REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 16117/11

(1) REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

…………………….. ………………………..
DATE SIGNATURE

In the matter between:

EDKINS, GRAHAM VERNON Applicant

and

THE REGISTRAR OF DEEDS,
JOHANNESBURG First Respondent

THE MASTER OF THE HIGH COURT
(JOHANNESBURG) Second Respondent

JACOBUS PETRUS FOURIE N.O.
In his capacity as Joint Trustee of the
Insolvent Estate of Talent Mthethwa
(Master's Reference: T3657/10) Third Respondent

MARIAAN BARNARD N.O.
In her capacity as Joint Trustee of the
Insolvent Estate of Talent Mthethwa
(Master's Reference: T3657/10) Fourth Respondent

ABSA BANK LIMITED Fifth Respondent

THE SHERIFF OF THE HIGH COURT
FOR THE DISTRICT OF JOHANNESBURG
SOUTH Sixth Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This opposed application essentially concerns the issue whether the purchaser of immovable property at a public sale in execution conducted by the Sheriff of the Court, is entitled to take transfer thereof in the following circumstances: where the registered owner of the immovable property subsequent to the sale in execution, but before transfer of the immovable property, published a notice of intention to surrender his estate in terms of sec 4(1) of the Insolvency Act No 24 of 1936 ("*the Insolvency Act*").

[2] The facts of this matter are straightforward and mostly common cause. However, the same cannot be said of the legal principles applicable to the facts.

THE PARTIES

[3] The applicant is a businessman in the area of residential property market. He says that he earns a living by purchasing residential properties which he either leases to third parties or re-sells such properties for a profit. The first respondent is the Registrar of Deeds, Johannesburg, whilst the second respondent is the Master of the High Court, Johannesburg. The applicant seeks no relief against the first and the second respondents. The third respondent and the fourth respondent are the joint trustees of the insolvent estate of Mr Talent Mthethwa, the registered owner and mortgagor of the immovable property in question, to whom I shall henceforth refer to as ("*the debtor*"). The third respondent and the fourth respondent are opposing the present application as indicated later herein. The fifth respondent is Absa Bank, the mortgagee of the immovable property under discussion ("*the bank*"). No relief is sought by the applicant against the bank. The final and the sixth respondent is the Sheriff of the High Court, Johannesburg, ("*the sheriff*"), who conducted the sale in execution of the immovable property in question.

The applicant seeks no relief against Sheriff.

COMMON CAUSE FACTS

[4]

4.1 The facts stated hereafter are either common cause or not seriously disputed. The debtor is the registered owner of the property described as Erf 64, The Hill Township, situated at 50 Ben Adler Road, The Hill, Johannesburg ("*the immovable property*"). The bank is the holder of a mortgage bond over the immovable property in the amount of approximately R1,1 m. During 2009 the debtor, for reasons unknown to the applicant, fell into arrears with the repayment of the bond instalments. The bank instituted action against the debtor in this High Court. On 18 February 2010 the bank obtained default judgment against the debtor, including an order declaring the immovable property to be specially executable. Subsequent to the aforesaid court order, and on 3 August 2010, (and not on 3 August 2009 as alleged by the applicant in para 4 of the founding affidavit), the immovable property was sold in execution to the applicant by the Sheriff. A copy of the Conditions of Sale is attached to the founding papers, as Annexure "GVE3". The applicant complied fully with all his obligations in terms of the Sale Agreement. Subsequently, it appears to have been 6 August 2010 (once more not 6 August 2009 as stated in the founding papers), the debtor published in the Government Gazette and the local

newspaper, respectively, a notice of his intention to surrender his estate in terms of the provisions of sec 4(1) of the Insolvency Act. On 3 October 2010 the voluntary surrender of the debtor's (now insolvent's) estate was accepted by the North Gauteng High Court, Pretoria, and placed under sequestration in the hands of the Master of the High Court (the second respondent).

4.2 On 3 September 2010, the third respondent and the fourth respondent were appointed as provisional joint trustees in the insolvent estates.

4.3 It is also common cause, and indeed apparent from the papers, that the immovable property sold by the Sheriff to the applicant before the relevant notices of voluntary surrender were published in the manner described above.

4.4 It is also not in dispute, as alleged by the applicant in para 31 of the founding affidavit, that at all relevant times hereto, he was completely unaware of the voluntary surrender of the insolvent's estate, the acceptance thereof, and/or the subsequent appointment of the third respondent and the fourth respondent as trustees in the estate. The papers suggest that even the Sheriff was not aware of this state of affairs just described. The Sheriff

has attached a confirmatory affidavit annexed to the founding affidavit, essentially confirming the truth and the correctness of the contents of the founding affidavit, "*insofar as it refers to me*".

4.5 On 3 August 2010 the applicant instructed conveyancers, Smit Sewgoolam Incorporated, to lodge the relevant transfer documents in the offices of the first respondent (the Registrar of Deeds), in order for the immovable property to be transferred into his name. However, the applicant was subsequently advised by the conveyancers that they were unable to lodge the registration of transfer due to the Registrar of Deeds' Conference Resolution with regard to transfer of a property pursuant to a sale in execution where the debtor was sequestrated after the date of sale in execution. It is necessary to reproduce the Registrar of Deeds' Conference Resolution 54/2009 which is as follows:

> "*If property was sold in execution and debtor is sequestrated after such sale, does the sequestration prevent the sheriff from transferring the property to the purchaser of the sale in execution?*
>
> *Resolution: Yes.*"

The Registrar further resolved that, "*once the sequestration order has been granted, only the trustee may pass transfer*

subject to the provisions of section 5 of the Insolvency Act".

4.6 The applicant alleges in the founding papers that the insolvent was, and should have been, aware at all stages of the attachment of the immovable property in question and of the subsequent sale in execution. In spite thereof, so the applicant continues to allege, the insolvent purposely decided to wait until after the conclusion of the sale in execution before he lodged an application for the voluntary surrender of his estate, and before the notices connected therewith were published.

4.7 As stated earlier in the judgment, all of the above facts are common cause or not seriously challenged. In fact, the third respondent and the fourth respondent, in the answering affidavit, which is rather brief, state that the factual allegations contained in the founding affidavit are not in dispute. I deal with the third and the fourth respondents' substantive legal contentions in the next paragraph below.

THE THIRD AND THE FOURTH RESPONDENTS' CONTENTIONS

[5] In short, the third respondent and the fourth respondent submit that, notwithstanding the sale in execution, the ownership of the immovable

property sold in execution vested in them upon their appointment as trustees, by virtue of the provisions of sec 20 of the Insolvency Act. Further that, the applicant's right to claim transfer of the property, prior to sequestration, was an unsecured personal right. In addition, the third respondent and the fourth respondent submit that, based on the principles pertaining to a *concursus creditorium*, which came into existence upon sequestration, the said respondents are enjoined to treat the claims of creditors with regard to their status prior to sequestration. That, as a result of the establishment of a *concursus creditorium*, the principles pertaining to executory contracts (uncompleted contracts) are not specifically dealt with by the Insolvency Act, and are, by way of analogy, also applicable to uncompleted sales in execution. The third respondent and the fourth respondent submit that it is they, as trustees, and not the Registrar of Deeds, who must decide the fate of the immovable property. For all these reasons, the third respondent and the fourth respondent confirmed that they have elected not to transfer the immovable property into the applicant's name.

SOME APPLICABLE LEGAL PRINCIPLES

[6] I now deal with some applicable legal principles in order to arrive at a consideration of the central issue in this application as set out in para [1] of this judgment. In short, whether the applicant is entitled to registration of transfer of the immovable property into his name. The starting-point seems to be Rule 46(13) of the Uniform Rules, which provides as follows:

> **"***(13) The sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of*

> *transfer, and anything so done by him shall be as valid and effectual as if he were the owner of the property.* "

The emphasis is on the word "*shall*", which suggests that it is peremptory for the Sheriff to give transfer to the purchaser upon fulfilment of the conditions of sale. For example, in *Souter v Norris* 1933 (A) 41, the Court was concerned with the interpretation of the provisions of sec 45 of the Patents Act No. 9 of 1996. At p 46 of the judgment, Curlewis JA said:

> "*Now the words 'but no such assignment shall be of force or effect unless registered at the Patent Office' are couched in the negative form and are prima facie peremptory.* "

In the present matter, the applicant, as purchaser in execution, has complied fully with all his obligations as required by the Sale Agreement. The material obligations of the applicant are contained in clause 7 of the Conditions of Sale. In particular, clause 7.4 provides that:

> **"***The purchaser shall pay all transfer duties, costs of transfer, and arrear rates, taxes and other charges necessary to effect transfer, upon request by the attorney for the Execution Creditor.* "

The Sheriff, in the confirmatory affidavit, attached to the founding affidavit, confirms the complete performance by the applicant. In any event, all of these facts are common cause.

[8] In *Simpson v Klein NO and Others NO* 1987 (1) SA 405 (W), the facts were briefly as follows:

> "*The applicant had purchased certain immovable property from a seller in terms of an Instalment Sale Agreement in September 1984. The applicant had paid the required deposit, had taken occupation, and had paid the monthly instalments into the seller's bank account until October 1985. However, unbeknown to the applicant, three writs of attachment had been issued against the property prior to his taking occupation. The property was sold in execution by the deputy-sheriff to the second respondent in February 1985. The seller's estate was then sequestrated in May 1985. At that stage, the property had not been transferred by the deputy-sheriff to the second respondent. The attitude of the first respondent (the trustee of the seller's insolvent estate) was that he was obliged to pass transfer of the property to the applicant, provided that the applicant performed his obligations in terms of the deed of sale. The second respondent, on the other hand, contended that he was entitled to transfer in that the seller's dominium in the property had ceased upon the sale in execution and, since then, the dominium had vested in the deputy-sheriff from whom he had purchased the property.* "

In finding for the applicant, Kriegler J at p 411B-C said:

> "*Where one is dealing with movables, ownership would pass upon delivery thereof, ie by the deputy-sheriff to the purchaser at the sale in execution. In the case of immovables, however, ownership in the attached property can not pass during the sale in execution. It only passes subsequently upon formal transfer of the property by the deputy-sheriff to the purchaser in execution.*"

The facts in the latter case are clearly distinguishable from those in the present matter. Whereas in the present matter, the applicant has complied with all his obligations under the sale agreement, in *Simpson v Klein NO* the applicant had paid a deposit, taken occupation, and had been paying monthly instalments. As argued by counsel for the applicant, the provisions of Rule 46(13) quoted above, make provision for two distinct transactions in regard to execution levied against immovable property, namely the sale of the property and the transfer thereof. See *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* 1997 (1) SA 764 (D) at 777G-778D.

[9] In dealing with the duties of the Sheriff pursuant to a sale in execution of immovable property, the Court in *Goedhals v Deputy Sheriff of Albany* 1913 CPD 108, at 109 said:

> "*The Sheriff reports to the Court, and the sale is then confirmed if there are no objections, in order that the property may be transferred to the purchaser. Under the Rules of Court, the duties of the Sheriff are exactly laid down. He may be liable for negligence in performing such duties, and successful actions have been brought where negligence has been proved, but so long as he follows out the Rules he is doing all that is required of him, because, as has been said, he is merely the creature of statute.*"

All the above principles confirm unequivocally that the Sheriff in the present matter, has a duty to transfer the immovable property to the applicant. In *De Jager NNO v Balju Bloemfontein-Wes en Andere* (407/10) delivered by C van Zyl J on 4 June 2010, at para [27]:

> "*Verder meer blyk dit duidelik uit die bepalings van Reël 46(13) dat die balju verplig is om oordrag van die eiendom aan die koper te gee teen bepaling van die koopprys en die nakoming van die verkoopsvoorwaardes.*"

[10] For the reliance of the view that, notwithstanding the sale in execution, the ownership of the immovable property sold in execution, vested in them, the third respondent and the fourth respondent rely on the provisions of sec 20 of the Insolvency Act.

[11] However, prior to dealing with the provisions of sec 20 of the

Insolvency Act, I must observe, *en passant,* that the third respondent and the fourth respondent also contend that the Registrar of Deeds (first respondent) is incapable of deciding the fate of the property as he is obliged to act on the instructions of the third respondent and the fourth respondent. This, in essence, and partly, puts paid to the possible force and effect of the Registrar of Deeds' Conference Resolution 54/2009 citing the reason for the inability to transfer the property to the applicant, as set out in para [8] of this judgment. In my view, the Registrar of Deeds' Conference Resolution 54/2009 represents only his view and interpretation of the legal position. It is plainly intended to serve as a practical guideline only. The view cannot supersede a court's function and discretion.

11.1 It is settled practice that generally, in matters involving registration of property transfers, the courts attach great importance to the reports and views of the Registrar of Deeds. Section 3 of the Deeds Registries Act 47 of 1937 deals with the duties of the Registrar. Among these are the provisions of sec 3(1)(z) which provide to: "*implement practice and procedure directives that are issued from time to time by the Chief Registrar of Deeds*". It appears to me that the Conference Resolution of the Registrar concerned in the instant application falls under this category of the Registrar's duties.

11.2 The learned author H.S. Nel in *Jones Conveyancing in*

South Africa, 4th ed, p 13, makes the point clear: "*Nevertheless, although a registrar naturally dare not usurp the functions of the courts in determining the rights and obligations of parties in dispute on registered matters, on matters about to be registered it seems to be a different story, for there is no doubt that his opinions carry a good deal of weight …*" Indeed, it is not unusual for courts, in appropriate cases, to set aside decisions or resolutions of the Registrar of Deeds. More recently, in *South African National Roads Agency Ltd v The Chief Registrar of Deeds* 2010 JDR 0188 (GNP), at para [23], Makgoba J said: "*The resolutions adopted by the various Registrars of Deeds (i.e. resolution 10/2008 in respect of vesting transfers and resolutions 13/2005 and 9/2007 in respect of expropriation transfers) clearly fall within the ambit of the definition of an 'administrative action' in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The action falls to be reviewed under the provisions of section 6(2)(d) of PAJA. The Registrar of Deeds clearly erred in law in adopting the resolutions which they did.*" Indeed, the third and the fourth respondents concede in the answering papers that: "*It is not for the Registrar to decide the fate of the property.*"

THE EFFECT OF SEQUESTRATION ON AN INSOLVENT'S PROPERTY

[12] Section 20 of the Insolvency Act provides as follows:

"*(1) The effect of the sequestration of the estate of an insolvent shall be –*

(a) *to diverse the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him; {**24, 81, 178, 186, 304**]*

(b) *to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate; [**85, 86, 180**]*

(c) *as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs; [**86, 112**]*

(d) *to empower the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the court to order his release, on such conditions as it may think fit to impose. [**87**]*

(2) For the purposes of sub-section (1) the estate of an insolvent shall include -

(a) *all property of the insolvent at the date of*

the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment; ***[82]***

(b) *all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three. [****82, 304****].*"

[13] The effect of sequestration is trite. In the Law of Insolvency, Catherine Smith, 3rd ed, at p 81:

> "*The main object of the Insolvency Act is to provide for the liquidation of the insolvent's estate and secure an even distribution of his assets amongst the creditors in accordance with the order of preference provided for by the Act. It is a trustee's duty to fulfil this object. He must gather together the assets, realise them and distribute the proceeds amongst the creditors. In order to render it possible for the trustee to do so and at the same time to ensure that the assets of the insolvent are preserved the Act provides that one of the effects of the sequestration of the estate of an insolvent is to divest him of his estate and to vest it in the Master and subsequently in the trustee after he has been appointed.*"

In *Mackay v Fey and Another* 2006 (3) SA 182 (SCA) at para [6] Scott JA said:

> "*In terms of s 20, the effect of sequestration is to vest the insolvent's estate in the Master until a trustee has been appointed and, upon the latter event, to vest it in the trustee. The estate of the insolvent is, moreover, stated as to include all property which the insolvent may acquire or may accrue to him or her during the sequestration, except as otherwise provided in s 23.*"

See also *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at paras [12] and [13].

[14] The provisions of sec 20 of the Insolvency Act, as are the provisions of sec 5 of the same Act, which I deal with later herein, and in the context of the present matter, require that in their construction, the plain meaning of their language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly. See *Poswa v Member of the Executive Council for Economic Affairs, Environmental Tourism, Eastern Cape* 2001 (3) SA 582 (SCA), at para [10]. With this in mind, it is clear that the legislature could not have intended to nullify a valid sale in execution which occurs before an insolvent surrender his estate in terms of the provisions of sec 4(1) of the Insolvency Act. There is no evidence that the estate of the insolvent ever vested in the Master at the time of the sale in execution before the appointment as trustees of the third respondent and the fourth respondent. There is no evidence that either the applicant or the Sheriff were aware of the insolvent's notice to surrender his estate, which occurred after the sale in execution. If the Sheriff was aware of the insolvency, he or she would probably have complied with the provisions of sec 20(1)(c) which provide, as stated above, that:

> **"***As soon as any sheriff or messenger, … becomes aware of the sequestration of the insolvent estate, to stay that execution, unless the court otherwise directs.* "

In *Ex Parte Eastern Province Building Society* 1931 (W) 102 at 105:

> "*Section 20(1)(c) provides:*
>
> *'The effect of the sequestration of the estate of an insolvent shall be –*
>
> *(c) as soon as any Sheriff or Messenger, whose duty it is*

> *to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the Court otherwise directs.*'

> *It seems clear that the section gives the Court power to order that the execution shall be continued or proceeded with. Execution covers the power to sell and, ordinarily, the power to sell includes the power to make delivery of what is sold.* "

It is common cause that there is no evidence at all regarding the circumstances under which the decision was made by the insolvent in the current matter to apply for the surrender of his insolvent estate. It must therefore be reasonably accepted that the insolvent knew full well about the attachment and the imminent sale in execution, but despite this fact, he waited until after the completion of the sale in execution before he decided to apply for the surrender of his estate, and prior to the publication of the relevant notices of surrender. He was plainly not *bona fide*. There is also no evidence that the applicant, as purchaser in execution, acted in bad faith when he purchased the property. See in this regard *Gibson NO v Iscor Housing Utility Co and Others* 1963 (3) SA 783 (T), at 787A-B. In these circumstances, to deny the execution purchaser to take transfer would seriously affect the credibility and genuineness of sales in execution.

[15] In support of his contentions, counsel for the applicant relied rather extensively on *De Jager NNO v Balju Bloemfontein-Wes en Andere* (*supra*). The facts in that matter were briefly as follows. The two applicants were the trustees of Remi's Property Trust. The latter was the registered owner of certain immovable property. The second respondent was the Standard Bank

of South Africa ("*the bank*"), which held a mortgage bond over the immovable property. When Remi's Property Trust defaulted in regard to the repayment of the bond, the bank foreclosed, obtained summary judgment and a declaration of the immovable property specially executable, and a writ of execution. The immovable property was attached on 31 August 2009. On 20 November 2009, the sale of the immovable property by public auction to be held on 9 December 2009, was published in the Government Gazette. On 9 December 2009 the immovable property was sold by public auction to the first respondent, Germar Trust. The fourth respondent and the fourth respondent, as trustees of Germar Trust, had complied with all the conditions of the sale in execution, and paid in full the purchase price to the sheriff.

15.1 As in the present matter, the applicants in the *De Jager NNO*, on 15 January 2010, published a notice to surrender in terms of sec 4(1) of the Insolvency Act in the Government Gazette and relevant newspaper. The applicants intended to apply to the High Court on 11 February 2010 for the surrender of the estate of Remi's Property Trust.

15.2 On 18 January 2010 the applicants' attorneys of record addressed a letter to the Sheriff, informing of the notice to surrender in terms of sec 4(1) of the Insolvency Act. The Sheriff was also requested not to proceed with the registration of the transfer of the immovable property into

the name of the purchaser, i.e. Germar Trust.

15.3 The bank's attorneys adopted the standpoint, which was conveyed to the Sheriff, that the publication of the notice to surrender in terms of sec 4(1) of the Insolvency Act, only prohibited a sale in execution after the publication thereof, and not a transfer of property in which the sale in execution occurred prior to the publication of the notice to surrender. The applicants subsequently brought the application to interdict the transfer on urgent basis.

15.4 In dismissing the application on the basis namely, that the applicants had failed to make out a case for the interim interdict halting the transfer process, Van Zyl J, made a number of findings on several issues which are relevant to the present application.

15.5 In regard to ownership of the immovable property, and in reference to *Simpson v Klein and Others (supra*) at 411B, the learned judge came to the conclusion that although ownership before transfer vested in Remi's Property Trust, that did not *per se* confer any right or *prima facie* right on the applicants to prevent the transfer of the property. The reason was that the applicants had no authority ("*seggenskap*"), over the property in regard to

the sale thereof at a public auction in execution. Based hereon, counsel for the applicant in the instant matter, argued that the insolvent's present ownership (the property is still registered in his name) of the immovable property, does not confer on him any right. Consequently, whatever entitlement the insolvent has, also does not give the third respondent and the fourth respondent any rights to deal with the immovable property. It was further argued that the third respondent and the fourth respondent, as joined trustees of the insolvent estate, as well as the insolvent, in fact, do not have any interests in this application and have no *prima facie* right based on substantial law that deserves protection, as was found in paras [30] to [31] of the *De Jager NNO* judgment.

[16] In the answering affidavit, the third respondent and the fourth respondent also rely on the principles pertaining to a *concursus creditorium* for the proposition that the immovable property vested in them. And further that they are enjoined to treat the claims of creditors with regard to their status before sequestration. The third respondent and the fourth respondent contend that they act in the best interests of the *concursus creditorium* ("*the algemene liggaam van skuldeisers*"). The fact that the best interests of the general body of creditors should be considered is trite. In *Uys and Another v Du Plessis (Ferreira Intervening)* 2001 (3) SA 250 (C), the Court had to do with an

opposed application for provisional sequestration. In holding that an applicant for a provisional sequestration order is entitled, in certain circumstances, to refer to and rely on all the papers before the Court, including those of an intervening creditor, the Court at p 254B said:

> "*At all stages in sequestration applications the Court must consider the interests of the general body of creditors. Furthermore, it is well established that the Court takes a practical view in such matters (see too the case of Jhatam v Jhatam (supra) at 38B.* "

It is also so that the Courts tend to consider the body of creditors solely because it is a creditor that launches the applicable application. In an application for the surrender of the estate of a natural person, as is the case in the present matter, such a natural person has no obligation to the *concursus creditorium* in his intended application for surrender. As argued by counsel for the applicant, there is no *nexus* between the third respondent and the fourth respondent on the other hand, and the insolvent and the possible interests of the body of creditors on the other hand. This was also the finding in *De Jager NNO* at paras [35] and [36].

[17] The third respondent and the fourth respondent have, in their opposition to this application, furnished no details of the status of the insolvent's estate. There are no details of who the other creditors making up the *concursus creditorium* will be. What is however, clear from the founding papers is that the bank (the fifth respondent), is the holder of a mortgage bond over the property in the amount of R1,100 (One Million One Hundred Rand). The applicant, as execution purchaser, bought the property for R530 000,00

(Five Hundred and Thirty Thousand Rand). On these basis, and as argued by counsel for the applicant, it appears that in the event that the market value of the immovable property is taken into account, the sale thereof would not cover the secured debt of the bank. There will, accordingly, be no benefit to the general body of creditors. In *Master of the Supreme Court v Nevsky* 1907 TS 268, the mortgagor advertised his intention to surrender his estate a day before the advertised date of an execution sale of the mortgaged property. There were two mortgage bonds registered over the property. In refusing the postponement of the sale which was suggested to realise more at a later date, the Court at p 269, said:

> "*The determining considerations are that the proceeds are not likely to be sufficient to satisfy the two bonds, and that there is nobody likely to be benefited by holding over the sale.* "

In the light of the above, the conclusion that the third respondent and the fourth respondent have not proved, on a balance of probabilities, a case to justify their decision in not accepting the sale agreement between the applicant and the sixth respondent at the sale in execution.

THE PROVISIONS OF SECTIONS 4(1) AND 5(1) OF THE INSOLVENCY ACT

[18] I deal with the provisions of secs 4(1) and 5(1) of the Insolvency Act, which provide, respectively, as follows:

"*4(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: [**13, 14, 26, 74, 78**] …*"

"*5(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 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 000,00, 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. [**23, 24**]*"

[19] In regard to sec 4(1), the learned authors in Mars, *The Law of Insolvency in South Africa*, 9th ed, p 49 state:

"*The purpose of such notice is to ensure that, as much as this may be possible, his or her creditors receive timeous notice of the debtor's intention to apply for his or her estate to be sequestrated.* "

At p 53:

"*The publication of the notice of surrender has many important consequences, and should not be resorted to by a debtor merely to gain time.* "

Reference is then made to *Fesi and Another v Absa Bank Ltd* 2000 (1) SA 599 (C), where p 502, the Court said:

"*It would seem that all was well for the applicants until the sale of 22 March, when respondent was foreclosing on the bond, and that they*

> *started movement for the notice of surrender to be published, (as it was) on the 25 June 1999 in the Government Gazette and the local newspaper. The probabilities favour the assertion by respondent that the surrender is being made to prevent the sale and to avoid harassment by creditors. It is not acceptable that applicants should take that course. It is against the object of the Insolvency Act.* "

In my view, what was frowned upon in the above quotation, is in fact exactly what occurred in the present matter, as proved by the common cause facts, set out earlier in this judgment. The insolvent conveniently concealed the true facts until well after the sale in execution when he published the notices to surrender his estate. See *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 p 155, at paras [12] and [13].

[20] I deal with the provisions of sec 5(1) of the Insolvency Act. It is significant that the third respondent and the fourth respondent confine themselves to the provisions of sec 20 of the Insolvency Act only in this application. Once more, in interpreting the provisions of sec 5(1), the proper construction is as set out in *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape, (supra).*

[21] Section 5(1) makes it plain that:

> "*After the publication of a notice of surrender … it shall not be lawful to sell any property of the estate in question …* "

It is common cause that the sale in execution in the instant matter occurred before the publication of the notice to surrender. There is no evidence that either the Sheriff or the applicant were aware of the notice to surrender, as envisaged in sec 5(1), i.e. "*… unless the person charged with the execution of*

the writ or other process could not have known of the publication". See also sec 20(1)(c) of the Insolvency Act. In *Ex Parte Pretoria Hypotheek Maatskappy* 1933 OPD 137, the Court refused to grant an order for the postponement of a sale in execution pending publication of the notice to surrender which was due to take place the day after.

[22] Counsel for the applicant argued, correctly in my view, that in terms of sec 5(1) of the Insolvency Act, provision is made that in the event that the sale in execution takes place before the publication of the notice of voluntary surrender, the transfer of the property can still take place. The publication of the said notice can therefore effectively stop a sale in execution that has not taken place but not the transfer of the property after the sale had taken place. Further that the effect of sec 5(1) above, is that the publishing of the notice of surrender deprives the creditors of the petitioner of the right to execute against he debtor's property. In this regard, counsel for the applicant relied on *De Jager NNO (supra)* at para [45] where the Court said:

> "*Die doel van artikel 4(1), wanneer dit saamgelees word met artikel 5(1), is so dat daar nie te lank op krediteure se regte inbreuk gemaak word nie, aangesien artikel 5(1) die effek het dat, soos in Ex Parte Oosthuysen 1995 (2) SA 694 (T) op 698B-C deur 'n Volbank beslis:*
>
> > '**By the petitioner's act alone in publishing the notice of surrender, creditors are deprived of the right to execute against the debtor's property.**'"

[23] It is also correct, as counsel for the applicant submitted, that when the wording of sec 5(1) is compared with the wording that is used elsewhere in the Insolvency Act, it becomes clear that the legislature consistently draws a distinction between the processes of execution, conclusion of an agreement

of sale and transfer of property. See sect 5(1); sec 20(1)(c) and 34(1) read with sec 34(3). In addition, sec 35 of the Insolvency Act distinguishes clearly between the conclusion of a contract for the acquisition of immovable property and where the *merx* has not been transferred. It was also contended on behalf of the applicant that, having the above distinction in mind, it is clear that if the lawmaker indeed intended to exclude the transfer of property which had already been sold in execution before the publication of the surrender notice (as is the case in the present matter), the lawmaker would specifically have made reference to transfer or transport thereof, specifically in the light of the wording of sec 5(1) of the Insolvency Act. The words "*to sell*" in sec 5(1), so the applicants' argument proceeded, are clearly applicable to actions which would take place in future after the publication of the notice of surrender; that it was not the intention of the legislature to include in the prohibition ("*verbod*"), property that had already been sold at the stage where publication in the Government Gazette had taken place; and that the wording of sec 5(1) prohibits the sale and not the transfer of the property. As stated before, in the circumstances of the present matter, to deny the execution purchaser to take transfer, would affect seriously the credibility and genuineness of sales in execution, especially from the perspective of the unsuspecting and vulnerable public.

[24] In my view, the argument advanced on behalf of the applicant, especially in regard to the proper interpretation of sec 5(1) of the Insolvency Act, has considerable merit as against that of the third respondent and the fourth respondent, as indicated later herein. What is of significant persuasion

is the reference to the finding in *De Jager NNO* at para [55], where there was reference with regard to *Amod v The Messenger* 1909 TS 13, at 16-17 where it was decided that:

> "*As to an attachment subsequent to a notice of insolvency, sec 4 of the Insolvency Law only prohibits a sale after the notice of surrender, and says nothing about further attachment ... I think the argument that the creditor is entitled to all the remedies which are not prohibited by the notice of surrender is one entitled to weight, and that the notice of surrender should not have the effect of tying the creditor's hands and yet leave the debtor in full possession of his assets with power to alienate them.*"

At para [56] in *De Jager NNO*, the learned judge justified the conclusion reached by saying:

> "*Bogemelde gevolgtrekkings is ook in ooreenstemming met die Meester se siening van die regsposisie. Die Meester se verslag, gedateer 11 Februarie 2010, lees onder andere as volg:*
>
> '(3) Artikel 5 van die Insolvensiewet, 24 van 1936 hanteer die staking van eksekutorale verkopings van goed na publikasie van 'n kennisgewing van boedeloorgawe. Aangesien die verkoping in die geval plaasgevind het voordat die aansoek om boedeloorgawe gedoen is, is dit my submissie dat die artikel nie in die geval toepassing vind nie.
>
> *(4) Mars, The Law of Insolvency in South Africa, 9de uitgawe, par. 3.10 bespreek die situasie. Sou die oordrag van die eiendom in die geval reeds plaasgevind het, dan moes die opbrengs aan die balju oorbetaal word. Indien die boedeloorgawe op die stadium wanneer die balju die opbrengs ontvang het nog nie aanvaar is nie dan sal die balju die opbrengs aan die eksekusieskuldeiser moet oorbetaal. Indien die boedeloorgawe wel aanvaar is dan moet hy die fondse oorbetaal aan die kurator.*
>
> *(5) Dit is dus my submissie dat die plasing van 'n kennisgewing van boedeloorgawe wel 'n eksekusieverkoping kan stuit, maar nie 'n oordrag nadat die verkoping reeds plaasgevind het nie.*
>
> *(6) Ek berus my egter by die beslissing van die Agbare Hof.*'"

[25] On the other hand, the third respondent and the fourth respondent argued that the interpretation of sec 5(1) contended for by the applicant is incorrect. In the heads of argument, the third respondent and the fourth argued that:

> "*Section 5(1) of the Insolvency Act prohibits the sale of any property of the estate in question after publication of a notice of voluntary surrender.*"

Further, that the sec does not deal, and does not purport to deal with the fate of an execution sale that had not been completed on the date of sequestration, and finally, that sec 5(1) is irrelevant for the purposes of the adjudication of the instant application. There is no reference to any authority, regrettably for the argument advanced. As demonstrated above, the contentions of the third respondent and the fourth respondent cannot be the correct interpretation of sec 5(1). The conclusion arrived at in para [57] in the *De Jager NNO* matter that:

> "*Waar die verkoping in die onderhawige geval dus voor die kennisgewing van publikasie van boedeloorgawe plaasgevind het, stuit sodanige publikasie na my mening nie die oordrag van die eiendom nie,*"

was with respect, correct in my view. The reliance by the applicant on the findings of *De Jager NNO,* where relevant, cannot be faulted. The interpretation and construction of sec 5(1) of the Insolvency Act as contended for by the third respondent and the fourth respondent, if correct, may offend

the applicant's right to property as enshrined in sec 25 of the Bill of Rights, as well as his right to earn a living as protected by sec 22 of the Bill of Rights.

CONCLUSION

[26] I conclude that the agreement of the sale in execution in the present matter was concluded before the publication of the notices of surrender of the insolvent's estate as envisaged in sec 4(1) of the Insolvency Act. The insolvent knew full well that the bank had foreclosed, obtained default judgment, a writ of attachment, and the imminent sale in execution of the immovable property, but he deliberately waited until after the sale to publish his intention to surrender his estate. As argued by the appellant, at that stage of publication of the notices of surrender, the insolvent had no authority over the immovable property. At the time of the appointment of the third respondent and the fourth respondent as trustees, they therefore had no right to prevent transfer of the property. They could not have had any. The applicant has succeeded to prove, on a balance of probabilities, that he is entitled to the transfer of the immovable property into his name.

COSTS

[27] There is no compelling reason why the costs should not follow the result. When the matter first came before me on 20 September 2011, it was postponed *sine die* with no order as to costs. The present application was opposed by the third respondent and the fourth respondent only in their capacities as joint trustees of the insolvent estate.

ORDER

[28] In the result the following order is made:

28.1 An order is granted in terms of prayers 1, 2 and 3 of the notice of motion dated 18 April 2011.

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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DATE OF HEARING	20 OCTOBER 2011
DATE OF JUDGMENT	9 MARCH 2012