IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case no.: 2130/2021

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

NICOLAAS EUVERHARDUS PHILIPPUS STOFFBERG N.O. First Applicant

ZULMIRA FEDELIA STOFFBERG N.O. Second Applicant

(In their capacity as the surviving duly appointed Co-trustess of the KEERT DE KOE TRUST IT1909/99)

and

CAPITAL HARVEST (PTY) LTD Respondent

REASONS FOR ORDER MADE ON 3 FEBRUARY 2021

(Delivered by email to the parties' legal representatives and by release to SAFLII. The reasons shall be deemed to have been handed down at 10h00 on 2 March 2021.)

BINNS-WARD J:

[1] On 3 February 2021 I made an order in the following terms in this matter, which came before me in the fast track court in the Third Division:

1. The applicants' non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and the application is entertained as a matter of urgency in terms of Rule 6(12).
2. The execution of the writ of execution in respect of moveable property dated 1 September 2020 in case no. 8303/2020 is hereby stayed until 4 August 2021, and the sale in execution pursuant to such writ advertised to take place at 10h00 on 3 February 2021 is hereby cancelled.
3. The applicants are ordered to pay the respondent's costs of suit, including the wasted costs incurred up to and including 3 February 2021 in respect of the aborted execution of the writ of execution.
4. Written reasons for this Order will be handed down in due course.

As adumbrated in paragraph 4 of the order, these are my reasons for making it. Their provision was unfortunately delayed because the court file was detained for more than three weeks by the typists responsible for typing up the court's orders. The file was returned to my chambers only on 24 February, and the length of the interval since I had last dealt with it meant that I had to take time to refresh myself on the facts.

[2] The applicants, who are the surviving trustees of the Keert de Koe Trust ('the Trust'), applied as a matter of urgency to stay the sale in execution of a herd of dairy cows and certain farming equipment. The sale was advertised to take place at 10h00 on 3 February 2021. The application to cancel the sale and stay the execution of the writ of execution was brought immediately before the auction proceedings were due to commence. This was because, in the circumstances I shall describe presently, it was only appreciated at a very late stage that the respondent would not agree to defer execution. It was therefore necessary for me to issue an order that was telephonically conveyed to the sheriff conducting the sale in execution directing that the auction not proceed until the application was determined later in the morning.

[3] The Trust, which conducts a dairy farming business, is a judgment debtor of the respondent. The judgment was obtained by reason of the Trust's failure to redeem two loans to it by the respondent. There had been a long history of abortive arrangements between the parties to obtain the repayment of the loans before the respondent eventually took judgment against the Trust and proceeded to execute it. It was clear that the respondent had endeavoured to be as

accommodating as a reasonably possible of the Trust's business difficulties, but that it had run out of patience.

[4] The application was opposed. It was not suggested that there was anything amiss with the judgment that the respondent had obtained, or that it was susceptible to being rescinded or overturned on appeal. The applicant merely contended that in the peculiar factual circumstances, which I shall describe presently, real and substantial injustice would be wrought were execution of the judgment not temporarily stayed.

[5] The respondent is a registered credit provider. It carries on business in the provision of credit to agricultural enterprises. The judgment debt was incurred in respect of two credit agreements entered into between the Trust and the respondent in June 2017. The last instalment payment made by the Trust in redemption of the debt was effected as long ago as 5 December 2018. The Trust indicated that it intended to sell some of its property to redeem the debt. The respondent alleged that the intention was to sell the land to a developer, but the project came to nought because the Trust's asking price was too ambitious. The respondent considers that it was given the 'run around' for a period of about two years. Action was instituted against the Trust for payment of the then outstanding amount of R5 035 498.78 in July 2020.

[6] The Trust applied during 2020 for permission in terms of the Subdivision of Agricultural Land Act 70 of 1970 to subdivide one of its farms so as to be able to sell off the subdivided portion and use the proceeds to settle the respondent's claim. Permission for the subdivision was granted on 5 October 2020. A deed of sale, in terms of which the trustees of the Jan Cloete Trust agreed to purchase the portion for R11 million, was executed on 14 January 2021. The Jan Cloete Trust has since paid the sum of R5,5 million, which is the deposit in terms of the deed of sale. The money has been paid into the appointed conveyancer's trust account to be held there pending transfer. Bond finance for the payment of the balance of the purchase price has reportedly been procured from Absa Bank, at least in principle. The respondent has not, however, been provided with sufficient financial guarantees that its claim will be a first charge on the proceeds of the sale, but it is the mortgagee and transfer cannot be given until its interest in receiving payment has been adequately secured.

[7] The validity of the sale agreement is questionable because at the time it was concluded the Trust had only two trustees, whereas the trust deed requires that there at all times be no less

than three trustees and that should the number fall below that the remaining trustees have no authority to act save in respect appointing a successor trustee or to preserve the assets of the Trust. The vacancy on the board of trustees was occasioned by the death of one of the trustees on 18 October 2020. Delays have been experienced in obtaining letters of authority for the substitute trustee.

[8] Notwithstanding the difficulty with the formal validity of the sale agreement, there is no doubting the earnestness with which the purchaser entered into the transaction and the likelihood that it will remain committed to the transaction. That follows, in my view, from its payment of the 50% deposit on the purchase price. There is also no reason to doubt that the trustees of seller trust will confirm the agreement once they are again quorate. The difficulty occasioned by the Trust having been short of a trustee when the deed of sale was concluded was only appreciated when the applicants consulted with counsel on 2 February 2021 for the purpose of drafting the papers in the current application.

[9] The respondent contends that there is nothing to prevent the purchaser demanding repayment of the deposit because the trustees lacked authority to sell the property. That is true. But if it were to happen, and it were to become clear that the sale had fallen though, there would be nothing to prevent the respondent from thereupon applying for a cancellation of the stay of execution. The grant of a stay of execution is in the nature of an interlocutory order that a court would be at liberty to revisit on new facts.

[10] The applicants averred that the property that has been attached, and was the subject of the advertised sale in execution, is the Trust's dairy herd and the 'milking apparatus' used to milk the cows. It was averred that the dairy herd is a crucial source of income for the Trust, without which it would be unable to profitably conduct its operations on its remaining farmland. The applicants testified that the sale in execution would accordingly have 'disastrous financial consequences, including that the Trust will have to retrench all 23 of its permanent employees that are engaged in its milking operations (each of whom supports a family residing on the Trust's other farms)'.

[11] Upon being apprised of the sale to the Jan Cloete Trust, the respondent's attorneys were instructed to advise the applicant Trust's conveyancers of the bond cancellation figure and to inform that the latter of the respondent's requirements for their consent to the cancellation of the

mortgage bonds. Those requirements were conveyed in an email letter from the respondent's attorneys to the applicants' conveyancers, dated 26 January 2021. The respondent required the issue of the following guarantees in its favour: a guarantee in the amount of R5 389 111.24 plus interest thereon from 31 December 2020 in respect of the settlement of the debt owed in terms of the first of the aforementioned credit agreements and R656 139.24 plus interest in respect of the second credit agreement.

[12] In response to the aforementioned letter of 26 January, a guarantee in favour of the respondent's bankers in the amount of R5,5 million was issued by Grindrod Bank on 1 February 2021. The respondent's attorneys thereupon addressed a letter to the applicants' conveyancers that was emailed at 4:35 pm on 1 February 2021 in which they pointed out that the guarantee that had been furnished did not cover the full amount of the respondent's claim and referred to the telephonic advice provided by the applicants' conveyancer earlier in the day that a bond was to be obtained from Absa Bank, from which the balance owing to the respondent would be settled. The respondent's attorneys had been informed that attorneys Laas & Scholtz had been instructed to register the bond. The applicants' conveyancers were requested to ascertain as a matter of extreme urgency 'what the status of their bond instruction is at this stage and what outstanding requirements they have before they would be in a position to issue us with a bank guarantee in respect of the outstanding balance owed to our client'. The letter proceeded 'We also confirm our advices that our client will only be in a position to make a final decision with regard to the sale in execution scheduled for Wednesday the 3rd instant upon receipt of the aforesaid information'.

[13] The applicants' conveyancer says that he did not receive the email. No information was provided from attorneys Laas & Scholtz. By the time the current application was launched, no further information had been provided to the respondent in respect of the provision of an additional guarantee in respect of the balance of the judgment debt.

[14] So much for the factual context of the proceedings. The application was brought in terms of rule 45A of the Uniform Rules, which provides:

'*The court may suspend the execution of any order for such period as it may deem fit.*'

[15] Mr *White*, who appeared for the respondent, relied on the judgment of Davis J in *Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another* 2014 (1) SA 168

(WCC), to argue that unless there was a basis to believe that there might be an inherent flaw in the judgment that was being executed or the 'causa' of the respondent's claim, the court lacked any authority under rule 45A to suspend the execution of the judgment. It would appear that Davis J proceeded on an acceptance that '*the basic principles for a grant of a stay in execution*' were expressed in the judgment of Waglay J in *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) at para 37, where the learned judge held:

> *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, ie 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.*
>
> (My underlining for highlighting purposes.)

[16] Davis J held, in para 12 of *Firm Mortgage Solutions*, that the ambit of the judicial discretion in terms of Rule 45A was circumscribed. The learned judge expressed himself in that regard as follows:

> *'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?'*

As correctly indicated in the headnote to the report of the judgment, Davis J gave a negative answer to the rhetorical question.

[17] The statement of 'general principles' in *Gois* actually falls to be understood in three parts. Para (a) thereof should be read discretely from the rest, and the part of para (b) that I have underlined has to be read discretely from the rest of para (b) –(e). It is evident from the context that Davis J's reference to '*any legal causa*' was informed by paras (d) and (e) It would appear, with respect, that the qualification in the para (b) that I have underlined in the passage from *Gois* quoted above, as well as the discrete character of the statement in para (a) therein, must have been overlooked. The suggestion that the court's discretion in terms of rule 45A is in any way circumscribed seems to have been grounded on a misreading of the statement in *Gois*. As I shall endeavour to show, it is inconsistent with higher court authority and, indeed, also most of the other jurisprudence cited in *Gois*. Consideration of the cited cases shows that if there is a 'general principle', it is that a court will be inclined to suspend the execution of a judgement if real and substantial injustice would result if it refused to do so (see para (a) in the statement in *Gois*).

[18] The statement of 'general principles' in para 37 of *Gois* was predicated on Waglay J's review of a number of earlier judgments, some of them preceding the introduction of rule 45A into the Uniform Rules in 1991. The judgments referred to were *Strime v Strime* 1983 (4) SA 850 (C), *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T), *Erasmus v Sentraalwes Koöperasie Bpk* [1997] 4 All SA 303 (O) at 307D – H, and *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 304G – H. Most of the statement (viz. para (b) – (e), with the exception only of the part of para (b) that I underlined above) was itself in large part based on a translation from the exposition in Afrikaans by Wright J in *Erasmus v Sentraalwes Koöperasie Bpk* supra, at 302. In that case, Wright J, having noted that an application for the suspension of the execution of a judgment was a matter that fell to be decided in the court's discretion, suggested that '[b]*y oorweging van die faktore wat in aanmerking geneem moet word by die uitoefening van die diskresie, kan met vrug gelet word op die vereistes vir 'n voorlopige interdik* ...'.[1] The learned judge then almost immediately qualified that suggestion, saying '*Hierdeur*

[1] 'In weighing the factors that should be taken into consideration in the exercise of the discretion, regard may usefully be had to the requirements for an interim interdict'. (My translation.)

word nie bedoel dat slegs bogemelde beginsels by die uitoefening van hierdie diskresie ingevolge Hofreël 45A nagevolg moet word nie, en mag daar ook ander faktore wees wat 'n rol kan speel by die vraag of 'n lasbrief opgeskort moet word.'[2]

[19] In *RAF v Strydom* supra, at 304E-G, Immerman AJ referred to Wright J's aforementioned suggestion in *Erasmus v Sentraalwes* and remarked that '[t]*he analogy of interim interdict does not appear to be entirely appropriate in the circumstances of this matter. For one thing the applicant is not asserting a right in the strict sense but a discretionary indulgence based on the apprehension of injustice. The Court in Erasmus's case was nevertheless at pains to point out that it was not laying down that only the principles relative to an interim interdict had to be followed in the exercise of a discretion under Rule 45A. It stressed that other factors might play a role in the question as to whether a writ should be suspended*'.

[20] Immerman AJ proceeded to express his understanding of the import of rule 45A as follows at p. 301A- C of *RAF v Strydom*:

> '*This Rule [rule 45A] provides that a Court may suspend the execution of any order for such period as it may deem fit. The Rule itself affords the Court a discretion of the widest kind and imposes no procedural or other limitations or fetters on the power it confers.*
> *Grounds on which a Court may exercise the discretion are that the causa of a judgment is being impugned or that execution of the judgment is being sought for improper reasons, as correctly contended on behalf of the respondent. However, the Court's discretion under Rule 45A cannot be limited by postulating that it can be exercised only in these circumstances (see Whitfield v Van Aarde* ([1993 (1) SA 332 (E)] *at 337F)). Indeed, in relation to the inherent discretion which, by reason of its power to control its own process, a Court has to stay a writ of execution where real and substantial justice requires such a stay.*'

[21] The only judgment referred to in *Gois* that might be read to support the notion that the court's jurisdiction to stay the execution of a judgment was circumscribed was *Le Roux*'s case. That matter, however, did not involve an application to stay execution. It entailed an exception

[2] 'By this it should not be understood that only the aforementioned principles [ie the requirements for an interim interdict] should be applied in the exercise of the discretion in terms of Rule 45A. There may be other factors that could play a role in the question whether a writ of execution should be suspended.' (My translation.)

taken against the particulars of claim of a judgment debtor whose property had already been sold in execution. The plaintiff in *Le Roux* sought the setting aside of the writ in execution and the sale that had occurred pursuant to it. One of the arguments put up in opposition to the exception was that the court could grant the relief sought in the exercise of its common law discretion. The judgment in *Strime* (supra) was invoked in support of the argument.

[22] In *Strime*, Tebbutt J remarked as follows:

> '*Execution is a process of the Court and the Court has an inherent power to control its own process subject to the Rules of Court. It accordingly has a discretion to set aside or stay a writ of execution (see Williams v Carrick 1938 TPD 147 at 162; Graham v Graham 1950 (1) SA 655 (T) at 658; Cohen v Cohen 1979 (3) SA 420 (R) at 423D - C). 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*.' (at p.852A-B),
>
> and (at p. 852F-G)
>
> '*Execution should … generally be allowed unless the applicant for a stay shows that real and substantial justice requires that such a stay should be granted (see Rood v Wallach 1904 TS 257 at 259; Graham v Graham (supra at 657, 658)).*'

[23] The matter in *Strime* entailed an application by a divorced husband to stay the execution of a writ issued out at the instance of his ex-wife in respect of unpaid maintenance. The applicant sought the stay until after the determination of his pending application before the Maintenance Court to have his maintenance obligation reduced or cancelled. The court granted the stay notwithstanding that it was not in a position, and indeed considered that it would be inappropriate, to assess the applicant's prospects of success in the matter pending in the Maintenance Court. It is evident from the learned judge's reasoning, at pp.854-855, that Tebbutt J considered that it would be in the interests of justice in the peculiar circumstances of the case to grant a stay. There was no suggestion that 'the causa' of the respondent's judgment claim was in dispute (it was not) and there was no mention in the judgment of 'irreparable harm'. There was, however, the possibility that the judgment debt might be expunged consequentially upon a retrospective cancellation by the Maintenance Court of the existing maintenance order.

[24] Ackermann J pointed out that *Strime* was distinguishable on its facts from the case before him in *Le Roux*. He in any event doubted the existence of a wide judicial discretion to suspend execution. The learned judge emphasised that none of the cases cited in *Strime* had involved the *setting aside* of the execution of a judgment. He did, however, consider it significant that there was a possibility that the maintenance debt which was the causa for the writ of execution in *Strime* might fall away depending on the outcome of the pending proceedings in the Maintenance Court and appeared to think that it was only in such cases that a court could stay an execution of judgment.

[25] The obiter opinion expressed in *Le Roux* that a court has only a limited power to stay the execution of a judgment is not in accord with later appeal court authority. Thus, 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) at para 51-52, Navsa JA stated the law in respect of the staying of execution of judgments as follows:

> *'[51] Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to 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 causa of a 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, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action.*'
>
> (Footnotes omitted.)

It is clear from the context that the learned judge of appeal cited instances '*where the underlying causa of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes*' merely as examples of where the suspension of execution might be appropriate, not as a *numerus clausus*. It would appear that the judgment in *Van Rensburg* was not drawn to the attention of the learned judge in *Firm Mortgage Solutions*.

[26] 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 courts' 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 precise 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 might be persuaded to allow should be granted.

[27] Whilst I had some sympathy with the respondent's frustration with the trustees, I was in no doubt that the respondent's claim was more than adequately secured and that there was little danger that it would not be paid in full (including interest for the delay caused by the stay). Allowing the sale in execution to proceed however, would destroy the substratum of the Trust's business and put 23 permanently engaged employees and family breadwinners out of employment. In a country in which the economy is under unprecedented strain and the rate of unemployment and attendant socio-economic distress have reached crisis proportions, I consider that real and substantial injustice would be done if the judgment debtor were permitted to proceed with execution of the judgment when the harm that would be caused thereby seemed unnecessary and eminently avoidable.

[28] It is important though that the result of this case should not be understood to suggest that a stay of execution should be granted upon a mere plea *ad misericordiam*. My reservations about the statement of principle in *Firm Mortgage Solutions* concerning the ambit of the court's discretion do not mean that I have any doubt about the correctness of the result in the very different factual context of that case. A stay of execution is not to be had on flimsy grounds, merely to accommodate an alternative payment plan that the judgment debtor might be able to offer. I think the cases make it clear that the remedy is not just for the asking.

[29] The applicants sought a stay of execution until the transfer of the land sold by the Trust to the Jan Cloete Trust. I was not prepared to grant the relief in those terms. One of the respondent's justified complaints is that the applicants have been tardy in providing information

and assurances concerning the required financial guarantees for payment of the full judgment debt. I understand that this unsatisfactory situation may endure for while, in part due to the delays in obtaining the issue of letters of authority from the Master's office for a new trustee and the knock-on effect of that on the Trust's and the intending purchaser's ability to transact effectively with the banks, but the respondent cannot be expected to wait indefinitely for satisfaction of its judgment. I decided that a six month moratorium would meet the justice of the case. In my assessment that should afford sufficient time for the applicants to get the Trust's administration in order. They would have to make out a stronger case than has been made out on the papers in the current case to justify any extension of the stay.

[30] The applicants also sought an order for costs in the event that their application for a stay was opposed. In my judgment, they would be entitled to such an order only if the opposition to the application were unreasonable. It was not. In the circumstances, and as the applicants were seeking an indulgence on compelling grounds of equity, rather than asserting a right, I was of the view that it would be fair and reasonable that they pay the costs of the application, including the costs incurred by the respondent in opposing it.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**A.R. Newton**
Applicants' attorneys:	**Riaan de Kock & Co. Inc** **Melkbosstrand** **Bellinghan Joubert Attorneys** **Cape Town**
Respondent's counsel:	**J.P. White**
Respondent's attorneys:	**Mostert & Bosman**

Bellville

MacRobert Inc

Cape Town