

SOUTH AFRICA / JUDGMENT

# van der Merwe v Safe Waterkloof NPC and Others [2023] ZAGPPHC 101; 42344/20 (6 February 2023)

[2023] ZAGPPHC 101

## COURT

North Gauteng High Court, Pretoria

## BEFORE

Mazibuko

## CASE / FILE NUMBER

42344/20

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IN THE HIGH COURT OF  
SOUTH AFRICA  
GAUTENG DIVISION,  
PRETORIA

Case

no: 42344/20

REPORTABLE:

NO  
OF  
INTEREST TO OTHER JUDGES: NO

REVISED:

NO  
In

the matter between:

MARIAN  
VAN DER  
MERWE  
Applicant  
And  
SAFE  
WATERKLOOF  
NPC  
First Respondent  
WATERKLOOF HOMEOWNERS'  
ASSOCIATION  
Second Respondent  
CITY OF TSHWANE  
METROPOLITAN  
MUNICIPALITY

Third Respondent  
THE CHAIRPERSON OF THE  
MUNICIPAL PLANNING TRIBUNAL: CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY  
Fourth Respondent  
LOUIS  
JORDAAN  
UYS  
Fifth Respondent  
JOHANNES  
PERTUS DE WET STRYDOM  
Sixth Respondent  
ANTHONIE  
MICHAEL FERREIRA  
Seventh Respondent  
SOPHIA  
JOHANNA  
FERREIRA  
Eighth Respondent  
NAOMI  
MATHILDA  
MARINI  
Ninth Respondent  
ERIC  
VAN DER  
MERWE  
Tenth Respondent  
TSHEPO  
SETLHAKE  
Eleventh Respondent  
LUKHANYO  
NTANJANA  
Twelfth Respondent  
JOHANNES  
HERMANUS GROBLER  
Thirteenth Respondent  
MADODA  
ALFRED PETROS  
Fourteenth Respondent  
GLORIA  
NOMLINDA  
PETROS  
Fifteenth Respondent  
CONRAD  
WERNER ENGELBRECHT  
Sixteenth Respondent  
SYLVIA  
ENGELBRECHT  
Seventeenth Respondent  
SUZANNE  
UYS

Eighteenth Respondent

RUSSEL

JOSS

Nineteenth Respondent

INGRID

CARPENTER-KLING

Twentieth Respondent

CHRISTIAAN

ERNST GERHARDUS

MULDER

Twenty-first Respondent

ANNA

VALENTE

Twenty-Second Respondent

BARBARA

ELLEN BARON

Twenty-Third Respondent

DIMITRI

KAVALLINEAS

Twenty-Fourth Respondent

BARBARA

STUPEL

Twenty-Fifth Respondent

COZA

INVESTMENTS (PTY) LTD

Twenty-Sixth Respondent

JEANETTA

VAN DER MERWE

Twenty-Seventh Respondent

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## JUDGMENT

(LEAVE TO APPEAL APPLICATION)

Mazibuko AJ

1. The applicant seeks leave to appeal to the Full Court, alternatively, the Supreme Court of Appeal, against the whole judgment and the order of this court delivered on 17 October 2022.
2. The applicant had sought an order rescinding an order granted by De Vos J on 25 September 2020 and for intervention as a party under the above-mentioned case number.
2. Alternatively, an order declaring that the Municipal Council of the City of Tshwane Metropolitan Municipality (the municipality), the third respondent, or its delegate referred to in the Tshwane Municipal Council Resolution approved on 31 March 2021 did not take a decision in terms of section 45(3) of the

Rationalization of Local Government Affairs Act, No. 10 of 1998. Also, no resolution was passed by the Municipal Council or its

delegate that it intends to authorise access restriction as applied for by the first respondent, Safe Waterkloof NPC (the NPC).

3. This court dismissed the application on both the main relief and the alternative.
4. In the application, the issue was whether the applicant had (a) established any grounds for a rescission of the order granted by De Vos J, (b) made out a case for the declaratory order that it sought as an alternative to the rescission and whether this court was competent to order the applicant's inclusion or participation in the proceedings.
5. The rescission application was brought before the court in terms of the common law, alternatively, Rule 42(1) of the Uniform rules.
6. What this court does not propose to do is to set out the exhaustive grounds of appeal again or repeat that which is set out in the judgment since that which was relevant was dealt with in the judgment.
7. The grounds for leave to appeal are, to a large extent, in my view, submissions and contentions being made of what this court should have found, should have considered critically, should have considered certain probabilities and erred in not considering factors and not taking certain aspects into account.
8. On summation, the following are the grounds of the bout on the judgment, in that the court; erred in failing to
  - 8.1. Rescind the De Vos J Order in terms of Rule 42(1),
  - 8.2. Take into account the content of the De Vos J order,
  - 8.3. Consider and decide the application for the rescission of the order on all the grounds for the application and
  - 8.4. Determine that the order granted by De Vos J was in conflict with the Constitution and failed to find that it should be rescinded.
9. The court erred in
  - 9.1. Not distinguishing between the requirements for the rescission of a court order in terms of the Common law and one in terms of Rule 42 of the Uniform rules.
  - 9.2. Refusing, during the application hearing, to accept documents referred to in the applicant's affidavit but which were not attached to her affidavit in circumstances where a good explanation was given why it was not attached and why it would only be presented in court and
  - 9.3. Selecting a limited number of grounds relied upon by the applicant for the rescission and deciding the matter on those limited grounds with the exclusion of all the other bases.

10. The court mistakenly considered the rescission application

10.1. In terms of Common law in that the applicant was in default.

10.2. Against the order granted by De Vos J exclusively on the requirements of the provision of Rule 42(1)(a). Whereas the application was not limited, the application ought to have been upheld based upon one, more or all of the grounds relevant to rescission and

10.3. On the basis that the applicant could only be absent in the proceeding before De Vos J if they were cited as the party to the application.

11. The court erred in finding that

11.1. The applicant exclusively relied on facts relevant to the decision on access control.

11.2. The merits of the access control application were not before De Vos J and were also not determined by him during the application.

11.3. The applicant did not show why the De Vos J order would not have been granted had he been aware of all the relevant facts.

11.4. It was evident that the alleged effect on the applicant was not the order granted by De Vos J but the decision on the access restriction application.

11.5. Finding that the NPC was procedurally entitled to the order as all affected parties were adequately notified of the relief that could be granted.

11.6. It was not necessary for the applicant before De Vos J to give notice of those proceedings to the applicant in the application for the rescission of the order by not giving effect to paragraph 25 of the judgment in Freedom Stationery (Pty) Ltd v Hassam 2019(4)SA 459 (SCA), para 43.

11.7. The Municipality represented the Administrator and

11.8. The hearing of the application by De Vos J was inconsequential concerning his alleged biases due to him being a member of the respondent.

12. The court misdirected itself in

12.1. Deciding that the submissions made in the rescission application constituted an appeal against the order.

12.2. Deciding that the failure by De Vos J to consider all the relevant facts is not a ground for an application for a rescission of that order.

12.3. Not exercising its discretion to rescind.

12.4. Not giving effect to paragraph 24 of Lodhi 2 properties Investments CC v Bondev Developments (Pty) Ltd (128/06) 2007 (6) SA 87 SCA in that the applicant had an interest in the application before De Vos J.

12.5. Finding that the applicant did not demonstrate that her interest is affected by the non-citation of the administrator and

12.6. Finding that a good cause for rescission was required (specifically regarding the non-joinder of the administrator).

12.7. The court misdirected itself by not considering the fact that De Vos J was, at the time of the application before him, a paid-up member of the applicant in the application before him.

13. The court erred in not finding that

13.1. De Vos J's failure to consider the legal framework for a road closure application constituted sufficient ground for the rescission of his order.

13.2. De Vos J's order was erroneously granted based on the fact that had the court been aware of facts not disclosed, it would not have granted the order.

13.3. The applicant had a Constitutional right to participate in the proceedings before De Vos J and

13.4. De Vos J should have recused himself from the application, and his failure to do so constituted a proper ground for the rescission of the order he granted.

14. The court failed to fully and adequately take the context required to accurately interpret the statutory framework in Chapter 7 of the Rationalisation Act into account and to mainly take the subject matter of the statute, its apparent scope and purpose and the circumstances attendant upon its coming to existence to fully into account.

15. The Court erred in not considering the provisions of Section 39(1)(c) of the Constitution, read with the provisions of Section 35 of the Local Government: Municipal Structures Act 117 of 1998 and Section 2 of the Local Government: Municipal Systems Act, 32 of 2000, and fully and properly take the context required to interpret the statutory framework accurately. In particular, to take the subject matter of the statute, its apparent scope and purpose and the circumstances attendant upon its coming into existence fully into account.

16. In argument, the applicant, through its counsel, submitted that it reiterates the content of its heads of argument, which this court did not uphold during the judgment as it found in favour of the respondents. During this application, the court was referred to several case laws, as they appear in the application for leave to appeal. They include *Matshepo Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) [10], *Ungerer v Mafube Local Municipality and another* 2022 JDR 0853 (FB) and *Shinga v The State and another* (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); *S v O'Connell and others* 2007 (2) SACR 28 (CC).

17. It was argued, on behalf of the applicant, that there existed grounds for the appeal to be heard in that the grounds, as mentioned earlier, established reasonable prospects of success on appeal, that another court will arrive at a conclusion different to that reached by this court and that there are compelling reasons why the appeal should be heard.
18. The respondent opposed the application for leave to appeal on the ground that the application fails to satisfy any of the requirements for the granting of the appeal.
19. It was argued, on behalf of the respondents, that, among others, the applicant's submissions show a lack of appreciation for the distinction between an appeal and a rescission in the instance that the applicant places reliance on their interest in the matter before De Vos J.
20. In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015)(2016) ZASCA 176 (25 November 2016), the SCA held that: "An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."
21. The grounds of appeal raised by the applicant are emphatically on what this court should have found, should have considered critically, should have considered certain probabilities and erred in not considering such factors and not taking certain aspects into account. Considering the grounds raised, there is no sound and rational basis to conclude there are reasonable prospects of success on appeal.
22. In *Goodwin Stable Trust v Duohex (Pty) Ltd and another* (2) 12, the Court held that: "In deciding whether or not to grant leave to appeal, a Court's responsibility was to apply its mind as to the probability of whether or not the answer to any outstanding questions would be in favour of the party applying for leave to appeal; leave should not be granted simply to allow outstanding questions to be finally determined by the Appellate Division."
23. Another ground raised on behalf of the applicant against the judgment is that the court erroneously failed to deal with all the grounds raised in the applicant's heads of argument. In reading the judgment and the grounds, it is apparent that the applicant complains that the court should have considered all they raised, and by doing that, it should have concluded in favour of the applicant.
24. The approach of this court was that of answering the crisp question of whether the applicant has shown grounds for a rescission either on common law or in terms of Rule 42(1). There are other matters of interest to the applicant or the matter as a whole. However, they were not of assistance in determining the answer to the main question of whether the applicant had (a) established any ground for rescission of the order by De Vos J. Also, whether they made out a case for the declaratory order it sought as an alternative to the rescission and whether the court was competent to order the applicant's inclusion or participation in the proceedings.

25. Leave to appeal may only be given where the judge concerned believes that “the appeal would have a reasonable prospect of success” in terms of Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013
26. This court believes it was correct in applying the provisions of the common law and that of Rule 42(1) the way it did. It considered, decided and supplied reasons for the conclusions and decisions concerning issues raised by the applicant

and the respondent, respectively. It is not persuaded that the grounds raised by the applicant in its application for leave to

appeal are issues in which another court is likely to reach conclusions different to those reached by this court.

27. Regarding the compelling circumstances as envisaged by Section 17(1)(a)(ii) of the Superior Courts Act. No compelling reasons were placed before the court. What has been placed before this court is a wide range of grounds, most of which have nothing to do with the rescission application, for instance, the interpretation of the Rationalisation Act, the Local Government: Municipal Structures Act and Municipal Systems Act as raised. In the circumstances, there is no justification for the application to succeed.
28. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para [2] that: “A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future

disputes. But here, too, the merits remain vitally important and are often decisive.”

29. Applying the test in *Caratco* and assessing the merits of the applicant’s case, including their grounds of appeal, the court could not find any compelling factors necessitating the hearing of the applicant’s appeal.
30. On the other hand, the submissions on behalf of the applicant are that the order granted by De Vos J was final, though the respondent sought interim relief. Therefore, nothing precluded them from appealing against the said order.
31. The applicant submitted that their application relates to a decision by this honourable Court which does not fall within the ambit of Section 16(2)(a) of the Superior Courts Act.
33. It is common cause that the Municipality has decided on the access restriction application in terms of the order granted by De Vos J. The objection to the Municipality’s processes was dismissed.
34. Though the applicant may still explore other available recourse in terms of PAJA and other prescripts, the matter is moot. No justification exists for this court to grant leave to hear an appeal whose decision will have no practical effects. Consequently, the application stands to fail.

35. I believe this Court did not judicially exercise its discretion in refusing the application. The application was, on the basis appearing in the judgment, correctly refused.

36. Consequently, the application for leave to appeal must fail. The following order is made:

Order

1. The application for leave to appeal is dismissed with costs.

N. Mazibuko

Acting Judge of the High Court of South Africa

Gauteng, Pretoria

This Judgment is digitally submitted by uploading it onto Caselines and emailing it to the parties.

Representation

Counsel for the Applicant: Mr G. Wagenaar

Instructed by:

GERHARD WAGENAAR ATTORNEYS

Counsel for Respondents: Mr LGF Putter SC

Mr S Ogunronbi

Instructed by:

FINDLAY & NIEMEYER INC

Date of hearing:

20 January 2023

## Judgment

delivered on: 6 February 2023

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