

Article written by Jarrod Van Der Heever, Candidate Attorney, checked and released by Gary Baruchowitz, Partner at Schindlers Attorneys

30 August 2021

Background

In the above matter, David Mashengwana ("**the Applicant**") applied to the Limpopo High Court ("**the Court**") for the voluntary surrender of his estate in terms of section 3(1) of the Insolvency Act 24 of 1936 ("**the Act**"). The statement of affairs lay open at the office of the Master of Polokwane for a period of 14 days. The Applicant resides within the district of Lebowakgomo where there is no Master's office. In the circumstances, the statement of affairs should have lay open for inspection at the office of the Magistrate of Lebowakgomo.

Section 4(5) and 4(6) of the Act provides, inter alia, as follows:

"4(5) If the debtor resides ... in any district 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 petitioner resides ... 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 the magistracy of that district, at the office of such additional or assistant magistrate.

4(6) The said statement shall be open to the inspection of any creditor of the debtor during the office hours for a period of fourteen days from a date to be mentioned in the notice of surrender."

The statement of affairs did not lay open for inspection at the office of the Magistrate of Lebowakgomo. The Applicant's attorney submitted an affidavit with the application where he stated that the Applicant presented the statement of affairs to Mr Madisha, the civil clerk of Lebowakgomo to lay open for inspection but Mr Madisha refused to accept the document. When the application for the voluntary surrender of the Applicant's estate was heard, the Applicant's counsel requested that the surrender be accepted without the statement of affairs having laid open for inspection at Lebowakgomo.

It was held in the case of *Ex Parte Proxenos* 1953 (4) SA 593 (O) 595, that where there were two

locations where court may be held within a district the statement of affairs must lay open for inspection where the Magistrate for the district is ordinarily located. Reference was made to the case of *Ex Parte Van Der Merwe* 1964 (3) SA 246 (T) that, where the notices did not lie open for inspection at the Magistrate's offices of Piet Retief such a defect was not a formal defect capable of being condoned.

The Applicant's request was rejected and it was held that a court cannot condone a deliberate failure by a state official to accept the statement of affairs. The application for the surrender of the Applicant's estate was postponed until 20 July 2021, to enable the statement of affairs to lie open for inspection at the office of the Magistrate of Lebowakgomo. The statement, once again, did not lie open for inspection and the Applicant urged the court to condone such a failure.

Court Held

The Court held that the Applicant had in essence requested that the Court condone a failure by a State official to comply with his duty in terms of the Act. It was held that the Court has no such power to condone such a failure.

The Court held that the purpose of section 4(5) of the Act is to allow creditors in the district where the applicant resides an opportunity to speedily inspect the statement of affairs to verify whether they are included in the list of creditors. This provides creditors with the opportunity to form an opinion on the value of the bad debts and to decide whether the application should be opposed or to consider whether claims should be filed. The Court held that the object of the section is defeated when creditors are told the statement will lie open for inspection at the office of the Magistrate when it in fact does not.

Section 157(1) of the Act states, inter alia, that nothing done in terms of the Act shall be invalid by reason of a formal defect or irregularity unless a substantial injustice is thereby done which cannot be remedied by any order of the court. The Court held that section 157(1) of the Act is not applicable to the present case. The Court held that the failure of the statement to have lain open for inspection is not a formal irregularity, but rather a peremptory requirement.

The Court remarked that it was unclear why the State officials refused to allow the statement to lay open at the Magistrate for the district. The Court held that whilst it may be due to the State officials being poorly trained, it was most likely a dereliction of their duties.

The Applicant's attorney in a letter to the Court Manager indicated what was required in terms of the Act and, despite this, no assistance was forthcoming to the Applicant. The Court held that such a dereliction of duty is deplorable, undermines public confidence in public service and contravenes sections 9 and 195(1) of the Constitution of the Republic of South Africa, 1996. The Court held that it must compel the officials of the Magistrate at Lebowakgomo to do their statutory duty in terms of the Act.

Consequently, the Court ordered that the Judgment together with the statement of affairs was to be served by way of sheriff on the Court Manager at Lebowakgomo one Agnes Ntini and the civil clerk Mr Madisha personally who were called upon to ensure that the statement of affairs lay open for inspection for 14 days and that a certificate to that effect be issued after the relevant period. The Court Manager and the civil clerk were called upon to appear in Court to show cause why they should not personally be held liable for the wasted costs of the Applicant's application as a result of their failure to comply with their statutory duties.

It was further ordered that should the court order not be complied with on the return date the Court Manager and civil clerk should advance reasons why they should not be held in contempt of court and why a term of 2 months imprisonment should not be imposed on each of them.

Value

This decision demonstrates that in order for a Court to order the voluntary surrender of a person's estate in terms of the Insolvency Act 24 of 1936, a party must comply with the requirements as stipulated in section 4(5) thereof. A failure to comply defeats the purpose of the Act and the relevant section. Further, this decision demonstrates that a court will not condone a refusal by a State official to perform their duties.

In the Ex Parte Application of David Makopole Mashengwama (2305-2021) [2021]
ZALMPPHC 41 [Download](#)