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

Reportable:	**NO**
Of interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case no: **5983/2024**

In the *ex parte* application of:

TIAAN VAN NIEKERK Applicant

Identity number: 86[…]

(Unmarried)

For the voluntary surrender of his estate

AND

Case no: **28/2025**

In the *ex parte* application of:

PETER CARL DU PLESSIS 1st Applicant

Identity number: 53[…]

And

SOPHIA MAIRA MAGDALENA DU PLESSIS 2nd Applicant

Identity number: 58[…]

(Married in community of property)

For the voluntary surrender of their estate

Coram:	JP DAFFUE J
Heard:	20 FEBRUARY 2025
Reasons delivered:	27 FEBRUARY 2025

These reasons were handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 27 FEBRUARY 2025.

REASONS

DAFFUE J

Introduction

[1] Two applications for voluntary surrender of the respective applicants' estates in accordance with s 4 of the Insolvency Act 24 of 1936 (the Insolvency Act) came before me in the unopposed motion court of 20 February 2025. I dismissed both applications and stated that my reasons would follow in due course. These are my reasons.

[2] Insofar as I have dealt with several similar applications over the years, I shall in the course of this judgment refer to some of my judgments as well as those of eminent judges of various divisions of the High Court in this country. Let me by way of introduction refer to the following observations made by the authors of *Mars:*[1]

'The requirement that all information presented to the court in an application for surrender must be accurate and that valuations must be exact, arises from the courts' insistence that a debtor who is pressed by his creditors does not over-estimate the value of his estate in order to obtain relief from his financial burdens.

The administration of insolvent estates has over the years developed into a very lucrative and therefore very competitive profession. The pressure has therefore increased to identify debtors whose sequestration or liquidation may render a lucrative return to lawyers, trustees, liquidators, valuators and auctioneers. Advertisements in the media canvassing debtors who are desirous of ridding themselves of their financial burdens have become commonplace. This has increased the risks for debtors and creditors alike. …

On the other hand, insolvency practitioners are tempted to present a rosy picture of the debtor's affairs that bears little semblance to reality, resulting in an estate being declared insolvent that renders little or no dividend for creditors once the fees of the various participants in voluntary surrender proceedings have been deducted and the administration costs have been paid.'

The parties

[1] Bertelsmann *et al*, *Mars: The Law of Insolvency in South Africa*, 9th ed p 63.

[3] The applicant in application number 5983/2024 is Mr Tiaan Van Niekerk an unmarried male person residing at Vrede in the North Eastern Free State. He is a general worker who will be 29 years old in a few days from now.

[4] The applicants in application number 28/2025 are Mr Peter Carl du Plessis and his wife with whom he is married in community of property, Mrs Sophia Maria Magdalena du Plessis. They are an elderly couple. Mr Du Plessis is 72 years and his wife 66 years old. Both of them are still employed and both are managers in the respective companies by whom they are employed. They reside in Frankfort in the Northern Free State.

Similarity in the two applications

[5] Mr David Johann Schoonraad, an attorney practising under the name and style of Schoonraad Attorneys in Arcadia, Pretoria, is the applicants' attorney of record. His correspondent in Bloemfontein is Kleingeld Attorneys. The same counsel appeared before me in both applications. He is relatively new in Bloemfontein, having completed his pupillage at the local bar in 2024. He was not involved in any of the earlier applications to which I shall refer.

[6] Ms Adele Reyneke, a financial advisor of Senator Counsellors (Pty) Ltd (Senator) of Centurion, was requested to consider the applicants' financial problems. She found in both instances that there was no evidence that any of the applicants' creditors provided reckless credit. Her affidavit in both applications read about the same. She stated in paragraph 3 that all the facts as stated in paragraph 11 of the applicants' founding affidavits, with specific reference to the applicants' debt review, was unsuccessful as they could not afford the required minimum monthly instalments. I mention already at this stage that it is obviously apparent that the applicants did not apply to the Magistrate's Court for appropriate orders in terms of s 87 of the National Credit Act 34 of 2005 (NCA).

[7] The valuator in both applications is Mr Franco Maartens from Worth Authority in Centurion. In both instances a Mr Albertus Wilhelm Labuschagne was the commissioner of oaths. For an unknown reason the affidavits were commissioned in Bloemfontein. I shall revert to this strange phenomenon.

[8] It is noted that the valuator who had to travel all the way from Centurion to Frankfort and Vrede respectively did not provide a statement of account in respect of his fees and travelling expenses. It is possible that these were paid up front, but in such a case I would have expected the applicants to come clean and inform us how they managed to settle this debt. I find it improbable that a valuator from Centurion would drive to Bloemfontein for his affidavits to be commissioned here relating to valuations undertaken in respect of properties in Frankfort and Vrede. Both these towns are more than 300 km away from Bloemfontein.

[9] There is no indication that the valuator has tested any of the household appliances to establish whether they were in a working condition. Furthermore, we have not been informed how old these items are. As strange as it may sound, in both cases the applicants are in possession of a four-piece leather lounge suite. It is not stated whether the material thereof is genuine or synthetic leather. No photos have been taken of the more expensive items such as the lounge suites. Valuators often decrease their valuations with 30% in order to obtain the forced sale value of immovable properties. In casu, the applicants preferred to rely on the market valuations although the valuator provided for about a 10% percentage deduction to arrive at forced sale values.

[10] Mr Schoonraad filed supporting affidavits. These read word for word the same. In paragraph 4 he stated the following:

'I further submit that the dividend calculation explained in the Applicant's Founding Affidavit was done strictly in accordance with the prescriptions and provisions of the Insolvency Act, Act 24 of 1936.'

According to his calculations the trustee is entitled to R2 850 remuneration in both cases as is apparent from the founding affidavits. This is the very same amount relied upon in the application to which I shall refer hereunder.

[11] The attorney regards himself as an expert in insolvency matters. I shall refer later herein to his involvement in similar matters more than a decade ago. He incorrectly calculated the trustee's remuneration. He either cannot do maths, or is

totally unaware of the tariff applicable to trustee's remuneration,[2] or he deliberately elected to present the court with false facts. I do not have to adjudicate this vexed question. Allow me to put facts on the table. In the Van Niekerk application the trustee's fee will be R7 113 if the properties are sold at the valuation relied upon. 10% of R50 650 is R5 065. If 15% VAT in the amount of R760 is added, the total fee is R6 825. 1% on the cash found in the estate – R25 000 deposited in the Guardian Fund – is R250. If 15% VAT is added, the total is R288. The total fee in this case should therefore be R6 825 plus R288 which equals R7 113. The calculation in the Du Plessis application is as follows: 10% of R65 600 is R6 560. If 15% VAT in the amount of R984 is added, the total fee should be R7 544. There is no explanation why the attorney arrived at a figure of R2 850 in both instances. Furthermore, the attorney should have known that the trustee would probably sell the assets on public auction in which case the auctioneers are entitled to 6% of the proceeds plus VAT. He also failed to consider the Master's fees. No provision is made for advertisement costs which nowadays are enormous.

[12] The fees of the two sets of attorneys are calculated at R14 000 plus VAT for the Pretoria attorney and R8 000 plus VAT for the Bloemfontein attorney. These fees are ridiculously low. I dealt with legal costs in voluntary surrender applications more than a decade ago in *ex parte Snooke.*[3] Since then the fees to which legal practitioners are entitled have been increased considerably.

[13] There is no doubt that the person who drafted the documents made use of a copy and paste process. There is nothing wrong to make use of precedents in drafting documents. However, the similarity in these applications and also found by me and other judges in earlier judgments referred to herein is much more than a mere coincidence.

Similarity between these applications and an earlier application

[14] On 25 July 2024 application number 3065/2024 for voluntary surrender served before me in the unopposed motion court. The applicant was one Ms Lizelle Mare, a female person married out of community of property. The legal practitioner appearing for the applicant requested a postponement as the Master's report was

[2] Tariff B of the second schedule of the Insolvency Act 24 of 1936, read with s 63 thereof.
[3] 2014 (5) SA 426 (FB) paras 17-23; see also *ex parte Cloete* 2013 JDR 0854 (FB) a judgment delivered on 5 April 2013 para 22.

outstanding. I was prepared to postpone the application to 22 August 2024, but ordered the applicant to supplement her founding affidavit in the following respects:

'1. …

2. Leave is granted to the applicant to file a supplementary affidavit dealing with all of the following:

2.1 several of the applicant's movable properties fall within the category of properties usually returned to an insolvent in accordance with section 82(6) of the Insolvency Act 24 of 1936 and the applicant shall provide reasons why the value of all such household properties should be taken into consideration in determining a possible dividend;
2.2 nowhere is there any mention of the fees and travelling expenses of the valuator and the applicant shall explain with proof of his account why these expenses are not set out as part of the disbursements;
2.3 the valuator's valuation is meaningless insofar as the items valued have not been identified by make, model, age, purchase price and/or whether these items are still under warranty;
2.4 the lounge suite valued at R20 010 is not properly identified with reference to paragraph 2.3 above, but more particularly, there is no indication as to the number of pieces thereof, whether it is a genuine leather suite, and if not, the kind of material thereof should be provided;
2.5 it is expected that photographs be provided of the lounge suite in particular, but also of the most expensive items valued in excess of R 2 000;
2.6 what is meant in annexure IV of the statement of affairs with reference to the alleged prescription of the claim of the Receiver of Revenue and is it the applicant's case that no amount is due and payable to the Receiver of Revenue;
2.7 the statement by H Smit is not commissioned and in any event, this person shall explain in detail why the debt review application was dismissed in terms of section 86 of the National Credit Act 34 of 2005 (NCA) as it is apparent from paragraph 13 of the founding affidavit that at least R 5 000 per month would be available to distribute amongst creditors;
2.8 the applicant shall explain whether, when and to which court she applied for relief in terms of section 86 of the NCA;
2.9 the affidavit of attorney Schoonraad is confusing and he should confirm whether he and his correspondent will insist on their taxed fees and expenses and not the minimal amounts of R 14 000 and R 8 000 plus VAT used to calculate a dividend, whilst it should be common cause that the taxed accounts of two sets of attorneys will be much higher than estimated which will have a detrimental effect on the dividend;

2.10 why was it necessary to make use of a Gauteng attorney, valuator and debt counsellor when the applicant is resident in Bloemfontein;

2.11 it is expected that the applicant shall state what her husband earns and what he contributes to the household expenses.

3. This supplementary affidavit and any annexures thereto shall be served on the Master to enable him/her to file a supplementary report.'

[15] In preparing these reasons I requested the court file in the aforesaid application. It appeared from the file that the applicant's attorney filed a notice to remove the matter from the roll on 6 August 2024 as the applicant wanted to 're-asses her financial position'. That application has not been enrolled again. The documentation in that application is, save for the personal information which obviously differs, a carbon-copy of the two applications that served before me on 20 February 2025. Mr David Johann Schoonraad is again the Pretoria attorney who made use of the same correspondent in Bloemfontein. Mr Franco Maartens also did the valuation in that case. Senator was also involved. A certain Ms Herma Smit, a financial advisor at this company, signed a document which was not even commissioned before a commissioner of oaths. She made the exact same allegations which were subsequently made by Ms Reyneke in the matters now before me.

[16] As in the present two applications, the trustee's fees were calculated to be R2 875.00, the Pretoria attorney's fees to be R14 000.00 plus VAT and the Bloemfontein correspondent's fees to be R8 000 plus VAT.

[17] The dividend in the Mare application was calculated to be 20.10 cent in the rand. As strange as it may sound, the dividend in the Du Plessis application was calculated to be 20.49 cent in the rand and in the Van Niekerk application a little bit more, to wit 21.78 cent in the rand. If my memory serves me correct, the Pretoria High Court insists on dividends of at least 20 cent in the rand in order to prove a benefit to creditors.

Evaluation of the applications

[18] The applicants had to satisfy the court that the acceptance of the surrender of their estates would be to the advantage of their creditors. In these instances where

the over-indebtedness is about exclusively related to debt arising from credit agreements, the applicants should have properly utilised the NCA processes which provide a wide range of remedial relief. Section 87 of the NCA reads as follows:

'(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) (b), or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may-

(a) reject the recommendation or application as the case may be; or
(b) make-

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) (c) (ii); or
(iii) both orders contemplated in subparagraph (i) and (ii).

(2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section.'

[19] Although I am prepared to accept that no reckless credit was extended as stated by the financial advisor, the applicants' resistance to seek relief provided by the NCA is frowned upon. I shall show in the next paragraph that the applicants in both applications have a sufficient nett income (if their contractual obligations towards creditors are deducted) to be utilised in order to settle their debts in affordable instalments. In my view the applicants have been advised by their attorney to choose relief in terms of the Insolvency Act to their convenience and in doing so by mechanically and superficially satisfying the relevant statutory requirements under the Insolvency Act. This is a misdirected approach, especially where the grant of the selected remedy is discretionary as pointed out many years ago by Binns-Ward AJ in *Ex parte Ford and Two Similar Cases.*[4]

[20] On his version under oath, Mr Van Niekerk has in excess of R4 500 per month available to be paid in instalments to his only creditor, the FNB. I accept that

[4] 2009 (3) SA 376 (WCC) para 19.

this amount is much less than his contractual instalments, but no reasons have been provided why relief was not sought in terms of s 87 of the NCA. The Du Plessis couple has about R10 000 per month available whilst their contractual instalments are R17 200. The same applies in their case although they are in a better position than Mr Van Niekerk to settle their debts.

[21] In the case of Van Niekerk, the only creditor *ex facie* the statement of affairs is First National Bank who has lent money to the debtor in respect of several accounts. The statutory notice was apparently sent to FNB via a postal address in Johannesburg. There is no indication that the notices provided for the various account numbers to enable the recipient to allocate the letters to the correct division.

[22] In the Du Plessis' application no proof has been filed that the statement of affairs lay open for inspection for a period of 14 days in the Magistrate's office in Vrede and that no objections had been lodged. It is indicated in the Master's report that the Master received a certificate from the Magistrate relating to the estate late SMM du Plessis. Obviously, such a certificate is hopelessly wrong and even if it was filed with the court, it would have been rejected. While dealing with the Master's report in Du Plessis, reference is made by the Master to the fact that in calculating the dividend, the Master's fee of R1 000 as well as the auctioneer's fees had not been taken into consideration. In the case of Van Niekerk the Master did not make a similar comment which should have been made. I also find it strange that the Master did not notice that the trustee's remuneration was calculated incorrectly as mentioned above.

[23] I stated as long ago as 2013 in *Ex parte Cloete*[5] that it is not acceptable that debtors utilise the expensive machinery of the Insolvency Act to get rid of creditors to the disadvantage of creditors. Insolvency must always be the last resort. In cases such as the present matters, where we are confronted with small estates, the starting point should be to embrace the protection of the NCA if the claims fall within its ambit. We have seen over the years that debtors are not prepared to continue paying off their debts, but rather to get a quick fix to get rid of their debts, either by way of friendly sequestrations, or the surrender of their estates. In *Ex parte Loraine*

[5] 2013 JDR 0854 (FB) a judgment delivered on 5 April 2013, at para 24.

Jordaan and three other similar applications[6] I discussed in detail the statutory requirements for voluntary surrender, the abuse of the process by some legal practitioners and applicants, as well as the similarities in the four applications that served before me at the time. As in that case, it is debatable whether it is a coincidence that the concurrent dividend payable to creditors is calculated at about 20 cent in the rand.[7] Already then, the law firm, Schoonraad Attorneys, was one of the role players insofar as the valuator instructed at the time 'received written instructions from Schoonraad Attorneys to estimate the market value in each case.' I stated further:

'There is no indication how Schoonraad Attorneys fit in the picture and it appears as if a third set of attorneys are involved. This is the case in all the applications, save the Esterhuizen application, where no valuation was placed before the court.'[8]

[24] In *Ex parte Concato and Similar Cases*[9] Bozalek J was seized with five similar voluntary surrender applications. The learned judge concluded as follows:

'A conclusion of lack of bona fides was also informed by shortcomings in the applications as a whole, including inter alia their superficiality, the similarity in the averments made and the uncanny coincidence of the projected dividend being either 16 or 17 cents in the rand. There were also lacunae evident in the particular applications under consideration that led to the conclusion that the applicants had either not made full and proper disclosure of their affairs, or had not employed, or properly utilised, alternative statutory measures to reach an accommodation with their creditors.'

[25] It is also appropriate to again refer to *Ex parte Snooke.*[10] The judgment dealt with an application for rehabilitation, but I discussed the legal fees and the advantage of creditors in some detail. I *inter alia* mentioned the following:

'Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 9 ed at 64 are of the view that there 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

---

[6] Unreported judgment in the Free State High Court delivered on 27 March 2014 under case numbers 386/2014, 266/2014, 268/2014 & 633/2014; see also *Botha v Botha* (4457/2016) [2016] ZAFSHC 194 (17 November 2016) para 11; *Eksteen v Van der Merwe* (2710/2018) [2018] ZAFSHC 131 (2 August 2018).

[7] *Ibid* paras 17.4.

[8] *Ibid* para 17.3.

[9] 2016 (3) SA 549 (WCC) paras 67 & 69.

[10] 2014 (5) SA 426 (FB) para 25.

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; Freban Inv (Pty) Ltd v Itzkin; Botha v Botha* 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] The factual inaccuracies in the affidavits before the court, whether intentional or negligent, prove the point raised by me many years ago that the Master should consider the advantage of creditors in each and every application for voluntary surrender and to report to the court on this issue. The Master is for example empowered to direct the applicant to obtain a valuation 'by a sworn appraiser or by any person designated by the Master for the purpose.'[11] Too many applications for voluntary surrender are nothing but an abuse of court process.

[27] The legal practitioners who are involved in these applications benefit directly from the debtors' financial predicament. The same applies to the trustees who are eventually appointed to liquidate the insolvent estates with no hassles or difficult issues to be considered. The meetings of creditors are a mere formality as creditors more often than not refuse to file any claims. Much more can be said, but hopefully this judgment will remind all role players of their responsibilities in order to ensure that justice is done.

[28] I am satisfied that both applications are not *bona fide*. I have reason to believe that if these two applications were to succeed, the applicants would be rid of their debts to the detriment of creditors who would not even try to file claims, bearing in

[11] Section 4(4) of the Insolvency Act 24 of 1936.

mind the risk of a contribution payable. The Registrar of the court is directed to send a copy of this judgment to the Master.

DAFFUE J

Appearances

For applicant:	Adv AA Verhoef
Instructed by:	Schoonraad Attorneys c/o Kleingeld Attorneys Bloemfontein