(Inlexso Innovative Legal Services) of

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 1373/2022

DATE: 2022.01.26

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES : NO
(3) REVISED

In the matter between

DIVERSIFEX 529 (PTY) LTD

and

KIWANGO Q S (PTY) LTD AND TWO OTHERS

J U D G M E N T

WEPENER, J: The applicant seeks to stay or suspend a warrant of execution issued, and properly and lawfully obtained by the first respondent against it. It is common cause that there is no pending litigation between the parties. What the applicant seeks is an order that the respondent be compelled not to exercise its lawful rights but to embark on a procedure elected by the applicant to be more convenient for it.

Rule 45A is not designed to grant a Court with the discretion to apply legal principles or procedures at the whim or the wish of a party. It is designed to assist the party in circumstances where the requirements of the interdict is usually present. Now, the first requirement of an interdict is that there must be an unlawful interference by another party with the rights of the party complaining thereof. It is common cause in this matter that the respondent has not acted unlawfully in any manner whatsoever that it is exercising its rights bestowed on it by law.

The applicant has not taken any steps to dispute the indebtedness to the respondent. Indeed, the legal representative of the applicant conceded that the respondent has a valid cause of *causa* and a valid warrant of execution, which is not the subject of any dispute.

This being so, the applicant has shown no basis upon which the *causa* of the writ may be impugned or the warrant may be impugned. This case is on all fours with the matter of *Firm Mortgage Solutions v Absa Bank Ltd* 2014 (1) SA 168 (WCC) where Davis J held at 171 paras 11 to 14 as follows:

> "11. In the ordinary course of a dispute between a bank on the one hand and an owner of property on the other, where there is a mortgage on the property which secures the debt, the provisions of the National Credit

Act 34 of 2005 ('NCA') would be applicable. *En passant*, I accept that in this case, these provisions are not applicable due to first applicant being a juristic person (as defined in s 1 thereof read together with s 4(1)(a)(i) and because of the nature of the transaction. (See s 4(1)(b) together with s 9(4) of the Act). In this hypothetical case, the NCA is applicable. Does this mean that, where the procedures of the NCA are followed, for example, where a debtor is invited to utilise the debt review mechanisms of the NCA but fails to so act, or before judgment is granted, does not seek to persuade a court to exercise its discretion to invoke the safeguards of debt review and subsequently judgment is granted, the debtor may come and raise similar arguments? In other words, after the judgment has been granted, but before the sale in execution of the property, a court can again intervene by virtue of recourse to rule 45A."

And I would add a question mark.

"12. If the answer is a positive one, then would a court have to consider the very same

arguments on two separate and discrete occasions? Could it possibly be that Rule 45A envisaged the exercise of an equitable jurisdiction unhinged from any legal *causa,* but simply predicated on the equities of a case?

13 If this was the case, almost every default judgment, which provides for a sale in execution of a property, at some point is likely to require a second hearing, pursuant to the stay in terms of Rule 45A. If this were what was intended, Rule 45A should so provide expressly or by clear, necessary implication. In my view, it does not so provide, for the very reason which is highlighted in my example.

14. There may be some sympathy for the second applicant but, this is somewhat diminished by virtue of the fact that he was able to place all these arguments before a court prior to judgment being granted but failed to do so. Unfortunately, the blame lies at his door rather than that of the Court or his counsel who tenaciously sought to justify the application of Rule 45A."

To make it quite clear, the headnote says as follows:

> "The question arose whether Rule 45A provides a residual, equitable discretion to a court confronted with the present set of facts to grant a stay of execution?"

That answer was answered in the negative. There is no difference between that case, which I believe to be correct, and the facts in the matter in this case. Although there was some argument about costs and *de bonis propriis* costs, I do not believe that the attorney of the applicant acted against the rules and procedure provided for in the various directives of the heads of court but rather in terms of a bad legal principle.

In the circumstances, I make the following order:

ORDER:

1. The application is dismissed with costs on an attorney and client scale.

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WEPENER, J

JUDGE OF THE HIGH COURT

DATE: 28/02/2022