



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No's: 19421/13 and
19422/13

Before: The Hon. Mr Justice Binns-Ward

In the ex parte application of
JACOBUS CORNELIUS CRAFFORD
(ID No.)
and
HEIDI CRAFFORD
(ID No.....)
(for the voluntary surrender of their joint estate)

and

In the ex parte application of
CLAIRE ELIZABETH NAPIER
(ID No.....)
(for the voluntary surrender of her estate)

JUDGMENT DELIVERED 13 FEBRUARY 2014

BINNS-WARD J:

[1] Two applications for voluntary surrender in terms of s 4 of the Insolvency Act 24 of 1936 came before me in the unopposed motion court on 28 November 2013. The applicants in both matters were resident in Cape Town. They were, however, represented by a Pretoria firm of attorneys, P.A. Markgraaf Attorneys (or Philip Markgraaf Attorneys, as the firm was referred to in places on the papers). In order to meet the requirement of showing that the

surrender of the applicants' respective estates would be to the advantage of creditors, the papers in both applications contained an itemised description of the applicants' movable property that would allegedly be realisable by a trustee, together with a sworn valuation by an appraiser confirming what the property might be expected to fetch on a forced sale. On the face of the papers the sworn valuation would appear in each case to have been done by a Pretoria-based sworn appraiser, Koop Styger of Status Valuations. The intended effect of the evidence in both matters, taking into account the sworn appraisals and the estimated costs of sequestration, was that the liquidation of the applicants' respective estates might in each case reasonably be expected to provide a dividend of 21c in the rand to concurrent creditors.

[2] The Assistant Master filed reports questioning whether it would be to the advantage of creditors to accept the surrender of the estates. He stated that in his experience concurrent creditors often refrained from submitting claims in matters like this for fear of being liable to make a contribution to the costs of sequestration, and movable property of the sort described in the papers (used furniture and appliances) often realised lower prices than their appraised value.

[3] There were a number of problems with the papers in both applications. For present purposes I need mention only some of them. According to the papers in the first application, the Pretoria-based valuer had inspected the applicant's motor vehicle and household furniture in Cape Town on 21 October 2013 and then deposed to an affidavit in Pretoria later the same day confirming his appraisal of their value. The papers in the second application reflected that the sworn appraiser had inspected the property of those applicants in Cape Town on 24 October 2013 and, as in the first mentioned case, deposed to an affidavit later the same day in Pretoria confirming his valuation. It struck me as inherently improbable that an appraiser would travel twice between Pretoria and Cape Town in the course of a single week to assess the value of estates containing such meagre assets. I doubted that it would be feasible for the sworn appraiser to carry on business in the manner that the affidavits in both cases, considered together, would suggest. I was furthermore unable to discern how the expense of flights to and from Gauteng had been accommodated in the estimated costs of sequestration set out in the supporting papers. The other aspect of the valuations that struck me as implausible was that according to the tenor of the sworn appraisements the applicants would appear to have acquired relatively expensive and luxurious household items, such as large screen televisions, surround sound systems and dishwashers, within the year immediately preceding the applications, notwithstanding their allegedly penurious

circumstances and, in the one case, extended history of loss of employment. The goods were indicated in the sworn valuations as being one year old.

[4] I was also struck by how much of the applicants' liabilities in both matters seemed to relate to loans obtained from credit providers. These comprised both banks and certain business entities that I suspected (correctly, as it turned out) were probably micro-lenders. I could not understand how so much credit could have been advanced to the applicants in the context of their circumstances as described on the papers had proper assessments, as prescribed in terms of s 81 of the National Credit Act 34 of 2005 ('the NCA'), been undertaken. In that connection the considerations discussed in *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC) concerning the undesirability of accepting the voluntary surrender of insolvent estates when the interests of creditors who had been 'responsible credit grantors' could be better served if the applicants instead sought debt relief in terms of the NCA appeared to weigh in the balance against acceding to the applications.

[5] When the matters were called I required the first of the aforementioned issues, as well as certain other matters which it is not necessary to particularise, to be explained on affidavit. I postponed the applications for a few days to allow for the submission of the required explanations.

[6] At the resumed hearing, on 3 December 2013, an affidavit by the sworn appraiser was handed in, which purported to explain that the dates mentioned in the respective sworn valuations were erroneous. The valuer's explanatory affidavit, which was filed in both matters, read as follows:

I the undersigned
KOOP DE VRIES STYGER
 Declare under oath as follows.

1.

I am the valuer who did the valuations in both the above applications.

2.

It has been brought to my attention that the dates appearing on the valuation certificates and the sworn affidavits in these applications are the same dates.

3.

Upon investigation it appears that the respective valuations were prepared on the 21st October 2013 and the 24th October 2013.

The same dates was (sic) inadvertently inserted on the valuation certificates which is incorrect. The dates on the respective valuation certificates should be 20 October 2013 being the date of the valuations in both matters.

4.

I failed to notice this mistake upon signature of the documents.

I was also informed by the Cape Town attorney appearing for the applicants at the resumed hearing that the applicants wished to withdraw their applications to surrender their estates.

[7] I was not satisfied by the explanation provided on affidavit. While I could understand that the appraiser may have misdated one of his valuation reports, I considered it most unlikely that he would have repeated the mistake three days later. Far from assuaging my concerns, the explanation tendered made me even more suspicious that the court was being misled. I therefore decided to refuse leave for the withdrawal of the applications and to conduct an examination in terms of s 3(3) of the Insolvency Act. I directed that Mr Markgraaf, Mr Styger and the applicants should appear in person for that purpose on 27 January 2014.

[8] On 21 January 2014 affidavits made by Mr Markgraaf and Mr Styger were filed of record in which it was averred that they were unable to attend at the examination because of the inability of the applicants to finance their travel expenses from Pretoria, including airfare and accommodation costs. Both persons indicated their willingness to answer any questions the court might have in writing. Mr Styger stated that he was ‘more than willing to answer any questions with regards to the valuation by way of a further Affidavit’.

[9] The excuses given for non-attendance at the enquiry were unacceptable. Professionals who choose to become involved in voluntary surrender applications should be aware of the provisions of s 3(3) of the Insolvency Act¹ and that they may be required to attend court to answer any questions that the judge seized of the application may wish to direct to them. Their liability to attend such examinations does not depend on how far their places of business might be from the seat of the court.²

[10] When the examination hearing was convened on 27 January 2014, Mr Markgraaf was present, having wisely reconsidered the position adopted in the affidavit filed on 21 January. Mr Styger, however, was absent. Under questioning from the bench, Mr Markgraaf confessed that Mr Styger had not come to Cape Town to value the applicants’ movable assets. Markgraaf also confessed that this had been to his knowledge when the applications had been issued.

[11] Mr Markgraaf furthermore indicated that the matters had been referred to him by an attorney in eM[...] (Witbank) by the name of Esmeraldo. He said that he was acutely conscious of his professional misconduct and that the matter had weighed heavily on his conscience since the court had indicated that his presence was required at the enquiry. It was

¹ Section 3(3) of the Insolvency Act provides s.v. ‘Petition for acceptance of surrender of estate’: ‘*Before accepting or declining the surrender, the court may direct the petitioner or any other person to appear and be examined before the court.*’

² There is no provision in the Act for the payment of witness fees and expenses to persons required to attend at an examination in terms of s 3(3). It may be that the witnesses might enjoy a claim against the applicant’s estate in such matters, but that is not something that I need to determine.

for that reason that he had presented himself for questioning notwithstanding the affidavit he had filed on 21 January. He undertook to report himself to the Law Society for the Northern Provinces and subsequently provided the court with confirmation that he had done so.

[12] Mr Crafford, the first applicant in one of the applications, then gave evidence in which he confirmed that Mr Styger had not personally inspected his movable assets for the purposes of valuation. He thereby confirmed that the affidavits deposed to by Styger on 21 October 2013 and 29 November 2013, respectively, had been perjurious.

[13] Mr Crafford also explained how he and his wife had come to make their application and what they had been led to understand would be its effect. He testified that his affairs had been under administration (presumably in terms of ss 74 -74A-74W of the Magistrates Court Act 32 of 1944), but that this had not been satisfactory as creditors had still been pressing for full and immediate payment. He had then approached a debt counsellor for relief in terms of the NCA. The debt counsellor had advised that his case was not suitable to be dealt with in terms of the NCA and that he should rather apply to surrender his estate in terms of the Insolvency Act. The debt counsellor had provided him with the contact details of an attorney in Witbank called Esmeraldo. He was required to pay Esmeraldo the sum of R7 500 to deal with the voluntary surrender application. Esmeraldo's office had prepared papers for signature and had required him to make a list of his disposable property. At the time he had signed the affidavit forwarded to him for deposition by Esmeraldo's office, the purported valuation by Styger had not been annexed. In other words, he signed the affidavit without the annexures referred to therein having been attached or available to him. Crafford said that he had been led to understand by Esmeraldo's office that the effect of his voluntary surrender of his estate would be that he would be required to pay a monthly amount in reduction of his debts for a period of three years, failing which the movable property which he had listed would be seized and sold.

[14] Crafford was confounded to hear that the court had been informed on 3 December 2013 that he and his wife wished to withdraw their application to surrender their estates. He said that no such instruction had been given and that he had been awaiting the outcome of the application anxiously.

[15] Ms Napier, the applicant in the second case, told a similar story to that related in Mr Crafford's evidence. She too had approached a debt counselling practice conducted under the name of Payplan. She was also advised 'to go the voluntary sequestration route' and provided with the contact details of an attorney named Michael Esmeraldo. She had dealt mainly with Mr Esmeraldo's secretary over the telephone. She too was required to make a

payment of R7 500 to Mr Esmeraldo's firm. She testified that that she had paid the final R2 500 instalment payment to the attorneys on 7 January this year, which was a month after I had been informed in court that the applicants wished to withdraw their applications. Ms Napier testified that she had not given instructions for her application to be withdrawn; she had in point of fact been unaware that the matter had been brought before court because she had not yet fully paid the fee demanded by Esmeraldo's firm. She also confirmed that her property had not been valued and that she had never given Mr Esmeraldo or his firm any instructions about the age of the property listed in the sworn valuation that purported to relate to her assets.

[16] Voluntary surrender applications seem to be the basis of something of a minor cottage industry. My experience in this division suggests that the applicants in the vast majority of such applications are represented by one of a very small number of firms of attorneys which appear to do this type of work. After the examination in terms of s 3(3) had been conducted in the current matter I requested the registrar to draw the files in all of the voluntary surrender applications made in this division during the fourth term of 2013. All of the applications had been brought through the offices of only four firms of attorney. Of the files to which I had reference three other applications had been brought by applicants represented by Mr Markgraaf, and in each case the sworn valuations submitted in support of those applications had been made by Mr Styger. Moreover, in each such case the arithmetical calculation of the alleged advantage to creditors resulted in an estimated dividend to concurrent creditors of precisely 21c in the rand. That exactly the same dividend was estimated in each of the five matters identified reflects, in the context of the circumstances described earlier, a coincidence that raises a strong suspicion that the values used were falsely determined to support a predetermined result.

[17] The papers in most voluntary surrender cases that have come before me in the unopposed motion court reflect that the greater part of the debt concerned has arisen out of credit agreements within the meaning of the NCA and should therefore be better amenable to being addressed in terms of the debt re-arrangement provisions of that statute, including the provisions which permit of the subordination or cancellation of obligations undertaken by debtors in the context of reckless credit extension.³ Those provisions are intended for the benefit of not only the credit receiver, but also for that of creditor providers who have advanced credit to the debtor responsibly because they fall to be preferred in the scheme of

³ See s 83 of the National Credit Act.

debt re-arrangement over creditors who have advanced credit recklessly. In matters in which the major portion of the debt concerned is credit agreement-related, it is difficult to conceive how accepting the surrender of the estate would be more advantageous to responsible creditors than debt re-arrangement under the NCA. Thus the advice reportedly given to the applicants by the debt counsellors in the two matters currently before court is difficult to understand other than in the context of the activity of a network of contacts established to generate business for the attorneys firm in Witbank. The questions as to why debt counsellors in Cape Town should be advising debtors to proceed with applications for the surrender of their estates in cases like these, and providing details of a firm on the other side of the country to deal with the applications calls out for an answer. Did the Cape Town debt counsellors involved act as publicists for the Witbank firm of attorneys gratuitously? I have my doubts, but whatever the position, it cries out for investigation. A copy of this judgment will therefore be referred to the National Credit Regulator in the hope that an investigation will follow.

[18] As mentioned, Mr Markgraaf has owned up to his misconduct and, quite properly in the circumstances, reported himself to the Law Society. The conduct of Mr Esmeraldo also merits investigation and a copy of the judgment and the transcript of the examination in terms of s 3(3) of the Insolvency Act will therefore be forwarded to the Law Society of the Northern Provinces so that the necessary steps can be initiated.

[19] The matter of the apparently perjurious affidavits made by Mr Styger also needs to be followed up. Not only are the strong indications that the witness perjured himself a matter that requires investigation by the appropriate authority and possible criminal prosecution, so too does the apparent attempted fraud on the court. It is a grievous matter for any witness to perjure him-or-herself, but such conduct is especially egregious when he or she does so in the context of purporting to discharge the functions of an office in which legislation and practice repose particular trust. Sworn appraisers are ordinarily appointed by the Masters of the High Court in terms of s 6 of the Administration of Estates Act 66 of 1965. They are specially entrusted with functions in terms of a number of statutes, including the Insolvency Act, for example.⁴ The proper operation of the statutory provisions concerned is obviously negated if sworn appraisers perjure themselves and produce false valuations. Their role, for the assistance of the courts, in litigation matters is also expressly provided for in some court

⁴ See ss 4(4) and 69(1) of the Insolvency Act. See also, for example, s 27(2), 38(1) and 43(2) of the Administration of Estates Act and s 118 of the Tax Administration Act 28 of 2011.

practice notes.⁵ That the questions that have arisen concerning Mr Styger's alleged conduct in the current matters need to be properly investigated and effectively dealt with if the public interest in the proper administration of justice is to be adequately served is axiomatic. A copy of the judgment, together a copy of the transcript of the examination in terms of s 3(3) of the Insolvency Act, will therefore be forwarded to the Director of Public Prosecutions in Gauteng and, because it is assumed that Mr Styger is an appraiser appointed in terms of the Administration of Estates Act, also to the Master of the High Court, Pretoria.

[20] A copy of the judgment and transcript will also be forwarded to the Chief Executive Officer of the National Credit Regulator so that the role played by the debt counsellors approached by the applicants may be investigated and that any action consequently shown to be indicated may be taken.

[21] Both applications for voluntary surrender are dismissed; and the registrar is directed to forward copies of the judgement and transcript of the examination in terms of s 3(3) of the Insolvency Act to the responsible parties referred to in para [18] - [20], above.

A.G. BINNS-WARD
Judge of the High Court

⁵ See para 15.14.4.2 of the North Gauteng Division Practice Manual and para 10.14.4.2. of the South Gauteng Division Manual.