

SOUTH AFRICA / JUDGMENT

Modise and Another v Strauss and Another (Reasons) (56239/2020) [2025] ZAGPPHC 547 (21 May 2025) [2025] ZAGPPHC 547

COURT

North Gauteng High Court, Pretoria

BEFORE

SJ Myburgh

CASE / FILE NUMBER

56239/2020

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 56239/2020

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

21 May 2025

In the matter between:

EUGENE THIPE MODISE

1ST APPLICANT

TRIOTIC PROTECTION SERVICES (PTY) LTD 2ND APPLICANT

and

FREDERICK JOHANNES STRAUSS

1ST RESPONDENT

LYNETTE STRAUSS

2ND RESPONDENT

REASONS FOR ORDER

MYBURGH, AJ

INTRODUCTION:

[1] On 6 May 2025 I granted the following relief in this matter:

1. The Applicants' rescission application under case number 56239/2020, served on 25 August 2022, is dismissed.
2. The Applicants are ordered to pay the cost on an attorney and client scale, jointly and severally, the one to pay the other to be absolved.

[2] Considering the punitive nature of the cost order and giving effect to the pronouncements in the matter of Prithilal v Akani Egoli (Pty) Ltd and Another (CCT 290/24) [2025] ZACC 5 (24 April 2025), this judgment will set out the reasons for the punitive order and the basis upon which I exercised my discretion.

[3] I, in addition, instruct, as a matter of urgency, that a copy of these reasons be provided to the Judge President of this Division, the Legal Practice Council as well as the Pretoria Society of Advocates, for them to urgently consider whether further steps should be taken regarding the conduct of the Applicants' legal representatives. My reasons for doing so will be discussed *infra*.

LITIGATION HISTORY:

- [4] Following a protracted history of disputes, and during 2020, the Respondents issued summons against the Applicants, claiming, amongst others, cancellation of a lease agreement, which related to an immovable property allegedly leased by the Applicants from the Respondents, and payment of an amount of R758 067.80 in arrear rent payable. The Applicants filed a plea, which constituted a bare denial save for an attack on the jurisdiction of the Court, and secondly an allegation that the Applicants laboured under the misapprehension that the lease agreement was actually a purchase agreement.
- [5] The above action was set down for 6 June 2022, which was preceded by a special pre-trial conference that was attended by all parties on 30 May 2022. A joint practice note, evidencing the content of the special pre-trial, was properly signed. The disputes of fact, evidenced in the practice note, does not echo the disputes raised in the pleadings, as the attack on the Court's jurisdiction was omitted. The practice note however confirms that the nature of the agreement, being either a lease agreement or a sale agreement, was still a contentious issue, together with the Respondents' entitlement to cancel, the Applicants' breach and the Applicants' indebtedness.

- [6] On 6 June 2022, being the date of trial, the Applicants' then attorney, Samalenge Attorneys, filed a notice of withdrawal, citing a lack of instructions, communication and funds. On such day, and following the instructions of Ledwaba DJP, attempts were made to locate the Applicants' then attorney as Ledwaba DJP required an explanation for the sudden and late withdrawal. The attorney was however in the Eastern Cape and did not attend Court on such day. Ledwaba DJP proceeded to grant default

judgment

against the Applicants.

- [7] On 30 June 2022 the Applicants served upon the Respondents a document purporting to be an application to have the judgment of 6 June 2022 rescinded¹[1]. The Applicants were, in this application, ostensibly represented by a firm of attorneys referred to as Malatji Attorneys²[2]. This application was however launched under case number 567239/2020, being the incorrect case number. The Respondents proceeded to file a notice of opposition and to file an answering affidavit.

- [8] On or about 30 June 2022 the Applicants served a further purported rescission application (the second application), seeking the

rescission of the order dated 6 June 2022³[3], again ostensibly represented by a firm of attorneys referred to as Malatji Attorneys. This application was brought under the correct

case number. Similar to the previous application, the Respondents proceeded to oppose this application and file an answering affidavit.

- [9] On 23 September 2022 the Applicants served an urgent application on the Respondents, in which application the Applicants sought, on an urgent basis, an interdict against the Respondents preventing them from executing the order dated 6 June 2022, pending the finalization of the rescission application. Again, Respondents opposed such application and filed an answering affidavit. This application the Applicants did not persist with.

- [10] The Applicants did not file a replying affidavit in the second purported rescission application, following which the Respondents enrolled such for determination on 22 May 2024. On such day the matter was removed from the roll, with no order as to costs. It appears that the Presiding Judge, Collis J, required service of the enrolment on the Applicants.

- [11] With proper service the Respondents again enrolled the purported application for rescission for hearing on 4 November 2024. On such date, and before Mazibuko AJ, the Applicants applied for a postponement of the matter. The Court granted such a postponement and further ordered directives to be applicable insofar as it related to the Applicants' application for condonation for the late service of their replying affidavit, which application for condonation had to be launched on or before 15 November 2024. Respondents were directed to serve and file any answering affidavit on or before 22 November 2024, and the Applicants directed to file and serve any replying affidavit in the condonation application on or before 6

December 2024. In addition, the Applicants were ordered to file and serve their practice note and heads of argument and apply for a date on the opposed roll on or before 13 December 2024, failing which the Respondents were entitled to approach the Registrar and the Deputy Judge President for a preferential date.

- [12] In the proceedings before Mazibuko J Adv Molopyane represented the Applicants.
- [13] Coupled with the aforementioned, Mazibuko AJ ordered the Applicants to pay the wasted costs on an attorney and client scale, including Scale C.
- [14] In compliance with the aforementioned directives issued by Mazibuko AJ the Applicants launched an application for condonation, which was opposed but as has been the norm of the Applicants, they again failed to file any replying affidavit. The Applicants furthermore failed to file a practice note and/or heads of argument and apply for a date. The Respondents enrolled the purported rescission application, coupled with the condonation application, for determination before this Court.

RULING ON THE WITHDRAWAL OF THE APPLICATION:

- [15] At the hearing of this matter on Tuesday 6 May 2025 I was informed by counsel acting for the Applicants, again Adv Molopyane, that a notice of withdrawal of the application had been served. Such notice had however not been filed with the Court.
- [16] In terms of Rule 41(1)(a) of the Uniform Rules of Court a person instituting any proceedings may at any time before the matter has been set down, and thereafter by consent of the parties or leave of the Court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay the costs and the Taxing Master shall tax such costs on the request of the other party.
- [17] The counsel acting on behalf of the Respondents refused to consent to the withdrawal, following which counsel acting for the Applicants was invited to address the Court on the reasons why the Court should exercise its discretion and grant leave for such withdrawal. The attempted withdrawal was not accompanied by a tender of costs, and the Applicants were, during argument, insistent the Respondents should separately apply, in terms of the provisions of Rule 41 of the Uniform Rules of Court, for such a cost order.
- [18] Save for insisting that the Applicants were entitled to withdraw the application at any time, even after enrolment, counsel for the Applicants could not provide any reason why the Court should exercise its discretion in favouring the withdrawal. Having regard to the time that has elapsed since the underlying judgment was obtained, the need for finality and guided by the principles enunciated in *Huggins v Ryan N. O. and Others* 1978 (1) 216 (R) at 218 E, and further considering the Applicants' insistence that the Respondents should apply for an order of costs, I exercised my discretion to refuse leave to withdraw the application. See in this regard *Levy v Levy* [1991] ZASCA 81; 1991 (3) SA 614 (A) at 619 F – 620D.

[19] Following such ruling counsel for the Applicants withdrew, and the matter proceeded absent any further input from the Applicants. I interpose to state that I invoked the “two counsel” rule, and counsel for the Applicants thus remained in Court for the remainder of the proceedings in this matter.

THE STATUS OF THE “APPLICATION” FOR RESCISSION:

[20] Neither the Applicants nor the Respondents raised any of the issues discussed in this section of my reasons. The issues were identified by me in preparing the written reasons for the punitive cost order. The punitive cost order was made having regard to the conduct of the Applicants that was before me, which conduct I regarded as sufficient to justify the punitive order made.

[21] However, and on 7 May 2025 the judgment handed down in this division by Raubenheimer AJ, in the matter of Ismail and Another v Davis (2024/136926) [2025] ZAGPPHC 416 (14 April 2025) came to my attention. The judgment indicates that Adv Molopyane also represented the applicants therein.

[22] This judgment records a challenge to the status of Malatji Attorneys, the attorneys on record, as being registered attorneys with the Legal Practice Counsel, and they were requested to provide proof of such registration. This request was not complied with and, at the hearing before Raubenheimer AJ, Adv Molopyane provided his brief from Samalenge Attorneys. Neither a Notice of Withdrawal for Malatji Attorneys nor a Notice of Appointment of Samalenge attorneys was filed.

[23] I interpose to state that Samalenge Attorneys, in the present matter, previously represented the Applicants. When the notice of appointment of attorneys in the present application was filed on 31 October 2024, it indicated the appointment of Malatji Attorneys as attorneys, care of Samalenge Attorneys.

[24] The hearing before Raubenheimer AJ took place on 6 March 2025, and the judgment is dated 14 April 2025. Adv Molopyane, in his appearance before me, ostensibly on instruction of Malatji Attorneys, failed to mention this judgment and the findings therein.

[25] The judgment of Raubenheimer AJ further alerted me to the unreported judgment of Retief J in Ramatlapa and Another v SB Guarantee Company (RF) (Pty) Ltd (61088/2020)

[2024] ZAGPPHC 853 (28 August 2024).

[26] In paragraph 26 of her judgment, Retief J states:

“On 8 July 2024, and without Mashao ever formally withdrawing, Malatji Attorneys [Malatji] came on record by notice. Malatji in the notice was cited as the attorney of record in care of Samalenga attorneys. This created the impression that Samalenga was Malatji’s

correspondent. However, both Samalenga attorneys and Malatji practice in Pretoria and from the same address, situated at the Centenary

Boulevard, at 2[...] B[...] Lane, Church Square Pretoria. The reason for the use of the acronym 'c/o' in the notice is unknown, it is confusing and certainly under the circumstances raises suspicion. Furthermore, Malatji's letterhead fails to identify any of its partners nor style under which the practice is registered. Whether practising in a partnership, own account or otherwise. This omission by Malatji is in contravention of provision 15 of the South African Legal Practice Council Codes of Conduct promulgated in terms of section 36(1) of the Legal Practice Act 28 of 2014 [LPC Act]."

[27] And in paragraph 31 Retief J wrote:

"To test the weight of the submission this Court requested Malatji after the hearing to provide proof of Mr Moses Mosiko's section 25 certificate confirming his authority of right of appearance and that he indeed was an admitted attorney in their employ. No response was forthcoming from Malatji. Several attempts were made. In fact, Mr Moses Mosiko's name nor a firm practising as Malatji attorneys at the given address on their letterhead, appears on the LPC's website. Confirmation of Mr Mosiko's admission, his right to appear in the High Court and the proper registration of Malatji with the LPC remains unconfirmed. The necessary authorities will be requested to attend to the further enquiry and consequences thereof."

[28] Adv Molopyane also appeared before Retief J, ostensibly on instruction of Malatji Attorneys.

[29] There are however further similarities between the matter presented before Retief J and the present matter. In paragraph 12 of her judgment, Retief J stated:

"The papers which were filed by the applicants in support of the rescission application consisted of a founding 'affidavit'

and confirmatory 'affidavit'. Both 'affidavits' purportedly commissioned by one Robert Charles Maasdorp [Maasdorp]. Maasdorp, at the time was a Court messenger and did not hold office nor was he authorised to administer the oath and commission any document as envisaged in terms of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963 [Oaths Act]. This fact was verified with the office of the Deputy Chief Registrar of this Division. This would explain why Maasdorp did not clearly set out his designation nor his ex officio as statutorily prescribed by the Oaths Act and the regulations thereto. Maasdorp rather and disingenuously so, merely inscribed "The High Court" as his designation and ex officio. Maasdorp then proceeded to detail the physical address of this Division as the address from whence he held and exercised such 'office' and from where he administered the prescribed oath and affixed his signature. The weight of the applicants' evidence in support of the rescission application clearly disturbed and Maasdorp perpetrating a possible fraud."

[30] It is the same Robert Charles Maasdorp who "commissioned" the Founding Affidavit in the present matter. Again, Adv Molopyane failed to disclose it.

[31] Albeit that the first rescission application, launched under the incorrect case number, was not before me, I perused the Founding Affidavit filed therein, and found it was “commissioned” by the same Maasdorp. In addition, such comparison evidenced, at least prima facie, that the second rescission application under the correct case number was issued using the original “affidavit”, as signed, save that the first page was removed and replaced with a new page, not initialled.

[32] When the current application served before Mazibuko AJ in November 2024, and the Applicants sought a postponement, the judgment of Retief J had already been handed down. This was also not brought to the attention of Mazibuko AJ.

THE DUTY OF OFFICERS OF COURT:

[33] In his article ‘The dependence of judges on ethical conduct by legal practitioners: The ethical duties of disclosure and non-disclosure’

(2021) 4 SAJEJ 47 R Sutherland DJP wrote, on page 47, that it is ‘the duty of legal practitioners to respect and support the process of court by making proper disclosure and not mislead the court. It is argued that the culture of contemporary litigation must be more respectful of this interrelationship between the judge and the legal practitioner to produce efficient and fair litigation.’

[34] At page 64 he wrote:

‘Moreover, in a climate of burgeoning caseloads and the unrelenting pressure on courts to deliver on the expectations of the litigating public, it is plain that the dependence of the judge on legal practitioners is acute. The pressures on the judge and on the legal practitioner when busy and, perhaps, overwhelmed, create an environment of fatigue ripe for error, oversight and slackness. The essence of professionalism is being resilient and compliant with ethical duties under such conditions. The ethical responsibilities of the judge and of the legal practitioners are in harmony. The symbiotic relationship between the roles of judge and legal practitioner warrants the respect necessary to produce efficient and fair litigation.’ (Footnotes omitted.)

[35] As Court I have a duty of oversight over the conduct of officers of Court. In this regard the following was held in *Legal Practice Council v Mkhize* 2024 (1) SA 189 (GP) para 1.

‘The public’s faith in the legal system is a condition for the rule of law. The conduct of lawyers can diminish the legitimacy of the legal system. It is for this reason, that the Court has oversight over the conduct of its officers. The public must be able to trust their lawyers will act ethically and with integrity; and if the public cannot trust their lawyers: they must trust that the Court will not hesitate to act. This is such a case, in which the Court is requested to act to redeem a breach of the public’s trust in the legal system.’

[36] In *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* 2024

- (2) SA 58 (CC), at paragraph 107, Majiedt J[4] approvingly referred to the Canadian judgment of *Lougheed Enterprises Ltd v Armbruster* 1992 CanLII 1742 (BCCA); (1992) 63 BCLR (2d) 317 (CA) at 324 to 325. The Court stated 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”.
- [37] 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”.
- [38] In paragraph 109 Majiedt J refers to an article by Rogers J, wherein he concludes, amongst others, in respect of the ethical duties of counsel, that “[t]here is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.”
- [39] In paragraph 46 of his Public Protector judgment, Ponnan JA quotes with approval the following:
- ‘Lawyers are not solely professional advocates or “hired guns”. And while they do not surrender their free speech rights upon admission to the Bar, they are also officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice.”
- [40] Due to fact that these issues, subsequently identified by me, were not fully debated and ventilated by the parties, I make no final finding regarding the status of Malatji Attorneys, the conduct of Samalenge Attorneys, the conduct and failures of counsel for the Applicants or the purported commissioning and alteration of the affidavit. I do however find that counsel for the Applicants had a duty, as officer of this Court, to disclose the judgments of Retief J and Raubenheimer AJ, which duty he neglected.
- [41] I implore the LPC to investigate the previous and this referral as a matter of urgency.

SJ MYBURGH ACTING

JUDGE OF THE HIGH COURT, PRETORIA

These reasons have been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 21 May 2025.

Date of hearing: 6 May 2025

Date of

reasons:

21 May 2025

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- [1] The reasons why this was not an application will be discussed infra.
- [2] The reasons for the use of the qualification “ostensibly” will be discussed infra.
- [3] The reasons why this was not an application will be discussed infra.
- [4] Zondo CJ, Maya DCJ, Kollapen J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ concurring

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