REPUBLIC OF SOUTH AFRICA

**GAUTENG HIGH COURT**
**Johannesburg Local Division**

**CASE NO: 34819/2013**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

27/11/13
DATE

SIGNATURE

In the matter between:

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| **PENIEL DEVELOPMENT (PTY) LTD** | **FIRST APPLICANT** |
| **DUBA GIVEN PITSI** | **SECOND APPLICANT** |
| and | |
| **ISAK SMOLLY PIETERSEN AND FIVE OTHERS** | **RESPONDENTS** |

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**JUDGMENT**

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Introduction

1. There are two applications before me. The first is an application by the two applicants (the main application). The second is a counter application brought by the respondents (the counter application). Both applications are brought on an urgent basis. In the main application the applicants seek an order interdicting the respondents from evicting them from a

commercial property pending the outcome of an application brought by them to rescind and set aside a judgment of this Court granted in favour of the respondents. The judgment and order authorises the eviction of the applicants from the premises which belong to the respondents. It further orders the applicants to pay the respondents the sum of R295 260- 00. In the counter application the respondents seek, *inter alia*, a declaratory order to the effect that the said judgment is not appealable, and an order authorising the respondents to continue with the eviction of the applicants, notwithstanding the fact that the judgment upon which the eviction action is based is presently the subject of the rescission application.

2. The judgment which the applicants seek to have rescinded was issued by this Court on 11 July 2013 (the judgment of Makhanya J). On 7 August 2013 the Sheriff of the Court commenced ejecting the applicants from the property in execution of the judgment. On the same day the applicants launched an application for leave to appeal against the judgment. This was done in order to stop the eviction. It succeeded; the Sheriff removed some of their property from the premises but halted the eviction process as soon as the application for leave to appeal was served upon him. The application for leave to appeal was subsequently withdrawn on 17 September 2013 and replaced with the rescission application. On the same date, another application for leave to appeal was also filed. This second application for leave to appeal was never withdrawn. These applications for leave to appeal were filed because the Sheriff indicated that he would only stay the execution process if such an application was

filed. At the hearing of this matter,counsel for the applicants indicated that the "*applicants regard that application to be dead*". Upon receiving the rescission application as well as the second application for leave to appeal, the respondents launched the counter application.

Rule 49(11) of the Uniform Rules of Court

3. The main application is premised exclusively on the provisions of Rule 49 (11) of the Uniform Rules of Court ("the Rules"), which provides:

> "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 an order, on the application of a party, otherwise directs."

4. A plain reading of the provisions of this Rule clearly supports the applicants' case. Such a reading ineluctably leads to the conclusion that the delivery of an application for rescission automatically suspends the operation and execution of the order. After all, the phrase, "*Where ... an application ... to rescind ... has been made, the operation and execution of the order in question shall be suspended, pending the decision of such ... application*," could not be more clearly crafted. It unambiguously directs that the order of the court is suspended pending the outcome of the rescission application. This is also so in the case where an application for leave to appeal has been brought. In the latter case the courts have, over the years, come to accept this conclusion as the normal outcome of the provisions of Rule 49(11).

5. Given that the applicants have launched an application to have the judgment and order of Makhanya J rescinded, the respondents would automatically be precluded from proceeding to give effect to that order if the plain meaning of the relevant provision of Rule 49(11) is given effect to. This, however, has not always been how the said provision of Rule 49(11) has been interpreted and applied by the court. This Court, in *United Reflective Converters (Pty) Ltd v Levine*[1] (per Roux J), held that an application for rescission of a judgment does not automatically suspend the operation and execution of the judgment and order. The Court commenced its analysis by noting that the Rules are "*made to regulate the conduct of proceedings of the Provincial and Local Divisions of the Supreme Court.*"[2]Bearing in mind the distinction between "*procedural rules and substantive rules of law*"[3], the Court further noted that the Rules were made in terms of the section 43(2)(a) of the Supreme Court Act 59 of 1959 (the Supreme Court Act), and then held as follows:

> "I have no doubt that the Rules made by virtue of the provisions of s43 (2) (a) of Act 59 of 1959 can only relate to matters regulating procedure."[4]

6. Having made this finding the learned judge proceeded to find that the Chief Justice has made a substantive rule of law by including the words "*or to rescind, correct, review or vary*" into the provisions of Rule 49(11), and by so doing acted beyond the scope of the powers conferred upon his office by section 43(a) of the Supreme Court Act. The assertion is robust,

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[1]1988 (4) SA 460 at 463J-464A; *Nel v Le Roux NO* 2006 (3) SA 56 (SE) at 59I;
[2]*United Reflective Converters* (*op cit*) at 463B
[3]*Id* at 463C
[4]*Id* at 463E

and no authority is cited in support thereof. I, in turn, was unable to find any such authority.

7. I do not agree with the finding of the Court in *United Reflective Converters* that the Chief Justice by including the said words in Rule 49(11) has, without due power, created a substantive rule of law. In my view, the Chief Justice has merely made a rule with regard to procedural matters. Therefore, I respectfully disagree with the judgment in that case.

8. It bears noting that by issuing a judgment the Court pronounces on the merits of a case. However, a court in ordering that the operation of the judgment be suspended pending the outcome of an application for leave to appeal or an application to have the judgment rescinded, does not examine, let alone make a pronouncement on, the merits of that application. Thus, the order suspending the operation of the judgment 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. It merely says that for a certain time-period the operation of the judgment would be held in abeyance. As matters relating to time periods applicable to pleadings in general are accepted as being purely procedural in nature there is no reason why an order temporarily suspending the operation of a judgment is also not a purely procedural matter. They both attend only to matters temporal. The court is merely regulating the procedure to be applied with regard to the execution of its judgment. There is no reason

why the Chief Justice, relying on the lawful powers conferred upon his/her office, cannot establish a Rule of Court attending to the operation of a judgment in a situation where its findings may be disturbed. Hence, I do not agree that the Chief Justice has created a substantive rule of law by fiat.

9. It needs to be emphasised that the learned Judge accepts that a court does have the power to stay the execution process which may have commenced despite the launching of an application to have the judgment rescinded. This is certainly correct and it is catered for in the provisions of Rule 49(11). The provision allows a party in whose favour a judgment has been given to apply for it to be executed,if its operation is suspended (whether by virtue of an application for leave to appeal or an application to rescind the judgment), and no specific procedure or time period has been prescribed for that party to adhere to it should it wish to bring such an application.

10. Having found that section 43(2)(a) of the Supreme Court Act only allows for the regulating of procedural matters and that the provisions of Rule 49(11) insofar as they relate to applications for rescission of a judgment extend beyond this scope, the Court came to the following conclusion:

> "My conclusion is therefore that Rule 49(11)(a), save where it deals with appeals, goes beyond laying down a rule for the conduct of proceedings and purports to create a substantive rule of law. The words, 'or to rescind, correct, review or vary' as they appear in the Rule are of no force and effect."[5]

[5] *Id* at 464B

11. This is a radical conclusion, one that I respectfully cannot agree with. I see no reason not to give effect to the plain meaning of the words used in Rule 49(11). There is nothing irregular in the establishment of Rule 49(11), nor is its provisions offensive to the rule of law. On the contrary, it is, as I demonstrate below, a necessary adjunct to law that an application for leave to appeal suspends the operation of the judgment. There is no difficulty, practical or otherwise, in our law with the common law rule that an application for leave to appeal suspends the operation of a judgment. This common law rule, salutary as it is, may have its origins in the *dicta* of *Voet*, but its underlying principles are well articulated by Corbettt JA, who puts the point this way:

> "The purpose of this rule as to the 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 manner appropriate to the nature of the judgment appealed from."[6]

12. 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*

[6] *South Cape Corporation v Engineering Management Services* 1977 (3) SA 534 (A) at 545B. References to cases by Corbett JA have been omitted

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. The common law itself is dynamic and fluid. 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*. An application for rescission may not have existed in the days of *Voet*, but, its presence in our courts since then is prevalent. Hence, if the judgment in *United Reflective Converters* is correct then there is a need to develop the common law in this area.This has already been done. In *PE Khoza and 17 Others v The Body Corporate, Ella Court*[7] 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.

13. According to the Court in *United Reflective Converters* an applicant for rescission of a judgment must bring another application to suspend, or stay, the operation or execution of the judgment. This is articulated in the following terms:

> "Rule 42 can only regulate the procedure to achieve a variation or a rescission. The powers of a Court to vary or rescind its orders has been the subject of many judgments. ...
> The authorities are not harmonious. What does, however, emerge is that there is no substantive rule of law that an application to vary or rescind an

[7] [2008] ZAGPHC 429. It is unfortunate that this judgment is not referred to in Erasmus, *Superior Court Practice* or in Harms, *Civil Procedure in the Supreme Court,* especially since counsel have a habit of quoting from either of the two texts without doing further research on the subject matter at hand.

> order or judgment automatically suspends its operation. ... Certainly a Court is empowered to assist a litigant by ordering the suspension of an order or judgment pending an application to vary or rescind it. I am aware that such orders have been granted to avoid an injustice. A proper application must be brought to obtain such relief. The relief will only follow if the Court grants the order.[8] (Emphasis added).

14. I do not agree with this approach, for in my view, it results in a proliferation of applications to Court. This Court has to deal with urgent applications on a regular basis asking for it to stay a writ of execution pending the finalisation of a rescission application. At times the writ is issued after the rescission application has been launched, thus forcing the applicant seeking the rescission of the judgment to bring an application to stay the execution process. Once the application to stay the writ is launched the Sheriff withholds the execution process. Nevertheless, the Sheriff is cited in the application and served with the papers, but never enters the debate. Invariably, the application to stay the writ of execution is granted and in the course of so doing, the Court rarely, if ever, scrutinises the merits of the rescission application in any significant detail since it is not attending to the rescission application. That application will be dealt with, and determined, in the normal course of events. Thus, the applicant seeking the rescission of a judgment has been forced to bring a second application. Given that the application to stay the writ is invariably granted, the futility of the whole exercise becomes apparent and all the resources expended in issuing and attempting to execute the writ yield little, if any, value. In my judgment, the route directed by the Court in *United Reflective*

[8] *United Reflective Converters* (*op cit*) at 463H-464A.

*Converters* results in the wasteful utilisation of valuable judicial resources as well as in unnecessarily increasing the litigation costs for the parties.

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 spelt out in *South Cape Corporation.*[9] In fact, in the present case, such an application is before Court in the form of a counter application. Thus, what we have here is a default judgment, an application for rescission of the default judgment, a writ of execution, an application to stay the writ pending the finalisation of the rescission application, and a counter application to proceed with the execution process which commenced in accordance with the judgment of Makhanya J. The last application, in my view, is the only one that should have been before Court, and if granted, only then should the writ have been issued.

Should the application to stay the writ and halt the execution process be granted?

16. In the light of the conclusion I have come to, the application to stay the writ and halt the execution process should be granted.

17. However, for the sake of completeness it bears noting that the applicants claim for relief rests on their contention that they will show at the rescission application that the judgment was acquired in their absence and

[9] *South Cape Corporation* (*op cit*) at 545C-546*H*.Although the reference here is with regard to an application for leave to appeal, the circumstances are equally applicable to an application for a rescission of a judgment.

without their knowledge. Had they been aware of the application for their ejectment, they would have opposed it and counter applied for payment of R650 000.00 from the respondents. They annex copies of invoices for services they purchased in the course of effecting repairs to the premises. They claim that they are entitled to be reimbursed for the payments they so made. It has to be said that the copies of the invoices they annex to their papers do not support their claim that they incurred a cost of R650 000.00. Some of the invoices are duplicated. Ignoring the duplicated ones, the total amount reflected on the invoices is R133 000.00. However, this issue is not relevant for present purposes and for that reason no more need be said of it.

18. It is clear that should the judgment of Makhanya J be rescinded the *causa* for the eviction of the applicants from the property would disappear, at least, until the application for their eviction and for payment from them is finalised. Hence, it would be fair to grant the application to stay the writ of execution. This, however, is not the end of the matter, for there is a counter application, the outcome of which has a direct impact upon the application to stay the eviction process.

The counter application

19. The counter application asks, *inter alia*, for a declaratory order as well as an order that allows for the eviction process, which has already been set in motion, to proceed pending the finalisation of the rescission application. The counter application was delivered simultaneously with the answering

affidavit. The applicants did not ask for an opportunity to deal with that application more fully. They chose to deal with it in their replying affidavit and in so doing failed to address the factual issues raised therein. They merely relied on the fact that they have a claim arising from the expenses incurred by them in causing improvements to the premises. They did, and do not deny that the lease agreement has been validly cancelled, and that absent the lease agreement they have no legal title to occupy the premises. They cannot dispute that the amount they are claiming is substantially less than that which the respondent is claiming and for which it has already obtained a judgment, albeit by default of the applicants. Should the applicants succeed in rescinding the judgment their claim for money will be adjudicated together with the claim of the respondents, which will, no doubt, continue as the respondents would still want to execute on the money judgment they presently hold. However, more importantly, the applicants do not deny that they are occupying the premises without paying anything for this benefit, and have been benefitting in this respect so for some time now. As long as the applicants continue to occupy the premises free of any obligations the respondents suffer harm which is not legally justifiable. That this harm is irreparable is another factual contention not disputed by the applicants. Hence, I hold that the applicants present no real case against the counter application.

20. For these reasons, the real harm which the respondents are forced to bear,and the potential harm they are exposed to if the counter application is refused, far exceeds that to which the applicants are to bear should the

counter application be granted. In fact, the applicants will suffer no harm if they are ejected from the premises. Their monetary claim remains alive and will be adjudicated, either with the rescission application or after (should they be successful in the rescission application). Thus, the counter application is no ordinary application for leave to execute the order pending the outcome of the rescission application. It is an application to execute only that part of the order whose suspension would cause them irreparable harm. In the circumstances, I hold that it would be in the interests of justice to grant the relief sought in the counter application.

21. If the counter application is granted, it follows that the application to stay the execution of the eviction part of the judgment has to be refused.

Costs

22. Both parties agreed that costs should follow the result.

The order

23. For the reasons already set out, the following order is made:

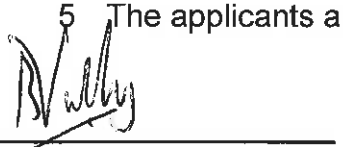
1 It is declared that the judgment of this Court granted on 11 July 2013 is not appealable.

2 The application for leave to appeal that judgment filed on 17 September 2013 is set aside.

3 The application to stay the execution of the eviction order is refused

4 The respondents are authorised to execute the warrant of ejectment pending the outcome of the rescission application.

5 The applicants are to pay the costs.



**Vally J**
Gauteng High Court, Johannesburg Local Division

**Appearances:**

| | | |
|---|---|---|
| For the applicants | : | Adv Boale |
| Instructed by | : | Unknown |
| | | |
| For the respondents | : | Adv S Aucamp |
| Instructed by | : | ReanSwanepoel Attorneys |
| | | |
| Dates of hearing | : | 25 September 2013 |
| Date of judgment | : | 26 September 2013 |

Date judgment was edited: 27 November 2013