IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 5/9/19

CASE NO: 26705/2013

In the matter between:

RUDIE MORS	First Applicant
ROELIE CHRIZANE MORS	Second Applicant

and

ABSA BANK LTD	First Respondent
D P WOLVAARDT	Second Respondent
D C WOLVAARDT	Third Respondent
THE SHERIFF, CENTURION EAST	Fourth Respondent
THE REGISTRAR OF DEEDS	Fifth Respondent

5/09/2019

JUDGMENT

DAVIS, AJ

INTRODUCTION:

[1] This is an application to have a sale in execution declared "*void and of no force and effect*" (in the Applicants' words) and to prohibit the transfer of a certain immovable property to the Second and Third Respondents, lastmentioned who were the successful bidders at a sale in execution of the property in question.

THE APPLICANTS' CASE:

[2] The Applicant's case as set out in their Founding Affidavits, is the following:

2.1 They are the joint registered owners of a certain residential property in Highveld X44, City of Tshwane Metropolitan Municipality ("*the property*").

2.2 The property was bonded to the First Respondent.

2.3 The Applicants fell in arrears with their bond instalments, resulting in the First Respondent obtaining judgment against them together with an order whereby the property was declared specially executable. I interpose to state that the wording of the portion of the order relating to executability was, due to a typographical error, incompletely reflected in the typed version of the order, but the Applicants before me, represented by Adv M P Van der Merwe, abandoned any reliance on such deficiency and conceded that an order of executability had been granted. The First Respondent's counter-application to have the wording of the order corrected was therefore unopposed.

2.4 The aforesaid order was granted as long ago as 22 April 2010, that is more than 4 years prior to this matter being heard in this court's opposed motion court roll of 26 August 2014 and has been implemented as set out hereunder, despite the typographical error contained therein.

2.5 After the First Respondent had advertised a sale in execution of the property scheduled for 2 March 2011, the Applicants, with financial assistance from family members paid the arrears amount owing at the time and the sale was cancelled (the "*first sale*").

2.6 The Applicants subsequently concluded an agreement with the First Respondent, known as a "*Help you stay Agreement*" in terms of which the Applicants paid instalments in "*staggered payments according to affordability at the time until the account is normalised*". This resulted in a second scheduled sale for 2 November 2011 also being cancelled (the "*second sale*").

2.7 During the later part of 2012 the Applicants fell in arrears in terms of this latter agreement as well.

2.8 During January and February 2013 the Applicants attempted to negotiate with the First Respondent regarding further restructuring of their proposed obligations as they expected to be in a position to repay their arrears and honour future payments by the end of April 2013. They were however informed on 11 February 2013 by officials of the First Respondent that they first had to make good the arrears "*immediately*".

2.9 On 25 February 2013 the Applicants were contacted by one Ricardo from a business known as Securibond (Pty) Ltd t/a Securibond and "*Save my Roof*" ("*Securibond*"). To the applicants' shock they were informed that a sale in execution of the property has yet again been advertised. Securibond offered to "*help*" the Applicants.

2.10 Prior to accepting Securibond's offer, the Applicants yet again contacted the First Respondent whose officials advised that unless the arrears were brought up to date, the sale in execution, arranged for 13 March 2013, would proceed.

2.11 Against a payment of R5 000,00, Securibond undertook to assist the Applicants. Due to what transpired later, I deem it appropriate to quote in this regard from the First Applicant's Founding Affidavit (the contents of which had been confirmed by the Second Applicant):

"*32.*

The representative of Securibond informed us they would have a solution for us. I asked what solution. I was then informed that Securibond knows what steps to take in order to stop execution sales and that I would be afforded a further opportunity to make arrangements with the bank. Neither the Second Applicant nor I are legally trained persons and we did not know particularly what Securibond intended doing in order to stop the sale. We thought they would enter into negotiations with the First Respondent's employees or attorneys and would argue our case and persuade the bank to stop the sale and renegotiate a payment plan with the First Respondent ...

36.

Without informing us of any detailed particularity Securibond then caused an advertisement to be published in the Government Gazette of 8 March 2013.

I am now advised, having engaged our present attorneys of record, that they effect of such an advertisement was in terms of the provisions of Section 5 of the Insolvency Act, 24 of 1936, to prohibit any sale in execution of our property.

37.

I wish to categorically make it clear that we were not informed by Securibond that there is such a statutory provision in the Insolvency Act. We were only told that they know how to stop an execution sale and how to negotiate with the bank and as we eagerly wanted the execution sale to be stopped we left it in the hands of Securibond to do what they regarded as prudent to stop the sale. The Second Applicant and I were under the bona fide impression that whatever they would do would be lawful and regular." (my emphases)

2.12 The advertisement in the Government Gazette is irregular as it constituted a composite advertisement of the voluntary surrender of both the Applicants' estates jointly although they are married out of community of property to each other. Be that as it may, Securibond sent a letter to the First Respondent on the day preceding the scheduled sale in execution informing both the First Respondent and the Fourth Respondent, being the relevant Sheriff, of the

advertisement as well as the consequences thereof. I shall deal with this letter more fully *infra*.

2.13 Despite the letter and the publication, the sale in execution went ahead. The First Respondent sought to justify the conduct of the Fourth Respondent in proceeding with the sale (despite the prohibition contained in Section 5(1) of the Insolvency Act, No. 24 of 1936, to which provision I shall return to *infra*) with reliance on a suspensive condition contained in the Conditions of Sale which reads as follows:

> "*11.1* ***Suspensive conditions (if applicable)***
>
> *If applicable, the sale shall be subject to the Defendant/s being unsuccessful or not proceeding with his/her intended application for voluntary surrender of his/her estate.*"

2.14 As aforementioned, the Second and Third Respondents were the successful bidders at the auction and became the purchasers of the property (the "*third sale*"). Subsequent to the auction and the third sale, the Applicants never proceeded with or even lodged applications for the voluntary surrender of their estates.

2.15 Against this backdrop and, with particular (if not almost exclusive) reliance on Section 5(1) of the Insolvency Act, the Applicants claim the relief referred to earlier.

THE RELEVANT STATUTORY PROVISIONS:

[3] 3.1 The relevant provisions of the Insolvency Act, No. 24 of 1936, read as follows:

> "*3.* ***Petition for acceptance of surrender of estate***
>
> *(1) An insolvent debtor or his agent ... may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his creditors ...*
>
> *4* ***Notice of surrender and lodging at Master's office of statement of debtor's affairs***
>
> *(1) Before presenting a petition mentioned in Section 3 the person who intends to present the petition (in this section referred to as the Petitioner) shall cause to be published in the Gazette and in a newspaper circulating in the district in which the debtor resides ... a notice of surrender in a form corresponding substantially with Form A in the first schedule*

to this Act. The said notice shall be published not more than 30 days and not less than 14 days before the date stated in the notice of surrender as the date upon which application will be made to the court for the acceptance of the surrender of the estate of the debtor.

(2) (a) Within period of 7 days as from the date of publication of the said notice in the Gazette, the Petitioner must deliver or post a copy of the said notice to everyone of the creditors of the debtor in question whose addresses he or she knows or can ascertain...

(3) The Petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs ...

5. ***Prohibition of sale in execution of property of estate after publication of notice of surrender and appointment of curator bonis***

(1) After the publication of a notice of surrender in the Gazette in terms of Section 4, it shall not be lawful to sell any property of the estate in question which has been attached under writ of execution or other process,

unless the person charged with the execution of the writ all other persons could not have known of the publication: provided that the Master, if in his opinion the value of any such property does not exceed R5 000,00 or the court, if it exceeds that amount, may order the sale of the property attached and direct how the proceeds of the sale shall be applied ...

6. ***Acceptance by a court of surrender of estate***

(1) *If the court is satisfied that the provisions of Section 4 have been complied with, that the estate of the debtor in question is insolvent, that he owns a realisable property of a sufficient value to defray all costs of the sequestration ... and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate.*

(2) *If the court does not accept the surrender or if the notice of surrender is withdrawn in terms of Section 7, or if the Petitioner fails to make the application for the acceptance of the surrender of the debtor's estate before the expiration of a period of 14 days as from*

the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor's estate, the notice of surrender shall lapse ...

7. ***Withdrawal of notice of surrender***

(1) A notice of surrender published in the Gazette may not be withdrawn without the written consent of the Master.

(2) A person who has published a notice of surrender in the Gazette may apply to the Master for his consent to the withdrawal of such notice and if it appears to the Master that the notice was published in good faith and that there is good cause for its withdrawal he shall give his written consent thereto...

8. ***Acts of insolvency***

A debtor commits an act of insolvency...

(f) ... If, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of Section 6 of 7, he fails to comply with

the requirements of sub-section (3) of Section 4 or lodges, in terms of that section a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made ..."

3.2 Section 5(1) contains an absolute prohibition against a sale in execution proceeding validly once the Sheriff becomes aware of the publication of a notice of surrender.

See: **Ex parte Oosthuizen** 1995(2) SA 694 (T) at 698A-D

3.3 The prohibition contained in Section 5(1) however presupposes (absent fraud) a valid advertisement published in terms of Section 4(1). This much is clear from the wording of the sub-section. In turn, Section 4(1), also upon a reading of the clear wording thereof, presupposes that the person who publishes such an advertisement is the person (petitioner/insolvent debtor or his agent) who is indeed desirous of proceeding with a petition (application) for voluntary surrender as provided for in Section 3(1).

3.4 Read integrally, the chronology of the process of the voluntary surrender of a debtor's estate is as follows:

3.4.1 The intention is formed by a debtor to have his/her estate voluntarily wound up;

3.4.2 Once such an intention is formed, then the person desiring to have his estate voluntarily wound up must cause a notice of voluntary surrender to be poublished in the Government Gazette (and in a newspaper in the area in which he resides);

3.4.3 Such an advertisement, if it comes to the knowledge of the "*person charged with the execution of the writ*" i.e. the relevant Sheriff, precludes a lawful sale in execution from taking place thereafter. This prohibition preserves the assets of the estate for distribution as part of the winding-up proceeds of the estate (in the event of a successful voluntary surrender subsequently occurring) and prevents the possibility of preference to creditors, in particular the judgment creditor. The prohibition thereof operates

primarily to the benefit of the body of creditors and not the debtor.

3.4.4 Should no application for a voluntary surrender follow the publication of such an advertisement, the prohibition against execution sales is lifted, together with the sanction that such an advertisement constitutes an act of insolvency.

3.4.5 If, on the other hand, an application for voluntary surrender is proceeded with, then the debtor still has to satisfy a court that, not only have all the statutory requirements prescribed for such an application been satisfied, eg. timeous advertisement, notice to creditors, accounts having laid for inspection and the like, but also that the debtor's estate is indeed insolvent and that there would be some not impecunious benefit (advantage) to concurrent creditors.

3.5 Various well-known textbooks also detail the above-mentioned process in various commentaries on the Insolvency Act. I have merely summarised the process to

assist in assessing the Applicants' conduct and their alleged state of mind at the time when the advertisement was published particularly when viewed in the illuminating light of those facts which they sought not to include in the confines of their founding affidavit.

THE "*ACTUAL*" FACTS:

[4] As aforesaid, apart from the allegations which the Applicants have chosen to include in the somewhat obscure wording of their Founding Affidavit, the following additional (or "*actual*") facts appear from the Answering Affidavit:

4.1 The Applicants' averments that they were unaware of Securibond's intended publication of a notice of surrender in terms of Section 4(1) and that they were equally unaware of the prohibitions of the Insolvency Act were not only questioned by the First Respondent but shown to be untrue.

4.2 The First Respondent's attorneys requested and obtained from the Applicants' attorneys on 20 June 2013 two documents, being:

"1. *Memorandum of Agreement entered into by and between Consumer Guardian Services (Pty) Ltd and our clients;*

2. *E-mail from Consumer Guardian Services (Pty) Ltd to our clients dated 25 February 2013.*"

The letter disclosing these documents also contained the following statement:

> "*We are not in possession of further e-mails, faxes and/or correspondence entered into between our clients and Securibond but we have requested our client to furnish us with copies thereof should same exist.*"

Needless to say, no further documents have been produced.

4.3 Before dealing with the aforementioned documents themselves, the question should be asked and answered as to who Consumer Guardian Services (Pty) Ltd ("*CGS*") is and what its role was. CGS was one of three companies acting in concert with each other and with the same *modus operandi*. All had the same member and same managing director, being one Johannes Tobias Muller. At one stage CGS, Securibond and yet another sister entity, Consumer Verification Services ("*CVS*") operated from the same premises. Often also

Securibond acted on instructions from CGS in sending letters, not only to prospective clients but also to Sheriffs of the Court subsequent to the publication of notices of surrender.

4.4 The First Respondent became aware of the above after having been cited as a co-respondent together with two other banks (Nedbank Ltd and Standard Bank of South Africa Ltd) in an application by Firstrand Bank Ltd against CGS, CVS, Securibond and their joint attorneys at the time. No relief was sought against the banks and the nature of the proceedings is apparent from a judgment by Binns-Ward J, as yet only electronically reported with the electronic citation *Firstrand Bank Ltd v Consumer Guardian Services (Pty) Ltd and Others (10978/2012) [2014] ZAWCHC 27 (4 March 2014).* I shall refer to this judgment more fully *infra*.

4.5 Returning to the letter in question furnished by the Applicants' attorneys to the First Respondent's attorneys, the relevant portions of the e-mail letter addressed to the Applicants by CGS read as follows:

"Good Day Mr R Mors

Consumer Guardian Services, CGS is a private company with an outsourced legal team which specialises in the property market and offers legal assistance and realistic solutions to the consumer against big financial institutions such as banks.

Your property Unit No. 1 SS Highveld 2716 Pretoria has been listed for auction on the date 13 March 2013 by Absa Bank and we would like to assist you in saving your property. We can stop and cancel the auction; you do not have to lose your property.

Consumer Guardian Services (Pty) Ltd is a privately-owned company that represents the rights of the home owner when the banks want to sell their properties on auction. We work with the Insolvency Act but please note that we do not under any circumstances intend to sequestrate or declare you insolvent. [my emphasis] *The only reason we use this law is because of the time period of 30 days it offers you during which period neither the bank nor any other institution or company or creditor may touch any of your property. The notice we place in the Government Gazette is called a notice of voluntary surrender. It is not an application for a sequestration (insolvency). The law stipulates that in the event that you publish a notice of voluntary surrender in the Government Gazette, from the date of publication you have a period of 30 days from said notice being published that you*

can then basically re-evaluate your financial situation. If you do not go to court during this time to lodge an official application for sequestration during the 30 day period, the notice will just expire and you will get 3 to 6 months to either come up with your arrears (75%) of you can decide to sell the property. Nothing stays against your name or goes down on your record. But the bank will have the right again to place your property on auction. And this we want to prevent from happening ...

To cover you from further action from the bank and to afford you the chance to recover financially, once your notice of voluntary surrender has been published, we start doing a forensic audit on your bond account. By doing this exercise we can then establish what the discrepancy on your bond account amounts to. Once this has been done, we can prove that the bank is also in breach of contract. Then we have ammunition to fight the bank on your behalf. The bank then either has to deduct the discrepancy amount from your bond account against the arrears or they have to pay you out in cash. I would advise that while we are busy with this whole process, you don't pay the bank but you have to save the money for a balloon payment for the bank...

What we want to do at the end of the day is to go to court with the results of the forensic audit and apply for the bank to remove the judgment against your name. Seeing that the bank is also in breach of contract not just you. The Constitutional Court brought out a new law in April that

stipulates that the Registrar of the Court whose is just a clerk, does not have the right or knowledge or expertise or qualifications to decide whether something as valuable as your property should go up for auction. Please understand that our main goal here is to successfully assist you in sorting out your problems where the bank is concerned... [Hereafter a reference is made to Section 4(1) of the Insolvency Act and Section 5(1) of the Act is then also quoted. The letter appears to contain an authorisation to "*communicate with the Sheriff and the attorneys acting on behalf of the execution creditor.*"] [The letter then proceeds:]

"*Dear MR MORS <u>This is the best way to get you some time to engage in negotiations with the bank or to get a buyer, we can also assist you with the sale of this property, remember we do not want to sell your property unless you have no other option</u>...*

Please take note that point 5.2 of the home owner agreement is not applicable to you as we are not going to proceed with sequestration and you may cross it out and initial the change ... All forms and proof of deposit has to be faxed through to me ASAP to the fax number mentioned below. We have until THURSDAY 15:00 (pm) to get these publications through to the printers of the Government Gazette and if we miss it there is nothing to be done to stop this auction. If you are unsure or uncertain about anything please do not hesitate to contact me...

Kind Regards

CGS Consultant
RICARDO"

5.6 It is clear that some of the contents of the letter are patently false and misleading and refer to time periods and practices regarding arrear payments which can only amount to marketing by CGS to attract clientele. However, what is also clear from the letter is that the Applicants were informed:

5.6.1 of the statutory provisions, particularly those of Section 4(1) and Section 5(1) of the Insolvency Act;

5.6.2 of the process which Securibond (or CGS then) would follow after payment of R5 000,00 to them, namely the publishing of the notice of voluntary surrender in the Government Gazette; and

5.6.3 of the consequences of such a notice and in particular the prohibition contained in Section 5(1).

All this belies the correctness of the Founding Affidavit.

5.7 The agreement which accompanied the letter and which both Applicants have signed on 27 February 2013 contains the following wording:

"MEMORANDUM OF AGREEMENT

entered into by and between

CONSUMER GUARDIAN SERVICES (PTY) LTD

Registration No: 21010/012840/07

(CGS)

and

THE HOMEOWNER

1. *The Homeowner described hereunder is the registered owner of the undermentioned property.*

2. *The undermentioned property is mortgaged to the Execution Creditor who obtained a judgment against the Homeowner.*

3. *The Execution Creditor intends to proceed with the execution of the judgment by way of the sale of the undermentioned property to be held by Sheriff.*

4. *The Homeowner hereby appoints and nominates CGS to be its duly appointed agent with instructions:*

4.1 to communicate with the Sheriff and the attorneys acting on behalf of the Execution Creditor;

4.2 to cause the cancellation of the sale of the undermentioned property;

4.3 to cause a notice of surrender ('the notice') to be published in the Government Gazette in terms of Sections 4(1) and 5(1) of the Insolvency Act, No. 24 of 1936 (as amended) ('the Act'). Section 5(1) of the Act stipulates inter alia as follows: [Then the wording of the sub-section is quoted.] ...

4.4 to proceed with an application for acceptance of surrender of the Homeowner's estate in terms of Section 3(1) of the Act ('the surrender') on receipt of the full payment referred to in clause 5.2 below;

4.5 to appoint an attorney or attorneys if necessary to effect publication of the notice and draft the surrender.

5. The Homeowner agrees:

5.1 to pay a service fee of R5 000,00 in respect of the publication of the notice;

5.2 to pay a further service fee of (R) in respect of the surrender in instalments of R1 000,00 per month,

payable before or on the 1st day of each and every month after payment of the service fee mentioned in 5.1 (IGNORE 5.2) ...

7. *The payment of R5 000,00 referred to in 5.1 above must be effected at least on or before 13-00 pm on Thursday for purposes of publication in the Gazette the following Friday, being the Friday prior to the date of the sale in execution (unless otherwise verbally advised) which payment is not refundable.*

8. *The Homeowner acknowledges and confirms herewith that:*

   8.1 *This agreement is founded on the principles and contents of Sections 3, 4, 5, 6, 7 and 8 of the Act.*

   8.2 *After publication of the notice in the Gazette* ***it is not lawful to sell the property of the Homeowner****.*

   8.3 *The Court may on application by the Execution Creditor nevertheless order the sale of the property attached and direct how the proceeds of the sale shall be applied.*

   8.4 *The notice to be published in the Government Gazette could constitute an act or insolvency as contemplated in Section 8(f) of the Act..."*

5.8 If anything had been unclear to the Applicants as to the process or *modus operandi* to be followed by Securibond/CTS from the invitation letter, then the contents of their signed agreement clearly put the issue beyond doubt.

5.9 In argument before me the Applicants' counsel attempted gamely to convince me that, seeing that clause 5.2 of the agreement had not been deleted and initialled, his clients should be deemed to have had the necessary intention to proceed with their application for surrender. This submission conveniently ignores the words ("I*GNORE 5.2*") included in the printed agreement as quoted above.

5.10 Apart from the fact that no other steps for such an application as summarised by me earlier in this judgment have been taken, the only portion of the Applicants' affidavit not contradicted by the aforementioned "*actual*" facts, are their allegations that they had no intention to apply for the voluntary surrender of their estates, irrespective of the deletion of aforementioned clause 5.2 or not. It is also clear from a reading of the two documents that the Applicants' intention (as was the intention of Securibond/CGS) was simply to stop the scheduled sale in execution.

EVALUATION:

[6] 6.1 In the abovementioned matter before Binns-Ward J, Firstrand Bank Ltd complained about the conduct of CGS, CVS and Securibond. The learned judge, after having referred to a letter *in pari materia* with the one directed to the Applicants in this application, found as follows:

> "*[13] Analysis of the content of the letter bears out the Applicant's complaint about the use by the Respondents of the provisions of the statute in fraudem legis. Those portions that I have marked in bold confirm that the Respondents' practice is to canvass business by persuading execution creditors to (sic)* [this should read debtors] *to engage the Respondents at a fee to publish notices of surrender for the purposes of stopping sales in execution so as to create an opportunity to audit the judgment debt and impugn the claim. The Respondents go so far as to expressly point out that no actual sequestration will follow and the terms of the letter unambiguously convey that publication of a notice of surrender does not imply a duty on the execution debtor to apply to court for acceptance of the surrender. In other words it is misrepresented to the potential client that publication of a notice of surrender gives certain*

rights or advantages without any attendant obligations or liabilities...

[16] The Respondents contend that there is nothing untoward in their practice because it has to be assumed that their clients have the intention when instructions are given and accepted to place a notice of surrender to proceed with the process and make the necessary application to court for the acceptance of the surrender. I do not agree. The facts show the opposite and hardly surprisingly, having regard to how the Respondents go about canvassing business."

6.2 The facts of the present application and the contents of the Applicants' Founding Affidavit bear out the correctness of this assessment: The Applicants never had the intention of applying for voluntary surrender and they did not take any of the steps in relation thereto post the advertisement in the Government Gazette. They did not effect another advertisement, they did not notify their creditors, they did not draft a statement of affairs, they did not have the statement of affairs lie for inspection and they did not thereafter apply for voluntary surrender of their estates. At no stage did they indicate that they had initially intended to do so but subsequently had a change of heart (or mind).

6.3 In similar fashion as the *modus operandi* described in papers before Binns-Ward J, the present Applicants did not produce evidence to indicate that their estates are indeed insolvent and that, had there been an application for voluntary surrender by each of them, there would have been a benefit for their respective concurrent creditors.

6.4 In similar fashion as before Binns-Ward J further, it was argued before me that Section 5(1) provides alternate remedies for the execution creditor faced with a published notice of surrender. Binns-Ward J dealt with the matter as follows:

> "*The Respondents have contended that the Applicant has alternative remedies. It is suggested that the Applicant could apply to court in terms of Section 5(1) for authorisation for the sales in execution to proceed. Apart from the practical difficulty of doing so within the short time afforded between the giving of the notice and the scheduled holding of the advertised sales, which makes the suggested alternative impractical in most cases, there is also the point that the remedy made available to the execution creditor in terms of Section 5(1) is intended to be available in the context of bona fide voluntary surrender applications. It was not provided to address circumstances in which notices of surrender are published <u>in fraudem legis</u>*
> ..."

6.5 I am in respectful agreement with this finding expressed in paragraph 19 of the said judgment and point out that in the present instance the transmission log of the faxed letter sent by Securibond to the Sheriff, although dated 12 March 2013 indicate the telefaxing thereof on Wednesday 13 March 2013 at 08:12 being the day of the scheduled sale. A copy was also sent to the execution creditor's attorneys some 3 minutes earlier (08:09) and only preceded by a similar telefax the previous day (12 March 2013) at 16:15. There can be no argument that notice at such a late stage effectively precludes any of the "*alternative relief*" contended for by the Applicants.

6.6 The First Respondent's counsel urged me, with reference to various textbooks on criminal law and cases dealing with intentional misrepresentation, to find that the Applicants had committed fraud in causing the notice of voluntary surrender to be published. Certainly the Applicants had, by publishing the notice, caused readers and/or potential creditors to understand it to mean that the Applicants had the intention to apply for voluntary surrender of their estates. In this, the creditors would have been misled as it had never been the Applicants' intention to apply in the terms as set out in the notice.

6.7 The Applicants can also not, as indicated earlier, contend that they had not been aware of the intended publication of the notice nor of its contents and consequences. This much has been refuted by the documents referred to in paragraphs 4.5 and 5.7 *supra*.

6.8 Even if the Applicants may have been misled about the exact process to be followed regarding an application for voluntary surrender, i.e. the steps to be taken within 7, 14 or 30 days thereafter, they had certainly been aware of the fact that their Founding Affidavit sought to mislead the court as to what they knew or did not know at the time regarding the publication of notices of surrender and its consequences upon an already scheduled sale in execution. Even usage of the words "*without informing us of any detailed particularity*" in paragraph 36 of their Founding Affidavit as quoted above, appears to be an attempt at intentional misleading of the Court.

6.9 If there is any doubt, the falsity of paragraph 37 of the First Applicant's Founding Affidavit as already quoted, puts the issue beyond doubt. It must follow that it has been proven on a balance of probabilities that the publication had been authorised with an ulterior motive, namely to stop the sale in

execution and not the motive envisaged in the Insolvency Act, namely to proceed with an application for voluntary surrender.

See also: **Fesi and Another v Absa Bank Ltd** 2000(1) SA 499 (C) where similar notices were deplored.

6.7 Following on this, I must conclude that the Applicants had made express representations to the public at large and their prospective creditors that they intended applying for the voluntary surrender of their estates while knowing that these representations are not true.

6.8 If I am wrong in this conclusion and imputing too much knowledge of the wrongfulness to the Applicants, then, pursuant to the letter from CGS and the signing of the accompanying agreement authorising CGS or Securibond to "*do the necessary*" and by paying them the agreed R5 000,00, the Applicants must have had the necessary *dolus eventualis* for, if not condoning a direct contravention of law, by at least not caring about the consequences of the publication of the notice in terms of Section 4(1) (which they had been aware would follow), save for the ulterior purpose of stopping the sale in execution. If not amounting to fraud in the narrow sense, I

find that the Applicants had formed the necessary *dolus eventualis* concerning their agent acting *in fraudem legis* the provisions of the Insolvency Act on the Applicants' behalf. I am further of the view that this justifies a punitive costs order being made against the Applicants.

See also: **Ex parte Lebowa Development Corporation** 1989(3) SA 71 (T) at 101C-J and **Randbank Bpk v Santam Versekerings-maatskappy Bpk** 1965(4) SA 363 (A).

6.9 Having said this, something else needs to be said about the conduct of CGS/Securibond. Binns-Ward J made the following order (on 4 March 2014):

> "*1. The First, Second, Third and Fourth Respondents* [CGS, CVS, Securibond and Rashid Appoles t/a Appoles Attorneys] *are hereby interdicted, prohibited and restrained from in any manner, whether directly or indirectly, canvassing business from or carrying out instructions obtained from any execution debtor or any person acting on behalf of an execution debtor entailing the publication of notices of surrender in terms of Section 4(1) of the Insolvency Act for the purposes of stopping or delaying sales in execution of property in circumstances in which the predominant object of the*

publication of the notice is to frustrate the sale rather than to achieve the voluntary sequestration of the execution debtor's estate..."

6.10 Paragraph 2 of his interdict deal with the representations to execution debtors to the effect that the publication of a notice of surrender affords a moratorium for execution debtors to review their financial affairs and commission and audit and certain ancillary representations.

6.11 Although, in the present instance, all the prohibited acts, namely canvassing of clients, obtaining instructions, making of misrepresentations and the publishing of a notice in the Government Gazette in the circumstances as already detailed, took place prior to the interdict, once the interdict came to the knowledge of the Applicants, which surely it must have done if regard is had to the reference thereto in Heads of Argument filed on their behalf as late as on 13 August 2014, it is difficult to understand why the Applicants proceeded with their application. Presumably this was to still advance the contention that they had not acted *mala fide* or had any intention to act *in fraudem legis*. Be that as it may, their application is without merit.

6.12 I interpose to state that Binns-Ward J had refused leave to appeal against his judgment and the Supreme Court of Appeal has similarly refused such leave on application (petition) to it, citing that any such appeal would have no reasonable prospects of success.

6.13 Another somewhat unrelated submission which is also without merit is the First Respondent's contention that the insertion of clause 11.1 in the third sale agreement places the sale of the Sheriff beyond the prohibition of Section 5(1). In similar fashion as analogous suspensive conditions inserted in agreements of sale in attempts to avoid the consequences of the Subdivision of Agricultural Land Act, No. 70 of 1970 have been found to have been prohibited (see **Geue and Another v Van der Lith and Another** 2004(3) SA 333 (SCA)), the attempted avoidance of the clear and absolute prohibition contained in Section 5(1) cannot be countenanced. I am in agreement with similar sentiments expressed by Binns-Ward J in the matter before him (at paragraph [20]).

[7] In a last-ditch attempt, the Applicants invited me to revisit the order declaring the property executable. Rule 46 does not provide, such as, for example in Rule 6(12)(c) or Rule 43(6) that an order granted

may be revisited or reconsidered either in general or on proof of changed circumstances. Although changed circumstances might occasionally occur if there is a long period that elapsed between the order of executability and the execution itself, I am of the view that this does not of itself entitle a court to unilaterally "*reconsider*" a final order granted by it (by another judge).

[8] A factor which might weigh in favour of the possible "*reconsideration*" of the order declaring executability is the fact that the judgment of Makgoba J predates the amendment to Rule 46(1) effected by GN R981 of 19 November 2010 with effect from 24 December 2010 which provides that where immovable property sought to be attached is the primary residence of a judgment debtor, no writ shall issue unless the court "*... having considered all the relevant circumstances ...*" orders execution against such property.

[9] I need not express a final view in this regard and on the issue as to whether the Constitution of the Republic of South Africa, Act 108 of 1996, would enjoin a court to extend or develop the applicability of Rule 46 to the extent that prior orders can be reconsidered as this aspect was not raised with any substantial measure of particularity in the Applicants' affidavits nor claimed as specific relief and also not persisted with in the Heads of Argument filed on their behalf. Insofar

as this issue may not have been abandoned, I have considered it and find that the Applicants have not made out any case in this regard or alleged any uncontroverted facts which indicate a materially different position than that which served before Makgoba J when the declaration of executability had been made. I therefore do not intend interfering in the order of executability, even if I had the power to do so.

[10] As previously indicated, the counter-application regarding the correction of the wording of the order of Makgoba J was unopposed. In it, it is claimed that the aforesaid order dated 22 April 2010 should be corrected by the inclusion of the words "*specially executable*" where applicable.

[11] In the premises, I make the following order:

1. The Applicants' application is dismissed with costs, which costs shall be on the scale as between attorney and client.

2. The introductory portion of paragraph 3 of the order of Makgoba J dated 22 April 2010 is amended to read as follows:

"3. *An order declaring the following property specially executable:*"

N DAVIS
ACTING JUDGE OF
THE HIGH COURT