



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number : 3116/2015

In the matter between:

MATJHABENG LOCAL MUNICIPALITY

Applicant

and

PHAKAMA SECURITY SERVICES CC
[Registration number: 2005/183456/23]

First Respondent

THE SHERIFF OF THE HIGH COURT, WELKOM Second Respondent

In re:

Case number: 3116/2015

In the matter between:

PHAKAMA SECURITY SERVICES CC

Applicant

and

MATJHABENG LOCAL MUNICIPALITY

Respondent

CORAM: HEFER, AJ

HEARD ON: 15 JUNE 2017

JUDGMENT BY: HEFER, AJ

DELIVERED ON: 13 JULY 2017

- [1] The First Respondent caused an application for what is known as a structural interdict coupled with payment of certain amounts to be issued against the Applicant. The application did not come to the notice of the Applicant as a result of which the First Respondent moved for and obtained a default judgment against the Applicant on an unopposed basis.
- [2] The Applicant then caused an application for rescission of the order to be issued. The application was opposed and enrolled for hearing during November 2015. After arguments were heard, the presiding judge reserved judgment which was eventually delivered during August 2016, therefore nine months after the hearing. Applicant's application for rescission of judgment was dismissed with costs.
- [3] During September 2016 the First Respondent obtained a warrant of execution for the attachment of moveable assets of the Applicant in regards to the capital amount as well as interest *a tempore morae* from 7 August 2015, being the date after default judgment had been

obtained against the Applicant, to date of final payment and costs to be taxed.

- [4] The capital amount was paid by means of payment in two instalments by the Applicant.
- [5] In regards to the interest *a tempore morae*, the Applicant tendered payment which tender was not acceptable to the First Respondent.
- [6] The Applicant disputes the underlying causa for the difference between the amount of interest tendered by the Applicant and claimed by the First Respondent.
- [7] As point of departure the Applicant contends that the judgment debt payable by order of the Court bears interest from date of such order. According to the Applicant, an application for rescission suspends the operation of a judgment. The effect of the suspension is, according to the Applicant, temporally prevent from continuing or being enforced or effect of the judgment and/or order. The crux of the Applicant's calculation of interest is that the running of interest was suspended until final decision of the rescission application. Thereafter it starts to run again from date of final decision until date of payment. Barring the rescission application there would be no quibble: If repayment of the judgment debt was delayed, section 2(1) of the Prescribed Rate of Interest Act, 55 of 1975, provides that the Applicant would have to pay interest on the judgment debt from date of judgment until date of payment in full.

- [8] It is the Applicant's main contention that whilst the force or effect of the Court order was suspended and of no force and effect, it should not and did not attract interest.
- [9] According to the First Respondent, the Applicant's contentions contained in this application have its foundation in an (in any event incorrect) interpretation of certain repealed provisions of Rule 49 which provided that the filing of an application for rescission of default judgment suspended the operation of the order/judgment.
- [10] Prior to 17 April 2015, Rule 49(11)(a) of the Uniform Rules of Court contained the following provisions:

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

- [11] Rule 49(11)(a) dated from 15 December 1967 up until 17 April 2015, when it was repealed.
- [12] With reference to Rule 49(11)(a), Roux J held in **United Reflective Converters (Pty) Ltd v Levine** 1988(4) SA 460 WLD, that save where it deals with appeals, the rule goes beyond laying down a rule for the conduct of proceedings and purports to create a substantive rule of law.

[13] *Mr. Fischer SC*, on behalf of the Applicant, referred me to **Peniel Development v Peterson 2014 (2) SA 503 GJ**, where Vally J however disagreed with the judgment in **United Reflective Converters** and held that the order suspending the operation of the judgment pending the outcome of an application for leave to appeal or an application to have the judgment rescinded merely regulates the procedure as to the operation of its original judgment in the light of the fact that its findings may be disturbed by the now pending application for leave to appeal or application for rescission. The effect thereof was merely that for a certain time period, the operation of the judgment would be held in abeyance.

[14] I respectfully agree with the latter finding.

[15] Both these matters referred to, were adjudicated whilst Rule 49(11)(a) was still in operation. In view of this rule however being repealed, *Mr. Fischer* urged me to extend the common law rule, to the effect that an application for leave to appeal which suspends the operation of a judgment, to an application for the rescission of judgment. In this regard Vally J in **Peniel Development** said the following at **507 C – E**:

*“There is no reason why the Court in **United Reflective Converters** should not have pronounced its extension in relation to rescission applications. The common law itself is dynamic and fluent. It has to adapt to an ever changing modernity. The conditions and circumstances under which the law operates today are very different from those that prevailed during the time of Voet, but its presence in our Courts till then is prevalent. Hence, if the judgment in **United Reflective Converters** is correct, then there is a need to develop common law in this area. This*

*has already been done. In **Khoza v Body Corporate Ella Court** this Court, facing the difficulty posed by the judgment in **United Reflective Converters**, decided to overcome it by extending the common law rule (of suspending the operation of a judgment upon the noting of an application for leave to appeal) to the noting of an application for rescission.”*

- [16] Vally J further held that a proper application for the suspension of an order pending the outcome of an application for rescission of judgment in view of the provisions of Rule 19(11)(a) was not necessary for, if it is necessitated, it will result in a proliferation of applications to Court. This was done with reference to the plain meaning of the rule.
- [17] Rule 49(11)(a) does not form part of the rules of procedure anymore. This is in regards to both applications for leave to appeal as well as applications for rescission of judgments. Presently, Section 18(1) of the Superior Courts Act, 10 of 2013 only provides for the suspension of a Court order pending a decision in regards to an application for leave to appeal or an appeal itself. The Superior Courts Act nor the Uniform Rules of Court contain any corresponding provision in regards to applications for rescission of judgments. As correctly pointed out by Meyer J in **Tenants, Willison Court v Lewray Investments** 2016 (6) SA 466 GJ neither the **Khoza** nor **Peniel** matters 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. In the present matter I was also not referred to such authority. Meyer J further said the following at **471 E – F**:

“There is also nothing which indicates an intention on the part of the legislator to broaden the automatic suspension of operation and execution of decisions beyond those included in Section 18. A Court can always be approached under Rule 45 A to suspend the operation and execution of orders not included in Section 18. But the operation and execution are not automatically suspended.”

[18] Rule 45A therefore provides for the suspension of the execution of any orders which will include orders in regards to which application for rescission are pending. I therefore find that there is no need for extending the common law rule for rescission of judgment and orders.

[19] Section 18(1) of the Superior Courts Act provides for suspension of the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal. It is only in respect of execution in a narrow sense of the issue of a writ or attachment of goods, that the judgment is suspended by an appeal. (See: **Erasmus Superior Court Practice Second edition, Vol. 1**). In the same breath, Rule 45A of the Uniform Rules of Court referred to, only provides for suspension of the execution of such an Order of Court. In **South African Cape Corporation (Pty) Ltd v Engineering Management Services** 1977 (3) SA 534 A Corbett JA at **544 H – 545 A** stated the following in regards to Section 18:

“The purpose of this rule as to suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by

execution of the judgment in any other matter appropriate to the nature of the judgment appealed from.”

[20] Although the operation and execution of an Order of Court may be suspended pending an application for leave to appeal, an appeal or an application for rescission of judgment, such suspension does not affect the run of interest which a judgment debt may attract in terms of the Prescribed Rate of Interest Act referred to. There may be exceptional circumstances where a Court, and in particular a Court of the first instance may be asked to disregard a certain period of time for purposes of attraction of interest in regards to the judgment amount. Such exceptional circumstances will for instance be in instances where one of the parties to the litigation through its own actions causes unduly extensive delay of the proceedings. In such circumstances it might be just and equitable to grant such an order. However where the delay in delivering the judgment in the application for rescission of judgment was not due to the actions of either one of the parties and in particular of the First Respondent, there is no reason why the period between the hearing of the application up until the judgment in the application of rescission of judgment should be disregarded for purposes of the attraction of interest. The application should therefore fail.

ORDER

[21] The application is dismissed with costs.

J.J.F HEFER, AJ

On behalf of the Applicant : Adv. P.U Fischer SC
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On behalf of First Respondent: Adv. M.C Louw
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