IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 12349/2012

In the matter between:

24/4/2015

On 24 April 2015 before the Honourable Holland-Müter AJ:

ANTONETTE LABUSCHAGNE — Applicant / Defendant

and

ABSA BANK LTD — Respondent / Plaintiff

JUDGEMENT

1.

The applicant brought an application during March 2014 before Court for an order in the following terms:

1.1 That the execution of the court order dated 12 November 2012 ("court orders"), in terms of which the settlement agreement dated 12 November 2012 ("the settlement agreement") was made an order of court, be suspended pending an application for the setting aside of the court order;

1.2 That the order granted in terms of paragraph 1 supra will serve as an interim order pending the finalization of the Applicant / Defendant's application for setting aside the court order;

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

24/4/2015
DATE

SIGNATURE

1.3 That the Respondent (Plaintiff) is ordered to pay the costs of this application, in the event such application is opposed.

2.

This application was opposed by the Defendant.

3.

The parties exchanged answering and replying affidavits. Some confusion between the parties caused the applicant to file the heads of argument late but no harm resulted in this.

4.

The matter was initially brought as an application for sequestration of the now applicant by the now respondent and enrolled for 12 November 2012. It was, as a result of this sequestration application, that the settlement agreement was signed by both parties, the agreement then made an order of court on 12 November 2012. It must be added that the applicant consented to the agreement being made an order of court.

5.

The relevance of this court order on the current application is inter alia that the applicant failed to comply with par 1.4 of the agreement. This clause provided for the applicant to pay the final agreed installment on 1 July 2013, failing to comply authorizing the respondent to proceed with the sequestration application.

6.

The balance of the agreement made provision that the respondent, as a result of the applicant's failure the comply with the afore mentioned payments, may proceed to sell the said properties mentioned in the agreement. In terms of the agreement the applicant gave the respondent an irrevocable authority to sell the properties at prices and on conditions which are in the sole discretion of the respondents.

7.

After the applicant failed to meet the 1 July 2013 deadline, she alleges that she tried to negotiate with the defendant on this aspect. The defendant denies that the initiative came from the applicant. This is however not relevant as to whom took the initiative, it is clear that certain correspondence followed between the parties resulting in no success.

8.

A round table conference was scheduled for somewhere in November 2013, but the applicant withdrew from the proposed conference on very short notice. The applicant then indicated that she intended bringing an application to have the order of 12 November 2012 rescinded.

9.

In the letter informing the respondent of the intended application, certain defences were raised by the applicant, being (i) duress on her by employees of the respondent influencing her to sign the above mentioned agreement. It is alleged that this influence effectively paralyzed her to convince and persuade her to agree to the settlement.

10.

The second defence now raised is the alleged unconstitutionality of certain clauses in the settlement agreement. The main objection to the respective clauses is that the irrevocable authority given to the respondent to sell the properties at prices and on conditions solely in the discretion of the respondent amounts to *parate executie*.

11.

The point is taken that such a clause of *parate executie* is invalid if the property is encumbered by mortgage. Reference was made to **ISCOR HOUSING UTILITY CO CHIEF REGISTRAR OF DEEDS 1971 (1) SA 613 (T).**

12.

The next point taken was not initially canvassed in the heads of argument by both parties, but in the interest of justice the court allowed deliberation thereof. This point refers to the effect of an application to rescind a judgment. See **Rule 49(11)** of the Uniform rules.

13.

On behalf of the respondent it was submitted that the institution of a rescission application does not suspend the order sought to be rescinded. Reference was made to **UNITED REFLECTIVE CONVERTERS (Pty) Ltd v. LEVINE 1988(4) SA 460 (W).** In this case it was held that the provisions of **Rule 49(11)** have no force and effect insofar it relate to rescission applications, save insofar as it relates to the noting of an appeal.

14.

The applicant, with reference to **KHOZA and OTHERS v BODY CORPORATE OF ELLA COURT 2014(2) SA 112 (GSJ)** and **PENIEL DEVELOPMENT (Pty) Ltd v PIETERSEN AND OTHERS 2014(2) SA 503(GJ),** contended that the provisions of **Rule 49(11)** do suspend the operation of an order upon application for rescission of that order.

15.

The distinction between procedural issues and substantive rules of law, was discussed in detail in the **KHOSA** and **PENIEL** matters *supra* and need not be repeated here.

16.

After careful examination of the two opposing views as stated in the **UNITED REFLECTIVE CONVERTERS** case on the one hand, and that of in the **KHOZA** and **PENIEL** cases to the contrary, I am convinced that the approach followed in the latter is indeed the correct approach.

17.

Whilst the court has the power to rescind orders, but that pending rescission orders do not suspend the execution of the said order, the result could be that, pending the hearing of such rescission application at a later stage, the result may become pure academic should the execution of such order in the meantime result in for instance immovable property be auctioned before the rescission application is heard. It may then result in that, should the rescission application be successful, but the immovable property be sold by then, the result will be of no effect.

18.

Irreparable harm may already be done if the existing order is executed pending the hearing of the rescission application. Such harm / prejudice will be averted if the approach in the **KHOZA** and **PENIEL** cases is followed.

19.

I am convinced that the latter approach is the correct approach and that the reasoning in the **KHOZA** and **PENIEL** cases *supra* is correct. **Rule 49(11)** is in my view clearly applicable on rescission applications as on leave to appeal applications.

20.

The merits of such rescission application is not to be adjudicated at this stage, but only on the hearing thereof. I have been furnished with copy of the application for the rescission of the court order granted on 12 November 2012. The application, although more than two years after the granting of the initial order, is set down on the unopposed role in this court for **18 May 2015.** At that hearing or subsequent later opposed hearing, the merits will be considered.

21.

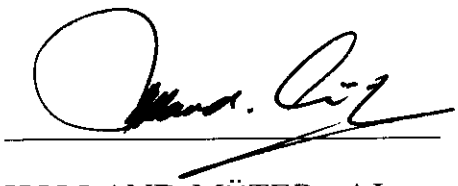
In view of the above finding, the relief in prayer two (2) of the application for an interim interdict is no longer necessary. The provisions of **Rule 49(11)** in any event suspends the execution of the said order.

22.

In the circumstances, I make the following order:

1. The order made on 12 November 2012 by Mr Justice Phatudi in declared to be suspended by virtue of the provisions of **Rule 49(11)** of the Uniform Rules pending the finalization of the rescission application instituted by the applicant on 28 March 2015, the Notice of Motion under **case number 12349/2012** dated 28 March 2015; and

2. The costs of this application is to be costs in the main application.



HOLLAND-MÜTER AJ

24 April 2015

Applicants Attorneys:

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Advocate: S Maritz

Respondents Attorney:

TIM DU TOIT ATTORNEYS

Advocate: MP vd Merwe SC