

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-024353

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
DATE: 14-11-2025

In the matter between:-

A[...] M[...] Applicant
(IDENTITY NUMBER: 6[...])

and

M[...] A[...] M[...] Respondent
(IDENTITY NUMBER: 7[...])

JUDGMENT

CORAM: SCHOEMAN (AJ)

INTRODUCTION:

1. “[1] There are certain sayings that may fairly be described as proverbs pertinent to litigation that have developed over time and are apposite to this application. One is that where one litigates in haste, one repents at leisure. This proverb underlines the importance of properly considering one’s case before the launching of an application, especially an urgent one, to ensure that a proper case for relief is made out. Another is to avoid drafting with the proverbial “hot pen”. This leads ineluctably to emotive and sometimes incorrect statements being made in the papers.”¹
2. The above *dicum* finds, in this Court’s view, apposite application to the manner in which this matter was handled by the Respondent and her attorney of record, at the outset before the Urgent Court on 13 December 2024, and I wish to add to the above quote that sometimes incorrect statements are also purposefully being made in open court.
3. The proceedings before the Urgent Court, set in motion a litany of litigation, which in this Court’s view could have, and should have, been avoided. Such a manner of litigation, was remarked upon by this Court, as recently as 4 November 2025, in a judgment eloquently penned by the Honourable Justice Moshoana in the matter of **San Miguel Brewing International Limited v Power Horse Energy Drinks GMBHG [2025] ZAGPPHC 1155 (4 November 2025)**. The Court commenced its judgment with the following words, which are very much applicable to the current matter (and the proceedings preceding this Application), all the more considering that this Application does not bring the parties one iota closer to disposing of the real issues in their pending divorce action:-

¹ See: **Sekhethela v William, Fourways and Others (2023/085953) [2023] ZAGPJHC 1059 (21 September 2023)**

“[1] Parties involved herein were embroiled in a never-ending litigation since the year 2020. As at the handing down of these reasons, there was no visible ending in sight of this litigation. It seems to be an acceptable norm that trademark litigation ought to be conducted tortuously. Litigants in this type of litigation happily take a nonchalant approach to finality.”

4. While the aforesaid judgment remarked upon litigation concerning trademarks, in this Court's experience, the same can be said for matrimonial litigation, all the more when the parties are in the midst of a divorce.
5. For ease of reference, the parties shall, in this judgment, be referred to as they are cited in the present Application before Court.
6. On or about 3 December 2024, the Respondent caused service of an Urgent Application seeking an Order for interim anti-dissipatory relief aimed at, *inter alia*, interdicting and restraining the Applicant's pension fund from transferring 50% of the Applicant's pension fund interest into the Applicant's bank account, pending the finalisation of the parties' divorce action, which had already been instituted at that stage.
7. This Court was initially not made privy to the papers filed of record in the Urgent Application, as same curiously does not appear on CaseLines, notwithstanding the fact the current matter bears the same Case Number as the Urgent Application from which it emanates.
8. The aforesaid Urgent Application resulted in an Order being granted, on an unopposed basis, by the Honourable Madam Justice Collis, on 13 December 2024.
9. This Order is appended to the Applicant's Founding Affidavit as Annexure "AM4".

10. It should be made clear right at the outset, that this Court is not sitting as either a Court of Appeal, nor as a Court of Review, pertaining to the Order granted on 13 December 2024, and as such, the merits or lack thereof, of the Urgent Application, behoves no discussion, and/or consideration, by this Court.
11. In its judgment, this Court shall simply confine itself to the basis for the current Application, namely the granting of an adverse order for costs against the Applicant, being the Respondent in the Urgent Application. In doing so, the Court is tasked with having to consider the matter in light of the provisions of Rule 42 of the Uniform Rules of Court, *alternatively* the Common Law.
12. The parties, in their Joint Practice Note dated 3 November 2025, could not agree as to the exact nature of the current Application, with the Respondent contending that the Applicant is conflating the concept of applying for a “*variation*” of an Order (as is sought by the Applicant from a mere grammatical reading of Prayer 1 of the Notice of Motion), with that of a party seeking to “*rescind*” an Order.
13. In paragraph [12] of the Applicant’s Founding Affidavit, the Applicant submits that he has “*no choice*” but to seek a rescission of the costs portion of the Order by the Honourable Justice Collis, that he contends has been granted erroneously.
14. While this might be confusing at first glance, having regard to the wording of Prayer 1 of the Notice of Motion, the Court simply has to resort to reading paragraph [13] of the Founding Affidavit to appreciate what it is that the Applicant has set out to achieve with the current Application. Ineloquently worded as it may be, there can be little doubt that the Applicant seeks an Order that “*does away*”, so to speak, with the adverse Order pertaining to costs that was granted by the Honourable Madam Justice Collis on 13 December 2024.
15. In Prayer 3 of the Notice of Motion, the Applicant prays for “*Further and/or alternative relief as this Honourable Court may deem fit*”. This

confers upon this Court some measure of discretion under appropriate circumstances. I shall return to this issue later.

16. In order to appreciate that which brought the parties before Court, one needs to have regard to the chronological sequence of events set out in the Applicant's Founding Affidavit. The history of the litigation between the parties, and the ancillary exchange of correspondence between their respective attorneys of record in the midst thereof, is not in dispute.

LEGAL QUESTION AND NATURE OF RELIEF SOUGHT:

17. The current Application is premised on the provisions of Rule 42 of the Uniform Rules of Court.
18. Rule 42 provides as follows:

"42 Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, mero motu or upon application of any affected party, 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 a result of a mistake common to the parties." (own emphasis)

19. It is trite law that a judgment or Order of the High Court can be set aside under Section 23A of the Superior Courts Act, Rule 42, Rule 31(2)(b) and (6), on appeal, and on Common Law grounds.
20. The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the Rules, or the Common Law.
21. The purpose of Rule 42 is to “correct expeditiously an obvious wrong judgment or order”. The Rule therefore makes provision for three distinct procedures, only one of which finds application in this instance, namely the rescission or variation of an order or judgment erroneously sought, or erroneously granted, in the absence of a party affected thereby, either by the Court *mero motu*, or as in this case, upon the Application of any party affected thereby.
22. It is clear that Rule 42 gives the Court a discretion to order rescission or variation, which discretion must be exercised judicially. I do not read the Rule to mean that an election is to be made whether a party seeks “*rescission*”, or “*variation*”, or that these two remedies are mutually exclusive, if not mutually destructive.
23. In **ZUMA v SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR 2021 (11) BCLR 1263 (CC)**, the majority of the Constitutional Court stated that:

“[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”.

24. Broadly speaking, the exercise of a Court’s discretion is influenced by considerations of fairness and justice, having regard to all the facts and circumstances of a particular case. A Court will however not exercise its discretion in favour of a rescission application if unfavourable consequences would follow.
25. Most importantly, and where the Respondent’s attorney persisted with the argument advanced in her Heads of Argument, namely that the requirements of Rule 42 are not met, and that the Applicant is conflating a “*rescission*” with a “*variation*”, the authorities are clear that the fact that a rescission application is brought under subrule (1) of Rule 42, does not mean that it cannot be entertained under Rule 31(2)(b) or the Common Law, provided that the requirements thereof are met.²
26. With reference to the provision in the relevant subrule, namely “*in addition to any powers it may have*”, said powers referred to are those under the Common Law and Rule 31(2)(b).
27. At Common Law, a judgment can be varied, rescinded, or set aside on the following grounds: -

i. Fraud;

ii. *Justus error*;

² See: *De Wet v Western Bank Ltd 1977 (4) SA 770 (T) at 780H-781A; Mutebwa v Mutebwa 2001 (2) SA 193 (Tk); Swart v ABSA Bank Ltd 2009 (5) SA 219 (C)*

iii. In certain exceptional circumstances when new documents have been discovered;

iv. Where the judgment has been granted by default; and

v. In the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.

28. In order to succeed on a claim that a judgment be set aside on the ground of fraud, it is necessary for the Applicant to allege and prove the following: -

28.1 That the successful litigant was a party to the fraud;

28.2 That the evidence was in fact incorrect and/or incomplete;

28.3 That it was made fraudulently and with the intent to mislead; and

28.4 That it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect and/or incomplete evidence to give.

29. In short, it seems to be well settled, that to the above may be added the requirement that it must be alleged and proved that, but for the fraud, the Court would not have granted the judgment.

30. If a rescission of a default judgment is sought on the ground of fraud, the party seeking said relief, in addition to the requirements set out above, needs to provide a satisfactory explanation as to why he did not raise his defence timeously.

31. With regards to rescission at Common Law, based on the discovery of new documents, De Villiers JP concluded in the matter of **CHILDERLY ESTATE STORES v STANDARD BANK OF SA LTD 1924 OPD 163 at 166-9**, which judgment has been cited with approval in many subsequent authorities, that a judgment could be set aside on the ground of the discovery of new documents after the judgment has been given in certain exceptional circumstances only, one of which (for purposes of the current dispute before me) includes cases in which it was in consequence of the fraud and/or misrepresentations of the opposite party that the relevant document/s was/were not found, or produced at the trial.
32. When seeking a rescission, or a variation, of an Order premised thereupon that the Order was erroneously sought or granted, in the absence of a party affected thereby, the mistake may either be one which appears on the record of proceedings, or one which subsequently becomes apparent from the information made available in an Application for Rescission of Judgment. Furthermore, the error may have arisen either in the process of seeking the judgment on the part of the Applicant for default judgment, or in the process of granting default judgment on the part of the Court.
33. The Applicant for rescission of judgment is not required to show, over and above the error, that there is good cause for the rescission as is contemplated in Rule 31(2)(b).
34. In general terms therefore, a judgment is erroneously granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the Order.

35. It follows that if material facts are not disclosed in an application, or if fraud is committed (i.e. the facts are deliberately misstated to, or withheld from, the Court), the Order will be erroneously granted.³
36. An Order or judgment is also erroneously granted if it was not legally competent for the Court to have made such an Order. In my view, this would include an Order granted on an Urgent basis, where the requisites of Rule 6(12) have not been met, or where the grounds upon which the Applicant relied for urgency were mis-stated, or not in existence, at the time that the Order was granted.
37. In most cases the error concerned would be apparent on the record of the proceedings, however, in deciding whether a judgment was erroneously granted, a Court is not confined to the record of proceedings.⁴
38. Judgments have been rescinded under subrule (1) where, for example, counsel for the Applicant in an Application had led the Court mistakenly to believe that the Respondent had deliberately decided not to consult his attorney or to appear at the hearing,⁵ where the Order was without legal foundation,⁶ or where notice of proceedings to a party was required but was lacking.⁷ I mention the latter as it is common cause between the parties, which was again confirmed during argument before me, that the attorney for the Respondent failed, and/or neglected, and/or elected not to, respond to the letter sent to her by the Applicant's attorneys of record, and which is appended to the Founding Affidavit as Annexure 'AM2'. In the mentioned letter the Respondent's attorney was advised that the

³ See: *Naidoo v Matlala NO 2012 (1) SA 143 (GNP); Jacobs v Van Niekerk NO (unreported, WCC Case No: 114/2023 dated 2 February 2024 – a decision of the Full Court) at paragraph [8]*

⁴ See: *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at 93C-H; Stander v ABSA Bank 1997 (4) SA 873 (E)*

⁵ See: *Theron No v United Democratic Front (Western Cape Region) 1984 (2) SA 532 (C)*

⁶ See: *Marais v Standard Credit Corporation Ltd 2002 (4) SA 892 (W)*

⁷ See: *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at 93H-94A*

Applicant shall consent to the relief sought in the Urgent Court, on condition as the Respondent (being the Applicant before the Urgent Court) pays the costs associated with said Urgent Application.

39. In her address before me, the Respondent's attorney of record admitted having received the aforesaid correspondence on 5 December 2024 at 12:33, and she further conceded that she did not proffer a reply to this letter. More importantly, the Respondent's attorney of record confirmed that the Applicant's attorney of record was neither informed that the proposal contained in the letter under discussion was rejected, nor was she advised that the attorney for the Respondent would proceed to move for the Order sought in the Urgent Application, inclusive of the prayer for costs.
40. This Court has taken the initiative of securing access to the electronic CaseLines profile, under the same case number, which contains the papers filed of record in the Urgent Application before the Honourable Madam Justice Collis. I have been advised by the attorney for the Applicant in the current proceedings, that due to the technical difficulties experienced with the Court Online platform of late, she was advised by the Registrar to create a new CaseLines profile to which documents could be manually uploaded. This would explain why two separate CaseLines profiles exist, albeit under the same case number and case reference.
41. From this Court's independent perusal of the CaseLines profile for the Urgent Application, and which was also canvassed with the parties' legal representatives at the hearing of this matter, the following came to light: -
 - 41.1 An Order was granted in the Urgent Court by the Honourable Madam Justice Collis on 13 December 2024. Of importance to note is that the aforementioned Order commences with the following "*Having read the documents filed of record, (having) heard the Legal Practitioner and having considered the matter*".

(my emphasis). Evidently, the Order was therefore granted premised on a reading of the papers, coupled with the submissions made by the Respondent's legal representative on the day.

41.2 Furthermore, the Respondent's attorney of record signed no less than two (2) Certificates of Urgency, wherein she certifies that the matter is of such urgency, that it justifies the departure from the ordinary time limits and provisions relating to service as set out in the Uniform Rules of Court.

41.3 The aforesaid Certificates of Urgency fly in the face of the fact that the Urgent Application was served on 3 December 2024, after the Respondent's attorney of record has admittedly been placed in possession of the correspondence from the Applicant's attorney of record (Annexure "AM1" to the Founding Affidavit), dated and dispatched on 28 November 2024, wherein the Respondent's attorney was advised of the error in the Applicant's Financial Disclosure Form, and to which proof was appended that the Applicant will in fact only retire on 1 November **2025**. Despite this assurance, the Respondent forged ahead with the Urgent Application, using the error in the FDF of the Applicant (to the effect that the Applicant would be retiring at the end of December **2024**) as a basis for her alleged urgency.

41.4 It needs to be emphasised that the letter correcting the error, was sent prior to service of the Respondent's Urgent Application. This in itself casts doubt as to the *bona fides* of the Urgent Application, and the basis upon which the issue of urgency was premised.

41.5 What is however of grave concern to this Court is that the letters appended to the Founding Affidavit as Annexures "AM1" and "AM2", do not appear anywhere on the CaseLines profile that served before the Honourable Madam Justice Collis. In fact, these documents were evidently withheld from the Court tasked

with having to determine the Urgent Application. It was incumbent, in my view, upon the attorney for the Respondent to place ALL relevant information before the Honourable Madam Justice Collis at the time that the Urgent Application was heard.

41.6 What is most astounding, is that the Respondent's attorney of record personally deposed to a Service Affidavit on 12 December 2024, wherein she confirms service of the Application, but omits to inform the Court of the existence of Annexure "AM2" to the Founding Affidavit.

41.7 This Court is also concerned about the content of Paragraph 4.4.8 of the Respondent's Founding Affidavit in support of her Urgent Application, as she alleges therein that *"I also learned from my Attorney that the Respondent is going on pension in December 2024...."*. While it is so that the Founding Affidavit was deposed to some 2 (TWO) days before the letter from the Applicant's attorneys of record wherein the error in the Applicant's FDF was rectified, the Urgent Application was only served (thus *"delivered"*) nearly a week later. There was, in my view, no reason why a Supplementary Affidavit could not be filed dealing with the content of Annexure "AM1", or why this information could not, and was not, placed before the Urgent Court.

42. In giving the Respondent's attorney of record the benefit of the doubt, however, this Court also had regard to the Practice Notes and Heads of Argument prepared by the Respondent's attorney of record, and uploaded onto the 2nd CaseLines profile, in the up march to the proceedings before the Urgent Court.

43. The First Practice Note is found on the 2nd CaseLines profile at 16-5 to 16-10, and same is dated 26 November 2024. By this time, neither Annexure "AM1", nor Annexure "AM2", was at hand.

44. The Second Practice Note is found on the 2nd CaseLines profile at 16-12 to 16-16. Similarly, this Practice Note is dated 26 November 2024.
45. However, when this Court perused the Heads of Argument prepared by the Respondent's attorneys of record, the first set of which is found at CaseLines 19-29 to 19-40, it is evident that although these Heads of Argument are undated, same was only uploaded onto CaseLines on 5/12/2024 at 2:08:16PM. This is after receipt of Annexure "AM1", and on the same date on which Annexure "AM2" was dispatched.
46. In Paragraph 19 of the aforesaid Heads of Argument, the Respondent's attorney of record makes the positive averment that the Applicant "*is going on pension by the end of December 2024*", without making any attempt to inform the Urgent Court of the existence, or content, of the correspondence appended to the Applicant's Founding Affidavit as Annexure "AM1". When asked about this blatant omission at the hearing of the current Application, the Respondent's attorney of record replied that she "*cannot take it further*".
47. By a similar token, these Heads of Argument also makes absolutely no reference to the letter appended to the Applicant's Founding Affidavit as Annexure "AM2", and the Court was not advised in the Heads of Argument that the Applicant consents to the Order, on condition that he shall not be burdened with having to pay the costs of the Urgent Application. Once again, and when prompted by this Court to explain this non-disclosure, the Respondent's attorney of record submitted that she "*cannot take it further*".
48. A second set of Heads of Argument was uploaded onto CaseLines on 5/12/2024 at 2:22:01PM. They seem to be identical to the Heads of Argument referred to above, and as such, the same questions arise from a reading thereof.

49. The Respondent's attorney of record was given ample opportunity in this Court to firstly gainsay the suggestion that she failed to place relevant information (although it might have been detrimental to her client's case) before the Honourable Court tasked with having to adjudicate the Urgent Application. She could not do so, least of all convincingly. In fact, the attorney of record conceded that she did not place this information before the Honourable Madam Justice Collis at the time that the Urgent Application was heard, and that the existence of Annexures "AM1" and "AM2" was not brought to the Urgent Court's attention on the day that the Order was granted. She could not explain why this was so, apart from stating that she is of the view that the error in the Applicant's FDF could not be cured by "*a mere letter from his attorney*", and furthermore that the Applicant had to attend the urgent proceedings to state his case, "*even if only to oppose the issue of costs*".
50. Why these unilateral decisions by the Respondent's attorney were not left in the hands of the Judge presiding in the Urgent Court, after having been made aware of all the facts, is something that the Respondent's attorney of record, regrettably, could not justify to this Court.
51. As such, this leads this Court to have to consider the material question whether the party that obtained the Order sought to be varied or rescinded, was procedurally entitled to it. If so, the Order cannot be said to have been erroneously granted in the absence of the affected party. An Applicant (or in this case the Respondent) would be procedurally entitled to an Order when all affected parties were adequately notified of the relief that may be granted in their absence. In the present matter, however, it is common cause that the Applicant and her attorney of record were not notified that, notwithstanding acquiescing to the relief sought on condition that no cost order shall follow, the Respondent was intent on pursuing an Order for costs nonetheless. In my mind, the silence on the part of the Respondent

and her attorneys or record, rather points towards a tacit acceptance of the condition precedent to the Applicant consenting to the relief sought. At the very least, the Urgent Court ought to have been made aware of this condition, and the reason for the Applicant's default of appearance on the day of the hearing. Regrettably, it was not.

52. By a similar token, the Court had to have been made aware thereof that the *substratum* for the Urgent Application may very well have fallen away. The Urgent Court was however again kept in the dark, so to speak, in this regard.
53. Neither of the aforesaid two crucial pieces of information was disclosed to the Honourable Madam Justice Collis at the hearing of the Urgent Application, yet not as a result of anything that can be attributed to the Applicant in the matter before me, or his legal representatives.
54. In fact, the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, published in terms of Section 36(1) of the Legal Practice Act, Act 28 of 2014, commences in Section 3 thereof to state, unequivocally so, that Legal Practitioners shall maintain the highest standards of honesty and integrity and that they shall treat the interests of their clients as paramount, provided that their conduct shall always be subject to their duty to the Court; the interests of justice; the observance of the law; and the maintenance of the ethical standards prescribed by this Code.
55. In addition to this, the Code of Conduct also prescribes that Legal Practitioners shall refrain from doing anything that could or might (not has or shall) bring the legal profession into disrepute.
56. Furthermore, and perhaps quite applicable to the current set of facts, and that which played itself out before the Urgent Court, is the provisions of Section 9.5.1 of the Code of Conduct, which states that: -

“9.5.1 The legal practitioner shall not assert or imply any fact, or permit the assertion or implication of any fact, which he or she knows to be untrue, nor shall he or she connive to substantiate a falsehood.”

57. Under Section 21 of the Code of Conduct, “*Misconduct*” on the part of an attorney *inter alia* includes a breach of the Ethical Code for Legal Practitioners, or any conduct which would reasonably be considered as misconduct on the part of an attorney, or which tends to bring the attorney’s profession into disrepute.
58. Furthermore, and if regard is had to what this Court deems the duties of the Respondent’s attorney were with regards to the full disclosure to the Urgent Court, on the day of the hearing, of the existence of Annexures “AM1” and “AM2” to the Applicant’s Founding Affidavit, it is instructive to have regard to the provisions of Section 57 of the Code of Conduct. A duty to disclose to a Court every fact known to the Legal Practitioner that might reasonably have a material bearing on the decision that the Court is required to make is, in this Court’s view, non-negotiable.
59. Something further needs to also be said about the scathing allegations made against the Honourable Madam Justice Collis, in the Respondent’s papers. I interpose to state that the Respondent’s attorney of record deposed to the Opposing Affidavit.
60. Without repeating the content of the Opposing Affidavit, especially of and concerning a Judicial Officer *verbatim*, it is simply apposite to summarise that the attorney of record for the Respondent, *inter alia* makes the positive allegation that the Honourable Madam Justice Collis’s handling of the matter, following the granting of the Order in the Urgent Court, is to be referred to the Judge President of this Division.
61. The attorney for the Respondent then elaborates further in the Opposing Affidavit by stating that the Honourable Madam Justice

Collis failed to observe the Rules of Court, and that her conduct in advising the Applicant, after the convening of a Judicial Case Management Meeting, to apply for a rescission and/or variation of the Order *“does not constitute proper conduct by a sitting judge”*.

62. By the Honourable Justice Collis so advising the Applicant’s attorney of record, with the knowledge of the Respondent’s attorney of record, but without her pre-empting the outcome of any further proceedings, the Respondent’s attorney of record still finds it necessary to submit under oath that Justice Collis’s conduct is *“improper and ill-informed”*⁸, and she is in addition thereto outright accused of being *“unfair and bias”*.⁹
63. Furthermore, the condescending and disrespectful tone adopted in the Opposing Affidavit of, and regarding, a Judicial Officer, does not escape this Court. The use of such language is strongly discouraged, and it brings the entire legal system into disrepute. The Court expects more of a Legal Practitioner deposing to Affidavit for, and on behalf, of his/her client. Remarks such as *“...but somehow Judge Collis did not investigate this”*¹⁰; *“Had Judge Collis been fair and unbiased in the proceedings she would have remembered... in which case she would have known...”*¹¹; *“Even when I submitted to the Honourable Judge that the Applicant has already brought an application to appeal, it was quickly brushed off and not much made of it...”*¹²; *“Furthermore, it is quite improper for a sitting Judge to provide legal advice to a practitioner, one to experience as to even be allowed to appear before the above Honourable Court, to bring a specific type of application ... the administration of justice would be hampered by a judge deciding a matter that she herself advised the Applicant to launch. Clearly, she will be incline to granting the order, even one in such poor form as is*

⁸ See: Paragraph 4.4 of the Opposing Affidavit at CaseLines 05-6

⁹ See: Footnote 9 *supra* and also paragraph 4.5 of the Opposing Affidavit at CaseLines 05-5

¹⁰ See: Paragraph 4.5 of the Opposing Affidavit at CaseLines 05-6

¹¹ See: Paragraph 4.4 of the Opposing Affidavit at CaseLines 05-6

¹² See: Paragraph 4.5 of Opposing Affidavit at CaseLines 05-7

the Applicant's"¹³; "...the Court hearing this matter should completely disregard all mention and reliance on the advice of Judge Collis..."¹⁴ have no place in Court papers.

64. Perhaps the most offensive attack on the Judiciary in general, and the integrity of the Honourable Madam Justice Collis in particular, is what is stated, and/or suggested, in Paragraph 10.4 of the Opposing Affidavit, regarding the content of Annexure "AM6" to the Founding Affidavit. Annexure "AM6" constitutes an electronic mail sent by the Registrar of the Honourable Madam Justice Collis to the parties' legal representatives on 20 March 2025 at 9:04AM, advising the legal representatives as follows: -

"Dear attorneys

The above matter refers. Kindly note that Judge Collis has listened to the recordings of the proceedings during the Urgent Court Proceedings and Judge is of the opinion that the First Respondent is to apply for a rescission of the Order in terms of Rule 42." (my emphasis)

65. In dealing with the content of the aforesaid electronic mail, and the advices received from the Honourable Madam Justice Collis therein contained, the Respondent's attorney has the temerity to remark in the paragraph mentioned hereinbefore that *"As things stand, we do not know what it is that Judge Collis heard that convinced her that a rescission application was the best way forward because all we know is that the judge advised that she listened to the recordings."*
66. The aforesaid submission made under oath no less, is suggestive of the Honourable Madam Justice Collis either misleading the parties in

¹³ See: Paragraph 4.6 of the Opposing Affidavit at CaseLines 05-7

¹⁴ See: Paragraph 4.7 of the Opposing Affidavit at CaseLines 05-7

that she has in fact not listened to the recordings of the proceedings before her in the Urgent Court, *alternatively*, that the Honourable Madam Justice Collis advised the parties incorrectly, after having applied her mind to that which she has heard from her reconsideration of the record. In either event, and while the Court appreciates that Judicial Officers are not immune to criticism, the Court regards the untested and unsubstantiated averments contained in the Opposing Affidavit to be contemptuous, and in bad taste, as same is suggestive of incapacity, impropriety, gross incompetence, or gross misconduct against a Judicial Officer.

67. In the event that the Respondent, or her attorney, felt aggrieved by the perceived conduct of the Honourable Madam Justice Collis, they had the right to file a complaint against the Judicial Officer for misconduct. Such a complaint must be in the form of a sworn statement, or affidavit, setting out all the facts relating to the matter, and it must be submitted to the Judicial Services Commission, as per the general fragment for judicial complaints set out in Section 14 of the Judicial Service Commission Act, Act 9 of 1994. The process for complaints against a Judge is detailed in Sections 15, 16 and 17 of the Act. Neither the Respondent, nor her attorney of record, have availed themselves of this opportunity, and as such, the criticism levelled against the Judicial Officer in the Respondent's papers, in the absence of a formal complaint to the JSC, rings utterly hollow.
68. To add to the aforesaid, the Law Society of South Africa, which has since been replaced by the Legal Practice Council, has cautioned practitioners in a formal Press Release as early as 11 May 2017, that it *"condemns any attack on the judiciary"* and that *"such unwarranted attacks appear to have the sole aim of undermining the judiciary and thereby fail to be in the interest of society."* In concluding the said Press Release, Legal Practitioners were advised that *"[S]hould they feel strongly about their convictions, the LSSA urges the complainants to submit these complaints with full grounds to the Judicial Services*

Commission for urgent investigation, as this is the correct body to investigate such serious allegations against a judge". No regard was seemingly had by the attorney of record for the Respondent for these advices from her professional governing body.

69. In this regard, the Court is also mindful of the provisions of Section 9.7 of the Code of Conduct for Legal Practitioners, which dictates that a legal practitioner shall not in the composition of pleadings and of affidavits, gratuitously disparage, defame or otherwise use invective words, and shall not recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner. Once again, these provisions of the Code of Conduct were given no regard to by the attorney for the Respondent.

70. At the hearing of this matter before me on Thursday, 6 November 2025, and after having heard arguments on the merits of the Applicant's Application, the Court engaged both parties' representatives on the following issues:

70.1 Why the conduct of the Respondent's attorney of record with regards to her admitted non-disclosure of Annexures "AM1" and "AM2" to the Honourable Madam Justice Collis at the hearing of the Urgent Application should not be referred to the Legal Practice Council for investigation, and possible disciplinary action;

70.2 Why the conduct of the Respondent's attorney of record with regards to the content of the Opposing Affidavit as far as it relates to allegations made of, and concerning, a Judicial Officer should not be referred to the Legal Practice Council for investigation, and possible disciplinary action; and

70.3 Why, in the light of the conduct of the attorney of record, the Court should not consider an Order of costs *de bonis propriis* against the Respondent's attorney of record.

71. Counsel for the Applicant addressed the Court in this regard, and submitted that she sees no reason why the conduct of the Respondent's attorney of record should not be referred to the Legal Practice Council, and furthermore that she is of the considered view that such conduct is deserving of a cost Order *de bonis propriis*.
72. The Respondent's attorney of record, in turn, declined to make any submissions, and reverted to submitting that she "*cannot take it further*". The attorney for the Respondent however indicated her dissatisfaction with this Court's enquiry and claimed that she feels "*ambushed and prejudiced*", and insisted that the Court should only confine itself to determining whether the Order by the Honourable Madam Justice Collis should be varied or rescinded, and nothing more.
73. In light thereof that the Respondent's attorney of record declined to make any meaningful submissions regarding the questions posed in the paragraphs above, the Court nonetheless thought it prudent to direct the parties to submit Heads or Argument on the issue, in order not to be seen to have "*ambushed*" or "*prejudice*" any of the parties.
74. In the premise, and on 6 November 2025, the Court reserved judgment in this matter to 14 November 2025, and directed both parties to file Heads of Argument by no later than 12:00 on 12 November 2025, dealing with the issue of a possible referral to the Legal Practice Council, as well as the question of costs *de bonis propriis*.
75. On 10 November 2025, the Applicant's attorney of record filed her Heads of Argument, as per this Court's directive.¹⁵

¹⁵ See: CaseLines 07-46 to 07-54

76. The Respondent's attorney of record declined to file Heads of Argument, as directed by this Court.
77. Instead, and on 12 November 2025, she unilaterally (and without seeking leave from this Court) uploaded onto CaseLines a further affidavit, in which she *inter alia* claims she was directed to depose to said affidavit by this Court. In fact, she elaborates in Paragraph 1.3 thereof by saying that "[I] depose to this affidavit as directed by the Honourable Schoeman AJ, who insisted that I state, under oath, why I allegedly did not tell Judge Collis that the Applicant, per his attorneys, delivered a letter stating that the Applicant was not retiring, why I have not reported the matter to the Judge President and that I should make a decision whether I should be reported to the LPC or be ordered to pay the costs of this application de bonis propriis".
78. This statement made under oath is factually incorrect and false. The record of the proceedings on 6 November 2025 will show that the parties were directed to deliver Heads of Argument on the issue regarding a referral to the Legal Practice Council, and furthermore whether costs *de bonis propriis* should be considered. At no stage were the parties directed (or permission given) to file further affidavits, and the Respondent was not called upon to make an election whether she is to be reported to the Legal Practice Council or whether she should rather be ordered to pay the costs of the Application in her personal capacity as stated in Paragraph 6.1 of her further affidavit.
79. The Applicant's attorney of record, as she was directed to do, filed Heads of Argument, and it is improbable that, in the event that the parties were directed to file Affidavits, same would not have seen the light of day on the part of the Applicant. Once again, it seems that the Respondent's attorney of record is adopting a regrettable dismissive attitude as far as this Court's proceedings and directives are concerned.

80. The Court appreciates that the Applicant has not had the opportunity to answer, or consider, the content of the further affidavit deposed to by the Respondent's attorney. Furthermore, this affidavit was filed without leave of the Court and notwithstanding specific directives that the parties are to present Heads of Argument. In any event, from a reading of the content thereof, same does not assist the Respondent's attorney in the least in my view. The converse is rather true. As such, this Affidavit shall not be accepted into evidence, and I shall regard it as being *pro non scripto*". This thus means that the Respondent's attorney purposefully made the election, as she confirms in her affidavit, not to file Heads of Argument, or present the Court with any argument, as to why this matter should not be brought under the attention of the Legal Practice Council, and why an order for costs *de bonis propriis* should not issue. The parties were given ample opportunity to make their respective submissions in this regard, and the Respondent's attorney of record was advised that she has the right to obtain legal representation of her own, in order to defeat a possible cost order against her, personally. She chose not to avail herself of this opportunity, and as such, I am to adjudicate these issues (as far as the attorney for the Respondent is concerned) on the submissions made by the Respondent's attorney in open Court only, while having regard to her initial Heads of Argument (which does not address the issues referred to above).
81. In considering the merits of the Application, it is this Court's considered view that the part of the Order of the Honourable Madam Justice Collis that the Applicant seeks to vary or rescind, was erroneously sought, or erroneously granted. It is common cause further, that the said Order was granted in the absence of the Applicant.
82. As such, the Applicant has, in my view, satisfied the requirements of Rule 42(1)(a) of the Uniform Rules of Court. As alluded to hereinbefore, and even if the Court is wrong in this regard, nothing

precludes this Court from entertaining this Application under the Common Law, provided that the requirements thereof are met.

83. The Court has a duty to correct an obvious wrong Order and judgment, and to do so expeditiously. This duty should however be exercised judicially, and if the interests of justice warrant such a variation or rescission.
84. As far as the Common Law grounds for rescission of judgment go, the Court is satisfied, having regard to the evidence before it, that the Order of the Honourable Madam Justice Collis is open to variation and/or rescission, based on fraud, in that the evidence that was placed before the urgent court was incorrect and/or incomplete, and advanced with the intent to mislead. The Court has no doubt that, in the event of the true facts being placed before her, the Honourable Madam Justice Collis would not have granted the Order that she did.
85. To put it plainly, but for the fraud, the Urgent Court would not have granted the judgment. The attorney for the Respondent could not point to any facts indicating the contrary, let alone convince this Court that she made a complete disclosure of all the relevant information to the Honourable Madam Justice Collis. This, in my view, cements the notion that the Order stands to be set aside on the ground of fraud.
86. The further notion to allow for a variation and/or rescission at Common Law, is also amplified by the fact that the Common Law additionally allows for a rescission and/or variation of an Order where new documents are discovered in cases in which it was as a consequence of the fraud of the opposite party that the relevant documents were not found, or produced at the hearing of the matter. Again, the CaseLines profile, and the Heads of Argument of the Respondent's attorney, which served before the Urgent Court, speak for itself. The relevant documents do not appear on CaseLines, nor were they mentioned in the Heads of Argument.

87. In the premise, the Court has no hesitation in varying the Order granted by the Honourable Madam Justice Collis, as prayed for in Prayer 1 of the Applicant's Notice of Motion before me.
88. In her supplementary Heads of Argument, the Applicant's attorney of record seeks an Order that the entire judgment and Order of the Honourable Madam Justice Collis be set aside. This is not the relief sought by the Applicant in his Notice of Motion. This Court is not sitting as a Court of Appeal, or a Court of Review, and in my view the amplified relief sought in the Heads of Argument is too substantive in nature to fall under the prayer for "*Further and/or alternative relief*".
89. The Court however makes no finding as to the remainder of the relief that was granted by the Honourable Madam Justice Collis, or whether the entire Order is to be rescinded, varied, or set aside. Should the Applicant be so advised, he is to pursue a separate Application for Rescission of Judgment in this regard.
90. This then brings the Court to the matter concerning the conduct of the Respondent's attorney of record. It is always a sad day when Legal Practitioners are to be proverbially "*hauled over the coals*" by a Court.
91. In considering the general duties of a litigant, and all the more the Legal Practitioners representing him/her/it, this Court can do no better than to refer with approval to the following statements made by the Honourable Mr. Justice Avvakoumides (AJ) in the recent decision of **Afriforum NPC v City of Tshwane Metropolitan Municipality and Others [2025] ZAGPPHC 755 (31 July 2025)**:-

"171. In *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) at para 130 the Constitutional Court held: "*The rule of law is one of the cornerstones of our constitutional democracy. And it is crucial for the survival and vibrancy of our democracy that the observance of the rule of law be given the prominence it deserves in*

our constitutional design. To this end, no court should be loath to declare conduct, that either has no legal basis or constitutes a disregard for the law, inconsistent with legality and the foundational value of the rule of law. Courts are obliged to do so. To shy away from this duty would require a sound jurisprudential basis. Since none exists in this matter, it is only proper that we do the inevitable.”

172. *Before issuing the order which I intend to make, I need to record a few aspects which I found warranting comment. Both sides employed senior counsel, the respondent's having employed the services of three counsel. I find that the employment of senior counsel was warranted, subject to what follows. On the first day of hearing, after lunch I was approached by counsel for the parties in the corridor where the respondent's senior counsel advised me that he would not be able to complete his submissions on that day, namely 24 July 2025. The application, in my view had been set down for two days, and, when I enquired about 25 July 2025, senior counsel for the respondents advised me that he would be in Lesotho the next day and asked whether the application could stand down to the following week.*

173. *I declined the request, firstly because my acting appointment would end on 25 July 2025 and, secondly, perhaps more importantly, counsel in opposed applications, let alone special motions, should follow the well-known practice of being available for the whole week in which their case will be heard. I was then asked whether the case could continue virtually on 25 July 2025. I acceded to the request, the applicant's senior counsel not having difficulty with the request. On the*

morning of 25 July 2025 I was informed by Mr Manala, the respondents' one junior counsel that the senior counsel had contacted him early that morning to inform him that he had no internet connectivity and could not appear. That was the last I saw or heard from the senior counsel, and no explanation has been proffered to me by the senior counsel for not having foreseen the possibility of connectivity issues.

174. I must also make of my disapproval at the City having employed three counsel and who put up a completely unmeritorious defence to the applicant's case. Ordinarily I would have debated this question with counsel but given the absence of the respondents' senior counsel and insufficient time, I find it appropriate to send out a message to legal practitioners on prosecuting or defending cases unmeritorious. The aim is not to discourage legal practitioners from taking on cases where the line between meritorious and unmeritorious case is thin, for fear of being ordered to pay the costs of the litigation de boniis propriis but rather warn legal practitioner of the obligations to the court and limited resources, let alone their client's funds which may be depleted for no good reason.

175. The Constitutional Court ("CC") in *Ex Parte Minister of Home Affairs v Lawyers for Human Rights* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC) (30 October 2023); See also: *South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae)* [2018] ZACC 26; 2018 JDR 1451 (CC); 2018 (10) BCLR 1291 (CC) (SASSA); *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113

(CC), expressed its displeasure towards the legal practitioners pursuing litigation in the manner that the court found to be in contrast with their ethical duties and said the following:

“[107] In Canada, the Court of Appeal for British Columbia held in Lougheed that in an adversarial system the usual approach of judicial non-intervention presupposes that counsel will do their duty, not only to their client but to the court in particular. That duty, said the Court, entails: “to do right by their clients and right by the court In this context, ‘right’ includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law”.

[108] My Colleague states in his article that the rules of professional conduct of the law societies of Canada contain provisions supporting a conclusion that it is improper to advance a hopeless case.

[109] In his article, Rogers J concludes, amongst others, in respect of the ethical duties of counsel (which, self-evidently are of equal application to attorneys; the emphasis is my own):

- (a) Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation.*
- (b) It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts.*

- (c) *A necessary correlative is that counsel must properly research the law and insist on adequate factual instructions.*
- (d) *In principle counsel may properly conclude that a case is hopeless on the facts though in general counsel cannot be expected to be the arbiter of credibility.*
- (e) *There is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.*
- (f) *Misconduct of this kind must be assessed subjectively – the question is whether counsel genuinely believes that the case is not hopeless and is thus properly arguable...” (own underlining for emphasis).*

176. Relying on an earlier decision on the issue of costs being awarded against the legal practitioners, the Full Court of Gauteng Local Division in a judgment dated 29 July 2024, penned by Mlambo JP, said the following:

“[25] *In Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd, this Division elaborated on the principles relating to an order of costs de bonis propriis as follows:*

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of [their] own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court’s reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client’s rights and

interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.” (Citation omitted and emphasis added.)

[26] The Court went on to explain the circumstances in which an order of costs *de bonis propriis* can be granted against a legal representative as follows:

“It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.” ...

“[28] ...In Ex Parte Minister of Home Affairs; In re Lawyers for Human Rights v Minister of Home Affairs and Others, supra, the Constitutional Court emphasised that-

“[l]egal practitioners are an integral part of our justice system. They must uphold the rule of law, act diligently and professionally. They owe a high ethical and moral duty to the public in general, but in particular to their clients and to the courts.”

92. Nothing advanced by the attorney for the Respondent when given multiple opportunities to state her case, and present argument, as to why her conduct should not be referred to the Legal Practice Council, mitigates against such a referral.
93. By a similar token, the same holds true as regards to the attorney for the Respondent being ordered to pay the costs of this Application *de bonis propriis*. While, at best for the Respondent’s attorney of record, her conduct before the Honourable Madam Justice Collis (by not disclosing crucial information to the Court on the day of the hearing of the Urgent Application) might be seen as a temporary lapse of judgement, the fact that this conduct was perpetuated (and in fact even amplified by the scathing attack on Madam Justice Collis) in the opposition of this matter, both in the Opposing Affidavit filed, as well as in her address to the Court, in my considered view, should be seen as aggravating. There is no reason why the Respondent in this Application should personally be burdened with having to pay the costs of this Application, under circumstances where costs are to following the event.
94. Under the circumstances, I make the following Order:

(a) That the Order granted by the Honourable Madam Justice Collis on the 13th of December 2024 is hereby varied as follows:

By the deletion of Paragraph 6 of the Order, and replacing same with the following: -

“That the costs of this Application shall be borne by the Applicant”.

(b) That the costs of the Application for Variation which served before me, shall be paid by the Respondent’s attorney of record, Regina Bangiswani Tlou, *de bonis propriis*.

(c) That the content of Case Number: 024353-2024, together with a copy of this Judgment, shall be sent by the Registrar of this Court, to the Legal Practice Council, for an investigation into the conduct of the Respondent’s attorney of record, Regina Bangiswani Tlou, and for possible disciplinary action, if the Legal Practice Council deems it appropriate.

SCHOEMAN, AJ

ACTING JUDGE: HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of hearing: 6 November 2025

Date of judgment delivered: 14 November 2025

Appearances:

For Applicant: Ms. R.I. Mogosi

For Respondent: Ms. R.B. Tlou