REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3173/2020
REPORTABLE: YES/NO
OF INTEREST TO THE JUDGES: YES/NO
REVISED.

In the matter between:

CHRIS-JUAN VAN DER WESTHUIZEN N.O	**1ST APPLICANT**
JAN KRUGER ROBBERTSE N.O	**2ND APPLICANT**
And	
THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA	**1ST RESPONDENT**
THE MASTER OF THE HIGH COURT LIMPOPO	**2ND RESPONDENT**
REGISTRAR OF DEEDS, LIMPOPO	**3RD RESPONDENT**
MH COETZEE BOERDERY	**4TH RESPONDENT**
DEON MARIUS BOTHA	**5TH RESPONDENT**
SHUAIB MAHOMED	**6TH RESPONDENT**
INTERVENING PARTY:	
CORNELIA MARIA CLOETE N.O	**1ST INTERVENING**
RENEILWE DELIN N.O	**2ND INTERVENING**

JUDGEMENT

MANGENA: AJ

[1] On the 24th June 2021 this court granted a final order of sequestration against Sweet Home Mountain Lodge Trust. The order resulted in the trust being divested of its rights to manage its assets and same were placed in the hands of the trustees duly appointed by the Master of the High Court.

[2] At the time of sequestration, the trust was the registered owner of an immovable property described as Farm Sweethome 322, Registration Division KQ, Limpopo Province, in extent 1729, 0445 hectares. It is the transactions relating to this farm which are at the centre of this litigation. This is how it happened.

[3] Jan Kruger Robbertse concluded a credit loan agreements with Unigro Financial Services Proprietary Limited for a total sum of R20 million. These loans were taken in 2013 and 2014 respectively. As security for his indebtness, the trust entered into an unlimited suretyship agreement with Unigro Financial Services (Pty) Ltd (Unigro) and committed itself to pay for Mr Robbertse should he default in his repayment. In 2013 the trust hypothecated the property (Farm) as security for Mr Robbertse`s debt by registering a mortgage bond for R15 000 000-00. In 2014, a second mortgage bond was registered for R5000 000-00.

[4] The credit loan agreements were later ceded to the Land and Agricultural Development Bank of South Africa (Land Bank). When Mr Robbertse defaulted on his repayment, Land Bank instituted legal proceedings for the repayment of all balance owing on various accounts as well as cancellation of the agreements. It also instituted sequestration proceedings against the trust and obtained a provisional order on 27 October 2020. It is this provisional sequestration order which was confirmed as final on 24 June 2021 by Makgoba JP.

[5] Upon receipt of the final sequestration order and their appointment as trustees of the insolvent estate of the Sweet Home Mountain Trust, the trustees took over the management of the farm and placed it on sale. I interpose to state that the trustees, Mr Robbertse and Van Der Westhuizen had on 06 April 2021 appointed Mr Deon Marius Botha, the fifth respondent and the provisional trustee at the time; their lawful agent and nominee to act on their behalf and sign documents relating to the sale of the farm Sweet Home. Notably the Power of attorney further states that “We tender to unconditionally support and not oppose the transfer of the Sweet Home Farm in our personal capacities.”

[6] On the 19th June 2021, the trustees accepted an offer of R23 000 000-00 to purchase the farm property. The acceptance was subject to the Master of the

High Court extending their powers. The Master approved the sale on 24 August 2021.

[7] The applicants in their capacities as the trustees of the trust launched an application for rescission of the "default judgment" granted by Makgoba JP on 24 June 2021 placing the trust under final sequestration. This application is opposed by the first, fifth and sixth respondents and is still pending before this court. Pending rescission of the default judgment, the applicants requested written confirmation from the first respondent that she will not proceed with the sale of the immovable property. No such written confirmation was made and instead the first respondent filed an opposing affidavit to the rescission application wherein the sale of the farm was confirmed.

[8] Unhappy with the turn of events, the applicants approached this court on an urgent basis for an order suspending the operation and execution of the order finally sequestrating the Sweet Home Mountain Lodge trust, pending the finalisation of the rescission application. This application is opposed by the first, fifth and sixth respondents primarily on the basis that it is male fide, constitute an abuse of process and therefore not in the interest of justice.

[9] At the commencement of the proceedings I prevailed upon counsel to argue both points in limine and merits simultaneously as they appear to be closely interlinked. Counsel duly obliged and I am grateful for their kind understanding. I duly considered the submissions made including all the points in limine raised and given the conclusion reached, I propose to dispose of the matter on its merits.

[10] Rule 45A of the Uniform Rules provides that the court may suspend the execution of any order for such period as it may deem fit. Both counsel agreed that the rule grants the court a wide discretion which must be exercised judicially. It is also accepted as a general principle that a court will grant a stay of execution where a real and substantial injustice would otherwise occur. Waglay J (as he then was) summarised the legal position on the application of Rule **45A in Gois v Van Zyl, 2011(1) SA 148(LC)** at para 37 as follows:

"The general principles for the granting of a stay in execution may therefore be summarised as follows:

(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

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the undertaking causa is the subject –matter of an on-going 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.

[11] **In Van Rensburg and Another NNO v Naidoo and others NNO, Naidoo and others NNO v Van Rensburg NO and others, 2011 (4) SA 149 (SCA**) Navsa JA confirmed the correctness of the approach adopted by Waglay J and said the following with regard to the inherent powers of the court on the staying of execution:

"[51] *Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.*

[52] A court will grant a stay of execution in terms of Uniform rule 45A where the underlying cause of judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, court acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action."

[12] Guided by the above principles, I proceed to consider whether the circumstances of this case justify an order suspending the operation and execution of the final sequestration. Conversely put, will there be an injustice if the liquidation process were to be allowed to continue? Adv. Van der Merwe, counsel for the trust, submitted that the Farm is the only major asset of the

trust and if it is to be sold, there will be no use in rescinding the default Judgment. He argued that the trust is not indebted to the Creditors but stood as surety for the indebtness of Mr Robbertse who is disputing the claims by the Creditors. The cases have not been adjudicated and the respondents were wrong to obtain a sequestration order in respect of a disputed claim. The trust relies on the defences of the Principal debtor (Mr Robbertse) to resist the Creditors claim.

[13] The respondents represented by Adv Cilliers SC contends otherwise and it is submitted on their behalf that the application for the stay of the sequestration proceedings is mala fide and constitutes an abuse of court process. In support of this contention counsel stated that the applicants were aware of the sequestration proceedings and made a deliberate and intentional choice not to oppose them. On the 23 April 2021 prior to the granting of the final order, the Judge President convened a meeting of all the affected parties with a view to manage other cases involving Mr Robbertse and the trust. The applicants were represented by Mr A Van der Merwe (Counsel) and W. Swanepoel (Attorney). With regard to this case in particular, the minutes reflect that all papers had been filed and the respondent was to file its heads of argument by 14 May 2021 and the matter was allocated a hearing date of 24 June 2021.

[14] The applicants failed to comply with the Judge President's directives regarding the filing of the heads of argument and instead filed a Rule 35(12) notice calling upon the respondents to provide certain documents. On the date of the hearing, the applicants applied for a postponement ostensibly to be furnished with the requested documents mentioned in Rule 35(12) notice. The application was unsuccessful and counsel then informed the court that he had no instructions to proceed with the matter and applied to withdraw from further participation. The court allowed him to withdraw and the matter proceeded without applicant's oral submissions. The court granted a final sequestration order.

[15] The respondents argue that given the conduct of the applicants it will not be in the interest of justice that the sequestration proceedings be stayed pending rescission. They submit forcefully that the applicants are the authors of their own misfortune by disregarding the rules and deliberately failing to comply with the Judge President's Directives. Their conduct does not deserve of their protection by this court.

[16] I agree with the respondents submission that the applicants are solely to blame for the quandary they find themselves in. Any seasoned litigation practitioner knows that an applicant for postponement seeks an indulgence. The Constitutional court, per Mokgoro J, authoritatively put it as follows:

"*The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seek an indulgence from the court. Such a postponement will not be granted unless this court is satisfied that it is in the interest of justice to do so…whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties."* **National Police Service Union and others v Minister of Safety and security and others, 2000 (4) SA 1110 (cc) at para 4.**

[17] Once a postponement is refused, the party asking for a postponement should be able to proceed. In **Take and Save Trading CC and others v Standard bank of South Africa Ltd, 2004 (4) SA 1 (SCA)** Harms JA in a case similar to the present this one where counsel withdrew after the court refused a postponement, said the following: Fairness of court proceedings requires of the trier of fact to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. **One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner) to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues and the parties to ensure that this abuse is curbed by, in suitable cases, refusing postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right."**

[18] The applicants do not dispute that they failed to comply with the directives issued by the Judge President with regard to filing of their heads of argument and appearing in court on the 24 June 2021 for the hearing of the matter. This admission weighs heavily with me in the determination of the relief the

applicants seek. I find it opportunistic for a party to walk away from a court constituted to give him a fair hearing on an existing dispute and later turn around and claim that he was not afforded an opportunity to state his case. The machinery of justice must, according to the applicants, grind to a halt whenever it suits them. They and they alone determine when will the respondents and the creditor's interest they have been appointed to protect receive justice from this court. This attitude is repulsive to good order and the administration of justice. It should not be tolerated in the name of access to justice. Every person including the respondents have a right of access to justice and when they litigate their expectations are that their matters will be adjudicated in accordance with the rules and justice will be dispensed speedily. It is unfair for the applicants to spurn the court, violate its rules and still seek its protection relying on the rules they have violated.

[19] The applicants are clearly malicious in their intent and their application for rescission of judgment lacks the hallmarks of honesty and sincerity. Whilst it is true that I am not called upon to make a determination on the prospect of their success, I am justified to take into account the circumstances which led to the "default Judgment" being obtained against them. In this regard I am duty bound to make an assessment of the bona fides of the applicants in their rescission application and the grounds they rely upon. I do so not to pre-empt the outcome or to pre-judge it but to assess their sincerity. Applicants have a benefit of legal representation and would have been aware by now what the consequences of their walk away from the court proceedings on 24 June 2021 was. Their legal counsel would have by now advised them that the constitutional court said: "the words granted in the absence of any party affected thereby as they exist in Rule 42 (1) (a) exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent……. I do not, however accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by the same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence**)" Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State [2021] ZA CC 28.**

[20] The Constitutional Court is the highest court in the land and the views expressed therein constitute good law in the administration of justice. Justice is best served when all parties to the litigation are governed by the same rules and play by them. It is denuded of its value and purpose when others deliberately ignore the rules and frustrate the system. In time, it will collapse and the social order upon which it is predicated will be adversely affected. The court has a duty to protect its own processes against those who seek to abuse it for their own selfish ends. I conclude with the words of the Supreme Court Justices of Zimbabwe who 30 years ago said the following:

"It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage: *(vigilantibus non dorminientibus jura subveniunt)*- roughly translated the law will help the vigilant but not the Sluggard: **Ndebele v Ncube,1992 (1) ZLR 288 S**

[21] Having perused the papers filed, it is clear that at the heart of the applicant's apprehension for injustice is the sale of the farm. This fear is unfounded and unjustified on the facts of this case as the trustees have voluntarily and without coercion signed a power of attorney authorising the fifth respondent to conclude an agreement for the sale of the farm. This power of attorney has not been revoked. At the time the applicants signed the power of attorney, they knew that the fifth respondent had been appointed a provisional liquidator and they had filed their opposing papers to the sequestration proceedings. Taken in context, the sale of the farm cannot be a reason justifying the institution of the Rule 45A application. I am therefore not persuaded that there will be any substantial injustice if the sale of the farm is proceeded with. This would of necessity mean as well that no case has been made out for the stay of the sequestration proceedings.

[22] In the circumstances the application is dismissed with costs including the costs of one senior counsel.

MANGENA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Applicants:	**A VAN DER MERWE**
Instructed by:	**DIEDERIKS OUDEGEEST ATTORNEYS INC**
For the Respondents:	**J CILLIERS SC**
Instructed by:	**STRYDOM & BREDENKAMP INC**
Date Heard on:	**08 FEBRUARY 2022**
Date Delivered:	**14 FEBRUARY 2022**