

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

A220/14.

CASE NO.: 15860/2013

DATE: ~~45~~ SEPTEMBER 2016

21.

|                  |                                       |
|------------------|---------------------------------------|
| (1)              | REPORTABLE: YES / NO                  |
| (2)              | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3)              | REVISED: YES / <del>NO</del>          |
| <br>             |                                       |
| <u>20/9/2016</u> | <u>[Signature]</u>                    |
| DATE             | SIGNATURE                             |

In the matter between:

**WARRICK LESLIE VISSER HEPPEL**

Applicant

and

**THE LAW SOCIETY OF THE NORTHERN PROVINCES**

Respondent

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**J U D G E M E N T**

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**DE VOS J:**

- [1] The application for leave to appeal in this matter served before myself and my brother, Motgotsi AJ, on 25 February 2014. Leave to appeal against our judgment, handed down on 05 December 2013, was granted to the applicant. The order which was granted on 25 February provided that leave be granted to the full bench of this Court.

[2] It was subsequently brought to our attention that leave to appeal to the full bench of this Court is inadmissible as section 16(1)(a)(ii) of the Superior Courts Act, No. 10 of 2013 specifically provide that:

*“16.(1) Subject to section 15(1), the Constitution and any other law –*

*(a) An appeal against any decision of a Division as a court of first instance lies, upon leave having been granted --*

*(i) ...*

*(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal”.*

[3] It is abundantly clear that when judgement was delivered on 05 December 2013 the court presided by myself and Mogotsi AJ became *functus officio*. The application could accordingly no longer be regarded as a pending proceeding for the purposes of section 52(1) of the Superior Courts Act, as the provision of the Act are not to be applied to pending cases. Section 52(2) of the Act defines pending cases as matters where summons had been issued but judgement had yet to be passed as at the date of the commencement of the Superior Courts Act. The Act came into operation on 12 August 2013. The notice of motion was issued during March 2013. The main application was to be concluded in terms of the provisions of the Supreme Court Act, which was in fact done. The Supreme Court Act was no longer applicable when the application for leave to appeal was issued. The application for leave to appeal was dated 09 December 2013 and should therefore be concluded in terms of the Superior Courts Act. Section 16 of the Superior Courts Act does not alter the position as it was under section 20 of the Supreme Court Act.

[4] From the foregoing it is clear that the referral to the full court cannot stand and should be recalled in terms of Rule 42 of the Rules of Court. Rule 42 of the Rules of Court provides that a court may *mero motu* or upon application of any party affected, rescind and vary:

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby.

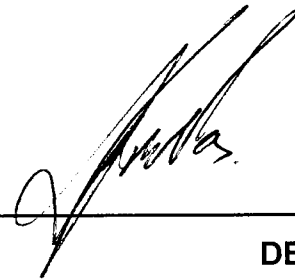
(b) An order or judgement in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; and

(c) An order or judgement granted as the result of a mistake common to the parties.

[5] Subsection (3) provides that the Court shall not make any order rescinding or varying any order or judgement unless satisfied that all parties whose interest may be affected have notice of the order proposed. Such a notice was sent to both parties on the 29<sup>th</sup> July 2016, informing them that we intend to recall that portion of the order granting leave to appeal to the full court of this division and to substitute same granting the applicant leave to appeal to the Supreme Court of Appeal. The parties both concurred with the proposed amendment.

ACCORDINGLY THE FOLLOWING ORDER IS MADE:

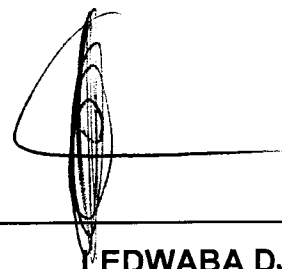
1. The order granted by myself and my brother Mogotsi AJ on 25 February 2014 is recalled and substituted with the following order:
  - 1.1 Leave to appeal is granted to the Supreme Court of Appeal;
  - 1.2 Costs shall be costs in the cause.



**DE VOS J**

JUDGE OF THE GAUTENG DIVISION  
OF THE HIGH COURT OF SOUTH AFRICA

I agree and it is so ordered.



**LEDWABA DJP**

DEPUTY JUDGE PRESIDENT OF THE GAUTENG DIVISION  
OF THE HIGH COURT OF SOUTH AFRICA  
(ON BEHALF OF MOGOTSI AJ)