IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 42344/20

Reportable: No

Of interest to other Judges: No

Revised: No

In the matter between:-

MARIAN VAN DER MERWE	APPLICANT
And	
SAFE WATERKLOOF NPC	FIRST RESPONDENT
WATERKLOOF HOMEOWNERS ASSOCIATION	SECOND RESPONDENT
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	THIRD RESPONDENT
THE CHAIRPERSON OF THE MUNICIPAL PLANNING TRIBUNAL: TSHWANE METROPOLITAN MUNICIPALITY	FOURTH RESPONDENT

LOUIS JORDAAN UYS	FIFTH RESPONDENT
JOHANNES PETRUS DE WET STRYDOM	SIXTH RESPONDENT
ANTHONIE MICHAEL FERREIRA	SEVENTH RESPONDENT
SOPHIA JOHANNA FERREIRA	EIGHTH RESPONDENT
NAOMI MATHILDA MARINI	NINTH RESPONDENT
ERIC VAN DER MERWE	TENTH RESPONDENT
TSHEPO SETLHAKE	ELEVENTH RESPONDENT
LUKHANYO NTANJANA	TWELFTH RESPONDENT
JOHANNES HERMANUS GROBLER	THIRTEENTH RESPONDENT
MADODA ALFRED PETROS	FOURTEENTH RESPONDENT
GLORIA NOMLINDA PETROS	FIFTEENTH RESPONDENT
CONRAD WERNER ENGELBRECHT	SIXTEENTH RESPONDENT
SYLVIA ENGELBRECHT	SEVENTEENTH RESPONDENT
SUZANNE UYS	EIGHTEENTH RESPONDENT
RUSSEL JOSS	NINETEENTH RESPONDENT
INGRID CARPENTER – KLING	TWENTIETH RESPONDENT
CHRISTIAAN E.G. MULDER	TWENTY-FIRST RESPONDENT

ANNA VALENTE	TWENTY-SECOND RESPONDENT
BARBARA ELLEN BARON	TWENTY-THIRD RESPONDENT
DIMITRI KAVALLINEAS	TWENTY-FOURTH RESPONDENT
BARBARA STUPEL	TWENTY-FIFTH RESPONDENT
COZA INVESTMENTS (PTY) LTD	TWENTY-SIXTH RESPONDENT
JEANNETTA VAN DER MERWE	TWENTY-SEVENTH RESPONDENT

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant seeks an order rescinding the order granted by De Vos J under the above-mentioned case number 42344/2020, dated 25 September 2020 and (b) for intervention as a party under the above-mentioned case number.

2. Alternatively, an order declaring that the Municipal Council of the City of Tshwane Metropolitan Municipality (the municipality), the third respondent, or its delegate referred to in the Tshwane Municipal Council Resolution approved on 31 March 2011, did not take a decision in terms of section 45(3) of the Rationalization of

Local Government Affairs Act, No. 10 of 1998. Also, no resolution was passed by the Municipal Council or its delegate that it intends to authorize the restriction of access as applied for by the first respondent, Safe Waterkloof NPC (the NPC).

3. The applicant was not a party when De Vos J's order was granted. The order was granted following an application by the NPC against the municipality. Both parties were legally represented at the time of granting the said order by De Vos J.

4. The first and second respondents oppose the application. The applicant stated in her affidavit that she was not a member of the first and second respondents. However, from time to time, she made financial contributions to certain projects of the second respondent.

5. The third to the twenty-seventh respondents did not participate in this application. However, there is a pending application *as in casu under the above-mentioned case number,* brought by the fifth to twenty-fifth respondents.

Background

6. It is common cause that the applicant resides in M[....] Street, forming the Northern border of the proposed road closure. In 2017 she engaged with the first and second respondents regarding the proposed road closure project. She raised concerns about the impact same will have on the traffic on M[....] Street. Her inputs into the project's design phase were not considered, and she had a sense that she was excluded from the project, being a registered owner and permanent resident of a property in the said area.

7. On 12 December 2018, the NPC submitted to the municipality the "Waterkloof Access Restriction Application" to install and implement controlled access and monitoring systems and measures in an area of Waterkloof, Pretoria, within the jurisdiction of the City of Tshwane. The relevant municipality officials and the various municipality units had positively considered the NPC's access restriction application. They recommended to the Mayoral Committee of the Municipality that the application be approved. However, the Mayoral Committee of the City of Tshwane did not

decide in respect of the application.

8. The NPC brought an application. On 25 September 2020, De Vos J granted an order directed at the failure of the municipality to decide so that such failure be reviewed and declared to be unlawful in terms of section 6(2) (g) and 6/3) (a) read with section 8(1)(d) of Promotion of Administrative Justice Act No. 3 of 2000 /"PAJA").

9. Between September and October 2020, the applicant heard rumours about the court order. She got a copy of same in March 2021. On 19 January 2021, she filed an objection to the access restriction. On 1 February 2021, the applicant was informed that her objection would not be considered because it was out of time, as the last date for objections was 30 November 2020.

10. In July 2021, she became aware of the fifth to twenty-fifth respondents' rescission application against the same order by De Vos J. She subsequently lodged this application for rescission in terms of rule 42(1)(a), (b) and (c) of the Uniform Rules, or the common law.

Issues

11. The issues to be determined are;

11.1. Whether the applicant has established any ground for rescission of the order;

11.2. Whether this court is competent to order the applicant's inclusion or participation in the proceedings under this case number.

11.3. Whether the applicant has made out a case for the declaratory order that it seeks as an alternative to the rescission.

Discussion

Applicant's case

12. In her affidavit, the applicant refers to the review application matter between the second respondent and the municipality under case number 4168/2019, which pertains to the municipality's approval of the road closure application. She states that that application is of importance and relevance to this her application.

13. It was argued on behalf of the applicant that the order was erroneously sought and erroneously granted for the following reasons appearing from the record in the matter that served before De Vos J, which entitles this court to mero motu rescind the order:

13.1. No evidence was presented before De Vos J that the NPC exhausted its internal remedies as provided.

13.2. No record of the proceedings before the municipal council was placed before De Vos J. Without a record, the court could not perform its constitutionally entrenched review function.

Reference was made to Minister of Cooperative Governments and Traditional Affairs v De Beer and Another (2021) ZASCA 95 (1 July 2021) and Helen Suzman Foundation v Judicial Service Commission and others (134/2015) (2016) ZASCA 161;(2017) 1 All SA 58 SCA, 2017 (1) SA 367 (SCA) at para 26.

13.3. The non-joinder of the administrator appointed after the dissolution of the municipal council, as the administrator, does not fall within the definition of the municipality. The administrator is a different entity from the municipality, which is a separate legal *persona.*

13.4. In issuing the order, the court extended its role beyond the pleadings, the relief sought, and the evidence. In these circumstances, the granting of the supervisory order and/or structural interdict falls foul of the fundamental principle that courts are restricted to the pleadings.

Reference was made to Unreported Judgement: Jan Arnold Vermeulen and

others v Minister van Veiligheid en Sekuriteit and others, Northwest High *Court, Mafikeng, Case number:1377/2008 at paragraph 11* and *Baedex Financial Corporation (Pty) Ltd v Selolo, 2015 JDR 2689 (GJ) at paragraph 15*.

13.5. The Court effectively and proactively (and without any foundation) reviewed a future "failure to take a decision" as contemplated in PAJA, set it aside, and "substituted" this purported failure to take a decision with its own decision. This relief was not sought in the notice of motion, and no evidence was presented in support thereof.

14. On behalf of the applicant, it was argued that the order was erroneously sought and erroneously granted as, at the time of the issue of the order, De Vos J was unaware of some information as it was not disclosed to him. The same does not appear in the record. De Vos J would not have been aware of the following:

14.1. The pending review application of Waterkloof Home Owners Association, the second respondent versus the municipality, under case number 4168/2019.

14.2. The minutes of the Municipal Planning Tribunal meeting dated 19 August 2020, in which the NPC’s road closure application was addressed.

14.3. A report drafted by a certain Ms Nicolene Le Roux on behalf of the municipality. The fact (alleged by Le Roux) that a meeting was to convene on 25 September 2020 to consider the NPC's road closure application.

14.4. A report (referred to by Le Roux) approved by the administrator in May 2020 dealt with the replacement of the councillors.

14.5. Due to the politically sensitive nature of the road closure application, the Municipal Planning Tribunal did not deal with the application. However, it was dealt with in terms of the City of Tshwane Political Committees.

15. The order made by De Vos J is of a public character that transgenes the

interests of the specific litigating parties, which makes it an order in *rem*.

Referred to Buffalo City Metropolitan Municipality v Alsa Construction(Pty) Ltd 2019 (6) BCLR 661 (CC) at paragraphs 1 to 3.

16. The order prescribes a procedure through which a final decision is made without interested parties who did not form part of the litigation having control over protecting their rights. It further deprived the general public of making submissions to ensure compliance with the order by the executive authority of the Tshwane Municipality.

17. The order constitutes a supervisory order, also known as a structural interdict. The purpose of a structural interdict is for a court to give further ancillary orders or directions as might have been necessary to ensure the proper execution of its order. Such an order should only be made in specific terms when necessary. When the parties always respect and execute orders of the court, there is no reason to believe that it will not do so in a particular case, and a structural interdict will, in those cases, not be necessary.

18. No evidence was presented to the court that the municipality would not comply with the court order. It is submitted that a proper supervisory order would have allowed the municipality to report back to court instead of the court making the order it did. Reference was made to Pretoria City Council v Walker 1998 (2) SA 363 (CC) at paragraph 96.

19. An order in rem determines the objective status of a person or a thing. Reference was made to the case of Tshabalala v Johannesburg City Council 1962 (4) SA 367 (T) at 368. When making an order in *rem*, a court must give reasons for its decisions, especially if it approves a settlement agreement on appeal that sets aside a trial court's judgment in *rem*. It is submitted that this principle also applies when a court makes a draft order an order of court. Stuttafords Stores v Salt of the Earth Creations 2011 (1) SA 267 (CC) was referred to. As with settlement agreements, draft orders can only be made an order of court if it conforms to the Constitution and the Law. Reference was made to Airport Company South Africa v

Big Five Duty Free (Pty)Ltd (2018) ZACC at paragraph 13.

20. De Vos J did not consider the draft order against the background of the Airport Company's case and the Eke's case as:

20.1. No order was made regarding urgency.

20.2. The court did not consider the issue of internal appeal, as provided for in PAJA.

20.3. No consideration was given as to why the Rule 53 procedure was not followed and why no record of the decision was before the court.

20.4. No consideration was given as to why the administrator was not joined.

20.5. No evidence was presented that the municipality would not comply with the court order, and therefore no supervisory order was necessary.

20.6 There is no indication in the order as to why the court needed to refer the matter to the Municipal Planning Tribunal.

20.7. The NPC applied for an interim order. However, they were granted a final order.

20.8. The Court erred in not sufficiently considering and applying the concept of separation of powers in this regard, as the order appears to indicate that the Executive Authority has no other choice but to approve the application in the event of the recommendation by the Municipal Planning Tribunal was one of approval.

20.9. The court order did not make any provision for a situation where the Municipal Council could not decide within the 6 (six) week period.

21. De Vos J should have declined to hear the matter at all as a result of his interest in the matter. The test for recusal is whether, seen objectively, the Judicial

Officer is either: factually biased; or whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the adjudication of the case.

22. The mere possibility of bias apparent to a layman on the part of a judicial officer is insufficient in the absence of an extrajudicial expression of opinion in relation to the case or in the absence of another recognized ground for rescission. Reference was made to the case of President of the Republic of South Africa v South African Football Union 1999 (4) SA 147 (CC) at 172B and 177B-E.

23. It was further argued that one must look at the presumption of impartiality and double requirement of reasonableness and that justice should not only be done but should manifestly and undoubtedly be seen to be done. I was referred to (a) South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) at 713H-714A, (b) Sv Basson 2007 (3) SA 582 (CC) at 605E-F (c) Rex v Sussex Justices, Ex parte McCarthy /1924) 1 KB 256 at 259 and (d) Erasmus Superior Court Practice.

24. The court did not disclose its residence and membership. Therefore reasonable impression in the mind of the applicant and the public, in general, is created that the court would not be impartial in its decision on the merits of the NPC’s application due to its interest in the NPC's application served before it.

25. De Vos J's eventual order in the matter affected the rights of parties, like the applicant and the residents of Rupert Street, who were objectors to the road closure applications who were not before him on the day.

Respondent’s case

26. The following was argued on behalf of the respondents:

26.1. The access restriction application served before the municipality was not before De Vos J. What served before De Vos J was an application to direct the municipality to consider and take a decision. The applicant's case

is a merits review of what served before the municipality, a disguised appeal on facts of a different decision.

26.2. There was no procedural lapse in the matter before De Vos J. The NPC was procedurally entitled to the order as all affected parties were adequately notified of the relief that may be granted.

26.3. The alleged defence as to why the order should not have been granted is a matter for appeal, not rescission. The order was not '*erroneously granted*' within Rule 42(1). The question of whether an order is '*erroneously granted*' under Rule 42(1) relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim.

26.4. The order granted became fully satisfied when the municipality took the required decision. The issues became moot once the municipality carried out the order granted. Any rescission of that order is merely an academic exercise. The administrative decision of the municipality exists in fact and law.

26.5. Even where a ground of rescission is present, the court has broad discretion to refuse a rescission. "In circumstances such as these, a party who did not oppose or participate in the proceedings would not be entitled to relief under rule 42(1)(a)". Reference was made to the cases of (a) Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at para 25 *(b)* Lodhi 2 Properties Investments CC v Bondev Developments 2007(6) SA 87 (SCA) at para 24 *(c)* Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

27. The application relies on facts relevant to the decision on the access control, the merits of which were not determined in the review application by De Vos J. The application does not distinguish the decision of De Vos J and that of access control.

28. The order sets a mechanism for decisions by the municipality. The municipality was obliged to decide on the merit of the access restriction application in

favour of or against the NPC. Nothing in the order granted required the city to approve the access restriction application in any particular manner.

29. The alternative relief sought is an undisguised appeal over the municipality's decision. The municipality decided on the access restriction application. The objection by the applicant to the municipality's processes has been dismissed. The declaratory order must be of practical effect or advantage to someone. The order is sensitive to the interplay of the Acts and by-laws governing the municipalities.

30. This court has no inherent power to set aside its judgments as it cannot sit as a court of appeal on its own judgment and also cannot review it. The judgment was not obtained in default of the applicant's appearance as she was not a party to the proceedings.

Conclusion

31. For an applicant to succeed in a rescission application under the common law, they must prove that there is "sufficient" or "good cause" to warrant rescission. The applicant brought her rescission application within a reasonable time as she brought it after she had the court order and learnt that other interested parties have applied to rescind the said court order.

32. For rescission under the common law to succeed, an applicant must show good cause by giving a reasonable explanation of the default. It has to show that the application is bona fide and that the applicant has a bona fide defence to the claim, which prima facie has some prospect of success. See Chetty v Law Society, *supra.*

33. The application, in *casu,* relies on facts relevant to the decision on the access control, the merits of which were not determined in the review application by De Vos J. The application does not distinguish the decision of De Vos J and that of access control. The application appears to be on the review of De Vos J's order or appeal against same. The facts raised are not cogent for the rescission application. It refers to the court having erred and not considered some or other facts in its determination of the application. It is not required of the applicant who brings a rescission

application. The application, therefore, stands to fail.

34. The application before De Vos J was not into the merits of the NPC's application, which was before the municipality, but the fact that the municipality had failed to decide in terms of PAJA.

35. It is trite that the court has the power to rescind its orders or judgment in terms of rule 42 (1) (a) and (b), which provides as follows:

> "*Variation and rescission of orders*
>
> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties.*
>
> *(2) Any party desiring any relief under this rule shall make an applica8on upon no8ce to all par8es whose interests may be affected by any varia8on sought.*
>
> *(3) The court shall not make any order rescinding or varying any order or judgment unless sa8sfied that all par8es whose interests may be affected have no8ce of the order proposed."*

36. In 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) ZACC 28, para 53, the Constitutional Court explained the import of rule 42 as follows:*"[53] It should be pointed out that once an applicant has met the*

requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."

37. Two requirements in terms of rule 42 (1) (a) of the Rules the applicant needs to satisfy. It must show the existence of both the requirements that the order or judgment was granted in their absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse the rescission to rescind an order regarding fairness and justice.

38. In Tshabalala v Peer (2021) ZACC 28, para 53, the court held that if the court finds that an order or judgment was erroneously granted in the absence of any of the affected parties, it should, without further enquiry, rescind or vary the order. The applicant was not a party to the application that was before De Vos J.

39. The requirement that the order was erroneously granted is generally satisfied when the applicant can show that at the time the order was made, there existed a fact that, had the court been aware of it, it would not have granted it.

40. For the applicant to contend that the order was granted in her "absence", she must establish the interest to be affected by the municipality being ordered to consider and determine the application.

In Lodhi 2 Properties Investments CC v Bondev Developments (Pty) (Ltd) (128)/06) 2007(6) SA 87 SCA at para 24, "*Where notice of proceedings to a party is required, and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason, not*

been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If in these circumstances, judgment is granted in the absence of the party concerned, the judgment is granted erroneously".

41. The applicant has not addressed why the order would not have been granted or which portion of the said order affects her right. It is evident that the alleged effect on the applicant is not the order of this court but the decision on the access restriction application. The approval by the municipality of the access control application by the NPC followed a process only after this court granted the order.

42. The NPC was procedurally entitled to the order as all affected parties were adequately notified of the relief that may be granted. Joinder of a party is only required as a matter of necessity if that party has a direct and substantial interest which may be affected prejudicially by the court's judgment in the proceedings concerned.

43. The fact that the applicant may be interested in the litigation's outcome does not warrant a non-joinder plea, which is the applicant's claim that the order was granted in her absence.

See Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at para 25, where it was held: "In circumstances such as these, a party who did not oppose or participate in the proceedings would not be entitled to relief under rule 42(1) (a)" The word "absence" in Rule 42(1)(a) "exists] to protect litigants whose presence was precluded, not those whose absence was elected".

44. The Municipal Council was dissolved in terms of section 139 of the Constitution on 10 March 2020 by a decision of the Gauteng Provincial Executive Council as a result of a deadlock in decision-making by the Municipal Council. The administrator was appointed. The administrator was represented when the municipality defended the matter before De Vos J. In my view, citing the administrator when the municipality was already party to the proceedings was not required.

45. I agree with the respondents that the administrator has no particular interest in

the litigation, which is separate from the municipality's. The applicant has not demonstrated that her interest is affected by the non-citation of the administrator. No prejudice is alleged, and what is before the court does not constitute a good cause for rescission.

46. The approval by the municipality of the access control application by the NPC followed a process only after the order was granted.

47. In my view, the court did not grant the order in error in the absence of the applicant, as they were not cited as a party to the application. The court disclosed that it was resident in the neighbourhood related to the application. The legal representatives on behalf of the litigants before it had no objection against it proceeding to hear the matter.

48. In my view, for one to be said they are biased or impartial, their conduct must be read and interpreted within the context and the effect of the consequences of the non- recusal. The presiding of the court in *casu* was inconsequential as the order, whether for or against the NPC, had nothing to do with the approval of the NPC's application. All it meant was for the municipality to convene, deliberate, and decide on the matter.

49. In the result, I find that the applicants have not met the requirements in terms of rule 42(1)(a), 42(1)(b) or at common law for having the judgment or order granted on 25 September 2020 rescinded and set aside. The applicant is at liberty to apply to join as a party under the above case number in the other applications of her interest.

50. The alternative relief for a declaratory order that the municipal council or its delegate did not take a decision; therefore, no resolution was passed that intends to authorize the restriction of access as applied for by the NPC cannot succeed. No cogent and adequate facts were placed before the court. Therefore, such a declaratory order cannot be justified.

51. The municipality followed its process in deciding the access control application. Before the court order, the council had reached a deadlock, but that did not mean

that it had no systems and processes in place to take decisions in matters like the one brought by the NPC.

52. In the circumstances, the applications stand to be dismissed

53. For these reasons, the following order is made:

1. The rescission application is dismissed.

2. The application for a declaratory order is dismissed.

3. The applicant is to pay the costs on a party and party scale.

N. MAZIBUKO
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email by being uploaded to Case Lines. The date for hand-down is deemed to be on 17 October 2022.

Representation

For the applicant:	Mr Gerhard Wagenaar
Instructed by:	Gerhard Wagenaar Attorneys

For the first and second respondents:	Adv LGF Putter, SC Adv S Ogunronbi
Instructed by:	Duke Attorneys
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