

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 34484/2017

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

Date: 17 July 2024 E van der Schyff

In the matter between:

MANDLA MACBETH NCONGWANE

FIRST APPLICANT

MACBETH ATTORNEYS INCORPORATED

SECOND APPLICANT

and

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

FIRST RESPONDENT

GAUTENG LEGAL PRACTICE COUNCIL

SECOND RESPONDENT

MPUMALANGA LEGAL PRACTICE COUNCIL

THIRD RESPONDENT

FIRSTRAND BANK LIMITED

FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicants approached the urgent court on the basis of utmost urgency. The notice of motion is dated 1 July 2024, and the respondents were called to file a notice of intention to oppose by no later than noon on the same day, and an opposing affidavit by close of business on Tuesday 2 July 2024. The application was set down for hearing on Tuesday 9 July 2024.
- [2] The applicants sought an order in the following terms:
- 2.1 That it be confirmed that the suspension order granted by this court on 4 June 2024 is stayed pending the finalisation of the applicants' appeal of the order;
 - 2.2 That the first and second respondents be interdicted and restrained from executing and / or enforcing the suspension order granted by this court on 4 June 2024 pending the finalisation of the applicants' appeal of the order;
 - 2.3 That the fourth respondent be ordered to uplift the suspension of the second applicant's trust account and permit the second applicant to utilize the trust account pending the finalisation of the applicant's appeal order;
 - 2.4 Costs of the application on an attorney and client scale.
- [3] The first, second, and third respondents filed a notice of intention to oppose the application. An answering affidavit was subsequently filed, after which the applicants filed a replying affidavit.

Background

- [4] On 4 June 2024, Basson J and Spunzi AJ suspended the applicants in his practice as legal practitioner pending the finalisation of the application for the removal of his name from the roll of legal practitioners and issued a *rule nisi* with a return date of 28 November 2024, calling on the applicant to show cause why he should not be removed from the roll of legal practitioners. The applicant was ordered to deliver, among others, his accounting records, client files, and specifically all records, files,

and documents pertaining to the matter of one Ms. Wezi Jumbe within 10 days to the Legal Practice Council. He was also ordered to immediately surrender and deliver to the registrar of the High Court his certificate of enrolment as a legal practitioner. A *curator bonis* was appointed to, among others, administer and control the applicant's trust accounts, and wind up the applicant's practice.

[5] The applicants filed an application for leave to appeal the order granted on 4 June 2024. They held the view that the application for leave to appeal suspended the execution of the order. The Legal Practice Council (LPC) informed them that they are erring in that the order granted by Basson J and Spunzi AJ is an interim order, pending the finalisation of the matter on the return date. As a result, the LPC is of the view that the operation of the order is not automatically suspended when an application for leave to appeal is filed.

[6] However, the first applicant regards his 'irreversible suspension' as equivalent to being removed from the roll of practicing attorneys –

‘On common sense, the suspension is permanent and the removal is almost *fait accompli*’

and he seeks a declaratory order to this effect.

[7] The applicants thus approached the urgent court, essentially for declaratory relief. They seek a declaratory order that the order handed down by a Full Bench on 4 June 2024 is an order 'having the effect of a final judgment'. The legal consequence of such an order would be that the application for leave to appeal, suspends the operation and execution of the order of 4 June 2024.

Urgency

[8] It is trite that an applicant who approaches the urgent court must first cross the hurdle of urgency. The applicant contends that the application is urgent because the third respondent informed him that it had been requested to assist the *curator* with taking possession of the applicant's practice's client files and accounting records. The

respondents submit that the application has been served and enrolled 'on oppressively short notice.' They hold the view that the filing timetable was 'lopsided by design' to prejudice them since the applicants know that the first and second respondents are institutional litigants who require authorisation before they can file papers in opposition to applications of this nature.

- [9] I agree with the respondents that the urgent court application was served 'on oppressively short notice'. It would have been justified to strike the application from the roll. However, I had regard to the nature of the application, and the relief sought. Due to the LPC's unique position in litigation of this nature, it is in both parties' interest to speedily address the legal issue. In addition, there is indeed some degree of urgency in the application, although not utmost urgency. The respondents filed comprehensive answering papers, and the applicants filed replying papers. The application, as it stands, is ripe for hearing. It would serve no purpose to strike the matter from the roll so that the applicants can re-enroll it in the urgent court again in the next week. Court rolls are congested as they are, and I read the papers. I am, however, of the view that it is important to preserve the integrity of the urgent court and deter similar behavior. This can be done by ordering punitive costs.

Discussion

- [10] Due to the nature of the legal question before this court, I deem it necessary to define the parameters within which this application is considered. This court is not sitting as the court considering the application for leave to appeal of the order handed down on 4 June 2024 by Basson J and Spunzi AJ. In fact, for purposes of dealing with this issue, I will accept, without making any finding in this regard, that the order handed down by the Full Bench is appealable. The law has developed significantly since the judgment handed down in *Zweni v Minister of Law and Order*,¹ and the appealability of interim orders is now impacted by the constitutional standard of 'the interest of

¹ 1993 (1) SA 523 (A).

justice'.² It is thus possible to appeal interlocutory orders, which do not have the effect of a final judgment in specific circumstances, hence the distinction provided for in section 18(1) and (2) of the Superior Courts Act 10 of 2013. The appealability of an interim order does not summarily translate to the suspension of the interim order being appealed.

[11] This judgment is aimed at answering the question as to whether the application for leave to appeal that was filed subsequent to the handing down of the order on 4 June 2024, automatically suspended the operation and execution of the order, in essence, whether section 18(1) or section 18(2) of the Superior Courts Act 10 of 2013, (the Act) applies.

[12] Section 18(1) of the Act provides as follows;

‘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.’

[13] Section 18(2) of the Act in turn provides:

‘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.’

[14] In short, does the 4 June-order have the effect of a final judgment that brings it into the ambit of section 18(1) of the Act, or is it an interlocutory order not having the effect of a final judgment? The general test for determining whether an order is an

² *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) 223 (CC). See also *City of Cape Town v The South African Human Rights Commission* (Case no. 144/2021) [2021 ZASCA 182 (22 December 2021)].

interlocutory one or not, boils down to the questions as to whether: (i) the order 'dispose of any issue or portion of the issue in the main action', or 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing';³ (ii) whether it is definitive of the rights of the parties;⁴ and (iii) whether the court of first instance is entitled to alter it.⁵

In limine: Jurisdiction

[15] The LPC-respondents raised the question of whether a court consisting of one judge can 'reverse' an order handed down by a Full Bench. The issues at hand are issues of law and do not finally affect the status of the first applicant. It is a question of law as to whether the suspension order falls in the ambit of section 18(1) or section 18(2) of the Superior Courts Act 10 of 2013 (the Act). If it is regulated by section 18(1) its suspension is a consequence of law. If section 18(2) applies, the order can only be suspended if the applicant meets the requirements of section 18(3). There is no statutory restriction prohibiting a single judge from considering the facts of a matter in determining whether an applicant succeeded in making out a case that it will suffer irreparable harm if the interim order being appealed is not suspended. This court has the necessary jurisdiction to deal with the application.

The suspension order

[16] The relevant portion of the suspension order reads as follows:

'1. That MANDLA MACBETH SHONGWE (hereinafter referred to as the first respondent) be suspended in his practice as a legal practitioner of this Honourable Court, pending the finalisation of the application for removal of his name from the roll of legal practitioners.

³ A principle stated as early as 1948 in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 at 870. See also *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 48F.

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).

⁵ *Ibid.*

1.1 That a *rule nisi* be and is hereby issued and the respondents are called upon to show cause, if any, at 10h00 on 28 November 2024, why the name of the first respondent should not be removed from the roll of legal practitioners.’

- [17] The order continues to provide for the winding-up of the first applicant’s practice.
- [18] The applicants aver that the order handed down on 4 June 2024 (the suspension order) has the effect of a final judgment. They submit that it is clear from paragraph 1.1 of the order that the first applicant’s suspension will be escalated to a removal from the legal practitioner’s roll subject to a hearing to determine, not whether or not the suspension is an appropriate sanction, but why the first applicant ‘should not be removed from the roll’. The applicants contend that the provisionality of the order is specifically qualified and limited to him showing good cause as to why he ‘should not be removed.’ In their view, the suspension order is ‘untrammelled by a further scrutiny of its defensibility’ and not subject to change.
- [19] The LPC, then the Law Society of the Northern Provinces, first approached the court during May 2017. At the heart of the application is a disciplinary matter, and the court was approached to exercise its disciplinary powers over the first applicant. The ultimate relief sought by the LPC, was, and is, the removal, or striking, of the first applicant’s name from the roll of legal practitioners.
- [20] It is evident that the LPC regarded the first applicant’s suspension as interim relief, since its ultimate goal is to obtain a so-called striking order. It is trite that the threshold that an applicant has to cross to obtain an interim order is lower than the threshold for final relief. The applicant merely has to convince the court that it has a *prima facie* right in contrast to the clear right an applicant for final relief has to establish.
- [21] Translated to the *sui generis* nature of applications of the current nature, the LPC only needs to establish a *prima facie* case when a suspension order is applied for, pending the finalisation of the application to strike a respondent’s name from the roll

of legal practitioners. To obtain a final order, the LPC must duly prove the misconduct concerned on a balance of probabilities.⁶ As Francis-Subbiah J explained in *South African Legal Practice Council v Naude*:⁷ ‘On a final determination by the Court, the suspension can be uplifted or the first respondent can be struck from the roll’. The suspension can also be made conditional.⁸

- [22] The applicants are thus mistaken in their view that the Full Bench, presiding over this matter on the return date, will not, in principle, be able to uplift the suspension if the LPC fails to make out a case for the striking of the first applicant from the roll of legal practitioners on a balance of probabilities, or alter the suspension order by adding certain conditions to its terms. Once the *curator*’s report is filed, the *audi et alteram* principle dictates that the applicants will be provided with an opportunity to answer to the findings, in fact, the suspension order provides for the filing of supplementary affidavits.
- [23] It cannot be disputed that the winding-up of an attorney’s practice after the granting of a suspension order pending the finalisation of the main application, has serious practical consequences mainly brought about by the terms of the order relating to the practice’s winding-up. But so does a Rule 43 order granted pending the finalisation of a divorce.⁹ However, the reality of practical consequences, even irreversible severe practical consequences, is not the sole determining factor as to whether an interim order has the effect of a final judgment.
- [24] The applicants’ submission that the hearing on the return date is solely for the first applicant to show cause why he should not be removed from the roll, with the suspension an entrenched reality, is incorrect. The error is ostensibly owed to a mistaken view on the effect that the issuing of a *rule nisi* to show cause why ‘this’ or ‘that’ order should not be made has on the onus resting on an applicant in motion proceedings.

⁶ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) 844A-B.

⁷ 2023 JDR 2242 (GP).

⁸ *Botha v Law Society of the Northern Provinces* 2009 (1) SA 227 (SCA).

⁹ Rule 43 of the Uniform Rules of Court.

[25] On face value, a reading of any *rule nisi* might create the impression that the onus has shifted, or that an applicant can find comfort in the knowledge that it has satisfied the required burden of proof and that the respondent is now burdened with something akin to a reverse onus. Such a view is wrong, and loses sight of the difference between a *prima facie* case, and proving a case on a balance of probabilities. The granting of a *rule nisi* does not affect the incidence of onus when the matter is heard on the return date.

[26] In *SAFCOR Forwarding (Johannesburg) (Pty)Ltd v National Transport Commission*,¹⁰ the Appellate Division explained the nature and effect of a *rule nisi*, and although the facts of SAFCOR matter are distinguishable, the explanation applies:

'The objection that the issue of such a *rule nisi* places an unwarranted *onus* on the respondent is, in my view, unfounded. All that the rule does is to require the respondent to appear and oppose should he wish to do so. The overall *onus* of establishing his case remains with the applicant and the rule does not cast an *onus* upon a respondent which he would not otherwise bear.'

[27] As a result, the suspension order granted on 4 June 2024 is interlocutory, not having the effect of a final judgment. The order does not dispose of any issue or any portion of the relief that might be given at the hearing, as the LPC seeks an order surpassing mere suspension. The suspension is also not final, but it is pending the finalisation of the application to remove the first applicant's name from the roll. Therefore, it is also not definitive of the rights of the parties. The suspension order does not preclude any relief which might be given at the hearing. The court hearing the application on the return date has to make a final order and determine whether the LPC proved the alleged misconduct on a balance of probabilities. It is not bound to any findings of the court that granted the suspension order and is bound to uplift the

¹⁰ 1982 (3) SA 654 (A) 676 (A).

suspension if it comes to the view that the LPC failed to discharge the burden of proof.

Alternative relief

- [28] When the application was argued in the urgent court, counsel for the applicants submitted that this court is, in essence, only required to provide declaratory relief, in declaring whether the application for leave to appeal automatically suspended the operation and execution of the order. I concluded above that it does not. The heads of argument filed by the applicant hint to alternative relief being sought in that counsel submits it is in the interest of justice that the execution of the order be stayed. The notice of motion also includes a prayer seeking the stay of the order.
- [29] I agree with counsel for the first to third respondents that, on the papers before me, the applicants failed to show exceptional circumstances that necessitate the suspension or stay of the order. What the applicants consider exceptional circumstances are, in fact, natural consequences of an order of this nature. Consequences suffered by every legal practitioner suspended pending the finalisation of an application to remove his or her name from the roll of legal practitioners.
- [30] On the papers before me, the applicants additionally failed to show that they would suffer irreparable harm if the execution and operation of the suspension order were not stayed pending the hearing of the application for leave to appeal. The winding-up proceedings being effected is a legal consequence of granting orders of this nature. Once again, a Rule 43 order in divorce proceedings is comparable. The consequences of the order are not reversible in that a parent will never be able to recoup or regain any time its child spend at the other parent's home- but it is a practical consequence of the order, it does not render the interim order a judgment with final effect.
- [31] The suspension order provides for suspending the applicants' trust bank account, not the business account. The freezing of the applicants' business account does not

fall within the ambit of the order, and the fourth respondent exceeded the terms of the order if it froze the business account. Since salaries and monthly expenses are not supposed to be paid from the trust account, the suspension of the trust account should not affect this type of payment. The applicants did not include a prayer that the business account be unfrozen in the notice of motion, and on the affidavit before the court, it is evident that the business account was frozen by the fourth respondent for unrelated reasons.

- [32] If the applicants suffer reputational damages due to the suspension order being granted, a stay of the operation of the order would not cure such damages.

Costs

- [33] The applicants approached the urgent court with flagrant disregard for the applicable Rules. As a result, the applicants are to pay the respondents' costs on attorney and own client scale.

ORDER

In the result, the following order is granted:

- 1. The application is dismissed with costs on an attorney and own client scale.**



E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:

Adv. T. Kruger SC

Instructed by:	Moeti Kanyane Incorporated
For the first to third respondents:	Ms. S. L. Magardie
Instructed by:	Damons Magardie Richardson Attorneys
Date of the hearing:	9 July 2024
Date of judgment:	17 July 2024