

SOUTH AFRICA / JUDGMENT

Hlumisa Technologies (Pty) Ltd and Another v Nedbank Ltd and Others (3304/2019) [2019] ZAECHGC 124; 2020 (4) SA 553 (ECG) (10 December 2019)

[2019] ZAECHGC 124

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

3304/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 3304/2019

Date

heard: 28 November 2019

Date

delivered: 10 December 2019

In

the matter between:

HLUMISA
TECHNOLOGIES (PTY) LTD
First
Applicant
SABELO
HLUMELO JELA
Second
Applicant
and
NEDBANK
LTD
First
Respondent
ANDREW

STUART PATERSON N.O.

Second

Respondent

JEANNINE

ELIZABETH SAFFY N.O.

Third

Respondent

A

SAYMAN N.O.

Fourth

Respondent

JUDGMENT

LOWE, J

INTRODUCTION

- [1] In this application, a Company, which is under a final liquidation order, seeks Orders which are directed at placing the Directors of the Company in control of the Bank account of the Company in liquidation pending the finalisation of an application for the rescission of the final order of winding-up.
- [2] The final order of winding-up was issued on 15 June 2018. The application to rescind the final order of winding-up was issued on 14 May 2019.
- [3] The effect of the final order of winding-up is to place the control of all assets of the Company in liquidation in the hands of the Liquidator and to discharge the Directors.
- [4] This application is premised upon the assertion that the effect of a pending application for the rescission of a final order of winding-up automatically suspends the operation and execution of the final order

of winding-up and, in effect, releases the Company and its assets from the consequences of the final order of winding-up.

- [5] The nature of the dispute thus requires a finding to be made as to whether or not the filing of an application to rescind a final order of winding-up automatically suspends the operation and execution of

the final winding-up order.

- [6] It must immediately be pointed out that Rule 49(11) of the Uniform Rules of Court, which provided:

“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.”

was repealed on 22 May 2015.

- [7] The operation and the execution of a decision which is subject to an application for leave to appeal or appeal, is dealt with as to suspension of such a decision, in Section 18 of the Superiors Courts Act 10 of 2013.
- [8] The noting of an appeal suspends the operation and execution of the order pending the decision on appeal or application for leave.
- [9] This (Section 18) simply essentially restates the common law rule accordingly[1].
- [10] Rule 49(11), it has been said, simply restated the common law. This seems to me to overstate the position, as Rule 49(11) dealt with more than appeals and includes applications to “rescind, correct on review or vary an order”.
- [11] Contrary to Applicants’ assertion, there is no substantive common law principle or rule of common law that an application to rescind an Order of Court automatically suspends the effect and operation of such Order[2].
- [12] In *Peniel Development (Pty) Ltd and Another v Pietersen and Others* [3] it was held that the delivery of an application for rescission automatically suspends the operation and execution of an order[4].
- [13] In *Peniel Development*
- [5] Vally J held:

*“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. . . . 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 *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.”*

- [14] This is all recently dealt with in *Pine Glow Investments (Pty) Ltd and Others v Brick-On-Brick Property and Others* [6] in illuminating terms by Legodi JP as follows:

“[7] ... The real question is whether it is necessary to develop or extend the common-law rule to apply to rescission applications in order to automatically suspend the operation of an order of court in circumstances where a procedural rule is provided in the Uniform

Rules of Court. This question in my view should also be seen in the context of what was said in the case of *Khoza and Others v Body Corporate of Ella Court*, a case upon which the respondents also heavily relied. In para 26 thereof Notshe AJ held:

'Furthermore, even if there were no substantive rule of law to that effect, I would be entitled to develop a procedural rule suspending the operation of an order upon an application for rescission thereof. I have concluded above that the rule that suspends the operation of an order upon an application for rescission of that order is a procedural rule. At common law the High Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. This power is confirmed [s 173 of] . . . the Constitution.' [Own emphasis.]

[8] Notshe AJ, as he then was, expressed himself as he did without making reference to the procedure in rule 45A which deals with suspension of court orders and it reads:

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

[9] This, in my view, must have brought to an end any reliance at the risk of contempt of court on the decisions of Notshe AJ and Vally J referred to above. But of course the respondents seek to avert the procedural imperative in rule 45A on the basis that it is a prejudicial rule. The fifth respondent in its written heads of argument seeks to deflate the imperative in rule 45A by contending, *inter alia*, as follows:

'We respectfully submit that this overlooks an important and vital difference between rule 45A and s 18(3), namely the burden of proof. An application for the suspension of an order under rule 45A must show all the requirements for an interlocutory interdict (ie a *prima facie* right; irreparable harm; balance of convenience and absence of an alternative remedy) but contrarily an application for rescission under rule 42 does not have to show good cause only that an order has wrongly been granted in his absence. The applicant for implementation under s 18, however, bears the burden of proof, more particularly in relation to the balance of convenience and the irreparable harm. In our E respectful submission, there is no good ground for distinguishing between a person who has suffered injustice by an incorrect court order (against which he is appealing) and a person whose rights have been ignored by a plaintiff who has obtained an order behind his back.'

[10] The first sentence in the quotation was with reference to the decision of Meyer J in *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another*, wherein Meyer J came to the conclusion that an application for rescission of judgment does not automatically suspend a judgment or an order of court, and concluded by stating that —

'a person 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 rescission'.

- [11] I could not agree more. Had Vally J and Notshe AJ's attention been drawn to the provisions of rule 45A, I do not think they would have come to the same conclusion. The 'procedural rule' referred to in Notshe AJ's judgment is there and is founded in rule 45A. Therefore there is no need to develop the common law and regulate one's own processes contrary to the procedure laid down in rule 45A. Any party who seeks to avoid irreparable prejudice, which was mentioned in para 27 of Notshe AJ's judgment, by execution of an order of court is entitled to resort to rule 45A for interim relief.
- [12] That being so, the standard of proof alluded to in the quotation in
- [9] of this judgment cannot be a justification to subvert rule 45A and allow courts to regulate their own processes as contemplated in s 173 of the Constitution in the face of rule 45A, with its main object being to avoid the very irreparable prejudice referred to in para 27 of Notshe AJ's judgment. The point is this: The interest of justice is taken care of by rule 45A. In any event an order of court, no matter how wrong it might be, stands to be observed until it is set aside, rescinded, corrected and/or varied. Anyone who claims prejudice can resort to rule 45A on an urgent basis, provided such an application is justified.
- [13] Perhaps there is a good reason why s 18 applies only to cases pending finalisation of appeal process once an application for leave is delivered. The repeal of rule 49(11) without corresponding automatic suspension of an order of court in s 18 of the

Superior Courts Act by rescission application, must be a clear intention of the legislature not to do so. The retention of such a suspension in terms of rule 45A must have been considered sufficient to address any potential prejudice arising from judgment obtained in the absence of another party who cannot wait until rescission application is finalised. That 'there is no good ground

for distinguishing between a person who has suffered injustice by an incorrect court order (against which is appealing) and a person whose rights have been ignored by a plaintiff who has obtained an order behind his back', does not seem to be based on any good legal principle. In fact, I am unable to understand the logic in the submission. At the risk of repetition, if it was the intention of the legislature in s 18 to extend automatic suspension of an order of court upon delivery of rescission application it could easily have been spelled out in s 18 of the Superior Courts Act.

...

- [20] I Two of these cases followed Meyer J's judgment. In the matter of Matjhabeng Local Municipality v Phakama Security Services CC Hefer AJ, dealing with the alleged automatic suspension by rescission application, inter alia, held:

'Rule 45A therefore provides for the suspension of the execution of any order 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.'

[21] Similarly, Mudau J in *Peach v Kudjoe* held in para 16:

'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 rescission. There is no need to

develop our law in this regard. Rule 45A provides adequate protection for a litigant with a meritorious application.' [Own emphasis.]

[22] Eloquently put by Mudau J, automatic suspension of any judgment or order of court upon delivery of rescission application by any person could result in an absurd situation. That is, meritless rescission applications can easily be resorted to, to frustrate the execution of a judgment or an order of court."

[15] I could not agree more with the conclusion and reasoning of Legodi JP in *Pine Glow* and it serves no purpose to restate same, which I shall adopt.

[16] Of relevance further is Section 150 of the Insolvency Act 24 of 1936:

"150 Appeal

- (1) Any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may, subject to the provisions of section 20 (4) and (5) of the Supreme Court Act, 1959 (Act 59 of 1959), appeal against such order.
- (2) Such appeal shall be noted and prosecuted as if it were an appeal from a judgment or order in a civil suit given by the court which made such final order or set aside such provisional order, and all rules applicable to such last-mentioned appeal shall mutatis mutandis but subject to the provisions of subsection (3), apply to an appeal under this section.
- (3) When an appeal has been noted (whether under this section or under any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestered estate shall be realized without the written consent of the insolvent concerned.
- (4) If an appeal against a final order of sequestration is allowed, the court allowing such appeal may order the respondent to pay the costs of sequestrating and administering the estate.
- (5) There shall be no appeal against any Order made by the court in terms of this Act, except as provided in this section."

[17] Fundamentally as set out in Respondents' Heads, it would be absurd if the operation and execution of an Order of Court, and particularly a final order of winding-up or sequestration, were to be automatically suspended by simply filing an application for the rescission of that Order. Such a rule would enable Respondent or Defendant to frustrate the

operation of an Order of Court by launching an application for the rescission of the Order and, unlike in circumstances of an application for leave to appeal or the noting of an appeal, the successful party would not be able to invoke the provisions of Section 18 of the Supreme Court Act and would potentially be without a remedy to meet the prejudice which may follow as a consequence[7].

[18] It seems to me that this application is premised upon an incorrect proposition of our law as to suspension of an order of Court upon a rescission application being lodged, absent an application being sought for relief in terms of Rule 45A. This seems to me to be more so in respect of a final liquidation order.

[19] In the premises the application falls to be dismissed.

COSTS

[20] Respondents seek a costs order on the scale as between attorney and client and payable by Mr Jela, Second Applicant, as to do otherwise would prejudice the Company in liquidation. I agree as to the latter proposition in the special circumstances of this matter, but not that this should be on a scale of attorney and client.

[21] In the result, the following order issues:

1. The Application is dismissed with costs.
2. The costs of the Application are to be paid by Second Applicant.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant:

Adv S Nzuzo

Instructed by:

Mhlanga Inc. c/o Mgangatho Attorneys, Grahamstown

Obo the First, Second and Third Respondents:

Adv D H de la Harpe SC

Drake Flemmer & Orsmond Inc. c/o Netteltons Attorneys, Grahamstown

[1] MV Triena; Haji-Iannou and Others v MV Triena and Another 1998

(2) SA 938 (D); South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977

-
- (3) SA 534 (A) at 544H-545A.
- [2] United Reflective Convertors (Pty) Ltd v Levine 1988
- (4) SA 460 (W) at 463J-464B.
- [3] [2014] 2 All SA 219 (GJ)
- [4] See also Khoza and Others v Body Corporate of Ella Court 2014
- (2) SA 112 (GSJ) at 117H-I and Jameya Investment Projects CC v The Magistrate Mr Naidoo & Others (Gauteng High Court (Johannesburg), Case No.: 467/2015, 10 February 2015).
- [5] Supra at [12]
- [6] 2019
- (4) SA 75 (MN) at [7] and [20]
- [7] Erstwhile Tenants of Williston Court & Others v Lewray Investments (Pty) Ltd 2016
- (6) SA 466 (GJ) at para 19.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2019/124.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hlumisa-technologies-pty-ltd-and-another-v-nedbank-unknown-topic-aecghc-2019--6a3ea5173b1caa912980e10f>

Prepared on 10 October 2026 · Esheria