

SOUTH AFRICA / JUDGMENT

SAMWU Polokwane Workers Fund and Others v Tshidiso Business Enterprise CC and Another (Reasons) (11541/2023) [2025] ZALMPPHC 92 (9 May 2025)

[2025] ZALMPPHC 92

COURT

Limpopo High Court, Polokwane

BEFORE

M Mangena

CASE / FILE NUMBER

11541/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11541/2023

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO THE JUDGES: YES/NO
- (3) REVISED.

DATE: 09/05/2025

SIGNATURE

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 POLOKWANEMUNICIPALITY 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 xxxxxxxxxx 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 *Mzaiya 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

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