IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2016/30120

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[10 JANUARY 2018] .....
SIGNATURE

10/1/18

In the matter between:

RIANA PEACH **APPLICANT**

and

AMBASSADOR SONTO KUDJOE **1ST RESPONDENT**
THE MINISTER OF STATE SECURITY **2ND RESPONDENT**

JUDGMENT

MUDAU, J

[1] The Applicant seeks an order for the reinstatement of her salary and fringe benefits (the main application), which were stopped by the Respondents, following her dismissal from employment of the Ministry of State Security Agency, with effect from December 2015. Furthermore, the Applicant seeks an order directing that her suspended pension and medical aid contributions

be reinstated and that all her back payments and/or premiums or instalments be paid to her by the Respondents, immediately.

[2] The Respondents seek an order, by way of a counter application, as an alternative in opposition to the main application, to suspend the operation of the order of Basson, J, (in which the decision to stop the payment of the Applicant's monthly remuneration and benefits was reviewed and set aside) pending the outcome of a rescission application. The order is sought in the alternative and in the event that this Court dismisses the Respondents' contention that there exist a substantive common law rule, to the effect that the operation of judgment or order is suspended, upon institution of a rescission application by the person affected thereby.

RELEVANT BACKGROUND FACTS

[3] The Applicant was employed by the Second Respondent. Disciplinary proceedings were brought by the Respondents against the Applicant on forty charges of misconduct, based on allegations of fraud. Consequently, the Applicant was found guilty in respect of all the misconduct charges. A decision was made to terminate the employment of the Applicant. On 20 April 2016, the Applicant instituted review application proceedings in which she sought to have the decision of the Respondents to dismiss her from the employment of the State Security Agency, reviewed and set aside based on certain irregularities.

[4] The decision to dismiss the Applicant from the employment of the State Security Agency was taken following the recommendation of the Disciplinary Hearing Panel, recommending that the Applicant's employment with the Respondents be terminated. The Applicant had specifically required that the First and Second Respondents dispatch within 15 (fifteen) days after receipt of the notice of motion, to the Registrar, the record of proceedings sought to be corrected or set aside, '*together with such reasons as they in law required or desired to give or make and/or to notify that they have done so*'.

[5] Following receipt of the Applicant's Rule 53 application, a notice of intention to oppose the application was duly filed and served on 16 May 2016. Between the period 16 May 2016 and 4 July 2016, the parties exchanged various correspondences which *inter alia* dealt with the Applicant's proposal for the settlement of the matter. The records of the decision sought to be reviewed and the supplementary records thereto were filed on 29 July 2016 and 12 August 2016, respectively.

[6] However, the Respondents failed to file any opposing affidavit. The review application was enrolled on the unopposed motion roll of 12 August 2016, with prior notice to the Respondents. The Respondents were represented by counsel at Court who made certain submissions. As there were no affidavits filed by the Respondents; all submissions were made from the Bar.

[7] The thrust of the argument put forth by counsel for the Respondents was that the matter had not been properly set down, as it was supposed to be on the opposed motion roll due to the filing of the notice of intention to oppose. Counsel further argued that the time was not ripe for the filing of their opposing affidavit, as the Applicant first needed to file a supplementary affidavit, after which the Respondents' opposing affidavit should be filed. It was conceded by counsel for the Respondents that the records that were filed by the Respondents were both out of time and incomplete[1].

[8] The Court dismissed the arguments raised by counsel appearing for the Respondents due to the fact that no affidavits were filed by the Respondents. The Court dealt with the matter on an unopposed basis and granted the following orders:

> "*1. The decision of the First Respondent following a disciplinary hearing to terminate the employment of the Applicant is hereby reviewed and set aside;*
>
> *2. The decision to stop the payment of the Applicant's monthly remuneration and benefits is hereby reviewed and set aside;*

[1] See: p105 & p109;

3. *The Respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved."*

An application for rescission of the judgment by Basson, J with condonation having been granted, is pending.

[9] The Respondents failed to comply with the orders by Basson, J despite a letter dispatched to the Respondents' attorney on 27 September 2016, on behalf of the Applicant. In this letter to the Respondents, the Applicant's attorney drew the attention of the Respondents to the fact that an application for rescission of judgment does not suspend the right of the Applicant to execute the order, as in the case of an appeal. With no response forthcoming, the Applicant then proceeded with the current application. The crisp issue before this Court is straight forward. The only question for consideration is whether the filing of the Respondents' application for rescission of judgment suspends the operation of the orders by Basson, J, as contended by the Respondents.

[10] The Respondents referred to Section 18 of the Superior Courts Act[2] , contending that it is meant to provide the means to attain the ends which the administration of justice seeks. It was further contended, on behalf of the Respondents that, there is, at common law, a substantive rule suspending the operation of an order or judgment upon the noting of an application for rescission, as it always has been with the noting of an appeal. In terms of the previous Rule 49(11) of the Uniform Rules of Court:

"Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of 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"

[2] Act 10 of 2013.

[11] The rule provided plainly that, once an application for rescission has been made, the Court order in question is suspended and cannot be executed on. However, in the case of *United Reflective Converters (Pty) Ltd v Levine*[3], Roux, J held that there is no substantive rule of law that an application to vary or rescind an order automatically suspends its operation[4]. Accordingly, insofar as Rule 49(11) sought to create such a substantive rule of law, it had overstepped the mark and was *ultra vires* and of no force or effect. Regarding the automatic suspension of an order on the noting of an appeal, Roux, J held further that Rule 49(11) merely restated the already existing substantive law in that regard and, was therefore, valid.

[12] In the instant case the Respondents further contended that the Court is entitled to develop a procedural rule suspending the operation of an order upon application for rescission thereof. Section 18, which has replaced Rule 49 (11), reads as follows:

> ***"18 Suspension of decision pending appeal***
>
> *(1) Subject 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.*
>
> *(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*
>
> *(3) 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.*
>
> *(4) If a court orders otherwise, as contemplated in subsection (1)-*
>
> *(i) the court must immediately record its reasons for doing so;*

[3] 1988 (4) SA 460 (W).
[4] At 463J.

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[13] Section 18 does not address the implication of an application to rescind, correct or vary an order (see *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*[5]). It omits any reference to application for rescission of judgment. It only provides for the automatic suspension of the operation and execution of a decision pending an application for leave to appeal or an appeal. Recently in *Khoza and Others v Body Corporate of Ella Court*[6] (per Notshe, AJ) however, the court was of the view that Rule 49(11) did provide for a rule of procedure, as opposed to a substantive rule of law, and was not satisfied with Roux, J's conclusion that there is no common law supporting an automatic suspension of an order on the bringing of an application for rescission.

[14] Notshe, AJ held in *Khoza and Others v Body Corporate of Ella Court,* as counsel for the respondents' also contended, that, if the common law were lacking such a rule, it should be developed by the Courts to provide for it. In reasoning that such a common law rule should be developed, Notshe, AJ stated as follows in para 28 of the judgment:

"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

[5] 2014 (3) SA 189 (GJ).
[6] 2014 (2) SA 112 (GSJ).

circumstances, the rule that applies to the noting of appeals would be extended to noting of the rescission application as well."

Notshe, AJ's approach was echoed by Vally, J in *Peniel Development (Pty) Ltd and Another v Pietersen and Others*[7].

[15] In *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another*[8] Meyer, J held that Section 18 was to be interpreted in accordance with the established principles of interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9] as well as *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[10]. Meyer, J reasoned as follows in para 18 with which I respectfully agree:

"... 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)."

[16] The learned Judge continued at para 19 as follows:

"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."

I agree. A litigant, 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

[7] [2014] 2 All SA 219 (GJ)
[8] 2016 (6) SA 466 (GJ)
[9] 2012 (4) 593 (SCA)
[10] 2014 (2) SA 494 (SCA) para 12

rescission. There is no need to develop our law in this regard. Rule 45A provides adequate protection for a litigant with a meritorious application.

[17] The Respondents in the counter application ask, *inter alia*, for an order that suspends the operation of the order by Basson, J, pending the finalisation of the rescission application. Rule 45A deals with suspension of orders by the Court and provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit".

The counter application was delivered simultaneously with the answering affidavit. To summarise, before this Court is a default judgment by Basson, J and an application for rescission of the default judgment yet to be adjudicated upon. On face value, the application for rescission seems justified. Should the default judgment of Basson, J be rescinded the *causa* for the application for the execution of that judgment in favour of the applicant would be out of the way.

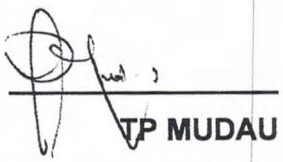
[18] The real harm which the Respondents are forced to bear, and the potential harm they are exposed to, if the counter application is refused, far exceeds that to which the Applicant is to bear, should the counter application be granted. The Respondents are unlikely to recover the amounts of money paid, the source of which are public funds. Besides being inconvenienced the Applicant will suffer no irreparable harm if her application was to be dismissed pending the rescission application.

[19] The claim for monetary relief and related benefits remains alive and will be adjudicated, either with the rescission application or after (should the application for rescission of the Basson judgment be successful). The applicant will if successful, be entitled to all monies due to her. If the counter application is granted, it follows that the application to execute the default judgment has to be refused. There was no disagreement by the parties that costs should follow the result.

THE ORDER

[20] For the reasons already set out, the following order is made:

1. The application for an order to reinstate the salary and fringe benefits is dismissed.
2. The counter application to stay the execution of the Basson, J order is granted pending the outcome of the application for rescission of the order.
3. The applicant is to pay the costs.



TP MUDAU
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

Date of Hearing:	1 November 2017
Date of Judgment:	10 January 2018

APPEARANCES

For the Applicant:	Adv. I Vermaak-Hay 083 675 1546
Instructed by:	Stopforth Swanepoel & Brewis Inc 012 343 7437
For the Respondent:	Adv. J Motepe SC 012 303 4098 and Adv. H.A. Mpshe 083 295 1874
Instructed by:	State Attorney Pretoria 012 309 1635

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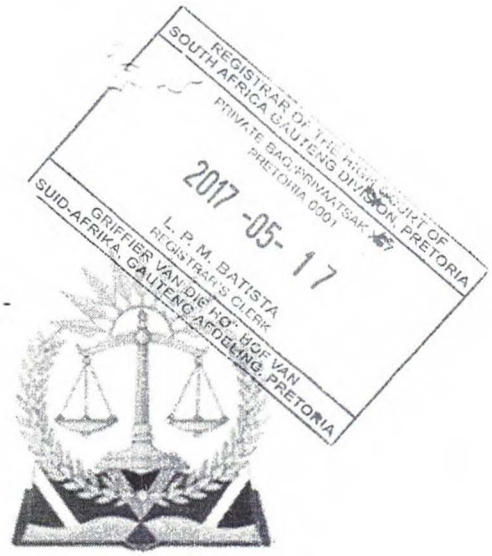

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APPLICATION FOR OPPOSED DATE
CASE NUMBER:

APPLICANT'S SERVICE	DATE
INDEX	17/05/2017
HEADS OF ARGUMENTS	29/03/2017
RESPONDENT'S SERVICE	**DATE**
HEADS OF ARGUMENTS	16/05/2017