:

In the *ex parte* application of:

JOHN GERALD KULLMANN

Applicant

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 2 May 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

[1] This is an application brought *ex parte* for an order sequestrating the estate of the applicant, Mr John Peter Gerald Kullmann, through voluntary surrender.

[2] The applicant seeks this relief under section 3(1) of the Insolvency Act, 1936.

FACTS

[3] On 3 February 2023, Mr Kullmann brought this application *ex parte* for the voluntary surrender of his estate.

[4] In the founding affidavit, Mr Kullmann says that he “*could not comply*” with section 4 of the Insolvency Act, which requires him to have given notice to all affected persons. As appears below, the Insolvency Act determines when that notice, modelled on Form A in the first schedule to the Insolvency Act, is to be published both in the *Government Gazette* and in a local newspaper.

[5] In paragraph 33 of the founding affidavit, Mr Kullmann says that his non-compliance “*is purely on practical grounds in that the registrar of this honourable court only provides hearing dates once a case has been issued and not prior*”. He proceeds: “*I will comply with the notice requirements fully and file a supplementary affidavit detailing my compliance once the registrar has provided me with a hearing date.*”

[6] In the notice of motion, there is no prayer seeking that Mr Kullmann’s non-compliance with section 4 be condoned. Yet, if one reads paragraph 33 of the founding affidavit with paragraphs 10–11 of the replying affidavit, and paragraphs 3–7 of Mr Kullmann’s supplementary affidavit of 27 October 2023, it is plain that he also seeks that head of relief. Indeed, subject to what I say below, in these circumstances it would be wise for applicants like this always to include such a prayer in the notice of motion.

[7] On 22 March 2023, a short “*opposing affidavit*”, deposed to by Ms Indhira Naik, a forensic investigator, was delivered on behalf of “*several creditors of the applicant*”. Oddly, neither in the header of the opposing affidavit, nor in its body, does Ms Naik name on whose behalf the affidavit is delivered. Only in the filing sheet, by

which the opposing affidavit was filed, is it said that the affidavit is delivered on behalf of “*Sarah-Jane Moloney and 12 others*”, “*Anne Clarissa Carsten*”, and “*Maletsatsi Tsholofelo Wes*”. (All three of those names appear in the section of the founding affidavit devoted to the applicant’s various litigious affairs.)

[8] In the opposing affidavit, Ms Naik refrains from saying how the named and unnamed creditors in question learnt of the application. Without enclosing any proof of this and without delivering confirmatory affidavits, she avers that she is “*duly authorized to depose*” to that affidavit “*on behalf of several creditors of the applicant*” (by which she probably means that they have authorized her to oppose the application on their behalf).

[9] Ms Naik complains of the applicant’s non-compliance with section 4. She says that the applicant had not yet fulfilled his undertaking to comply with section 4 once the registrar had provided a hearing date. She goes as far as this:

“The applicant’s failures ... have caused significant prejudice to ... all the creditors in that the creditors cannot make an informed decision as to whether or not to oppose this application ...

The applicant’s intention was clearly to deny the creditors an opportunity to oppose this application.”

[10] As an unnumbered attachment, Ms Naik appends to the opposing affidavit another opposing affidavit, to which she had also deposed on 22 March 2023, delivered in a similar application brought by the brother and business partner of the applicant, Mr Conrad Kullmann. From its case number, it appears that that application had been brought shortly before this one.

[11] This is certainly one important contribution made by Ms Naik in her affidavit. It brings to the fore what the applicant chose not to reveal, namely that his brother had embarked upon the same process of voluntary surrender.

[12] At the hearing of this application, on the afternoon of Friday, 17 November 2023, it was said that, on 10 November 2023, judgment had been granted in that application. On 20 November, a copy of the judgment in that application (*per*

JL Kaplan AJ) was provided to me electronically, in response to my request at the hearing. There were several reasons for the dismissal of that application, including that there was no proper valuation before the court of the property of that applicant.

[13] On 4 May 2023, Mr Kullmann delivered a replying affidavit to Ms Naik's affidavit. He questioned the absence of confirmatory affidavits on the part of the creditors for whom Ms Naik was a proxy. He raised the question of *locus standi*, complaining that “[n]o allegation is made explaining the locus standi of each of the alleged creditors” and that, while Ms Naik was “an apparent private investigator”, she was not a creditor in his estate and there were no confirmatory affidavits from what he styled “the alleged creditors”.

[14] On his non-compliance with section 4, Mr Kullmann said this:

“10. The practical difficulties in complying with the Act are as follows:

10.1 In order to advertise my sequestration, I must obtain a date which must be heard on a date far enough in the future to allow me to advertise not more than 30 days and not less than 14 days before the hearing of the matter.

10.2 In order to do so, I must advertise in a National Newspaper and the Government Gazette.

10.3 Although advertising in a National Newspaper can be done within a day or so, the Government Gazette requires that I pay and apply for an advert to be placed on or before a Friday and which advert would be published the following week.

10.4 Once the application for my surrender had been filed, I applied for a date for the hearing of my surrender on the unopposed roll on 27 February 2023 [...]

10.5 The registrar allocated the date of 23 March 2023 on the unopposed roll which date was provided to me on 27 February 2023 [...]

10.6 I was unable to advertise the notice using this date as the advert to be placed in the Government Gazette would be out of time in terms of section 4 of the Act.

10.7 *Therefore, the matter was not set down for 23 March 2023 as the adverts could not be placed.*

10.8 *In any event, the alleged creditors filed their answering affidavit to my surrender application on 22 March 2023 and therefore the matter must now proceed on the opposed roll.*

11 *Of course, now that the application is opposed, I would first have to obtain a date from the registrar on the opposed roll for me to adequately comply with section 4 of the Act. I will, as I have undertaken in my founding affidavit, file a supplementary affidavit which will set out my compliance in terms of the Act.*

12 *Certainly, no court would order my sequestration when there has been no compliance with the Act, however the reasons therefore are purely practical issues relating to the court and advertising process and not any wilful disobedience on my part.”*

[15] On 27 October 2023, Mr Kullmann delivered the supplementary affidavit to which I refer above. He says:

“3 *I gave due notice, as contemplated in terms of section 4(1) of the Insolvency Act, of my intentions to approach this Honourable Court on 13 November 2023 for an application for the surrender of my estate, by publication thereof in the Government Gazette of 20 October 2023 and in the Beeld Newspaper of 18 October 2023, being a newspaper in circulation in the district where I reside and work.*

4 *I respectfully refer this Honourable Court to the press-cuttings of the mentioned newspapers attached hereto [...]*

5 *I have complied with s4(2) of the Insolvency Act in that within 7 (seven) days after publication of the applicable notice of surrender a copy of the notice of surrender was:*

3.1 *delivered by registered mail to all my creditors whose names and addresses are known to me or could have been ascertained; and*

3.2 *delivered by registered mail to SARS.¹*

6 *I confirm that I have duly given notice to the creditors of the intended application for surrender of the estate of my estate [sic] and, in*

connection herewith I respectfully refer the Honourable Court to the copies of the letters with the copies of the registered slips as proof of the fact that these notices have been sent to the various creditors. [...]

7 *As proof that I have given notice to SARS, I refer the Honourable Court to the annexed copy of the letter addressed to the South African Revenue Services ... and the official registered post lodgment slip of the Post Office. [...]*

8 *Copies of my statement of debtor's affairs was open to the inspection of any Creditors at the Office of the Master of the High Court, Johannesburg, for a period of 14 (fourteen) days calculated from 31 October 2023 until and including 13 November 2023."*

[16] At 13:09 on Friday, 17 November 2023, shortly before argument commenced in this application, a document was uploaded onto the CaseLines electronic court file for this application, namely a sworn valuation of the immoveable property of the applicant, Portion 1 of Erf 1[...], P[...] N[...], Johannesburg. It had been sworn to by one Mr Grant Fraser, who says that he had "*physically inspected*" the property on that same day, namely 17 November 2023. He says that the open-market valuation of the property is R4,2m. He does not say what the forced-sale value would be. Be that as it may, counsel for the applicant was frank that the report was being delivered in the light of the attitude that the court had taken in the parallel application of Mr Conrad Kullmann.

THE LAW

General

[17] Voluntary surrender is governed by the Insolvency Act, 1936. In relevant part, section 3 of the Insolvency Act, headed "*Petition for acceptance of surrender of estate*", reads:

"(1) *An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of an insolvent debtor who is incapable of managing his own affairs, may petition the court for*

the acceptance of the surrender of the debtor's estate for the benefit of his creditors.

...

(3) *Before accepting or declining the surrender, the court may direct the petitioner or any other person to appear and be examined before the court."*

[emphasis added]

[18] South Africa's law of insolvency is creditor-focussed. Section 3(1) is not devised to provide straitened debtors a proverbial get-out-of-jail card. It does not avail an applicant unless there is clear evidence of a benefit to creditors, as section 3(1) makes explicit.

[19] In *Mthimkhulu v Rampersad (BOE Bank, Intervening Creditor)*,² the Natal Provincial Division expressed caution over friendly sequestrations, there having developed an ever-stronger judicial suspicion of collusion between applicant-creditors and debtors. This wariness has been transposed to applications for voluntary surrender.

[20] In 10.12.6, the Practice Manual of the Gauteng Local Division of February 2018 warns judges to guard against abuse in applications for voluntary surrender:

"In voluntary surrender applications, caution must be exercised by Judges. This procedure has been abused. Judges should scrutinise the affidavits in relation to the reasons for insolvency, the value of the assets, the valuations provided by sworn valuers (who have been found to manipulate the value of the assets in order to arrive at a dividend of +20 cents/R)."

[21] In *Ex parte Arntzen*,³ the Kwazulu-Natal High Court said this:⁴

"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 required. 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."

[22] The *Arntzen* court went on to describe the reasons why, in applications of this sort, "*creditors are required to be more alert, proactive and must respond more quickly in assessing whether or not to intervene than if they had been a party to the application*":⁵

"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."

[23] Accordingly, if an even more superlative version of *uberrimae fides* is conceivable – the Roman lawyers were fond of infinitesimally finer gradations – it is that hyperbolic genus that applies here.

[24] The sum of all this is that the applicant is to take the court fully into his confidence, giving chapter and verse on all the facts relevant to the issues for determination by the court.

[25] If the court is satisfied that a case has been made out that there has been compliance with all the above requirements, it retains a discretion whether to accept or reject the surrender of the estate, especially if there are opposing creditors. In

other words, even if the applicant has complied with sections 4 and 6, the court is not bound to grant an order for voluntary surrender.⁶

The formal requirements in section 4

[26] Section 4, headed “Notice of surrender and lodging at Master’s office of statement of debtor’s affairs”, provides:

“(1) Before presenting a petition mentioned in section three the person who intends to present the petition ... shall cause to be published in the Gazette and in a newspaper circulating in the district in which the debtor resides, or, if the debtor is a trader, in the district in which his principal place of business is situate, a notice of surrender in a form corresponding substantially with Form A in the First Schedule to this Act. The said notice shall be published not more than thirty days and not less than fourteen days before the date stated in the notice of surrender as the date upon which application will be made to the court for acceptance of the surrender of the estate of the debtor.

(2) (a) Within a period of seven days as from the date of publication of the said notice in the Gazette, the petitioner must deliver or post a copy of the said notice to every one of the creditors of the debtor in question whose address he or she knows or can ascertain.

(b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice –

(i) by post to every registered trade union that, to the petitioner’s knowledge, represents any of the debtor’s employees; and

(ii) to the employees themselves –

(aa) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor’s premises; or

(bb) if there is no access to the premises by the employees, by affixing a copy of the notice to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the surrender; and

(iii) by post to the South African Revenue Service.

(3) The petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act. That statement shall contain the particulars for which provision is made in the said Form, shall comply with any requirements contained therein and shall be verified by an affidavit (which shall be free from stamp duty) in the form set forth therein.

(4) Upon receiving the said statement, the Master may direct the petitioner to cause any property set forth therein to be valued by a sworn appraiser or by any person designated by the Master for the purpose.

(5) If the debtor resides or carries on business as a trader in any district (other than the district of Wynberg, Simonstown or Bellville in the Province of the Cape of Good Hope) wherein there is no Master's office, the petitioner shall also lodge a copy of the said statement at the office of the magistrate of the district, or, if the debtor resides or so carries on business in a portion of such district in respect of which an additional or assistant magistrate permanently carries out the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate.

(6) The said statement shall be open to the inspection of any creditor of the debtor during office hours for a period of fourteen days from a date to be mentioned in the notice of surrender."

[emphasis added]

[27] Thus, section 4 sets in place a carefully marshalled sequence of steps relating to publicity that are required of an application for voluntary surrender, designed to protect the interests of creditors. The steps are peremptory ("*shall cause to be published ...*"; "*must deliver or post*"; "*shall lodge ...*").

[28] Especially here, where the applicant complains that it was impossible for him to have complied with the timelines in section 4 and where a proxy for various creditors accuses him of having plotted that non-compliance to disadvantage those creditors, it is not unimportant to know, as a starting point, what presenting a petition means.

[29] The authorities bear out that to present a petition means to file the application with the registrar. That is distinct to making application, which denotes the actual hearing of the application in court.⁷

[30] Accordingly, in a perfect world, the first step an applicant under section 3 is to take is to cause to be published both in the *Government Gazette* and in a local newspaper a notice of surrender. This must be done before they file the application, but no more than 30 days and no fewer than 14 days before the date upon which the application will be heard. In other words, section 4 envisages that the applicant drafts a notice of surrender and then, in short order and before the application is yet issued, obtains a hearing date. Once they have the hearing date, they must attend to publishing the notice in a window of two weeks two weeks before the hearing date.

[31] What is more, within seven days of the date on which the notice is published in the *Government Gazette*, the applicant is to deliver or post a copy to all creditors whose addresses they know or can find. This must be done by registered post.⁸ Within the same seven days, the applicant must post a copy of the notice to every registered trade union that, to their knowledge, represents any of their employees, and to the employees themselves (by affixing a copy to an accessible notice board at their premises, or, if the employees do not have access to the premises, to the front gate or front door of the premises). Within the same seven days, the applicant must also post it to the South African Revenue Service.

[32] The object of the publication and dissemination of the notice of surrender contemplated in sections 4(1) and (2) is to ensure that, as far as possible, the creditors of the debtor-applicant get notice timeously of the latter's intention to apply for sequestration. This would enable them to be heard should they wish to.

[33] Under section 4(3), the applicant shall lodge with the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act, verified by an affidavit.

The court must be satisfied of everything in section 6

[34] Section 6, entitled “Acceptance by court of surrender of estate”, provides:

“(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.

(2) If the court does not accept the surrender or if the notice of surrender is withdrawn in terms of section seven, or if the petitioner fails to make the application for the acceptance of the surrender of the debtor’s estate before the expiration of a period of fourteen days as from the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor’s estate, the notice of surrender shall lapse and if a curator bonis was appointed, the estate shall be restored to the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section five.”

[emphasis added]

[35] Accordingly, the court *may* accept the surrender of an estate if it is satisfied of four things, namely that: (i) there has been compliance with section 4; (ii) the estate of the debtor is insolvent; (iii) the debtor owns realizable property of a sufficient value to defray all the costs of the sequestration payable out of the free residue of the estate; and (iv) it will be to the advantage of creditors of the debtor if the estate is sequestrated. The applicant must, on a balance of probabilities, discharge the onus of rendering the court satisfied of the above four requirements.

[36] In particular, the test on advantage to creditors is more strictly stated than that which applies in other insolvency contexts. In section 6(1), the court must be

satisfied that it will be to the advantage of creditors if the debtor's estate is sequestrated.

[37] As I say above, there is also the overarching requirement that, in framing their application, as is required in all *ex parte* applications, applicants must meet the standard of *uberrimae fides*, or the utmost good faith, by making full and frank disclosure of all material facts, namely all facts that may influence the court's decision.⁹ Without a full and frank disclosure, the court cannot be satisfied over requirements (iii) and (iv) in paragraph 35 above, in particular.

Intervention of creditors

[38] The Insolvency Act is silent on intervention. Creditors wishing to intervene must do so as they would usually, namely at common law read with rule 12, which provides that a plaintiff or defendant may "*apply for leave to intervene*". By virtue of rule 6(14), rule 12 applies to applications.

[39] Applicants for intervention should bring a formal application, showing that they have a direct and substantial legal interest in the subject-matter of the case that might be prejudicially affected by the order sought. In other words, applicants must show that they have a right adversely affected or likely to be affected. When seeking leave to intervene, the applicant does not have to satisfy the court that it will succeed if allowed to intervene. It is enough for the applicant to field allegations, that, if proven, would entitle them to relief.¹⁰

[40] Once the applicant has shown this on a *prima facie* basis, the court has no discretion. In *SA Riding for the Disabled Association v Regional Land Claims Commissioner*,¹¹ the Constitutional Court held:¹²

"If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."

[41] In *SA Riding*, the Constitutional Court quoted its decision in *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*:¹³

“[W]hen ... the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”

[42] In *Fullard v Fullard*,¹⁴ this court held that, as far as procedure goes, the intervention by creditors in insolvency applications is unique:¹⁵ *“[It] differs altogether from conventional intervention. It is neither a pure intervention nor substitution of applicants and is really sui generis seen from a procedural point of view.”*

[43] In *Levay v Van den Heever NNO*,¹⁶ this court held:¹⁷

“It is well established that an intervening creditor may be given leave to intervene at any stage, either to oppose a sequestration or to have a rule nisi discharged. A creditor may also intervene when an applicant for a sequestration order does not proceed with his application or does not succeed therein. The court takes a practical view in these matters and also bears in mind the interests of the general body of creditors.”

[44] For these reasons, creditor interventions in insolvency matters are unique:¹⁸

“[T]he creditor only arrives in Court with his own evidence, usually on the return day. Because he is the creditor he has locus standi to be heard in a concursus creditorum which already exists and the so-called leave to intervene is actually a formality.”

[45] Considered with the Constitutional Court’s finding in *SA Riding*, namely that a court lacks a discretion once a party has demonstrated a direct and substantial legal

interest, a court would usually not require a formal application for intervention if a creditor shows they are a creditor.

ANALYSIS

[46] I turn to address the question of the applicant's compliance or otherwise with sections 4 and 6, in the light of his duty to make full and frank disclosure. Then, I consider the intervention.

Compliance with section 4

[47] The applicant is frank that he did not comply strictly with section 4. He did not publish the notice required by section 3(1) before presenting the petition. He could not do so.

[48] Indeed, the picture that emerges is of a herculean and Escher-like set of challenges that applicants must surmount to fit an application of this sort into the statutory framework. Yet they must always fail in what they are enjoined to achieve, which is an impossibility. I assume that, when the Insolvency Act was promulgated in 1936, compliance with its terms was possible. It is unfortunate that this appears no longer to be the case, and that these applications must perforce be marked by condonation sought and the delivery of further affidavits – the more so where applications of this type already require a high measure of agility from creditors.

[49] Yet, by the time that he delivered his supplementary affidavit, on 27 October 2023, he had so complied. On 20 October 2023, the notice of surrender was published in the *Government Gazette*. On 18 October, it had appeared in *Beeld* newspaper. Enclosed with his supplementary affidavit is proof of the dispatch to his creditors and SARS of the notice of surrender. As required by section 4(2), this was done within seven days of the publication of the notice of surrender under section 4(1).

[50] A copy of the applicant's statement of affairs was open for inspection by creditors at the office of the Master for a period of fourteen days, from 31 October up to and including 13 November 2023.

[51] In the light of what the applicant says about his efforts to comply with section 4, it is in the interests of justice that his late compliance is condoned. As I say above, it would behove all applicants in his position to seek this upfront in the notice of motion.

Compliance with section 6

[52] The founding affidavit spans nine terse pages.

[53] The applicant says that, until late 2017, he and his brother Conrad conducted the business of constructing and leasing furniture for exhibitions. They used seven companies through which to conduct that business, yet by the date of the founding affidavit they were all in liquidation. The applicant remained a member or director of them but *"they accrue no income for [him] in considering this application"*. The applicant says that he holds no directorship in any fully active entity. Neither is he employed, nor does he earn *"any income"*.

[54] In this regard, in a following paragraph he says something somewhat different:

"I have not been able to earn a reasonable salary to cover my liabilities since the businesses I ran were liquidated. This arose because when I had taken out credit with the banks listed below, the business was successful, and I had drawn a good salary from the business for many years. When the business failed, those liabilities remained outstanding however my income dwindled and became erratic."

[emphasis added]

[55] On this aspect – indeed on all applicable aspects – the founding affidavit is scant on detail. It is odd that the applicant did not foresee that the court hearing this application would be interested in what a businessman, once running several companies, did in the period since late 2017 to be gainfully engaged. Taking the applicant’s own version at face value, the question arises whether he has earned nothing since late 2017, or whether he has earned less than a reasonable salary. If he has indeed earned something in the period since late 2017 – which is surely highly likely – what is the *quantum* and where has that money been deposited?

[56] The applicant says that his only assets are the immovable property at 25A Tenth Avenue, Parktown North, and furniture. The former he says is valued between R4,2m and R4,5m “*as appears from the valuation assessment provided by Pam Golding on 21 July 2021*”. The “*forced sale value of the property would be around*” R4,2m. (This seems to be contradicted by Mr Fraser.)

[57] I agree with my brother Kaplan AJ, who presided in the application of the brother of this applicant, that this Pam Golding document, akin to the one in the application that he heard, is insubstantial. It is no valuation for purposes of the exercise entrusted to a court hearing an application of this sort. It provides no basis for the conclusions it reaches. Also, at the time of the launching of application it was about eighteen months old. The applicant could not have imagined that it would suffice.

[58] As I say above, in the light of the fate of his brother’s application, dismissed as it was for *inter alia* the absence of a sworn valuation of that applicant’s fixed property, minutes before the hearing the sworn valuation of Mr Fraser was delivered. It was fresh off the press. It settled on about the same figures as Pam Golding had done about two years before.

[59] The Fraser valuation, while rather more substantial than Pam Golding’s guesstimate, was delivered wholly outside the rules. No application for the condonation of its late and irregular delivery was sought. It was not delivered under cover of an affidavit explaining the process that led to its production at beyond the eleventh hour. Had it been enclosed with the founding affidavit, as it should have

been, some of the applicant's creditors that were not represented in court, might well have taken a different view on participating in the hearing. In these circumstances, it is not in the interests of justice that it be admitted. Yet, even if I had received it, the outcome of this application would have been no different.

[60] The only other assets that the applicant has is furniture that is "*of a low value given their age*" and that should, so the applicant says, fetch R50,000 on a forced sale. This value is simply asserted. Neither reasoning, nor proof is offered.

[61] As far as the applicant's assets go, that is it. One inevitably wonders why the applicant owns no other assets, not even a motor vehicle. It may well be that this is the case, but the founding affidavit is skeletal. It has more pregnant unknowns than knowns. Indeed, it looks rather like it might have been drawn to a standard plan. It hardly creates the impression of someone taking the court into his confidence.

[62] The applicant's liabilities include a home loan that, at the time the applicant deposed to the founding affidavit, stood at R1,9m, and an amount of R17,781.79 owed to the City of Johannesburg. He owed just shy of R120,000 on one credit card, and R40,000 on another. The applicant goes on to describe what he calls contingent liabilities in pending litigation. He mentions four cases. The first was a claim for R2,2m on an unidentified cause of action. The second was a claim for R2,7m, again on an unidentified cause of action. At the date of the founding affidavit, both of those actions were in the pre-trial stage.

[63] The third was a judgment handed down in the Labour Court. Its *quantum* was estimated at either R3,3m or R1,6m. A copy of the judgment was included in the applicant's statement of affairs that lay at the Master. In the fourth action, judgment had been handed down directing Mr Kullmann to repay R2,8m to a close corporation in liquidation, following the setting aside of dispositions that the entity had made to him during 2016. An appeal to the full bench of this court was dismissed. At the time of the founding affidavit, it was on appeal to the Supreme Court of Appeal.

[64] Another of the several themes on which the applicant kept mum was how his legal fees in all these various matters had been and were being paid.

[65] The applicant concludes that, depending on what he owed in the Labour Court judgment, his total judgment indebtedness would be either R9,4m or R11m. His total indebtedness was R13,2m:

“If my property is sold by the estate, my creditors would obtain at least 34.44c in the Rand (R4 550 000.00) (being the fire sale value of the assets) / R13 201 578.00 (being total liabilities) being the worst possible scenario.”

[66] Yet, for all the reasons I state above, the very foundation stones of this calculation are shaky. They are not to be credited easily or readily.

[67] Indeed, the applicant then makes this observation:

“I note that my brother is also liable to pay for the litigation liabilities jointly and severally and he has a property registered in his name as aforementioned which value is at least R4 500 000.00. Indeed, the creditors will be able to also attach and sell this asset which will further allow the creditors to recoup any other funds which they could not recoup from me.”

[68] This is a remarkable statement for the applicant to make. At the time that he deposed to the founding affidavit, the applicant must have known that his brother and close business associate was in exactly the same boat as he. In both applications, the same firm of attorneys represented the applicants. The application of Mr Conrad Kullmann bears a case number a little before this case number. Both relied upon a Pam Golding guesstimate of the value of their fixed property.

[69] The probabilities are overwhelming that the applicant knew that the statement in the above paragraph was untrue when he made it. If his brother's surrender was accepted, how could it ever be that creditors of this applicant might *“be able to also attach and sell this asset [sc. the home of Mr Conrad Kullmann] which will further allow the creditors to recoup any other funds which they could not recoup from me.”*

[70] In his replying affidavit, the applicant does not even deign to respond specifically to the facts surrounding his brother's application for voluntary surrender. Worse still, he puts up a bald denial, in the face of clear evidence that his brother had embarked on the same route.

[71] For all the above reasons, the applicant has fallen far short of demonstrating on a balance of probabilities that his estate is insolvent or that it will be to the advantage of his creditors if his estate were sequestrated.

[72] What is more, the applicant's persistent silence on his brother's voluntary surrender in the light of what he says about him in the founding affidavit falls well below the standard of *uberrimae fides*.

The intervention

[73] As to the intervention, it suffices to say that it was done in a rather slipshod fashion. Each creditor should show that they are a creditor. If their affidavit contains averments, which, if true, demonstrate their standing as creditors, a court would not disregard such an affidavit.

[74] However, creditors that are unnamed, like those in Ms Naik's affidavit, have not shown their standing. They cannot properly intervene since the court does not know who they are or whether the proceedings might affect their legal interests.

[75] To have sought an intervention properly would have required only a few more succinct paragraphs in the affidavit of Ms Naik, as well as the delivery of confirmatory affidavits.

[76] Nevertheless, by the time I became seized of the matter, Ms Naik's affidavit was part of the architecture of this application. What is more, her affidavit delivered cogent evidence embodied in the enclosed affidavit of Mr Conrad Kullmann, which elicited my request for the judgment of my brother Kaplan AJ.

[77] Accordingly, I exercise my discretion nevertheless to take account of the facts thus gleaned.

COSTS

[78] The costs follow the result.

ORDER

1. The application is dismissed.
2. The applicant is to pay the costs of this application, including the costs of counsel.

J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 17 November 2023

Date of judgment: 2 May 2024

APPEARANCES

For the first applicant: Advocate Tyrone Lautré

Instructed by: Kaveer Guinness Inc.

For the respondent: SW van der Merwe

Instructed by: Eversheds Sutherland (SA) Inc.

¹ *Sic*: incorrect numbering of sub-paragraphs.

² [2000] 3 All SA 512 (N).

³ 2013 (1) SA 49 (KZP).

⁴ At para 6.

⁵ At para 8.

⁶ *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D), at 219; see also the discussion in Boraine and Roestoff “Revisiting the state of consumer insolvency in South Africa after twenty years: The courts’ approach, international guidelines and an appeal for urgent law reform (1)” 2014 *THRHR* 357.

⁷ The Insolvency Act uses “*petition*” variously (sections 3, 4, 9, 12, and 15). In section 3(1), an insolvent debtor “*may petition the court for*” voluntary surrender. Section 4(1) requires things to happen before “*presenting a petition*”. The Act defines neither the noun “*petition*”, nor “*present a petition*”. In *Ex Parte Berson* 1938 WLD 107, this division said presenting a petition means filing it at court. The Petition Proceedings Replacement Act, 1976, defines “*petition*”: “[A]ny reference in any law to the institution of application proceedings in any court by petition, shall be construed as a reference to the institution of such proceedings by notice of motion in terms of the rules regulating the conduct of the proceedings of such court.” In applying that definition, this division has held that the “*date of such petition*” in section 9(3) of the Insolvency Act is the “*date of such notice of motion*” (*Anthony Black Films v Beyl* 1982 (2) SA 478 (W), at p 479H). In *Lief, NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W), this division said that “*the presentation of the petition is effected by the filing of the petition at the office of the Registrar of the Court ...*” and it proceeded to use “*presented*” and “*filing*” interchangeably (p 345H). In *Meaker, NO v Campbell’s New Quarries (Pvt) Ltd* 1973 (3) SA 157 (R), a foreign court considered the meaning of “*presenting the petition*” under the Rhodesian Companies Act as well as our Companies Act, 1963, similarly holding (p 160B). In *Jacobs v PC Udingo Joint Venture (Pty) Ltd* 2015 JDR 0932 (GP), this division observed that “‘when a petition is presented to Court’ entail[s] service of the application when the papers are lodged at Court, i.e. filed with the Registrar – *P.W. Roberts v The Taylor of Bunkingham CC* Case No. 2008/21864 (WLD) at paras [6]–[7] *Corporate Money Managers (Pty) Ltd and Others v Panama Properties 49 (Pty) Ltd* 2013 [1] SA 522 (GNP).”

⁸ *Ex parte Bishop* 1936 (WLD) 83; *Ex parte Marchesi* 1960 (2) SA 52 (N).

⁹ *Ex parte Swart* 1935 NPD 432 at 433; *Berrange NO v Hassan & another* 2009 (2) SA 339 (N), at 354A–B.

¹⁰ See for example *Ex parte Moosa: In re Hassim v Harrop Allin* 1974 (4) SA 412 (T), at 414B and *Minister of Local Government and Land Tenure v Sizwe Development: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk) (*Sizwe Development*), p 679A.

¹¹ 2017 (5) SA 1 (CC).

¹² At para 10.

¹³ 2004 (2) SA 81 (SE), at para 9, quoted at para 11 in *SA Riding*.

¹⁴ 1979 (1) SA 368 (T). See also *Mercantile Bank Limited v MMR (MBR intervening)* (unreported, GJ case no 2020/19791 dated 5 April 2022), at para 9.

¹⁵ *Fullard*, quoted from the headnote since the judgment is in Afrikaans.

¹⁶ 2018 (4) SA 473 (GJ).

¹⁷ At para 11.

¹⁸ *Fullard*, quoted from the headnote.