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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 62272/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: **4/03/2025**

SIGNATURE:

In the matter between:

TRANSVAAL YACHT CLUB

Applicant

and

KINGSLEY JACK WHITEAWAY SEALE

First Respondent

ONTSPAN BELEGGINGS (PTY) LTD

Second Respondent

HI FRANK COMPONENTS (PTY) LTD

Third Respondent

SCHOEMANSVILLE OEWER CLUB

Fourth Respondent

and

MINISTER OF WATER AND SANITATION

**Second Respondent
In reconvention**

In re:

KINGSLEY JACK WHITEAWAY SEALE

First Applicant

ONTSPAN BELEGGINGS (PTY) LTD

Second Applicant

HI FRANK COMPONENTS (PTY) LTD

Third Applicant

SCHOEMANSVILLE OEWERKLUB

Fourth Applicant

and

MINISTER OF PUBLIC WORKS

First Respondent

MINISTER OF WATER AND SANITATION

Second Respondent

JUDGMENT

CILLIERS AJ:

[1] This application is the latest chapter in the history of this matter, which spans for more than a century.

[2] The State owns a narrow strip of land on the eastern bank of the Hartbeespoort Dam between the borderline and the boundaries of the adjacent properties. This strip of State land has at least since 1925 been referred to as the foreshore. It includes erven in the Schoemansville and Meerhof townships.

[3] The first respondent (Mr Seale) is a director of the second respondent (Ontspan Beleggings) and the third respondent (HI Frank Components). They own properties that are situated adjacent, or in close proximity, the foreshore.

The history of litigation

[4] Mr Seale, Ontspan Beleggings, HI Frank Components and the fourth respondent launched an application in this Court for orders declaring and enforcing servitudal rights over the foreshore. They contended that they were entitled to the enforcement of contractual rights to registration of the servitudes, alternatively that they had acquired the servitudes by acquisitive prescription.

[5] In this Court, Davis J dismissed the application. An order for costs was made against Mr Seale, Ontspan Beleggings, HI Frank Components and the fourth respondent.¹

[6] Dissatisfied with the order, Mr Seale, Ontspan Beleggings, HI Frank Components and the fourth respondent appealed the order a quo, with leave from Davis J to the Supreme Court of Appeal.

[7] In a reasoned judgment and order, the Supreme Court of Appeal held that the court a quo should have issued the declarator that was sought by Ontspan Beleggings. The Supreme Court of Appeal held that the unreserved recognition by the Second Respondent i.e., the Minister of Water and Sanitation (the Minister) on appeal of the servitude that attached to Portion 43 rendered the issue abstract or academic and there was no need for a declarator to be issued in favour of Ontspan Beleggings.

[8] The appeal was accordingly dismissed, and the Second Respondent was liable to pay the costs of Ontspan Beleggings.

¹ Seale v Minister of Public Works 2019 JDR 1041 (GP).

[9] The Supreme Court of Appeal dismissed the appeal but varied the costs order a quo to make provision that the Minister pay the costs of Ontspan Beleggings.²

[10] Still discontent with the outcome, Mr Seale, Ontspan Beleggings, HI Frank Components and the fourth respondent then sought leave to appeal from the Constitutional Court.

[11] In the application to the Constitutional Court for leave to appeal, the parties exchanged the complete set of affidavits. The Constitutional Court considered the application for leave to appeal. The conclusion was that the application should be dismissed as it did not engage the apex Court's jurisdiction and, in any event that it bore no prospects of success.

[12] The available appeal processes were thereby exhausted.

[13] One would justifiably have considered the final word in the appeal processes to have signalled the end to the litigation. That was not to be.

[14] Upon the Applicant (Transvaal Yacht Club) discovering during the taxation process that the costs order granted by Davis J in the application for leave to appeal the order a quo, was not correctly reflected in the written order, it launched an application in terms of Uniform Rule 42(1)(b) to this Court to correct what was considered to be a patent error.

[15] Mr Seale, Ontspan Beleggings and HI Frank Components (collectively referred to as the Respondents) opposed the Uniform Rule 42 application by the Transvaal Yacht Club.

[16] In a counter application, the Respondents seek an order orders that this Court rescind the order a quo and/or declare the order a quo void.

² Seale v Minister of Public Works 2020 JDR 2131 (SCA).

[17] They also seek an order for the granting of the relief that was sought a quo (with minor exclusions) to declare and enforce servitudal rights over the foreshore. The respondents essentially claimed an order directing the State to take all steps necessary to register predial servitudes of access to a dam for purposes of boating and fishing, as follows:

- (a) Over portion 28 in favour of the land on which the Township of Schoemansville had been established (that is all the Erven in Schoemansville), in accordance with the aforesaid provision in the Title Deeds of these Erven;
- (b) Over the foreshore in front of Erf 4[...], in favour of Erf 4[...];
- (c) Over portion 29 in favour of the land on which the Township of Meerhof had been established (that is all the Erven in Meerhof), in accordance with the aforesaid provision in the Title Deeds of these Erven; and
- (d) Over portion 59, in favour of Erf 9[...], Meerhof.

[18] In the alternative to the order sought to declare and enforce servitudal rights over the foreshore, the Respondents seek that the matter be remitted for hearing by trial proceedings.

The background facts

[19] In its judgment, the Supreme Court of Appeal provided a neat exposition of the facts:

[4] The history of the matter spans more than a century. The following exposition suffices for a proper understanding of this judgment. At the time when the Union Government determined to construct the Dam (then referred to as the Hartebeespoort Reservoir), the Schoeman family owned portions of the freehold farm Hartebeespoort nr 498 in the district of Pretoria. The Crocodile River, which would be the main source of water for the Dam, traversed the original farm. Mr Johan Hendrik Schoeman and members of his

family were the co-owners of the land known as the northern portion of the farm Hartebeestpoort. Mr Schoeman was the owner of an adjacent farm referred to as a certain portion of the south-eastern portion of the farm Hartebeestpoort. Parts of these two portions of land would be submerged by the Dam.

[5] In the light hereof, on 25 January 1918, the Union Government, represented by the Minister of Lands, and the owners of the aforesaid portions of the farm Hartebeestpoort, represented by Mr Schoeman, entered into an agreement of sale (the 1918 agreement). In terms thereof the Union Government purchased the portions of the aforesaid tracts of land from the Schoeman family that would be submerged by the Dam. The eastern boundary of the land purchased was determined to be a line running three feet above the projected high flood level of the Dam.

[6] The land in question was subdivided accordingly and the portions thereof that became the property of the Union Government presently consists of three titles. These adjoining properties are presently described as the following portions of the farm Hartebeestpoort: the remaining portion of portion 28, measuring 474,6058 hectares (portion 28); the remaining extent of portion 29, measuring 231,4418 hectares (portion 29); and portion 59 (a portion of portion 29), measuring 2,0296 hectares (portion 59). They vest in the State as the legal successor of the Union Government.

[7] After the subdivision, Mr Schoeman retained ownership of the remainder of the portion of the south-eastern portion and shortly afterwards also acquired ownership of the remainder of the northern portion. The boundary between Mr Schoeman's land and the State land therefore ran above the actual (fluctuating) waterline of the Dam. As I have said, this strip of land is referred to as the foreshore and has to be traversed to gain access to the Dam from the east.

[8] Clause 3(k) (clause K) of the 1918 agreement provided for the retention of rights of access to the Dam in the following terms:

“The said Johan Hendrik Schoeman in his individual capacity or his assigns shall retain the right of access to the said Hartebeestpoort Reservoir on certain three places to be mutually agreed upon by the parties to these presents – the said places being situated approximately as follows: (a) near the south eastern entrance to Hartebeestpoort on the eastern bank of the River, (b) near the site of the old dam on the Crocodile River built by the now late General Schoeman, and (c) at a suitable site in the Zwartspruit Valley – for the purpose of boating on the said reservoir and fishing therein, provided that the said Schoeman or his assigns shall at all times be subject to all general regulations and restrictions that may be framed and at any time come into force in connection with the said reservoir and the use thereof by the public, provided that such regulations shall be of general application and that the said Schoeman or his assigns shall not be prevented from reasonably using the said reservoir for the said purposes unless and until the water of the said reservoir may at any time be required for domestic purposes and the public are excluded from access to the Reservoir when the rights hereby granted to the said Schoeman shall cease and determine until such time as such restrictions are withdrawn. It is further understood and agreed that if in regards to the operations to be undertaken in connection with the said reservoir the actual sites marked on the last mentioned diagrams or any of them should be required for the purposes aforesaid that then and in that case a suitable site as near as possible to the original site shall for the purposes aforesaid be granted to the said Schoeman in his individual capacity who shall have the right of selecting such site or sites – which shall not interfere with the working and works of the Reservoir”.

[9] For reasons lost in time, the parties never agreed upon the precise locations of the 'three places'. Mr Schoeman nevertheless desired the registration of these rights. After correspondence had been exchanged, the Union Government during 1922 entered into a notarial contract with Mr Schoeman (the notarial contract). It recorded the 1918 agreement, reproduced clause K and proceeded as follows:

“WHEREAS it is desired to have the right so reserved in Clause K registered in the Deeds Office, but as the Government will hold that area which will form

the submerged area of the said Hartebeestpoort Reservoir under a great many titles, some portions of which have not yet been acquired by the Government. NOW THEREFORE, the parties hereto agreed to register this Contract in the Deeds Office in the Register known as the Register for Diverse Acts, whereby the rights granted to the Party of the other part, the said JOHAN HENDRIK SCHOEMAN , in his individual capacity, or his Assigns, and more fully detailed in Clause K above set out in full, may be recorded and registered in favour of the said JOHAN HENDRIK SCHOEMAN , in his individual capacity or his Assigns, against the said submerged area of the Hartebeestpoort Reservoir, subject to the conditions that when and soon as the Government has acquired the whole of the area which will form the submerged area of the Hartebeestpoort Reservoir, and has taken out a Certificate of Consolidated Title of such area; the parties hereto, their Successors in Title or Assigns, bind themselves to enter into a Contract whereby the rights as detailed in said Clause K of the said Deed of Sale, may be properly registered as a servitude against the Titles of the servient and dominant tenements respectively.”

[10] It is apparent that the notarial contract envisaged two registrations. The first was the registration of the notarial contract itself in the Register of Diverse Acts. The second was the registration of a servitude. The first registration took place on 3 October 1922. The second did not take place. Although the Union Government and its successors for many years afterwards expressed the intention to acquire the titles of the area submerged by the Dam, the State at some stage decided not to do so. It therefore did not take out the certificate of consolidated title envisaged in the notarial contract.

[11] It appears that Mr Schoeman was an entrepreneur of note. During 1923 he established the Schoemansville Township. It was established on the remainder of the northern portion adjacent to portion 28. The title deeds of all the erven in Schoemansville contain the following clause:

“All registered erf-holders shall be entitled in common with JOHAN HENDRIK SCHOEMAN, his Successors in Township Title or Assigns, to the right of

access to the dam near the South- eastern entrance to Hartebeestpoort on the Eastern-Bank of the Crocodile River, for the purpose of boating on the said reservoir and fishing therein, subject to the conditions of Notarial Agreement No. 99/1922M, dated the 27th day of September, 1922, filed in the Deeds Office ”

[12] During 1935 Mr Schoeman also established the township of Meerhof. Meerhof is situated adjacent to portions 29 and 59. The title deeds of the erven in Meerhof contain a similar provision in respect of access to the Dam:

“All registered erfholders in the Township shall be entitled in common with the Applicant, his successors in Township Title or Assigns to the right of access to the Lake at the southern end thereof near the late H.J. Schoeman's old dam known as Sophia's Dam (now adjoining Schoemansville Station) on the Eastern Bank of the Crocodile River for the purpose of boating in the said lake and fishing therein subject to the conditions of the Notarial Agreement No. 99/1922M, dated the 27th September 1922, and filed in the Deeds Office. The owners of business erven Nos. 89, 9[...], 164 and 165 however, shall be entitled to ply boats for hire on the Lake, as from the abovementioned access”.

[13] In the meantime, Mr Schoeman persuaded the Union Government to retransfer a portion of the land that had been transferred pursuant to the 1918 agreement, to him. The decision of the Union Government was taken on 10 October 1925 and was recorded in Cabinet Minute 3125 (the Cabinet Minute). In terms thereof, the following was approved:

“1. The grant to JOHAN HENDRIK SCHOEMAN of certain piece of land being Portion No. 1 of Portion L of the Northern portion of the farm Hartebeestpoort No. 498, District Pretoria, measuring 476 square roods, together with the right to use the foreshore immediately in front of the said land and between it and the Hartebeestpoort Lake, subject to rights of access to the said foreshore in favour of the Government of the Union of South Africa and its servants.

2. The grant of a right of user in favour of the TRANSVAAL YACHT CLUB in respect of the foreshore immediately in front of Stands Nos. 1[...] and 1[...]2 of Schoemansville Township and between the said Stands and the Hartebeestpoort Lake. Subject, however, to rights of access in favour of the Government of the Union of South Africa and its servants.

3. The reservation of the foreshore adjoining the Hartebeestpoort Lake extending from Stand No. 1[...]5 to the corner of Tolstoi Street and Lakeside Avenue of Schoemansville Township as a landing place for the general public and persons plying for hire with boats on the Hartebeestpoort Lake, other than stand holders in the Schoemansville Township, the owner for the time being of the piece of land referred to in paragraph (1) above and the Transvaal Yacht Club referred to in paragraph (2) above, subject to rights of access in favour of the Government of the Union of South Africa and its servants.

4. The reservation of the foreshore adjoining the Hartebeestpoort Lake extending from the corner of Tolstoi Street and Lakeside Avenue to Riekerk Street of Schoemansville Township, as a landing place for the owners of Stands in Schoemansville Township other than the owner for the time being of the piece of land referred to in paragraph (1) above and the Transvaal Yacht Club referred to in paragraph (2) above, subject to rights of access in favour of the Government of the Union of South Africa and its servants.”

[14] Paragraph 1 of the Cabinet Minute was given effect to by Crown Grant 67 of 1926 (the Crown Grant). It was registered in the Deeds Office on 1 April 1926. In terms thereof Mr Schoeman received transfer of a piece of land, measuring some 48 hectares, presently known as portion 43 of the farm Hartebeestpoort (portion 43). It does not form part of the Schoemansville Township. The Crown Grant also provided for access to the Dam, as follows:

“The owner of the land hereby granted shall be entitled to the free use of the foreshore immediately in front of it, and between it, and the Hartebeestpoort Lake as indicated on the Diagram S.G. No. A.1936/25. ”

This servitude was duly endorsed on the title deed of the servient tenement, presently portion 28.

[15] The fourth respondent was established on 23 February 1923. It was a condition of the grant of portion 43 to Mr Schoeman that he would donate erven 1[...] and 1[...]2, Schoemansville to the fourth respondent. These erven were duly transferred to it. It subsequently also obtained ownership of the adjacent erf 1[...]3. These three erven have since been consolidated and are presently known as erf 1[...]4 Schoemansville. The rights that had been approved in terms of para 2 of the Cabinet Minute were registered as a servitude against the title deed of the servient tenement, in favour of the fourth respondent's land.

[16] Lakeside Avenue in Schoemansville is presently known as Waterfront Street. During the early 1980's a bird sanctuary was established on parts of the foreshore referred to in paragraphs 3 and 4 of the Cabinet Minute. The relative locations of the adjacent properties that I have referred to can be pictured as follows. Moving roughly from west to east, one would traverse the foreshore in this order: in front of portion 43; in front of erf 4[...], Schoemansville (erf 4[...]); in front of erf 1[...]4, Schoemansville; from in front of erf 1[...]5, Schoemansville to the western boundary of the bird sanctuary; the bird sanctuary itself; and from the eastern boundary of the bird sanctuary to in front of the corner of Riekert Street and Waterfront Street in Schoemansville.

[17] The first appellant established the Hartbeespoort Snake and Animal Park on portion 43 during 1962. In 1964 he extended his operation to the adjacent erf 4[...], with the permission of the owner thereof, Mr Schoeman. During 1965 Mr Schoeman donated erf 4[...] to the Peri-Urban Health Board. The first appellant leased erf 4[...] from it. During 1973 the first appellant obtained the shareholding in the second appellant and the second appellant obtained transfer of portion 43. And in 1982 the Peri-Urban Health Board transferred erf 4[...] to the first appellant.

[18] As I have said, erf 1[...]4 adjoins erf 4[...]. In terms of various successive lease agreements, the fourth respondent has since 1969 leased not only the foreshore in front of its property but also approximately two thirds of the foreshore in front of erf

4[...]. The fourth respondent effected significant improvements to the foreshore, to facilitate access to the Dam for yachting. The fourth respondent's use of the foreshore in front of erf 4[...] was and remains a major bone of contention. One of the principal purposes of the appellants' application was to limit the fourth respondent to the use of the foreshore in front of the fourth respondent's property.

[19] The first appellant also owns a residential property in Schoemansville (erf 2[...]), as well as erven 8[...], 9[...], 1[...] and 1[...]5 in Meerhof. Erf 9[...] adjoins portion 59 and the other erven are situated adjacent to portion 29. The third appellant is the owner of erf 1[...]6 in Schoemansville. It is situated opposite erf 4[...], which lies between it and the foreshore'.

The application in terms of Uniform Rule 42(1)(b)

[20] The Transvaal Yacht Club produced the transcription of the hearing when Davis J heard the application for leave to appeal the order a quo.

[21] The transcription reads that the order in respect of costs was that "the cost would be cost in the appeal, including cost of multiple council (sic) where so employed."

[22] The typed order reads differently. In respect of costs, it reads "including costs of multiple counsel, where so employed".

[23] At the hearing of the application, there was no appearance for the Transvaal Yacht Club. It delivered a notice to abide the outcome of the application, provided that no costs are sought against the Transvaal Yacht Club.

[24] The typed order clearly contains a patent error. In respect of costs, the typed order does not accord with the order that was made by Davis J at the hearing.

[25] Uniform Rule 42(1) empowers this Court to mero motu rescind or vary an order in which there is a patent error, but only to the extent of the error.

[26] In opposing that this Court correct the patent error, the Respondents rely on the failure to have joined the Minister and alleged prejudice by reason of the lapse of time.

[27] The Minister intervened in the proceedings. This ground of opposition was accordingly overcome by events. The alleged prejudice does not constitute a legally relevant ground to oppose that this Court correct the patent error in the typed order of 22 August 2022 to ensure that it correctly reflects the order that was given by Davis J.

[28] I can see no reason why I should not *mero motu* vary the patent error in the typed order.

[29] There was no appearance for the Transvaal Yacht Club. I am accordingly not inclined to make any order for costs in the application in terms of Uniform Rule 42(1)(b).

The counter application

[30] In main, the Respondent's counter application is aimed at obtaining an order to rescind the judgement *a quo* and/or to declare the order *a quo* void. The remainder of the relief sought is dependent on the successful obtaining of such order.

[31] It is not unusual in this Court, or in any other Division of the High Court for a party to seek an order for the setting aside of an order.

[32] This counter application is however extraordinary.

[33] The Supreme Court of Appeal delivered a reasoned judgment, confirmed the order made *a quo*, made specific orders concerning the rights of Ontspan Beleggings and varied the cost order that was made *a quo*. The Constitutional Court also considered the merits of the matter and concluded that the application for leave to appeal bore no prospect of success.

[34] An application in the High Court to set aside (or to declare void) its own order after that order a quo was pronounced on in the Supreme Court of Appeal and in the Constitutional Court is, as far as I am aware unprecedented. I was unable to find any precedent in the Republic of South Africa, or in foreign law where the rescission of a judgment a quo and/or a declaration of voidness of a judgment a quo was sought after a higher court or higher courts finally pronounced on an order made in a court of first instance.

[35] In *Magomed v Middlewick N.O. and another*³, Kotze J held that to hear an application for review after the High Court pronounced finally in an appeal from the Magistrates Court on the matter, would render the final judgment on appeal of no effect. He held that the result would be that the whole matter would have to be re-opened, which would all together be an incorrect procedure. He allowed for the exception in the extreme case where fraud is alleged to have been practiced on the court to obtain the court's former judgment. It was accepted that such application or process for re-opening the matter had to be brought in the court that pronounced finally in the appeal. The magistrate's court would not have been the correct forum.

[36] At the hearing, I raised my concern whether this Court has the jurisdiction to make the orders sought in the counter application with counsel for the parties. My concern was raised in the context of the unprecedented nature of the counter application. Counsel for the Respondents and the Minister submitted that this Court is endowed with the jurisdiction to make the orders sought in the counter application.

[37] Whether this Court has the jurisdiction, in the sense of the power to make the orders sought is not dependant on the view of the parties, or even their agreement.

[38] In *Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and others*,⁴ Khampepe J considered the jurisdiction of the Constitutional Court. In that context, the learned Judge held that "it would of course be inappropriate for any

³ 1917 CPD 539 at 540.

⁴ 2021 (11) BCLR 1263 (CC) at [49].

other court to entertain a rescission application pertaining to an order made by this Court (the Constitutional Court)".

[39] Considering the hierarchy of the courts, the doctrine of precedent and the principle of finality, it is indeed obvious that it would be inappropriate for a lower court to entertain a rescission application of an order by the Constitutional Court. On my understanding of the finding, the learned judge however cast the net wider and considered that it would be inappropriate for a lower court to entertain a rescission application pertaining to an order made by the Constitutional Court.

[40] Without placing any limitation on the interpretation of the finding, I consider that the finding includes the meaning that it would be inappropriate for a lower court to entertain a rescission application of an order of a lower court in respect of which the Constitutional Court pronounced finally on appeal in a reasoned judgment and order.

[41] In my view, a contrary interpretation would mean that the final judgments and orders of the Constitutional Court could be rendered meaningless, and without any force or effect by an order of a lower court to set aside an order a quo that pertain to final orders in the Constitutional Court.

[42] Such untenable result is precisely why the doctrine of precedent provides certainty, predictability, reliability, equality, uniformity and convenience. Observance of the doctrine has been insistent upon by the Constitutional Court and by the Supreme Court of Appeal. The doctrine not only binds lower courts but also binds courts to their own decisions. Stare decisis is not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is founding value of our constitution. To deviate from this rule is to invite legal chaos.⁵

⁵ *Camps Bay Ratepayers and Residents Association and another v Harrison and another* 2011 (2) BCLR 121 (CC) at [28]; *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) at paras 58-62.

[43] By parity of reasoning, it would be inappropriate for the High Court to entertain a rescission application pertaining to an order made by the Supreme Court of Appeal and pertaining to an order of the Constitutional Court.

[44] Should I be persuaded to grant the relief sought in the counter application, founded on the allegations of fraud and nullity of the order a quo, the findings will perforce imply that fraud was committed in the proceedings before the Supreme Court, and/or that the Supreme Court of Appeal confirmed an order that is a nullity.

[45] Should I also be persuaded to grant the orders declaring and enforcing servitudal rights over the foreshore, the judgment and the order of the Supreme Court of Appeal in which these same orders were refused would also stand.⁶ This Court would then not only have made an order that pertain to the order in the Supreme Court of Appeal, but would also disregard the law of precedent.

[46] The fact that the Constitutional Court also considered the merits, renders it equally inappropriate for this Court to entertain the counter application.

[47] In the India jurisdiction, the doctrine of merger is applied. This entails a common law doctrine rooted in the idea of maintaining the decorum of the hierarchy of courts and tribunals. The doctrine is based in the reasoning that there cannot be, at one relevant point in time, more than one operative order governing the same subject matter.

[48] In *Kunhayammed and Understanding Doctrine of Merger of Orders others v State of Kerala and another*⁷ it was held that 'where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law'.

⁶ Department of Transport and others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC).

⁷ (2000) 6 SCC 359 at para 43.

[49] Similarly, the High Court of Bombay observed in *CIT v Tejaji Farasram Kharawalla*⁸ that 'it is a well-established principle of law that when an appeal is provided from a decision of a tribunal and the appeal court after hearing the appeal passes an order, the order of the original court ceases to exist and is merged in the order of the appeal court, and although the appeal court may merely confirm the order of the trial court, the order that stands and is operative is not the order of the trial court'.

[50] I could not find any indication that the doctrine of merger that is applied in the India jurisdiction finds any application in the South African legal context.

[51] In my view the underlying reasoning that there cannot be, at one relevant point of time more than one operative order governing the same subject matter and that the decision by the superior forum is operative, is sound. I also consider this reasoning not to be at variance with the relevant finding in the case of *Zuma*, the hierarchy of the South African Courts and the law of precedent.

[52] I find that it would be inappropriate for the High Court to entertain the counter application and that the High Court does not have jurisdiction to entertain the application for the rescission of the order a quo and/or to declare the order a quo void, to make orders declaring and enforcing servitudal rights over the foreshore and to refer the matter to trial.

[53] The only courts that can conceivably consider the counter application and the relief sought are the Supreme Court of Appeal and the Constitutional Court.

[54] If I am wrong in the conclusion that I have reached, the counter application must also fail on its merits. I deal of each of the grounds advanced.

The reliance on fraud

⁸ 1953 SCC OnLine Bom 28.

[55] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old tradition are twofold. First, once a court has pronounced a final judgment it becomes *functus officio* and its authority over the subject-matter has ceased. The second reason is the principle of finality of litigation.⁹

[56] There are exceptions to this general rule. The requirement for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances on the ground of justus error or the discovery of new documents.¹⁰

[57] In the case of *De Wet and others v Western Bank Limited*¹¹ it was held that the court has the inherent power to control the procedure and proceedings in its court. This is done to facilitate the work of the courts and to enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. This does not include the right to interfere with the principle of the finality of judgments other than in circumstances specifically provided for in the Rules or at common law. Such a power is not a necessary concomitant of the inherent power to control the procedure and proceedings in a court.

[58] In *Zuma*¹² it was held that the rule of law requires not only that litigation must come to an end, but that the Constitutional Court affirms itself as the final arbiter of disputes of law. The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation, and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made. Uniform Rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. If not, chaos would be invited

⁹ *Freedom Stationary (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 SCA at 465.

¹⁰ *Freedom Stationary (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 SCA at 465.

¹¹ 1977 (4) SA 770 (T) at 780H.

¹² 2021 (11) BCLR 1263 (CC) at [97] to [98].

into the processes of administering justice and the interest of justice requires the grounds available for rescission to remain carefully defined. The guiding principle of the common law is certainty of judgments, and a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion should be exercised only in exceptional cases having regard to the principle that it is desirable for there to be finality in judgments.

[59] In order to prove fraud, it has to be established that the successful party was a party to the fraud,¹³ that, but for the fraud the court would not have granted the judgment¹⁴ and there must have been a causal connection between the fraud and the judgment.¹⁵

[60] The Respondents' case to obtain an order for the rescission of the order quo in tainted in obscurity. There is no proper order and structure to the allegations. The founding affidavit is littered with allegations concerning conduct prior to the launch of the application that served a quo, criticisms of the case that was presented a quo by the Minister and the Transvaal Yacht Club, the alleged conduct by the Minister subsequent to the appeal process having become exhausted and argument concerning the correctness of the findings in the Supreme Court of Appeal.

[61] I consider it wholly unnecessary to deal with these issues that were presented in extremely prolix fashion. Complaints concerning the case presented and the on the judgments a quo and on appeal cannot serve as a basis to sustain fraud as a ground to obtain a rescission of an order. It is also trite that material known to the parties before the litigation was concluded cannot serve to sustain fraud as a basis to obtain a rescission of judgment. In *Port Edward Town Board v Kay and another*¹⁶ it was held that a court would only grant restitution based on fraud if a document had been discovered by the unsuccessful litigant after judgment only and that there seems to be no reason why the position should be any different in the case of a fraud committed before judgment in a manner other than by falsifying documents.

¹³ Makings v Makings 1958 (1) SA 338 (A).

¹⁴ Robinson v Kingswell 1915 AD277 at 285.

¹⁵ Mabuza v Nedbank Limited and another 2015 (3) SA 369 (GP) at [17].

¹⁶ 1994 (1) SA 609 (D) at 705.

[62] It seems to be that the gravamen of the allegation of fraud is that the Minister and the Transvaal Yacht Club denied in the course of the litigation that the Meerhof and Schoemansville property owners had any right of access to the offshore, but that they did a volte-face in the Constitutional Court by admitting those very rights. Therefore, so I understand the case, fraud was committed on this Court by the Minister and the Transvaal Yacht Club falsely denying the rights of the Meerhof and Schoemansville property owners to prevent the granting of the orders declaring and enforcing servitudal rights over the foreshore, whilst they in fact acknowledged the existence of those rights.

[63] The Respondents specifically rely on statements by the Minister in the answering affidavit to the application for leave to appeal in the Constitutional Court. These statements were that 'not a shred of evidence has been adduced by the Applicants in the High Court that the Government has, or will refuse members of the public, or property owners in Schoemansville and Meerhof from having the right of access of the foreshore to the Hartbeespoort Dam', and 'nowhere in the papers has any of the parties made an allegation that the owners of erven in Schoemansville or Meerhof will be deprived of their access to the Hartbeespoort Dam', and that 'the right of access to the Hartbeespoort Dam has been inserted in the Title Deeds of all erven, and no evidence has been adduced that the Government has, or will interfere with this right of access'.

[64] Reliance is also specifically placed on the position adopted by the Transvaal Yacht Club in the affidavit of its representative in opposing the application for leave to appeal to the Constitutional Court that the matter did not concern the property rights of property owners in Schoemansville and Meerhof and therefore that no need presented to have joined them to the proceedings.

[65] The Respondents founded their case in the proceedings a quo, in the Supreme Court of Appeal and in the Constitutional Court on the enforcement of contractual rights to registration of the praedial servitudes and on acquisition of the praedial servitudes by acquisitive prescription.

[66] The contractual case was based on clause K on its own, or clause K together with a Notarial Contract.

[67] The Supreme Court of Appeal finally held that clause K was unenforceable and that the Notarial Agreement on which Mr Seale placed some reliance did not assist as the rights that had purportedly been ceded were not enforceable. In consequence, it was held on appeal that the unenforceability of clause K was also destructive of the enforceability of the Notarial Contract and the Title Deed provisions.

[68] The statements by the Minister in the answering affidavit to the application for leave to appeal to the effect that no evidence was presented in the High Court that the Government has, or will refuse members of the public, or property owners in Schoemansville and Meerhof from having the right of access over the foreshore to the Hartbeespoort Dam and that the right of access to the Hartbeespoort Dam has been inserted in the Title Deeds of all erven, and no evidence has been adduced that the Government has, or will interfere with this right of access and the determination of the contractual rights in terms of clause K and the Notarial Deed, as well as the determination of acquisitive prescription concerns access to the public and statement of an understanding of rights. The last-mentioned is a legal matter. The same applies to the statement of the Transvaal Yacht Club that the matter did not concern the property rights of property owners in Schoemansville and Meerhof and therefore that no need presented to have joined them to the proceedings

[69] The statements does not amount to fraud and I fail to see the connection between the statements by the Minister and the Transvaal Yacht Club on the findings in the Supreme Court of Appeal on the unenforceability of clause K, and the effect thereof on the on the Notarial Contract and the Title Deeds.

[70] Put differently, clause K is unenforceable, irrespective of the position adopted by any party. The concomitant effect on the Notarial Contract and the Title Deeds also follows, irrespective of the of the position adopted by any party.

[71] The high-water mark of the case for fraud truly is that the Respondents say that the Minister and the Transvaal Yacht Club should not have opposed the application to declare and execute the praedial servitudes on the foreshore.

[72] The Respondents in any event rely on the content of the affidavits that were delivered by the Minister and the representative of the Transvaal Yacht Club in the Constitutional Court. That was before the appeal processes were exhausted and finally pronounced on. The facts that the Respondents now rely on to sustain the allegations of fraud were known before the Constitutional Court pronounced on the application for leave to appeal, they served before the Constitutional Court and the Constitutional Court refused the application for leave to appeal. A party is not allowed to have a final judgment re-opened on the same evidence as was put before the court and rejected in the proceedings resulting in that judgment.¹⁷

[73] As a last resort, the Respondents also relies on the interest of justice as a basis to obtain an order for the rescission of the judgment of this Court. In *Zuma*, the Constitutional Court held that the setting aside of an order in the interest of justice would require that that be done in very exceptional circumstances and that the administration of justice will be adversely affected if parties are free to continuously approach courts on multiple occasions in the same manner.¹⁸ However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interest of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship of injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata. To do so, the circumstances must however be wholly exceptional to justify a departure from the res judicata doctrine. The interest of justice is the general standard, but the vital question is whether there are truly exceptional circumstances.¹⁹

[74] Exceptional circumstances, in the context of s 17(2)(f) of the Superior Courts Act, and apart from its dictionary meaning should be linked to either the probability of

¹⁷ Makings v Makings 1958 (1) SA 338 (A) at 342.

¹⁸ At para [87].

¹⁹ Zuma, paras [88] to [90], and the authorities referred to.

grave individual injustice, or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs.²⁰

[75] I can see no exceptional circumstances that would trigger a finding to rescind the order a quo on the basis of the interest of justice. No evidence was presented that grave individual injustice might follow and that the administration of justice might be brought into disrepute if the order a quo is not rescinded.

[76] The contrary holds true. Not only would the principle of finality be implicated, but chaos would be invited to the process and it would allow the Respondents to re-open their case without any valid basis. This is aptly illustrated by the fact that this application mostly consisted of lengthy affidavits in which the case was re-argued, inter alia to persuade that the judgment in the Supreme Court of Appeal was wrong.

[77] I accordingly find that the Respondents failed to prove the elements of fraud to sustain a finding that fraud was committed by the Minister and the Transvaal Yacht Club, and that the fraud renders the order a quo to be rescinded.

Is the order void?

[78] The Respondents contend that the order is an order in rem, that the property owners in Meerhof and Schoemansville were not joined to the proceedings and consequently that the order a quo is void.

[79] A judgment in personam relates only to rights inter se the parties before the court and binds only the parties to the proceedings. A judgement in rem fixes the status of the matter in the litigation. A judgment in rem has effect against the whole world, and not merely as between the parties to the litigation before the court.²¹

²⁰ S v Liesching 2019 (4) SA 219 (CC) at para 138.

²¹ City of Tshwane Metropolitan Municipality v Lombardy Development [2018] 2 All SA 605 (SCA) at [28].

[80] In *Home Sites (Pty) Ltd v Senekal*²² the granting of a verbal servitude was in issue and in particular whether the person to whom the verbal servitude was granted had to be joined to the proceedings. On appeal, Shreiner JA considered that the party to the verbal servitude agreement that was not joined to the proceedings had an interest in the validity of her servitude and that she had to be given an opportunity of being heard on the point. The order a quo was then amended, and the action was stayed until joinder of the party to the verbal servitude agreement. This matter concerned the joinder of a party with a direct and substantial interest before conclusion of the litigation.

[81] Assuming that the order is an order in rem, it does not follow that the order is a nullity. The consequence simply is that the parties that were not joined cannot be met with the exceptio res judicata.²³

[82] The reliance on non-joinder of the Meerhof and Schoemansville property owners was not raised in this Court a quo, or in the Supreme Court of Appeal.

[83] Moreover, the Respondents were the Applicants in the proceedings in this Court. They joined the parties to the proceedings. They themselves did not join the Meerhof and Schoemansville property owners. No property owner in Meerhof and Schoemansville joined this application to complain that there was a non-joinder.

[84] It is these Respondents that now contend that the order a quo is void, because they themselves did not join the Meerhof and Schoemansville property owners.

[85] I have already concluded that it was held in *Swartland* that the order is not a nullity. The consequence simply is that the parties that were not joined cannot be met with the exceptio res judicata

[86] I find that there is no basis to declare the order a quo void.

²² 1948 (3) SA 514 (AD) at 520.

²³ *Standard Bank of South Africa Limited v Swartland Municipality and others* 2011 (5) SA 257 (SCA) at [12].

[87] In the result, the counter application stand to be dismissed.

[88] I make the following order:

a. In the application in terms of Uniform Rule 42(1)(b), the typed order of 22 August 2022 is varied to read as follows:

“1. The application for leave to appeal is granted to the Supreme Court of Appeal.

2. Cost would be cost in the appeal, including cost of multiple counsel where so employed.”

b. No order for costs is made in the application in terms of Uniform Rule 42(1)(b).

c. The counter application is dismissed.

d. The First Respondent, the Second Respondent and the Third Respondent are ordered, jointly and severally to pay the costs of the Intervening party in the counter application on Scale C, including the costs consequent on the employment of two counsel where so employed, one of which is senior counsel.

CILLIERS AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 28 February 2028.

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