IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case no: 4653/15

In the matter between:

RAPP VAN ZYL INC	First Plaintiff
RENATE RAPP	Second Plaintiff
CHANTEL VAN ZYL	Third Plaintiff
and	
FIRST RAND BANK	First Defendant
JOHANNA DOROTHEA LOCHNER	Second Defendant
RORICH, WOLMARANS & LUDERITZ INC	Third Defendant
RAYNAULT MEINTJIES	Fourth Defendant

JUDGMENT DELIVERED (VIA EMAIL) ON 28 APRIL 2022

SHER, J:

1. The plaintiffs, an incorporated firm of attorneys and their then directors have sued a bank and one of its employees, and a firm of attorneys and one of their now ex-directors, for damages in the combined sum of R7.8 million for an alleged defamation arising from certain statements which were made in the founding

affidavit of an application which the bank brought in this Court for an interdict, in June 2012.[1]

2. The defendants deny that the statements were defamatory and, in the alternative, have pleaded that the statements were not unlawful as they were made during legal proceedings in the discharge of their right and duty to seek the relief which they claimed therein and were relevant thereto, and were accordingly made on a privileged occasion.

3. Pursuant to an agreed order, in terms of rule 33(4) certain stated issues of liability are to be determined first and those pertaining to *quantum* are to stand over.

The evidence

4. Chantel Van Zyl (3rd plaintiff) and Renata Rapp (2nd plaintiff) testified on behalf of the plaintiffs. The defendants presented the evidence of Raynault Meintjies (the 4th defendant) only. The facts are largely common cause and the exposition which follows is drawn from the evidence and the papers in the interdict application.

5. Upon being admitted as an attorney in 2006, Meintjies was employed by the 3rd defendant. Towards the end of 2009 the firm started doing work for the 1st defendant bank, after he was approached by the Manager of its Home Loan: Insolvency section, Johanna Lochner (the 2nd defendant) to assist it. Meintjies regularly advised the bank on insolvency applications, including applications for voluntary surrender which were brought by debtors who had mortgage loans with it.

6. Over the course of time the bank noted a dramatic increase in the number of such applications by debtors against whom it had obtained judgments which remained unsatisfied and in respect of which the bank sought to execute against their immovable properties. It picked this up from notices of surrender which were published weekly in the Government Gazette, in terms of s 4(1)[2] of the

[1] Under case no.10978/12.

[2] Read together with Form A of the First Schedule.

Insolvency Act.[3] These publications often occurred shortly before sales in execution were due to take place.

7. The notices would commonly contain particulars of the dates and divisions of the High Court at which such applications were to be made, and of the applicants, who were identified by their names and identity numbers, and would provide the dates when, and the particulars of the Master's office at which, the applicants' prescribed statements of affairs would be lodged for inspection by creditors.[4] Where the applicants were represented by attorneys or agents their particulars and contact details would also usually be supplied. A spreadsheet which set out the details of the surrender applications which were to be brought by the bank's judgment debtors was forwarded to Meintjies on a weekly basis and depending on the bank's instructions (given their record of the debtors' circumstances), he would obtain a copy of their intended applications, which he would then assess, in order to advise the bank whether to oppose them or not.

8. Towards the end of 2010-beginning 2011 he noticed a peculiarity in the wording of certain surrender notices in the Gazette whereby the erf or title deed numbers of the applicants' immovable properties were being provided, but no contact details, either for the applicants or their agents. In this regard almost all the s 4(1) notices he had surveyed over the years had at least provided some contact details for the applicants or their agents, and hardly ever an erf or title deed number. When following up on these odd applications at the various seats of the High Courts at which they were supposed to be brought he noted that in each of these matters, without exception, the applications were not being moved on the appointed dates, as they had not been enrolled. This resulted in considerable inconvenience to the bank and unnecessary expenses to it, as sales in execution had to be cancelled and wasted sheriff's and attorney fees were incurred, and the sales had to be re-advertised in the Gazette for a later date.

9. The sales had to be cancelled because, once a s 4(1) notice of the intended surrender of a debtor's estate is published in the Gazette a sale in execution of

[3] Act 34 of 1936.

[4] In accordance with ss 4(3)-(6) read together with Form B.

the debtor's property cannot proceed, as s 5(1) of the Act stipulates that upon the publication of such a notice it is not lawful to sell any property that falls within the debtor's estate, unless a Court orders otherwise. The rationale for the prohibition is that once a debtor finds herself in insolvent circumstances and gives notice of her intention to sequestrate herself the assets which are in her estate are to be preserved so that they may form part of the total assets which are to be divided amongst the creditors in an orderly fashion, so that no single creditor is unduly preferred or advantaged at the expense of others.

10. On further investigation it became apparent that in several instances even a second or third scheduled sale in execution in respect of certain of these judgment debtors had to be cancelled, because second and third notices of intention to surrender had been published at their instance without the expected applications for the surrender of their estates being lodged. It was thus evident that this was a pattern of behaviour and no accidental coincidence, and Meintjies concluded that it was part of a concerted and deliberate stratagem to frustrate judgment creditors such as the bank from being able to execute against their debtors, and he suspected that these notices emanated from a common, organized source. In this regard he pointed out that it was beyond coincidence for different debtors of the bank, as laypersons, to be publishing notices of intention to surrender their estates in an identical format viz. one in which they provided their names and identity numbers and no contact details but happened to provide the erf and/or title deed numbers of their immovable properties. He therefore set about determining who was behind this.

11. On tracing some of the applicants in these matters and contacting them, he established that they were being assisted by one Johannes Muller, the sole director of 3 interrelated entities known as Consumer Guardian Services (Pty) Ltd ('CGS'), Consumer Verification Services (Pty) Ltd ('CVS') and Securibond (Pty) Ltd.

12. After informing Lochner of this he was provided with copies of covering letters in respect of certain of these debtor applicants which emanated from a Cape Town-based firm of legal practitioners, Appoles attorneys, which had been addressed

to several of the bank's foreclosure attorneys who were dealing with scheduled sales in execution. The letters, which adopted a standard format, sought to inform the bank, on behalf of the debtors concerned, that a surrender notice in terms of s 4(1) of the Insolvency Act had been published in the Gazette on a certain date and drew its attention to s 5(1) of the Act, the provisions of which were quoted verbatim, and the bank was requested in view thereof to confirm that the sales in execution which had been scheduled in respect of the debtors' immovable properties would be cancelled. The letters were commonly sent a few days before the auctions were to be held, but in certain instances they were sent on the day of the auction itself.

13. Given that Appoles purported to be acting on behalf of debtors who were being assisted by Muller and CGS/CVS, Meintjies deduced that he was acting at their instance and behest. Consequently, on the instructions of the bank, on 7 April 2011 he addressed a joint letter to Appoles and to CGS in which he averred that they were utilising the machinery of the Insolvency Act for purposes for which it was never intended, by causing surrender notices to be published whereby creditors were being notified that applications would be made for the voluntary surrender of debtors' estates, without any actual intention of applying for such surrenders. The notices were being published solely with the intention of stopping or cancelling sales in execution which had been scheduled to take place in respect of properties on which creditors had foreclosed, thereby delaying the execution process to afford debtors and CGS time to pursue 'other avenues', instead of the debtors' sequestration.

14. In this regard it appeared that once a scheduled sale had been cancelled, pursuant to a notification of the publication of a s 4(1) notice in respect thereof, CGS/CVS would come forward and inform the bank that they had been mandated to conduct a forensic audit of the debtor's mortgage loan account, with a view to ascertaining whether they had been overcharged in respect of interest and/or bank charges, and the bank was warned that in such event the judgment which had been obtained and on which the bank sought to rely, would be rescinded and action would be instituted for unjust enrichment.

15. Consequently, Meintjies alleged that the practice which Appoles and Muller and his entities were engaged in constituted an abuse of the Insolvency Act, with a view to frustrating the bank in executing judgments it had lawfully obtained. They were accordingly requested to provide a written undertaking, within 7 days, that they would cease and desist from continuing with this and from publishing any further notices to surrender and would withdraw any pending notices which had not yet been published in the Gazette, failing which 3rd defendant had instructions to approach the High Court on an urgent basis for the appropriate relief. No such undertaking was forthcoming.

16. But on the same day that the letter was sent, Muller contacted Meintjies telephonically, at which time he confirmed that CGS had given Appoles instructions to publish certain s 4(1) notices, on behalf of its 'clients'. He claimed that the reason why their surrender applications had not been proceeded with, was because they had not paid what was owing in respect of such services. He conceded that it was 'against the law' to publish such notices, without proceeding with the requisite applications in respect thereof.

17. After an exchange of correspondence in which Muller contended that CGS and Appoles were not engaged in any unlawful conduct and were making legitimate use of the provisions of the Insolvency Act, it was decided in May 2011 that an application should be brought for an interdict. As this was to be a substantive (as opposed to a 'Mickey Mouse' (sic)) application which was aimed at putting a stop to an expansive, nationwide 'scheme', it was considered necessary to obtain a complete set of supporting documents from the bank's panel of mortgage and foreclosure attorneys, which would establish the existence thereof over a period, to the satisfaction of the Court. Such documents would include copies of s 4(1) notices and the covering letters whereby the bank's attorneys were notified of their publication and were requested to confirm the cancellation of the sales, as well as copies of the court rolls in respect of such matters, which evidenced that notwithstanding publication of the notices the intended surrender applications were never brought on the dates stipulated.

18. Over the next 6 months a large volume of supporting documentation was accumulated and eventually towards the end of the year-beginning 2012 Meintjies was satisfied that what they had was sufficient, whereupon he instructed counsel to attend to the drafting of papers for an interdict. Despite this, and for reasons which were never properly and adequately explained[5] it appears that the application was only launched on 5 June 2012, a year and 2 months after the letter of demand that was sent to CGS and Appoles, in which they had been warned that unless they desisted an application would be launched as a matter of urgency. Even allowing for the fact that the founding affidavit was 91 pages long, to which were attached approximately 1150 pages of annexures, there is to my mind no reason why, had the matter been as urgent as was alleged, the application could not have been launched (if necessary, in a less prolix from) within a month or two after the letter of demand had gone out in April the previous year, and it was surely not necessary to have taken so long to get the papers out. Unusually, in addition to Muller and his various companies both Appoles attorneys and the plaintiffs were also cited as respondents in the application. From the evidence it appears that the plaintiffs were joined as parties in the proceedings as a result of the following circumstances.

19. Sometime after counsel was briefed to attend to drafting the papers Meintjies was contacted by one Marianne Brummer, who had been employed by CGS as a consultant between December 2010 and 22 May 2011. She advised him that she was in possession of information which was pertinent to the matter. He duly referred her to his counsel, who took an affidavit from her (which was deposed to on 18 May 2012), which was duly annexed to the papers in the application together with a string of emails which had been exchanged between her and one Victor Orpen, on 16 and 17 June 2011.

20. In her affidavit Brummer provided details of how CGS went about its business. In this regard, much in the same way as the bank's employees did, CGS employees would also scrutinize the Gazette on a weekly basis. But whereas the bank was

[5] The explanation that was provided was that it took (two) counsel about 5-6 months to 'actually' draft the papers, as they were going through the documents as they came in, 'collating' the annexures and 'preparing' the affidavit.

on the lookout for notices that were being given by judgment debtors in terms of s 4(1) of the Insolvency Act of their purported intention to surrender their estates, CGS was interested in the earlier, weekly notices of scheduled sales in execution which were being published in respect of such debtors. From the particulars which were provided in these notices and a deeds search CGS was able to obtain particulars of the debtors' identities and contact details and of their immovable properties which were to be sold in execution, as well as particulars of the execution creditors and their attorneys. Armed with this information CGS consultants would then contact the debtors and offer to assist to 'save' their properties, by causing a notice to be published in the Gazette which would compel the sheriff legally to cancel the sale. Although the notice would purport to be a notice of their intention to make application for the surrender of their estates, they were assured that this would not be done, and the purpose thereof would merely be to stop the sale in execution. According to CGS this would prevent the bank from taking any further legal proceedings and provide the debtors with time to 'sort out' their affairs.

21. Although the actual cost for the publication of a s 4(1) notice by the government printers was only R 69, the minimum fee which was quoted for such a service by CGS started at R 4000 and escalated at the rate of R 1000 for every R 100 000 by which the balance of the debtor's outstanding judgment debt exceeded R 500 000. For an additional fee of between R 3000 and R 4000 CGS also offered to assist with a forensic 'investigation' of the debtor's mortgage loan account with a view to determining whether there had been any overcharging in respect of interest or bank charges.

22. Once the debtor had signed an agreement and paid the fee required, CGS would instruct Appoles, who shared the same offices as it did, to 'execute the mandate' i.e. to cause the sale in execution to be cancelled. He did this by sending letters notifying the bank's attorneys of the publication of the surrender notices (and in certain instances by causing the prior publication of the notices) at the instance of CGS and on its instructions, without ever consulting any of the debtors for whom it purported to act.

23. Brummer said that during the time that she was employed by CGS hundreds of 'deals' were concluded and hundreds of surrender notices were published on behalf of judgment debtors, and in only one instance was a surrender application ever brought, and no statement of affairs was ever prepared or lodged on behalf of any debtor.

24. In her affidavit Brummer alleged that she had since learnt that apart from Appoles, CGS also utilised the services of the plaintiffs, as was apparent from the email exchange which she had with Orpen on 16-17 June 2011. He was a former client of CGS who had moved over to her. From this correspondence it appears that CGS had assisted him some 3 months earlier by stopping a scheduled sale in execution of his property, by way of the publication of a s 4(1) surrender notice. He then sourced a buyer for his property, but the bank was not amenable to engaging him in this regard and accused him of having committed fraud, by publishing a notice that he intended to surrender his estate when he never actually intended to do so. When he approached CGS for assistance they referred him to the 2nd plaintiff (Van Zyl), an attorney with whom they said they did business on a 'daily basis'. After Orpen contacted her on 3 May 2011, Van Zyl attempted to negotiate a private sale of his property with the bank, on his behalf, without success. On 13 June 2011 he was informed by CGS that his property had again been put up for auction, whereupon he again requested the 2nd plaintiff to assist him. The following day she reported that the bank's attorneys had indicated they would consider cancelling the 2nd sale in execution upon receipt of a valid sale agreement and bond approval for a private buyer.

25. Aside from Brummer's affidavit and the Orpen email exchange, amongst the 'thousands' of documents Meintjies assimilated were approximately 19-20 covering letters which the plaintiffs had sent to the bank's attorneys in respect of its judgment debtors, which were virtually identical to the covering letters which had been sent by Appoles, whereby the bank was notified of the publication of surrender notices, thereby causing the sales in execution which were supposed to be held in respect of the debtors concerned to be cancelled. Only 7 of these letters were included in the bundle of supporting documents which were filed in

support of the interdict application because it was only in these 7 instances that the bank was able to compile a complete set of the requisite supporting documents i.e. copies of the surrender notices and the covering letters by the plaintiffs notifying the bank of the publication thereof, together with the relevant extracts from the court rolls.

26. Meintjies pointed out that the letters informed the bank's attorneys that the mandate of Appoles attorneys had been terminated and that 1st plaintiff had been instructed to represent the various judgment debtors that were named therein, in its place. In addition, the letters 'confirmed' that a surrender notice had been published on a specified date, and a copy thereof was attached. Consequently, according to Meintjies the 'only perception' that one could come to in this regard, 'objectively speaking', was that 1st plaintiff had either published the notices or caused them to be published, as a layperson would not know about the provisions of ss 4 and 5 of the Act and how and where to publish notices as envisaged therein, and the assistance of an attorney was 'surely' required.

27. He also referred to copies of some of the covering letters which had been sent by 1st and 2nd plaintiffs, in which it was similarly 'confirmed' not only that a s 4(1) notice had been published, but that a forensic audit had been commissioned. In at least one of these instances it was indicated that a further s 4(1) notice had been published because the forensic audit had not been finalised. As a forensic audit was not a requirement for a surrender application and had nothing to do with it, in his view causing the cancellation of a sale in execution in such circumstances also constituted a misrepresentation. When asked to explain this he said that by publishing a notice of their intention to surrender their estate a debtor represented that they intended to make application for their sequestration. Where it thereafter became apparent that instead of doing so they had commissioned a forensic audit, it followed that they had misrepresented the purpose of the publication of the surrender notice.

28. He further pointed out that in the case of more than one of these judgment debtors surrender notices were published on more than one occasion, and the publications occurred at the instance of more than one of the respondent entities

concerned. Thus, in the case of the debtor Billy Ilukena three surrender notices had been published: the first in January 2011 at the instance of Appoles, the second at the instance of 1st plaintiff on 6 April 2011, and the third on 5 August 2011 at the instance of CGS. This gave him the impression that 1st plaintiff was part of a 'tag team', involving CGS and Appoles.

29. Consequently, based on the documents which were in his possession and the information that had been provided by Orpen viz that CGS dealt with 2nd plaintiff on a daily basis, the only 'reasonable and logical' conclusion to come to was that 1st plaintiff was 'part and parcel' of the scheme which Muller, CGS/CVS/Securibond and Appoles were engaged in.

30. It is time to turn to the statements which form the subject of the complaint in this matter, which were set out in 5 separate paragraphs[6] of the founding affidavit which was deposed to by the 2nd defendant on behalf of the bank in the interdict application, on 21 May 2012. Because there is a great deal of repetition and unnecessary verbiage therein, I do not propose setting the statements out verbatim and will attempt to provide only the material gist of the allegations which were made in them.

31. In the first place, it was averred that the respondents being CGS, CVS, Securibond, Appoles and the 1st plaintiff (either collectively, singly or in separate combinations with one another[7]) had by way of a 'device, stratagem, scheme and/or trick' acted in '*frauden legis*'(sic) and had perpetrated a fraud upon the 1st defendant and other banks.[8] In the case of the 1st defendant this had amounted to at least 166 (separate) acts of fraud,[9] which had been committed by causing the publication of notices of intention to surrender and the forwarding of covering letters notifying the banks thereof, thereby representing that the debtors referred

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[6] Paras 8, 55, 56.1, 58 and 59.

[7] In four of the paragraphs concerned (paras 55, 56.1, 58 and 59) it was averred that '1st to 5th' respondents had made themselves guilty of certain acts, and in the remaining paragraph (para 8) it was averred that these acts had been perpetrated by '1st to 5th respondent and/or any of them'.

[8] Paras 8.1-8.2.

[9] Para 55.1. This figure was comprised of 121 debtors of the 1st defendant, with the remaining 45 being debtors of the other 3 banks which were joined as respondents in the proceedings.

to therein intended to apply on a certain date for the surrender of their estates,[10] a representation which was to the knowledge of the respondents untrue and false, and which was made (solely) in order to cause the banks to cancel the sales in execution which were scheduled in respect of the debtors concerned.[11] In the second place, it was alleged that these acts constituted an abuse of the process[12] and machinery of the Insolvency Act, and an abuse of the rights[13] which the 1st defendant and other banks had to execute upon judgments which had lawfully been granted in their favour, and sought to 'stymie, stifle or harass'[14] them in the exercise thereof.

32. In the answering affidavit which she deposed to on behalf of the plaintiffs, Van Zyl said that the bank's decision to join them in the proceedings was malicious and calculated to harm the 1st plaintiff's business and professional reputation, and it was a decision that was made without due and proper regard for the 'true' facts. According to her, the founding affidavit contained no evidence in support of any of the allegations made therein, which were made recklessly, and were defamatory of the plaintiffs.

33. The plaintiffs had never published, or caused to be published, any notices of intention to surrender and had only been involved in a 'few' of the 166 matters that were referred to in the founding papers i.e. those involving the Ilukena, Paulsen, Mocamo, Orpen, Dooge, Hanslo, Haribans and Jewell debtors. Save in the case of Jewell (where 1st plaintiff had been approached by an entity known as Allied and Associates in August 2011) all of the remaining debtors were clients of CGS, and in all of these matters (except for Orpen-in which 2nd plaintiff's involvement was as set out in the email correspondence that has been referred to), 1st plaintiff had simply sent covering letters to the bank's attorneys notifying them of the prior publication of surrender notices in respect of these debtors and alerting them to the provisions of s 5(1) of the Act, in view whereof they were

[10] Paras 55.1-55.2.
[11] Para 56.1.
[12] Paras 58-59.
[13] Paras 8.3, 58.
[14] Para 8.5.

requested to confirm that the sales in execution of the debtors' properties would be cancelled.

34. The plaintiffs never received instructions from CGS to publish surrender notices, but only to inform the bank of the prior publication thereof, and never received instructions to surrender any of the debtors' estates. The plaintiffs never had any reason to believe that CGS did not have instructions to proceed with the surrender applications, at the time when the surrender notices in respect thereof were forwarded to them by CGS for the purposes of notifying the bank thereof.

35. In this regard Muller had contacted her at the end of March-beginning April 2011 and had informed her that he would arrange for instructions to be sent to their firm, to act as attorneys for CGS, in the place of Appoles, in instances where his mandate had been terminated. Subsequently, on 6 April 2011, Van Zyl received an email from Appoles which enclosed a sample of the standard covering letter which he used to notify creditors of the publication of s 4(1) notices, together with a copy of the notice which had been published for Ilukena in the Gazette on 1 April 2011, regarding a sale in execution which was scheduled for the same day, 6 April 2011.

36. Following receipt of these documents, Van Zyl duly sent a covering letter to the bank's attorneys in similar terms as the standard Appoles letter, on the same day, notifying them of the publication of the surrender notice and requesting confirmation that the sale would be cancelled. She said that she assumed that Ilukena had given CGS instructions to proceed with the surrender application. She was however subsequently advised by CGS that they had been instructed to attend to a forensic audit of his mortgage loan account and a report in respect thereof would be ready by 6 May, and she accordingly notified the bank's attorneys of this. Thereafter she received no further instructions from CGS in relation to the matter, notwithstanding repeated requests, and eventually decided to withdraw from it. She informed the bank's attorneys on 19 August 2011 that she was no longer acting for him. The same thing happened in relation to the other debtors for whom the plaintiffs prepared covering letters notifying the bank of the publication of s 4(1) notices. In their case too, no subsequent instructions

were received and the plaintiffs notified the bank on 19 August 2011 that they were no longer acting for these persons.

37. In this respect, she had received instructions from CGS on 11 April 2011 to notify the bank's attorneys of the publication of a surrender notice for Paulsen, and for Macamo on 12 April 2011, the same day when a sale in execution of his property was due to be held. On 5 May she was informed by CGS that he too had instructed it to do an audit on his mortgage loan account, which would be ready the following day, which she also duly conveyed to the bank's attorneys. On 10 May 2011 she received instructions to inform the bank of the publication of a (2nd) surrender notice in respect of Dooge, whose property was due to be sold in execution (for the second time), the following day. A week later, on 17 May 2011, she received similar instructions from CGS in respect of Haribans. In his case the sale was scheduled for 23 May 2011, and she was asked to advise the bank that a surrender notice would be published on 20 May 2011. On 17 May she was also requested to notify the bank of the publication of a s 4(1) notice in respect of Hanslo, whose property was due to be sold in execution on 20 May 2011, which she duly did. However, in his case, instead of confirming that the sale was cancelled the bank brought an urgent application for leave to proceed therewith. As Van Zyl was unable to deal with it she passed it on to her partner, Renate Rapp, who promptly set up consultations with counsel and Hanslo, in order to determine whether the application should be opposed or not, at which time it became apparent that Hanslo did not appreciate the implications and consequences of proceeding with a surrender application and it was accordingly decided not to oppose the bank's application for the sale to go ahead.

38. Finally, on 2 August 2011 Rapp had been approached by one Leonard Duvha of Allied & Associates, who similarly requested her to notify the bank's attorneys of the publication of a s 4(1) notice in respect of a Mr Jewell, which instruction was duly carried out. After Rapp was informed on 15 September 2011 that the bank had scheduled a 2nd sale in execution for 2 November 2011, she attempted to obtain instructions in relation to the possible preparation of a surrender

application, but this never materialized, and her mandate to act was terminated at the end of October 2011.

39. During her evidence Van Zyl elaborated on the circumstances under which she was approached by Muller. She had previously done work for him when he was involved in a gym and health supplement business. When he contacted her at the end of March/beginning April 2011, he informed her that he had started a new business (CGS) in 'collaboration' with attorneys and counsel, which was 'doing financial statements' and 'out of that' (sic) it published notices of intention to surrender, for which it had used Raschid Appoles, whose mandate had been terminated. A week later Appoles forwarded Van Zyl a copy of the standard letter which he used to notify the bank of the publication of such notices. At the time Van Zyl was not *au fait* with voluntary surrender applications and the provisions of the Insolvency Act pertaining thereto, as she had only worked with sequestrations and liquidations. Thus, following receipt of the documents that were sent to her by Appoles and CGS she familiarized herself with the provisions of ss 4 and 5 of the Act. She conceded that, contrary to the impression that was created in her answering affidavit that the plaintiffs had only been involved in 7 instances which concerned the bank, there were in fact a further 12-13 or so more, as testified to by Meintjies, which she had not disclosed.

40. Although she therefore received a series of instructions from CGS in April and May 2011 whereby she was required to inform the bank of the publication of s 4(1) notices in some 20 odd matters, she claimed that she had not realized that there was clearly no intention on the part of any of these debtors to sequestrate themselves, and that the notices must accordingly have been published solely in order to stop the sales in execution which had been scheduled in respect of their properties.

41. Similarly, she maintained that although the dates by which certain of the surrender applications were to have been filed during April/May came and went without the plaintiffs receiving instructions to prepare and lodge such applications, and notwithstanding the fact that in certain instances it was apparent that there had been a previous publication of one or more surrender

notices in the case of certain of these debtors, this had also not been a cause for concern for her and had not caused her to realize that there had never been any genuine intention of surrendering these debtors' estates.

42. She said that concerns about what was going on only arose in her mind on 23 May 2011, after Rapp spoke to her, following her consultations with Hanslo. In this regard, Rapp raised issues about the fact that s 4(1) notices were being published by CGS in respect of clients who were apparently not being apprised of the implications thereof.

43. In similar vein, notwithstanding that in at least 3 of the matters i.e. those involving Ilukena, Paulsen and Macamo she had been required to notify the bank of the s 4(1) notices at the last minute, on the very day of the scheduled auctions and within an hour or 2 thereof (in the case of Ilukena she received the letters from Appoles some 20 minutes before the auction was due to start), she steadfastly claimed not to have realized that the real purpose behind the notifications was to make sure that the sales were stopped. She conceded that in those matters the notifications which were given to the bank were so close in time to when the sales were due to be held that the bank would not have had sufficient time to approach the Court for an order allowing it to proceed with them. Nonetheless, seemingly this too did not cause her to suspect that this was part of a deliberate strategy by CGS to place the bank in a situation where it would have no option but to cancel sales in executions in respect of these debtors, without recourse to the courts.

44. However, she conceded that, from the bank and its attorneys' point of view, in the light of these circumstances it was reasonable for them to have inferred that CGS and Appoles were involved in a scheme to stop sales in execution in respect of the bank's debtors, and not to surrender their estates, and she conceded that if 1st plaintiff's role was similar, in effect, to that played by CGS and Appoles, it would have been reasonable for the bank and its attorneys to have concluded that it was part of such a scheme. That then as far as the evidence of Van Zyl is concerned.

45. Rapp testified that she was admitted as an attorney in 2005. At the time of the events in question Van Zyl was a 50-50 partner in the firm with her, but each of them was responsible for their own matters and clients. Although the firm did a lot of insolvency and debt-collecting work, Rapp had also not previously been involved in applications for the voluntary surrender of a debtor's estate.

46. She confirmed that 1st plaintiff never caused a s 4(1) notice to be published on behalf of CGS or any of the bank's debtors, and that she was only involved in 2 of the matters i.e. those of Hanslo and Jewel. She never had any personal dealings with Muller or CGS. Hanslo came to her via Van Zyl, and Jewell via Allied and Associates, a community-based NGO. In the case of Hanslo it had become clear during consultations with him on 20 May 2021 that he did not understand the legal implications of a surrender application and when they were explained he indicated that he did not want to be forced to sequestrate himself, to stop the sale in execution of his property. Subsequently, when Rapp had a discussion with Van Zyl about the matter she shared her concern that debtors were not being notified by CGS of the legal implications of the publication of notices in terms of s 4(1), and she wanted to know how many of these matters Van Zyl was involved with, and how many letters were being issued by her notifying the bank of the publication of surrender notices, as she was concerned that Van Zyl needed to make sure that the debtors concerned understood the legal implications. She told Van Zyl that they should perhaps not be 'doing this' or should not be 'continuing with this' practice. Despite this, she had no problem carrying out an instruction from Mr Duvha of Allied & Associates on 3 August 2021, to notify the bank of the publication of a s 4(1) notice for Jewell, thus stopping the sale in execution of his property which was scheduled for 5 August 2021, and similarly maintained that she did not realize that the provisions of the Act were being misused.

An assessment of the witnesses

47. Before turning to discuss the legal principles which are applicable, it is necessary to comment on the witnesses who testified and their credibility. As far as Meintjies is concerned, from my reading of his evidence he did not contradict

himself in any material respect and stuck to his version in cross-examination and in my view, it cannot be said that there were any material improbabilities in the evidence which he gave.

48. As for 2nd and 3rd plaintiffs, several aspects of their evidence troubled me. In the first place, both of them clearly had no qualms taking instructions from 3rd parties (CGS, Muller and Allied & Associates) to act for individuals with whom they never consulted (in the case of Rapp this occurred only in respect of Jewell not Hanslo), and neither of them had any difficulty declaring in letters which they purportedly addressed on their behalf to the bank, that they were representing them and acting for them, in relation to what appeared from the face thereof to be surrender applications. In cross-examination both Van Zyl and Rapp were constrained, rightly, to admit that such actions did not manifest the allegedly 'uncompromising' approach to legal ethics which they proclaimed, in their particulars of claim, they followed in their practices.

49. As far as Van Zyl is concerned, on several material aspects her evidence was highly unsatisfactory and in certain instances so improbable that it cannot be accepted. In this regard, her persistent claim that she never realized that what she was being asked to do by CGS was to stop sales in execution and that she never realized that there clearly was never any intention on the part of it, or the individual debtors it purported to represent, to surrender their estates, beggars belief.

50. Already at the time of the 1st instruction she received, in the case of Ilukena on 6 April 2011, she must have noted that it was the 2nd time that a surrender notice had been published, which of necessity must have meant that pursuant to the publication of the first such notice a surrender application had not been brought. This circumstance on its own was surely sufficient to place her on the alert. Notably she never made any enquiry about this. In addition, she was required to bring the publication of the 2nd notice to the attention of the bank minutes before the scheduled start of the auction at which his property was due to be sold. This too, would have raised suspicion. Then, a few days later she was asked to do the same for Paulsen and Macamo, in respect of whom surrender notices had also

previously been published. In their case too she made no enquiry in relation to why no surrender application had been brought, pursuant to the publication of the first notice of their intention to do so, and claimed not to have had her suspicions aroused.

51. In such circumstances, any attorney who had been given such instructions, and who had familiarized themselves with the provisions of ss 4 and 5 of the Act, would surely have realized that the primary and immediate purpose of the publication of the s 4(1) notices and notification thereof to the bank could only be to stop the sales in execution and there was no intention to surrender the debtors' estates. If any doubts in this regard still lingered these would have been dispelled by the unequivocal terms of the written instructions that she received from CGS in several of the subsequent matters i.e. those of Dooge, Hanslo and Haribans all of whom similarly involved 2nd sales in execution. In all of these matters the written instructions which she received from CGS were to attend to 'stopping the sales' (sic). In the circumstances, her continued assertion that despite all of this she nonetheless did not realize that she was involved in a scheme to stop sales in execution, is ludicrous.

52. When pressed in cross-examination as to why she never consulted the individual debtors who were supposed to be her clients, she claimed not to have been provided with their contact details, despite repeated requests. Yet, by her own admission she never addressed a single letter or email to CGS requesting to be provided therewith, nor did she ever write a single letter to it requesting to be provided with the alleged 'further' instructions which she claimed she was waiting upon, when none were forthcoming. This too is extremely peculiar behaviour on the part of an attorney who, as she claimed, assumed that she was to be given instructions to proceed with surrender applications for these debtors, after notifying the bank of the publication of surrender notices for them. Any reasonable attorney would have made sure to request the instructions required, in writing, yet according to her she only made telephonic requests, and there was no indication in her evidence that she made any file notes regarding these alleged conversations.

53. Having read the provisions of s 4(2) she would have noted that a copy of the s 4(1) notices was to have been delivered or posted to all creditors, as well as to any trade union or individual employees and to SARS, within 7 days from the date of the publication thereof in the Gazette. There was no indication from her evidence that she ever made any attempt to ascertain whether this statutory obligation was complied with, either by CGS or the individual debtors concerned, or that she even was concerned about it.

54. She would also have noted that in several of the matters in which she had written letters to the bank's attorneys notifying them of the intended surrender applications these had apparently not been brought on the dates they were supposed to, yet once again she made no enquiry in this regard and claimed not to have thought that anything was amiss. In some of these matters she was informed that instead of the applications being brought, audits were now being performed, and from her reading of the Act she would have noted that the obtaining of an audit report in respect of debtors' mortgage loan accounts not only was not required for the purposes of a surrender application, but could not be used in order to prevent the bank from proceeding with a sale in execution in satisfaction of a judgment debt, and she conceded as much in cross-examination. Yet once again, she had no qualms going along with this and made no enquiry of CGS, and when pressed on this aspect during cross-examination her evidence was disingenuous and contrary to what she had said during her evidence in chief. In this regard she claimed that Muller had informed her that the forensic audit into the debtors' mortgage loan accounts was part of the investigation into their financial circumstances, for their surrender applications, in order to determine if there was any benefit to creditors.

55. Of course, such conduct i.e her failure to consult any of the debtors and to write any letters to CGS requesting their contact details and further instructions, and to follow up on the prescripts of s 4(2) and the bringing of the applications on the dates they were supposed to, would however make perfect sense if she knew that what she was being asked to do on behalf of CGS was simply to stop the debtors' properties from being sold, and that there was never any intention to

assist them to sequestrate themselves. In such event there would be no need to consult any of the debtors and no need to obtain any further instructions from them or CGS, and that would obviously explain why no letters were written by her to CGS in this regard and no written enquiries were made on any of the aspects I have referred to.

56. On this score I must digress to point out that at some point, when being pressed during cross-examination as to what it was that Muller had initially asked her to do, much to the surprise of all concerned Van Zyl claimed that he had indicated that the 1st plaintiff would be required to proceed with surrender applications in respect of those debtors for whom s 4 (1) notices had been published. This was however not what she said in evidence in chief, and there is not a single document which supports this averment, and none of the correspondence which was addressed to her by CGS or Appoles ever indicated that she would be required to bring such an application on behalf of any of the debtors, or even intimated such an intention. Once again, had there been such an understanding on her part one would have expected there to have been correspondence from her to CGS in this regard, yet there was none.

57. In the circumstances, in my view Van Zyl was not an honest witness and the probabilities are overwhelmingly in favour of her well knowing that the whole purpose of the publication of the s 4(1) notices and of notifying the bank's attorneys thereof was simply directed at stopping sales in execution, and she willingly participated therein, in her own right and as a partner in the 1st plaintiff.

58. As far as Rapp is concerned, by her own admission her conduct too was unacceptable. In this regard, she conceded that the letter which she wrote on Jewell's behalf falsely asserted that he had requested the 1st plaintiff to address a letter to the bank's attorneys, when in fact Rapp had never even spoken to him. When asked to explain this she said that she may possibly have used one of the letters which Van Zyl had used, as a precedent. That she had no difficulty stating in a letter to a bank that she had received instructions to act for a client when she had not, is extremely unsettling. That letter too, made no mention of the bringing of any surrender application on his behalf and only asked for confirmation that

the sale in execution would be cancelled. In that matter too, it is apparent from her evidence that the instructions which she received from Duvha were to 'stop the sale'. Having had the prior experience which she had with Hanslo (when it must have become apparent to her that the purpose of the publication of his s 4(1) notice albeit it by CGS had simply been to stop the sale in execution of his property), she would have been alerted to the abuse of process that was taking place whereby the provisions of the Act were being used for a purpose for which they were not intended, yet, despite this she had no qualms accepting an instruction from Duvha to notify the bank of the publication of a notice for Jewell, and to 'stop the sale'. Although a consultation was then set up, according to her, Jewell did not pitch for it. Nonetheless, she remained available to assist Duvha. When the bank's attorneys then notified her on 15 September 2011 that the second, scheduled date for the sale in execution was 2 November 2021, Duvha informed her that they 'would like to publish another' s 4(1) notice. Surely, it must again have been abundantly clear to her that in his case too there was no intention to surrender his estate and the real purpose was to frustrate the process of execution. In the circumstances, in her case too, I find her explanation that she did not realize that the provisions of the Act were being misused in order to stop sales in execution, hard to believe and improbable.

The law

(i) Defamation generally

59. it is trite that the test in determining whether a statement is defamatory is an objective one. In the first place the Court is required to establish the ordinary or 'natural' meaning thereof, being the meaning which the reasonable reader of ordinary intelligence would attribute to the words under scrutiny, in their context.[15] In this regard is accepted that the reasonable reader would understand the statement not only for what it expressly states but also for what it implies. Thereafter, one must determine whether the ascribed meaning of the words used would have the effect of injuring the plaintiff's reputation by lowering her in the

[15] *Sindani v Van der Merwe* 2002 (2) SA 32 (SCA) paras 10-11; *Le Roux v Dey* 2011 (3) SA 274 (CC) para 89.

estimation of 'right-thinking' members of society,[16] which our Courts have treated as being synonymous with reasonable, ordinary, or average members of society.[17]

60. The ordinary and natural meaning which is to be ascribed to the passages in issue in this matter is that, in collusion with one or more or all of the other respondents (CGS/CVS/Securibond/Muller) the plaintiffs participated in an unlawful and fraudulent scheme which involved the perpetration of a large number of separate acts of fraud on the 1st defendant and other banks, and abused the machinery and processes of the Insolvency Act and the rights which the 1st defendant and other banks had to execute on judgments which they had obtained. Such allegations would obviously serve to lower the reputation of the plaintiffs in the minds of any right-thinking members of society and were therefore clearly defamatory.

61. Given the publication of material that was defamatory of the plaintiffs it is rebuttably presumed that the publication was made intentionally (*animo iniuriandi*) and that it was wrongful/unlawful.[18] The sole defence which has been raised is one of qualified privilege which it is trite, if established, would rebut the presumption that the defendants had acted unlawfully. In this regard it is also trite that the onus which rests on the defendants of establishing that they are entitled to rely on the defence is a full one which is to be discharged on a balance of probabilities, and not merely an evidentiary burden to adduce evidence.[19]

(ii) Qualified privilege

62. The premise underlying the defence of privilege is that in certain recognized instances or 'occasions' and within the bounds set by law public policy requires that a person should have the right to express themselves and to impart

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[16] Per the oft-cited dictum in *Sim v Stretch* [1936] 2 All ER 1237 (HL) 1240.

[17] *Mohammed v Jassiem* 1996 (1) SA 673 (A) at 706H-707A, where it was held (at 706J-707B) that in a heterogeneous society such as ours the notional 'right-thinking' person must be construed with reference to the particular segment of society or community (be it religious, social, cultural or racial), to which the plaintiff belongs and not the entire society at large.

[18] *Joubert & Ors v Venter* 1985 (1) SA 654 (A) at 696A; *Le Roux* n 15 para 85.

[19] *Neethling v Du Preez & Ors; Neethling v Weekly Mail & Ors* 1994 (1) SA 708 (A) paras 193-194, 197; *Mohammed* n 17, at 709H-I.

communications to others without restriction, notwithstanding that in doing so they may infringe on the rights of dignity and reputation of others.

63. Unlike certain other jurisdictions, our law does not afford absolute protection ie absolute privilege for the consequences of such publications save in certain limited instances, which are provided for by statute. In this regard absolute privilege is only conferred on members of parliament and provincial legislatures and councillors of municipal councils, who enjoy complete freedom of speech and protection in respect of utterances made during the proceedings of such bodies.[20]

64. Save for the aforegoing, in our law any protection which is extended on a so-called privileged occasion is qualified[21] and not absolute. Thus, it may be lost if the speaker exceeds the bounds of what is considered permissible (either in regard to what is relevant or germane to the occasion or because their communication was not one made in the discharge of a right, duty or interest which they may have had in communicating the information concerned), or because it is considered that they were actuated by 'malice'[22] i.e. driven by an ulterior motive such as spite or ill-will.

65. Three distinct and separate categories of statements which may enjoy qualified privilege are recognized in our law namely those made 1) in the discharge of a legal, moral or social duty or a legitimate interest or 2) those made in the course of judicial or quasi-judicial proceedings and 3) those which constitute the publication of the proceedings of courts, parliament and certain public bodies. Insofar as the second category is concerned it is well-established that the privilege extends to litigants and their legal representatives as well as to witnesses and the presiding officer.

66. As pointed out by Brand JA[23] our law of defamation is principally derived from Roman and Roman-Dutch law and our Courts have generally sought to resist the

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[20] In terms of ss 58(1) and 71(1) of the Constitution, in relation to proceedings in the National Assembly and Council of Provinces and s 117(1) of the Constitution in relation to provincial legislatures, and s 28 of the Local Government Municipal Structures Act 117 of 1998 in relation to municipal councils.

[21] Or as is sometimes referred to by textbook writers 'relative' or 'conditional'.

[22] As to which the *locus classicus* is *Basner v Trigger* 1946 AD 83 at p 107.

[23] In his contribution on the law of defamation in *LAWSA* Vol 14(2) 3rd Ed.

importation of English law principles into it, save on aspects on which our law is considered compatible therewith.[24] After considering Roman-Dutch authorities and our early decisions[25] the Appellate Division held in 1934 in *Findlay v Knight* [26] that the 'welfare of society' required that an advocate or attorney who pleads the cause of his client should have a large degree of freedom in laying his client's case before the Court even though in doing so he may defame the other party or a third party, and as such the privilege extends to what is said in pleadings and other documents which are necessary to place the case before the Court. Consequently, courts accorded to attorneys and advocates a large degree of 'freedom' in drawing pleadings and in pleading causes and to hamper this freedom unduly would be to hamper the administration of justice, which would be contrary to public policy. But that said, Wessels CJ also held that the other principle of public policy which underlines the privilege is that the process of the courts is not to be 'wantonly' used for the purpose of defaming litigants or 3rd parties.[27]

67. It will be noted from the formulation of their respective pleas (which are identically worded) that in seeking to rely on the defence of qualified privilege the defendants have conflated (the first) 2 species of the defence into one, although the requirements for reliance on these are, contrary to what they suggest,[28] not entirely the same. Thus, as the defendants correctly point out whereas both require that the defamatory statements be relevant (or as is often synonymously said 'germane' or 'pertinent') to the occasion, there is a long line of authority

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[24] Thus, in cases which deal with the defence reference is frequently made to the decisions in *Toogood v Spyring* [1834] Eng R 363 and *Adam v Ward* 1917 A.C 309, which appear to be the *fons et origo* of the English law principles pertaining to the defence, which are substantially the same, but not identical to ours.

[25] Including in particular the decision in *Preston v Luyt* 1911 EDL 298, in which Kotze JP conducted an extensive review of the old common law authorities.

[26] 1935 AD 58, at 71.

[27] *Id*.

[28] In their heads of argument (*vide* paras 25 and 28.2 *et seq*) 1st and 2nd defendants did not refer to the first species of the defence and made no submissions separately contending that they had acted in the discharge of a duty or interest, and their heads deal only with the issue of relevance. In their heads 3rd and 4th defendants appear to have adopted a similar approach and stance viz that in order to succeed it need only be shown that the statements were relevant to the occasion, a view apparently shared by certain authors *vide* for example Neethling, Potgieter et al *The Law of Delict* (7th ed) at p 359 and ftn 176 thereof.

going back to the decision in *Findlay* [29] that in relation to statements made in the course of legal proceedings, they are not only required to be relevant to the matter in issue but the maker thereof must also have a 'reasonable foundation' or 'reasonable cause' for making them.[30]

68. In *Pogrund v Yutar* [31] a full bench of the Appellate Division held[32] that this meant that in addition to showing that the defamatory statement was pertinent or germane to the occasion there also had to be 'some' foundation for it in the evidence or the 'surrounding circumstances', an approach that was confirmed in the appeal in *Joubert.* [33] Although neither of the subsequent appellate Courts in *Van der Berg* [34] and *Hardaker* [35] appear to have expressly reiterated this as a separate requirement, as I read these decisions this is because these cases were decided on the basis of relevance, or the lack thereof. And as will appear from the discussion of *Van der Berg* the basis for the decision in that matter was that the defamatory statement was irrelevant because it had no foundation in fact and was based on speculation. Thus, by implication the requirement that there be some foundation for the statement was accepted.

69. Having outlined the basic principles, it is useful to consider how these have been applied in matters where the makers or the objects of defamatory statements which were made during legal proceedings, were legal practitioners.

70. In *Findlay* [36] an attorney who was instructed to draft a plea in an action for payment of surgical and medical fees that were owing to a medical practitioner pursuant to certain operations which he had performed, alleged that he had performed the first of these so carelessly and unskillfully that he had ruptured the plaintiff's bowel whereupon he had performed a second, follow-up operation at a time when he was not in a 'fit' condition to do so, in order to try to 'overcome the

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[29] Note 26 at p 72 (per Wessels CJ) and p 75 (per De Villiers JA), which authority was traced to Voet 47.10.20.
[30] *Id*. According to De Villiers JA the language used by Voet more aptly translates as requiring 'some probable or credible' foundation.
[31] 1967 (2) SA 564 (AD).
[32] *Id*, at 569H-570E, effectively endorsing the dictum of Kotze JP in *Preston* n 25 at p 320.
[33] Note 18 at 704B-D.
[34] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Ors* 2001 (2) SA 242 (SCA)
[35] *Hardaker v Phillips* 2005 (4) SA 515 (SCA).
[36] Note 26.

evil results' of his own carelessness. In response to a request for further particulars it was averred that the medical practitioner had not been sober when performing the operation. In making these statements the attorney had relied solely on the instructions he received from the husband of the patient, who was a grocer, without recourse to any expert medical opinion and without obtaining any information as to what had happened during the operations, from any of the assisting doctors. In fact, one of the attending doctors who had assisted during the 2nd operation had declared, under oath, that the plaintiff had not been intoxicated at the time.

71. On appeal the decision of the court a *quo* that, in the absence of any evidentiary foundation for the allegations which he had made in the pleadings the defendant was not entitled to rely on the privilege as there had been no 'reasonable foundation' for them, was upheld. Although the Court recognized the wide latitude which is afforded to legal practitioners in the presentation of a case on behalf of a client it held[37] with reference to the Roman-Dutch authorities,[38] that in doing so he/she may only do that 'which the case requires' and may not indulge in scandalous or libellous language 'beyond the necessity of the case'. Thus, it was not permissible for an advocate or attorney to plead defamatory statements which he/she knew to be false, or in respect of which they knew there was no proof, or where they did so recklessly, not caring whether the averments were true or false, and the pleader who did so was abusing the process of the court. Consequently, inasmuch as the allegations in question were made recklessly by the defendant, not caring whether they were true or false, or whether they could be proved or not, the privilege was not available to him.

72. In similar vein, in *Gluckman* [39] an attorney who was defending a client who was charged with having incited the plaintiff to commit theft, accused the plaintiff during cross-examination of having previously committed theft. The accusation was based on hearsay information which had been imparted to him by a 3rd party, who had allegedly obtained it from the police. The information was to the

[37] Per Wessels CJ at p 72.
[38] Voet 47.10.20 and Van Leeuwen Bk 4 c.4 sec 2.
[39] *Gluckman v Schneider* 1936 AD 151.

effect that a person with a similar name as that of the plaintiff, who was 25 years old and lived at a certain address in Doornfontein, Johannesburg had previously been convicted of several thefts. During evidence in chief the plaintiff testified that he was 22 years old. This should have put the defendant on the alert that he might not be dealing with the same person in respect of whom he had obtained the information. However, before putting the defamatory allegations to him the attorney did not ask the plaintiff to verify his age and made no attempt to ascertain where he lived, in order to make sure that the information in fact pertained to him and not to another person with the same surname. As it turned out the information pertained to someone else. Although the allegations were made during legal proceedings and were clearly relevant to the matter before the Court it was nonetheless held that inasmuch as the defendant had made them recklessly, without caring whether they were true or false, he had exceeded the bounds of privilege.

73. In *Van Der Berg* [40] the trustees of an insolvent estate had alleged in a condonation application in interdict proceedings that the attorneys who acted for the other side had refused to honour undertakings they had made to provide certain documents for an insolvency enquiry, because they had been 'manipulated' by the insolvent's senior counsel into taking up an attitude which favoured the insolvent and which was wholly inappropriate, given their duties as officers of the Court. The decision of this division that the statement was protected because it was relevant and was therefore subject to qualified privilege was reversed on appeal.

74. The Supreme Court of Appeal held that there were no 'hard and fast rules' and no 'universally applicable formula' which applied to determine whether a defamatory statement which was made during legal proceedings could be said to have been relevant thereto, only guiding principles, and in the context of the defence relevance was not a concept which was capable of precise definition.[41] It was not to be equated with the test for relevance in an evidential sense i.e.

[40] Note 34.
[41] *Id,* paras 22 and 26.

whether the material was of probative or persuasive value to the case.[42] Essentially the determination of whether the material in question was relevant amounted to a value judgment, based on reason and common sense, which had its foundation in the facts and circumstances of each particular case.[43]

75. In *Van der Berg* the defence failed because it was held that all that the trustees reasonably needed to allege, for the purpose of the application, was that the insolvent's attorneys had failed to honour their undertakings on the advice of their senior counsel and there was no need to have gone beyond that, and the trustees' case could not reasonably have been furthered by the allegation that the plaintiff had been manipulative, an allegation which was founded on speculation and had no factual foundation. If the allegation had been omitted from their affidavit it would not have affected the trustees' case one way or the other. Thus, it was not reasonably necessary for the purpose which was sought to be achieved in either the principal application or the application for condonation and it was therefore not relevant to the occasion.

76. It is important to note that, as was foreshadowed in *Findlay*,[44] in *Van Der Berg* the defamatory averment was held to be irrelevant largely because it was considered that it was not reasonably necessary for the occasion i.e. it was not reasonably necessary for it to have been made. Thus, relevance was determined, at least in part, by what was considered legally necessary. This is contrary to the stance which has been adopted by the defendants in this matter. They contend that whether or not it was necessary to make certain of the defamatory allegations, particularly the more egregious ones pertaining to fraudulent conduct by the plaintiffs, in order to obtain the relief which they sought in the interdict application, is irrelevant. All that matters, so they say, in order to establish the necessary relevance which is required for the defence to succeed is that the allegations which were made were in some way or measure relevant, pertinent or germane to the application which was brought, in which they attempted to show that the plaintiffs were engaged in an unlawful scheme which

[42] Para 25.
[43] Para 26.
[44] As outlined in para 71, above.

involved making misrepresentations to the banks that debtors intended to sequestrate themselves, when in fact they did not intend to do so, and were abusing provisions of the Act to prevent the banks from executing on judgments they had obtained. Therefore, whilst it may not have been strictly or legally necessary in order to obtain the interdictory relief (given the supporting allegations that were made that there had been an abuse of rights and process), to allege that the plaintiffs had also participated in a fraudulent scheme, it was clearly relevant in the broad sense encompassed by the concept of relevance, as required in order to rely on the defence of qualified privilege.

77. In support of their contentions the defendants point out that in his judgment in the interdict application[45] Binns-Ward J in effect found[46] that Muller, CGS and Appoles had been engaged in an unlawful and fraudulent scheme, which operated in *fraudem legis*. The defendants also call in aid the cautionary remark which was made by Smalberger JA in *Van Der Berg* [47] that public interest requires that when determining relevance a Court should not adopt an approach which is too strict or rigid lest litigants, witnesses or deponents to affidavits be unduly restricted or fettered in their evidence, thereby detracting from their right to freedom of speech, as well as the remark by Scott JA in *Hardaker* [48] that it is necessary in the interests of the proper administration of justice not to unduly restrict the protection which is afforded to a litigant or witness. They further point out that in *Hardaker* the SCA held[49] that a defamatory statement may be protected by qualified privilege not only in circumstances where it is relevant to the 'true' or 'real' issues in the matter i.e. those issues which must necessarily be determined in order to arrive at a decision, but also to those subsidiary or 'side' issues which frequently arise in motion proceedings and which are often only tenuously linked, if at all, to the real issues; and to hold that the privilege is limited only to the real or true issues would result in the protection that is to be

[45] Reported *sub nom Firstrand Bank Ltd v Consumer Guardian Services (Pty) ltd & Ors* [2014] ZAWCHC 27.
[46] At paras 8-9 and 13.
[47] Note 34 para 24.
[48] Note 35 para 17.
[49] *Id,* para 18.

afforded by it being extensively limited, and litigation would be a lot more perilous for litigants than it already is.

78. Thus, in *Hardaker* an averment which was made in a replying affidavit on behalf of the NDPP in a so-called 'POCA' preservation application (in which it was sought to restrain the respondent from disposing of his assets pending criminal proceedings), to the effect that his supposed condemnation of the use of drugs on premises belonging to him should not be taken too seriously as he had a long-standing relationship with a person who had been convicted of dealing in drugs in New Zealand and had assisted him financially during his trial, was held to be relevant, even though it had nothing to do with the principal issues in the application, and merely reflected on the respondent's credibility. Likewise, in *Joubert* an allegation in an answering affidavit that the applicant had previously misappropriated monies and assets of a company whilst it was in provisional liquidation, while he was acting as its liquidator, via an attorney that acted on his behalf, was held to be relevant, as it related to whether he was a fit and proper person to be appointed to act as its receiver, following a compromise that had been arrived at.

79. Before attempting to apply the legal principles which have been outlined to the facts in this matter it is necessary to make some final, prefatory remarks. In the first place it is important to note that where reliance is placed on the defence of qualified privilege, whether the defamatory statements which were made were in fact true or not has no bearing on the central question which must be answered i.e. whether they were relevant or germane to the occasion.[50] This follows from the accepted principle in our law of defamation that truth, on its own, is not a defence.[51] Despite this, all the parties, particularly the plaintiffs, expended a large amount of time and effort in attempting to show that the contents of the defamatory statements either were substantially true, or alternatively, that they were not shown to be so.

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[50] *Borgin v De Villiers & Ano* 1980 (3) SA 556 (A) at 579A; *Mohammed* n 17 at 710H; *Van der Berg* n 34 para 35.

[51] In order to rely on truth as a defence the defendant is required to show not only that the statements were true in substance, but that it was to the benefit of the public that they be published.

80. In the context of the defence of qualified privilege the truth or otherwise of a defamatory statement is only relevant to the question of whether there was malice shown i.e. some spite, ill-will or ulterior motive on the part of the defamer, which would thereby defeat the privilege. Malice was not initially pleaded by the plaintiffs. However, shortly before the completion of cross-examination of the plaintiffs' last witness Rapp, their counsel sought to make an amendment to introduce it, not as is commonly done by way of a replication, but in the particulars of claim. In this regard the averment which was made by the plaintiffs was a simple one. They simply averred that insofar as the defendants did not have reasonable cause for making the statements in question, they were actuated by malice. Although the amendment was initially opposed the defendants later acceded thereto on the understanding that they were to be taken as having denied the allegations made in this regard in their respective pleas, without any formal amendment thereto being filed.

The law applied

81. If one stands back and considers the material facts the following wood emerges from the trees. At the time when he sent the letter of demand to Muller and Appoles in April 2011, Meintjies was unaware of the plaintiffs. That is why they were not included as addressees and the indications are that they were only added as respondents in the proceedings at the last minute, shortly before the application was launched a year later, after Meintjies had been contacted by Brummer in or about May 2012, at which time he became aware of Van Zyl's involvement in CGS-related matters, notably that involving Orpen, who had approached her to assist him in the sale of his house by private treaty after a previous scheduled sale in execution had been cancelled by way of the publication of a s 4(1) notice by CGS. From Brummer's affidavit and the Orpen emails it would have appeared that the first and/or third plaintiff (Van Zyl), had regularly acted for CGS/Muller. But given that Brummer had only worked for CGS for a period of about 6 months, between December 2010 and May 2011 and the emails between Van Zyl and Orpen reflected that she had acted for him in June

2011, from the information which Brummer provided the plaintiffs' involvement with CGS/Muller did not extend beyond June 2011.

82. Aside from Brummer's affidavit, Meintjies' understanding of the plaintiffs' involvement was also founded on some 19-20 letters which he came into possession of, which were almost identical in their format and terms to those which had been prepared and sent out by Appoles, whereby the bank was similarly notified by them during April and May 2011 of the publication of s 4(1) notices in respect of its judgment debtors. In certain of these letters the plaintiffs had indicated that they had taken over from Appoles as his mandate had been terminated and in several of these instances it appeared the plaintiffs were acting for debtors in respect of whom prior s 4(1) notices had been published, without their intended surrender applications having been brought. In addition, in certain instances the plaintiffs' letters informed the bank's attorneys not only of the publication of such surrender notices, but also that forensic audits were underway, something which was not required for the purposes of such applications. Lastly, according to him, Meintjies had only come into possession of one of the letters of withdrawal which had been sent to the bank by Van Zyl in August 2011, whereby she indicated that she was no longer acting for one of the debtors. He was unaware of the other letters of withdrawal which had also been sent in August 2011 on behalf of the remaining 18-19 debtors for whom the plaintiffs had acted.

83. In the circumstances, it was surely fair to infer, based on the information which he had at his disposal, that the plaintiffs had also participated in the scheme which was being perpetrated by Muller and in this regard had played a similar role therein as Appoles. But that was an inference that could only fairly be drawn in relation to their conduct in April-June 2011, a year earlier. The single incident in August 2011 when 2nd plaintiff (Rapp) had notified the bank of the publication of a surrender notice for Jewell was, on the face of it, unconnected to CGS, Muller or Appoles as she appeared to be acting for Allied and Associates, an entity which was not known, or suspected by him, to be connected to Muller/CGS.

84. On the available evidence therefore neither Meintjies nor the bank had any evidence to hand which indicated that at the time when the application was about to be launched a year later in May-June 2012 the plaintiffs were still actively participating in the Muller/CGS scheme. Yet, they were nonetheless joined as parties to the litigation, which was aimed at obtaining interdictory relief, restraining the respondents from participating in the scheme. In order to obtain such relief, the bank needed to show not only that its rights had previously been infringed by the respondents, but that it needed to be protected from them as there was a continuing, ongoing violation thereof, or at least an imminent threat of such violation. It was hardly going to succeed in obtaining such relief against the plaintiffs on the strength of a violation of rights which had taken place a year earlier and which had, on the face of it, ceased and was not ongoing at the time when the application was brought. In the circumstances, there was no way the bank would rightfully have obtained interdictory relief against the plaintiffs and that must surely have been the reason why, when the plaintiffs filed their answering affidavit in which they confirmed that they had ceased acting for CGS/Muller in May-June the previous year, the bank had to withdraw the proceedings against them and tender their costs.

85. In such circumstances, can it be claimed that the allegation that the plaintiffs had engaged in a fraud on the bank and had participated in an unlawful scheme by CGS/Muller to frustrate it in its rights was protected by qualified privilege, because in a broad sense it was relevant to the proceedings and the issues raised therein, or to the story which needed to be told?

86. In my view the answer must be no, for the following reasons. In the first place, the bank and Meintjies did not have a sufficient foundation in the information which they had at their disposal to make the necessary connection that was required in June 2012 to allege not only that the plaintiffs were participating at the time in an ongoing, unlawful scheme but also that they were engaged in an ongoing fraud.

87. As the plaintiffs rightly point out an allegation that someone has engaged in fraud connotes that they acted criminally, and dishonestly. In its ordinary meaning, as

understood by the average person, it accuses the person against whom it is directed of intentionally participating in the making of a false representation to another. The persons against whom such an accusation was directed were attorneys and colleagues of Meintjies. Accusing an attorney of fraud and of abusing court proceedings is a very serious allegation.[52] It is not one to be made lightly, by anyone, least of all a colleague. On the information which Meintjies had available to him, given the plaintiffs' limited involvement the fact that they had previously participated in the scheme did not necessarily, and only, imply that they did so with fraudulent intent. It was equally possible that they may have done so negligently, or even inadvertently, at the instance and on the instructions of CGS/Muller. Thus, caution was required and some attempt should have been made to ascertain what the position was, before simply making an allegation that they were engaged in fraud.

88. In a series of decisions (none of which the parties thought to refer to) the Canadian Supreme Court has ruled against legal practitioners who made defamatory statements of and concerning colleagues and other professionals without ensuring that they had a proper foundation for doing so.

89. In the first of these, *Hill v Church of Scientology* [53] a press statement made by a barrister in court regalia, on the steps of a courthouse, that the Crown attorney who was acting for the other side in a matter had made himself guilty of professional misconduct by misleading a judge and breaching orders sealing documents from discovery, was held not to be protected by privilege as it was not relevant to the occasion, as it was neither 'necessary nor appropriate'[54] for it and had been made recklessly, without regard for the underlying facts. The Court held that as an experienced lawyer the barrister ought to have taken steps to verify the allegations he made before making them.

90. It pointed out that reputation has a particular significance for lawyers and is a 'cornerstone' of their professional life, as a lawyer's practice is founded and maintained on a good reputation for professional integrity and trustworthiness

[52] *Katz v Welz* [2021] ZAWCHC 76 para 123.1.
[53] [1995] 2 SCR 1130.
[54] Para 156.

and is of 'paramount' importance to clients, other members of the profession and the judiciary, and the entire system of administration of justice depends upon a lawyer's reputation for integrity.[55]

91. In like vein, in *Botiuk* [56] the Court held that a declaration which was made by 8 prominent lawyers in which they alleged that a colleague had breached a promise to donate fees that he had been paid (to act on behalf of the Ukrainian-Canadian committee at a public enquiry) had been made recklessly, without establishing the truth or veracity thereof, as they were duty-bound to do, and was consequently not protected by the privilege.[57]

92. In *Bent v Platnick* [58] an attorney who was the president-elect of the Ontario Trial Lawyers Association, which represented the interests of accident victims in motor vehicle insurance claims, had warned members in a confidential, internal email that a medical practitioner who was often used as an expert by insurers in such matters had, when preparing summaries of the evaluations of the insurer's experts, omitted certain important findings therefrom that were in favour of plaintiffs, or had attributed conclusions to them which were contrary to their findings. Consequently, she advised colleagues that in matters involving him they should routinely call for all the reports on which his summaries were based and for supplementary discovery, to verify the contents thereof. The insinuation in the communication was that the plaintiff had falsified reports.

93. Although the communication was clearly relevant, in a broad sense, the majority nonetheless held[59] that the defendant had exceeded the bounds of the privilege. It was of the view that as an experienced lawyer she should have taken steps to confirm her allegations before launching an attack on the plaintiff's professional integrity. The defendant had sought to rely on events which had taken place 3 years earlier when she had received a report from him which appeared to be inconsistent with 2 other reports, without conducting a contemporaneous investigation and without attempting to communicate with the plaintiff, and the

[55] *Id*, paras 118 and 177.
[56] *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3.
[57] *Id*, para 103.
[58] 2020 SCC 23.
[59] Albeit narrowly, by 5-4.

information she had at the time of making the statement had not been sufficient to justify a reasonable belief that he had deliberately falsified or altered records.

94. The Court held that in the light of the heightened expectation of reasonable due diligence which has historically been required of lawyers they are not entitled to rely on the privilege where they have been 'indifferent' or reckless in relation to the averments which they make.[60] Thus, unlike in the case of laypersons, a Court will strictly scrutinize a lawyer's conduct in making a defamatory allegation, because lawyers are duty-bound to take reasonable steps before making statements that are defamatory, especially in cases involving other professional persons.[61] Therefore, the defence of qualified privilege will not be available where the limits of any duty or interest which exists in imparting the information concerned were exceeded because the information was not relevant, as it was not reasonably appropriate to the legitimate purpose of the occasion.

95. As in *Bent*, the information on which the defendants sought to rely when they launched the application was outdated, and not current. Meintjies made no attempt to ascertain whether it was still valid and whether it could still be relied upon. One would have expected that the least he would have done before proceeding to join the plaintiffs as respondents in an application in which they were accused of engaging in fraud, was to write a letter to them in which they were apprised of the information which the bank had pertaining to their participation in the scheme, and which afforded them an opportunity to provide an explanation. There is no doubt that, had he done so, the plaintiffs would have informed him that they had simply been involved in a few instances of notifying the banks of the publication of s 4(1) notices on behalf of CGS, in May-June 2011 and since then had no longer acted for the debtors concerned or for CGS, and had not acted with any fraudulent intent. Had such information been imparted the defendants would surely not have had any basis or cause to have joined the plaintiffs in the proceedings, in their own right. The defendants' case in relation to the plaintiffs' involvement at the time when the application was

[60] Para 137.
[61] Para 133, relying on *Hill* n 53 para 155.

launched was therefore based on speculation and assumption and did not rest on any solid factual foundation.

96. In the circumstances, in my view the defendants, particularly Meintjies, did not do what was reasonably expected of them and acted recklessly, and joining the plaintiffs as respondents on the basis that, as at June 2012, they were participants in the unlawful scheme was not reasonably appropriate. If one goes back to first principles it must be remembered that it is the *occasion* which is privileged and not the *statement*. Therefore, whether the statement is protected by the privilege depends on whether it was relevant or pertinent to the *occasion* and its purpose,[62] which in this case was the seeking of an interdict in June 2012. The fact that the plaintiffs had previously participated in an unlawful scheme for a period of 2-3 months, a year earlier, was not relevant to the 'occasion', which occurred a year later. In this regard it was held in *Rhodes University College*[63] that the privilege cannot be relied upon on the basis that it was necessary to make the statements in question because they were simply made as part of the historical account of events.

Conclusion

97. In the result, it follows that the defence of qualified privilege cannot be upheld and the plaintiffs must succeed. Although I am required at this stage solely to pronounce on the defendants' liability, I believe that the following comments must be made, insofar as they may impact on the quantum of the damages which the plaintiffs may expect they are entitled to, and which are either to be settled or determined in due course.

98. Even though the plaintiffs must succeed in their claim, this may ultimately result in no more than a nominal vindication of their rights rather than the award of any substantial recompense. I say this because, even assuming in their favour that they did not intentionally and deliberately participate in the making of false representations to the defendant bank that the debtors they purported to be acting for intended to surrender their estates, and did so merely carelessly in the

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[62] *Molepo v Achterberg* 1943 AD 85 at 89; *Borgin* n 50 at 579A; *Van der Berg* n 34 para 22.
[63] *Rhodes University College v Field* 1947 (3) SA 437 (A) at 464, 466-467.

pursuit of fees, the fact of the matter is that, as I found from my assessment of their evidence, in doing so they clearly must have realized that the provisions of the Act were being misused for the purposes of frustrating the bank in its rights to execute on judgments it had obtained, and they must have realized that what they were doing at the very least constituted an abuse of process. Such conduct on the part of attorneys who, as officers of the Court are expected to always act honourably and with scrupulous propriety, is repugnant to the values of the profession and to award damages in any substantial amount in such circumstances would surely be inappropriate and contrary to public policy.

99. In the result, I make the following Order:

1. The defendants shall be liable, jointly and severally (the one paying the other to be absolved) for such damages as the plaintiffs may prove, or as may be agreed, they are entitled to, pursuant to the publication of the defamatory statements which were set out in paragraphs 8, 55, 56.1, 58 and 59 of the founding affidavit in the application under case number 10978/12.
2. The defendants shall be liable, jointly and severally (the one paying the other to be absolved) for the plaintiffs' costs of suit, including the costs of two counsel where so employed.

M SHER

Judge of the High Court

Appearances:

Plaintiffs' counsel: Adv P Botha SC and M Combrink

Plaintiffs' attorneys: Rapp Van Zyl (Cape Town)
First and second defendants' counsel: Ad S Budlender SC and E Webber
First and second defendants' attorneys: Glover Kannieappan Inc (Johannesburg)
Third and fourth defendants' counsel: Adv C Bisschoff
Third and fourth defendants' attorneys: Clyde & Co (Cape Town)