IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: A566/2003

In the matter between:

JOHN FORTUIN	**1ST Appellant in Case No: 116/2003**
MAGDELENA FORTUIN (née SKIPPERS)	**2ND Appellant in Case No: 116/2003**
JOHANNES EVERHARDUS MARTHINUS VAN SCHALKWYK	**APPELLANT in Case No: 118/2003**
ERNEST BOUWERS	**1ST Appellant in Case No: 120/2003**
ADRIANA JANETTA BOUWERS (née BEUKES)	**2ND Appellant IN Case No: 120/2003**
JOHANNES PERSENS	**1ST Appellant in Case No: 479/2003**
GRIETA PERSENS (née SYSTER)	**2ND Appellant in Case No: 479/2003**
MZWANDILE HEADMAN BOOI	**1ST Appellant in Case No: 481/2003**
NANCY NOMVULA BOOI	**2ND Appellant in Case No: 481/2003**
VARIOUS CREDITORS	**RESPONDENTS**

JUDGMENT DELIVERED ON 01 DECEMBER 2003

DLODLO, A.J

INTRODUCTION

1. This is an appeal against an Order and Judgment of the Magistrate of Malmesbury, handed down on 01 April 2003 in which the applicants' joint application for an administration order was dismissed. The Appellants are referred to as the Applicants.

FACTUAL BACKGROUND

2. Applicants issued applications for an administration order out of Malmesbury Magistrates Court. The necessary notices were given to the Applicants' creditors as required in terms of section 74A(5) of the Magistrate's Court Act, 32 of 1944 (The Act).

3. The Applications were set down together for hearing on 01 April 2003. When the applications were argued, the magistrate raised an issue with the Applicants' legal representative concerning the amounts offered by applicants. The issue was in the magistrate's own words:

> "***Is hierdie bedrag voldoende om die kapitale skuld in 'n redelike tydperk te delg, tot voordeel van beide die Applikante en hul Krediteure, veral as rente en die administrasiefooi van 12.5% in aanmerking geneem word?"***

4. On the same day the magistrate handed down his judgment in terms whereof each individual application was dismissed. The Applicants' grounds of appeal are as follows:

> [a] The magistrate erred in law in finding that the amounts reflected as owing to the creditors by the Applicants in their respective applications constituted liquidated money debts which attracted interest "as from the date that the debtor is in *mora* even if the contract itself did not make provision for that payment of interest."
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> [b] The magistrate erred in law in finding that the provisions of section 74 of Act 32of 1944 contemplate that: ***"Die aanbod wat die Applikante maak moet daarop gemik wees om die skulde en gepaardgaande kostes ten volle te vereffen."*** As a consequence the magistrate erred in finding that the Applicants were obliged to have available for distribution to creditors an amount such that ***"die skuld binne 'n redelike tyd vereffen moet word."***
>
> [c] The magistrate erred in finding in effect that interest which might accrue to a creditor post administration ought to be taken into account

when deciding whether to grant an application or not particularly when no evidence was advanced by any creditor that such interest would indeed accrue post administration. As a consequence the magistrate erred in Law in failing to take into account the provisions of section 74(H) and that any interest which might accrue post sequestration, is a separate debt which must be proved by the creditor concerned.

[d] The magistrate erred in law in finding, in effect, that the said section 74 purports to qualify, define or prescribe a minimum payment.

APPLICABLE LAW

5. The requirements for the granting of an administration order are set out in section 74(1) of the Act as follows:

"(1) Where a debtor-

[a] is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations, and

[b] state that the total amount of all his debts due does not exceed the amount determined by the Minister from time to time by notice in the Gazette, such Court or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor, or under section 65I, subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hyphothec (except movables referred to in section 34 bis of the Land Bank Act, 13 of 1944), or otherwise, make an order (administration order) providing for administration of his estate and for the payment of his debts in installments or otherwise."

6. The application must be made in writing in the prescribed form accompanied by a full statement of his/her affairs confirmed by affidavit in which the applicant declares that to the best of his/her knowledge the names of all creditors and the amounts owed to them severally are set forth in the statement and that the declaration made in it is true.

APPLICATION OF LAW TO FACTS

7. Administration has been described as a modified form of insolvency suited to deal with relatively small estates where costs of sequestration proceedings would exhaust the estate. The Applicant in section 74 proceedings presents the Court, in a statutory prescribed form, with circumstances of his financial misfortune. He sets out how he became the victim, whether intentionally or as a result of ignorance on his/her part. He provides facts from which it is possible to gather how his financial predicament resulted in him not being able to provide sufficient means to maintain himself and his/her dependants. In other words, he commits an act of insolvency in that he is not able to pay his creditors. As was held by Corbett J (as he then was) in ***Cape Town Municipality v Dunne*** 1964(1) SA 741 (Watermeyer J (as he then was) concurring) the aim of an administration order is to "assist a debtor over a period of financial embarrassment without the need for sequestration."

8. In ***Prima Slaghuis (Cartonville) vs Roux en 'n ander*** 1973(1) SA108(T) the Court drew a distinction between the effect of judgment execution provisions in terms of section 65 of the Act and the object and effect of the provisions of section 74 of the Act. The Court set it out as follows:"Artikel 65 is van toepassing waar 'n enkele vonnisskuldeiser die bepalings van hierdie artikel gebruik om voeldoening van sy vonnisskuld te verkry. Artikel 74 is van toepassing waar die vonnisskuldenaar bedreig word deur 'n sameloop van skuldeisers en hy verligting wil verkry in die sin dat daar nie onmiddellike eksekusie gehef word op sy goedere nie, maar dat daar 'n administrasie bevel uitgereik word waarkragtens daar 'n eweredige distribusie van sy skuldeisers sal wees ter geleidelike betaling van sy skulde deur die administrateur wat die Hof aanstel."

9. The court hearing the application has a discretion to grant the application. The discretion, however, must be exercised judicially and on proper grounds. The learned magistrate's finding seems to imply that the scene created in terms of section 74 is directed in obtaining the settlement of a debtor's relevant debts. Seeing that section 74U provides that an administration order lapses when the costs of administration and **"the list of creditors"** have been paid, it must be kept in mind that the word **"debts"** in section 74 A(1) means debts which are due and payable and does not include obligations to pay money ***in futuro*****. In Jones and Buckle – the Civil Practice of the**

Magistrate's Courts in South Africa (9th edition) at page 306 – 307, the authors put it thus: "***Thus the capital sum of a mortgage bond which is not due and payable at the time when the administration order is granted is not a debt for the purpose of this section."***

10. I am of the view that the interest which has yet to accrue on a debt cannot be regarded as part of a debtor's debts at the time of an application for an administration order. See in this regard ***Wedge Steel (Pty) Ltd. vs Wepener,*** 1991(3) SA 444 WLD. In my view the debtor does not have to show that he has an ability to make immediate progress in the reduction of the claims of his **"listed creditors".** This cannot, in my view, be a pre-requisite to obtaining an administration order. Holding otherwise would run counter to the intention of the Legislature, namely, to assist a debtor over a period of financial embarrassment without the need for sequestration. (See section 74 of the Act as interpreted in ***Cape Town Municipality v Dunne*** *supra*)

11. Section 74 also makes provision for a review and appropriate amendment of the administration order in case where the debtor's altered or changed circumstances so indicate. The provisions of section 74 of the Act are designed for obtaining some **concursus creditorium** easily, quickly and inexpensively. These provisions are appropriate for dealing with the affairs of debtors who have little assets and income and who genuinely wish to cope with the financial misfortune that has befallen them. The effect is that a ***concursus creditorium*** commences and that the rights of the general body of creditors have been taken into consideration. In ***African Bank Ltd. v Weiner and others*** 2003 (4)B All SA 50 (C) Griesel J (Selikowitz J concurring) dealing with the matter regarding the provisions of section 74 of the Act observed as follows:

"It may be accepted, therefore, that it was never the intention of the legislature that a debtor should be bound up in an administration order indefinitely, where there is no reasonable prospect of such order being discharged within a reasonable period of time. On the contrary, I am of the view that the mechanism of an administration order is intended to provide a debtor with a relatively short moratorium to assist in the payment of his or her debts in full and to ward off legal action and execution proceedings during such period."

12. It is of significance to note that section 74J makes provision for the distribution of the available amount by the administrator ***pro rata*** amongst the creditors (unless creditors have agreed to the contrary or the Court has ordered otherwise). The solution to the interest issue could be found by invoking the provisions of section 74J. The magistrate could have in terms of section 74J ordered for example (if he wanted) that the distributed payments must first be allocated to the reduction of the capital debt. That would limit the growth in the debtor's interest burden with which the magistrate seemed so concerned. That would easily have ensured the eventual extinction of the capital debt and consequently allow the gradual payment of the interest debt.

13. The Magistrate clearly misdirected himself when he found that the periodic payments which fail to cover a debtor's interest burden is anything other than "**payment"** of a debt. The fact that the payment is insufficient to avoid the amount of the total debt mounting does not render the installment anything other than a **"payment"** of a debt.

14. Indeed in an administration application situation **(like the present one where Applicant is a debtor with a simple and limited estate, having a regular income with a disposable residue, unable to pay his debts and where sequestration would hold no or insufficient advantage to creditors)** it would generally be to the benefit of the debtor and the affected creditors for an administration order to be granted. In a situation where a creditor is able to exact payment of the installments due in preference to the payment by the debtor of his obligations, an undesirable situation of the making of undue preferences would be likely to result. There is a further advantage in the administration order in such a situation, namely the avoidance of such undue preferences.

15. The section expressly refrains from requiring a debtor to show, or a Court to find that an application for administration would hold some immediate advantage for creditors or indeed the debtor himself/ herself.

16. The fact that the Applicants have or might have very little money with which to pay the body of creditors and that this will result in the creditors

having to wait a long time before they receive their money, is indeed not a factor that should play a decisive role in adjudicating any application for an administration order.

17. Indeed as stated by Francis AJ, (as he then was) in an **unreported Judgment of Witwatersrand Local Division** in the matter of **August Francis,** the machinery of section 74 of the Act was designed for the very purpose of assisting debtors and that any benefits that creditors might derive from it, should be accepted. Had it been the intention of the Legislature that there should be an immediate benefit to creditors, it would have made express provision therefor, as in the Insolvency Act regarding sequestration proceedings. Similarly, the amount of outstanding debt coupled with the period that it will take to pay off the debt, is not the only factor that should be taken into consideration. The statutory provisions clearly provide that the total amount of all the Applicants' debts should not exceed R50 000.00 (Fifty Thousand Rand).

18. There is no provision in the section under discussion for the period within which any debt has to be paid. Once more had that been the intention of the Legislature that a debt has to be paid in full within a certain time period, it would have made express provision to that effect. In the light of the ***African Bank Ltd.*** case *supra,* I have to considered the circumstances of each debtor individually. I have found that (regard being had to financial resources and debts) the administration order is the only appropriate remedy to address their current financial predicaments. There is nothing to suggest that they will be bound-up indefinitely. There is also nothing to suggest that there is no reasonable prospect of such order being discharged within a reasonable period of time. Most importantly, the provisions of the section contemplate a review and appropriate amendment of the administration order in circumstances where the debtor's altered circumstances so indicate. This illustrates that a longer term view of the debtor's position should be taken and that the potential for the debtor to subsequently improve his position and ability to address his debt burden after the date of the initial application is a factor which should be acknowledged, unless the facts of the particular case exclude such a consideration. (cf. Section 74B (e) (ii) which enjoins consideration by the court, insofar as the evidence permits, of the debtor's 'future income')

19. It is clear that the Court *a quo* did not consider those aspects that should have been considered in the granting of an administration order. By refusing the application for the reasons set out in its judgment, the Court *a quo* failed to exercise its discretion properly and judicially.

20. I am satisfied that the Applicants complied with the formal requirements of the prescribed statutory provisions. I am furthermore satisfied that the Court *a quo* did not exercise its discretion judicially. The findings and orders made by the Court *a quo* stand to be set aside. The Appeal should therefore succeed.

ORDER

21. In the circumstances I am of the view that the following order should be made in each of the appeals:

[a] The Appeal is upheld.

[b] The application is referred to the Magistrate who is ordered to make an order in terms of section 74 C of the Act.

[c] There is no order as to costs.

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DLODLO, A.J

I agree and it is so ordered.

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VELDHUIZEN, J