IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 11126/2013

DATE: 18 JULY 2013

In the matter between:

FIRM MORTGAGE SOLUTIONS (PTY) LTD	1st Applicant
JAN DIEDERICK COETZEE	2nd Applicant
and	
ABSA BANK LIMITED	1st Respondent
GERHARD LA GRANGE	2nd Respondent

J U D G M E N T

DAVIS, J:

This is an application for a stay of execution, which was scheduled for 22nd July 2013, for a period of no less than six months from date hereof. The background to this application is that a judgment was procured by the first respondent on the 29th January 2013. It appears that the applicants were engaged in a business venture with second respondent. According to the founding affidavit, the applicants were contractually obligated to the first respondent, as set out in the

particulars of claim, which justified the order to which I have made reference.

In terms of these particulars of claim, the first applicant was obliged to pay to plaintiff monthly instalments in reduction of its total indebtedness to the first respondent. The instalments at the time of the compilation of the particulars of claim was in the amount of R5 062 679,00. In addition deeds of suretyship were signed by the second applicant and the second respondent on the 11 February 2008 in which they bound themselves jointly and severely as sureties and co-principal debtors *in solidum* on the first respondent for due payment of the debts to which I have already made mention.

This particular *causa*, which formed the basis of the summons by which the first respondent sought to recover the monies it had lent failing breaches by the first applicant, second applicant and second respondent. There is no dispute that the judgment which was granted on the 29th January 2013 was properly procured and granted the Court in question. There is no application for rescission of this judgment, nor as I understand from Mr Steenkamp, who appears on behalf of the applicants, is there any likelihood of an application.

The question that arises is: on what basis, given that there is

no application for rescission of judgment, would a Court exercise a discretion to grant the application as urged upon me by the applicants? The answer is to be found in Rule 45A of the Uniform Rules of Court and. In turn this necessitates an answer to a further question as to whether the particular Rule is applicable in a case such as the present. In Gois v Van Zyl and Others 2011(1) SA 148 (LC) Waglay, J (as he then was) set out the basic principles for a grant of a stay in execution which, as Erasmus in Superior Court Practice writes, is applicable to Rule 45A. These principles were summarised by the learned Judge, at para 37 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);

(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 underlying *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."

To the extent that there is any uncertainty as to the meaning of these dicta, further clarity is to be found in the judgment where, the learned Judge examines the facts of the case and, in particular, whether a stay of execution should be granted, pending the outcome of a rescission application. Waglay J then said:

> "The applicant will furthermore suffer irreparable harm if the execution is not stayed and the rescission application is successful." (para 38)

It is clear that what was intended in this case was that, where the *causa* for the execution is a judgment and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a

favourable discretion by a court.

In the present case, there is no such application. The question arises as to whether Rule 45A provides a residual, equitable discretion to a court confronted with the present set of facts.

What then does the applicant offer as the justification for an exercise of a court's discretion in its favour?

In essence, it puts up a set of proposals by which second applicant seeks to ensure that the total debt to first respondent will be discharged by no later than the 31st January 2014. In both the founding affidavit and in a further affidavit, the Court is informed that the second applicant has the means to settle the debt and accordingly, a discretion should be exercised to achieve this purpose, particularly because of the notorious fact that, if property is sold in execution, the property fetches a lower purchase price than otherwise would be the case.

Can this, on its own, justify the exercise of a discretion within the scope of Rule 45A? The difficulty confronting the Court in this case may be illustrated by way of an example which is not directly applicable to this case but illuminates the problem.

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 section 1 thereof read together with section 4(1)(a)(i) and because of the nature of the transaction. (See section 4(1)(b) together with section 9(4) of the Act). In this hypothetical 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 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 section 45A.

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?

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 stay in terms of Rule 45A . If this is 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.

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 of these arguments before a court prior to judgment being granted but failed to do so. Unfortunately, the blame then lies at his door rather than that of the Court or his counsel who tenaciously sought to justify the application of Rule 45A.

In the result, **THE APPLICATION IS DISMISSED WITH COSTS**.

DAVIS, J