

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 <i>[Handwritten Signature]</i>	
Date <i>18/7/2019</i>	

CASE NO: 4496/2018

In the matter between:

SETH AZWIHANGWISI NTHAI

APPLICANT

and

PRETORIA SOCIETY OF ADVOCATES
JOHANNESBURG SOCIETY OF ADVOCATES
POLOKWANE SOCIETY OF ADVOCATES
THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT

JUDGMENT

MAKGOBA JP et MABUSE J

- [1] The Applicant in this matter, SETH AZWIHANGWISI NTHAI ("NTHAI") brought an application for his re-admission as a legal practitioner in this Court on 18 October 2018. The said application was opposed by the First Respondent, PRETORIA SOCIETY OF ADVOCATES ("PSA"), Second Respondent, JOHANNESBURG SOCIETY OF ADVOCATES ("JSA"), and the Fourth Respondent, THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL ("LPC"). The Third Respondent, POLOKWANE SOCIETY OF ADVOCATES ("POLSA") supported the application.
- [2] The application for re-admission was heard by this Court on 15 April 2019 and judgment was reserved. On 24 May 2019 the Court delivered the judgment and order in which Nthai was re-admitted as a legal practitioner of the High Court of South Africa to be enrolled as an advocate.
- [3] On 11 June 2019 and 14 June 2019 JSA and LPC filed their applications for leave to appeal respectively. PSA and POLSA have not given their notice for leave to appeal against the judgment and order of this Court re-admitting Nthai as a legal practitioner. Subsequent to the application for leave to appeal Nthai brought the present application in terms of section 18 of the Superior Courts Act 10 of 2013 ("The Act") which application is opposed by JSA and LPC.

- [4] The application in terms of section 18 of the Act was heard by this Court on the 5th July 2019, the same day with the application for leave to appeal. In both instances judgment was reserved.
- [5] In the application in terms of section 18 of the Act Nthai asks for an order in the following terms:
1. To the extent necessary, condoning the Applicant's non-compliance with the rules of this Court relating to the forms and service, and hearing this application on an urgent basis in terms of rule 6(12)(a).
 2. Leave to be granted that the judgment and order of this Court, delivered and issued on 24 May 2019 shall operate and be executed in full pending the outcome of the application for leave to appeal including future appeals, if any, to be noted by any party.
 3. The Applicant be exempted from furnishing security in terms of Rule 49(12) of the Uniform Rules of Court.
 4. Costs against any of the Respondents who opposes the application, on attorney and own client scale.
 5. Granting the Applicant further and / or alternative relief.
- [6] In an application in terms of section 18 of the Act, the Applicant for such relief bears the onus to establish three distinct propositions:

- 6.1. First, he must demonstrate that exceptional circumstances are present, which must be established based on the specific facts of the case.
- 6.2. Second, he must prove on a balance of probabilities that he will suffer irreparable harm if the order is not granted.
- 6.3. Third, he must prove on a balance of probabilities that the Respondent will not suffer irreparable harm if the order is granted

[7] In our approach to the issues involved in the present matter we shall certainly bear in mind and take into consideration the words of Keightly J in the unreported judgment of the Full Court: **Mobile Telephone Networks (Pty) Ltd v Vodacom (Pty) Ltd and Another**¹ where it was stated that:

“.....The court is required to make a determination on the probabilities of the alleged irreparable harm occurring. This is consistent with the purpose of section 18, which is to prevent a party from suffering irreparable harm while appeal proceedings are pending. It’s purpose is rooted in the realities and practicalities of the parties’ situations. It follows that the determination of irreparable harm must also address these realities and practicalities. In other words, the court must determine whether, in reality, it is more probable than not that the applicant (or respondent as the case may be) will suffer irreparable harm. As the court noted in Incubata, this inevitably requires the court to make a qualitative assessment of the existence of irreparable harm: as to irreparable harm is a qualitative decision admitting some scope for reasonable people to disagree about the presence of the so-called “fact” of “irreparability”.”

¹ Case No A5074/2018, Gauteng Local Division, 26 March 2019, at para 27

[8] Section 18 of the Act reads as follows:

"Suspension of decision pending appeal

- (1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
- (2) *Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*
- (3) *A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*
- (4) *If a court orders otherwise, as contemplated in subsection (1)—*
 - (i) the court must immediately record its reasons for doing so;*
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;*

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[9] Subsections 18(1) and (3) of the Act in essence provide for a two-fold enquiry in that the following requirements must be met before an order appealed against can be put into operation pending the outcome of the appeal:

1. First, whether or not exceptional circumstances exist and
2. Second, proof on a balance of probabilities by the Applicant of –
 - 2.1. The presence of irreparable harm to the applicants / victor, who wants to put into operation and execute the order; and
 - 2.2. The absence of irreparable harm to the respondent / loser, who seeks leave to appeal².

[10] The test to be applied by a Court in deciding whether or not to suspend a Court order by virtue of the provisions of section 18(1) (and the observe situation arising from section 18(2)) has been the subject of a fair amount of judicial

² Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) para 16 and Ntlemeza v Helen Suzman Foundation and Another [2017] 3 ALL SA 589 (SCA) at para 35; 2017 (5) SA 402 (SCA) at para 35-36.

scrutiny. In particular, there have been conflicting decisions with regard to whether or not the Court ought to take into account the question of prospects of success on appeal. The latter question, and the test itself, has been settled by the Supreme Court of Appeal in the matter of **University of The Free State v Afriforum**³. In that matter the appeal Court found that the Legislature has proceeded from established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. The exceptionality of such an order is also underscored by the requirements of section 18(4) which provides for, *inter alia*, an automatic right of appeal on an urgent basis. The appeal Court also found that the requirements introduced by section 18(1) and (3) are more onerous than the common law requirements which existed previously and that section 18(3) has introduced

*"a higher threshold, namely proof on a balance of probabilities that the Applicant will suffer irreparable harm if the order is not granted, and conversely that the Respondent will not if the order is granted"*⁴.

- [11] In **Afriforum**, *supra*, the Court found that prospects of success in the pending appeal ought to play a role in the consideration as to whether or not to grant such an order. In doing so, the appeal Court confirmed a dictum by

³ 2018 (3) SA 428 (SCA) paragraphs 9 - 15

⁴ UFS v Afriforum (*supra*) paragraphs 9 - 10

Binns-Ward J in the case of **Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another**⁵ as follows:

"The less sanguine a Court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a Court dealing with an appeal against an order granted in terms of s 18(3)."

[12] In our judgment in the application for leave to appeal (which is delivered and handed down simultaneously with this judgment) we made a finding that the Applicants therein have no reasonable prospects of success on appeal against our judgment and order in the main application. Therefore, the prospects of success on appeal will equally play a significant role in our findings in the present matter involving section 18 of the Act.

[13] Whether or not exceptional circumstances for the purpose of section 18(1) are present, must necessarily depend on the peculiar facts of each case. In **Incubeta Holdings (Pty) Ltd v Ellis**⁶ at paragraph 22 Sutherland J put it as follows:

⁵ [2016] ZAWCHC 34

⁶ 2014 (3) SA 189 (GJ) at paragraph 22

“Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be ‘exceptional’ must be derived from the actual predicaments in which the given litigants find themselves.”

We agree and wish to add that in evaluating the circumstances relied upon by an Applicant, a Court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

- [14] Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion, their existence or otherwise is a matter of fact which the Court must decide accordingly.
- [15] For reasons that appear hereunder, we are of the view that there are exceptional circumstances that justify Nthai’s application in terms of section 18 of the Act.
- [16] As at the date of filing of the application for leave to appeal by JSA and LPC on 11 and 14 June 2019 respectively Nthai had already taken steps to join POLSA which accepted him as a member and allocated chambers to him. Nthai has since duly paid the membership fee in the amount of R 6000.00. Furthermore , POLSA has appointed Nthai to serve on the Pupillage Committee and

he has offered and continues to offer lectures to 44 pupils. Nthai is expected to continue to assist the pupils in preparation for their National Bar Examinations in July and August 2019.

- [17] As the news of his re-admission was widely covered in the media, several attorneys have already briefed Nthai on several matters. It is noteworthy to learn that the State Attorney (Pretoria) who was one of the complainants in the misconduct charges leading to Nthai's removal from the roll of advocates, is one of the several attorneys who have recently briefed Nthai.

The brief from the State Attorney relates to a complex and important matter that declared certain section of the South African Citizenship Act 88 of 1995 as unconstitutional and invalid. The matter is heading to the Constitutional Court in terms of section 172(2)(d) of the Constitution for confirmation of the Orders of constitutional invalidity. In that matter, Nthai is leading two junior advocates. This, in our view, is exceptional for a man who had just been readmitted as an advocate. His services and expertise are really being valued.

- [18] Nthai has joined the POLSA as a member, which will keep a watchful eye on his conduct and behaviour. This includes the General Council of the Bar (GCB) of which POLSA is its own constituent bar. The same applies to the LPC and the Limpopo Provincial Legal Council which has recently been established as the *custos morum* of the legal profession.

In January 2010, before he was struck from the roll of advocates in April 2013, Nthai voluntarily and proactively undertook and ceased to practice. This means that he can be trusted, and that if the intended appeal by JSA and LPC is successful, he will similarly stop practicing. There will be no danger or harm to members of the public and the public interest is protected.

[19] In our judgment in the main application we made a finding that since his name was removed from the roll of advocates, Nthai made a sincere and determined effort to live with honesty, integrity and dignity⁷. Nthai has demonstrated personal integrity and scrupulous honesty in his subsequent employment and interaction with others. This, in our view, is in itself an exceptional circumstance.

[20] The PSA which brought an application to remove Nthai's name from the roll of advocates and also opposed the main application, has now resolved not to apply for leave to appeal against the judgment. POLSA has always supported the main application. JSA's Council were not given a complete mandate to lodge the application for leave to appeal as members of the Advocates for Transformation (AFT) (Johannesburg) are contemplating to take steps to rescind the decision purportedly adopted by the JSA's Council to lodge the application for leave to appeal against the judgment.

⁷ Judgment, para 57.4, pages 45 and 46

The position of the LPC in these proceedings is precarious in the sense that its Executive Committee's decision to embark upon these proceedings is being questioned on the basis that it should have been the full Council or Provincial Council who took the decision and not the Executive Committee as it purported to have done. This makes the present matter exceptional in the sense that all relevant parties do not agree on the steps taken to apply for leave to appeal against the judgment in the main application.

[21] It is a notorious fact that our appeal process takes long to be completed. In the event of this matter proceeding on appeal to the Supreme Court of Appeal and possibly to the Constitutional Court, it may take not less than three years to finalise the appeal process. This then will entail the forfeiture of substantial relief on the part of Nthai because of the procedural delays in prosecuting the appeal. This, in our view qualifies as "exceptional circumstances".

[22] Whether circumstances of the foreseen duration of the appeal process constitutes an exceptional circumstance, was answered in **Incubeta Holdings (Pty) Ltd v Ellis**⁸ where Sutherland J said in paragraph 27:

⁸ 2014 (3) SA 189 (GJ) at para 27

"Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'"

We respectively align ourselves with the reasoning of the learned Judge and accordingly find that exceptional circumstances exist, which may justify the implementation of the order. The Applicant herein was victorious in the main application and should not be deprived of the benefits of the order by the slow grinding of the judicial mill.

- [23] The JSA's opposition to the section 18 application is based on the alleged irreparable harm that will be inflicted on the public if the section 18 application is granted and if a Court of appeal ultimately overturns this Court's order to readmit Nthai. The JSA argued that if that happens, Nthai will commence practice during the interim period, in circumstances in which a Court of appeal later finds that this Court erred in finding him to be a fit and proper person to practice. The argument goes further that the public will have been subjected to a legal practitioner who is ultimately found not to be fit and proper to have been readmitted.

Furthermore it is argued that all those attorneys who have briefed Nthai will at that point have to immediately terminate his services and find alternative

Counsel. This, according to JSA, may cause those attorneys and their client and members of the public to suffer procedural prejudice, duplication of costs and strategic disadvantage in the conduct of their litigation.

[24] There is no merit in the aforesaid argument. More often than not it happens in the course of any litigation that Counsel's mandate is terminated for various reasons, including illness, death, failure to pay Counsel's fees and lack of further or proper instructions to Counsel, that Counsel on brief does not proceed with the matter with the result that another or new Counsel is briefed to proceed with the matter at hand. In our view it is possible to replace Nthai in whatever matter he would be handling should the appeal Court ultimately overturn this Court's order of readmission.

[25] On the other hand Nthai has already joined the POLSA and paid a membership fee in an amount of R 6000.00. He is offering lectures to pupils at the POLSA and has already accepted a series of briefs from attorneys. If the section 18 application is not granted Nthai will suffer irreparable harm in the sense that while the appeal is pending he will be unable to practice and will accordingly suffer a loss of income and will have incurred expenses in the form of membership fees paid to POLSA.

Failure to execute the Court Order immediately will negatively affect Nthai's right to practice his profession of choice and the administration of justice in cases where his services would be required by clients. This would not be in the interest of justice. The current and future pupils at POLSA would be denied the benefit of his experience.

- [26] The Respondents herein will not suffer any irreparable harm. Nthai has joined POLSA as a member and will be duly subjected to the rules and ethics of the legal profession. In the event of the appeal Court overturning the order of this Court, Nthai will immediately cease to practice as he has shown previously in January 2010.
- [27] As shown in our judgment in the application for leave to appeal (which application was dismissed) we hold that the prospect of success on appeal qualify as an exceptional circumstance over and above all other factors stated hereinabove.
- [28] We are satisfied that Nthai has demonstrated and proved on a balance of probabilities that he will suffer an irreparable harm if the judgment and order are not implemented pending the outcome of the application for leave to appeal or appeal, if any, to be noted by any party.

Furthermore Nthai has demonstrated and proved that the Respondents will not suffer any irreparable harm if the judgment and order are executed pending the determination of any appeal process in this matter.

[29] Accordingly, we hold that the operation and execution of the judgment and order by this Court on 24 May 2019 is not suspended and will continue to be operational and executed in full whether or not there are any applications for leave to appeal and appeals or whether or not there are any petition for leave to appeal against the said judgment and order.

[30] The following order is granted:

- 1. The judgment and order of this Court delivered and issued on 24 May 2019 shall operate and be executed in full pending the outcome of the application for leave to appeal including future appeals, if any, to be noted by any party.**
- 2. The Applicant is exempted from furnishing security in terms of Rule 49(12) of the Uniform Rules of Court.**
- 3. No order as to costs.**



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



P M MABUSE
JUDGE OF THE HIGH COURT

APPEARANCES

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Dates heard:

05 July 2019

Date of Judgment:

18 July 2019