

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 11541/2023

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
DATE: <u>09/05/2025</u> SIGNATURE: <u>[Signature]</u>	

In the matter between:

SAMWU POLOKWANE WORKERS FUND

1ST APPLICANT

POLOKWANE WORKERS FUND

2ND APPLICANT

SOUTH AFRICAN MUNICIPAL WORKERS UNION

3RD APPLICANT

-and-

TSHIDISO BUSINESS ENTERPRISE CC

1ST RESPONDENT

FIRST NATIONAL BANK

2ND RESPONDENT

In re:

TSHIDISO BUSINESS ENTERPRISE CC

APPLICANT

-and-

SAMWU POLOKWANE WORKERS FUND

1ST RESPONDENT

POLOKWANE WORKERS FUND

2ND RESPONDENT

SOUTH AFRICAN MUNICIPAL WORKERS UNION

3RD RESPONDENT

In re:

TSHIDISO BUSINESS ENTERPRISE CC

APPLICANT

-and-

STANDARD BANK OF SOUTH AFRICA LTD

1ST RESPONDENT

POLOKWANE WORKERS FUND

2ND RESPONDENT

CITY OF POLOKWANE MUNICIPALITY

3RD RESPONDENT

SAMWU LOCAL BRANCH

4TH RESPONDENT

FIRST NATIONAL BANK

5TH RESPONDENT

WRITTEN REASONS

MANGENA AJ

[1] **Tshidiso Business Enterprise CC (Tshidiso)** has been involved in a litany of court cases against the respondents (**SAMWU**). The dispute arises out of the contract concluded for the provision of services for which the respondents were

liable to pay on an agreed formula. What I was called upon to decide on has nothing to do with the contract, but issues related to an order granted by **my brother Diamond AJ** on **18 March 2025**.

- [2] The genesis of the order is briefly as follows: -On the **12 December 2023** **Tshidiso** approached the court *ex-parte* in which she sought to interdict **SAMWU** from operating / transacting on its **Standard Bank** and **First National Bank** accounts. The orders were granted by **my sister Bresler AJ** with the return date of **05 March 2024**.
- [3] **SAMWU** anticipated, as it was in law entitled to, and the matter came before **Semenya DJP** who reconsidered the *ex-parte* order and upon consideration of the facts placed before her by both parties, concluded that **Tshidiso** was not entitled to the order. She took umbrage at **Tshidiso's** failure to disclose crucial information that would have assisted the court in the adjudication of the matter. The crucial information related to the fact that there were previous applications under case numbers **12952/2022** and **3900/2023** which were disposed of and dismissed. In addition, **Tshidiso** was granted a substantially similar order under **case number 8781/2023** on **26 September 2023**. On the basis of its failure to act with utmost good faith by withholding crucial information to the court, the application was dismissed with costs.
- [4] Aggrieved by the dismissal order, **Tshidiso** applied for leave to appeal and same was granted by **Semenya DJP** to the full court on **20 September 2024**. **SAMWU** contends that the appeal has lapsed.
- [5] On the **3rd December 2024** **Tshidiso** appeared before **Naude-Odendaal J** once again seeking an order that First National Bank (FNB order) be ordered and directed not to allow any withdrawals from **SAMWU Workers Fund** account pending finalisation of the appeal under **case number 11541/2023**. This order came into immediate effect and a rule nisi was issued calling upon respondents to show cause on **18 March 2025**, at **10h00** why this order should not be made

final. It is unclear on the papers before me whether this application was served upon **SAMWU** or not. It is also not clear whether **Naude – Odendaal J** was made aware that there is a pending case between the parties under **case number 8781/2023**.

[6] In relation to **case number 8781/2023**, I may just point out that **Kganyago J** was also not pleased with the conduct of **Tshidiso** in so far as non-disclosure of material facts is concerned. Relying on *Phillips v Director of Public Prosecutions, 2004 (3) SA 615 (SCA)* at para 19, **Kganyago J** unhesitatingly found that **Tshidiso** failed in its duty to disclose all material facts. On this duty, the learned judge said: "The duty which is upon the applicant is to disclose facts that might influence the court in deciding the matter in a just manner. It is not upon the applicant to be selective as to which facts might influence the court. It's duty is to disclose all, and the court will decide which (ones) are relevant." As a mark of displeasure, he granted costs in favour of **SAMWU** on a punitive scale of attorney and client scale B. He therefore dismissed **Tshidiso's** application on **05 February 2025**.

[7] **SAMWU's** celebration was short-lived in that on the **13th February 2025**, **Tshidiso** once again approached the court in relation to the Standard Bank account. The notice of motion says that the application was to be heard on **18th February 2025**. The founding affidavit is dead silent on the orders of both **Semenya DJP** and **Kganyago J**. **Tshidiso** once more failed to make a material disclosure other than that there is a pending appeal. It is important to state that **Standard bank account** was not part of **Naude-Odendaal J's** order granted on **03 December 2024**.

[8] The application in relation to Standard Bank was scheduled to be heard by **Kganyago J** on **18 February 2025**, but was removed from the roll and later brought for an urgent hearing before **Diamond AJ** on **27 February 2025** where it was again removed from the roll with an accompanying order that **Tshidiso** pays the costs.

[9] The matter came before **Diamond AJ** who was doing urgent duty on **18 March 2025**. This was the date that **Naude-Odendaal J's** order prescribed as a return date where parties were to show cause why the order granted on **03 December 2024** should not be made final.

[10] **SAMWU** appeared in court on the **18 March 2025** together with its attorneys and counsel and found that the matter was not on the roll.

[11] **Tshidiso** admits that it is correct that the matter was not on the roll and says that this was due to a mistake on the part of the office of the Registrar. **SAMWU** contends otherwise and argued strenuously that the responsibility lied with **Tshidiso** to make sure that the court file is ready for hearing by the presiding judge. **Tshidiso** failed to do this and when the court (**presiding judge, Diamond AJ**) indicated that the file was not before him because the matter was not on the roll **SAMWU** together with its attorneys left.

[12] When the file was later found on the same day, **Diamond AJ** enrolled the matter and after listening to **Tshidiso's** submissions, gave an order interdicting **SAMWU** from operating both FNB and Standard Bank account. This order was made in the absence of **SAMWU** and reads as follows: -

" Having heard counsel for the applicant and having considered the documents read on file of record by the applicant it is hereby ordered that: -

- 1. It is hereby ordered that the rule nisi is hereby confirmed as follows;*
- 2. Directing that the matter be dealt with as one of urgency in terms of Rule 6(4) and Rule 6(12) and that the normal High Court Rules relating to this application has not complied with Rules of this court, that failure to do so is condoned.*

3. *The **fourth respondent, First National Bank** is ordered, and directed not to allow any withdrawals from account **SAMWU workers fund** account number xxxxxxxxx pending finalisation of the appeal case number: **11541/2023** in this matter.*
4. *It is ordered and directed that the respondent, **Standard Bank of South Africa Limited** is interdicted from allowing any withdrawal from account number xxxxxxxxx until all disputes are finalised by court order or by settlement.*
5. *No order as to costs."*

[13] **SAMWU** approached the court to have the order (**Diamond AJ order**) rescinded on two grounds, namely that it was not competent for **Diamond AJ** to grant an order against **Standard Bank** on the basis of a rule nisi issued by **Naude-Odendaal J** in **December 2024** as that order related only to FNB.

[14] Secondly, **Diamond AJ** was aware that **SAMWU** was in court earlier in the day and demonstrated its readiness and desire to present its case. The matter was not on the roll and the court had at that stage not read the file and/or prepared on it. After its representatives had engaged with the judge, they left on the understanding that the matter was not on the roll.

[15] **Mr. Thobejane**, for **Tshidiso** disagrees and argued that **SAMWU** was called by the court to appear on the **18th March 2025** and should have waited until excused by the court. Had they waited whilst he was sorting the "**mistake**" with the office of the Registrar, the court would not have granted the order(s) in their "**absence**". **Mr. Thobejane** urged me to find that **SAMWU** engineered its absence, and the court should not assist them. He called in aid the judgment of the Constitutional Court involving **Mr. Zuma** and "the state capture commission".

- [16] **SAMWU** contends otherwise and takes the view that on the objective facts, it attended court and cannot be blamed for leaving when the presiding judge told them that the matter was not on the roll. The court never said to them that they should wait whilst **Tshidiso's attorney** is sorting out the matter with the Registrar. They argued that their "**absence**" when the matter was enrolled and heard by **Diamond AJ** cannot be equated with the absence in the context of **Mr. Zuma**. The difference between them and **Mr Zuma** is that they came to court and **Mr Zuma** refused to go to court. This is a distinction with a difference as wide as an ocean and can never be placed in the same category. With this I agree.
- [17] The other issue related to the Standard Bank inclusion in the order of **18 March 2025** when same was not part of the order granted by **Naude-Odendaal J** on **06 December 2024** . As I understand SAMWU's case, it has been operating on the **Standard Bank account** since the dismissal of **Tshidiso's** application by **Semenya DJP**. This remained the position until the **18th March 2025** when **Diamond AJ** "**confirmed**" the rule nisi in their absence in circumstances where **Standard Bank** account was not supposed to have been included. They argued that the inclusion of **Standard Bank** on the confirmation order was an error committed by the court in their absence. They attack this order on two fronts, namely that the parties were never called upon to argue a joinder of **Standard Bank** as there was no joinder application. Secondly **Diamond AJ** could not have "**confirmed**" **Naude-Odendaal's** order as same did not include **Standard Bank**.
- [18] The application issued on **13 February 2025** in relation to **Standard Bank** was removed by **Diamond AJ** from the roll on **27 February 2025** with a costs order against **Tshidiso**. There was no order that it was going to be heard on **18 March 2025** together with a rule *nisi* issued by **Naude-Odendaal J**. The granting of the order inclusive of the **Standard Bank account** under one composite order in circumstances where there was no proper joinder in terms of Rule 10 is patently erroneous.

[19] The principles governing rescission applications are trite. The Supreme Court of Appeal reminded us of the proper approach as recent as **31 March 2025** in the matter of ***Obiang v Janse Van Rensburg and others* [2025] ZASCA 30 (31 March 2025)**. It said:

*“Rescission is a remedy available only in exceptional cases. Where the order is made in the absence of a party due to the omission of the other party to serve legal process on it, the party in whose absence the order was made may apply for rescission of the judgment in terms of Rule 42 (1) (a) of the rules. That party would bear the burden to justify the default that led to an adverse decision being made against him or her. The words “**absence of a party affected thereby**” in rule 42(1) are intended to protect a litigant whose presence was precluded as a result of a procedural irregularity in the proceedings. A litigant who elected to be absent will enjoy no protection under the rule. The order sought to be rescinded must have been erroneously granted because, at the time of its issue, there existed a fact the judge was unaware of which would have precluded the granting of the order and would have induced the judge if aware of it not to grant the order. Even where the requirements for rescission are met, a court retains the discretion to refuse an order for rescission”.*

[20] On the facts of this case, it is apparent that **SAMWU** was not in deliberate default in relation to the rule nisi which called upon them to appear in court on the **18th March 2025**. They honoured the court’s invitation, and the matter was not on the roll due to what **Tshidiso** calls the Registrar’s mistake. When **SAMWU** left, it did so not out disrespect for the court but because the matter was not on the roll. To expect them to wait until excused by the court when it was not known whether the file will be found or not is unjustifiable in the circumstances.

[21] **SAMWU** was also negatively affected by the order of **Diamond AJ** to the extent that it was “**confirmed**” in their “**absence**” when the court was aware that they appeared earlier that morning to oppose the “**confirmation**” of **Naude-**

Odendaal J's rule nisi. The inclusion of **Standard Bank** in the "**confirmation**" order was a procedural irregularity entitling **SAMWU** to the relief it seeks under Rule 42(1)(a).

[22] Guided by the applicable principles in rescission applications, I granted an order rescinding **Diamond AJ's** order issued on **18 March 2025**.

[23] With the above said, this court was recently rebuked by the SCA regarding the manner in which it handled matters with particular reference to *res judicata*. The censure was well-meant, and it brought much needed alertness and attentiveness on the part of the judges in the performance of their duties.

See: Board of Governors of Mitchell House School & Others v T K M (748/2023) [2025] ZASCA 15 (25.02.2025)

[24] It however needs to be stated that judges rely on legal practitioners to present their client's cases with utmost honesty and good faith. What happened in this case attests to the failure of the legal representative to observe the duties he/she owes to the court. The papers in all the applications which served before the various judges, since 2023 were drafted by a legal representative who knew and or was aware that she/he has an obligation to disclose previous cases which served before the court and were dismissed. He failed to do so, motivated by nothing but desire for instant glory in the eyes of his/her client. This conduct should not be countenanced.

[25] In conclusion, I consider it appropriate to remind legal practitioners of what the court said in **Mzayi v Road Accident Fund (480/2020) [2020] ZAECELLC 15; [2021] 1 All SA 517 (ECL) (17 September 2020)** and offer advance apology for a long quotation. It said:-

[83] ***"A legal practitioner has a pre-eminent duty to the court not to embark on a litigation plan that will mislead the court and this includes misleading the court on evidentiary and legal points. He is not***

permitted to knowingly offer or rely on false evidence or to misstate evidence. He may not induce a witness to give dishonest evidence or to depose to an affidavit containing a version different to what he knows to be true facts. He is not permitted to draft a statement of case, an affidavit or any other document which contains any statement of fact which is at variance with or unsupported by his instructions. To suppress evidence or worse still to suborn perjury, is to sabotage the administration of justice and it strikes at the heart of the legal practitioner's duty to the court.

[87] *The misleading of the court can take place by way of both commission and omission. As to the latter, to every legal practitioner comes those implacable moments when he is called upon to make a disclosure in respect of a difficulty in or challenge to the granting of an order which the Presiding Judge, not having the attributes of papal infallibility, has either overlooked or is unaware and which may result in the client losing his case. The legal practitioner must step-up and must not shirk his duty..... If because of the disclosure the order is refused, well then, the legal practitioner would have honourably fulfilled his role in the proper administration of justice.*

[93] *Legal practitioners must refuse to follow instructions from their clients if to do so would put the administration of justice and the public's faith in the profession in jeopardy. Cases can and should be fought fearlessly but they must be fought within the bounds of honour and propriety."*

[26] What happened in this case was a failure of ethics on the part of the legal practitioner and had the potential to result in different/multiple orders not consistent with each other and at worst having the effect of overturning other judges' orders in violation on the principle of *res judicata*. This should be discouraged.


 M. MANGENA AJ
 ACTING JUDGE OF THE HIGH COURT
 LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANTS/RESPONDENTS

: Adv. M R Maphutha +
 Adv. P M Seloga
 (1st 2nd & 3rd App/Resp)
 GM TJIANE ATTORNEYS INC

FOR RESPONDENTS/APPLICANTS

: Adv. L E Thobejane
 BOTHA MASSYN & THOBEJANE
 ASSOCIATED ATTORNEYS
 (1ST Resp/App)

HEARD ON

: 29 April 2025

REQUEST OF REASON ON

: 30 April 2025

DELIVERED ON

: 09 May 2025