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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 17119/15

DATE: 2015/09/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES .

(2) OF INTEREST TO OTHER JUDGES: YES.

(3) REVISED.

DATE 15-09-2015
SIGNATURE

In the matter between

THE ERSTWHILE TENANTS OF WILLISTON COURT — FIRST APPLICANT

THE FIRST GROUP OF TENANTS GIVEN NOTICE — SECOND APPLICANT

And

LEWRAY INVESTMENTS (PTY) LTD — FIRST RESPONDENT

URBAN TASK FORCE CC — SECOND RESPONDENT

Case summary: Interpretation – Section 18 of the Superior Courts Act 10 of 2013 – subsection 18(1) provides for the automatic suspension of the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal – no provision is made for the automatic suspension of the operation and execution of a decision which is the subject of an application to rescind, correct, review or vary an order of court - had it been the intention of the

legislature to also automatically suspend the operation and execution of such decision, then such decision would have been expressly included in subsection 18(1).

J U D G M E N T

MEYER J:

[1] This is an urgent application for relief by way of the *mandament van spolie*. The applicants occupied the property situate at [W……..] [C……] corner [C……] [R……] and [L…..] [B…..] [A……], [P…….], Johannesburg (the property). They were evicted from the property by execution of an interim eviction order of this court. They contend that the execution of the order amounted to an unlawful deprivation of their possession of the property and they accordingly seek relief to the effect that their possession be restored.

[2] The respondents launched an application for the eviction of the applicants from the property in this court on 8 May 2015. In part A of the notice of motion, they sought that the applicants be evicted from the property pending the finalisation of part B of the notice of motion in which a final eviction order is sought. The proceedings were instituted in terms of s 5(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) in terms wereof '... the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order.' The

application was opposed by the applicants. On 14 July 2015 Modiba AJ granted the interim eviction order of the applicants as sought in part A of the notice of motion. The hearing of part B of the application has not yet taken place.

[3] The respondents' attorneys, Vermaak & Partners Inc, by letter dated 17 July 2015, informed the applicants' attorneys, Malangeni Attorneys, that-

'... all the occupiers will be evicted in terms of the interim order of the honourable Mr Justice Modiba.'

[4] The applicants then launched an application on 21 July 2015 in this court in which they seek the rescission of the interim eviction order in terms of rule 42(1)(b) of the Uniform Rules of Court, which provides that '[t]he court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary ... an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission'. The application for rescission is opposed by the respondents. It has not yet been enrolled for hearing.

[5] By letter dated 22 July 2015, the respondents' attorneys advised the applicants' attorneys as follows:

'Please note further that in filing a spurious rescission application, you and your counsel attempted the exact same strategy in the matter of Tenitor Properties (Pty) Ltd under case number 2015/06579, which application was

dismissed with costs by the honourable Mr Justice Spilg on Monday, the 13th July 2015. Should you persist with this transparent strategy and bring an application to suspend execution of our client's court order in full knowledge of the above and the ruling of the Honourable Mr Justice Spilg, we are instructed to seek a costs order against you and your counsel *de bonis propriis*.

...

The order was served by the Sheriff of the Court on Wednesday, the 15th July 2015 and your clients had 7 (seven) days from that date to vacate the property. They have not done so and they will be evicted within the next few days.'

[6] Again, by letter dated 29 July 2015, the respondents' attorneys advised the applicants' attorneys as follows:

'We must also reiterate that we have advised you of our position, and that of our client, that there is no impediment to the enforcement of our client's order and that execution of the order will now take place. If, having been forewarned well in advance that execution will proceed, your clients make use of the normal inner city strategy and apply during or after the eviction for a stay thereof and/or reinstatement to the property, we will make this correspondence as well as earlier correspondence available to the honourable Court in destruction of your client's purported urgency. Any urgency at that stage will be of their own making and we will, in addition, seek a costs order against you and your counsel *de bonis propriis*.'

[7] The Sheriff carried out the eviction of the applicants on 12 August 2015. While the interim eviction order was executed by the Sherriff, the applicants attempted to bring an urgent application in

this court before Mabesele J without papers in order to stay their eviction. Mabesele J refused to hear the application without papers. The applicants did not proceed with the application.

[8] The present urgent application for relief by way of the *mandament van spolie* was issued and served on the respondents' attorneys on 2 September 2015 at 16:18. It was set down for hearing in this urgent court on Tuesday 8 September 2015 at 10:00. In terms of the notice of motion the respondents were afforded less than two days to file their answering affidavits.

[9] The relief sought in this application raises two questions: whether there is a substantive rule of law that an application to rescind an order or judgment automatically suspends its operation pending the decision of such application and the proper interpretation of s 18 of the Superior Courts Act 10 of 2013, which Act commenced on 23 August 2013.

[10] Prior to its repeal on 22 May 2015, rule 49(11) of the Uniform Rules of Court provided as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[11] In *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W), at 463J-464B, Roux J held that there is no substantive rule of law that an application to vary or rescind an order or judgment automatically suspends its operation and that insofar as rule 49(11) purports to create a substantive rule to such effect, the rule is invalid. But in *Khoza v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ), at 117H-I, Notshe AJ held that at common law there is a substantive rule suspending the operation of an order or judgment upon the noting of an application for rescission. *Khoza* was followed by Vally J in *Peniel Development [Pty] Ltd and another v Pieterson and others* 2014 (2) SA 503 (GJ).

[12] Notshe AJ in *Khoza* (paras 26-28) further held that even if there were no substantive common-law rule which suspends the operation of an order or judgment upon an application for rescission the common law would be severely lacking in that regard and the court should develop the substantive rule. In this regard Notshe AJ said (para 28):

'An applicant for a rescission of an order would be irreparably prejudiced if the order were allowed to operate despite the application. This is no different from a situation where a notice of application for leave to appeal is delivered. In the circumstances, the rule that applies to the noting of appeals would be extended to noting of the rescission application as well.'

[13] Similarly, Vally J in *Peniel* (para 12) said the following:

'There is no reason why this rule developed in the common law should not be extended to applications for rescission of judgments. And, if I am wrong in my judgment that the Chief Justice had not exceeded his powers by so doing – as the Court in *United Reflective Converters* found – then there was nothing in law that prevented that court from extending the common-law rule to applications for the rescission of a judgment and order. In my judgment, given the power of this court to develop the common law, it is imperative that the court does so, if the need arises. After all, the rule relating to appeals is only part of the common law because Voet pronounced it to be. There is no reason why the Court in *United Reflective Converters* should not have pronounced its extension in relation to rescission applications.'

[14] The conclusion reached by Vally J in *Peniel* was influenced by the protection which rule 49(11) prior to its repeal afforded a party in whose favour the judgment or order was given. In this regard Vally J said the following (para 15):

'Of course, the party in whose favour the judgment has been given is entitled to seek an order allowing it to execute the judgment, given that there is a pending rescission application. This is allowed in terms of rule 49(11), and the circumstances under which it would be allowed to do so have been spelled out in *South Cape Corporation [South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C-546H]. In fact, in the present case, such an application is before court in the form of a counter application.'

[15] I must admit that I find the comment of the learned authors of Erasmus *Superior Court Practice* at B1-369 that the correctness of

the *Khoza* judgment 'is not beyond doubt', at least on the face of it, valid. Neither *Khoza* nor *Peniel* refers to any authority in support of a substantive rule of law that an application to vary or rescind an order or judgment automatically suspends its operation. Furthermore, the provisions of rule 45A of the Uniform Rules of Court, which provide that 'the court may suspend the execution of any order for such period as it may deem fit', were not considered.

[16] The view I take of the matter, and particularly on the interpretation of s 18 of the Superior Courts Act, however, makes it unnecessary for me to reconsider the correctness of the decision in *United Reflective Converters* or to consider the correctness of the decisions in *Khoza* and in *Peniel*. Also, this being one of about 40 urgent applications that serves before me in a very busy urgent court this week (where matters are mostly heard without the benefit of heads of argument and judgments and orders given under tremendous time constraints), I do not consider this to be the appropriate occasion to consider which of these decisions are clearly wrong.

[17] Section 18(1) of the Superior Courts Act provides that '[s]ubject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.' Subsection (2) deals with the suspension of

an interlocutory order not having the effect of a final judgment pending the decision of an application for leave to appeal or an appeal. And subsection (3) provides that '[a] court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.' Subsection (4) affords the aggrieved party an automatic right of an urgent appeal to the next highest court in cases where a court ordered otherwise as contemplated in subsection (1).

[18] The provisions of s 18 of the Superior Courts Act must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.) Contextually read, I am of the view that had it been the intention of the legislature for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then such decision would have been expressly included in section 18(1). The legislature would have expressed its intention to include such decision in clear and unambiguous language.

[19] The contrary interpretation would result in the absurdity that the filing of any unmeritorious application for rescission could foil the

operation and execution of a decision which is the subject of such application. Moreover, it would result in the absurdity that the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal may by order of court as contemplated in s 18 be carried into effect, but not a decision which is the subject of an application for rescission. But a person against whom the decision which is the subject of an application for rescission was given can always approach a court under rule 45A to suspend its execution pending the finalisation of an application for rescission. I see no reason in principle or in logic why an applicant for rescission should be placed in a better position than an applicant for leave to appeal or an appellant as far as the operation and execution of court orders is concerned. The glaring absurdities that could result in hardship to the party in whose favour a decision that forms the subject of an application for rescission was given could never have been contemplated by the Legislature. (See *Klein v Minister of Trade and Industry and another* 2007 (1) SA 218 (T); [2007] 1 All SA 257 (T) para 34.)

[20] The Superior Courts Act commenced on 23 August 2013. Its s 18 only provides for the automatic suspension of the operation and execution of a decision pending an application for leave to appeal or an appeal. No other provision of the Superior Courts Act provides for the automatic suspension of the operation and execution of a decision which is the subject of an application to rescind, correct,

review or vary an order of court. There is also nothing which indicates an intention on the part of the legislature to broaden the automatic suspension of the operation and execution of decisions beyond those included in s 18. A court can always be approached under rule 45A to suspend the operation and execution of orders not included in s 18. But their operation and execution are not automatically suspended.

[21] I conclude, therefore, that the eviction of the applicants by execution of the interim eviction order of this court did not amount to an unlawful deprivation of their possession of the property and they are thus not entitled to relief by way of the *mandament van spolie*.

[22] In the result the following order is made:

The application is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing: 8-9 September 2015

Date of judgment: 10 September 2015

Counsel for applicants: Adv B Ngqwangele

Instructed by:	Malangeni Attorneys
Counsel for respondents:	Adv C Van der Merwe
Instructed by:	Vermaak & Partners Inc