

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 1490/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 03/03/2022

IN THE MATTER BETWEEN:-

**THE TRUSTEES FOR THE TIME BEING OF THE
"LONA VENTER FAMILIE TRUST-IT:09635/2004"**

1ST APPLICANT

**ELANIE NACHTEGAAL HAVENGA N.O
(In her capacity as Trustee of the "LONA VENTER
FAMILIE TRUST-IT:09635/2004")**

2ND APPLICANT

ELANIE NACHTEGAAL HAVENGA

3RD APPLICANT

**FERREIRA MACHIEL NEL N.O
(In his capacity as Trustee of the "LONA VENTER
FAMILIE TRUST-IT:09635/2004")**

4TH APPLICANT

FERREIRA MACHIEL NEL

5TH APPLICANT

LONA VENTER N.O

6TH APPLICANT

**(In her capacity as Trustee of the "LONA VENTER
FAMILIE TRUST-IT:09635/2004")**

LONA VENTER

7TH APPLICANT

LEONARD VENTER N.O

8TH APPLICANT

**(In her capacity as Trustee of the "LONA VENTER
FAMILIE TRUST-IT:09635/2004")**

LEONARD VENTER

9TH APPLICANT

ROUAN VENTER N.O

10TH APPLICANT

**(In her capacity as Trustee of the "LONA VENTER
FAMILIE TRUST-IT:09635/2004")**

ROUAN VENTER

11TH APPLICANT

AND

FIRSTRAND BANK LIMITED t/a WESBANK

1ST RESPONDENT

**THE SHERIFF OF THE HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

2ND RESPONDENT

JUDGMENT

MANGENA AJ

"In all intercourse with my professional brethren, I will be always courteous. No man's passion shall intimidate me from asserting fully my own or my clients rights, and no man's ignorance or folly shall induce me to take any advantage of him, I shall deal with them all as honorable men, ministering at our common altar"

David Hoffman. A course of legal study

INTRODUCTION

[1] This is an urgent application for an order suspending the execution of the orders granted against the Applicants. The orders were granted subsequent to the institution of the legal proceedings by the Respondent against the Applicants. The facts giving rise to the application are set out below.

BACKGROUND

[2] On or about **26 April 2017**, the Applicants entered into an instalment sale agreement with **Unigro Financial Services (Pty) Limited (Unigro)**, Registration Number **2008/009529/07** for the purchase of **1x Nuwe 2017 John Deere CS 690 Katoen Stripper, engine number: [....], chassis number INOC6 9SCH4065007**. The total cost of the agreement was **R9 720 101.36** inclusive of VAT.

[3] The purchase price was payable in **4 annual instalment** payments in the amount of **R1 944 020.27** effective from **30 November 2017** with a final instalment due on **30 November 2021**.

[4] **Firststrand Bank Limited t/a Wesbank** issued summons against the Applicants alleging that as at **18th August 2020** the Applicants were in arrears on their financial obligations in an amount of **R3 375 679.18**. Attached to the **summons** was instalment sale agreement concluded between the Applicants and **Unigro Financial Services (Pty) Limited** as well an agreement between **Unigro Financial Services (Pty) Limited** and **Wesbank (A division of Firststrand Bank Limited)**. The other parties to the agreement are Grocapital Financial Services (Pty) Ltd and Afgri-operations Limited. Clause 6 of the agreement provides for cession and delegation of contracts by Unigro to Wesbank. The agreement was signed on **02nd March 2015**.

[5] Upon receipts of the summons, Applicants appointed **Tiaan Smuts Attorneys** to represent them in these proceedings. On the **13 April 2021**, the attorneys served and filed a notice of appointment as attorneys of record. The notice stated that all further pleadings, notices, processes and documents should be served at their offices c/o their correspondents. The notice has both the telephone numbers and e-mail addresses of the respective law firms.

[6] When no notice of intention to defend was forthcoming, Wesbank represented by **Hack Stupel and Ross Attorneys** approached the Registrar and obtained an order confirming cancellation of the agreement and return of the **1 x Nuwe 2017 John Deere CS 690 Katoen Stripper**. The date stamp on the court order is **02 December 2021**.

[7] On the **25th January 2022**, the Registrar authorised the **Sheriff of Mokopane** to take the 2017 John Deere CS 690 Katoen Stripper from the Applicants and place it in possession of Wesbank. The Sheriff did as instructed and attended at the Applicant's farm on **02 February 2022**.

[8] Surprised at the turn of events, Applicant's attorneys addressed a letter to

Hack Stupel and Ross Attorneys confirming an earlier telephone discussion and recorded the following requests:-.

[1] _____

[2] _____

[3] *Accordingly, we requested you to kindly, yet urgently, provide us with the application papers in respect of the default judgment taken against our client, together with the court order granted against our client. We shall be grateful to receive same as a matter of urgency.*

[4] *Our clients have bona fide defences to your client's claims. Although we have not yet received the application papers, we are of the view that good prospects exist for our clients to have the default judgment rescinded.*

[5] *We request that your client hold over on any attempted attachment and/or removal steps pursuant to the Court order it obtained in our client's absence, at least until such time that we have been afforded a reasonable opportunity to consider the application papers.*

[6] *In the event that your client does not agree to such request our clients will have no alternative but to proceed with an urgent application to stay such process and/or rescind the judgment.*

[7] *Moreover, we tender that in the interim whilst we await the application(s) papers and consider same, that our client will not in any way move or operate the cotton stripper, which is a 56 tonne machineIn an effort to further demonstrate our client's bona tides a tracking device can be installed to the cotton stripper for monitoring by your client.*

[9] Hack Stupel and Ross Attorneys responded to the letter advising that it does have a copy of the application for a default Judgment. It further advised that the proposal had been rejected and the item will be removed. In the intervening period,

the local correspondents were frantically searching for the court file at the Registrar's office and imploring on the Polokwane office of Hack Stupel and Ross Attorneys to assist but no avail. This is despite the fact that they undertook to pay for the copies. The letter concluded by stating that "your collegial co-operation will be greatly appreciated". Again no response was given.

[10] The flurry of correspondences culminated in a missive dated 14 February 2022 from Tiaan Smuts Attorneys on behalf of the Applicants addressed to Hack Stupel and Ross Attorneys wherein it was confirmed that two applications, namely "urgent applications suspending the irregular order obtained by your offices, as well as a rescission application in respect of the said order" have been actioned and set down for hearing on 22 February 2022. The letter was accompanied by unissued application papers and reiterated a tender for attachment without removal as the machine was required for harvesting purposes.

[11] Wesbank and its attorneys were unfazed by the tender and the offer for an "amicable" settlement. They instructed the sheriff to move ahead with the removal despite being in possession of the application *albeit* unissued. The removal necessitated an amendment of the prayers in the Notice of motion to include a prayer for the return of the cotton stripper which was removed on the date the applications were issued.

[12] The First Respondent, Wesbank is opposing the application for the suspension of the orders and has argued that the matter is not urgent. It is contended that Applicants have failed to set out facts and circumstances explaining why they could not get substantial relief in due course. In their defence, applicants stated that the matter is urgent in that the equipment (cotton stripper) is required for harvesting cotton in the next two months and if it is removed, they will suffer "catastrophic damages if the suspension order is not

granted and the sheriff is allowed to remove the cotton stripper. It was further submitted on their behalf that given its sheer size and the expertise required to assemble it, it will not be possible to acquire an alternative stripper. In my view, the applicants met the threshold for urgency and this issue should not detain us further.

[13] **Advocate Jacobz** further argued on behalf of Wesbank that the relief sought by the applicants was incompetent as the order and warrant have been executed and only the sale in execution which is still to take place can be halted. He submitted that the bank had given an undertaking that the sale in execution shall not take place pending the rescission application. He objected to the order for the return of the cotton stripper on the basis that Rule 45A cannot be read to include the power to order an execution creditor to return the goods already attached and removed. As I understand him a suspension order shall not have retrospective effect.

[14] The general principles for the suspension of orders are trite and a detailed exposition thereof was given by ***Binns-Ward J in Nicolaas Euverhardus Phillippus Stoffberg N.O and Another v Capital Harvest (Pty) Ltd*** Case no 2130/2021 delivered on **21 March 2021**. Regarding the power of the court and its limitations on the exercise of the discretion whether to stay/suspend the order(s) he said: "The broad and unrestricting wording of Rule 45A suggests that it was intended to be a restatement of the courts common law discretionary power. The particular power is an instance of the court's authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. "Real and substantial justice" is a concept that defies definition, rather like "good cause" or 'substantial reason'. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to

warrant suspending the execution of a judgment; and if they are, on what terms any suspension it may be persuaded to allow should be granted".

[15] The contention by Advocate Jacobz cannot be supported. Rule 45A grants the court a wide discretion to suspend an order for execution, which discretion is limited only by consideration that it must be exercised judicially. The overriding consideration is the interests of justice. In as much as the court has the power to enforce its orders, it should equally have the power to suspend orders from taking effect where real and substantial injustice would occur. This will include the power to order that the suspension be with retrospective effect. To restrict and limit the power to future operations will amount to the tying of the court's hands rendering it powerless in the eyes of injustice taking place within its corridors. I say so because a court has an inherent power to regulate and control its own process subject to the Rules of Court. The court will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or put otherwise, where injustice would otherwise be done. **Strime v Strime, 1983 (4) SA 850 (CPD) @ PAGE 852.**

[16] In **Fluxman v Fluxman, 1958 (4) SA 409(W) Trollip AJ** (as he then was) commenting on the use of the word rescind, suspend or vary in relation to the power of the court said that the power to rescind, vary or suspend an order in its ordinary connotation means abrogating, annulling or revoking the order from its inception and it could therefore be made with retrospective effect. It must also have been intended in consequence that the order could be suspended with retrospective effect. Moreover the power to rescind, suspend or vary is made dependent upon the existence of "good cause". As good cause, as shown, would have operated in the past it is reasonable to suppose that the legislature intended the court to have the necessary power to grant relief in respect of the past period as well. Lastly, it seems obvious from the section that the intention was that the court on good cause shown should be free to be able to do complete justice

between the parties having regard to all the circumstances.

[17] On the authority of **Fluxman** above, this court can suspend the orders granted against the Applicants with retrospective effect if it is in the interests of justice to do so or doing so will mitigate against real and substantial injustice.

[18] On the facts of this case, there is no gainsaying the fact that applicants are within the protection of Rule 45A in that they are disputing the cause of the debt relied upon by Wesbank to attach and remove the cotton stripper. They have challenged the legal authority of Wesbank to institute the proceedings against them and intend to raise this issue as one of the basis to challenge the default judgment granted against them.

[19] It is not for me to express my view with regard to the prospects of success save to state that I have given due consideration to averments made therein and noted that the cession agreement relied upon by Wesbank predates the sale agreement with Unigro. It may well be that it includes cession of future debts but that will be for the court hearing the rescission application to deal with.

[20] Having considered the papers filed and the submissions made by counsel, I am inclined to grant the prayers contained in the amended notice of motion. The conduct of Hack Stupel and Ross Attorneys for Wesbank with regard to the removal of the cotton stripper in spite of the fact that there was an impending urgent application for the stay of the warrant demonstrate the height of incivility and discourtesy to colleagues. Lawyers are officers of the court and they owe to each other respect and cordiality at all times. Attorneys for Wesbank failed in this basic duty and their failure resulted in an unnecessary and probably an expensive legal application which could have reasonably been avoided.

[21] Writing in **Helen Roper Consulting v Toyota Tshusho Africa, Case no**

1171/2010 (KZN) D Pillay J deprecated lack of collegiality as follows and I share her views unreservedly:-

[15] A disturbing feature of this case is the lack of collegiality on the part of the Applicant's legal representatives. Collegiality is a relationship between colleagues. Colleagues are people united in a common purpose in a professional or work situation. Broadly, it connotes a commitment to the common purpose and working towards it. Narrowly, colleague and collegiality refer to fellow members of the same profession. Respect for the commitment to the purpose and to fellow members welds the relationship amongst colleagues. In academic circles collegiality may count as one of the pillars of performance. Collegiality on the bench means that Judges have a common interest as members of judiciary to getting the law right; and to dispensing justice efficiently and effectively. This must also be the common purpose of the legal profession as a whole. The common purpose must be to resolve disputes efficiently and effectively. Interlocutory applications that tend to seek tactical advantages and which do not remedy disputes substantively tend not to be effective."

[22] This proceedings could have been very well averted had Hack Stupel and Ross resorted to the resolution of this matter on the basis of appropriately presented facts and not tactical proficiency. On the facts it was very clear that the applicants have appointed Tiaan Smuts Attorneys as their attorneys of record for the purpose of receiving all notices and pleadings in the matter. Even if they may have inadvertently omitted to file their notice of intention to defend, collegiality required to serve a set down for default judgment application in accordance with the Practice Directives. Upon receipt of the default judgment, it would still have not been harmful to notify the attorneys that a default judgment had been obtained and unless payment is received, execution steps will be taken. None of this was done and scarce judicial resources were expended on a matter which would have been "resolved" without a need for litigation.

[23] The applicants having succeeded; they are not entitled to their costs because all indications are that they have not been sincere in their dealings with Wesbank. They contended that their account is up to date and not in arrears but could not furnish any proof of payment. It is trite law that any party alleging payment of a debt bears the onus to proof payment **Krishna v Pillay, 1946 AD 946.**

[24] In the premises the following orders are made:-

1. The application is urgent and Applicant's non-compliance with time limits for service and filing is condoned.

2. Pending the finalisation of the Applicant's application for the rescission of the default judgment granted under **case number 7478/2020:**

2.1 The enforcement of the default judgment order is suspended with retrospective effect.

2.2 The warrant of delivery of goods issued **under case no 7478/2020** is suspended with retrospective effect.

3. The Respondent is ordered to take all reasonable and appropriate steps to return **NUWE 2017 JOHN DEERE CS 690 Katoen Stripper, Engine number [...], chasis number 1NOC69SCH4065007** to the Applicants within **15 days** from the date of this order. The Respondent shall be liable for the costs of the expert to disassemble and assemble it.

4. Each party to pay its own costs.

M.I MANGENA
ACTING JUDGE OF HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Applicants	:	Advocate Johan Prinsloo
Counsel for the Respondents	:	Advocate A Jacobz
Date of hearing	:	24 February 2022
Delivery	:	03 March 2022