


## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NO: 8781/2023

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED
DATE: <u>5/02/2025</u> SIGNATURE: 	

In the matter between:

TSHIDISO BUSINESS ENTERPRISE CC

APPLICANT

And

STANDARD BANK OF SA LTD

FIRST RESPONDENT

POLOKWANE WORKERS FUND

SECOND RESPONDENT

CITY OF POLOKWANE MUNICIPALITY

THIRD RESPONDENT

SA MUNICIPALITY WORKERS UNION

LOCAL BRANCH

FOURTH RESPONDENT

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JUDGEMENT

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**KGANYAGO J**

- [1] On 26<sup>th</sup> September 2023 the applicant brought an ex-parte application against the respondents. The applicant obtained the following interim order against the respondents with a rule nisi been issued:

"1.1 The first respondent, Standard Bank of South Africa Limited is ordered and directed to pay an amount R1 249 308.07 (one two hundred and forty-nine thousand and three hundred and seven cents only) plus interest at 11.25% from 30<sup>th</sup> November 2022, from the second respondent's account the funds held in account number XXX into the applicant's attorneys trust bank account for the benefit of the applicant, account holder Botha Massyn & Thobejane & Associated Attorneys account number BBB Bank name ABSA.

2.2 The first respondent, Polokwane Workers Fund be interdicted from allowing any withdrawals to be made from account number XXX until payment of an amount of R1 249 308.07 (one million two hundred and forty-nine thousand and three hundred and seven cents only) plus interest has been paid in full to the applicant or until the matter is finalised.

2.3 The second and third respondents, Polokwane Workers Fund and City of Polokwane Municipality is ordered to reinstate the applicant Tshidiso Business Enterprise CC as a service provider.

2.4 A rule nisi be issued calling upon the respondents to show cause on a date to be allocated by the registrar as to why this order should not be made final. The return date of the 30<sup>th</sup> November 2023.

2.5 An order that the respondents may anticipate the return date by notice to the applicant.

2.6 An order that any of the respondents that oppose this application pay costs on attorney and own client scale".

- [2] The applicant's founding affidavit was deposed Margaret Mankwana Mamogobo (Margaret) who has stated that she is the sole member of the applicant. The

applicant in its founding affidavit has stated that it is a registered credit provider. On 7<sup>th</sup> March 2016 it has applied to the 4<sup>th</sup> respondent to be reinstated as a microlender to the employees of the 3<sup>rd</sup> respondent. In terms of its application for reinstatement, the applicant had offered to donate 1% of its administration fee to the 4<sup>th</sup> respondent. In terms of its business the applicant was providing loans to the 3<sup>rd</sup> respondent's employees. The 4<sup>th</sup> respondent supported the applicant's application, and on 6<sup>th</sup> June 2016 the 4<sup>th</sup> respondent notified the 3<sup>rd</sup> respondent to recognise the applicant. The applicant was appointed by the 3<sup>rd</sup> respondent as the recognised service provider of its employees with effect from 8<sup>th</sup> June 2016. The repayments of the loans were collected by the 3<sup>rd</sup> respondent monthly by debiting or deducting from the employees' payroll premiums not exceeding 20% of the debtor employee's net salary per month.

[3] After deducting the monthly premiums payable by the employees, the 3<sup>rd</sup> respondent will pay the whole amount deducted into the bank account held by the 2<sup>nd</sup> respondent, from which it will be distributed to various service providers including the applicant. Margaret as the sole member of the applicant, was also a signatory to the 2<sup>nd</sup> respondent's bank account. During November 2022 the 2<sup>nd</sup> respondent failed to pay the applicant an amount of R571 927.92 which was due and payable to it as a result of the instruction from the 4<sup>th</sup> respondent. Margaret was also removed as a signatory to the 2<sup>nd</sup> respondent's bank account.

[4] At the end of November 2022 the applicant received a letter from the 4<sup>th</sup> respondent wherein the 4<sup>th</sup> respondent was making allegations of irregularities against the applicant. The 4<sup>th</sup> respondent had also given instructions to the signatories to the 2<sup>nd</sup> respondent's bank account not to process payments due



and payable to the applicant. In that letter the 4<sup>th</sup> respondent wanted the applicant to clarify the issue relating to the 3.5% administration fee charged by the applicant to the 4<sup>th</sup> respondent in respect of services rendered by the applicant to the employees of the 3<sup>rd</sup> respondent.

[5] At the end of December 2022 an amount of R681 838.25 was due and payable to the applicant, but was not processed by the 2<sup>nd</sup> respondent as result of the instruction contained in the letter from the 4<sup>th</sup> respondent. The total amount due and payable to the applicant excluding interest was now R1 249 308.07. According to the applicant the 4<sup>th</sup> respondent does not dispute that the applicant is entitled to payment of this money, but refuses payment to be effected to the applicant merely because it is unhappy that the applicant has not paid 3.5% of the administration fee.

[6] The applicant avers that its business suffered severe financial distress and could not sustain itself from December 2022 to date. It was forced to pay rental at its offices without carrying out its business activities. It is on the verge of liquidation and blacklisting with the credit bureau as a result of its failure to honour its financial obligations towards the landlord and other creditors. The applicant has submitted that it is merely seeking a preservation order by way of interim ex-parte order. The applicant has further submitted that it has made a good case not only to sustain the granting of the interim order but also to sustain the granting of the final order against the respondents.

[7] The 2<sup>nd</sup> to 4<sup>th</sup> respondents (respondents) are opposing the applicant's application. Fortune Mashabathaga the chairperson of the 4<sup>th</sup> respondent has deposed the answering affidavit on behalf of all the respondents. The respondents have raised two points *in limine*, the 1<sup>st</sup> being that of no *locus standi* and the 2<sup>nd</sup> being

that of non-disclosure. With regard to the first point *in limine*, the respondents have submitted that Margaret has no *locus standi* to launch the application as she had failed to attach a resolution authorizing her to act on behalf of the applicant. Further that no CIPC certificate or document to verify that the applicant is indeed registered in terms of the close corporation laws of SA confirming that Margaret is the sole active member of the close corporation has been attached.

[8] With regard to the point *in limine* of non-disclosure, the respondents have submitted that Margaret has failed to make a full and frank disclosure that she had failed in her two urgent applications in this Court under case numbers 12952/2022 and 3900/2023 wherein substantially the same relief was sought stemming from the same set of facts against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents. Under case number 12952/2022 the prayers which she was seeking were (i) that the 6<sup>th</sup> respondent's (signatory members of the Polokwane Workers Fund) powers to deal with the Polokwane Workers Fund be declared null and void; (ii) the 6<sup>th</sup> respondent be prohibited from withdrawing any monies from the Polokwane Workers Fund; and (iii) the 6<sup>th</sup> respondent not to organise year end party with the proceeds of the Polokwane Workers Fund.

[9] The prayers which she was seeking under case number 3900/2023 were (i) that SAMWU's decision of the 25<sup>th</sup> October 2021 to replace the signatories of the Polokwane Workers Fund be declared unlawful and set aside; (ii) Margaret and Godfrey Khumalo be declared the lawful signatories to the Polokwane Workers Fund; (iii) SAMWU and the 6 members of the Polokwane Workers Fund be interdicted and restrained from operating the Funds account at Standard Bank; and (iv) SAMWU and the 6 members of the Polokwane Workers Fund be



interdicted and restrained from making any unlawful payments from the Fund's account at Standard Bank.

- [10] The respondents have submitted that if the applicant had disclosed the failed two applications in its founding affidavit, that might have influenced this court to refuse to grant the applicant's ex-parte application. That the non-disclosure of such material facts negates the *audi alteram partem* principle, one of the most important principles underlying the rules of civil procedure.
- [11] When this matter was argued before me, the parties have agreed to argue the points *in limine* first, and at this stage it is not necessary for me to summarize the respondents' answering affidavit on merits. In reply to the respondents' points *in limine*, regarding the 1<sup>st</sup> point *in limine*, applicant has stated that Margaret did not need any resolution to act on behalf of it. With regard to the 2<sup>nd</sup> point *in limine*, the applicant has stated the two cases referred by the respondents did not involve the applicant as a cited party to the proceedings, and that the remedy sought is completely different from the remedy which the applicant is seeking in this application.
- [12] The respondents' 1<sup>st</sup> point *in limine* challenges the authority of Margaret to depose the founding affidavit on behalf of the applicant. Rule 7(1) of the Uniform Rules of Court (the Rules) provides as follows:
- "Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application".

- [13] In *Unlawful Occupiers, School Site v City of Johannesburg*<sup>1</sup> Brand JA said:

"The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred with approval by this court in *Ganes and Another v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624I-625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court".

- [14] It is trite that a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution and prosecution of the proceedings that must be authorised. (See *Ganes Another v Telkom Namibia*<sup>2</sup>). Margaret in the founding affidavit has stated that she is the sole director of the applicant and the respondents did not dispute that. If the respondents doubted her authority to depose the affidavit on behalf of the applicant they should have invoked the remedy provided for in rule 7(1) of the Rules, but have failed to do so. In my view, there is no merit in the respondent's first point *in limine* and it stands to be dismissed.

- [15] Regarding the 2<sup>nd</sup> point *in limine*, it is trite that in *ex parte* applications the applicant had a duty to the court to make a full and frank disclosure of all known facts that might influence the court in reaching a just decision. In *Phillips v Director of Public Prosecutions*<sup>3</sup> Howie P said:

"It is trite that an *ex parte* applicant must disclose all material facts that might influence the Court in deciding an application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given full facts, to set aside the provisional order or confirm it. In exercising

<sup>1</sup> 2005 (4) SA 199 (SCA) at 206G-H

<sup>2</sup> 2004 (3) SA 615 (SCA) at para 19

<sup>3</sup> 2003 (6) SA 447 (SCA) at para 29



that discretion the later court will have regard to the extent of the non-closure; the question whether the first Court might have been influenced by the proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside”.

[16] Margaret who is the sole director of the applicant was party to two matters that were both struck off the roll due to lack of urgency. Under case number 12952/2022 Margaret was the 2<sup>nd</sup> applicant, and under case number 3900/2023 Margaret was the 1<sup>st</sup> applicant. Both matters were launched as a result of non-payment of the applicant by the 2<sup>nd</sup> respondent on the instruction from the 4<sup>th</sup> respondent, and also the removal of Margaret as a signatory to the bank account of the 2<sup>nd</sup> respondent. The current application is based on the same facts that triggered the two applications that were struck off the roll due to lack of urgency. The relief which the applicants were seeking in the two applications that were struck off the roll due to lack of urgency are similar to the ones in the current application even though they have not been crafted in the exact similar words.

[17] The applicant's explanation for its failure to disclose the two matters that were struck off the roll due to lack of urgency are that these two cases did not involve the applicant as a cited party and the remedies that were sought in the previous applications are completely different from the remedy that the applicant is seeking in the current application. It is true that the applicant was not cited as a party to the proceedings. However, Margaret the deponent of the founding affidavit is the sole member of the applicant, and was an active participant in the two failed applications. This is her third attempt now having changed colours by introducing the applicant as a party to the proceedings. However, that did not change the substance of the matter. All these applications were triggered by the same facts and seeking the same relief, though now in a different format.



- [18] Margaret was running her loan business through the applicant to the employees of the 3<sup>rd</sup> respondent, who are union members of the 4<sup>th</sup> respondent, and also members of the 2<sup>nd</sup> respondent. As a sole member of the applicant, Margaret was using the applicant as an instrument which she conducted her business. Even though the applicant is a juristic person which is capable to sue and be sued on its own, it cannot be separated from its sole member. Margaret had represented the applicant by deposing its founding affidavit. When the applicant launched the current application, its sole member knew that it had twice failed in its attempt to get the relief it was seeking based on the same facts which led it to launch the current application. The duty which is upon the applicant is to disclose all material facts that might influence the court in deciding the matter in a just manner. It is not upon the applicant to be selective as which facts might influence the court. Its duty is to disclose all, and the court will decide which are the relevant ones.
- [19] The two cases which the applicant had failed to disclose had a direct bearing on the current application. There is no evidence that the two applications have been withdrawn, and are therefore still pending. The applicant wants to circumvent proceeding with two applications in the normal roll by bringing the new application under a new entity and new case number with the hope that it will not be traced. Even two applications which were struck off the roll, Margaret was involved with other different applicants under different case numbers to make it look as if it was not the same parties, whilst the relief she was seeking was the same and based on the same facts. In my view, with the history of how Margaret had been litigating with regard to the two failed urgent applications, the applicant had deliberately failed to make a full and frank disclosure of all known facts that might have influenced the court in reaching a just conclusion.

With that point alone, the rule nisi that was issued on 26<sup>th</sup> September 2023 stands to be discharged, and the application be dismissed.

[20] With regard to costs, even though the applicant was successful with the 1st point *in limine*, its conduct amounted to abuse of court processes, and this third application should not have been launched as there were already two pending applications seeking the same relief. This is one of the exceptional matters wherein punitive costs order should awarded.

[21] In the result the following order is made:

21.1 The respondents' 1st point *in limine* is dismissed.

21.2 The respondents' 2<sup>nd</sup> point *in limine* is upheld and the interim order granted on 26<sup>th</sup> September 2023 is hereby discharged.

21.3 The applicant's application is dismissed with costs on attorney and client scale B.

  
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 KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH  
 AFRICA, LIMPOPO DIVISION,  
 POLOKWANE

**APPEARANCES:**

Counsel for the applicant	: LE Thobejane
Instructed by	: Botha Massyn & Thobejane
Counsel for 2 <sup>nd</sup> and 4 <sup>th</sup> respondents	: Adv MR Maphutha

<b>Instructed by</b>	<b>: GM Tjiane attorneys</b>
<b>Counsel for 3<sup>rd</sup> respondent</b>	<b>: MS Shaik</b>
<b>Instructed by</b>	<b>: AM Carrim Attorneys Inc</b>
<b>Date heard</b>	<b>: 20<sup>th</sup> January 2025</b>
<b>Electronically circulated on</b>	<b>: 5<sup>th</sup> February 2025</b>

Polokwane High Court