IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 9200/2018

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

12 December 2023.
.....
DATE
SIGNATURE

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Applicant

and

SWART, HILDA First Respondent

KHUMALO,COMMENT RAYMOND Second Respondent

MDLULI, GOODWIN KWANELE Third Respondent

NCUBE, TOPSON KUKUZA Fourth Respondent

KHUMALO, FIDRESS NOMSA Fifth Respondent

JUDGMENT IN THE APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

S. VAN NIEUWENHUIZEN AJ

[1] This is an application for leave to appeal against the judgment I delivered on 2 February 2023, which involved a dismissal of a rescission of judgment, which judgment was delivered by Wright J on 21 February 2022. The grounds for the leave to appeal relied on at present read as follows:

> "*1. The Learned Acting Judge erred in finding that:*
>
> *1.1 That the judgment was not erroneously granted.*
>
> *1.2 That the judgment was not erroneously granted, despite finding that in his judgment, the Respondents did not comply with section 3 of Act 40 of 2002.*
>
> *2.3 That despite finding that that Respondents and/or their legal representative did not disclose that the condonation was granted, but refused the rescission application.*
>
> *2. The Learned Acting Judge erred in:*
>
> *2.1 Finding that Wright J applied his mind on the issue of service and regarded it under the rules despite Makume J's order.*
>
> *2.2 Finding that the judgment was not erroneously granted, despite the finding that if Wright J had known about the issue in terms of the Act he would have applied his mind to it.*
>
> *2.3 Finding that the issue of compliance with the Act was not pointed out to Wright J by Plaintiffs' legal advisers because, if this was known, he would have applied his mind to same and there probably would have been an application for condonation, but concluding that the judgment was not erroneously granted, despite non-compliance with the Act.*
>
> *3. The Learned Acting Judge ought to have found that:*
>
> *3.1 The failure of the Plaintiffs and/or their legal representatives to disclose that they have not*

complied with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, Municipal Systems Act 32 of 2000 and the Uniform Court Rules for service of notice in terms of section 3 of Act 40 of 2002 and summons in terms of Act 40 of 2002, Act 32 of 2000 and Uniform Rules when applying for default judgment, made the judgment to (sic) erroneously granted.

3.2 That the failure of the Plaintiffs and/or their legal representatives to comply with Act 40 of 2002, Act 32 of 2000 and Uniform Court Rules, made the Court not to have competence to grant the default judgment.

3.3 That the Court had no competence to grant the order, for non-compliance with statutory obligations by the Plaintiffs.

3.4 That the failure of the Plaintiffs to comply with the order of Makume J was another ground, on which the Court erroneously granted the default judgment.

4. For these reasons the Applicant submits that the proposed appeal has reasonable prospects of success, that it raises important points of law that warrant considerations of a higher court, having regard inter alia *to:*

4.1 In Hyundai Motor Distributors (Pty) Ltd v The Honourable Mr Justice JMC Smith 2000 (1) SA 259 (T) where Honourable Lordship Mr Justice BR Southwood stated as follows:

> *'Default judgment proceedings are akin to ex parte proceedings, and that in effect means that there is indeed a duty of disclosure, and that duty of disclosure requires (of counsel) to disclose even the adverse factors in the case, and if such material aspects of a case have been suppressed, which material aspects would have influenced the decision of the court, then a breach of the duty of disclosure has indeed occurred and if such a breach of disclosure has occurred, then it matters not whether the breach was wilful or* mala fide*, all that matters is the fact that a material breach has occurred, and such a material breach would in law warrant a rescission of judgment.'*

4.2 The Supreme Court of Appeal in the unreported judgment of 'Rossiter v Nedbank Limited, *case number 92/3014 dated 1 December 2015 stated that,*

'The law governing an application for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the subrule. Generally, a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.'

4.3 This appeal raises the import (sic) issue of law in regard to the service on the organ of state as contemplated in Act 40 of 2002, Act 32 of 2000 and the Uniform Rules of the Court, and the effect of non-compliance with such prescripts of the law, when it comes to rescission applications.

4.4 There are numerous additional and pending cases that have been launched by the applicant in this division in regard to rescission applications, whose facts are similar to this proposed appeal and which will be affected by the outcome of the proposed appeal.

5. It is thus in the interests of justice that an appeal is allowed, as contemplated in section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013."

[2] For purposes of convenience, I will refer to the applicant for leave to appeal as CoJ and the respondents merely as the respondents or, where required in the context, as the plaintiffs and CoJ as the defendant.

[3] The respondents opposed the application for leave to appeal.

BACKGROUND

[4] The original summons to the particulars of claim was served on 13 March 2018 on ME Mabaso the legal secretary of the legal advisor.

[5] Prior to the matter serving before Wright J, it came up for hearing before Makume J as an application for default judgment on 13 April 2021.

[6] Makume J made the following order:

> "*CLAIM 1*
>
> *[1] This is a claim for Loss of Support pursuant to the death of first Plaintiff's Customary Law husband in a shooting incident that took place on the 9th April 2017.*
>
> *CLAIM 2*
>
> *[2] This is a claim by the second and third Plaintiffs for wrongful arrest by members of the Defendant.*
>
> *CLAIM 3*
>
> *[3] This is a claim by the fourth and fifth Plaintiffs for loss of support on the facts relied on in claim 1. They being the biological parents of the deceased in claim 1.*
>
> *[4] The papers indicate that the summons and particulars of claim were served on an employee of the Defendant one M.E.M. Mabaso on the13th March 2018. The person is described as the Legal Secretary of the Legal Advisor in that office.*
>
> .
>
> *[5] The Defendant entered no appearance to defend the action and on the 23rd March 2020 Plaintiff's attorneys addressed a letter to the City Manager informing him that they are proceeding with an application for default judgment.*
>
> *[6] On the 10th November 2020 Plaintiff attorneys filed an affidavit in terms of Rule 31(5) and applied for default judgment.*

[7] The matter served before me in the unopposed roll on the 131h April 2021.

[8] The Plaintiff will have to present evidence on liability as well as to prove the identity of the perpetrators namely why is it alleged that the people who shot and killed the deceased were in the employment of the Defendant.

[9] The third and fourth Plaintiffs must present evidence and proof that the deceased maintained them.

[10) The notice of set down must be served on the Head Legal Division of the City of Johannesburg by the Sheriff.

[11] The summons in this matter was served during 2018. I direct that same be reserved by the Sheriff as set out in paragraph 10 above before the Registrar allocates a date for hearing."

[7] The whole of the aforesaid was known to Wright J and in his own judgment of 21 February 2022 he specifically refers to the fact that the plaintiffs notified the defendants, on 23 March 2020, by way of a courtesy letter, of the proposed service of the judgment and indicated that an application would be made for default judgment.

[8] The re-service of the summons pursuant to Makume J's order took place on 27 May 2021 on a certain Mr TS Kekana, a paralegal and ostensibly responsible employee not less than 16 years' of age, of and in control of and at the principal place of business within the court's jurisdiction of the City of Johannesburg Metropolitan Council at 3rd Floor, A Block, 158 Civic Boulevard, Braamfontein, Johannesburg while handing same to the first-mentioned. This service also elicited no response from CoJ.

[9] I held that Wright J took cognisance of the Makume J order specifically as to the order for re-service. Although the re-service was not in accordance with the order of Makume J, Wright J was not unaware thereof.

[10] In the plaintiffs' particulars of claim, it is alleged that there was compliance with the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act").

[11] Wright J clearly dealt with service and quantum, although there is no reference to the Act.

[12] The service of the Wright J judgment and order took place at the same address as in the previous service pursuant to Makume J's order and on the same Mr Kekana on 2 March 2022. All of a sudden, the machinery of the CoJ kicked into action.

[13] The City applied for the rescission of Wright J's judgment after they allegedly became aware thereof on 9 March 2022 and instituted the proceedings on 16 March 2022 seeking the order of Wright J to be set aside under rule 42(1) as being erroneously granted and specifically seeking to raise the defence that there was no notice sent in terms of section 3 of the Act.

[14] I heard the application to set aside the Wright J judgment and delivered judgment on 2 February 2023.

[15] Thereafter the notice of application for leave to appeal by CoJ was filed on 17 February 2023. No further movement on this application for leave to appeal took place until I was informed of same and tried to obtain dates for the hearing thereof in October 2023. In the final event the secretary at present dealing with applications for leave to appeal was able to set it down for 16 November 2023. But for my attempts and that of Mr Mabunda the application for leave to appeal would still have been pending whilst CoJ did nothing to obtain a hearing date. I should add that an application to stay the execution of a warrant obtained by the plaintiffs on 29 May of 2023 probably also incentivised CoJ to co-operate in arranging a date for the hearing of the application for leave to appeal.

[16] In my judgment, I analysed section 3 of the Act and concluded that it also applies to municipalities. I also held that the CoJ is a metropolitan municipality and a huge organisation. Wright J accepted the pleadings inasmuch as same asserts that proper notice of the facts giving notice to the event was given in terms of the Act. The actual notice that was sent and alluded to in the particulars of claim was, according to the date stamp on the registered letter, dated 24 January 2018, that's more than six months after 9 April 2017. In addition, the letter itself, purporting to give notice by registered post to the City of Johannesburg Municipality, P O Box 1049, Johannesburg 2000 purports to be dated 2 January 2017, some three months prior to the actual event, i e 9 April 2017. I held that this is in all probability

a typographical error. I further held that in the result the CoJ never had an opportunity to raise this defence. The fact that the letter was out of time is, of course, not in itself fatal and the only difficulty the plaintiffs would have encountered was that they would have had to apply for condonation having sent the notice late.

[17] The allegations made in the particulars of claim, that proper notice was given in terms of the Act, is incorrect. Had the particulars of claim reflected it correctly, the whole issue of notice would have been part of the proceedings before Wright J, and he would have been able to adjudicate thereupon.

[18] A further point taken by CoJ was that it was not notified of the matter and invited on CaseLines. This does not seem to be included in its grounds of appeal and nothing else has to be said about this, save that the right to be notified in terms of the relevant directive only arises once there has been some act of participation by CoJ. CoJ at no stage responded to any of the various means by which they were notified.

[19] It was argued before me that, once the matter has been heard on the merits, the court is *functus officio* and, in the instance of a default judgment, the court is only able to set same aside under Rule 42(1) on the narrow basis that judgment was erroneously granted. CoJ specifically relied hereon in the founding affidavit and the replying affidavit.

[20] I held that there is no doubt in my mind that the judgment was not erroneously granted. If Wright J had known about the issue in terms of the Act, he would have applied his mind to it. The only inference I could draw was that it was not pointed out to him by the plaintiffs' legal advisers because, if this was done, he would have applied his mind to same and there probably would have been an application for condonation. In the latter sense, "*the judgment may well have been erroneously sought*".

[21] I further held that this does not assist the applicant under Rule 42(1). In assessing whether the failure to comply with Makume J's order was fatal, I concluded that it was not. Wright J applied his mind to the issue of service and clearly regarded it sufficient under the rules, despite Makume J's order and the subsequent events proved him to be correct. Once a document is served on Mr Kekana prior to any judgment being taken, it is simply ignored. But, once judgment is taken, the machinery of the COJ kicks into action.

[22] I specifically held that I find it suspicious that after the service of judgment and order on the same Mr Kekana at the same address as before, CoJ suddenly responded.

[23] The deponent to CoJ's founding affidavit explained that he received the judgment on 9 March 2022. He does not say from whom or how this came about. On the papers, the only inference I can draw is that service on the same Mr Kekana eventually resulted in CoJ

responding. He also does not explain why the earlier attempts to serve on the same address did not result in a response. I drew the ineluctable inference that, despite the non-compliance with Makume J's order, CoJ did receive the summons at the latest when it was served on 27 May 2021. That led me to the conclusion that CoJ was aware of the case, did nothing to raise a defence, including the defence of no notice or no timeous notice under the Act, the only substantive defence it now wants to raise.

[24] The City's attempt to rely on the service as ordered by Makume J is unconvincing, especially in the absence of a full explanation as to how the judgment and order of Wright J came into its possession. It also smacks of opportunism.

[25] I, in addition, relied on the judgment in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 27, which I deemed apposite:

> "*Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.*"

[26] In the circumstances, I was of the view that the judgment was not erroneously granted and should not be set aside in terms of Rule 42(1). Hence, I declined the application for rescission of judgment.

[27] In the application for leave to appeal, which was heard on 16 November 2023, CoJ sought to demonstrate that the application for leave to appeal would have a reasonable prospect of success. In addition, it sought to demonstrate that there is also another compelling reason why the appeal should be heard, including conflicting judgments on a matter under consideration. The first error relied on is that Wright J applied his mind on the issue of service and regarded it sufficient under the Rules, despite Makume J's order. Wright J makes specific reference thereto and was clearly satisfied that, notwithstanding Makume J's order, the service on Kekana was sufficient.

[28] My finding, that if Wright J was aware of the error in the particulars of claim and the fact that condonation was required, is argued to be sufficient to demonstrate that the judgment was erroneously granted in non-compliance with the Act. It is submitted that I ought to have found that the failure of the plaintiffs and their legal representatives to disclose that they had not complied with the Act and the Rules is argued to be sufficient to meet the requirements of Rule 42(1). This does not take into account the fact that service on Mr Kekana, notwithstanding Makume J's judgment and order, *ex post facto*

demonstrated when the order was ultimately served on him, that CoJ is perfectly able to receive and respond to service even where no service took place on the head of legal. In the absence of any explanation or the fact that CoJ only sprints into action when the order is granted but does nothing when an application is served upon it suggests to me that there is an element of disingenuity in its defence.

[29] The inference I have drawn from this is that they had knowledge of the application for rescission of judgment and deliberately did not attend court. If they had attended court, all that would have happened is that they could have raised the defence of condonation but, in my view, where a party simply ignores the proceedings issued against it, it cannot *ex post facto* rely on its own failure to attend and to raise a defence. I accept that good cause is not necessary an element for the purposes of setting aside a judgment that was erroneously granted under Rule 42(1), but it is similarly not a basis to raise a defence *ex post facto* under circumstances where it deliberately failed to attend.

[30] One of the submissions raised in its heads of argument is a reference to *S v Mabena and Another*, where the Supreme Court of Appeal stated that an application for leave to appeal should not be regarded as an impertinent challenge. The full context of the circumstances under which this was stated are evident from paragraph 22 of the judgement and reads as follows:

"*[22] It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree. The record of what occurred in the present case is disturbing. Once more the prosecution, represented by Ms Mahanjana, was given no proper opportunity to be heard. Instead she was subjected by the judge to a relentless barrage of hectoring questions and assertions, to which she was expected to do little more than acquiesce, designed to demonstrate to those present, and in particular the press, that the judge's decision was justified. In the course of this hectoring the propriety of Ms Mahanjana's professional conduct, and that of the Director of Public Prosecutions in applying for leave to appeal, was called into question, and the judgment that followed went so far as to question Ms Mahanjana's integrity. It needs to be said that I have found nothing in the record to warrant any of those imputations. On the contrary, Ms Mahanjana showed remarkable resilience and fortitude, in circumstances which she must have found both difficult and humiliating. Some of the incorrect concessions that she made in the course of the proceedings, which are apparent from the extracts that I have referred to, and which were latched upon by the judge to bolster his reasons for granting the order, are understandable in the circumstances in which she found herself. The record in relation to this aspect of the proceedings, taken together with the dismissiveness with which the prosecution was dealt with earlier, creates a distinct and disconcerting impression of hostility to and partiality against the prosecution that is out of keeping with the dispassionate impartiality with which judicial proceedings ought to be conducted.*"[1]

[31] I do not quite comprehend the reason for this being raised, same being trite and an approach I invariably follow.

[32] It was further submitted that:

"*7. Thus, it is trite law that the court considering the application for leave to appeal should not focus too intently on individual parts of evidence, but rather adopt a holistic approach in evaluating*

[1] *The State v Mabena* [2006] SCA 132 (RSA) this being the neutral citation and available on SAFLII.org.za.

the evidence before it, by having regard to the mosaic of proof as a whole."

[33] It is exactly because of this, and the fact that I had to take into account the full conspectus of facts and circumstances, and in particular CoJ's behaviour before and after service of the proceedings and after service of the judgment, that I came to the conclusion that I did. In the context of the present matter, the mosaic of proof as a whole in this matter tends to show that CoJ follows a deliberate approach, i e no response prior to any order having been granted against it.

[34] I accept implicitly that the purpose of the relevant section is to enable CoJ to investigate and to consider the claims made against it responsibly before getting involved in litigation of public expense, so they can either accept or reject such claims. In my view that is not the approach the CoJ followed in this matter.

[35] None of the authorities raised in the heads of argument deal with the situation where one is able to conclude from the returns of service that CoJ blows hot and cold in respect of service. In my view, this is not a case where they had no opportunity to investigate. Even where the notice was sent late in terms of the Act, they had ample opportunity to investigate. After the service upon Mr Kekana, they also had opportunity to even further investigate or come to court and raise the issue. If the issue was raised, and, rather than agree to condonation, they required more time to investigate the case, all they had to do was

to respond to the service and not only respond *ex post facto* once an order is granted.

[36] If the CoJ does not want to attend to matters where service took place on Mr Kekana, it should not complain that it was unable to raise the defence of condonation, especially when it ultimately responds to further service on Mr Kekana under circumstances where an order has already been granted against it.

[37] In my judgment, I made specific reference to the judgment in the case of *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at paragraph 27, which reads as follows:

> "*Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."* (my emphasis)

[38] In the absence of CoJ appearing before Wright J and raising the issue of condonation, it would appear to me that the respondents are quite correct by referring to the decision of *Minister of Safety and Security v De Witt* (722/2007) 103 [2008] ZASCA (19 September 2008), at paragraph 10, where Lewis JA, for the SCA, stated the following:

"*In my view, the argument loses sight of the purpose of condonation: it is to allow the action to proceed despite the fact that the peremptory provisions of s 3(1) have not been complied with. Section 3 must be read as a whole. First, it sets out the prerequisites for the institution of action against an organ of state: either a written notice or consent by the organ of state to dispense with the notice. Second, it states the requirements that must be met in order for the notice to be valid. And third, it states should he or she have failed to comply with the requirements of subsecs (1) and (2): he or she may apply for condonation for the failure. Thus either a complete failure to send a notice, or the sending of a defective notice, entitles a creditor to make the application. Even this is qualified: it is only 'if an organ of state relies on a creditor's failure to serve a notice' that the creditor may apply for condonation. If the organ of state makes no objection to the absence of a notice, or a valid notice, then no condonation is required. In fact, therefore, the objection of the organ of state is a jurisdictional fact for an application for condonation, absent which the application would not be competent."*

[39] I was further referred to the decision in *The Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma and Others*[2] where the Constitutional Court, confirming the well-established principle of rescission, stated as follows in par 56 of the majority judgment:

"Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words "granted in the absence of any party affected thereby", as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent."

and in paragraph 68 of the majority judgment stated that:

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2 [2021] ZACC 28

"Whether we consider this application in terms of rule 42 or in terms of the common law, to which I will turn my focus next, the insuperable problem that Mr Zuma is confronted with is that the law of rescission is clear: one cannot seek to invoke the process of rescission to obtain a re hearing on the merits. The reason for this is that, as stated by this Court in Daniel: "the general principle is that once a court has duly pronounced a final order, it becomes functus officio and has no power to alter the order". Of course, rule 42 creates an exception to the doctrine of functus officio, but only in narrow circumstances. As stated in Chetty—

> *"a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission .... In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the Court was regarded as functus officio."*

[40] The respondents in this appeal, the original plaintiffs in the matter, contend that CoJ has always, throughout the matter, taken a hostile position towards the Rules of Court and failed dismally to comply with both its directives and also never sought any condonation for its conduct. The respondents further emphasise that, section 17 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"), regulates applications for leave to appeal and reads as follows:

"***17 Leave to appeal***

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[41] They also made submissions to the effect that, under the Superior Courts Act, the full bench of the Gauteng Division Pretoria, in the matter of *Acting National Director of Public Prosecutions and Others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [3]stated that:

> "The **Superior Courts Act has** raised the bar for granting leave to appeal in **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others,** Bertelsmann J held as follow:
>
> > *'It is clear that the threshold for granting leave to appeal against* a *judgment of* a *High Court has been raised in the new Act. The former test whether leave to appeal should be granted was* a *reasonable prospect that another court might come to* a *different conclusion, see* ***Van Heerden v Cronwright & Others*** **1985 (2) SA 342** ***(T) at 343H.*** *The use of the word "would" in the new statute indicates* a *measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*'"

[42] I was urged to take the above into account when considering whether there are reasonable prospects of success on appeal.

[43] It was also submitted that CoJ's absence was voluntary and that there are no prospects of success on appeal. Under the rubric of any other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration, no specific

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[3] *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 (24 June 2016) Para 25, 29 and 31. See especially Para 25.

cases were quoted by CoJ. The respondents, quite rightly, point out, at paragraph 29 of their heads of argument, that in its application for leave to appeal the other ground that the applicant relies upon, i e that the applicant has numerous pending cases that it has launched in this division in regard to rescission whose facts are similar to this proposed appeal and which will be affected by the outcome of the proposed appeal, should be taken into account. The respondents, in my view, quite rightly submit that this portrays a clear misunderstanding of the principle governing leave to appeal, particularly the requirement that the applicant should state compelling reasons why they should be heard.

CONCLUSION

[44] In view of all of the aforesaid, I have concluded that there are no merits in this application for leave to appeal and hence it should be dismissed. In the premises I make the following order:

> "The application for leave to appeal is dismissed with costs".

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S. VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

Date heard: 20 November 2023
Date reserved: 20 November 2023
Date delivered: 12 December 2023

Representation for applicant

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