IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE: 12/06/2026

SIGNATURE [redacted]

Appeal Case No. A152/2025

Court *a quo* case number: 62272/2017

In the matter between:

KINGSLEY JACK WHITEAWAY SEALE	**First Appellant**
ONTSPAN BELEGGINGS (PTY) LTD	**Second Appellant**
HI FRANK COMPONENTS (PTY) LTD	**Third Appellant**

and

MINISTER OF WATER AND SANITATION	**Respondent**

In re:

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	**Intervening Respondent**

In re:

KINGSLEY JACK WHITEAWAY SEALE	**First Applicant**
ONTSPAN BELEGGINGS (PTY) LTD	**Second Applicant**
HI FRANK COMPONENTS (PTY) LTD	**Third Applicant**
SCHOEMANSVILLE OEWER CLUB	**Fourth Applicant**
and	
MINISTER OF PUBLIC WORKS	**First Respondent**
MINISTER OF WATER AND SANITATION	**Second Respondent**
PREMIER OF THE NORTH-WEST PROVINCE	**Third Respondent**
TRANSVAAL YACHT CLUB	**Fourth Respondent**

REGISTRAR OF DEEDS, PRETORIA **Fifth Respondent**

JUDGMENT

The judgment and order are published and distributed electronically.

Summary: Full Court appeal against refusal of Court a quo to rescind judgment and order granted in the High Court and thereafter confirmed on appeal by Supreme Court of Appeal, and leave to appeal to the Constitutional Court thereafter being refused by that Court. Issues related to the Appellants' entitlement to seek declaratory and mandatory relief in relation to registration of praedial servitudes against State-owned land.

Held that lower Court has no jurisdiction to rescind order of Higher Court.

Held also that the appeal will have no practical effect or result. Appeal dismissed.

VAN NIEKERK, J (MBONGWE J et MANAMELA J concurring)

INTRODUCTION:

[1] First, Second and Third Appellants are the owners of immovable properties situated in townships developed around the Hartbeespoort Dam. The First Appellant is a director and shareholder in the Second and Third Appellants and the Second- and Third Appellants are related entities by virtue of their nexus to First Appellant.

[2] Respondent is the Minister of Water and Sanitation ("*the Minister*") who was the intervener in the Court *a quo*. The Minister applied to be joined as Second Respondent in reconvention in the Court *a quo* in the Minister's official capacity for reasons which will transpire hereunder. The Minister was the only party which opposed the appeal.

[3] The appeal follows on a protracted history of litigation, primarily between the Appellants on the one side (at a stage during the litigation joined by Schoemansville Oewerklub, a voluntary association) against the Minister (at a stage joined by Transvaal Yacht Club ("TYC")) on the other side. The litigation essentially related to rights of access to the foreshore and the waters of the Hartbeespoortdam for leisure purposes (fishing and boating) by property owners in the townships of Schoemansville and Meerhof which are adjacent to the waters of that dam. The issues raised by Appellants related *inter alia* to whether such rights presently exist, the nature of such rights, and whether the owners of properties in those townships are entitled to registration of praedial servitudes against titles of certain relevant state-owned properties which forms the shore of the dam, to protect those rights. Second Appellant ("Ontspan") sought distinct declaratory relief against the Minister which will be referred to *infra*.

[4] The protracted litigation commenced with the Appellants' application for declaratory and mandatory relief, which application Davis J dismissed. Aggrieved by the dismissal Appellants applied for and were granted leave to appeal to the Supreme Court Appeal ("SCA") which then upheld the Davis judgment. Appellants then applied for leave to appeal to the Constitutional Court which was denied by that Court. TYC, one of the unsuccessful parties in the appeal, then applied in this Division in terms of Rule 42(1)(b) to correct a cost order made by Davis J during the application for leave to appeal. The Appellants then opposed that application and instituted a counter-application for rescission of the Davis judgment and order. That rescission application was dismissed by Cilliers AJ who simultaneously granted the order in the Rule 42(1)(b) application. It is against that order and judgment of Cilliers AJ that the appeal lies.

[5] Considering the history of the matter and the nature of the relief sought and orders granted by the Courts referred to *supra*, the parties were invited to file supplementary heads of argument on the issue whether the appeal will have any practical effect or result, failing which Section 16(2)(a) of the Superior Courts Act 10 of 2013 will provide this Court with a discretion to dismiss the appeal on that ground alone.

HISTORY OF THE LITIGATION BETWEEN THE PARTIES:

[6] For purposes of the appeal, it is necessary that the nature of the disputes, the relief sought, and the orders made in the previous litigation between the parties, must be analysed. For that purpose, it is convenient to refer to the judgments delivered in each of the previous Courts referred to above as they provide a complete synopsis of issues and the full history of facts which informed the issues. These judgments contain comprehensive summaries of the historical acquisition of the contested rights of the Appellants and for sake of brevity are concisely summarised hereunder only insofar as that history is relevant to this appeal.

[7] The respective Applicants and Respondents in the three judgments to which reference will be made were not similar in each of those proceedings, however it is not relevant to explain the correct and precise joinder of all parties in each of the prior proceedings as it will only serve to confuse. In my view it will suffice to record that the present Appellants were the applicants in the application for declaratory relief before Davis J, the appellants in the appeal before the SCA, the applicants in the application for leave to appeal to the Apex Court (i.e. the Constitutional Court), and the applicants (in reconvention) in the rescission application.

[8] The Appellants (joined by Schoemansville Oewerklub as the Fourth Applicant) instituted an application during 2017 against *inter alia* the Minister and TYC and in that application, which was adjudicated by Davis J during 2019, the Appellants sought *inter alia* the following relief:

[8.1] A declarator that there was fictional fulfilment of a condition precedent in a Notarial Contract entered into on 27 September 1922 between a certain Mr. JH Schoeman and the Union Government (the Minister of Land at that time representing the Government of the Union of South Africa). That Notarial Contract is registered in the Deeds office. The Appellants further sought an order that the First- and Second Respondents in that application (i.e. the Minister of Public Works and Minister of Water and Sanitation respectively) be ordered to register the rights which were detailed in clauses of a 1918 agreement of sale of land and in the 1922 Notarial Contract (in the various judgments referred to as "clause K") as praedial servitudes against the titles of certain properties of the State which forms the shore of the Hartbeespoortdam. These rights as detailed in the 1918 agreement and 1922 Notarial Contract intended to secure access to the waters of the dam for leisure purposes (boating and fishing) for property owners at certain areas.

[8.2] The Davis judgment analysed the complicated history, evidenced by documents, which narrates the acquisition of portions of the farm Hartbeespoort by the Union Government from a certain Mr Schoeman in terms of a Memorandum of Agreement in 1918. This agreement contained a servitude clause ("clause K") which eventually, after some disputes, led to an agreement between the Union

Government and Schoeman, which then resulted in the Notarial Contract in 1922.

[8.3] The 1922 Notarial Contract contained a clause which intended to give effect to clause K of the 1918 agreement. This clause in the Notarial Contract provided for a servitude to be registered in favour of Schoeman or his "Assigns" against the land which would form the submerged area of the Hartbeespoortdam (which was not yet constructed) as soon as the Government has acquired the whole of the area which would form the submerged area of the dam. Schoeman retained these rights because he intended to establish townships against the shores of the dam on his land, and the rights would secure access to the dam for future owners of properties in the townships for purposes of fishing and boating. The registration of the rights contained in the 1918 agreement by way of a servitude as provided for in the 1922 Notarial Contract were therefore subject to a condition precedent. It was common cause that the condition precedent was never fulfilled.

[8.4] The Township of Schoemansville was developed by Schoeman and established in 1923 and a condition of establishment provides that all registered erf-holders shall be entitled to the right of access to the dam at specified areas for stated leisure purposes. The same applied to the township of Meerhof, which was established thereafter.

[8.5] Because the condition precedent to clause K in the 1922 Notarial Contract remained unfulfilled, Appellants sought declaratory relief that there was fictional fulfilment of the condition precedent in the 1922 Notarial Contract and an order

that the Minister of Public Works effect registration of praedial servitudes against the title deeds of the relevant State-owned properties. Appellants sought in the alternative similar relief aimed at achieving the registration of servitudes, based *inter alia* on acquisitive prescription.

[8.6] Ontspan, owner of a property (referred to as portion 43 in Schoemansville), sought a declarator in relation to the existence of an alleged registered praedial servitude of access to the shore of the dam, which it claimed emanated from a Crown grant, and which was disputed by the Minister in that application.

[9] Davis J. dismissed the application in terms of a judgment handed down on 9 May 2019 for reasons which are summarised as follows:

[9.1] The Appellants failed to prove fictional fulfilment of the condition precedent.

[9.2] The rights acquired by Schoeman in the 1918 agreement in relation to access rights (clause K) were personal and not praedial in nature and had therefore lapsed on the passing away of Schoeman in 1967;

[9.3] Davis J also found that the alternative cause of action based on acquisitive prescription must fail.

[9.4] Davis J. made no specific order on the declaratory relief sought by Ontspan.

[10] Dissatisfied with the Davis judgment, the Appellants applied for and were granted leave to appeal to the SCA. During the application for leave to appeal, Davis J. made an order for costs which did not specify that costs of the application for leave to appeal should be

costs in the appeal, which is the order which normally follows when leave to appeal is granted. The parties became aware of this issue when the appeal to the SCA was finalised and costs were in the process of being taxed.

[11] The judgment of the SCA is reported[1] and in that judgment the following was *inter alia* held:

[11.1] The rights contained in Clause K in the 1918 agreement were granted to Schoeman in his individual capacity or his assigns, and Clause K did not provide the right to a praedial servitude;[2]

[11.2] Clause K in the 1922 Notarial Contract was in essence an agreement to agree, and therefore unenforceable;[3] and

[11.3] The Appellants failed to show the acquisition of the servitudes by prescription.[4]

[12] The SCA therefore found that the Appellants were not entitled to the declaratory relief claimed before Davis J, and the judgment of Davis J. was upheld in respect to that part of the relief claimed before Davis J. It is important to note that the SCA, under the heading "*Second Appellant*" in paras 43 and 44 of the SCA judgment made the following remarks regarding Ontspan:

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1 *Seale and Others v Minister of Public Works and Others (899 PAJA 2019) [2020] ZASCA 31 (15 October 2020).*

2 *Seale judgment supra, paras [23] to [24].*

3 *Seale judgment, supra, paras [27] to [36].*

4 *Seale judgment, supra, paras [37] to [42].*

"[43] *It remains to deal with the declarator claimed by Ontspan Beleggings. The court a quo erred in saying that no reliance was placed on rights that had emanated from the Crown Grant. It therefore failed to consider Ontspan Beleggings' case before it. As I have demonstrated, the owner of portion 43 is clothed with a registered praedial servitude of access to the Dam over the foreshore in front of it. In this court the second respondent submitted that there had been no dispute as to the existence and use of this servitude. Ontspan Beleggings countered the submission by correctly pointing out that in the answering affidavit in the court a quo, the second respondent had denied that the Crown Grant gave rise to a praedial servitude. The true position was repeated in the replying affidavit. The second respondent did not dispute that in argument in the court a quo it had adopted the stance reflected in the answering affidavit.*

[44] *In the light of the second respondent's denial of Ontspan Beleggings' rights, the court a quo should have issued the declarator that it sought. However, in written and oral argument in this court, the second respondent unreservedly recognised the servitude attached to portion 43. Thus, there was no further need for the declarator that Ontspan Beleggings had sought. It is trite that this court does not decide abstract or academic issues and there is no reason why we should, in these circumstances, nevertheless exercise a discretion to issue a declarator. The second respondent acknowledged the rights of Ontspan*

Beleggings almost at the outset of the appeal. There should, however, be an order that the second respondent is liable for the costs of Ontspan Beleggings in the court a quo, and not the other way around, as the court a quo ordered."

[13] Following the findings aforesaid, the SCA dismissed the appeal with costs, with the proviso that the order for costs in favour of the Second Respondent was altered to the extent that the Second Respondent was ordered to pay the costs of the Second Applicant (Ontspan Beleggings).

[14] The Appellants then sought leave to appeal to the Constitutional Court, which dismissed that application. The Constitutional Court held that the appeal did not engage the jurisdiction of the Constitutional Court and in any event bore no prospects of success. Ordinarily, that would be the proverbial end of the road for the Appellants signifying the end of their quest for the registration of praedial rights of servitude and the other declaratory relief sought in the application before Davis J. However, that was not to be.

[15] When the Taxing Master commenced taxation of cost, it became clear that the order which Davis J. made when leave to appeal was granted to the SCA, did not follow the wording to convey that it was ordered that cost of the application for leave to appeal should be cost in the appeal. The order made by Davis J reads; *The application for leave to appeal is granted to the Supreme Court of Appeal, including the costs of multiple counsel so employed*". TYC, who was one of the successful parties in the SCA, then instituted an application in terms of Rule 42(1)(a) of the Uniform Rules of this Court for an order that the alleged patent error in the order of Davis J. be amended by the Court to reflect that the cost should be cost in the appeal.

[16] This substantive application became necessary because the Appellants refused to accede that the order was patently incorrect and insisted that TYC formally approach the Court for an order. TYC annexed a transcription of the proceedings to that application which records the order granted by Davis J to read as set out hereunder. Appellants opposed that application and filed a counter-application seeking the rescission of the order of Davis J. ("the rescission application").

[17] The Appellants' rescission application was based on the following stated grounds:

[17.1] The order of Davis J was based on fraud committed by TYC and the Minister which essentially, according to the Appellants, consisted therein that they presented false evidence in relation to the issue of acquisitive prescription.

[17.2] The order of Davis J is void, because property owners affected by the order which found that they did not have a right to enforce a praedial servitude were not joined in the proceedings. Underlying this ground, the Appellants contended that, having found that the rights which Schoeman acquired were personal rights and not praedial in nature, the judgment is a judgment *in rem* and thus void because the owners in the relevant townships were not joined to the proceedings.

[18] In the Court *a quo* Cilliers AJ dismissed the rescission application and granted relief under the application in terms of Rule 42(1) by varying the order of 22 August 2022 in the application for leave to appeal (of Davis J) to read:

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

2. *Cost will be cost in the appeal, including cost of multiple counsel where so employed".*

[18] Essentially, the relief sought by Appellants in the rescission application, ancillary to rescission of the judgment of Davis J, were orders that the rights detailed in Clause K of the aforesaid agreements be registered as praedial servitudes against the titles of the stated servient and dominant tenements (similar relief sought before Davis J) and the declaratory order in favour of Ontspan which the SCA found should have been granted by Davis J. as set out in par [44] of the SCA judgment. This relief was sought, notwithstanding the findings of the SCA as set out in paragraph [12] *supra*.

[19] The judgment of the Court *a quo* delivered by Cilliers AJ refers to the SCA judgment in relation to the history of the dispute and concluded that it is inappropriate for the High Court to entertain the counter-application (for rescission). The Court *a quo* found that the High Court does not have jurisdiction to entertain the application for the rescission of the order where the SCA and the Constitutional Court have pronounced on the orders of the respective lower Courts. The Court a quo also dealt with the merits of the application for rescission and dismissed the application.

GROUNDS FOR APPEAL:

[20] In heads of argument filed on behalf of Appellants the following is stated:

"1.2 The matter before this Court is not an attempt to re-litigate what has already been decided. It raises four distinct issues of law and fairness, each going to the integrity of the judicial process, the recognition of conceded rights, and the constitutional protection of property. It furthermore points to fundamental errors

in law and procedure which, if left uncorrected, perpetuate injustice and uncertainty".

[21] The aforesaid quotation is contained in the introduction to the Appellants' heads, and attempts to convey that the purpose of the application for rescission of the Davis judgment is not a re-litigation of *res judicata*, but, as a further reading of that introduction display, is aimed at correcting incorrect legal findings of the Davis judgment and to recognise rights which were conceded in favour of the Appellants during previous litigation. In my view this statement essentially confirms that the Appellants were attempting to achieve in the rescission application that which they were unable to achieve in the preceding litigation.

[22] In paragraph 1.3 of the Appellants' heads of argument the following rationale is provided for the rescission application:

"The hearing a quo revealed an exceptional state of affairs that warranted not only rescission of the Judgment by Davis J or recognising its nullity, but also, intervention in respect of the relief previously denied by Davis J to ensure finality to the matter".

[23] Expanding on the purpose of the rescission application as quoted *supra*, the Appellants proceed to state the following:

"1.4 The errors concerning the rights of erf holders are:

I. The Davis J judgment was characterised as in rem; a judgment in rem binds the world (inter omnes) and not only the cited parties. A judgment purporting to bind the world without proper joinder is no judgment at all –

it is a nullity ab initio. The court a quo erred in misstating effect of in rem orders and failed to recognise that, if indeed in rem, it is void ab initio and if in personam, the Davis judgment rested on a mistake of fact (justus error), the court a quo erred in treating it as conclusive/binding despite the Minister's clarified concessions. Either way, ***relief cannot be refused;*** *there is a Constitutional dimension: erf holders' property rights (s 25) adjudicated without them denies access to courts (s 34).*

II. *The Minister has clarified, both in the Constitutional Court and a quo, that the rights contained in the title deeds are indeed existing real rights. That clarification resolves the true dispute in favour of the Appellants. The relief sought is, however, neither academic nor redundant; it is necessary to prevent ongoing prejudice.*

III. *Allegations of fraud discovered post-litigation are not barred from adjudication. The court a quo erred in holding it lacked jurisdiction to consider such claims and the TYC's admitted misrepresentations directly induced refusal of relief. As a result the judgment must be rescinded. South African authority, reinforced by Takhar v Gracefield Developments [2019] UKSC 13, confirms that is irrelevant; undisputed fraud cannot and should not be excused it vitiates everything it touches including judgments, therefore, rescission is automatic with proven fraud*".

1.5 *In respect of the Second Appellant (*"***Ontspan***") The Court a quo held that the Constitutional Court's refusal of leave to appeal effectively precluded declaratory relief in favour of Ontspan, despite that it did not partake in the Constitutional*

Court proceedings, the Minister has conceded Ontspan's rights and is not opposed to the Declaratory which relief would clarify and prevent prejudice from officials' continued refusal.

1.6 The Court below erred by varying costs mero motu without hearing parties, despite a pending Rule 42 application. This was procedurally irregular. On Biowatch principles, costs should not have been awarded against litigants asserting constitutional rights. The Minister's shifting stance and the TYC's fraud, on the other hand, warranted costs against the respondents on a punitive scale".

[24] Appellants conclude by summarising the grounds for the appeal as follows in their heads of argument:

"1.11 This appeal is therefore built on four pillars:

i. Recognition of Ontspan's conceded rights

ii. The in rem / in personam fork, leading to either nullity or error

iii. Fraud as a new ground warrants rescission

iv. Procedural fairness in costs".

[25] The Appellants then proceed to argue in the heads of argument that the Court *a quo* incorrectly found that the SCA acknowledged the entitlement of Ontspan to the relief

sought before Davis J because the Court *a quo*, in para [33] of the judgment, stated the following:

"The Supreme Court made specific orders concerning the rights of Ontspan Beleggings".

[26] What the SCA in fact stated in regards to Ontspan Beleggings is set out in paragraph [43] to [44] of the judgment of the SCA and quoted in paragraph [12] *supra*. Appellants are thus correct in stating that Cilliers AJ erred in finding that the SCA made specific orders concerning the rights of Ontspan. However, it is clear that the SCA refrained from making an order because the SCA found that the issue between Ontspan and the Minister was moot. The finding made by the SCA was not in relation to the rights of Ontspan, but in relation the issue being moot.

[27] The Appellants argue in their heads of argument that the declarator sought by Ontspan, which the SCA had held to have erroneously not been granted in favour of Ontspan by Davis J, but notwithstanding refused to grant because it was found not to have any practical effect, should be granted for the following reasons:

> *"2.7 Therefore, the order, already determined to have erroneously not been granted in favour of Ontspan by Davis J, would materially clarify the situation, prevent the potential future confusion and augment the Supreme Court of Appeal's decision with the requisite means to* ***ensure finality*** *to a matter that should have already been resolved through the acknowledged concession*".

[28] The Appellants further argue that the judgment by Davis J should be set aside or declared a nullity in respect to the relief which affected the access rights in favour of the erven of the relevant townships because the Minister clarified before the Constitutional Court and

in the Court *a quo* that those title deed rights are existing real rights. According to the Appellants, post the litigation that clarification has not been honoured by the Minister's department. Appellants then argue that the Court *a quo* erred in holding that the Appellants' failure to join all erf holders justified the refusal to set aside the judgment of Davis J and argues that joinder cannot cure a judgment already given *in rem* without the necessary parties.

[29] In summary, what the Appellants intended to achieve with the rescission application, could be summarised as follows:

[29.1] To set aside that part of the Davis judgment and order which held that the rights of the erven holders (who were not joined in the application) were personal rights, and that registration of servitudes over the title deeds of State properties are therefore not competent. Because of the concession of the Minister, which recognises those rights because they are contained in the relevant township planning schemes, the Court should now order such registration.

[29.2] Because the SCA found that Davis J erred in not granting the declaratory relief in favour of Ontspan Beleggings, the rights of which were conceded by the Minister in the appeal, that declaratory order should now be granted for purposes of finality.

[30] Apart from the issues arising from the Davis judgment, Appellants submit that Cilliers AJ erred by *mero motu* amending the cost order because the issue was not fully ventilated before the Court *a quo*, therefore preventing the Appellants from making the necessary and required submissions to support their stance in relation to that costs issue.

[31] When the procedure adopted by the Appellants and the issues on appeal are analysed, it is clear that the following issues arise which require determination, as it may be dispositive of the appeal.

[31.1] Can the order of a Court, which was upheld on appeal by a Higher Court, be rescinded?

[31.2] Where the Supreme Court of Appeal held that an issue is moot, can that issue be revisited between the same parties in a lower Court where there is no dispute on the issue?

[31.3] What is the practical effect of the appeal before this Full Court?

CAN THE JUDGMENT OF A LOWER COURT, WHICH WAS UPHELD/SET ASIDE BY A HIGHER COURT ON APPEAL, BE RESCINDED?

[32] The Court *a quo* dealt with this issue under the heading "**The counter application**" in paragraphs [30] to [54] of its judgment, and concluded that it would be inappropriate for the Court *a quo* to entertain the counter-application in circumstances where the Davis judgment was upheld on appeal by the SCA and on a further appeal to the Constitutional Court, leave to appeal being refused. In this regard, the Court *a quo inter alia* held:

[32.1] An application to the High Court to set aside its own order after that order was pronounced upon in the SCA and in the Constitutional Court, is unprecedented. Cilliers AJ stated that he 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;[5]

[32.2] The Court *a quo* referred to authority[6] where Kotze J held that to hear an application for review after the High Court pronounced finally in an appeal from the Magistrate's Court on the matter, would render the final judgment on appeal of no effect. The exception is that where fraud is alleged to have been perpetrated on the Court to obtain the judgment, but that such application had to be brought in the Court that pronounced finally in the appeal. The learned Acting Judge *a quo* further referred to authority[7] where Khampepe J considered jurisdiction of the Constitutional Court and *inter alia* held that: "*... it would of course be inappropriate for any other court to entertain a rescission application pertaining to an order made by this Court (the Constitutional Court)*";

[32.3] Referring to the hierarchy of the Courts, the doctrine of precedent and the principle of finality, the Court *a quo* held that it would be inappropriate for a lower Court to entertain a rescission application pertaining to an order made by the Constitutional Court. Cilliers AJ then concludes in paragraph 40 of that judgment as follows:

"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

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5 *Vide: Judgment, Cilliers AJ, para [34].*

6 *Magomed v Middlewick N.O. and another 1917 CPD 539 at 540.*

7 *Zuma v Secretary of the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector, including Organs of State and others 2021 (11) BCLR 1263 (CC) at [49]*

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 recent judgment and order".

[32.3] The learned Acting Judge compared the doctrine of merger found in the law of India which is rooted in the idea of maintaining the decorum of the hierarchy of Courts and tribunals and based on the reasoning that there cannot, at one relevant point in time, be more than one operative order governing the same subject matter.

[33] The learned Judge *a quo* reasoned that final judgments and orders of a higher Court will be rendered meaningless when the orders of lower Courts are set aside, that it will result in an untenable situation, and that is against the principle of certainty, predictability, reliability, equality, uniformity and convenience.

[34] In my view the reasoning of Cilliers AJ cannot be faulted. To rescind the order of a lower Court which has been pronounced on by a Higher Court will offend the interests of justice. In my view, once a Higher Court has pronounced on the judgment of a lower Court, whether it is upheld or set aside, the judgment of the lower court is replaced with the judgment of the Higher Court, and the order of the lower Court is replaced with the order of the Higher Court and becomes the order of the Higher Court. The operative order is the order of last instance granted by the Higher Court and the order of the lower Court has no more effect. In my view this is a matter of common sense.

[35] Based on this principle, the Court *a quo* lacked jurisdiction to entertain the rescission application and the appeal against the Court *a quo*'s dismissal of the rescission application cannot be upheld.

SECTION 16(1) OF THE SUPERIOR COURTS ACT:

[36] I am of the view that it is also necessary to consider the effect of the relief claimed in the rescission application in the context of the stated reasons and grounds for appeal as set out in the Appellants' heads of argument and quoted in paragraphs [20] to [29] supra. Having considered the aforesaid stated reasons for instituting the rescission application and appealing against the dismissal of that application, it is clear that the appeal falls foul of the provisions of section 16(2)(a) of the Superior Courts Act. That section reads:

> ***"16. Appeals generally***
>
> *(1)* ...
>
> *(2)*
>
> *(a)*
>
> *(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*
>
> *(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."*

[37] The declaratory relief sought in favour of Ontspan was not granted by Davis J, although the entitlement to that relief was in dispute in that application and disputed by the Minister. From reading paragraphs [43] and [44] of the SCA judgment as quoted in paragraph [12] *supra*, it is clear that the Minister conceded the rights of Ontspan when the parties were before the SCA. Those paragraphs of the SCA judgment clearly confirm that the SCA then declined to grant a declarator in favour of Ontspan on the grounds that there was no further dispute on the rights of Ontspan. That issue, namely the entitlement to the declaratory relief claimed by Ontspan, is thus *res iudicata* and this court, sitting as a lower court (to the SCA), will effectively re-write the judgment of the SCA if this court rescind the Davis judgment and grant the declarator in relation to the rights of Ontspan.

[38] In any event, in all subsequent litigation since the SCA judgment the rights of Ontspan were conceded by the Minister. There is presently no *lis* in relation to these rights, and no argument could be advanced on behalf of the Appellants to illustrate any practical effect or result that such a declarator would achieve.

[39] Insofar as the Appellants' asserted praedial rights flowing from the 1918 agreement and 1922 Notarial Contract are concerned, the following statement was made by First Appellant in the founding affidavit in the application which served before Davis J, namely:

> "*12.5 As appears from the conditions of establishment of Meerhof, a copy of which is annexed hereto marked 'FA80', it contained a clause similar to the one included in the Schoemansville Township. The following was inserted as Clause (h) of the title conditions:*

'(h) 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 HJ Schoeman's old dam known as Sophia's Dam (now adjoining the 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 Notarial Agreement No. 99/1922-M, dated the 27th September 1922, and filed in the Deeds Office. The owners of business erven Nos. 89, 90, 164 and 165 however, shall be entitled to ply boats for hire on the lake as from the abovementioned access'.

12.6 By virtue of the rights retained in the 1918 Sale Agreement and 1922 Notarial Contract and recorded in the title conditions of the residential erven, the Meerhof owners enjoyed and still enjoys [sic] *access to the dam for purposes of boating and fishing from the Meerhof foreshore. By exercise these rights in the foreshore area of the Remaining Extent of Portion 29".*

[40] In an affidavit filed on behalf of the Minister, in the same application before Davis J, reference is made to the aforesaid clause, inserted in the conditions of establishment of the Meerhof and Schoemansville Townships. That affidavit quotes clause 13 of the Schoemansville Township Establishment Conditions which provides for the right of access to the dam for fishing purposes at an identified location as reflected in the 1922 Notarial Contract for all owners. The Minister then avers:

"*44. These rights were not only provided for in the condition of establishment of the two townships but were incorporated as a condition into the title deeds of the various erven in all of the townships.*"

[41] There was no dispute before Davis J, or in the SCA, or in the rescission application before Cilliers AJ, that these rights were recorded in the conditions of establishment of the relevant townships, nor that these rights are incorporated in the title deeds of the relevant owners. There was also no allegation that any one of the property owners in the relevant townships are (or were) engaged in litigation to enforce any such right by virtue of the right being disputed or frustrated by the Minister or anyone else. On the version of First Appellant as quoted in paragraph [39] *supra*, those owners have been exercising their rights, and are still exercising their rights of access. Leaving aside the Appellants' lack of *locus standi* to apply for an order to rescind the Davis judgment and order on the basis that it is a nullity by virtue of it being a judgment in rem and granted in the absence of joining those owners, it is clear that the relief claimed in this respect by Appellants also will have no practical effect or value, because the owners have a right of access, duly registered in their title deeds, which they presently enjoy (on First Appellants' own version).

[42] On reading paragraph 5 and its numerous sub-paragraphs in the affidavit deposed to by First Appellant in the rescission application, the deponent essentially avers that officials employed by the Department of Water affairs misinterpreted the order of the SCA and refuse to recognize the rights of property owners because the SCA dismissed the appeal. Based on this consideration, First Appellant avers that it is necessary that the order rescinding the Davis Judgment should be granted and this is the high-water mark of the Appellants case on the practical effect that the appeal will achieve.

[43] That argument is, in my view, based on a lack of appreciation for the fact that the SCA effectively found that the owners of properties in the two relevant townships do not have a right to insist on the registration of a praedial servitude over State land in order to secure their access to the dam, and that finding is based on an interpretation of the original 1918 agreement and 1922 Notarial Contract and the application of the law. The SCA also found that clause K was unenforceable, being an agreement to agree. The claim for acquisitive prescription was dismissed on the basis that the SCA held that it is a formidable onus to prove acquisitive prescription and the Appellants failed to provide adequate evidence of the actual use of the foreshore for that purpose. The allegations of fraud which were allegedly made in the rescission application therefore cannot upset those findings of the SCA . The only fact which thus remains worthy of consideration in relation to the issue of practicality of the appeal insofar as the relevant owners are concerned is the allegation that their rights are being disputed by officials who misinterpret the order.

[44] In my view the answer to that complaint lies in the fact that those owners do not have an unrestricted right of access over State land, but enjoy access to the dam in the manner as recorded in their respective deeds of title as set out in paragraphs [39] to [41] *supra* and confirmed by the First Appellant. The drastic measure of rescission (considered against the background of the peculiar facts of this matter or litigation) is not the appropriate manner to avoid the misinterpretation of an order of Court by lay officials.

[45] In any event, rescinding the order and judgment of Davis J will not change the fact that the SCA held that the rights emanating from clause K in the agreement were personal rights which do not give rise to a praedial servitude, nor will it change the finding by the SCA that clause K in the 1922 Notarial Contract is void and unenforceable and can not give rise to a claim for transfer of a praedial servitude.

[46] Based on the aforesaid the appeal, if successful, would yield no practical effect and/or will have no practical value and stands to be dismissed on that ground alone.

THE RULE 42(1)(b) ORDER

[47] It was argued on behalf of Appellants that Cilliers AJ erred procedurally when the order of Davis J was amended as set out in paragraph [17] *supra*. During the hearing of the appeal, and on direct questioning, counsel acting on behalf of the Appellants readily (and correctly), conceded that the "*normal*" order in an application for leave to appeal is namely an order that cost will be cost in the appeal. In my view it is patently obvious that the order of Davis J was incorrectly recorded and this is confirmed by the record of those proceedings which were attached to the R42(1) application.

[48] Appellants argument that Cilliers AJ acted procedurally incorrect or irregularly cannot be upheld. The attached record of those proceedings confirms the fact that the recorded order was incorrect and confirms that Davis J ordered costs to be costs in the appeal. Appellants' argument that they were acting in the public interest and for that reason seek to re-visit the costs order is opportunistic because the Appellants developed the argument relating to the rights of other property owners not joined in the proceedings only when instituting the rescission application as a ground to argue that the order of Davis J is a nullity. It is clear that the Appellants at all times acted in their own interest as confirmed by the fact that they never joined the other owners which they now claim are being prejudiced by the judgment in rem.

[49] Rescinding that part of the order of Cilliers AJ for purposes of enabling the parties to argue the issue by way of another opposed application will result in frivolous litigation and

a waste of scarce court resources. TYC filed an affidavit in support of the Rule 42(1)(b) application and Appellants answered thereto. It was well within the inherent jurisdiction of Cilliers AJ to adopt a procedure where he disposed of that issue without hearing oral evidence and to correct an order which was patently incorrectly granted and/or recorded in the order, and in so doing Cilliers AJ exercised a discretion which cannot be found to have been exercised capriciously or mala fide and in my view this Court cannot interfere with the exercise of that discretion.

CONCLUSION:

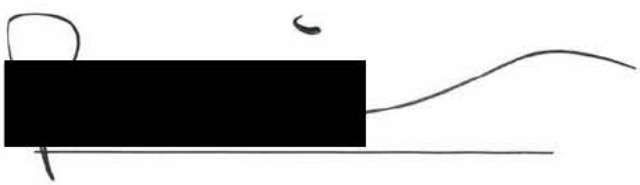
[50] Considering the aforesaid, I am of the view that the appeal should be dismissed.

[51] At the hearing of the appeal, the parties were *ad idem* that the cost should be awarded to the successful party, taxed on Scale C, including cost of two counsel.

In the result, I propose the following order:

[1] The appeal is dismissed.

[2] Appellants are ordered, jointly and severally, the one paying, the other to be absolved, to pay the cost of the appeal, including cost of two counsel where applicable, taxed on Scale C.



P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

I AGREE:

M MBONGWE
JUDGE OF THE GAUTENG DIVISION
PRETORIA

I AGREE:

KLM MANAMELA
JUDGE OF THE GAUTENG DIVISION
PRETORIA

DATE OF HEARING : **13 MAY 2026**

DATE OF JUDGMENT : **12 JUNE 2026**

APPEARANCES

FOR APPLICANTS	**ADV ELS SC**
	ADV RETIEF
INSTRUCTED BY	**COUZYN HERTZOG & HORAK**
RESPONDENT	**ADV ERASMUS SC**
	ADV MPSHE
INTSTRUCTED BY	**STATE ATTORNEY**