

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature	
Date... 18/07/2019	

CASE NUMBER: 6271/18

PRETORIA SOCIETY OF ADVOCATES

First Applicant

JOHANNESBURG SOCIETY OF ADVOCATES

Second Applicant

POLOKWANE SOCIETY OF ADVOCATES

Third Applicant

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Fourth Applicant

V

SETH AZWIHANGWISI NTHAI

Respondent

JUDGMENT

THE COURT: MAKGOBA JP et MABUSE J:

[1] These are two applications for leave to appeal against the judgment and order that the Court handed down on 24 May 2019. One application was brought by the Johannesburg Society of Advocates ("the JSA") while the other application was brought by the Legal Practice Council ("the LPC").

[2] On 24 May 2019 the Court handed down the judgment in which the order read as follows:

"The Applicant is hereby readmitted as a legal practitioner of the High Court of South Africa to be enrolled as an advocate."

[3] Section 17 of the Superior Courts Act No. 10 of 2013 ("the Superior Courts Act") governs the applications for leave to appeal. It provides as follows:

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success;

or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of s 16(2)(a); and

(c) the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] The enquiry as to whether leave should be granted is twofold. The first step that a Court seized with such an application should do is to investigate whether there are any reasonable prospects that another Court seized with the same set of facts would reach a different conclusion. If the answer is in the positive, the Court should grant leave to appeal. But if the answer is in the negative the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard.

[5] It was submitted by Adv Shakwane SC, counsel for Nthai, that s 17(1) sets out an inflexible threshold to grant leave to appeal. Therefore both the JSA and LPC must of necessity meet this stringent threshold set out in s 17 of the Superior Courts Act in order to succeed with their respective applications for leave to appeal. That the threshold under s 17(1) of the Superior Courts Act is now stringent, now even more stringent than when the now repealed Supreme Court Act 59 of 1959, was still applicable, is aptly demonstrated by **S v Notshokovu and Another [2016] ZA SCA 112 paragraph 2**

[7 September 2016], where Shongwe JA, writing for the Court, had the following to say:

“An Applicant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959.”

Section 17(1) uses the word “only”. It provides that:

“(17.1) Leave to appeal may “only” be given”

and then proceeds to set out the circumstances under which leave to appeal may be given. See **South African Breweries (Pty) Ltd v The**

Commissioner of the South African Revenue Services (SARS) [2017] 2 AGPPHC 340 (28 March 2017) par 5, in which the Court cited with approval the following passage from the **Mont Chevaux Trust v Tim Goosen and 18 Others 2014 JDR 2325 (LCC) par 6**:

"It is clear that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the new Act. The former test whether leave to appeal should be granted was reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cornwright and Others 1985 (2) SA 342 (T) at 343 H. The use of the word "would" in the new statutes indicates a measure of certainty that another Court will differ from the court whose judgment is sought to be appealed against."

Finally, on the rigidity of the threshold, Plaskett AJA, as he then was, wrote the following in the judgment in which Cloete JA and Maya JA, as she then was, concurred in **S v Smith 2012 (1) SACR 567, 570 par (7)**:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[6] One small vexing question of the *locus standi* of the JSA has again raised its ugly head. Nthai maintains in opposing the JSA's application for leave to appeal, that the JSA has no *locus standi* to apply for leave to appeal. It is an issue that the JSA intends taking up on appeal. The JSA intends appealing the following finding in the main judgment that it has no *locus standi* in the matter and furthermore that there was no reason for it to be involved in the application. The JSA contends, *inter alia*, that in terms of s 12(2) of the Interpretation Act 33 of 1957 ("the Interpretation Act"), it is presumed that where a law repeals any other law, unless the contrary intention appears, the repeal shall not affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed. Mr Shakoane SC, relying on the Constitution of the JSA, contended that the JSA do not have jurisdiction in the main application and that it still has no jurisdiction in the application for leave to appeal.

[7] We fully agree with the law as set out in the said section of the Interpretation Act. This means that Nthai's application had to be dealt with in terms of the Admission of Advocates Act No. 74 of 1964 ("the AAA"). This is the Act that was in force before 1 November 2018. After all Nthai's application was launched on 18 October 2018 in terms of the AAA and while the AAA was still in operation. Secondly, Nthai himself stated expressly that he brought this application in terms of the AAA. The main judgment dealt with the law before 1 November 2018 and after 1 November 2018. The finding that the JSA had no *locus standi* was based on the law that applied before 1 November 2018 which is Rule 3A(1)(c) of the Uniform Rules of Court and the Practice

Directive dated 4 July 2018. The decision to readmit Nthai as an advocate was not based on the law but on the evidence of the witnesses and therefore the facts of the case. In the judgment we referred to the AAA in paragraphs 1, 63, 64, 67 and 68, we also dealt with the provisions of the Legal Practice Act 28 of 2014.

[8] For four reasons the law as it existed at the time Nthai launched his application shows that even at that stage the JSA had no *locus standi* in Nthai's application. Those four reasons are as follows:

8.1 firstly, the JSA is a voluntary association of advocates practising predominantly in the Gauteng Division and Gauteng Local Division. It has its offices located in the province of Gauteng, in particular in Johannesburg. The JSA does not predominantly practise in the Free State or the Western Cape or North-West or Limpopo Provinces. In terms of the AAA, it was a *custos morum* of the profession of advocates in the Gauteng Province only. The Polokwane Society of Advocates ("POLSA") is a voluntary association of advocates who practise predominantly in the Limpopo Province. We pointed out in the main judgment that at the time Nthai launched his application, this POLSA was already in existence. Its jurisdiction extended over all the advocates who practise in the Limpopo Province. POLSA was the *custos morum* of all such advocates who practise in Limpopo. It never had any jurisdiction over advocates who practise in Gauteng or North-West or Free State provinces. Its jurisdiction did not extend over its territorial borders. Like

the JSA its *locus standi* was territorial limited only by the borders of the province in which its members predominantly practise;

8.2 secondly, so Mr Shakoane's argument continued, its own constitution restricts its powers to its own members and not members of other societies of advocates. Section 2 of its constitution defines "*advocates who normally practise in the division*" as those advocates who are recognised for the time being by the Bar Council as normally practising in the Division provided that no person shall be recognised who:

- "(a) *does not occupy chambers within the Division*" (Nthai did not occupy any chambers within the Division of Gauteng and Gauteng Local Division while he had been struck from the roll);
- (b) *does not hold himself available to undertake work pertaining to an advocate on behalf of the public.* (Nthai did not undertake work pertaining to an advocate on behalf of the public while his striking off endured), and
- (c) *is not willing and available to accept the normal duties of the profession including pro deo work at the request of the Court."*

8.2.1 The JSA constitution further describes "*a member*" or "*members*" as meaning a member or members as the case may be, for the time being of the society.

8.2.2 Society according to the said constitution means the Johannesburg Society of Advocates.

8.2.3 According to paragraph 3 of the said quotation the objects of the JSA are:

- “(a) the protection of the interests of the Bar of the Division, of the members and pupil members in their professional capacity;*
- (b) the supervision of the conduct of the members and of pupil members.”*

These are some of the objects of society.

8.2.4 The jurisdiction of the JSA does not extend over advocates who are not its members and who do not practise predominantly within its area of jurisdiction or within the Gauteng and the Gauteng Local Divisions' area of jurisdiction.

8.2.5 “Division” in the JSA’s Constitution is defined as ‘the area for the time being under the jurisdiction of South Gauteng High Court Johannesburg, or of any other court which may replace such Local Division for such area.

We could find nothing in the constitution of the JSA that gave it any powers to act outside its territory of operations.

[9] Thirdly, the *locus standi* of the JSA is excluded by the provisions of s 3(A)(1)(c) of the Uniform Rules of Court. We have referred to this rule in paragraph 67.1 of the main judgment. At the pain of repetition this rule provides:

“Subject to the provisions of rule 6 insofar as they are not inconsistent with the provisions of this Rule, a person applying for admission to practise and for

authority to be enrolled as an advocate shall, at least 6 weeks before the date on which this application is heard by the Court –

(a)

(b)

(c) *serve a copy of the documents and affidavit referred to in paragraphs (a), (b) and (A) on the secretary of the Bar Council or Society of Advocates of the division concerned.*”

The Bar Council or Society of Advocates referred to in this Rule is Bar Council or Society of Advocates that operates within the jurisdictional area of the division before which the application will be heard. The JSA does not predominantly operate in Limpopo Province. The terms of Rule 3(a)(1)(c) by implication exclude the JSA from operating in the Limpopo Province. There is a reason for excluding the foreign Society of Advocates. The most important consideration excluding foreign Society of Advocates is that by their distance the foreign Society of Advocates will not be in a position to monitor the conduct of the advocates practising within that province in which they do not predominantly practise. The Provincial Society of Advocates, in this case POLSA in that particular province, is the *custos morum* of the advocates’ profession in Limpopo Province. This Court was never referred to a case in which the JSA was a party to any application of an advocate or any application to strike an advocate in other provinces in which the JSA did not predominantly practise. In our view, the Rule is a *prima facie* indicator of the intention to exclude the JSA from matters which are not in its division or territory.

[10] Fourthly, the Judge President's Practice Directive dated 24 July 2018 may be construed as excluding the JSA. We have referred to this Practice Directive by the Judge President of this division in paragraph 68 of the main judgment. It states expressly that an application for admission as an advocate must only be served on the Polokwane Society of Advocates. Properly interpreted, we now deal here with the principle that the inclusion of one is the exclusion of the other or others ...

[11] We could find nothing in one of the above mentioned factors to satisfy this Court that the JSA could flex its muscles beyond the territory of Gauteng Local Divisions. Nothing in law gave the JSA any powers to take up fights within the area of its sister Society of Advocates. The purpose of the said Rule 3(A)(1)(c) is to prevent such situations where Society of Advocates do not speak in one voice on the same issue. In our view the conduct of the JSA undermines POLSA; it is designed to emasculate POLSA in its area and to render it a worthless Society of Advocates. JSA's involvement in this matter interferes with the elementary rights and powers of POLSA and should be avoided at all costs. We are satisfied that the JSA's appeal against the finding that it has no jurisdiction or *locus standi* in this matter has no reasonable prospects of success on appeal.

[12] It goes without saying that if it is established that the JSA has no *locus standi* to prosecute the appeal then the resolution by its members that it should apply for leave to appeal is null and void *ab origine*. Its members may not give it more powers than they themselves have. The members of the JSA cannot

have any power to authorise it to perform acts which are outside its territory or to give it an authority to infringe upon the territory of another Society of Advocates' area of jurisdiction. In our view, the General Bar Council, and not the JSA, would have been the appropriate party to take up the matter on behalf of the advocates' profession because in terms of its Constitution, the GBC's objects are, *inter alia* –

- (b) deal with all matters affecting the profession and to take action thereon;
- (c) upheld the interests of advocates in South Africa.

[13] Now the JSA gave several other grounds on the basis of which it seeks to appeal. It was argued by Adv Paul Kennedy SC (Mr Kennedy) counsel for the JSA, firstly that:

- “5.1 there is a reasonable prospect that a Court of appeal will differ from the approach taken by this Court to the readmission application;*
- 5.2 there is a compelling reason why the appeal should be heard and the conflicting judgment.”*

[14] Based on what is stated in paragraph 13 *supra* Mr Kennedy argued that this related in particular to the question whether the Bar Councils in the position of the JSA and PSA Pretoria have any standing to participate in readmission applications after the commencement of the Legal Practice Act 28 of 2014 (the LPA). Mr Kennedy argued that there are conflicting judgments on the question whether the Bar Councils in the position of the JSA and PSA have any standing to participate in any readmissions after the commencement of the LPA.

[15] We have dealt with these issues fully in paragraphs 71.3 to 71.8 and paragraph 72 of the main judgment. Furthermore we have dealt with the role that the JSA, PSA and GCB can play after 1 November 2018 in paragraph 76.1 and 76.2 of the main judgment.

[16] Mr Kennedy's argument that there are conflicting judgments is, in our view, misplaced. In the first place it is clear as crystal that in dealing with the matter of Johannesburg Society of Advocates v Edeling (326/2018) [2019] ZASCA the Supreme Court of Appeal applied the provisions of the AAA. This is the piece of legislation that made the JSA and other Society of Advocates the *custos morum* of the profession before 1 November 2018. Section 5 of the LPA has now vested the *custos morum* on the LPC. We have stated in the main judgment that the JSA should not go into extinction, now that the LPA is in place. No, the JSA must use the LPC for any submission that they wish to make. The JSA may not be allowed to usurp the powers of a properly constituted statutory body like the LPC. Their conduct in taking up the powers of a properly registered body will result in the negation of the LPC. This was not the intention of the legislature which intention was to:

"Regulate the legal profession, in the public interest, by means of a single statute."

The fact that the legislature intended regulating the legal profession by a single statute and the fact furthermore that the AAA was repealed in its entirety mean that there is no residual power which gives the JSA any power

to act in such matters. Finally, in terms of Schedule 6 Section 2(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996:

“All law that was in force when the new Constitution took effect, continued in force subject to any amendment or repeal.”

The AAA has been repealed. Thirdly, in the Edeling matter no-one questioned the application of the provisions of the AAA. It is for that reason that the Court applied its provisions. In Nthai’s application Nthai questioned the *locus standi* of the PSA and the JSA. Fourthly, the court in Edeling’s case relied on s 12(2) of the Interpretation Act.

[17] Accordingly the argument that there are conflicting judgments carries no weight. We find therefore that there is no compelling reason why the appeal should be heard as there are not conflicting judgments.

[18] The JSA’s reliance on paragraph 17 of the Edeling’s case to prove its *locus standi* in matters that arose after 1 November 2018 is, in our view, misplaced. In the said paragraph the SCA stated that:

“An advocate is required to be completely honest, truthful and reliable. In applications such as this the Society acts as custos morum of the profession. In doing so it acts in the interest of the profession, the Court and the public.”

We have already pointed out somewhere *supra* where the SCA dealt with the Edeling’s case that it did so in terms of the AAA. This quotation itself does not bestow the JSA with any *locus standi*, which is a question of law. The said paragraph should be looked at within the context of the AAA as it appeared then.

[19] Secondly, Mr Kennedy argued that Nthai did not make a full and frank disclosure to any disciplinary body or to any Court or of the extent of his misconduct in relation to the allegations of his overreaching and acting with conflict of interest in the Anglo Platinum matter. Mr Kennedy contended that Mr Nthai refused to disclose the documents and evidence that would be necessary to allow the issue of overreaching and conflicting of interest to be fully investigated; that Mr Nthai persisted in refusing to provide the documents previously requested by the Pretoria Bar Council (PBC) and the JSA's attorneys. In conclusion on this point he contended that Mr Nthai accordingly refused to disclose the relevant documents to give a full account concerning the allegations against him. According to him this conduct by Nthai is inconsistent with the conduct of a man who has reformed fully. For the following reasons there is no merit in this argument by Mr Kennedy.

19.1 Mr Nthai has fully dealt with the origin and circumstances of his overreaching in his founding affidavit. The Court was satisfied with the manner in which he had done so. The issue of overreaching was dealt with in paragraphs 39, 40 and 47 of the main judgment.

19.2 We pointed out in paragraph 39 of the main judgment that having considered certain documents referred to in the affidavit by Adv Motimele SC, the PBC concluded that Nthai was, guilty of overreaching. The Court that ultimately removed Nthai's name from the roll of advocates was asked to take into account the charge of overreaching and conflict of interests.

19.3 We pointed out furthermore in paragraph 40 of the main judgment that during the investigations of the issue of overreaching, the PBC wrote Nthai a letter in which it requested Nthai to disclose his books relating to the allegations of overreaching. His legal representative responded to the letter. The disciplinary committee did not pursue the matter any further, but in the application to remove Nthai's name from the roll of advocates the PSA raised and pursued the allegations of overreaching against him. Accordingly, overreaching was one of the grounds put forward and considered by the Court in removing Nthai's name from the roll. This allegation by Nthai was never challenged by the JSA.

19.4 At the hearing of the main application Adv N Cassim SC for the JSA conceded that the issue of overreaching was one of the grounds upon which Nthai's name was removed from the roll.

19.5 In paragraphs 41 to 42 pages 72 to 83 at his founding affidavit Nthai dealt extensively with the aspect of overreaching. The JSA did not dispute Nthai's version. It did not ask for chance to investigate his allegations.

19.6 Finally Nthai's financial statements were made available at the hearing of the main application. No-one of the parties involved in the main application referred to such financial statements. The JSA simply adopted an insouciant attitude towards Nthai's financial statements.

19.7 In the main application the Court was satisfied that Nthai had made a full and frank disclosure on the aspects of overreaching and conflict of interests. We are therefore satisfied that this ground of appeal would have no reasonable prospect of success on appeal.

[20] The JSA complained and raised it as a ground of appeal the fact that in its main judgment the Court held that voluntary legal work done as part of community service during Nthai's period of striking off was "invaluable" and was a relevant factor in favour of Nthai's application for readmission. It contended that the Court ought to have found that:

20.1 it was not proper for Nthai to conduct legal work in any capacity during his period of striking off, regardless of whether the work was done on a pro bono basis;

20.2 that the legal effect of the striking off application is to prevent an advocate from conducting any work in that capacity, regardless or not whether that work is remunerated and;

20.3 the fact that Nthai conducted legal work in the circumstances he described in his evidence during the times he had been struck off cast doubt on his judgment and his understanding of the seriousness and effect of his striking off.

[21]

21.1 In the first place it is not the JSA's case that the Court in making the finding referred to above in the said ground erred.

21.2 This ground of appeal lacks merit. We agree with Mr Shakoane SC that striking off does not necessarily mean that an advocate whose name has been removed from the roll of advocates is prevented by the striking off from rendering voluntary legal work or community service. Community service is in fact part of rehabilitation of an advocate who has been struck

from the roll. The finding that we made was supported by paragraphs [25] and [26] of the Ex Parte Pillay matter. The community services Mr Pillay, Mr de Klerk and Mr Leopeng rendered have been fully set out and highly regarded by the Court in the Pillay judgment. The Court regarded them as invaluable.

21.3 The JSA has not challenged the fact that the Court in Ex Parte Pillay recognised community service as an integral part of an advocate's rehabilitation.

21.4 Finally the JSA has contended that Nthai had rendered legal services unsupervised. It abandoned this point in its answering affidavit. This ground was therefore not pleaded by the JSA in its affidavit.

21.5 We are therefore of the view that the JSA has no reasonable prospects of success in an appeal on this ground.

[22] One of the grounds of appeal raised by the JSA was stated as follows:

"8. The question of determination was whether Mr Nthai should be given a second chance (judgment 3.2). This Court erred in this finding in that:

8.1 the question for determination is not whether Mr Nthai should be given a second chance but whether he has genuinely completely and permanently reformed."

In our view the JSA is disingenuous. In the first place the Court never stated anywhere in paragraph 3.2 of the main judgment that: *"the question to be determined was whether Mr Nthai should be given a second chance."* This is a serious misstatement. We will assume for the benefit of the JSA that it did read the whole of paragraph 3.2 of the main judgment. If the JSA had read

the whole of paragraph 3.2 it would have come across the following statement in the same paragraph:

“considering the circumstances under which Nthai’s name was removed from the roll, the fundamental question to be answered in this application is whether there has been a genuine, complete and permanent reformation on Nthai’s part.”

After this statement there is also reference to **Law Society, Transvaal v Behrman 1981 (4) 538 at 553 B-C** and also **Swartsberg v Law Society of the Northern Provinces 2008 (5) SA 322 (SCA) paragraph 222**. The contention that this Court held that the question for determination was whether Mr Nthai should be given a second chance is a fallacy. The contention that the Court failed to apply the proper legal test for readmission in the main judgment is lacking in merit. It is for this reason that Mr Kennedy did not even advance argument on this ground. There is therefore no reasonable prospect of success on appeal based on these baseless ground.

[23]

23.1 Another ground of appeal on the basis of which the JSA wishes to challenge the judgment and order of the Court was the following:

“5. The Court erred in this finding from the following reasons:

5.1 Mr Nthai deliberately refrained from delivering any answering affidavit in the striking off application [Judgment paragraph 43].

5.2 Mr Nthai did not participate in his disciplinary hearing before the PSA. [Judgment paragraph 40].”

23.2 These findings were justified. They were based on the uncontested evidence of Mr Nthai. He testified that he deliberately refrained from delivering any answering affidavit. He furnished a valid reason therefor. It was never disputed that he deliberately chose not to challenge the application to remove his name from the roll. There is no other version either by the PSA or JSA available to contradict this evidence by Mr Nthai.

23.3 Finally, paragraph 40 of the main judgment has very little to do with Mr Nthai's participation in his disciplinary hearing. Therefore the complaint set out in the application for leave to appeal referring to paragraph 40 is misguided and lacks any merits.

[24] The application of the provisions of s 12(2) of the Interpretation Act leaves the LPC in a precarious and unenviable position. This is so simply because it was not in existence when on 18 October 2019 Nthai launched his application. Accordingly it is unfair to expect it to play any significant role in both the main application and the application for leave to appeal. The LPC's participation in the proceedings should end up here.

[25] One of the reasons why the appeal should be heard and conflicting judgment is the finding that we made in the main judgment that sections 4 and 5 of the LPA have the effect that the GCB, the PSA and the JSA (in effect all the constituent bars of the GCB) no longer have any role to play as *custos morus* of the legal profession in terms of the LPA and that this rule as a matter of law has been taken over by LPC. See paragraph 71 of the judgment. If this view

is upheld or is left as a precedence, it will have the consequence that the effect of the LPC is to deprive the JSA, the PSA and the GCB of their formal standing to participate in readmission by their members who have been struck off the roll on their application.

[26] We fully dealt with the effect of sections 4 and 5 of the LPA on the GCB and its constituent bars in paragraphs 71 to 76 of the main judgment. We have not been persuaded that we erred in our interpretation of the provisions of the said sections. Accordingly our unanimous view is that there is no reasonable prospect of success if leave to appeal against this finding is granted.

THE GROUNDS OF APPEAL BY THE LPC

[27] In the first place we have remarked in paragraph [24] *supra* that seeing that the application by Nthai was launched on 18 October 2018 in terms of the AAA; seeing further that Nthai's application had to be dealt with in terms of the provisions of the AAA according to the provisions of s 12(2) of the Interpretation Act; and seeing furthermore that the LPC had not yet come into being as at 18 October 2018 it should not take part in the proceedings.

[28] Secondly, it was not invited by the court order of 30 November 2018 to take part in the main application. The Court had merely ordered copies of these proceedings, in particular the main application, to be served on the LPC simply to enable it to prepare a report that the Court desired; and not to take part in these proceedings. If the LPC had properly read and understood the court order of 30 November 2018 they would have understood that they were

[31] Finally, in paragraph 6.2.1 of the LPC's application for leave to appeal it is stated that:

"In terms of section 12(2) of the Interpretation Act 33 of 1957, Mr Nthai's admission ought to have been finalised as though the Administration of Advocates Act 74 of 1964 had not been repealed."

This ground alone excludes the LPC from further participation in these proceedings.

[32] In response to a Rule [7.1] notice issued by Mr Nthai and disputing the authority of the LPC to launch an application for leave to appeal the LPC delivered and filed the following extract from the minutes of the Executive Committee of the Legal Practice Council:

"EXTRACT FROM THE MINUTES OF A MEETING OF THE EXECUTIVE COMMITTEE OF THE LEGAL PRACTICE CONCIL HELD ON 8 JUNE 2019

Application for Leave to Appeal: Re-admission as an Advocate:

SETH AZWIHANGWISI NTHAI

IT WAS RESOLVED BY THE COUNCIL THAT:

- 1. the attorneys of the Legal Practice Council, be instructed to file an Application for Leave to Appeal against the judgment handed down by the High Court (Limpopo Division) for the re-admission of Mr Seth Azwihangwisi Nthai, as an advocate on 24 May 2019 AND THAT;*
- 2. the Chairperson and/or any member of the Legal Practice Council be and they are hereby authorised to sign all documents necessary to give effect to this resolution on behalf of the Legal Practice Council.*

CERTIFIED TO BE A TRUE COPY

Signed at PRETORIA on this 21th day of June 2019."

[33] Quite clearly this Resolution was not issued by the LPC, as required by s 6(1)(5) of the LPA, but by the Executive Committee of the LPC which is not authorised by the LPA. The Executive Committee may only issue such a Resolution if it has been so delegated by the LPC in terms of s 6(1)(x) of the LPA. It is not the LPC's case that it has delegated its powers to make resolutions to the Executive Committee. We agree with Mr Shakoane SC that the power to authorise the LPC's application for leave to appeal does not lie with the Executive Committee of the LPC. It is only the LPC sitting as a full council that has the power to decide to institute the present proceedings. Section 6(1)(a)(5) of the LPA provides that:

"POWERS OF THE COUNCIL

In order to achieve its objects referred to in section 5, and having due regard to the Constitution, applicable legislation and the inputs of the ombud and parliament, the Council may institute or defend legal proceedings on behalf of the Council. These provisions confirm the LPC as the only body with the power in terms of the LPA to take resolution in question."

We were referred to **Schierhout v Union Government (the Minister of Justice) 1919 AD 30 at page 44** in this regard where the Court stated that:

"When several persons are appointed to exercise judicial powers, then in the absence of provisions to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body And the same rule would apply whenever a number of individuals were

empowered by Statutes to deal with any matter as one body; the action taken would have to be the joint action of all of them For otherwise they would not be acting in accordance with the provisions of the Statutes."

[34] It was argued by Mr Shakwane furthermore that the principles set out in Schierhout has been mirrored in sections 6(2)(a)(i) and 6(2)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000 which provide that:

*"A court tribunal has the power to judicially review an administrative action if –
the administrator who took it –*

- (i) was not authorised to do so by the empowering provision;*
- (ii) acted on a delegation or power which was not authorised by the empowering provision."*

[35] A multi-member statutory body which acts without one or more of its members is either not the administrator created by the empowering provision, and hence is not authorised to act by the empowering provision or it is a differently constituted body acting under a delegation which was not authorised by the empowering provision. Either way the acts and decisions of the partially constituted body are liable to be set aside on review. The decision in the Schierhout case *supra* has been followed in the following cases. **Schoultz v Voorsitter, Personeel Advieskommittee van die Munisipale Raad van George en Andere 1983 (4) SA 689 (C) 707H; Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) paragraphs 24 to 30.** Accordingly the LPC is not properly before the Court. Accordingly this

Court is unable, on that ground alone, to properly consider its application for leave to appeal. In the result it is hereby refused with costs.

THE LPC'S LEAVE TO APPEAL ON THE MERITS

[36] In paragraph 13 of its application for leave to appeal the LPC states that the Court erred in finding that:

"2.1 Mr Nthai made full disclosures of all material aspects of the history and background of his transgressions [HC Judgment page 13, paragraph 8 to 10, page 14 paragraph 11]." These issues have been dealt with in paragraph 19 supra. At any rate it is of crucial importance to point out that the LPC:

- (i) did not dispute Nthai's version;
- (ii) placed no other version of the events set out by Nthai before the Court;
- (iii) did not argue that Nthai's version did not tally with the transcripts;
- (iv) in fact admitted Nthai's version.

[37] *"The Court erred in finding that:*

14.1.3.1 Mr Nthai's disclosure of his health condition covered a material time when his conduct occurred [HC Judgment page 48 paragraph 59.1]."

The Court is no expert on the matters raised by the medical experts and in the absence of any expert reports contradicting Nthai's medical expert reports the Court had no other report available to it from which to make any informed decision.

The LPC submitted no expert reports of its own and relied simply on the argument by its counsel who is a layman on such aspects.

[38] *"The Court erred in finding:*

5.1.1 *the allegations of overreaching by Mr Nthai constituted part and parcel of Nthai's removal from the roll."* This has already been dealt with in paragraph 19** *supra*.

"5.2.4 *The disciplinary proceedings in the Gauteng Division Pretoria have not been finalised."*

This allegation is unsubstantiated. The LPC, despite having being given an opportunity to do so, failed to place before this Court any proof of any outstanding disciplinary proceedings against Mr Nthai. These allegations by the LPC were not echoed by the PSA and the JSA. Neither of the two complained that there was any outstanding disciplinary proceedings against Nthai.

[39] (6) *In relation to the applicable law at Nthai's admission:*

6.1 *The Court erred in finding that:*

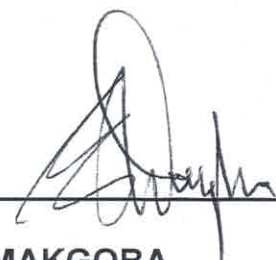
6.1.1 *it was unnecessary for Nthai to serve copies of his application on the PSA and the JSA. [HC Judgment, page 63 paragraph 69.1]"*

(i) Firstly, the LPC has no mandate to ask questions involving the PSA and the JSA.

- (ii) Secondly, this is a question of law or fact. The LPC has neither disputed the provisions of Rule 3A(1)(c) of the Uniform Rules of Court nor the Judge President's Practice Directive dated 24 July 2018.
- (iii) This issue has been dealt with under paragraph [9] *supra*.
- (iv) Fourthly, the LPC has not attempted to explain its role in this application; why it defied a court order and why it chose to oppose the application that was launched on 18 October 2018 when it was not yet in existence in terms of the LPA.

[40] We are satisfied therefore that all the grounds of appeal raised by both the JSA and LPC in their respective applications for leave to appeal lack merit. In our view there are no reasonable prospects of success on appeal and secondly, there are no valid reasons why this appeal should be heard. Accordingly we make the following order:

Both applications for leave to appeal are refused with costs.

A handwritten signature in black ink, appearing to be 'E M Makgoba', is written over a horizontal line.

**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**



P M MABUSE
JUDGE OF THE HIGH COURT

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Dates heard:

05 July 2019

Date of Judgment:

18 July 2019