

SOUTH AFRICA / JUDGMENT

Mors and Another v Absa Bank Ltd and Others (26705/2013) [2014] ZAGPPHC 681 (5 September 2014)

[2014] ZAGPPHC 681**COURT**

North Gauteng High Court, Pretoria

BEFORE

Davis, AJ

CASE / FILE NUMBER

26705/2013

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NO:**

26705/2013

DATE: 5 SEPTEMBER

2014

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

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.a

[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 the 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 1, 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).

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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 published 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 impeccunious 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 ("C\VS") 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 Firststrand 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 *Firststrand 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 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..."

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;

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