



The Procedure in an Application for Voluntary Surrender of an Insolvent Estate in Terms of the Insolvency Act 24 of 1936



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Locus Standi

In terms of section 3(1) of the Act, the various persons or bodies who may institute an application for the voluntary surrender of an insolvent estate are as follows:

- Insolvent debtor – (and his wife if they are married in community of property)
- Insolvent debtor's agent, acting on behalf of the insolvent debtor, and who is duly authorised
- Executor of a deceased estate
- A curator *bonis* of an insolvent debtor who is incapable of managing his own affairs
- The individual partners of a partnership – all the partners must institute the application
- A club that is capable of holding property apart from its members
- A trust

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The Aim of Voluntary Surrender of an Insolvent Debtor's Estate

- The aim of a voluntary surrender is to ensure that the insolvent debtor's assets are equitably distributed for the benefit of his creditors.
- In *Walker v Syfret NO1911 AD 141*, the Appellate Division stated that:

"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

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Contents and Publication of the Notice of Surrender of the Insolvent Debtor's Estate

Prior to lodging an application for voluntary surrender, a notice of intention to surrender the debtor's estate must be drafted, in accordance with Form 1 of the First Schedule to the Act


The notice must contain the following details:

- the debtor's full name and identity number and, if married in community of property, the full name and identity number of his spouse.
- the details of the hearing of the application, including the Court name and date of the hearing.
- the office at which and the period for which the sworn statement of affairs will lie for inspection – either the Master's Office or the Magistrate's Office if there is no Master's Office.
- The notice of surrender must be published in:
 - the Government Gazette; and
 - in a newspaper circulating in the district where the debtor resides or has his principal place of business or if he has ceased trading, where he used to trade immediately before he elected to apply to voluntarily surrender his estate
- The notice must be published not more than 30 days and not less than 14 days before the hearing of the application
- The applicant's attorney or member of his staff who attended to the publication must depose to an affidavit confirming that they attended to the publication of the notice. Copies of the relevant Government Gazette and the newspaper extracts must be attached to the affidavit. The affidavit must be filed together with the main affidavit supporting the application for voluntary surrender.

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Stay of Sales in Execution in Terms of Section 5(1) of The Act

- The publication of a notice of surrender in the Government Gazette stays the sale in execution of any assets belonging to the insolvent debtor.
- If the sale has already taken place but the proceeds derived from the sale have not yet been distributed, they must be retained until the application is adjudicated upon. If the application for voluntary is granted, the proceeds must be paid to the trustee. If it is refused, the proceeds must be paid to the person or entity named in the writ of execution.
- The High Court may specially order that the sale should proceed. In such an instance, the Court will direct how the proceeds derived from the sale should be applied.
- If, in the opinion of the Master, the assets do not exceed R5000.00, he may exercise his discretion in favour of authorizing the sale to proceed.



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Appointment of a curator bonis in terms of section 5(2) of the act

- Once a notice of surrender has been published in the Government Gazette, the Master may appoint a curator bonis to the insolvent debtor's estate.
 - The curator bonis has the power to:
 - take the estate into his custody; and
 - Take over any business or undertaking of the insolvent debtor as the Master may direct.
 - After the surrender of the estate has been accepted and until the appointment of a trustee or a provisional trustee, the curator bonis must continue to control the estate
 - or entity named in the writ of execution.
 - The High Court may specially order that the sale should proceed. In such an instance, the Court will direct how the proceeds derived from the sale should be applied.
 - If, in the opinion of the Master, the assets do not exceed R 5000.00, he may exercise his discretion in favour of authorizing the sale to proceed.
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Service of the notice of surrender

In terms of section 4(2) of the Act, within 7 days from publishing the notice, the applicant must serve a copy of the notice on the following:

- Every creditor of the insolvent debtor;
- The debtor's employees;
- All trade unions representing the debtor's employees ;
- The South African Revenue Services

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Lapsing of Notice of Surrender

- In terms of section 6(2) of the Act, the notice of surrender lapses if:
 - The court does not accept the surrender of the debtor's estate;
 - The notice of surrender is properly withdrawn, in terms of section 7 of the Act, after the debtor has obtained the written consent of the Master and published the notice of withdrawal and the Master's consent. The Master will only grant his consent if he is satisfied that:
 - The notice was published in good faith
 - Good cause exists for the withdrawal of the notice
 - The debtor has paid/ will pay all costs including the costs of the curator bonis (if appointed) and any costs incurred by creditors in opposition to the notice
 - The applicant fails to make the application for voluntary surrender of his estate before the expiration of 14 days from the date specified in the notice as the date of the application.
 - If a curator bonis has been appointed the estate is restored to the debtor once the Master is satisfied that sufficient provision is made for the payment of all costs incurred by the appointment of the curator bonis.
 - A notice of surrender cannot be withdrawn after it has lapsed.

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The contents of the statement of affairs

- A sworn statement of affairs must be prepared in accordance with Form B of the First Schedule. It is a balance sheet of the debtor's liabilities and assets. It must include the following information:
- A list of immovable assets indicating whether there are subject too a mortgage bond and accompanied by a sworn valuation by an expert valuator specifying the forced sale value of the property. Immovable property sold but not yet transferred must be included;
- A list of movable assets, including the valuation of the assets, in the same detail applicable to immovable assets;
- A list of debtors, indicating whether they are good, bad or doubtful and an indication of when they were contracted and the details of the debtor, including the debtor's name, residential and postal address. Bad debts should not be included in the balance sheet;
- A list of creditors, indicating whether they are secured, unsecured or contingent creditors;
- A list of movable assets that are pledged, hypothecated, subject to an installment sale agreement that are not fully paid up, subject to a lien or under attachment in execution in terms of a judgment;
- A list of every book used by the insolvent debtor at the time of the surrender or at the time when he ceased carrying on business;
- A detailed statement of the cause of the debtor's insolvency;
- The debtor's personal details including his marital status, race and nationality, place of birth, the date of birth of the debtor and his spouse , whether he was previously sequestrated.
- The pro forma affidavit confirming that the statement of affairs is true and correct must be signed by the debtor or the duly authorised person acting on his behalf in instituting the application.

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The cause of The debtor's insolvency

- A The statement of affairs must contain an explanation of the cause of the debtor's insolvency. This explanation must be amplified in the founding affidavit filed in support of the application for voluntary surrender.
- It must set out sufficient facts so that the Court can properly assess the applicant's bona fides.
- From the explanation, it should be clear that the debtor's insolvency was not caused by any fraud or dishonesty on the part of the debtor.
- Significantly, it must state the debtor's present salary and the expenses that he is required to meet on a monthly basis so that the court can assess his financial position.



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Voluntary Surrender Vs debt review

- The debtor must set out the reasons why the debt review process in terms of the National Credit Act 34 of 2005 (“the NCA”) would not result in a better return for creditors than voluntary surrender.

- If applicable, the applicant must also explain why he cannot raise the defence of reckless credit being extended to him. This was dealt with in *Ex Parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC), where the court found that the remedy in terms of the NCA was more appropriate.

- In *Ex Parte Fuls and Three Similar Matters* 2016 (2) SA 128 (GNP), Van Niekerk AJ stated that:

“In my opinion it is therefore incumbent on an applicant in an application for voluntary surrender, where it is required to illustrate advantage to creditors, to make a full disclosure of at least the following:

[6.1] Whether or not the applicant availed himself/herself of the procedures afforded in the NCA for debt review prior to the application being proceeded with, and if not, full reasons for such failure.

[6.2] A comprehensive report of the debt counsellor involved, explaining what procedures were followed, and whether or not the applicant complied with any debt restructuring arrangements.”





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Inspection of The statement Of affairs

- The statement of affairs must be lodged in duplicate at the Master's Office.
- The statement of affairs must lay for inspection at the Master's Office and at the Magistrate's Office, if there is no Master's Office within the jurisdiction or if the debtor resides or carries on business in an area where there is no Master's Office.
- In terms of section 4(6) of the Act, it must be available for inspection by creditors during office hours, for a period of 14 days from the date mentioned in the notice of surrender.
- The Master (and if applicable the Magistrate) must issue a statement confirming that the statement has duly lain for inspection and indicate whether any objections have been raised by creditors.
- Once it has lain for inspection, the statement of affairs and certificate/s must be uplifted and filed with the Court hearing the application.



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The application To court: checklist

- At the hearing of the application, the following must be before the court hearing the application:
- Notice of motion and supporting affidavit, together with the annexures;
- Statement of affairs and completed pro forma affidavit, verifying same;
- Independent sworn valuation of movable and immovable assets included in the statement of affairs by an expert valuator who has personally inspected and valued the assets;
- An affidavit by the applicant's attorney or member of his staff confirming that they caused of the notice of surrender to be published and attaching the copy of the relevant Government Gazette and newspaper extracts;
- Proof that the notice of surrender was dispatched to each of the creditors;
- Certificates from the Master and Magistrate confirming that the debtor's statement of affairs has duly lain for inspection for 14 days and whether any objections were received;
- A report from the Master (if he elects to file a report);
- If the matter is opposed the answering and replying affidavits.

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In terms of section 6(1) of the act, a court will only accept an application for voluntary surrender if it is satisfied as to the following four requirements:

1. The formalities specified in section 4 of the Act have been complied with.
2. The debtor is insolvent.
3. The debtor owns sufficient property to defray the sequestration costs from the free residue of his estate.
4. The surrender of the debtor's estate is to the advantage of creditors.

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Compliance with the statutory formalities of the act

- The Court must be satisfied that the statutory formalities of the Act, specifically section 4, have been complied with.
- In terms of section 157 of the Act, non-compliance can be condoned, if the non-compliance can be regarded as a 'formal defect' and if the prejudice occasioned thereby can be cured by an appropriate order. Section 157 provides as follows:
 - "Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by an order of the court."
- One test is to determine the object of the specific section and then to decide whether the provision is directive or imperative. If the provision is directive, the defect can be condoned.
- Another test is to determine what the objective of the specific provision is and then to determine if the non-compliance defeats this objective. If the non-compliance defeats the objective, it cannot be condoned.
- In *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP)*, the applicant served a copy of the application papers and the notice to surrender on SARS, as opposed to posting a copy of the notice of surrender to SARS. The court held that it was a formal defect, as contemplated in section 157(1) of the Act, and condoned it as there was substantial compliance by the applicant in respect of the other requirements and no substantial prejudice had resulted.

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The debtor is insolvent

- It must be established that the debtor is insolvent in that his total liabilities, valued fairly, exceed the sworn valuation of his assets.
- In considering this aspect, the Court will have regard to the statement of affairs as well as the facts set out in the founding affidavit filed in support of the application.
- The debtor bears an enhanced duty to disclose all of the relevant facts so that the court can make a proper assessment on this aspect.

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The free residue is sufficient to pay the costs of the sequestration

- The court must be satisfied that the debtor owns realizable property of a sufficient value to pay the costs of the sequestration, which will be payable from the free residue of his estate.
- The free residue is that portion of the estate which is not subject to any rights of preference by reason of any special mortgage, legal hypothec, pledge or right of retention.
- The costs of sequestration payable from the free residue include the costs of surrender, the general costs of administration set out in section 97 of the Act and legal costs.
- The debtor must provide a clear account of his assets and liabilities. If he fails to do so, the court will not be in a position to properly determine whether the free residue will be sufficient to pay the costs of the sequestration and will refuse to accept the surrender. This was the case in *Ex Parte Arntzen (Nedbank as Intervening Creditor) 2013 (1) SA 49 (KZP)*, where Gorven J was not satisfied that the applicant established this requirement as he had failed to:
 - (i) properly explain which of his liabilities had been the subject of debt review (which had been terminated);
 - (ii) attach proper sworn valuations of his property in the founding affidavit;
 - (iii) properly value his realizable assets;
 - (iv) properly explain the commission he earned over a period of time and only attached his latest slip;
 - (v) properly deal with his income and expenses.
- The debtor has personal knowledge of his financial affairs and is obliged to give a full account. If he only has liabilities and insufficient assets, the court will refuse to accept the surrender. It is imperative that the debtor provides a fair valuation of his assets so that the court can assess this aspect. In *Ex Parte Erasmus and Another 2015 (1) SA 540 (GP)*, Bertlesmann J pointed out that a valuator is obliged to personally inspect the debtor's property and provide a sworn and detailed valuation of the property, which must be attached to the application for voluntary surrender. The absence of following these steps amounts to an abuse of process.

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Advantage to creditors

- The court must be satisfied that the voluntary surrender will be to the advantage of creditors.
- In *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP)*, Gorven J (as he then was) pointed out that in an application for voluntary surrender:
 - the test relating to the advantage to creditors is far stricter than the test applicable to a provisional and final order for sequestration; and
 - it must be definitively established that the surrender will be to the advantage of creditors, whereas with a final sequestration order, it must simply be established that there is “reason to believe” that it will be to the advantage of creditors. In the case of a provisional sequestration order, this requirement must merely be established on a prima facie basis. The requirement is stricter in an application for voluntary surrender as the debtor has personal knowledge of the financial position whereas an applicant seeking an order of compulsory sequestration does not have such knowledge
- In *Ex Parte Contaco and Similar Cases 2016 (3) SA 549 (WCC)*, Bozalek J stated that:
 - “As has been noted, the requirement that the court must be satisfied that it will be to the advantage of creditors if the estate were to be sequestrated must be contrasted with the less stringent test for a provisional or final order, even in a friendly sequestration. This is fitting inasmuch as the debtor has complete knowledge of his own financial circumstances, which he is bound to disclose, and accordingly bears the onus of proving, on a balance of probabilities, that there will be the requisite advantage to the body of creditors.”@
 - The applicant must establish that there is a dividend of at least 20 cents in the rand payable to all creditors. The primary consideration is whether all creditors will receive a dividend.



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The court must be satisfied that the voluntary surrender will be to the advantage of creditors.

In *De Jager v Heilbron and Others* 1947 (2) SA 415 (W) and *Schlesinger v Schlesinger* 1979 (4) SA 342 (W), the court dealt with the general duty of good faith owed by applicants in *ex parte* applications. However, there is an enhanced duty of disclosure in applications for voluntary surrender, as the applicant is not the only party affected by the relief. *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP), Gorven J dealt with the rationale for this as follows:

“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 fulfill 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.”

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The court's discretion be to the advantage of creditors.

- Even if the requirements are established, the Court still has a discretion of whether to accept or refuse to accept the surrender of the estate. This is evident from the use of the word "may" in section 6(1) of the Act.
- Failure to comply with making a full and frank disclosure thereby giving effect to the enhanced duty of good faith will result in the court refusing to accept the surrender of the debtor's estate.
- It must also be clear to the court that the applicant has approached the court with the bona fide aim of benefiting the general body of creditors as opposed to simply avoiding payment of his debts.
- The court can refuse an application if: (i) the surrender is not sought for the benefit of creditors; (ii) the debtor has failed to give a sufficient account of his financial position; (iii) there is an ulterior motive in instituting the application eg. to stop a sale in execution; and (iv) the application was instituted to avoid harassment by creditors; (v) the founding affidavit lacks the necessary averments to sustain an application for voluntary surrender.
- The courts have expressed their displeasure in the mechanism of the remedy of voluntary being abused.