




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 18796/2015

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES NO
(3)	REVISED.
<u>13/08/2019</u>	
DATE	SIGNATURE

In the matter between:

DEREK LIONEL BURROWS

First Plaintiff

MARGARET CHARLOTE BURROWS

Second Plaintiff

and

STANDARD BANK OF SOUTH AFRICA LIMITED

Defendant

HAMMOND POLE MAJOLA INCORPORATED

Third Party

JUDGMENT

YACOOB J:

1. This matter is before me to decide only a point of law. That is, whether an application for leave to appeal against an order dismissing a rescission application invalidates transfer of the immovable property in respect of which the

order sought to be rescinded was made, when that transfer occurs after the application for leave to appeal was instituted.

2. The parties' statement of separated issues in terms of Uniform Rule 33(4) identifies two points of law. The first is outlined above. The second is what the effect is of the application for leave on the rescission application and the subsequent transfer of the property.
3. The third party is the transferring attorney and took no part in these proceedings, abiding the decision of the Court.

FACTUAL BACKGROUND

4. The plaintiffs are (or were) the owners of the subject property. They had a mortgage bond with the defendant, and defaulted on their payments. The defendant obtained default judgment against the plaintiffs, and served a writ and notice of attachment on them. The plaintiffs were served with a notice of sale, and then instituted an application for rescission. The sale of the property was stayed by agreement, pending the hearing of the application for rescission. The rescission application was dismissed on 19 October 2011.
5. The defendant again put the property up for sale and it was sold in execution on 07 December 2011. The plaintiffs then brought an urgent application to set aside the sale, and the judgment dismissing the rescission application, and to rescind the default judgment. The 19 October 2011 judgment was set aside on 28 March 2012. The sale was not set aside.
6. The defendant again caused the rescission application to be set down, and it was dismissed again, on 18 April 2012. An application for leave to appeal was

delivered on 4 May 2012 and the property was transferred to the purchaser on 28 May 2012.

7. The plaintiffs now bring an action for damages, on the basis that the delivery of the application for leave to appeal stayed the further execution of the foreclosure order, that is, of the transfer of the property. They seek payment of the difference in price between the amount they would have received had the property been sold for its market value and the amount they received from the sale of the property in execution. They also seek damages based on having rented somewhere to live.
8. The defendant contends that the application for leave has no effect on the foreclosure order.

THE ISSUES BEFORE ME

9. The facts and processes at issue all occurred before the Superior Courts Act, 10 of 2013 came into effect, and before Uniform Rule 49(11) was repealed. The question must therefore be determined in terms of Rule 49(11) and the common law.
10. Rule 49 (11) provided that when an application “for leave to appeal against or to rescind, correct, review or vary” a court order is made, the operation or execution of that order was suspended pending the determination of the application, unless the court otherwise directs.
11. The plaintiffs’ case is that, because there was (and is) an application for leave to appeal pending, the warrant of execution was unlawful. They rely in their heads of argument purely on the suspensive effect of the application for leave, and the authorities on which they rely deal only with the effect of an application for leave.

12. In argument at the hearing, however, it was submitted for the plaintiff that the question is whether the rescission application was revived, and the effect thereof.
13. The defendant counters that a rescission application does not automatically suspend the order sought to be rescinded. The effect of the application for leave to appeal is to suspend the dismissal of the rescission application. So, at best for the applicants, the question to be determined is what the effect of a pending rescission application. The defendant also pointed out that the application for leave to appeal was brought out of time and that the application for condonation had also not yet been determined.
14. In my view it is correct that, in the circumstances of this case, the only effect of the application for leave to appeal, had it been brought timeously (or if condonation is granted) is that the rescission application is still pending. It does not in itself affect the order sought to be rescinded. Only the rescission application may have any effect on the order.

THE EFFECT OF THE RESCISSION APPLICATION

15. There are a number of contradictory high court judgments dealing with the issue of the effect of a rescission application on the order sought to be rescinded, both in this division and in other divisions. On the one hand there are those which consider that Rule 49(11) suspends the operation of a court order which is the subject of an application for rescission. On the other, there are those which consider that the Rule purports to make substantive law as far as applications for rescission are concerned, that Rules of Court can only deal with procedural law and not substance, and therefore that the Rule as far as it purported to apply to rescissions has no effect.

16. Judgments on both sides consider that the judgments on the other side are wrong. This is not a particularly helpful situation for either litigants or the Courts. However, since the Rule no longer exists the confusion that may be caused in future is minimal.
17. The defendant relied primarily on *United Reflective Converters (Pty) Ltd v Levine* 1988(4) SA 460 (W) in which the court held that the Rule as far as it related to applications other than applications for leave to appeal was of no force and effect because it created a substantive rule of law, which the Rules did not have the power to do. *United Reflective* was followed in a number of other judgments.
18. Taking the opposite view, Notshe AJ held in *Khoza and Others v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ) that the Rule providing that an application for rescission suspended the operation of the relevant court order was in fact procedural rather than substantive. He also considered that there was no reason evident in the *United Reflective* case and those following it why there was no substantive rule of law suspending the operation of a court order when it is sought to be rescinded. In addition, Notshe AJ found that if it was a substantive rule of law and if there was no existing rule of law, then the common law stood to be developed so that there was one.
19. Vally J in *Peniel Development (Pty) Ltd and Another v Pietersen and Others* 2014 (2) SA 503 (GSJ) considered the rule to be procedural rather than substantive on the basis that the suspension of the operation of a judgment does not require a court to consider or pronounce on the merits of the matter. Those are still to be determined. Therefore he found that the suspension of a judgment pending determination of an application that may disturb it simply regulates procedure.

Vally J also found that if indeed a substantive rule of law was created, the court was empowered to develop and extend the common law.

20. It was submitted for the defendant that Vally J's reasoning regarding consideration and determination of the merits of the matter are incorrect because when a court considers the suspension of a court order has to consider the merits, and whether an injustice will be done if the order is not granted. This is correct. But the court does not make any determination of the merits of the matter.

21. Holland-Müter AJ in *Labuschagne v ABSA Bank Ltd* (2015 ZAGPPHC 226) considered the same question, whether the institution of a rescission application suspends the order sought to be rescinded. He considered the various authorities and found that the approach followed in *Khoza* and in *Peniel* was the correct one. The basis of his finding was that irreparable harm may otherwise result.

22. In both *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ) and *Pine Glow Investments (Pty) Ltd and Others v Brick-on-Brick Property and Others* 2019 (4) SA 75 (MN) the courts found that, had the attention of Notshe AJ and Vally J been directed to Rule 45A, which empowers a court to suspend the operation of any court order, they would not have found that the protection from irreparable harm they considered necessary was in terms of Rule 49(11). Both these judgments dealt, however, with the interpretation of section 18 of the Superior Courts Act, and not with the erstwhile Rule 49(11) itself.

23. I disagree with their comments. An applicant for rescission would then have to bring an urgent application in terms of Rule 45A in order to prevent execution on the order. If it brings it in the ordinary course, for example to be heard together

with the rescission, there is nothing to prevent the respondent from executing on the order as the defendant in this case has done.

24. In my view what Rule 49(11) does is simply make the procedure easier for applicants seeking in one way or another to set aside judgments, by ensuring that the *status quo ante* is preserved, to avoid irreparable harm, while the various applications are pending. I respectfully agree with Vally J that, since the Rule does not in any way determine the rights of the parties, it is procedural rather than substantive.

25. As far as the effect of the pending rescission application on the subsequent transfer of the property goes, in my view there are too many variables for a blanket determination that the transfer is invalid. These would include, as examples which came up in this case, whether an application for condonation for late filing of the application for leave is likely to be granted; whether any undertaking had been made to stay execution until the rescission application had been made; whether any attempt had been made to obtain urgent relief relating to the execution, and the outcome of any urgent application.

26. At best, the transfer is rendered vulnerable to being set aside. However, a court would have to consider all the relevant circumstances before deciding such an application, which is not before me.

CONCLUSION

27. For those reasons, I find as follows:

27.1. The application for leave to appeal instituted by the plaintiffs against the judgment of Claassen J does not automatically render the subsequent transfer of the property invalid.

27.2. The effect of the application for leave to appeal on the rescission application is that it has not been finally determined and is therefore still pending.

27.3. The effect of the application for leave to appeal on the transfer is that, because of the pending rescission application, the transfer is now susceptible to being set aside if a Court finds it just and equitable to do so.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Plaintiffs	: S Cohen
Instructing Attorneys	: Larry Marks Attorneys
Counsel for the Defendant	: M de Oliveira
Instructing Attorneys	: Lowndes Dlamini Attorneys
Date of hearing	: 04 February 2019
Date of judgment	: 13 August 2019