**IN THE HIGH COURT OF SOUTH AFRICA**
**(WITWATERSRAND LOCAL DIVISION)**

**CASE NO: 07/22463**

In the matter between:

**PE KHOZA AND 17 OTHERS** **Applicants**

and

**THE BODY CORPORATE, ELLA COURT** **Respondent**

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# JUDGMENT

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**NOTSHE AJ:**

[1] On 20 August 2008 the Applicants, the residents of some premises that are controlled by the Respondent, brought an application without any papers before me. Fortunately, they had served papers on the Respondent and the latter was represented by Attorneys Messrs NF Masenamela Incorporated.

[2] As the result of the urgency of the matter, I allowed the Applicants to lead *viva voce* evidence.

[3] The Applicants appeared in person represented by Mrs. E. Mokoena and the Respondent was represented by Mr. Masanamela. After hearing the evidence and argument I made the order appear at the end of the judgment. I then said that the reasons for the order will follow. The following is my judgment.

[4] As stated above the applicants are the residents of Ella Court, premises that are under the control of the respondent.

[5] On 16 April 2008 the respondent obtained an order evicting the applicants from the premises. The applicants were directed to vacate the aforesaid premises on or before 15 May 2008.

[6] The applicants did not vacate the premises.

[7] Instead they brought an application for the rescission of the order made against them.

[8] On 20 August 2008 the respondent sought to execute the eviction order. It sought to forcibly remove the applicants from the aforesaid premises.

[9] As a result thereof the applicants seek an order restraining the respondent from continuing with the eviction process. The respondent relies on the order granted on 16 April 2008.

[10] I raised, with the respondent, the issue of whether the eviction order could be executed in view of the rescission application instituted by the Applicants. In this regard I referred the respondent to the provisions of rule 49(11) of the Uniform Rules.

[11] It was submitted, on behalf of the respondent that the institution of a rescission application does not have the effect suspending the order sought to be rescinded. They relied on the decision of this Court in the matter of **United Reflective Converters (Pty) Ltd v Levine.**[1]

[12] The question that falls to be decided is whether an application for rescission of a judgment suspends the operation of that judgment and/or order. Rule 49(11) of Uniform Rules provides as follows:

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

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[1] 1988(4) SA 460 (W).

[13] In the **United Reflective Converters** case this Court held that the provisions of Rule 49(11) have no force and effect in so far as they relate to the rescission application save insofar as it relates to the noting of an appeal.

[14] The decision of the Court in the **United Reflective Converters** case is the decision of this Court. As a result there of, I, as a Judge of this Court, sitting alone, am bound to follow that decision unless I am of the view that it is clearly wrong. The Constitutional Court has recently commented on the doctrine of *stare decisis* and judicial precedent.

"*What is at issue here is not the doctrine of stare decisis as such, but its applicability in the circumstances of this particular case. A brief comment on the doctrine will therefore suffice. The words are an abbreviation of a Latin maxim, stare decisis et non quieta movere, which means that one stands by decisions and does not disturb settled points. It is widely recognised in developed legal systems. Hahlo and Kahn describe this deference of the law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of stare decisis is so important, saying:*

*'In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of Judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly*

*treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.*

*It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker Judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.' (Footnotes omitted.)*"[2]

[15] It is clear from the foregoing that a Court should not depart from a previous decision unless that decision is clearly wrong. It means that a Court should examine a previous decision and explain in the judgment why it regards that decision as clearly wrong. That process requires a clarity of thought and certainty of decision because one decision can affect a number of persons and entities.

[2] Per Kriegler J in Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another 2002 (4) SA 613 (CC) at p644 [57].

People are entitled to carry on with their lives and businesses knowing that the causeway of law is clear on a particular issue. The law is complex enough without ambiguous and conflicting decisions.

[16] After close and careful examination I have come to the conclusion that the aforesaid decision of the court in **United Reflective Converters (Pty) Ltd v Levine** is clearly wrong and I am not bound to follow it. My reasons for that conclusion are, in brief summary, the following:

16.1 The rule which provides that the noting of the rescission application suspends the operation of the order is not a substantive rule of law but a procedural rule;

16.2 It is not clear that there is no substantive common law suspending the operation of the order upon noting of a rescission application;

16.3 In any event I am enjoined by the provisions of section 173 of the Constitution to develop common law when necessary.

[17] The Court in the **United Reflective Converters** case came to the conclusion that the provision of Rule 49(11) of the Uniform Rules were of no force and effect because the rule creates a substantive rule of law, whereas the rules of Court were meant to merely deal with procedural issues. The Court further held that

there was no substantive rule of law to the effect that notice of application to vary or rescind an order or judgment automatically suspended the operation thereof. The Court said the following:

"*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 or effect.*"[3]

[18] The first issue is whether rule 49(11) is a substantive or procedural rule of law. It has been held that the dividing line between substantive and adjectival (procedural) law is not always an easy one to draw. It is difficult to distinguish between substantive or procedural law. Despite the difficulties, it has been held that the substantive law is concerned with the ends which the administration of justice seeks, whereas procedural law deals with the means and instruments by which those ends are to be attained.[4]

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[3] Per Roux J at 464.

[4] Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) at 781C - H, Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G - 755A;

Carmel Trading Co Ltd v Commissioner, SARS and Others 2008 (2) SA 433 (SCA) at 439.

[19] I am of the view that the Rule 49(11) is not a substantive rule of law. It is a procedural rule of law promulgated to regulate the procedure. In other words it is meant to provide means to attain the ends which the administration of justice seeks.

[20] The other *ratio* of the Court in the **United Reflective Converters** case was that there is no substantive rule of law to the effect that an application to vary or rescind an order automatically suspends the operation of that order. The Court relied on a number of cases in that regard. The cases relied upon by that Court do not support the conclusion that it reached:

20.1 In **Bell v Bell**[5] the Court therein was dealing with the power of the Court to vary or set aside a purely interlocutory order;

20.2 The Courts **in Estate Garlick v Commissioner for Inland Revenue**[6], **Meyer v Meyer**[7] and **United Technical Equipment Co**

[5] 1908 TS 887.

[6] 1934 AD 499 at 502.

[7] 1948 (1) SA 484 (T).

**(Pty) Ltd v Johannesburg City Council**[8] also did not deal with the issue.

[21] The Learned Judge, Roux J, correctly held that there is a substantive rule of law to the effect that the noting of an appeal suspends the operation of an order. He relied upon the decision of the Appellant Division in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd.**[9] He held that rule 49(11)(a) where it refers to the noting of an appeal merely restates the substantive law and regulates the procedure with which to apply the law. The rational for such a rule is that it was meant to prevent prejudice to the applicant if he/she succeeds in the appeal.

"*Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another, 1961 (2) SA 118 (T) at pp. 120 - 3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was*

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8 1987 (4) SA 343 (T) at 437G – H.

9 1977 (3) SA 534 (A) at 542E, 544G - H and 545A.

*given must make special application. (See generally Olifants Tin "B" Syndicate v De Jager, 1912 AD 377 at p. 481; Reid and Another v Godart and Another, 1938 AD 511 at p. 513; Gentiruco A.G. v Firestone SA (Pty.) Ltd., 1972 (1) SA 589 (AD) at p. 667; Standard Bank of SA Ltd. v Stama (Pty.) Ltd., 1975 (1) SA 730 (AD) at p. 746.) 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 (Reid's case, supra at p. 513).*"[10]

[22] It is clear from the foregoing that Roux J's decision is not supported by the authorities he relied on. He did not examine all the authorities regarding the powers of the Courts regarding the granting of rescission orders. This is important because if the Courts had common law powers to rescind orders the question would be what would happen to the execution of those orders whilst awaiting the outcome of the rescission application.

[23] It is settled law that at common law the Courts had the power to rescind orders made. The Appellant Division[11] stated the following:

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[10] Per Corbett J (as he then was) at p545.

[11] In De Wet and Others v Western Bank LTD 1979 (2) SA 1031 (A).

*"The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf Athanassiou v Schultz 1956 (4) SA 357 (W) D at 360G and Verkouteren v Savage 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being functus officio, and judgments could only be set aside on the limited grounds mentioned in the Childerley case."*[12]. If the Court had the powers to rescind orders then the question is whether there would not have been prejudice to the person who applied for rescission if the judgment that sought to be rescinded was not suspended.

[24] In my view there would have been irreparable prejudice if the order was not suspended and later on the application for rescission succeeded. This is the same rational which was given for the existence of the rule suspending an order on noting of an appeal.

[12] Per Trengrove AJA (as he then was) at 1041.

[25] In my view there was, at common law, a substantive rule suspending the operation of an order or judgment upon the noting of an application for rescission.

[26] Furthermore, even if there was 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."*[13] This power is confirmed by the Constitution.[14]

[27] Even if the aforesaid rule were to be held to be a substantive rule I would still been obliged to consider whether the common law substantive rule as it stands should not have been developed and extended to avoid irreparable prejudice to an applicant for a rescission of an order. Section 173 of the Constitution obliges me to do so. Section 173 reads as follows:

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13 Universal City Studios Inc and Others v Network Video (supra) at 754G.

14 S173.

"*The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*." (The emphasis is mine)

[28] In my view, if there was no common law rule which suspended the operation of an order or judgment upon an application for a rescission, the common law would be severely lacking in that regard. An applicant for a rescission of an order would be irreparably prejudiced if the order was allowed to operate despite the application. This is not different from a situation where a notice of application for leave to appeal is delivered. In the circumstances the rule that applies to the noting of appeals would be extended to noting of the rescission application as well.

[29] In my view, Rule 49(11) does not create a substantive rule of law. It is accordingly fully operational and suspends the operation of an order upon an application for a rescission.

[30] In this matter, the judgment of Horn J was suspended when the applicants instituted a rescission application.

[31] In the circumstances, I make the following order:

(a) The order made on 16 April 2008 by Mr. Justice Horn is declared to have been suspended by virtue of the provisions of Rule 49(11) of the Uniform Rules pending the finalization of the rescission application instituted by the applicants on 24 July 2008.

(b) The respondent be and is hereby directed to allow the applicants to return to the upper rooms of **Ella Court Building, 296 Smith Street, Joubert Park**, in the Gauteng Province situated 296 Smith Street, Joubert Park, Johannesburg.

(c) There is no order as to costs.

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**SV NOTSHE**

**ACTING JUDGE OF THE HIGH COURT**

Counsel for Applicants: In person

Counsel for Respondent: Mr N F Masenamela of Messrs N F Masenamela