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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 10624/2024

GODWILL NANA TUFFOUR

First Applicant

GODWILL PATIENCE TUFFOUR

Second Applicant

**ALL THOSE HOLDING TITLE THROUGH
FIRST AND SECOND RESPONDENTS OR
OCCUPYING "THE PROPERTY" AT
2[...] O[...] H[...], FERNWOOD
NEWLANDS, CAPE TOWN**

Third Applicant

THE MUNICIPALITY OF CAPE TOWN

Fourth Applicant

And

ANTHONIUS WILHELM VAN RIJSWIJK N.O.

First Respondent

JOHN GEORGE MELLITCHEY N.O.

Second Respondent

CHRISTOFFEL JACOBUS BOTHA N.O.

Third Respondent

IAN MAX VAN RIJSWIJK N.O.

Fourth Applicant

JOHN DANIEL WASSERFALL N.O.

Fifth Respondent

KNOX PROPERTY TRUST (IT 322/89)

Sixth Respondent

Heard: 19 December 2024

Delivered: Electronically on 11 February 2025

JUDGMENT

LEKHULENI J

Introduction

[1] This is an urgent application brought by the first and the second applicants in terms of Rule 45A of the Uniform Rules for an order to stay the execution of the eviction order granted by the Ralarala AJ, as she then was, on 18 October 2024, for the eviction of the applicants from the property described as Erf 1[...], situated at 2[...] O[...] H[...], Fernwood, Newlands, Western Cape, in the City of Cape Town. The stay of execution is sought pending the determination of the relief in Part B.

[2] In Part B of this application, the applicants seek an order to rescind the eviction order granted by Ralarala AJ on 18 October 2024 in respect of the above case number. The applicants simultaneously filed an application for condonation in support of their application for the rescission of judgment. This court is only enjoined to consider the application for the stay of execution in terms of Rule 45A of the Rules of Court.

Background Facts

[3] The first applicant is an adult male who is a full-time employee at the Consulate of Ghana in Cape Town and resides in Fernwood, Newlands in the city of Cape Town. The first and the second applicant are husband and wife. On 27 July 2020, the applicants, acting personally, entered into a written lease agreement with the sixth respondent, referred to as "*the trust*", which was duly represented by its authorised property agent, Ms Charne Shipper of Jawits Properties. The commencement date of the lease agreement and the occupation date thereof was the 1 September 2020. The lease agreement would remain in effect for the duration of 24 months, with an option for renewal, and therefore the termination date of the lease was 01 August 2022. In exchange for the unfettered and undisturbed possession of the leased property, the first and second applicants undertook to pay the trust a monthly rental of R30,000. In addition, both the first and the second applicants would be liable for monthly expenses in respect of water, sewerage, and refuse removal. Upon termination of the initial period, the lease would automatically continue on a month-to-month arrangement.

[4] Pursuant to the conclusion of the lease agreement, and acting in terms thereof, the trust provided the applicants with unfettered and undisturbed possession of the leased property and fully performed its obligations in terms thereof. Following the termination date of the lease agreement by effluxion of time on 01 August 2022, same continued automatically and subsequently transitioned to a month-to-month arrangement. Notwithstanding, the applicants breached the lease agreement by failing to pay the monthly rental and by failing to pay the amounts due for the monthly water, sewerage and refuse removal costs since June 2021.

[5] Despite demand, the applicants failed to remedy their breach. As of 1 January 2024, the arrear rental owed by the applicants in respect of the property was R158 214.71, and they also owed an outstanding balance in respect of unpaid utilities. The applicants were afforded a final opportunity to pay the outstanding amount by close of business on 9 February 2024. Notwithstanding, the applicants failed to remedy the breach. The trust eventually cancelled the lease agreement and demanded that the applicants vacate the property.

[6] In May 2024, the trust instituted eviction proceedings against the applicants in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 Of 1998 (*“the PIE Act”*). The Notice of Motion and the founding papers in the main application were served personally on the first and second applicant on 15 May 2024. The duly issued notice in terms of section 4(2) of the PIE Act which reflected that the matter was due to be heard on 16 July 2024 was also served personally on the first and the second applicant on 19 June 2024.

[7] On 16 July 2024, the matter was on the motion court roll, and both the first and the second applicants appeared in person. The application was postponed by agreement between the parties to the opposed roll (semi-urgent roll) for hearing on 18 October 2024. The court, in its order postponing the matter, directed the applicants to submit their answering affidavit, if applicable, no later than 6 August 2024. The applicants were fully aware of the requirement to deliver their opposing papers and the timeline for doing so. When the applicants failed to deliver their answering affidavit by 6 August 2024, as required by the court order granted on 16 July 2024, the trust brought a chamber book application to compel the applicants to deliver their answering affidavit. The order was granted.

[8] The order issued in terms of the chamber book application directed the applicants to file their answering affidavit within 5 days of such order being served on them. The chamber book order was personally served upon the applicants on 10 September 2024, directing them to file their answering affidavit within 5 days of service thereof. The applicants failed to file their opposing affidavit as directed by the court. On 18 October 2024, the applicants attended court in person, and the court after considering the matter, granted an eviction order against them. In terms of that order, the applicants were directed to vacate the property on Thursday 12 December 2024 failing which, the Sheriff was directed to evict them on 17 December 2024. The applicants are seeking to stay this order in terms of Rule 45A of the Rules of Court.

[9] In their application, the applicants asserted that the order of Ralarala AJ, should be stayed pending the rescission application in Part B of the application. According to the applicants, the order was granted due to their failure to file an answering affidavit. Furthermore, the applicants asserted that in the application for

eviction, the trust failed to inform the court that the applicants were interested parties to the leased property, particularly in that they have paid a deposit to purchase same. The applicants further claimed that they possess the right of first refusal concerning the aforementioned property.

[10] The applicants further averred that they intended to purchase the property to ensure their children would not face disruptions in their schooling or be removed from the community that they are accustomed to. The applicant further stated that they wanted the respondents to present them with a new offer to purchase the property so that the full bond application can be initiated through the bank. According to the applicants, in principle, the bank has agreed to advance the loan to purchase the property. However, the respondents have refused to entertain further communication regarding the sale agreement and its finalisation.

[11] The applicants further explained that if the Motion Court had been aware that the applicants had paid a deposit for the purchase of the property, the eviction order would not have been granted by default against them. Furthermore, the applicants contended that they were not aware that an answering affidavit was not filed. As a result, the applicants opine that the eviction order granted against them should be stayed, pending the determination of the rescission application which will allow them to ventilate the dispute relating to the payment of the deposit for the sale of the leased property.

[12] In their application for the rescission of the eviction order, submitted simultaneously with this application, the applicants provided their reasons for not submitting an answering affidavit to the eviction application. The applicant stated that they instructed Walker Inc to assist them in dealing with the eviction application. They also instructed Walker Inc to assist them regarding the respondents' claim for arrear rental instituted in the Regional Court. The applicant asserted that they believed that Walker Inc was attending to both Regional and High Court matters. It was only when the attorney withdrew from the case that the applicants realised that no action had been taken in respect of both cases.

[13] The applicants asserted that they discovered that no answering affidavit was served and filed opposing the eviction application. On 18 October 2024, they appeared in court without legal representation. However, they lacked the legal skills to respond to the papers or comprehend the proceedings. According to the applicants, they requested an opportunity to seek legal representation, however, this request was declined by the court. They now seek to challenge the order which was granted in their presence without the assistance of an attorney.

[14] On the question of urgency, the applicants averred that since the eviction sought by the respondents was imminent, the matter was sufficiently urgent for the court to hear this application on an urgent basis. The applicants also stated that they became aware of the eviction order on 18 October 2024 and were informed of the process that needed to follow a week before instituting this application. Furthermore, they lacked the financial resources to instruct a legal practitioner to institute this application. To this end, the applicants implored the court to grant the application as prayed for in the notice of motion.

Principal Submission by the Parties.

[15] During the hearing of this matter, the first applicant appeared in person and pleaded with the court to grant the application to stay the order for eviction against them. The first applicant submitted that they made monthly rental payments to the trust. According to the first applicant, the rental amount was also aimed to serve as payment of the purchase price of the leased property. The first applicant submitted that the lease agreement between them and the trust was a "Lease or Rent to buy agreement".

[16] According to the applicants, this means that the rental amounts payable was also intended to serve as the purchase price of the property. They have paid a deposit of R104 000 into the estate agent's account and have paid a total sum of R1 504 429 as rental during the lease period. According to the applicants, the rental amount also served as the purchase price of the property. The applicants refuted any indebtedness and contended that the rental they paid formed part of the purchase price of the property. The first applicant further submitted that although

they are tenants, they are the same buyers who paid the deposit. The first applicant submitted that they seek an order staying the eviction order to ensure that issues relating to the sale of the property to them can be properly ventilated in court.

[17] Conversely, Mr van der Merwe, Counsel for the respondents, challenged the urgency with which this application was brought. Mr van der Merwe submitted that it is trite in our law that an applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied. However, where an applicant first seeks compliance from the respondent lodging the application, it cannot be asserted that the applicant had been dilatory in bringing the application or that urgency was self-created.

[18] Mr van der Merwe further submitted that the applicants not only delayed for months to bring this application, but they also delayed the delivery of the founding papers on the respondents, placing them in an invidious position as far as any opposition thereof is concerned. According to Counsel, there can be no doubt that any urgency herein is entirely self-created and of the applicants' own making. Counsel opined that this application is brought in a manner that constitutes an abuse of the process of court. Mr van der Merwe refuted the claims of the applicants that the rental payable was meant to serve as part of the purchase price. The court was referred to the lease agreement signed by the parties, which clearly set out the rental amount payable by the applicants.

[19] Mr van der Merwe further submitted that the applicants failed to pay the rental as agreed and that the trust eventually cancelled the lease agreement. As far as the purchase of the property is concerned, Counsel submitted that indeed an offer to purchase was signed however, the applicants failed to raise funds within the required period as stated in the agreement. As a result, the intended agreement for the sale of the property was cancelled due non-fulfilment of the suspensive condition. Mr van der Merwe concluded that the applicants' application lacks merit and requested that the court dismiss the application with costs.

Applicable Legal Principles and Discussion

[20] As discussed above, the trust challenged the urgency with which this application was brought, asserting that the urgency is entirely and egregiously self-created. The respondent's Counsel argued that the urgent application should be struck from the roll purely on the grounds of urgency. I turn to consider this preliminary point.

Urgency

[21] In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is in law required to set out the circumstances which justify the hearing of an application on an urgent basis as well as the basis upon which it contends that it would not obtain substantial redress at a hearing in due course. Rule 6(12)(b) stipulates two requirements for an applicant in an urgent application. *First*, the applicant must set forth explicitly the circumstances that he avers render the matter urgent and, *secondly*, the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.¹ Rule 6(12) of the Uniform Rules of Court confers upon courts a wide discretion to decide whether an application justifies enrolment on the urgent court roll based on the facts and circumstances of each case.²

[22] In the present matter, the order that the applicants seek to impugn was granted on 18 October 2024 in their presence. The applicant has been aware of the terms of the order against them since it was granted. In terms of that order, the applicants and all individuals claiming occupation through them were directed to vacate the property on Thursday 12 December 2024. In the event they failed to vacate as directed, the Sheriff of this court was directed to evict the applicants and all those holding title under them from the leased property. The applicants brought this application on an urgent basis on 13 December 2024. Evidently, the applicants waited until the 13 December 2024, to institute the application on an urgent basis for the stay of the eviction order. The applicants waited nearly two months following the granting of the eviction order to bring this application.

¹ *Karino Homeland Distribution (Pty) Ltd v Commissioner for South African Revenue Services* (21279/2023)[2023] ZAWCHC 329 (27 December 2023) at para 16.

² *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] 4 All SA 67 (GP) at para 63; *Caledon Street Restaurants CC v D'Aviera* 1998 JDR 0116 (SE) at 8.

[23] The applicant advanced two reasons for bringing this application on an urgent basis. Firstly, the eviction sought to be stayed is eminent. The applicants asserted that the matter is sufficiently urgent for the court to hear it on an urgent basis and condone the noncompliance with the rules of court with regard to time frames and service. Secondly, the applicants argued that they did not have the necessary funds to bring the urgent application with the assistance of a legal practitioner.

[24] The explanation proffered by the applicants, when closely examined, does not hold up or withstand scrutiny. Importantly, the judgment in respect of the unpaid rental and municipal charges was granted in the Cape Town Regional Court on the 18 October 2024. Subsequent thereto, the applicants immediately brought an application to rescind the judgment on 31 October 2024. However, they waited two months to bring the application to stay the eviction order. They provided no plausible explanation for their delay beyond asserting that they lacked funds to bring this application.

[25] I repeat, the applicants were in court at the time when the eviction order was granted. They were informed in court of the order that was granted against them, and further, that they must vacate the leased property on 12 December 2024. Notwithstanding, they took no action. As the deadline approached for them to vacate the property, they brought this application on an urgent basis. Concernedly, the applicants did not only wait until 13 December 2024 to bring this application, but they also delayed for four court days after signing the founding affidavit before serving it on the respondents.

[26] The applicants were required by Rule 6(12)(b) of the Uniform Rules of Court to set forth explicitly in their founding affidavit the circumstances which they averred rendered this matter urgent, as well as the reasons they claimed that they would not be afforded substantial redress at a hearing in due course.³ In my view, the urgency asserted by the applicants is entirely a self-created urgency.⁴ There is no justification

³ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E-G.

⁴ *Big Blue Marketing CC v King Sabata Dalindyebo Local Municipality* 2017 JDR 0302 (ECM) at para 10; *Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd* 2013 JDR 1989 (ECM) at para 9.

for the applicants' failure to bring this application earlier. On this basis alone this matter should be struck off the roll.

Should the eviction order be stayed?

[27] In the interest of completeness, I deem it appropriate to consider the applicant's application on the merits. Rule 45A provides that the court may, on application, suspend the execution of any order for such period as it may deem fit. As a rule, the court will grant a stay of execution where injustice will otherwise be done if the suspension of the order is not granted. The court has, apart from the provisions of this rule, a common law inherent discretion to order a stay of execution and to suspend the operation of an ejection order granted by it.⁵

[28] The expansive and open-ended language of rule 45A suggests that it was intended to serve as 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 with careful consideration. Its exercise will therefore be fact specific, and the guiding principle will be that execution will be suspended where real and substantial justice necessitates it. 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. If so, it must also decide the terms under which any suspension should be granted.⁶

[29] In *Gois t/a Shakespeare's Pub v Van Zyl*,⁷ the court summarised the general principles for the granting of a stay in execution as follows:

- (a) A court will grant a stay of execution where real and substantial justice requires it or where injustice will otherwise result.

⁵ *Lovius and Shtein v Sussman* 1947 (2) SA 241 (O).

⁶ *Stoffberg N.O and Another v Capital Harvest (Pty) Ltd* (2130/2021) [2021] ZAWCHC 37 (2 March 2021) at paras 15 and 28.

⁷ 2011 (1) SA 148 (LC) at para 7.

- (b) The court would 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 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.

[30] As discussed above, the applicants seek a stay of the eviction order against them pending the outcome of the rescission of judgment application. It is well-established that an application for the rescission of judgment does not suspend the execution of an eviction order. The applicants brought an application to suspend the operation of the eviction order pending the outcome of their rescission application. The relief the applicants seek is interdictory in nature. In other words, the applicant seeks an interlocutory relief pending the outcome of the rescission application.

[31] In the determination of the factors that must be taken into account in the exercise of its discretion under rule 45A, it is instructive for this court to reference the requirements for the granting of an interlocutory interdict. The applicant must show (a) that the right, which is the subject of the main action and which he seeks to protect by reason of the interim relief, is clear or, if not clear, is *prima facie* established though open to some doubt; (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the

applicant if the interim relief is not granted; (c) that the balance of convenience favours the granting of the interim relief; and (d) that the applicant has no other satisfactory remedy.⁸ I now turn to briefly discuss these factors *ad seriatim* in this matter.

Prima facie right.

[32] In determining whether a *prima facie* right has been established, the right need not be shown by a balance of probabilities. If it is *prima facie* established though open to some doubt, that is sufficient.⁹ In cases where a factual dispute arises, the proper approach is to take the facts presented by the applicant, together with any facts provided by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. If serious doubt is thrown upon the case of the applicant, he cannot succeed in obtaining temporary relief.¹⁰

[33] In the present matter, the applicants assert that they only became aware that their legal representative had failed to submit an answering affidavit on 18 October 2024, at the time the matter was heard and concluded. Pursuant thereto, an eviction order was granted. The applicants also asserted that they have filed an application for rescission of judgment, as they have an interest in purchasing the property they currently occupy. They have paid a deposit and made partial payment towards the purchase price. According to the applicants, the monthly payment in respect of the rental also constituted part payment towards the purchase price.

[34] I find the argument put forth by the applicants markedly difficult to follow. The difficulty is compounded by the fact that on 16 July 2024, the applicants were present in court when the matter was postponed in their presence and by agreement

⁸ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383A-C; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) at 772C-E.

⁹ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Knox-D'Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 592H – 593B.

¹⁰ *Fourie v Uys* 1957 (2) SA 125 (C) at 127H – 128D; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267E-F.

to the opposed roll for hearing on 18 October 2024. The postponement was specifically intended to enable the applicants to file their answering affidavit by 06 August 2024. Notwithstanding, the applicants failed to file their answering affidavit as directed by the court. Pursuant thereto, on 23 August 2024, the respondent brought a chamber book application seeking an order that would compel the applicants to file their answering affidavit.

[35] On 28 August 2024, an order was once again issued directing the applicants to file their answering affidavit within five days of the order. On 10 September 2024, the Sheriff duly served a copy of the order personally on the first applicant. Notwithstanding, the applicants failed to file their answering affidavit. Whilst I accept that the applicants are not legally qualified and may be unfamiliar with the rules and time limits established by the court rules, however, their conduct in this matter is inexcusable. They were afforded ample opportunity to articulate their case in court, and yet they failed to do so. When the eviction order was granted on 18 October 2024, the applicants were present in court, and it is reasonable to assume, that the court considered all pertinent facts placed before it prior to issuing the order.

[36] Importantly, the applicants do not impugn the order per se, but the fact that the court was not apprised that they were purchasing the leased property in question, which was being financed through the monthly rental that they were making. I must stress that the applicants' assertion that the rental payments to the trust were intended as partial payments towards the purchase price of the property is fundamentally misguided and flawed. It is devoid of substantive merit and must be rejected outright.

[37] The lease agreement executed by the parties explicitly stipulated that the monthly rental amount payable by the applicants to the trust is R30,000. There is no indication in the lease agreement suggesting that the rental payable was also intended to serve as part payment of the purchase price. In my view, the claim by the applicants that the rental payments served a dual purpose is an unfounded fabrication that lacks any supporting evidence from objective facts. This conclusion, in my view, is fortified by the fact that when the parties subsequently entered into an agreement of sale of the said property, the applicants had to secure a bond for the

purchase of the property. The sale agreement is silent on the alleged part payment made by the applicants through the rental agreement. The applicants were unable to secure a bond approval for the purchase the property in question, leading to the cancellation of the intended sale agreement.

[38] The applicants additionally pinned their case on the grounds that they had the right of first refusal. However, from the record it is evident that the applicants intended to buy the leased property as well as the adjacent property belonging to the trust. However, they failed to obtain the necessary bond approval with the result that the suspensive conditions in both sale agreements were not fulfilled. Both agreements were thus extinguished *ex tunc*.

[39] Furthermore, pursuant to the applicants' failure to pay their monthly rental, the respondent cancelled the lease agreement and demanded the applicants to vacate the property. The applicants are indebted to the trust for arrear rental and municipal charges in the sum of R437 270, 21 excluding interest and legal costs. The trust secured a judgment against the applicants in respect of this amount in the Magistrate's Court. The court was informed that the applicants have brought and application for the rescission of this order at the Magistrate's Court.

irreparable harm

[40] The applicants are obliged to demonstrate that they have a well-grounded apprehension of irreparable harm if the interim relief is not granted, and the ultimate relief is eventually granted. In my view, they failed to do so. From the record, the applicants do not deny their indebtedness to the respondent. They only contended that they have the right of first refusal to buy the property and that the rental amount that they paid was part payment for the purchase price. This contention with respect is unsustainable.

[41] While I accept that in terms of the addendum to the lease agreement, the applicant had the right of first refusal, however that agreement was cancelled as a result of breach of contract committed by the applicants. As discussed earlier, the

allegation that the rental would form part of the purchase price is a sheer fabrication invented by the applicants as a stratagem to remain in the property.

[42] The applicant's application for the rescission of judgment filed simultaneously with this application is based on the reasons stated above. In my view, in the exercise of my discretion whether to grant the stay of the execution in terms of Rule 45A, I must consider the prospects of success in the applicant's application for the rescission of judgment upon which this application is hinged. This application as well as the rescission application in my view were filed to delay proceedings and to enable the applicants to occupy the leased property for free. At the hearing of this matter, the first applicant argued from his written submissions that they stopped paying rent because the trust took them to court. In other words, to date the applicants are living at no costs to them at the respondents' property. This position is quite troubling and unsettling, to put it mildly.

[43] By contrast, the respondents encounter significant and tangible prejudice. The trust and its beneficiaries are suffering prejudice, particularly, given that the applicants are indebted to the trust in the total sum of R437 270.21 excluding interest and legal costs. Furthermore, the trust is continuously enduring hardship as the applicants are not paying rental notwithstanding that they are in occupation of the property. The respondents asserted that the beneficiaries of the trust possess no additional income. They rely on distributions received from the trust for their survival.

[44] Significantly, by not receiving any rental income from the premises for an extended period of time, the trust has been unable to make distributions to the beneficiaries from any income it has received. I find this unconscionable, particularly when one takes into account that the beneficiaries of the trust are elderly couples who depend entirely on the distribution of the trust for their survival. Simply put, if no rental payment is made, the trust is unable to distribute payment to the beneficiaries. Concernedly, one of the beneficiaries is 89 years old (the husband), whilst the wife is 74 years. Their general health is poor, and they urgently require financial support for their medical expenses, particularly for the cancer treatment of the wife.

Balance of Convenience

[45] In evaluating the balance of convenience, the Court must assess the harm that the trust may suffer if the suspension order is granted, along with the prejudice the applicants will face if it is refused. In my view, in an application for a stay of an order in terms of Rule 45A, the balance of convenience demands considering and weighing several factors, namely, the prospects of success of the applicant's rescission application; the harm to be endured by an applicant if the order is not granted. The harm borne by the trust if the interim relief is granted. The weaker the prospects of success in the pending rescission application on which this application is pinned, the more the balance of convenience favours the respondent.

[46] The applicants are indebted to the respondent for a substantial amount in unpaid rent. They are in occupation of the property, and they are not paying rental to date. They are currently residing free of any rental payment in the respondent's property. The beneficiaries of the trust who are elderly couples are suffering prejudice in that they require financial support for their wellbeing and medical expenses. The respondents asserted that as a direct consequence of the non-payment of rental, the trust was compelled to sell the premises to one Jurgen and Sonya Kuhnel ("*purchasers*") for the sum of R5.8 million to obtain funds to maintain the beneficiaries.

[47] Clause 10 of the sale agreement clearly states that unless the trust can imminently give vacant transfer of the premises to the purchasers, they will resile from such sale agreement. Evidently, in such a case, the trust may not only have to face a claim for damages from the purchasers, but it will also have to again market and sell the property, which cannot be achieved overnight. In the interim period, the beneficiaries will be suffering prejudice.

Alternative Remedy

[48] The applicants have an alternative remedy. The applicants should seek alternative accommodation and still proceed with their rescission application should they wish. Ostensibly, the applicants are affluent tenants occupying luxurious premises and are currently holding over without making any rental payments. Their

true complaint is not that they will be rendered homeless, but that they will be prevented from remaining on the property of their choosing. In my view this conduct, and attitude confirm that this application constitutes an absolute and incontrovertible abuse of court process.

Conclusion

[49] In summary, in addition to the fact that the urgent application should be struck from the roll purely on the grounds of urgency, it is equally clear that the application is devoid of merit. In fact, real and substantial justice demands, let alone require that the relief sought be refused.

Order

[50] Given all these considerations, the following order is hereby granted:

50.1 The applicants' application is hereby dismissed.

50.2 The applicants are ordered to pay the costs of this application including the costs of Counsel on Scale B.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicants: In person

For the respondents: Mr van der Merwe
Instructed by: Wayne Hufkie Attorneys