

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **21st August 2023** Signature:

CASE NO: 081473/2023

DATE: 21st August 2023

In the matter between:

DYNAMIC SISTERS TRADING (PTY) LIMITED

First Applicant

POOE, TEBOGO

Second Applicant

and

NEDBANK LIMITED

First Respondent

Heard: 21 August 2023 – The ‘virtual hearing’ of this opposed Urgent Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 21 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 21 August 2023.

Summary: Urgent application – Uniform Rule of Court 6(12) – the applicant should set forth explicitly the reasons why the matter is urgent – self-created urgency does not entitle applicant to urgent relief – application struck from the roll for lack of urgency –

Civil procedure – summary judgment granted against applicants in their absence – pursuant thereto and to the specially executability order, a warrant of execution issued against immovable property – sale in execution of attached property pursuant to writ –

Urgent application to stay sale in execution, pending application to rescind summary judgment – no prospect of success of rescission application – Uniform rule of court 45A – application should fail.

ORDER

- (1) The first and the second applicants' urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of the urgent application.

JUDGMENT

Adams J:

[1]. On 13 January 2023 the respondent ('Nedbank') obtained summary judgment against the first and the second applicants for payment of the aggregate sum of R3 300 843, together with interest thereon and costs of suit. The immovable property of the first applicant, situated in Bryanston, was also declared specially executable, and pursuant to the said judgment, Nedbank caused a warrant to be issued against the said immovable property with a view to having same sold at a public auction in execution. The sale in execution is scheduled to be held tomorrow, Tuesday, 22 August 2023.

[2]. In this opposed Urgent Application, the first and the second applicants apply for a stay of the sale in execution of the first applicant's property, pending

the finalisation of an application for the rescission of the said summary judgment.

[3]. The applicants' rescission application is based on a claim by the applicants that they were badly represented by their legal representatives, who, in the main action, omitted to plead over to the particulars of plaintiff's claim and only raised a special plea based on the provisions of s 129 of the National Credit Act 34 of 2005. In the rescission application, so the applicants contend, they will raise further defences, on the merits, to Nedbank's claim in the summary judgment in the main action. The applicants also aver that certain settlement proposals were made to Nedbank with a view to settling the dispute between the parties, which proposals, so it is alleged by the applicants, Nedbank unreasonably refused to consider or accept. Shortly after 16 April 2023, when they became aware of the granting of summary judgment against them on 13 January 2023, they, so the case of the applicants goes, approached Nedbank and made certain settlement proposals, including an offer of payment of R1.8 million in full and final settlement of Nedbank's claim.

[4]. None of the applicants' settlement offers were accepted by Nedbank, which necessitated the rescission application and this application to have interdicted and/or suspended the sale in execution of the first applicant's property. The sum total of the defences raised by the applicants to Nedbank's claims is that the finance agreements had not been cancelled prior to the obtaining of the summary judgment in favour of Nedbank. Furthermore, so the applicants submit, Nedbank has failed to mitigate its damages by unreasonably refusing the applicants' proposals.

[5]. The defences raised by the applicants are bad in law. It is instructive to note that the applicants do not dispute that the first applicant was in breach of the loan agreements with Nedbank in that they were in arrears with payment of the monthly instalments, which, in my view, entitled Nedbank to foreclose on the first applicant's property. There is no merit, none whatsoever, in the applicants' contention that, in the absence of a notice to cancel the agreement, they were entitled to make the R1.8 million offer, as they did, which ought to have been

accepted by Nedbank. This contention loses sight of the fact that the offer was made in full and final settlement of Nedbank's claim, which is not the same as an offer to bring the arrears up to date by paying the R1.8 million.

[6]. That, in my view, puts paid to the defence which the applicants intend raising in their application for rescission. The same applies to the attempted defence by the applicants that they were not placed in *mora* and therefore Nedbank was premature in its institution of the action claiming payment of the outstanding balances and a foreclosure order. On this basis, therefore, the applicants apply to have the sale in execution suspended, pending finalisation of the rescission application.

[7]. In issue in this opposed Urgent Application is whether the applicants have made out a case to stay or suspend the sale in execution of the first applicant's property. This issue is to be decided against the factual backdrop as set out in the paragraphs which follow. But before I deal with the facts in the matter, it may be apposite to briefly refer to the principles applicable to the stay of warrants of execution against property, to place in context the issues which require adjudication.

[8]. Uniform Rule 45A reads as follows:

'45A Suspension of orders by the court

The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.'

[9]. As correctly pointed out by the learned authors in *Erasmus Superior Court Practice (Volume 2): Uniform Rules and Appendices*, the court has, apart from the provisions of this rule, a common-law inherent discretion to order a stay of execution and, by extension, a sale in execution pursuant and in terms of an order granted by it. It is a discretion which must be exercised judicially but which is not otherwise limited. (*Road Accident Fund v Legal Practice Council*¹;

¹ *Road Accident Fund v Legal Practice Council* 2021 (6) SA 230 (GP) (a decision of the full court) at paras [31] to [32];

*Brothers Property Holdings (Pty) Ltd v Dansalot Trading (Pty) Ltd t/a Chinese Fair*²).

[10]. Moreover, this Court has, under s 173 of the Constitution, the inherent power to stay execution if it is in the interests of justice. So, for example, in *Road Accident Fund v Legal Practice Council* (supra), the Full Court invoked s 173 of the Constitution (and its common-law inherent power), and not rule 45A, to stay execution. In that matter, it was also held that, as a general rule, the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus, the court will grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. (*Bestbier v Jackson*³; *Brummer v Gorfil Brothers Investments (Pty) Ltd*⁴; *Road Accident Fund v Strydom*⁵).

[11]. The general principles for the granting of a stay in execution were summarized as follows in *Gois t/a Shakespeare's Pub v Van Zyl*⁶;

- '(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
- (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- (c) The court must be satisfied that:
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
 - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

² *Brothers Property Holdings (Pty) Ltd v Dansalot Trading (Pty) Ltd t/a Chinese Fair* (unreported, WCC case no 6149/2021 dated 1 September 2021) at para [40];

³ *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484G - 485C;

⁴ *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 418E-G;

⁵ *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 300B;

⁶ *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) at 155H - 156B;

- (d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i e where the underlying causa is the subject matter of an ongoing dispute between the parties.
- (e) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute.’

[12]. That brings me back to the facts *in casu*. And as already indicated, the applicants have launched an application for the rescission of the summary judgment granted against them, which application has, in my view, no prospects of success. The applicants have failed to demonstrate that they have a *bona fide* defence to Nedbank’s claims, which means that they are not entitled to a rescission of the said judgment.

[13]. Applying the applicable legal principles (referred to *supra*) to the present case, I conclude that the first and the second applicants have not made out a case for the stay of the sale in execution of execution of the first applicant’s property. In my view, real and substantial justice require that the application for the stay of the sale in execution be refused – to hold otherwise would result in an injustice. Nedbank has a judgment against the first applicant on the basis of which the sale in execution is based. The applicants’ rescission application has no prospects of success. Moreover, in their application to stay the sale in execution, the applicants have, in my view, failed to demonstrate a *prima facie* right, entitling them to what is in essence an interim interdict – on the evidence before me, the applicants are not entitled to have the sale in execution stayed.

[14]. The application therefore stands to be dismissed.

[15]. There is another reason why the applicants’ application should fail and that relates to the issue of urgency. Nedbank also opposes the urgent application on the grounds that the application is not urgent. In the event that it is determined that there is any urgency, then it is submitted on behalf of Nedbank, that the urgency is entirely self-created. The first and the second applicants, so Nedbank contends, have been aware since at least 14 April 2023 that there is a judgment against them and that Nedbank intends selling the first applicant’s property at a sale in execution in satisfaction of the said judgment.

Despite this, they only launched the urgent application on 16 August 2023, that is some four months later.

[16]. I find myself in agreement with these submissions. The simple fact of the matter is that howsoever one views this matter the applicants should have launched this application much sooner than they actually did.

[17]. I do not accept the applicants' contentions in that regard that they were endeavouring to resolve the dispute with Nedbank amicably. In my view, the applicants should have launched this application as soon as Nedbank made it clear to them that they would be proceeding with the sale in execution if the parties could not reach an amicable settlement of the dispute. If they did so, urgency would not have been an issue now.

[18]. This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.

[19]. For all of these reasons, I am not convinced that the applicants have passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

[20]. The application therefore falls to be struck from the roll and the costs should follow the suit.

Order

[21]. Accordingly, I make the following order: -

- (1) The first and the second applicants' urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of the urgent application.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Pretoria*

HEARD ON: 21st August 2023 as a videoconference on
Microsoft Teams

JUDGMENT DATE: 21st August 2023

FOR THE FIRST AND THE SECOND APPLICANTS: Advocate Thabo Modisenyane

INSTRUCTED BY: Ndobe Incorporated Attorneys,
Melodie, Hartebeesport

FOR THE RESPONDENT: Advocate W P Steyn

INSTRUCTED BY: Baloyi Swartz & Associates Incorporated,
Centurion, Pretoria
