



OFFICE OF THE CHIEF EXECUTIVE OFFICER

14 March 2011

ATTENTION: Ms S Govender

Via e-mail SanGovender@justice.gov.za

Director: Rules Board for Courts of Law
Private Bag X668
Pretoria
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Dear Sir

COMMENT ON AMENDMENT OF UNIFORM COURT RULE 49 (11)

The High Court and Magistrate's Court Committees of the Law Society of South Africa (LSSA) have considered the proposed amendment and to the extent that the provisions for a stay in the event of an application to rescind, correct, review or vary an order of court appear to be *ultra vires*, the rule should be so amended.

However, this does not necessarily mean that our committees are of the view that the Supreme Court Act No. 59 of 1959 and the Magistrate's Court Act No. 32 of 1944 should not be amended to provide for a stay in such circumstances. Our committees are considering further whether it is necessary to amend these Acts to provide for automatic stay. If the Supreme Court Act should be amended, the appropriate provision could be inserted as Section 37 of Act No. 59 of 1959. Representation from an attorney has been received to the effect that, in the case of primary care maintenance orders which are the subject of an appeal, execution should not be suspended. This is also being considered. However, the High Court does appear to have inherent jurisdiction to order a stay in execution, as it is a process of the Court which it has an inherent power to control and a stay can be ordered where the interests of real and

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

substantial justice require such a stay. See in this regard Whitfield v van Aarde 1993 (1) SA 332 ECD at 335 C et sec. and Road Accident Fund v Strydom 2001 (1) SA 929 CPD at 301 C-H.

Section 78 of the Magistrate's Court Act is more specific and provides that "*where an appeal has been noted for an application to rescind, correct or vary a judgment has been made, the Court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the Court may determine as to security for the due performance of any judgment which may be given upon the appeal or application*".

The position in the Magistrate's Court Act therefore is that such suspension is not automatic but can be granted on application.

Accordingly, and in summary therefore, it would appear that Rule 49 (11) (a) should be amended as proposed, given that the portion of the Rule to be amended is in any event void as it is *ultra vires*.

Representations to the Department of Justice and to the Rules Board regarding possible amendments to the Acts will be forwarded to you in due course.

Yours faithfully



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