**Republic of South Africa**

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

**Case No.: 10978/2012**

Before: The Hon. Mr Justice Binns-Ward

In the application between:

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| **FIRSTRAND BANK LIMITED** | Applicant |
| and | |
| **CONSUMER GUARDIAN SERVICES (PTY) LIMITED** | First Respondent |
| **CONSUMER VERIFICATION SERVICES (PTY) LIMITED** | Second Respondent |
| **SECURIBOND (PTY) LTD** | Third Respondent |
| **RASCHID APPOLES t/a Appoles Attorneys** | Fourth Respondent |
| **VERSTER RAPP EN VAN ZYL INCORPORATED Trading as RAPP VAN ZYL KOTZE ATTORNEYS** | Fifth Respondent |
| **THE CHIEF MASTER OF THE HIGH COURT** | Sixth Respondent |
| **THE CHIEF EXECUTIVE OFFICER: GOVERNMENT PRINTING WORKS** | Seventh Respondent |
| **ABSA BANK LIMITED** | Eighth Respondent |
| **NEDBANK LIMITED** | Ninth Respondent |
| **STANDARD BANK OF SOUTH AFRICA LIMITED** | Tenth Respondent |

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**JUDGMENT DELIVERED ON 4 MARCH 2014**

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**BINNS-WARD J:**

[1] In this matter the applicant, which is a bank, seeks an interdict against the first to fourth respondents prohibiting them from engaging in a practice or scheme of business that

entails the publication of notices of surrender in terms of s 4(1) of the Insolvency Act 24 of 1936 ('the Act') in circumstances in which it is not intended to present an application to court for acceptance of the surrender. The publication of a notice of surrender has the effect, amongst other things, that no-one who has knowledge of the notice may sell any property of the estate in question that has been attached under writ of execution or other process. The applicant complains that the aforementioned respondents are engaged in the business of using the voluntary surrender provisions of the Act for the purpose of forcing the cancellation of advertised sales in execution of hypothecated immovable property in circumstances in which there is no intention to surrender the estates in question. The conduct in question is alleged to be prejudicial in that wasted costs, totalling tens of millions of rands, are incurred in respect of the cancelled sales and the delay in obtaining execution of the judgments after the notices lapse when no application for the acceptance of the surrender follows. It goes without saying that this would also have an adverse effect on the ratio of the extent of the debtor's liability to the value of the bank's security.

[2] The first, second and third respondents are three private companies of which the sole member is one Johannes Tobias Muller. Mr Muller is also the sole and managing director of each of the companies. He deposed to the principal answering affidavit on behalf of these three respondents. It is evident from his testimony that the conduct in issue in this case is predicated on a misconceived understanding by Muller and an attorney engaged by him for the purposes of the business of the first, second and third respondents (the fourth respondent) of the import of the pertinent provisions of the Act.

[3] The pertinent provisions of the Act are sections 3 to 7. They provide as follows in relevant part:

> **3 Petition for acceptance of surrender of estate**
>
> (1) An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of an insolvent debtor who is incapable of managing his own affairs, may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his creditors.
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> (2) [applicable to partnerships]
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> (3) Before accepting or declining the surrender, the court may direct the petitioner or any other person to appear and be examined before the court.
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> **4 Notice of surrender and lodging at Master's office of statement of debtor's affairs**
>
> (1) Before presenting a petition mentioned in section three 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, or, if the debtor is a trader, in the district in which his principal place of business is situate, 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 thirty days and not less than fourteen days before the date stated in the notice of surrender as the date upon which application will be made to the court for acceptance of the surrender of the estate of the debtor.

(2) (a) Within a period of seven 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 every one of the creditors of the debtor in question whose address he or she knows or can ascertain.
(b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice-
(i) by post to every registered trade union that, to the petitioner's knowledge, represents any of the debtor's employees; and
(ii) to the employees themselves-
(aa) by affixing a copy of the notice to any notice board to which the employees have access inside the debtor's premises; or
(bb) if there is no access to the premises by the employees, by affixing a copy of the notice to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business immediately prior to the surrender; and
(iii) by post to the South African Revenue Service.

(3) The petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act. That statement shall contain the particulars for which provision is made in the said Form, shall comply with any requirements contained therein and shall be verified by an affidavit (which shall be free from stamp duty) in the form set forth therein.

(4) Upon receiving the said statement, the Master may direct the petitioner to cause any property set forth therein to be valued by a sworn appraiser or by any person designated by the Master for the purpose.

(5) If the debtor resides or carries on business as a trader in any district (other than the district of Wynberg, Simonstown or Bellville in the Province of the Cape of Good Hope) 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 debtor resides or so carries on business 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 magistracy of that district, at the office of such additional or assistant magistrate.

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

**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 four, 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 or other process 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, 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.

(2) [power of the Master to a curator *bonis* to the estate being surrendered in certain circumstances]

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

(1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate 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 seven, 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 fourteen 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 and if a curator *bonis* was appointed, the estate shall be restored to the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section five.

**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 the 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. Upon the publication, at the expense of the applicant, of a notice of withdrawal and of the Master's consent thereto, in the Gazette and in the newspaper in which the notice of surrender appeared, the notice of surrender shall be deemed to have been withdrawn.

It should also be mentioned that in terms of s 8(f) of the Act a debtor commits an act of insolvency '*if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section four or lodges, in terms of that subsection, 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*'.

[4] It is evident upon a proper reading of the provisions of the Act quoted in the preceding paragraph that they fall to be read and applied integrally. Thus the decision to publish a notice of surrender occurs in the context of an intention formed by the debtor to apply to court for the acceptance of the surrender and entails a commitment to carrying out the further steps provided in terms of s 4 with regard to making that application. That follows, not only upon a contextual reading of the relevant provisions as a whole, but also, in particular, from the express wording in s 4(1) that '*the person who intends to present the petition … shall cause to be published in the Gazette … a notice of surrender*'.

[5] The only manner in which the commitment can validly be recalled is by withdrawing the notice of surrender in the manner provided in terms of s 7; that is with the leave of the Master, on good cause shown. It is true that the debtor cannot be compelled to present the application for the acceptance of his surrender to court, and that if he does not do so the notice of surrender lapses, but it is clear that the lapsing provision is intended for the benefit of the debtor's creditors and not that of the debtor. The effect of a lapsing of the notice of surrender is that the suspension, in terms of s 5(1), of the right of creditors to execute any judgment in their favour against the property of the debtor is lifted and, if an application for acceptance of the surrender has not been made in accordance with the tenor of the notice, the creditors are afforded the right to rely on s 8(f) of the Act to apply for the compulsory sequestration of the debtor's estate.

[6] The provisions of s 6(1) of the Act make it clear that no legitimate purpose can be served by the publication of a notice of surrender if the estate concerned is not actually insolvent and if it cannot be shown that the estate comprises of realisable property of sufficient value to defray the costs of sequestration payable in terms of the Act out of the free residue of the estate and that sequestration will be to the advantage of creditors. Thus, for example, in a case in which the major asset in the estate is an hypothecated immovable property that is subject of a pending sale in execution in which it is expected that the property will be realised for considerably less than the amount of the secured claim it will be difficult, if not impossible, for the debtor to satisfy the substantive requirements of voluntary surrender, and it is difficult to conceive that the debtor, acting in a *bona fide* manner, would be able to give notice of surrender conformably with the statutory scheme.[1] (The reason I have cited this example of a situation in which a debtor could not avail of the process in a *bona fide* manner will be apparent when the terms of a proposal letter by the first respondent to a debtor quoted later in this judgment are considered.[2])

[7] Nothing in the relevant provisions of the Act supports the notion that a notice of surrender may, or can, legitimately be given with the primary object of frustrating sales in execution, or to provide a debtor with a moratorium against the sale in execution of his property while he considers his position and decides whether or not he should proceed with the presentation of an application for the acceptance of his surrender. Compare *Ex parte Stepney*,[3] in which even the postponement of an application for voluntary surrender brought *bona fide* was refused because such a course would in substance '*sanction the device of putting a notice in the Gazette without a real intention to surrender, and thus locking up the assets, while the estate is left in the hands of the insolvent*' - something which a court could not be seen to countenance.

[8] The submission by counsel for the first to third respondents that the 'opportunity' of a moratorium was an 'incidental effect' of the relevant provisions is without merit because it fails to acknowledge the legal commitment to present the application that is bound up in the very act of causing a notice of surrender to be published. That commitment is confirmed not only upon a proper reading of the relevant provisions in the manner discussed, but also by the prescribed content of the notice which commits the debtor to disclosing the date on which his

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[1] Cf. *Ex parte Stepney* 1905 TS 27, in which Mason J observed '*I think, however, that such notice* [of surrender] *should only be given when the facts of the case would support a petition for voluntary sequestration.*'

[2] The letter gives as an example that a sale in execution might result in a property worth R1,3m being realised for only R350 000. See para [12], below.

[3] See note 1.

application will be made, and which obliges him within a very short period of the publication of the notice also to arrange for a statement of his affairs in the prescribed form to lie for inspection for fourteen days in the manner required by s 4(3), read with Form B in the First Schedule to the Act. The notice of surrender tells the world, the debtors' creditors and his employees that he will be applying for the acceptance of the surrender of his estate. It does not inform them that he is taking time to consider his options. To use the notice procedure for a purpose for which it is not intended is to misrepresent the debtor's position to the legally interested third parties and, when there are pending sales in execution involved, to cause s 5(1) of the Act to operate in circumstances in which it clearly was not intended to apply; in other words to act not only *contra legem*, but also *in fraudem legis*.[4] The misrepresentation is plainly *mala fide* when it occurs in the context of a deliberate misuse of the statutory provisions.[5]

[9] The prohibition against the sale in execution of a debtor's property in terms of s 5(1) of the Act has to be understood in the context of the relevant provisions as a whole. It does not operate in a vacuum. Moreover, it is also not a prohibition for the benefit of the debtor. On the contrary, when considered in its statutory context, its only purpose is plainly recognisable as one intended for the benefit of the *concursus creditorum*, which will be instituted upon the contemplated acceptance by the court of the surrender. It is a provision that is directed at avoiding, as far as possible, certain creditors being advantaged over others by a realisation of the debtor's property for their exclusive benefit at a time when a sequestration of the debtor's estate may be expected within a month or less.

[10] The practice or scheme of business that the applicant seeks to interdict operates in the following way. The first to third respondents' employees scan what is referred to as the 'Green Gazette' every week for advertisements of sales in execution of residential property. The respondents employ consultants throughout the country. The consultants in the various

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[4] Compare the dictum of the late Appellate Division in *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 998:

> For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act *in fraudem legis*, construing that term in the more restricted manner adopted by the majority of this Court in the case of *Dadoo Ltd v Krugersdorp Municipal Council* (1920 AD 530) (see also *Commissioner of Customs & Excise v Randles Bros & Hudson Ltd* (1941 AD 369)). Such a use is a mere *simulatio* or pretext. . . . And I should add that, of course, if the person exercising the power avowedly uses it for some purpose other than that for which alone it has been given, he acts simply *contra legem*: where, however, he professes to use it for its legitimate purpose, while in fact using it for another, he acts *in fraudem legis* (D.1.3.29, as explained in *Dadoo*'s case, and compare *In re Marsden's Trust* (supra)).

The dictum is applicable in the current context *mutatis mutandis* if the word 'power' is read as 'statutory procedure'.

[5] See *Brummer v Gorvil Bros Investments (Pty) Ltd* 1999 (3) SA 389 (HHA) at 414 I – J.

areas are advised of the particulars of persons whose homes have been advertised for sale in execution in their respective purlieux. The consultants then canvas the business of the execution debtors concerned. It is explained to the debtor that a cancellation of the sale in execution can be achieved by availing of the provisions of the Insolvency Act. The respondent offers to arrange the publication of a notice of surrender in terms of s 4(1) of the Act against payment of a fee - generally indicated to be in the sum of R5000. It is also indicated that the publication of the notice of surrender does not result in the sequestration of the debtor's estate and that there will be no consequences if an application to court does not follow. The debtor is advised that in such circumstances the notice will simply lapse, with the consequence that the property may be re-advertised for sale in execution. The debtor is further advised that against payment of an additional fee the respondent concerned will conduct a forensic audit, which will in all probability demonstrate that the execution creditor has miscalculated its claim and will afford the debtor the opportunity to reach a compromise with the execution creditor and avoid the sale of his property. The service of arranging for the application to court for the acceptance of the surrender is, however, also offered – again against payment of an additional fee.

[11] The respondents use a pro forma contract document (which was referred to in the papers and in correspondence as the 'Homeowner Agreement') for their transactions with execution debtors. The provisions pertaining to the option of engaging the respondents for assistance in presenting a voluntary surrender application to court are contained in clause 5.2 of the pro forma contract document.

[12] The first to third respondent's *modus operandi* is graphically illustrated by quoting an example of a proposal letter sent to a debtor in full:

> Good Day Mr Du Pisanie
> We are locating you (sic) folder at this moment, I checked with our debtors department and all your old debt has been paid so that is good, the Forensic Department said that it is done, I will get it on Monday morning, I will scan and email a copy of the amount and front page to you.
> **As explained the 2nd Auction will come up on the 27th January 2012, we need to stop it again for you with the same INTENTION TO SEQUESTRATE, this service will cost you R4000.00**, I've attached the contract which you need to sign, initial each page and fax or email this back to me ASAP. We will use the Forensic Audit as a strong factor for the second Auction when we send it to the bank's attorney and the sheriff.
> **The next step after this is to do the Commerce (Financial Assistance) we need to see if you are going to afford this property in the future, we will need all of your liabilities and assets (I will help you with info on what you need to send me) We then get the submit the Rapport (sic) with the Forensic Audit Report to the bank for a lower instalment so that you can afford this property in the future.**
> Please call the bank and find out what is your arrears amount, its better we both know so we can work around that.
> I've attached some Newspaper Clipping for you to read.

Many thanks
Shereen

Herewith more information on the process Consumer Guardian Services follow in order to assist you to stop the bank from auctioning off your above mentioned property.
Consumer Guardian Services (Pty) Ltd is a privately owned company that represents the rights of the homeowner when the banks want to sell their properties on auction. **We work with the insolvency act** (sic) **but please note that we do not, under any circumstances intend to sequestrate or declare you insolvent. 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 official application for sequestration (insolvency). **The law stipulates that in the event that you publish a notice of voluntary surrender in the Government Gazette, from the day 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 this 30 day period, the notice will just expire.** 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.
**Once the auction is stopped we will then proceed with a forensic audit.** When you default on your bond agreement, the bank gives instruction to their attorneys to take action against you. The attorneys in turn send the bank an account for their legal fees for the service they rendered to the bank. The bank is more than within their rights to retrieve those funds from you. But they have to invoice you on a different account with different interest rates and a different payment plan. Now this is where the problem comes in. The banks take those fees and adds it to the balance of your bond in order to inflate your bond so that they can charge you more interest. This is fraud! Your bond account is not an expense account for the bank. The only entries that may be on your bond statements are entries pertaining to your bond account. The banks also charge you a higher interest rate than what you agreed to on your bond agreement, they charge you compound interest and they even go so far as to charge you interest on your insurance that's in arrears. This constitutes fraud which puts the bank in breach of contract.
**To cover the 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.
**When a property goes on auction it goes up without reserve. And that means if the highest bid is R350 000 for a property worth R1,3 mil, the auctioneer and the bank will accept it and would still hold you responsible for the outstanding balance of the bond. The fact that your property was sold on auction will also stay against your name for 30 years, as will the default judgement they got against your name. 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 judgement against your name. Seeing that the bank is also in breach of contract and not just you. The constitutional court (sic) brought out a new law in April that stipulates that the registrar of the court, who is just a clerk, does NOT have the right of 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 problem where the bank is concerned**.
I would like to mention that in event the bank's attorneys decide to disregard the law and proceed with the auction, it will remain an illegal auction. You would then have to pay legal fees to apply for a court interdict at the Supreme court in order to reverse the auction and to keep the transfer from going through. We will apply for an immediate cost order against the bank for damages and costs. These funds have to be paid directly into your personal banking account.
**The charges are as follows"**

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| **Stop of Auction** | **R4000** |

**The Auction has to be stopped first that's our Main priority. Thereafter we can take further steps if required.**

| | |
|---|---|
| Forensic Audit | R3500 |

> The Forensic Audit. This will minimize your bond arrears amount.
> R5000
> The commence (Financial Assistance) to negotiate with the bank on your behalf
> At the bottom of the email I have included a link to YouTube for an overview of our company and referrals.
> **Please take note that point 5.2 of the Homeowner Agreement is not applicable to you as we are not going to proceed with sequestration and you may cross it out and initial the charge**.[6] Please also initial page 1 & 2 at the bottom of the pages of the agreement. Try and complete all forms as thoroughly as possible and if you have any problems or questions, you are more than welcome to give me a call and I will assist you with any problems you may have. All forms and proof of deposit has to be faxed through to me ASAP to the fax number mentioned below. **We have till Friday 10 o'clock (am) to get these publication 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.
> I'm attaching all documents that you have to complete. We will need statement and at least the agreed upon interest rate with the bank when the bond was registered on your name. If your bond is not at Standard Bank, you would need to get all necessary statements for us.
>
> Kind regards
> Shereen Karriem

(emphasis supplied)

[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 respondent' practice is to canvas business by persuading execution creditors 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.

[14] The fourth respondent was engaged by the first, second or third respondent, as the case might be, to send letters to the applicant advising it of the notice of surrender and drawing attention to the prohibition, in terms of s 5(1) of the Act, against the advertised sale in execution proceeding. These letters were generally sent to the applicant on the afternoon before or the very morning of the sale concerned. The fourth respondent admits that he undertook this work at a fraction of his normal fee, which suggests that his arrangement with the first to third respondents was such that the volume of work would compensate for the discount. During the twelve-month period preceding the institution of this application there

[6] See para [11], above concerning the significance of the reference to 'point 5.2 of the Homeowner Agreement'.

were at least 166 instances of sales in execution being stopped at the instance of the respondents in this manner.[7]

[15] The uncontested evidence is that in virtually all of the sales in execution at the instance of the applicant bank that have been stopped in the context of the respondents' aforementioned practice an application to court for acceptance of the surrender did not follow. Indeed, in several cases a subsequently re-advertised sale in execution had also to be cancelled because of a fresh publication of notice to surrender. (Indeed, the proposal letter quoted above evidences an example of such a case, with its reference to stopping a second auction.) The first to third respondents purported to challenge the evidence put up by the applicants to this effect by setting out what Muller maintained was a list of matters in which applications for the acceptance of surrender had followed. The list was, however, singularly lacking in particularity. It gave no court case numbers or hearing dates and gave the only the surnames of some of the alleged applicants several of which were of so commonly occurring that it would be almost impossible for the applicant to isolate and identify on a computer search with the meagre information provided. Documented records in respect of the names given on the list that could be identified refuted the allegation that applications for voluntary surrender had been made to court. In the circumstances Muller's averments in this regard do not give rise to what might properly be considered a real dispute of fact; cf. *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13.

[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. The suggestion that the respondents cannot be held responsible for their clients' failure to apply to court for the acceptance of the surrender imposes too much on the court's credulity. It is quite evident from the correspondence quoted above (and indeed also the terms of an affidavit made by Muller in support of an application by the first respondent in case no. 8964/12 to interdict former employees from competing with the business of the respondent, in which he sets out the respondent's '*modus operandi*') that the respondents canvas business by representing that the voluntary surrender provisions of the Act can be

[7] Averments in the supporting affidavit in an application brought by the first respondent to prevent former employees allegedly competing with it, a copy of which was put in evidence, suggest that a far higher number of matters might be involved.

used to ward off sales in execution without any attendant commitment to see the process through to a sequestration order. The very representation by the respondents to potential clients that the giving of notice of surrender and the application to court can be approached and dealt with discretely, rather than integrally – this much is underscored by their approach of marketing and charging for the services of arranging the publication of the notice of surrender and the making of an application to court separately - gives the game away. For the reasons explained earlier, a notice of surrender is not an acceptable device for gaining time to undertake forensic audits of clients' accounts with the execution creditor, or to find a basis to apply for the rescission of the judgment that is in the process of being executed.

[17] What is also striking is that the respondents' approach to potential clients whose property is subject to pending sales in execution does not involve any exercise directed to establish whether their proprietary status would render an application to court for the surrender of the estates in question feasible. Nothing in the approach is directed at establishing whether the prospective client would be able to satisfy the requirements of s 6(1) of the Act. That is no cause for surprise if the object is in fact not to achieve the voluntary surrender of the potential client's estate. To my mind this further highlights what is in any event glaringly apparent on the evidence that the respondents are unable to dispute; namely the resort by the respondents for the purpose of their businesses to the voluntary surrender provisions of the statute for purposes for which they are not intended.

[18] It is thus plain that the practice of the first to third respondents is in conflict with the scheme of the voluntary surrender provisions of the Act, and unlawful. It is equally apparent that it prejudicially affects the applicant. The requirements for final interdictory relief are well established: they are (a) the existence of a clear right by the applicant, (b) that an infringement of that right has actually been committed or is reasonably apprehended and (c) the absence of a satisfactory alternative remedy; see *Setlogelo v Setlogelo*.[8] The applicant has a clear right not to have the provisions of the Insolvency Act misused to thwart the execution of judgments that it has obtained against execution debtors. The practice or business scheme of the first to third respondents described above infringes that right and it is evident by virtue of the opposition to the application that unless the conduct in question is made subject of a prohibitory interdict it will continue.

[19] The respondents have contended that the applicant has alternative remedies. It is suggested that the applicant could apply to court in terms of s 5(1) for authorisation for the

[8] 1914 AD 221 at 227.

sales in execution to proceed. Apart from the practical difficulty of doing so within the short time afforded between the giving of 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 s 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 *in fraudem legis* and thus the respondents' suggestion that the applicant should be required to avail of it in the circumstances is in any event legally misconceived. It was also contended that the applicant could avail of s 8(f) of the Act and apply for the compulsory sequestration of the execution debtors who did not apply to court for the acceptance of their surrenders. That remedy is indeed available, but it does not fall properly to be considered as an alternative to the remedy of obtaining an order prohibiting the further abuse of the relevant provisions of the Act. (Ironically, the evidence suggests that in the instances in which the applicant has applied for the compulsory sequestration of debtors relying on s 8(f) of the Act, the debtors have opposed the applications.)

[20] The further contention that the applicant could avoid the consequence of the statutory prohibition against proceeding with a sale in execution of a debtor's property when the debtor has given notice to surrender his estate by proceeding with the sale and attaching a condition 'making it "*subject to the clients not proceeding with the voluntary surrender*" is completely without merit. The statutory prohibition is expressed in absolute terms in s 5(1), and the only manner in which its effect can be avoided is expressly provided in the subsection, that is, when the sale in execution of property exceeding R5 000 is concerned, by applying to court for exemption from the prohibition.

[21] There is furthermore no warrant for the implication that tacitly underlies all of the aforementioned adequate alternative remedy arguments: that is that the applicant should be required to be forbearing of the abuse of the statutory procedures and deal with the consequences reactively.

[22] Over and above what has already been said, I am of the *prima facie* view that the activities of the first to third respondents may also be unlawful in that they appear to constitute an offence in terms of s 83(2) of the Attorneys Act 53 of 1979.[9] This was raised in

[9] Subsection 83(2) provides:

> *No person shall orally or by means of any written or printed matter or in any other manner, directly or indirectly, either for himself or for any other person, canvass, advertise or tout for, or make known his preparedness or that of such other person to undertake any work, whether for or without remuneration,*

passing on the papers, but not argued with any enthusiasm by the applicant's counsel. The definitive answer depends on how widely or narrowly the words '*any work… in connection with… the administration or liquidation or distribution of the estate of any…insolvent person*' in that provision should be interpreted. It is certainly arguable that they include work involving the institution and prosecution of a voluntary surrender of an insolvent's estate. In view of the findings that I have already made it is unnecessary, however, for me to reach any firm conclusion in this regard for the purpose of determining the applicant's entitlement to interdictory relief.

[23] As already mentioned, and by his own account, the fourth respondent accepted instructions from the first respondent mainly to communicate the notices of surrender to the sheriff and the execution creditor for the purposes of ensuring that pending sales in execution did not proceed at a greatly discounted rate. He was also engaged in some cases to attend to the publication of the notices of surrender. The volume of this type of work in which the fourth respondent was engaged was such that he must have been aware of the *modus operandi* described above. Indeed, he admitted in correspondence to the Law Society, in response to a complaint lodged against him by attorneys representing another commercial bank, that the object of the notices of surrender was to stop sales in execution as 'a pre-emptive step' preceding forensic audits of the judgment debts concerned. He also admitted in his letter to the Law Society, which he misguidedly – apparently through a lack of understanding of the distinction between confidentiality and private privilege - claimed was privileged, that he engaged, amongst other things, in facilitating the sale of properties of execution creditors by private treaty after the sales in execution had been stopped. The out of hand sale by a debtor of his major assets is conduct quite inconsistent with a surrender of his estate. Once a notice of surrender is given it behoves a debtor, consistently with the effect of such a notice, to conserve his estate to be handed over, upon the acceptance of such surrender by a court, to a trustee to be liquidated for the benefit of the general body of creditors. It must have been evident to the fourth respondent from the fact that no applications to court for acceptance of the surrenders concerned followed that he was lending his services in furtherance of a scheme that entailed misuse of the provisions of the Act. His claim that the majority of clients referred to him by the first respondent had the *bona fide* intention to proceed with applications for the acceptance of the surrender at the time he arranged for the

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*in connection with the drawing up of a will or other testamentary writing, the administration or liquidation or distribution of the estate of any deceased or insolvent person, mentally ill person, or any person under any other legal disability, or the judicial management or the liquidation of a company.*

publication of the relevant notices of surrender was fatuous, and roundly refuted by the fact that, without exception, they failed to do so. In his answering affidavit he averred that he had acted '*in line with the specific instructions of the debtors in issue*'. Having regard to the background sketched earlier concerning the first respondent's canvassing of business, the volume of instructions accepted, and the fact that the debtors invariably did not proceed to carry through the advertised surrender of their estates, this averment falls to be seen as a confession of the fourth respondent's witting involvement in the unlawful practice. When given the opportunity to give an undertaking that he would have no further part in this unlawful conduct he failed to provide it.

[24] The fourth respondent averred in his answering affidavit that his mandate from the first to third respondents had been terminated. This averment was demonstrated to be incorrect. I was informed by the fourth respondent's counsel from the bar that the respondent had made a mistake in his answering affidavit and that he had made a subsequent affidavit giving a later date of termination than the one that the applicant had refuted in its replying papers. No application was made, however, for the admission of this subsequently made affidavit; and its content, whatever it might be, is therefore not in evidence before me. I agree with the submission by the applicant's counsel that the easiest thing for the fourth respondent to have done to avoid interdictal relief would have been to give an unequivocal undertaking no longer to be engaged in the practice of which the applicant complains. He had the opportunity to do that when he wrote the letter, dated 23 May 2012, to the applicant's attorneys annexed as annexure 'CGS 1A' to his answering affidavit. The tenor of that letter, which concluded '*We accordingly request that you desist of any further correspondence with our offices in this respect* [i.e. correspondence articulating the applicant's complaints about the abuse of the voluntary surrender provisions in the Act] *unless you have verified (from your client and your files) that such matters are indeed being dealt with by our offices, failing which…*', certainly did not intimate that the fourth respondent would not be taking instructions from the first respondent in such matters in the future.

[25] In the circumstances I am satisfied that the applicant has made out a case for interdictal relief also against the fourth respondent.

[26] The terms of the interdict sought by the applicant were framed as follows in the notice of motion:

> That the 1st Respondent and/or 2nd Respondent and /or 3rd Respondent and/or 4th Respondent…be interdicted, prohibited and restrained from the publishing and/or causing to be published Notices of Intention to Surrender in the *Government Gazette* as envisaged in Section 4(1) of the Insolvency Act,

> No 24 of 1936 on behalf of any persons with the intention of delaying or causing the cancellation of sales in execution of immovable property where the Applicant is the creditor.

The respondents contended that an interdict in the terms sought would be impossible to enforce and amount to a *brutum fulmen* because of the difficulty of establishing the relevant intention referred to. It was pointed out that the intention concerned in the decision to publish a notice of surrender in the context of the case is primarily that of the execution debtor. The respondents contended that the application should be dismissed because it would thus be inappropriate, if not ineffectual, to grant an order in the terms sought by the applicant.

[27] In my view there is some merit in the respondents' criticism of the wording of the interdictal relief sought by the applicant; it leaves it unclear whose 'intention' is entailed. On a fair and proper reading of the papers it is evident that what the applicant seeks to have interdicted is a continuance of the respondents' mode of canvassing and conducting business. That is clearly the nature of the substantive relief sought in the application. That object can be achieved by recasting the formulation of the interdict in a manner that avoids any reference to intention and in a way which would facilitate the provision of an objective basis for compliance and, also, if necessary, for the determination of any non-compliance with the order. It is plain that the real cause for complaint by the applicant is the nature of the representations made by and on behalf of the respondents to prospective clients as to the nature and effect of the giving of a notice of surrender. The nature of those representations was such as to disclose or establish that the predominant object of the contemplated publication of the notices of surrender was to stop the advertised sales in execution, and not to achieve the sequestration of the execution debtors' estates. The suggestion that the application should be dismissed because of the shortcomings in the formulation by the applicant of the interdictal relief is opportunistic and wholly lacking in merit. It is open to the court in such circumstances to grant the substantive relief sought by the applicant by choosing its own wording to express the terms of the relief. That is the course I intend to follow in the orders to be made.

[28] The improved wording will not confront the respondents with a result that was not foreseeable in the context of the case they were brought to court to meet. I also see no reason why the relief should be framed to confine the restraint to the respondent's conduct only insofar as it affects persons against whom *the applicant* has obtained judgments. To formulate the relief in that manner might be misconstrued to imply that the respondents might

be permitted to continue to misuse the statutory provisions against other judgment creditors. Such a situation plainly cannot be countenanced.

[29] I should mention that an application was moved at the commencement of the hearing on behalf of one Nothnagel for leave to intervene in the proceedings. The application for leave to intervene also incorporated an application by Nothnagel for the rescission of a judgment granted against him in favour of the applicant bank. Nothnagel's application was moved by the counsel who appeared on behalf of the first to third respondents. The application was dismissed with costs, including the costs of two counsel. The reasons for the dismissal of the application to intervene were firstly, that no relief is sought by the applicant against Nothnagel and secondly, the relief that is sought against the first to fourth respondents would, if granted, not affect any of Nothnagel's legal interests. The affidavit made by Nothnagel was in any event incorporated as part of the first to third respondents' answering papers and his averments have thus been taken into account, to the extent that they were relevant, on the basis of their having been incorporated in what fell to be treated as a supporting answering affidavit. (I should perhaps make it clear that the dismissal of the application for leave to intervene does not affect Nothnagel's right, if so advised, to seek to pursue his application for rescission of judgement in separate proceedings.)

[30] There was also an application for leave to intervene as a respondent by one Thilothabal Reddy. The application was delivered by the same firm of attorneys as that which represented the first to third respondents, but, unlike that of Nothnagel, it was not moved at the hearing. When I indicated that it appeared to me that the appropriate course in the circumstances appeared to be to strike the application from the roll with costs, counsel for the applicant submitted that an order in such bald terms might leave the applicant out of pocket because it arguably would not cover the costs incurred by the applicant in respect of the papers it had drawn for the purposes of opposing the application. There is no prospect in the circumstances - the opportunity for intervention having passed - that the struck off application for leave to intervene could be moved later. Striking it from the roll when it cannot be re-enrolled is effectively as good as a dismissal in the given situation. I shall therefore amplify the costs order to be given in this respect to make it clear that it includes the applicant's costs in respect of drawing papers to oppose the intervention application.

[31] The papers in this application were prolix; they ran, literally, to thousands of pages. To some extent their prolixity was understandable. The applicant justifiably set out to put up sufficient detail in order to make it difficult for the respondents to contrive spurious disputes

of fact. The replying affidavit, however, was everything that a replying affidavit is not meant to be. It was 144 pages long (without annexures) and it was tediously repetitive and argumentative beyond toleration. This type of abuse of the reply procedure in motion proceedings is all too frequently a cause for judicial lament. In *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd*,[10] Schutz JA trenchantly observed:

> In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.

In the circumstances I consider that it would be appropriate, as mark of the court's displeasure, to disallow a substantial portion of the fee that might otherwise be recoverable in respect of the drafting of the applicant's replying papers.

[32] The following order is made:

1. The first, second, third and fourth respondents 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 s 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.
2. In particular, but without derogating from the generality of paragraph 1 of this order, the respondents are interdicted from in any manner representing to execution debtors, whether expressly or by implication, that:
    1. The publication of a notice of surrender by or on behalf of the execution debtor does not result in a legal commitment by the execution debtor to present an application to court for the acceptance of the surrender and to do everything prescribed in terms of s 4 of the Insolvency Act 24 of 1936 to that end;
    2. That the publication of a notice of surrender in terms of the said Act affords a moratorium for execution creditors to review their financial affairs and

[10] 2003 (6) SA 407 (SCA) at para 80.

commission an audit or review of their indebtedness in terms of the judgment debt;

3. That the presentation of an application to court for the acceptance of the advertised surrender is a discrete and severable process as opposed to being integrally bound up in a decision by any person in terms of s 4 of the said Act to give notice to surrender an estate.
4. That the publication of a notice of surrender does not constitute a confession of actual insolvency.
5. That the giving of a notice of surrender may legitimately be used to stop a sale in execution when there is no fixed intention by the execution debtor at the time of the publication of the notice to apply promptly to a competent court for the acceptance of the surrender.

3. The first, second, third and fourth respondents shall pay the applicant's costs of suit in the application, including the costs of two counsel; save that the applicant shall be entitled to recover only 60% of its taxed costs in respect of the drafting of its replying papers.
4. The application of Thilothabal Reddy for leave to intervene is struck from the roll with costs for lack of prosecution. The costs shall include the costs incurred by the applicant in drawing papers in opposition or response to the intervention application.

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