THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 879/2019 and

Case no: 880/2019

In the matter between:

JOHANNESBURG SOCIETY OF ADVOCATES	**FIRST APPELLANT**
GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA	**SECOND APPELLANT**

and

SETH AZWIHANGWISI NTHAI	**FIRST RESPONDENT**
PRETORIA SOCIETY OF ADVOCATES	**SECOND RESPONDENT**
POLOKWANE SOCIETY OF ADVOCATES	**THIRD RESPONDENT**
THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	**FOURTH RESPONDENT**

Neutral citation: *Johannesburg Society of Advocates and Another v Seth Azwihangwisi Nthai and Others* (879/2020 and 880/2019) [2020] ZASCA 171 (15 December 2020)

Bench: PONNAN, CACHALIA, DAMBUZA and MOCUMIE JJA and EKSTEEN AJA

Heard: 2 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 15 December 2020.

Summary: Advocate – misconduct – application for readmission – nature of proceedings – onus to be discharged by applicant seeking readmission – standing of General Council of the Bar of South Africa and constituent Bars.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP and Mabuse J, sitting as court of first instance): judgment reported *sub nom Nthai v Pretoria Society of Advocates and Others* [2019] ZALMPPHC 23

(1) The application by the Pretoria Society of Advocates for leave to be joined as the third appellant in the appeal is dismissed.

(2) The application by the first and second appellants for leave to adduce further evidence is dismissed.

(3) The appeal is upheld with costs, excluding counsel's fees.

(4) The orders of the court below, dated 24 May 2019 and 18 July 2019, are set aside and each is replaced with the following:

'The application is dismissed with costs, excluding counsel's fees.'

(5) The Registrar is directed to forward a copy of this judgment to the National Director of Public Prosecutions.

JUDGMENT

Ponnan JA (Cachalia, Dambuza and Mocumie JJA and Eksteen AJA concurring)

[1] 'The slippery slope from ambition to greed to dishonesty'[1] is a pithy, yet apt introduction to this appeal, which lies against a decision of the high court to readmit

[1] I borrow the expression from the title of an article by Professor Lisa Lerman, Professor of Law and Director, Law and Public Policy Program at the Columbus School of Law. See L G Lerman 'The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity' (2002) 30 *Hofstra L Rev* 879-922, especially at

an advocate to practice.[2] Advocates are required to be of complete honesty, reliability and integrity.[3] The need for absolute honesty and integrity applies both in relation to the duties owed to their clients as well as to the courts.[4] The profession has strict ethical rules to prevent malfeasance.[5] This is for good reason. As officers of the court, Advocates serve a necessary role in the proper administration of justice. Given the unique position that they occupy, the profession has strict ethical rules. The observance of those rules is, regrettably, not always assured. Because '[t]he preservation of a high standard of professional ethics [has] been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part'.[6] The first respondent, Mr Seth Azwihangwisi Nthai, who had been exposed as precisely such a person in a particularly illuminating way, was previously struck from the roll of advocates.

880-881: 'Lots of lawyers are among the wealthiest people in the country… Some of those lawyers have stepped over the lines of legality and embarked on illegal schemes of income expansion… Many lawyers are preoccupied with gaining power within their law firms and with expanding their own incomes… [But] preoccupation with money tends to have a corrosive effect on integrity. For some people, the desire for wealth leads to dishonesty because it's easier to expand your income more quickly if you don't bother about legal niceties… Lawyers have fiduciary responsibilities to their clients, including an obligation not to exploit their client's resources for personal gain. A lawyer who is in the grip of a desire to expand his income may be more likely to trample on his client's financial interests, either legally or illegally, honestly or dishonestly.' (Footnotes omitted.)

[2] The judgment of the high court is reported as *Nthai v Pretoria Society of Advocates and Others* [2019] ZALMPPHC 23 and was delivered on 24 May 2019.

[3] *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 655I-656A; *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) para 126, with reference to an earlier judgment of this court, *viz Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G-H.

[4] *General Council of the Bar of South Africa v Geach* (above fn 3) para 126.

[5] *Kekana v Society of Advocates of South Africa* (above fn 3) para 13.

[6] Per Hefer JA in *Kekana v Society of Advocates of South Africa* (above fn 3) para 13.

[2] Mr Nthai was admitted as an advocate on 19 January 1988 and became a member of the Pretoria Society of Advocates (PSA) on 1 August 1996. Senior status was awarded to him in December 2006. Thereafter, he also served as the chairperson of PSA's Bar Council. In 2007, Mr Nthai was appointed by the State Attorney to act as lead counsel on behalf of the South African Government (the Government) before the International Arbitration Tribunal (the arbitration tribunal). The claimants in that matter, who were Italian nationals, had asserted that South Africa's new mining laws contravened a bilateral investment treaty between Italy and South Africa.[7] Before the formal hearing could commence, the claimants had expressed a willingness to withdraw the claim. What stood in the way of a withdrawal was the issue of costs, which amounted to about €5 million (approximately R50 million at the then prevailing exchange rate). The claimants accordingly required the Government to consent to the withdrawal of the claim.

[3] Mr Nthai met on a number of occasions with the CEO of one of the claimant companies, Mr Marcenaro. He did so without the knowledge of the Government or the State Attorney, who had briefed him in the matter. They initially met at their respective homes in Johannesburg. Later, Mr Nthai travelled to Italy. During these meetings, Mr Nthai attempted to solicit from Mr Marcenaro a bribe of R5 million, which he required to be paid into his foreign bank account. In return, he undertook to ensure that the Government would agree to settle the dispute on the basis that each party would pay its own costs, thus potentially saving the claimants millions of Rand, at the expense of his client, the Government.

[7] Agreement on the Promotion and Protection of Investments (signed 06-09-1997, entered into force 16-03-1999).

[4] Mr Nthai was not aware that Mr Marcenaro had recorded their conversations. In December 2009 it came to the attention of the claimants' legal team that Mr Nthai had been communicating with Mr Marcenaro. The State Attorney who had instructed Mr Nthai in the matter was informed and, consequently, lodged a formal complaint with the PSA on 22 January 2010. At that time, Mr Nthai held chambers in both Pretoria and Johannesburg and was also a member of the Johannesburg Society of Advocates (JSA).

[5] Upon receipt of the complaint, Advocate P Ellis SC, who was then the convenor of the Professional and Ethics Committee of the PSA, wrote to Mr Nthai on 26 January 2010. In the light of the serious nature of the allegations, Mr Nthai was requested to immediately resign as the Vice Chairperson of the General Council of the Bar of South Africa (the GCB), a position he then held, and to consent to his voluntary suspension from practice as an advocate for the duration of the investigation into the complaints, failing which an urgent application would be launched to suspend him from practice. Mr Nthai acceded to those requests.

[6] That evening, the Bar Council of the PSA met and resolved that a disciplinary committee be appointed to investigate the complaint. Advocate NGD Maritz SC was appointed as the *pro forma* prosecutor. A similar resolution was adopted by the JSA. Advocate LP Halgryn SC was appointed as *pro forma* prosecutor on behalf of the JSA to assist Advocate Maritz. On 9 February 2010, Justice K van Dijkhorst as well as Advocates JH Dreyer SC and Bokaba SC (respectively of the PSA and the JSA) were appointed as members of the Disciplinary Committee (the DC). The disciplinary proceedings were held on 25 March 2010.

[7] At the commencement of the proceedings, Mr Nthai intimated that he would be tendering his formal resignation from the JSA and the PSA. He, and his legal representatives, then asked to be excused and, despite being invited to remain, left the hearing. The disciplinary proceedings continued in their absence. On 6 April 2010 the DC delivered its findings. It found Mr Nthai guilty of, among other things, corruptly attempting to solicit a bribe; placing his own financial interest above the interest of his client; disclosing privileged information to the opposing party in the proceedings; and betraying the confidence that his client and instructing attorney had placed in him to honestly, objectively and independently advance his client's interests.

[8] The DC recommended that steps be taken to have Mr Nthai's name removed from the roll of advocates in terms of s 7 of the Admission of Advocates Act 74 of 1964 (the Advocates Act). On 13 April 2010 the Bar Council of the PSA resolved to bring an application to have Mr Nthai's name struck from the roll of advocates. A similar decision was taken by the Bar Council of the JSA. On 6 March 2012, the PSA brought proceedings to remove Mr Nthai from the roll. Although Mr Nthai filed a notice of intention to oppose, he did not deliver an answering affidavit or otherwise deal with or explain the allegations against him. He was struck from the roll of advocates, without opposition, by the Pretoria High Court on 15 April 2013, and ordered to return his letters patent.

[9] On 4 August 2010 the arbitration tribunal published its award. As appears from the award, the claimants had sought a discontinuance of the arbitral proceedings, whereupon the tribunal dismissed their claim and ordered them to pay a sum of €400 000 in respect of the Government's fees and costs. The tribunal

recorded the interaction and discussions that had taken place between Mr Nthai and Mr Marcenaro and, having regard to the former's 'solicitation of a bribe' and 'corrupt solicitations', decided that the Government could not claim the costs that were attributable to Mr Nthai's work.

[10] In October 2018, Mr Nthai applied *ex parte* to the Limpopo Division of the High Court, Polokwane, to be readmitted as an advocate (the readmission application). The readmission application was served only on the Polokwane Society of Advocates (POLSA). After being informed that the application had been launched, the PSA and the JSA applied for leave to intervene. On 30 November 2018 the application succeeded before Makgoba JP and Phatudi J and the PSA and the JSA were joined as the first and second respondents, respectively, 'subject to [Mr Nthai's] right to argue that [they] do not have locus standi' POLSA, who supported Mr Nthai's readmission, came to be cited as the third respondent. The order also directed Mr Nthai to serve the readmission application 'on the Legal Practice Council (LPC), constituted in terms of the Legal Practice Act 28 of 2014 which is invited to consider the matter and file a report by not later than 11 February 2019 … if so advised'.

[11] The JSA, the PSA and the LPC (the LPC came to be cited as the fourth respondent in the matter) all filed comprehensive affidavits in opposition to the readmission application. The readmission application was heard on 15 April 2019. Judgment was delivered on 24 May 2019. Despite opposition by the PSA, the JSA and the LPC, the application succeeded before the high court.[8]

[8] *Nthai v Pretoria Society of Advocates and Others* (above fn 2) para 93.

[12] On 11 and 14 June 2019 the JSA and the LPC respectively filed applications for leave to appeal. Mr Nthai thereupon launched an application in terms of s 18 of the Superior Courts Act 10 of 2013 that the readmission order 'be executed in full pending the outcome of the application for leave to appeal including future appeals'. The s 18 application was opposed by the JSA and the LPC. The applications for leave to appeal and the s 18 application were heard on the same day. On 18 July 2019 the high court dismissed the applications for leave to appeal[9] and allowed the s 18 application (the s 18 order).[10]

[13] The JSA appeals as the first appellant, with the leave of this court, which was granted on 19 December 2019, against the readmission judgment, as also the s 18 order, which is automatically appealable under s 18(4)(ii) of the Superior Courts Act. The order of this court also granted leave to the GCB to intervene in both appeals and directed that they should be heard together. The GCB is the second appellant.

[14] On 24 January 2020, Mr Nthai applied to the President of this Court in terms of s 17(2)*(f)* of the Superior Courts Act for the order of 19 December 2019 to be referred to the court for reconsideration and, if necessary, variation. On 24 June 2020, the President dismissed the reconsideration application. Whilst the reconsideration application was pending, on 28 May 2020, the PSA applied to the President to be joined as the third appellant in the appeal. That application (to which

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[9] See *Pretoria Society of Advocates and Others v Nthai* [2019] ZALMPPHC 32; 2020 (1) SA 267 (LP) para 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…'

[10] See *Nthai v Pretoria Society of Advocates and Others* [2019] ZALMPPHC 33 para 30. Paragraph 1 of the order reads as follows:
'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.'

I will revert), which is opposed by Mr Nthai, has been referred by the President to the court for determination.

[15] Preliminarily, it is necessary to pass some general observations about: (a) the nature of the proceedings; (b) the onus to be discharged by an applicant seeking readmission; and, (c) the role of the professional bodies in an application of this kind.

[16] *As to (a):* Neither the high court, nor Mr Nthai and his legal team, appeared to appreciate that these are not ordinary civil proceedings, but proceedings that are *sui generis* in nature. As Nugent JA observed in *Van der Berg v General Council of the Bar of South Africa*:

'Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans* is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that it is always undesirable to attempt to resolve factual disputes on the affidavits alone (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed of summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents (including the practitioner) in appropriate cases. In the present case that might well have been prudent and desirable so as to resolve the many questions that are raised by the evidence, but that notwithstanding, the appeal can in any event be properly disposed of on the undisputed facts. (For

that reason it is also not necessary to revisit what degree of persuasion evidence must carry before facts can be taken to have been established in cases of this kind.)[11]

[17] *As to (b):* Where a person applies for readmission, who has previously been struck off the roll on the ground of not being fit and proper to continue to practise:

[t]he *onus* is on him to convince the court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is readmitted, he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned…'[12]

[18] In considering whether the *onus* has been discharged the court must:

'...have regard to the nature and degree of the conduct which occasioned applicant's removal from the roll, to the explanation, if any, afforded by him for such conduct which might, inter alia, mitigate or even perhaps aggravate the heinousness of his offence, to his actions in regard to an enquiry into his conduct and proceedings consequent thereon to secure his removal, to the lapse of time between his removal and his application for reinstatement, to his activities subsequent to removal, to the expression of contrition by him and its genuineness, and to his efforts at repairing the harm which his conduct may have occasioned to others.'[13]

[19] *As to (c):* Generally, a factor of some importance in an application such as this is the attitude of the professional bodies concerned.[14] However, principally because the high court misconceived the nature of the proceedings (it proceeded as if the

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[11] *Van der Berg v General Council of the Bar of South Africa* [2007] ZASCA 16; [2007] 2 All SA 499 (SCA) para 2. (Footnotes omitted.)
[12] Per Corbett JA in *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-C.
[13] *Kudo v The Cape Law Society* 1972 (4) SA 342 (C) at 345H-346A, as quoted with approval in *Behrman* at 557D-E.
[14] *Swartzberg v Law Society of the Northern Provinces* [2008] ZASCA 36; [2008] 3 All SA 438 (SCA); 2008 (5) SA 322 (SCA) para 18.

professional bodies concerned were adversarial litigants and that the ordinary approach as outlined in *Plascon-Evans* applied), it found that the JSA and the PSA did not have *locus standi* in the readmission application; and that the GCB (which did not participate in the proceedings) and its constituent bars: (i) had been stripped of their role as *custodes morum* of the advocates' profession by the establishment of the Legal Practice Council (LPC); (ii) may no longer make submissions in applications to strike advocates from the roll or to readmit applicants; (iii) ceased to exist as statutory bodies as of November 2018, when the Legal Practice Act 28 of 2014 (LPA) was brought into force; and (iv) were in the same position as deregistered companies.

[20] At odds with its earlier judgment, the high court appeared to accept in dismissing the applications for leave to appeal that the Advocates Act applied to Mr Nthai's application, because it had been launched before the commencement of the LPA. But, it reiterated that the JSA had no standing in the application because, so the high court reasoned, the JSA represented advocates in the Gauteng province, whilst Mr Nthai intended to practice in Limpopo.

[21] The judgment on the application for leave to appeal further records that '[the GCB], and not the JSA, would have been the appropriate party to take up the matter on behalf of the advocates' profession' and that the LPC should not have participated in proceedings launched before the commencement of the LPA.[15] But this directly contradicts the earlier judgment, which had concluded that 'the GCB and its

[15] *Pretoria Society of Advocates and Others v Nthai* (above fn 9) para 12.

constituent bars countrywide, may in law not even deal with pending applications, such as the current one', and that 'only the LPC' had such standing.[16]

[22] Mr Nthai launched his application for readmission on 18 October 2018. The LPA, which repealed the Advocates Act,[17] commenced on 1 November 2018. Section 12(2) of Interpretation Act 33 of 1957 regulates certain consequences of the repeal and replacement of an Act. In terms of that provision:

'Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not—

…

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

[23] The LPA contains no 'contrary intention' to indicate that Mr Nthai's readmission application, which was already pending in terms of the Advocates Act at the time of the LPA's commencement, should be determined in terms of the LPA. Section 12(2) of the Interpretation Act therefore has the consequence that Mr Nthai's application for readmission had to be determined in terms of the Advocates Act. This is consistent with the interpretive presumption that legislation does not operate retrospectively.[18] Mr Nthai's application therefore fell to be adjudicated under the Advocates Act. In terms of the Advocates Act, it is clear that each of the JSA and

[16] *Nthai v Pretoria Society of Advocates and Others* (above fn 2) paras 71-72.
[17] Section 119 of the LPA.
[18] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC) para 26.

the PSA had standing, as *custos morum*, to participate in readmission applications of this kind.[19]

[24] While the LPA does indicate an intention to place pending disciplinary investigations and applications for removal under the LPC's jurisdiction, it does not indicate a similar intention with respect to readmission applications.[20] In any event, even if the LPA were applicable to Mr Nthai's application, it would not prevent the GCB or its constituent Bars from intervening. The LPA makes the LPC primarily responsible for the protection and regulation of the legal profession.[21] However, whilst the LPA confers primary jurisdiction for the discipline of legal practitioners on the LPC, this does not deprive existing bodies from having a continuing interest in the professional ethics of the profession or standing. The LPA requires the LPC to establish disciplinary bodies tasked with evaluating complaints about professional conduct.[22] And, it empowers the LPC to punish errant practitioners, including by approaching the high court for their removal from the roll.[23]

[25] The LPA does not, however, render nugatory the role of the GCB and the constituent Bars in the advocates' profession or in the professional conduct of advocates. It instead affirms the role of persons other than the LPC in these matters. Section 44(1) states that the provisions of the LPA:

'…do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity'.

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[19] See Eberhard Bertelsmann SC 'Independence and the advocates' profession' *Consultus* (May 1998) 66 at 67.
[20] Section 116 of the LPA.
[21] Sections 4 and 5 of the LPA.
[22] Sections 37-41 of the LPA.
[23] Section 40(3) of the LPA.

Section 44(2) adds:

'Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity…'

[26] A legal practitioner or juristic person is accordingly entitled to approach the high court for relief 'in connection with' a complaint of misconduct against a legal practitioner. This must include applications concerning the readmission of advocates previously removed from the roll on account of misconduct.[24] Section 44 must thus be construed to empower the Bars, which are juristic entities with legal personality and which have an interest in promoting and protecting the advocates' profession, to involve themselves in readmission applications and other matters concerning the professional misconduct of advocates.

[27] The high court reasoned that Mr Nthai sought readmission in Polokwane, which was outside of the jurisdiction of the JSA or the PSA, and that they were thus precluded from intervening by the Uniform Rules and a directive of the Judge President of the Polokwane High Court. First, the JSA and the PSA, of whom Mr Nthai was a member, had brought the disciplinary proceedings against Mr Nthai that led to his removal from the roll. They accordingly had a material interest in the outcome of his readmission application and were best placed to make submissions on his suitability for readmission. Second, neither the Uniform Rules, nor the Practice Directive, deprive the JSA and the PSA of standing to intervene in

[24] According to the Supreme Court of Appeal in *David Trust and Others v Aegis Insurance Co Ltd and Another* 2000 (3) SA 289 (SCA) para 31, '[t]he phrase "in connection with" is a wide one'. Similarly, in *Rex v Bresler* 1939 CPD 504 at 505 the Cape Provincial Division (as it was then) stated, relying on English law, that 'the words "in connection with" have been given a very wide meaning…'.

readmission applications in different provinces.[25] They merely state that, in an application for admission, an applicant needs to serve papers on the Bar Council for the Division concerned. Neither purports to address the standing or entitlement of the GCB or its constituent members to intervene in a former member's application for readmission.

[28] Moreover, the high court's finding that the JSA had 'no jurisdiction to intervene in readmission applications which are moved in any division other than the Gauteng divisions of the high court' is unsustainable. If this finding is upheld, it would be possible for an advocate who was struck off in one province to apply for readmission in another, thereby preventing the participation of the professional body that applied for his or her striking off. The absurd consequence would be that every readmission application would be decided as if it were a first-time application for admission. In that way, the professional body that obtained the striking off order would be precluded from placing the relevant facts relating to the striking off before the court hearing the application for readmission. This cannot be in the interests of justice, nor can it serve the objective of protecting the public interest.

[29] Each of the JSA and the PSA has an ongoing interest in the adherence of advocates to the highest professional standards and whether an applicant for

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[25] The court relied on rule 3A(1)*(c)* of the Uniform Rules of Court, which states as follows:
'Subject to the provisions of rule 6 in so far 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 six weeks before the day on which his application is to be heard by the court—
…
(c) serve a copy of the documents and affidavit referred to in paragraphs *(a)*, *(b)* and *(b*A*)* on the Secretary of the Bar Council or the Society of Advocates of the division concerned.'
The Court also relied on a Practice Directive by the Limpopo Judge President, dated 24 July 2018, which states as follows:
'With effect from 1 August 2018 it will no longer be necessary for the applications for admission as an advocate to be served also on the Pretoria Society of Advocates. Only service on the Polokwane Society of Advocates will suffice'.

admission or readmission is a fit and proper person. The fact that the LPC also has such an interest does not deprive the JSA or the PSA of its own interest – and therefore legal standing – in legal proceedings such as this.

[30] In any event, a person may intervene in an application if such person has a direct and substantial interest in the outcome of the litigation;[26] namely, a legal interest in the litigation that may be prejudicially affected by the judgment of the court and not merely a financial interest.[27] Practising advocates – and, more so, associations of advocates that represent their interests – plainly have a material interest in protecting and promoting the status and dignity of their profession, including by making submissions on the conduct of errant practitioners and its consequences.

[31] What is more, joinder of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. This court has set out the test as follows:

'The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.'[28]

The court went on to hold that the primary question is the impact of the order that is sought on the interest of third parties. Particularly important is the question whether the order sought cannot be carried into effect without substantially affecting their

[26] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 85.
[27] *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (5) SA 1 (CC) para 9.
[28] *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para 9. (Footnotes omitted.)

interests.[29] For the purposes of assessing whether a party must be joined: 'if suffices if there exists the possibility of such an interest. It is not necessary for the court to determine that it, in fact, exists; in many cases, such a decision could not be made until the party had been heard.'[30]

[32] Mr Nthai is a former member of the JSA, the PSA and the GCB. He was struck off pursuant to an application brought by the PSA. Following upon the high court's decision to readmit him, Mr Nthai joined the Limpopo Society of Advocates, which is affiliated to the GCB. It is thus plain that the GCB, the PSA and the JSA had a direct and substantial interest and, far from lacking standing to participate in the application, were necessary parties in accordance with the tests set out above.

[33] Moreover, our law recognises that associations that exist to promote the interests of their members have the power to intervene in litigation that affects those interests.[31] In *Veriava and Others v President, SA Medical and Dental Council, and Others*,[32] the Transvaal Provincial Division considered an application by individual medical professionals and two associations of medical professionals to review a decision of the South African Medical and Dental Council (SAMDC) in relation to misconduct by doctors. The court there dealt with a complaint that the SAMDC had failed to take appropriate disciplinary action against State employed doctors, who had failed to ensure that Mr Steve Biko was properly treated and cared for. Through their inaction and despite the fact that he was obviously severely injured, he was allowed to be transported by police on a long journey in the back of a vehicle. The

[29] Ibid para 10.
[30] *Abrahamse and Others v Cape Town City Council* 1953 (3) SA 855 (C) at 859B-F.
[31] *Minister for Justice and Constitutional Development v Nyathi and Others* [2009] ZACC 29; 2010 (4) SA 567 (CC) paras 5-6.
[32] *Veriava and Others v President, SA Medical and Dental Council and Others* 1985 (2) SA 293 (T).

court took the view that although the SAMDC is the statutory *custos morum* of the medical profession, and the guardian of the public, it did not have an exclusive interest or role in that regard.

[34] The court held that the medical professionals and their associations had 'a real and direct interest in the prestige, status and dignity of their profession' and, consequently, in decisions by the SAMDC on such conduct. If the individual doctors believed that the SAMDC had failed, they had the *locus standi* to pursue the matter in the courts. Significantly, unlike the professional bodies in this case, the SAMDC could, without the intervention of a court, strike a medical practitioner from the roll on grounds of misconduct. The empowering Act prohibited unethical conduct, among other things, to protect the medical profession. It could therefore be assumed, the court held, that other medical professionals would suffer injury if the SAMDC did not perform its role.

[35] These principles apply equally to the professional bodies and their members in this case. Advocates have a legal interest in protecting the status and dignity of their profession. It is well-established that the GCB and its constituent Bars, including the JSA and the PSA, are the *custodes morum* of the advocates' profession.[33] They act in the interest of the legal profession, the court and the public.[34] Indeed, in a matter such as this, they may well have been failing in their duty had they failed to place the information at their disposal, which was obviously material to the question of Mr Nthai's fitness, before the court. The high court was accordingly wrong to conclude that the GCB, the JSA and the PSA were no longer

[33] *Johannesburg Society of Advocates v Edeling* [2019] ZASCA 40; 2019 (5) SA 79 (SCA) para 17.
[34] *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 358D. See also *Kekana v Society of Advocates of South Africa* (above fn3) at 655G-H.

custodes morum of the advocates' profession and to conclude that the JSA and the PSA had no standing in the readmission application. The GCB and its constituent Bars are voluntary associations with legal capacity as governed by their Constitutions and, not statutory bodies, as supposed by the high court. Likening them to 'deregistered companies' was likewise inapt.

[36] The path has now been cleared for a consideration of the substantive merits of the readmission application. The court must be satisfied that the applicant is a fit and proper person and that his readmission would involve no danger to the public or the good name of the profession.[35] The enquiry into whether an applicant is a fit and proper person to be readmitted is a factual one.[36] As it was put in *Swartzberg v Law Society of the Northern Provinces*:[37]

'… This involves an enquiry as to whether the defect of character or attitude which led to him being adjudged not fit and proper no longer exists. (*Aarons* at 294H.*)* Allied to that is an assessment of the appellant's character reformation and the chances of his successful conformation in the future to the exacting demands of the profession that he seeks to re-enter. It is thus crucial for a court confronted with an application of this kind to determine what the particular defect of character or attitude was. More importantly, it is for the appellant himself to first properly and correctly identify the defect of character or attitude involved and thereafter to act in accordance with that appreciation. For, until and unless there is such a cognitive appreciation on the part of the appellant, it is difficult to see how the defect can be cured or corrected. It seems to me that any true and lasting reformation of necessity depends upon such appreciation.'

[37] In arriving at the conclusion that Mr Nthai had discharged the heavy onus resting upon him, the high court accepted that Mr Nthai: (i) had made full disclosure

[35] *Ex Parte Knox* 1962 (1) SA 778 (N) at 784G-H.
[36] *Kudo v The Cape Law Society* 1972 (4) SA 342 (C) at 675G-676.
[37] *Swartzberg v Law Society of the Northern Provinces* (above fn 14) paras 14 and 15.

to the court regarding his transgressions and correctly identified the defects of character that led to his removal (namely, 'dishonesty, greed, poor judgments [*sic*] and health conditions'); (ii) unreservedly accepted responsibility for his unethical conduct; (iii) was deeply remorseful; (iv) suffered dire personal consequences as a result of his misconduct, inasmuch as he had experienced financial hardship and was forced to sell his Porsche motor vehicle, five watches from his collection of fine watches and his immovable properties in Cape Town and Hartbeespoort; and (v) demonstrated integrity and honesty in his employment and interaction with others subsequent to his removal from the roll.

[38] Although the parties disagree as to the consequences, the material facts that led to Mr Nthai's fall from grace are not in dispute. In Mr Nthai's own word (in his founding affidavit in support of the readmission application):

'I then told Marcenaro that if the claimants were to pay me R5 million into my foreign bank account, I would use my influence to get the Government to agree to settle the matter with each party paying its costs. I further told Marcenaro that I had prepared the proposal for settlement and if the claimants agreed to pay the money, I would get the Government to accept the settlement proposal. He said that he would discuss the proposal with his partners. I however, cautioned him strongly against disclosing our discussion to third parties.'

[39] When Mr Marcenaro initially expressed misgivings about the amount being solicited, Mr Nthai is recorded as having said:

'You need to understand that the only thing is that is, if we go your route of settling, I lose. That is the problem.

…

That is what is, what I have to weigh between the two, what do I do.

…

Most probably after the end of the trial I will have made more than R5 million, I think.'

[40] At a subsequent meeting, when Mr Marcenaro again expressed reservations, Mr Nthai said:

'No, I mean if it is, look it is not an easy thing, I mean to deal with. I explained to you last time from my side that I am prepared to close this deal but I mean you must know I lose income, and that is the bottom line. If it goes ahead, well I will still get income. So …'

He then added: 'something must come my way. Whatever avenue. I do not know you will do it but that I leave to you.'

[41] At some point, Mr Nthai appears to agree with an evidently racist assertion by Mr Marcenaro that this kind of corruption is 'more African'. For good measure he then fuels that perception when he says:

'Ja, but let me tell you, let me mention something, you need [your] people there in Italy must understand one thing, and that is that if this case continues it will damage, I am talking about public, it will damage your company because you know there are a lot of third parties that have come in.

Oh yes, yes.

And they are taking a dimension that says you guys you come in this country, you do not want to comply with the law, that is the dimension that they are taking. They do not know about all these nitty-gritty's that you are telling me, the issues that you wanted your rights and all that. So, it is something that you have to be, and you know, there are unions here, NUM, and all that, you do not need that kind of publicity and noise around your company.'

[42] Having suggested that if the matter were to proceed it would attract the attention of the National Union of Mineworkers, he then alludes to environmental non-governmental organisations in disparaging terms, when he observes:

'Ja, no, no it is with the government taking a very hard line against you. I mean you cannot find problems. You have operations in Zimbabwe, you do not know how they will react. You know, I mean this thing can affect you guys seriously, I mean that is what I just thought. You know when

I saw some of these NGO's coming, you know, those people they make money by making a noise. So, they will make a helluva noise for you which you will not be able to deal with, because that is how they get their funding. You must know that for them to maybe to raise money to enter in this case, I mean for them it is very, very important. So, they will make all sorts of noises that they want to make and you will appear as if you are people who do not understand what is going on around you, stuff like that. I do not think it is a good thing.'

[43] All of this was designed to bring home to Mr Marcenaro that continuing with the case will cause them serious reputational harm. The interactions between Mr Nthai and Mr Marcenaro were extraordinary in the light of the most fundamental ethical and legal obligations of counsel. The fact that the conversations occurred at all is astonishing; direct engagement between counsel and an opposing party is impermissible. He bypassed his own attorneys and the attorneys of the claimants to discuss settlement of the case directly with Mr Marcenaro. Even more shocking was the purpose of the engagement; he offered, in exchange for a bribe of R5m, which he wanted paid into his foreign bank account, to orchestrate the settlement of the litigation on terms patently disadvantageous to his own client.

[44] It is difficult to imagine a more egregious transgression of the norms of professional conduct. This was no mere casual or momentary lapse of judgment. It was carefully calculated and zealously pursued. When the several meetings in this country failed to bear fruit, Mr Nthai travelled to Italy for the express purpose of nailing down an agreement. He sought to persuade Mr Marcenaro that the agreement would be economically advantageous to them and that he would actually lose money if there was a settlement. Implicit in this was the suggestion that R5 million was a bargain when compared to the costs of a trial. When the imploring and cajoling failed, Mr Nthai resorted to less than subtle threats.

[45] Over a protracted period, no thought whatever was given to his client, the Government, or the people they represent, the citizenry of this country. It was a staggering breach not just of almost every conceivable ethical duty of counsel, but also the most basic standards of human decency. The advocates' profession is founded on the principle that an advocate should fiercely uphold his client's interests and further the client's cause to the best of his ability (subject of course to ethical constraints and his duty of candour to the court).

[46] The high court accepted that Mr Nthai's misconduct was of the most serious sort and was deserving of significant sanction. Indeed, it compromised not only the interests of his client, the Government, but also the integrity of the advocates' profession. He pursued personal enrichment at the expense of his client and, ultimately, the taxpaying public. Over the course of a number of months, he sought a substantial bribe that would have required him to act against his client's interests. And, he persisted in doing so despite an obvious reticence by those from whom he sought the bribe.

[47] Properly characterised, what Mr Nthai did went way beyond mere professional misconduct. With deliberate calculation and clear intent, he attempted to solicit a bribe of R5 m in exchange for his assistance, in settling the matter on terms disadvantageous to his client. On his own version, there is no escape from the fact that this constituted a serious crime, for which he surprisingly does not appear to have been charged. Thus, given the severity of the transgressions, Mr Nthai would have had to establish truly exceptional circumstances to be considered for readmission.

[48] Regrettably, there was more: The affidavit deposed to by Mr Maritz, filed in support of the application by the PSA for Mr Nthai's striking off, contained further allegations of overreaching against him. These allegations related to substantial amounts of money that he had been paid by Anglo Platinum Ltd (Anglo Platinum) over an extended period of time (the Anglo Platinum complaint). It was alleged that Mr Nthai had received unreasonable and unjustified amounts of money from Anglo Platinum. Over a period of 43 months, Mr Nthai was paid an amount in excess of R10 million.

[49] On 9 February 2010, the Bar Council of the PSA resolved to include these allegations in its investigation of Mr Nthai. The PSA requested Mr Nthai to furnish his original fee book; diary; retainer agreements and VAT invoices for the period 2005 to 2010. Mr Nthai refused. Instead, he questioned the relevance of the information.

[50] Mr Nthai has since purported to apologise for his uncooperative behaviour and refusing to disclose relevant documents during the investigation into his transgressions and the proceedings before the disciplinary committee. In his readmission application, Mr Nthai stated:

'(11) As an officer of the Court, it was incumbent upon me to assist the Court.

(12) On reflection and introspection, I accept that it was disrespectful of me not have provided this assistance to the Court.

(13) This is a behaviour and attitude that would not be repeated if I am given a second chance.

(14) I am advised that the fees earned as indicated above were reasonable in view of the work involved.

(15) I accept that it was improper and unethical for me to play an active role in negotiating the budget and retainers directly with employees of AAP. The role I played was clearly blurred. On

reflection, I fully appreciate that I was wrong. I have indeed learned the hard way that at all times, it is important for counsel to always adhere to and observe the time ─ honoured ethical rules.'

However, as I shall show, Mr Nthai is either guilty of deliberately downplaying the full extent of these allegations or shows no true cognitive appreciation of their seriousness.

[51] Although Mr Nthai finally acknowledged that the PSA had the prerogative to determine the ambit of its investigation and admitted that he was wrong to question its request for the information sought, when his attorney was requested to furnish information (including information similar to that previously sought), the latter refused. It was indicated that Mr Nthai considered the requests 'irregular' and a 'blatant fishing expedition'. Mr Nthai's attorney also complained that the documents sought are 'information and records dating back some 14 years'.

[52] The letter written by the JSA's attorneys requesting the information specifically invited Mr Nthai to obtain the relevant information from his attorney in the matter, Bhadrish Daya Attorneys, Anglo American, his financial and/or tax advisors, his bankers and/or the auditors, tax advisor and/or brokers, in the event that the information was not in his possession. That request has not been complied with and Mr Nthai has not explained why he has been unable to comply.

[53] Mr Nthai's role in the Anglo Platinum matter went way beyond that traditionally reserved for counsel. As he described it:

'(9) The work included the required:

(a) negotiations with AAP employees in South Africa and London and with its different attorneys and counsel;

(b) consultations in the form of communities' meetings;

(c) identifying farms for relocation;

(d) negotiations with government officials and owners of the farms, municipalities and other stakeholders.

(10) I was involved in preparing agreements for relocation, construction, employment, audit, grave relocations, township schemes, home owners' consent, municipal services, town planning, donation of farms agreements and many more.

(11) The work also involved resolving complaints and disputes arising from the audits of each household and properties.

(12) This required endless telephone calls, including international calls with members of the communities, the project team and other stakeholders.

(13) Meetings through video links and teleconferences were frequently held. This was to ensure that issues were discussed and resolved regardless of the location where I was at any given time.'

[54] According to Mr Nthai:

'42.4 (1) I negotiated directly with employees of AAP at the highest level the entire budget for the relocation project, including the unforeseen activities. The budget included items such as, payment of compensation to community members, compensation philosophy plowing fields, stipends for members of the section 21 companies, payments to contractors, professionals and many other service providers. The entire budget for the relocation of two communities was approximately R800 million. I also negotiated directly with employees of AAP the yearly increases and renewal of the retainers.'

[55] In a letter dated 14 June 2006, Mr Daya wrote to Anglo Platinum:

'Enclosed herewith another statement for R200 000-00. I have been advised by Advocate Seth Nthai that he had discussed this matter with Mr R H H Van Kerckhoven.

The initial order was for R1.5 million and this statement together with the two previous statements of R800 000-00 and R500 000-00 will fulfill the amount claimed in the order.'

On 16 November 2006, Mr Daya despatched the following email to Anglo Platinum:

'I would appreciate it if you could advise me, whether you have approved the fee increment proposal for Seth.

I have been advised by Seth that he needs a response by not later than Friday.'

Similar emails followed on 10 January 2007, 3 February 2007 and 5 February 2007. Those read:

'In my previous e-mails I had advised as per Seth's proposal that a sum of R500 000-00 be deposited into my Trust account.'

…

'I had a discussion with Seth and have been advised as follows regarding the additional fees:-

1. With regard to my request for additional fees for R3 million.

Seth advises that he will accept the first instalment of R750 000-00 to be paid into my Trust account.

He advises that the remainder of R2 250 000-00 should be paid within two weeks of receiving the first instalment of R750 000.00.'

'I have discussed the matter with Seth and explained your proposal for making payment in instalments.

Seth has agreed to same. I have already forwarded the first invoice in the sum of R750 000-00 to Dirk Moolman at Anglo Platinum Management Services (Jhb).

I would appreciate it if you could liaise with Dirk to advise him of the agreement.'

[56] On 02 November 2011 the attorney representing the PSA in the striking off application wrote to Mr Daya requesting information from him pertaining to the Anglo Platinum matter. The next day Mr Daya responded that he would require some time to retrieve the files and will thereafter forward the requested information. Almost immediately thereafter he appeared to have a change of heart. In a further letter written that same day he stated:

'2. Since I consider the information requested by your client to be privileged I would require, in my respectful submission, permission from my clients to disclose the requested information.

3. I had accordingly telephonically contacted my clients to advise them of your letter dated the 2nd November 2011.

4. Clients have requested that I furnish them with a copy of your letter under reply. Clients have also advised that since Advocate Nthai SC is a interested party that I also forward a copy of your letter to him and also obtain permission from him as to whether I can disclose the requested information.'

[57] In the exchange of correspondence that followed, Mr Daya clarified that his clients are not Anglo Platinum, but 'the communities of Ga-Puka and Ga-Sekhoalelo based in Mokopane'. On 23 November 2011 Mr Daya wrote:

'6. In the interim and to assist my clients to make a informed decision to your clients request, you are kindly requested furnish us with the following information:

6.1. The nature and purpose of your client's enquiry relating to the payment of fees to Advocate Nthai;

6.2. Whether your client has requested the information it requires directly from Advocate Nthai;

6.3. The manner in which your clients have obtained the various tax invoices and that copies of all the tax invoices in your possession be forwarded to our offices.'

[58] Eventually, on 28 November 2011 Mr Daya wrote:

'5. Although I fully understand your client's obligation to pursue its investigation against Advocate Seth Nthai, as a attorney I also have a obligation to furnish any correspondence that you submit to me, to my client for further instructions. You will no doubt agree that I am duty bound to act on my client's instructions.

6. I furthermore note your client's reluctance to divulge the manner in which it has obtained the document/s in question. The documents in question, are in my respectful submission privileged documents and your client has an obligation to disclose the manner in which it has obtained same.

7. As you will note from my letter dated the 03rd November 2011, I had indicated from inception that personally and professionally I have no objections in furnishing the requested

information. I am however as the attorney duty bound to follow and comply with my client's instructions.'

[59] It is unclear on what basis privilege was asserted. But, it is not necessary to enter into that question, because it remained for Mr Nthai to explain his conduct. His explanation, such as it is, is wholly unsatisfactory. It was for him to take the court fully into his confidence. He failed to do so. The allegations pertaining to Mr Nthai's conduct in the Anglo Platinum matter still hang over his head. His uncooperative attitude on this score is concerning. His persistent refusal to disclose relevant documents and to give a full account concerning the allegations against him are not the actions of a reformed person.

[60] Importantly, the allegations in the Anglo Platinum complaint go beyond merely overreaching. Mr Nthai acted for the communities whilst he was paid by Anglo Platinum. This constitutes a clear conflict of interest. It is in a sense similar to Mr Nthai's conduct when, whilst acting for the Government, he sought to cooperate with Mr Marcenaro and to be corruptly compensated by him.

[61] Regardless of Mr Nthai's failure to address the full details of the allegations of overreaching and conflict of interest, the high court found that the claims of overreaching were part of the original application for Mr Nthai's striking off. The high court also found that he did not file an answering affidavit in the application because he realised that 'he deserved to be punished due to the serious nature of his indiscretions'.

[62] I have dwelt on this aspect, because it seems to me that the high court failed entirely to appreciate the full import of the transgression. This rendered it far too receptive to Mr Nthai's explanation. At the time our law recognised a divided profession coupled with a referral system[38] and that, at least in regard to the conduct of litigation, an advocate misconducts himself if he acts without the intervention of an attorney.[39]

[63] Our courts have generally affirmed that it is in the public interest that there should be an independent Bar whose members 'in general do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice.'[40] In *In re: Rome*, in outlining the points of distinction between the two branches of the profession, Corbett CJ said:

'The advocate is, broadly speaking, the specialist in forensic skills and in giving expert advice on legal matters, whereas the attorney has more general skills and is often, in addition, qualified in conveyance and notarial practice. The attorney has direct links (often of a permanent or long-standing nature), with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or longstanding relationship with the lay client: he only acts for the client on brief in a particular matter and is normally precluded by Bar rules from accepting professional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for the recovery of these and his own fees and disbursements from the client: The advocate has no direct financial dealings with the client.'[41]

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[38] *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) para 19.
[39] *Van der Berg v General Council of the Bar of South Africa* (above fn 11) para 23.
[40] *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 763G.
[41] *In re: Rome* 1991 (3) SA 291 (A) at 306F-G.

[64] Likewise, in *Rösemann v General Council of the Bar of South Africa*,[42] Heher JA had this to say:

'At this point the referral rule and its implications … become significant. An advocate in general takes work only through the instructions of an attorney. The rule is not a pointless formality or an obstacle to efficient professional practice, nor is it a protective trade practice designed to benefit the advocacy. The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client (on his own behalf and that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interest (other than the way in which the advocate is to carry out his professional duties), oversees each step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrates' court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client's behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal representative and then only subject to the approval of his instructing attorney. (This catalogue does not purport to be all-embracing. It is intended only to illustrate the sharpness of the divide and to point the answer to other debates on the same subject.)

[42] *Rösemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA) para 28.

[65] In a separate judgment in *Rösemann,* Streicher JA pointed out:

'… It follows, furthermore, on the other hand, that to allow advocates to accept instructions by attorneys to conduct litigation on behalf of a client from beginning to end, ie to do all the administrative and preparatory work in respect of litigation, would not serve the public interest and would constitute an abuse of the referral practice.

The instructions relied upon by the appellant were to do all the administrative and preparatory work normally done by an attorney. I, therefore, agree with the court *a quo* that the instructions were not proper instructions and that they should not have been accepted by the appellant.'[43]

[66] Needless to say, fees charged by an advocate must be reasonable. One who charges an unreasonable fee, is guilty of overcharging or overreaching.[44] Overreaching involves an abuse of a person's status as an advocate, by taking advantage for personal gain of the person paying.[45] For an advocate to take advantage of that situation by marking a fee knowing that it is not a proper fee, but one that is unreasonable and improperly marked under the rules, is an abuse of the advocate's position and amounts to overreaching.[46] As it was put in *Society of Advocates of South Africa (Witwatersrand Division) v Cigler*: '… the charging of excessive fees is not only a breach of the Rules but is also a matter of serious concern'.[47]

[67] Mr Nthai explained, but only in general terms, the nature of the work that he performed in return for his fees. It would be incumbent upon an advocate who is alleged to have charged excessive fees to provide sufficient detail of the work that

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[43] Ibid paras 9 – 10.
[44] *General Council of the Bar of South Africa v Geach* (above fn 3) para 131.
[45] Ibid para 132.
[46] Ibid para 132.
[47] *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* (above fn 14) at 354.

was performed to enable the fee to be assessed.[48] I think that much of the difficulties relating to the fees arose because Mr Nthai acted without proper instructions in the matter. It is true that he had an attorney in the form of Mr Daya, but Mr Daya appears to have been no more than a nominal attorney. As I have pointed out, an advocate may in general not act other than on the instructions of an attorney and by that I do not mean a nominal attorney. Had Mr Nthai been properly instructed, he would no doubt have been held to account by his attorney for the fees that he charged. In that event, it would have been necessary for him to have: (i) recorded his fees in the usual fashion; (ii) marked his briefs with the work done and the fee relevant to such work; (iii) submitted accounts that would have been subject to scrutiny by his attorney; and (iv) no doubt, received payment in the more conventional way.

[68] In summary, therefore, the evidence discloses that Mr Nthai had acted in conflict with the duties of an advocate in various respects. He marked fees and received payment other than in the conventional way, which was a consequence of him having acted without proper instructions. He associated himself with a mandate that was detrimental to the reputation of the profession. And, in executing the mandate he lent himself to what, at the very least, had the potential for fraud.

[69] Unlike his admission to the misconduct based on the bribery and corruption, Mr Nthai has not admitted the allegations of overreaching. Given his denials, his refusal to provide the underlying documents is concerning. Similarly, in *Johannesburg Society of Advocates v Edeling*,[49] Mr Edeling did not voluntarily disclose certain information relevant to his readmission as an advocate. He only did

[48] *Van der Berg v General Council of the Bar of South Africa* (above fn 11) para 23.
[49] *Johannesburg Society of Advocates v Edeling* (above fn 33).

so after the JSA had raised specific concerns about the information that he had provided in his application. This court found that Mr Edeling's failure to disclose matters relevant to the question of his readmission undermined his assertion that he had genuinely, entirely and permanently reformed. And, that he could not be trusted to carry out the duties of an advocate in a satisfactory way as far as members of the public are concerned.[50] The same must apply to Mr Nthai.

[70] It is no small matter for an advocate to disregard the rules of his professional body and the authorities that I have referred to illustrate the seriousness with which such conduct is viewed by the courts. Here, it is impossible to avoid the conclusion that Mr Nthai was a party to a relationship or an understanding between himself and the firm of attorneys, in terms of which he: was free to perform acts whether or not those were ordinarily performed by advocates; would not debit the attorneys for his work as and when the work was performed; and, would charge a composite fee irrespective of whether or not such fee was reasonable. The high court failed to recognise, as the full court emphasised in *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* that:

'The fact that an advocate has breached the Rules of the Society, even in isolated instances, may very well be relevant to the Court's decision as to whether he is a fit and proper person to practise as an advocate, and so is a finding whether he treats the Rules of the Society with respect or with contempt. Breaches of the Rules, as I have indicated, may cause an injustice and even an unfair trial. It is for these reasons that Courts have in the past always assisted Societies of Advocates in upholding and enforcing their Rules.'[51]

[50] Ibid para 36.
[51] *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* (above fn 34) at 354.

[71] In readmitting Mr Nthai, the high court placed particular emphasis on Mr Nthai's mental health at the time of the misconduct. Mr Nthai had placed evidence before the court to the effect that he had been suffering from depression. This, the court held, contributed significantly to and was the only rational explanation for Mr Nthai's misconduct. According to the court, it also explained his failure to participate in the disciplinary proceedings. The high court concluded that the fact that Mr Nthai was unwell at the time is the only thing that could 'explain the fact that he risked his lucrative practice, the opprobrium of his colleagues and friends and the society at large and his entire career in which he would have practised his advocacy until his retirement for a mere R5 million which amount, it must be pointed out, was not even paid to him.'.

[72] The high court considered the medical evidence concerning the role of anxiety and depression in Mr Nthai's transgressions to be an overwhelming factor in favour of his readmission. It held that 'it is easy for one to conclude that Nthai's health condition played a significant role in his deviant and irrational behaviour'. In that regard, it placed reliance on the medical reports of Dr Williamson, a psychiatrist, and Prof Wolff, a clinical psychologist. The court considered this to be 'powerful evidence in support of Nthai's case'. The court further held that Mr Nthai had 'made a good case that his misconduct was due to his poor health condition at the relevant time and that in that respect he has completely reformed'.

[73] However, in making these findings, the court went beyond what the evidence reasonably justified. Neither of the health professionals who saw Mr Nthai, definitively concluded that depression caused or explained his misconduct. Both

merely suggested that depression could have impaired his judgment and thus contributed to his misconduct.

[74] The medical evidence also appeared to have satisfied the high court that Mr Nthai would not repeat his transgressions. The court found that 'the reports of the said experts convincingly demonstrate that Nthai has fully recovered from the health condition that probably resulted in his irrational and corruptive conduct during October 2009.'

[75] It is clear that the high court misconstrued the evidence of Prof Wolff and Dr Williamson. Prof Wolff's evidence was to the following effect: Mr Nthai was a patient of Prof Wolff's practice since 2 April 2009 (which was before the date of his transgressions). Prof Wolff provided Mr Nthai with cognitive behavioural psychotherapy between 2 April 2009 and 12 May 2009 'when his depression and anxiety had improved significantly, and he was asymptomatic.' In February 2010, Mr Nthai returned to the practice complaining of depression and indicating that in October/November 2009 he had committed the transgressions and become more depressed, when he was mentioned in a negative light in the media. Prof Wolff found that, after his transgression became public, Mr Nthai had become severely depressed and sought treatment. Prof Wolff says that the severity of Mr Nthai's depression 'was such that it could only have been caused by the events described by him above, especially his depression and anxiety dating back from 1995'. He concurred with Dr Williamson's conclusion that Mr Nthai's condition could not have developed over a short period of time. He concluded that there is no reason (to him as a medical practitioner) why Mr Nthai should not be reinstated in his previous professional role

as an advocate on the basis that he was asymptomatic for depression, when he was re-examined in August 2018.

[76] Dr Williamson's evidence was that she had treated Mr Nthai after he had been referred to her by Prof Wolff on 2 February 2010. Mr Nthai described to Dr Williamson the incident in October/November 2009, which resulted in his name being removed from the roll of advocates. He alluded to the media coverage and the shame he felt at his actions, which also affected his late wife and children. Mr Nthai was unable to give Dr Williamson a rational basis for his actions. He had reported to Dr Williamson a long-standing history of intermittent depression and anxiety dating back to 1995, for which he had received treatment over the years. At the time when Dr Williamson first saw Mr Nthai, he was clearly very depressed.

[77] Dr Williamson concluded that:

'Given his history of intermittent episodes of depression and the Major Depressive Disorder that I observed in February 2010, I am of the view that this could have influenced his behaviour during the preceding months including September, October, November and December 2009. His severe condition in February 2010 could not have developed over a few short weeks. When I assessed Mr Nthai in February 2010, he was unable to give me a rational explanation of his decisions and behaviour in those months of 2009 that lead to his disbarment.

She concluded that:

- Mr Nthai is not suffering from depression at present
- He may have been depressed at the time of his irrational professional transgressions in October/November 2009 which could then have influenced his insight and judgment.
- Affording Mr Nthai a second chance, by re-admitting him to the Role of Advocates would contribute to his self-esteem and restore his dignity.' [emphasis added]

[78] This represents the high-water mark of the medical evidence. Ignoring some of the rather speculative hypotheses advanced by the medical professionals, what emerges is that Mr Nthai had suffered from depression and anxiety in the past, and it appeared to them that the anxiety and depression may have played some role in his transgressions. Neither of the experts went so far as to aver positively that depression or anxiety was the primary, or for that matter even a contributing factor to the transgressions.

[79] Yet the high court held that his condition provides a full explanation for Mr Nthai's transgressions. However, neither witness went so far as to suggest that it was the depression and anxiety that contributed to a lack of honesty, which marked his scheme, pursued vigorously over several months. Nor that without depression and anxiety, Mr Nthai would not have transgressed. Much more by way of evidence would have been required to justify the findings of the high court.

[80] In the absence of such evidence, it is not possible to conclude that Mr Nthai is not a person inherently prone to dishonesty or the fact that he is currently asymptomatic for depression and anxiety means that he is not at risk of similar transgressions in the future. On the contrary, because of the equivocal and limited nature of the medical evidence about the causal relationship between his condition and the transgressions, the high court could not justifiably have concluded that there is any assurance that the character flaws which resulted in the transgressions – in particular dishonesty and greed – will not recur if he is readmitted to practice.

[81] As a result, neither the psychiatrist, psychologist nor the high court genuinely came to grips with what patently was a significant contributing factor, namely, Mr

Nthai's greed and dishonesty. The anxiety and depression, such as it is, hardly explains his clear goal directed behaviour over a protracted period. Nor can it mitigate the dishonesty. It follows that neither of the health professionals could (or did) conclude definitively that Mr Nthai was depressed at the time of his misconduct or that a causal nexus existed between the two. Mr Nthai himself conceded that he was 'unable, as lay person, to link the incident to the illness'.

[82] While Mr Nthai makes the bare allegation that he accepts that greed and dishonesty played a role in his transgressions, and that he has reflected upon and repented for these character flaws, his reliance on depression and anxiety as a contributory factor obscures the fact that Mr Nthai has not properly come to grips with the real elements of his transgressions and of his inherent character flaw. As it was pointed out in *S v Matyityi*:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation

of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.'[52]

Although stated of an accused person in the context of criminal proceedings, those considerations apply no less in this context.

[83] It was for Mr Nthai to demonstrate by means of clear and convincing evidence that he has grappled with the nature and degree of his transgressions, and that he has indeed reformed and that he is now a fit and proper person.[53] The question is not whether he has been punished enough.[54] It is rather whether he is a person who can safely be trusted to faithfully discharge all of the duties and obligations relating to the profession of an advocate. In readmitting Mr Nthai, the high court emphasised the importance of the PSA, the JSA and the LPC finding it 'in their hearts to forgive Nthai' and in that regard made reference to a sermon delivered by Dr Martin Luther King Jr emphasising the importance of the capacity of forgiveness.

[84] The high court also gave considerable weight to the devastating impact of the media publicity on Mr Nthai and his family and the fact that his transgressions were made public. It accordingly concluded that Mr Nthai had been sufficiently punished for his transgressions. In the view of the high court the case was about whether Mr Nthai should be given a second chance. To focus on forgiveness and whether Mr Nthai had been sufficiently punished, as the high court did, is to fundamentally misconceive the nature of the enquiry.

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[52] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 14. (Footnotes omitted.)
[53] *Law Society, Transvaal v Behrman* (above fn 12).
[54] *Swartzberg v Law Society of the Northern Provinces* (above fn 39) para 27.

[85] As long ago as *Law Society v Du Toit* 1938 OPD 103, it was said in regard to an application for the removal of an attorney:

'The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this court. The proceedings are of a purely disciplinary nature; they are not intended to act as punishment of the respondent… It is for the courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the work of the court. The public are entitled to demand that a court should see to it that officers of the court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit.'

This statement has been quoted and followed in a number of subsequent cases and, although it deals with an attorney, it is equally applicable to the case of an advocate.[55]

[86] Mr Nthai's application was accompanied by affidavits from no less than five persons who attested to his rehabilitation. He also detailed his employment and business ventures subsequent to his removal from the roll. The high court placed great store by the evidence, especially that of Advocate George Bizos SC. It quoted from the affidavit of Mr Bizos, to the following effect:

'4. I have served as a director of Lawyers for Human Rights (LHR). I met Nthai through his activities as a regional director of LHR and a member of the Legal and Constitutional Committee of the African National Congress (ANC). In this capacity, Nthai participated in many conferences that shaped democracy in South Africa. When the ANC's Legal and Constitutional Committee convened a conference on whether South Africa should have the Nuremberg Style Trials or adopt the Truth and Reconciliation route, Nthai was an active participant.

[55] *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* (above fn 34) at 358A-B.

5. Nthai participated in the activities of the JSC, first as the Limpopo Premier's representative and later through appointment by President Thabo Mbeki. It was in this role that I came to know Nthai better.
6. During interviews of candidates Nthai always asked incisive and relevant questions. It was, however, during close sessions that Nthai's intellect and wisdom has shown. His views were always listened to and respected by all members of the JSC.
7. When the allegations of his transgressions first surfaced, they were met with disbelief and shock. Nthai was regarded by his peers as a man of integrity.
8. When he requested me to support his application, I agreed to do so as I believe that Nthai still has a role to play in the legal profession. His removal from the roll of practicing advocates had left a void which was difficult fill.
9. I therefore support his application for re-admission'.

[87] The high court criticised the PSA for trying 'to downplay the significance of the Mr Bizos's support for Nthai's application'. It suggested, '[t]his, in our view, is an attack upon the integrity of an eminent jurist, such as Mr Bizos'.[56] In that, the high court misconstrued the contention advanced on behalf of the PSA. Consequently, it did not engage with the gist of the argument, which was articulated thus by Wallis JA in *Edeling's* case:

'Most of the references were unhelpful and meaningless, because all they did was paint a favourable picture of Mr Edeling, without indicating the extent of their knowledge of Mr Edeling's wrongdoings or whether they knew about the personality traits or character defects which gave rise to his misdeeds and led to his striking off. None referred to the fact that dishonesty lay at the root of the decision to strike him from the roll of advocates. In regard to similar character references, Wessels JP said in *Ex parte Wilcocks*:

[56] *Nthai* (above fn 2) para 77.

"It is not sufficient to produce before the court a few certificates from interested friends or to say that he has led an honest life. The evidence with regard to that must be overwhelming: the court must be satisfied that it will make no mistake if it reinstates the applicant."'[57]

It follows that the high court could not, without more, on the strength of the character references have been satisfied that 'it will make no mistake' in readmitting Mr Nthai.

[88] There are, moreover, a number of telling instances where Mr Nthai's conduct post-removal has demonstrated that he is fundamentally ill-suited to a profession based on integrity, candour and honesty. In his founding affidavit in support of his readmission application, Mr Nthai observed:

'My initial reaction to the investigation by the Pretoria Bar Council and the inquiry by the DC was unhelpful. I felt that the manner in which the investigation by the Pretoria bar Council was conducted was unfair, my attitude was misguided and wrong.'

[89] However, what Mr Nthai somewhat euphemistically described as 'misguided and wrong' continues to characterise his behaviour. Instead of inviting rigorous scrutiny of his application by the very parties who had conducted the disciplinary proceedings and brought the striking off application, he has endeavoured to exclude them from the proceedings. Mr Nthai contested the standing of the JSA and the PSA in his application for readmission. This despite him having said that he 'felt ethically duty bound to bring the application to the attention of both Bars' and that he understood that they had an interest in his readmission. Contradictorily, he later denied the existence of the JSA and the PSA because 'the new South African Legal Practice Council has now been established in terms of the Legal Practice Act with oversight regulatory powers to all legal practitioners, including advocates'.

[57] *Edeling* (above fn 33) para 14. (Citations omitted.)

[90] In the same breath though he recognised the existence of POLSA and stated that the role of *custos morum* resided only with them. Of course, POLSA supported the readmission application. Why the application was supported has not been explained. POLSA has a duty to ensure that persons who are enrolled as advocates are persons of dignity, honour and integrity. In supporting Mr Nthai's readmission application POLSA appears to have failed in that duty.

[91] After both the JSA and the PSA had resolved to intervene in the readmission application, Mr Nthai refused to accede to their request for a postponement. And, in opposing the application for leave to intervene, Mr Nthai asserted: 'Simply put, this court is called upon to determine whether I am fit and proper person to be readmitted as an advocate. The burden of proof rests on me and no one else'.

[92] Mr Nthai also strongly opposed the JSA's application for leave to appeal and the GCB's application to intervene. He expressed the following view:

'Given the nature and effect of the judgment and order of the Court, and particularly the fact that the respondents' prospects of success on appeal are non-existent, I was justified in concluding that it was unthinkable for any of the respondents to lodge an application for leave to appeal.'

He added:

'[T]he application for leave to appeal is intended merely to harass, frustrate and drain me emotionally and financially. The intention is to drag and delay my return to practice law so that I would ultimately give up.'

Insofar as the GCB was concerned, he stated:

'The GCB's insistence on its continued regulatory role or as *custos morum* will, with respect always remain a pipe dream … It is clear that the GCB intends to use my case to try to achieve the outcome which it lost at the legislative altar'.

This is hardly the conduct of a self-effacing, reformed individual, who is open to the scrutiny of a court, aided and assisted by the facts and arguments that the professional bodies were uniquely positioned to place before it.

[93] What is more, after leave to appeal had been granted by this court and despite the fact that an appeal was pending against his readmission and the enforcement order, Mr Nthai started to accept briefs. In terms of section 18(4)(iv) of the Superior Courts Act, the enforcement order of the high court was 'automatically suspended' pending the outcome of the appeal of that order. He also continued using the appellation 'SC', thereby holding himself out as a senior counsel. Mr Nthai did so ostensibly because an application had been filed by him with the registrar of this court in terms of s 17(2)*(f)* of the Superior Courts Act for a reconsideration of this court's decision to grant leave to appeal against the readmission order. I pause to record that it seems to me that s 17(2)*(f)* entitles the President of this court to refer a matter for reconsideration only where leave to appeal is refused and that it therefore could not have been invoked in a case such as this, to reverse the decision of the court where leave to appeal had been granted. Mr Nthai's s 17(2) application was ultimately dismissed with costs by the President of this court on 20 June 2020.

[94] Whilst the s 17(2) application was pending, however, in February 2020 it was brought to the GCB's attention that Mr Nthai was scheduled to appear in the Constitutional Court on behalf of the Minister of Home Affairs. After seeking unsuccessfully to obtain Mr Nthai's undertaking that, pending finalisation of the appeals, he would withdraw from all matters in which he was engaged, the GCB was forced to point out to the registrar of the Constitutional Court that he was not entitled to appear before that court in the matter. Mr Nthai's instruction in the matter was

terminated, in consequence of the GCB's letter to the registrar, and the registrar's subsequent letter to his instructing attorney, the State Attorney. The response from the State Attorney to the registrar was: 'we thank you for bringing the developments in Mr Nthai's litigation to our attention'. It may reasonably be inferred from that statement that Mr Nthai had failed to advise the State Attorney, when briefed, that he was not eligible to practise pending the appeals.

[95] Despite this incident, Mr Nthai continued to act in a further brief for the Minister of Home Affairs in the Western Cape High Court. On 20 April 2020 Mr Nthai's attorney was reminded that he was not entitled to continue practicing before the termination of the appeals. His attorney, once again, disputed that it was necessary for him to stop practicing. Consequently, the registrar of that court had to be notified, whereafter he came to be replaced as counsel.

[96] The view of Mr Nthai's attorney was:

'Our client takes strong exception to the opportunistic and unilateral approach of the GCB to the CC … [T]he GCB failed to disclose the fact that our client has lodged an application for reconsideration of the SCA orders in terms of section 17(2)*(f)* … and accordingly such orders have been suspended in their operation.'

For that reason as well, the attorney took the view that the filing of the practice note and heads of argument by the JSA and the GCB was 'premature and improper'. She contended that, until Mr Nthai's s 17(2)*(f)* application had been determined, 'none of the parties are entitled to take a further step in the prosecution of the [appeal]'.

[97] What this demonstrates is an obstructive attitude on the part of Mr Nthai, aimed at preventing proper scrutiny of his readmission; hardly that of a reformed

person who deserves readmission. His persistence in turning his back on the truth, gratuitous insults and intemperate language constitutes evidence that since his striking off he has developed no insight and no greater perception of what is expected of him. This, it seems to me, is a defect of character which, going forward, is hardly likely to be ameliorated.

[98] In the words of *Swartzberg*, Mr Nthai 'did not succumb to a sudden temptation and his fall from grace was not in consequence of an isolated act. His was deliberate and persistent dishonesty for personal financial gain over a protracted period'.[58] Where, as here, an applicant for readmission has demonstrated a propensity for inherent dishonesty, 'his prospects of being readmitted to what after all is an honourable profession, will be very slim indeed. Only in the most exceptional of circumstances, where he has worked to expiate the results of his conduct and to satisfy the court that he has changed completely, will a court consider readmission at all.'[59] Mr Nthai has not demonstrated such exceptional circumstances.

[99] It follows that the high court failed to apply the appropriate test. It did not find exceptional circumstances of the kind required by this court in *Swartzberg*. Instead, the high court prioritised the consequences Mr Nthai had to endure after his misconduct came to light.

[100] I now turn to the appeal against the s 18 order, in terms of which Mr Nthai's readmission was to operate and be executed pending the outcome of any future appeals.

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[58] *Swartzberg v Law Society of the Northern Provinces* [2008] (above fn 14) para 23.
[59] Ibid para 32. (Footnotes omitted.)

[101] Given that the s 18 appeal is being heard together with the main appeal, the JSA accepts that the appeal against the s 18 order will have no practical effect. This is so because if the main appeal fails, Mr Nthai will be entitled to practice going forward. Contrarily, if the main appeal succeeds, he will not be entitled to practice. That notwithstanding, it is nevertheless necessary to observe that the high court erred in granting the s 18 order.

[102] This court explained in *University of the Free State v Afriforum*[60] that s 18 'places a heavy onus on the applicant' as '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.'[61] Section 18 does not seek merely to codify the common law but to 'introduce more onerous requirements'.[62] And, the interim enforcement of court orders constitutes an 'extraordinary deviation from the norm' and thus requires 'the existence of truly exceptional circumstances to justify the deviation'. Exceptional circumstances entail 'something out of the ordinary and of an unusual nature; … in the sense that the general rule does not apply to it; [and] something uncommon, rare or different'.[63]

[103] The circumstances relied upon by the high court in granting the enforcement order were not extraordinary, markedly unusual or specially different. It was contended before the high court that the s 18 application should not succeed because of the irreparable harm that would be inflicted on the public if Mr Nthai commenced

[60] *University of the Free State v Afriforum and Another* [2017] ZASCA 165; 2018 (3) SA 428 (SCA).
[61] Ibid paras 11 and 9, respectively.
[62] Ibid para 11.
[63] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156I-157C.

practising and this court on appeal overturned the order to readmit him. The public and the legal profession would then be faced with a situation where for that period, Mr Nthai would have been accepting briefs, conducting legal work and appearing in courts in circumstances where it would ultimately have been found that the decision to readmit him does not survive scrutiny.

[104] Before a court can grant such order, it must also be satisfied that the party seeking the order has proved, on a balance of probabilities, that he will suffer irreparable harm if the order is not granted, and that his opponent will not suffer such harm in consequence of interim enforcement.[64] Mr Nthai's s 18 application did not meet these requirements. He was at no risk of such harm. It is so that he may have been inconvenienced if he was prevented from commencing practice pending finalisation of the appeal. But this is an ordinary and unavoidable incident of the appeal process.

[105] The high court relied on the fact that Mr Nthai had already taken up chambers, paid his Bar fees, commenced lecturing pupils and had been briefed in various complex matters. But these circumstances are not exceptional in any sense. They were of Mr Nthai's own making. He took these steps despite being fully aware of the normal rule that court decisions are suspended pending an appeal. If these were exceptional circumstances, any candidate for interim enforcement could abruptly take irreversible steps to ensure that the test in s 18 is met.

[64] Section 18(3) of the Superior Courts Act.

[106] The high court held that Mr Nthai 'undertook not to practise … and observed his undertaking … despite the fact that he was admitted to practise as an advocate in both Lesotho and Botswana'.[65] This meant, the court stated, that he could be trusted to cease practice if an appeal was successful. And, it held that Mr Nthai had demonstrated personal integrity and scrupulous honesty subsequent to his misconduct.[66] I have demonstrated that this is not so. Further, Mr Nthai's resignation on the eve of his disciplinary hearing was an act of self-preservation, designed to avoid scrutiny and culpability. It was not the act of a trustworthy man. But even if he were demonstrably trustworthy, this would not constitute exceptional circumstances. The test is not whether the ultimate appeal order would be complied with, as the high court appears to suggest, but whether exceptional circumstances exist that warrant enforcement pending the appeal.

[107] If anything, it was the GCB and its constituent Bars that faced the threat of irreparable harm if the enforcement order was granted and the appeal subsequently upheld. The admission and practice, even if temporarily, of a person who is not fit and proper to practice can cause irreparable reputational damage to the advocates' profession and real harm to members of the public. In my view, the high court should

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[65] *Nthai* (above fn 2) para 80.

[66] Ibid para 55. The high court continued: 'The fact that Nthai was entrusted with handling monies on behalf of the company [where he was employed subsequent to his striking off] without supervision means that his conduct was commensurate with a large degree of trust. This is one of the most crucial traits that the Court takes into account in considering an application for re-admission.' However, even if the evidence of Mr Nthai's former employer is accepted as fact, it remains entirely irrelevant. The degree of trust placed in Mr Nthai as a mere employee, after being struck from the roll and thus acutely aware of being under the proverbial magnifying glass, is by no means a reliable determinant of his rehabilitation or newly found fitness for the profession. Much less when it is the say-so of his former employer, who no longer resides in this country and therefore has nothing to lose in the event of Mr Nthai choosing to once more attempt unlawfully benefiting at the expense of the national government and thus, ultimately, at the expense of the entire country.

have concluded, after weighing the respective interests of the parties,[67] that the readmission judgment should not be enforced pending an appeal.

[108] It remains to consider the applications for the PSA to be joined as an appellant and the GCB and the JSA to adduce further evidence, both of which have been opposed by Mr Nthai. On 20 May 2020 the PSA applied for leave to be joined as the third appellant in the appeal. Although the PSA had sought and previously obtained leave to intervene and was subsequently joined as the first respondent in the high court, it did not seek leave to appeal the judgment of the high court. Mr Ellis, explained on behalf of the PSA:

'3.2.1 The Bar Council of the PSA adopted a resolution on 11 June 2019 not to pursue an application for leave to appeal the judgment and order that was made by the Court *a quo* on 24 May 2019.

3.2.2 The general membership of the PSA did not support the Bar Council's aforementioned decision and a special general meeting was convened on 17 October 2019, during which a resolution was adopted to pursue the matter and to assist the SCA in this regard.'

[109] The PSA contends that it is duty-bound to apply to this court for leave to be joined as the third appellant so as to enable it to become actively involved in the appeal and to assist the court in the adjudication of the matter. The PSA did not furnish an explanation for the delay from 17 October 2019, when the resolution was adopted, until the application was filed with this court. It was also late in filing its replying affidavit. Mr Ellis deposed to the replying affidavit on 16 July 2020. However, the replying affidavit together with PSA's practice note and heads of

[67] In *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC) para 10, the Constitutional Court held that 'a Court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties' before making 'an order to execute pending appeal'.

argument only came to be filed with the registrar of this court on 26 October 2020, some four court days before the hearing of the appeal. In addition, the issues that it sought to canvas have been comprehensively dealt with by the GCB and the JSA. In the circumstances, the PSA's participation adds nothing new. I would accordingly dismiss the application.

[110] On 22 September 2020 the JSA and the GCB applied, in terms of s 19*(b)* of the Superior Courts Act, for leave to adduce further evidence in the appeals. The evidence, which only saw the light of day after the finalisation of the matter in the high court, may be summarised as follows: In an application for condonation filed in June 2020, in support of an unfair dismissal claim before the CCMA against Mr Nthai, his former secretary, Ms Marietjie Jansen van Vuuren, alleged that he continued to practice law after his striking off. Ms Jansen van Vuuren set out in fair detail some of the legal work performed by Mr Nthai, along with supporting annexures.

[111] It appeared from the annexures that Mr Nthai prepared opinions together with Advocate Sophia Masimene. In addition, it seemed that he had drafted letters to be placed on the letterhead of Bhadrish Daya Attorneys, to thereafter be sent to clients. Ms Jansen van Vuuren also alleged that Ms Masimene split her fees with Mr Nthai. Mr Nthai denied the allegations, which he described as 'defamatory and scandalous'. Mr Nthai suggested that Ms Masimene had considered him a mentor and that it was in this capacity that he rendered assistance to her 'over the years, and on various occasions', for no payment. In his affidavit before the CCMA, Mr Nthai did not deal fully with the specific examples cited by Ms Jansen van Vuuren or the annexures to her affidavit.

[112] When these allegations came to the attention of the GCB and the JSA, Mr Nthai was asked for an explanation. He adopted the stance that he is 'not prepared to entertain false, untrue and defamatory allegations'. In opposing the application to adduce further evidence, Mr Nthai correctly pointed out that the CCMA had found Ms Jansen van Vuuren to be untruthful and her evidence not to be credible. He was also correct in stating that there are, on the face of it, certain disputes of fact.

[113] Mr Nthai went on to describe the request by the JSA and the GCB as a 'fishing expedition' and the application for leave to adduce further evidence as 'an abuse of court process', asserting that 'the relevance of the confidential emails between Adv Masimene and I *"from 1 January 2018"* is highly questionable'. He added:

'36.4 In in any event, the issue of locus standi of both the GCB and JSA looms large. It goes into the legal authority of the GCB and JSA to demand confidential financial records for this from me…

37.3 The letters addressed to the State Attorneys demonstrate the desperation on the part of the GCB and JSA and an exercise in futility. All the efforts came to naught.'

[114] But, despite questions around Ms Jansen van Vuuren's credibility and the potential disputes of fact, by his own admission, Mr Nthai assisted Ms Masimene with various opinions. Indeed, his handwritten notes disclosed by Ms Jansen van Vuuren, suggest that he was to an appreciable degree responsible for drafting significant parts of those opinions. In certain instances his handwritten notes, to the word (grammatical and spelling errors included), came to be incorporated into Ms Masimene's opinions. In correspondence addressed to Ms Jansen van Vuuren he also suggested that he 'worked on' opinions with Ms Masimene. And, once again by his own admission, Mr Nthai engaged in 'referral mining consultancy work' with Bhadraish Daya Attorneys.

[115] It is so that in appropriate cases, cross-examination might be required to establish the true facts. This might well be such a case. However, notwithstanding the troubling nature of the allegations, I prefer to pass over them. For, it seems to me that the matter can be decided without resort to the further evidence. As should be perfectly plain, on the evidence that served before the high court, the appeal must succeed. In that sense the further evidence will not alter the outcome and, strictly speaking, amounts to mere surplusage. I would accordingly refuse the application to adduce further evidence.

[116] Finally, Mr Nthai apprehended that he would be prosecuted. According to Mr Maritz:

'10.2. On 25 March 2010 and shortly before the scheduled time for the commencement of the disciplinary hearing, I met Advocate I A M Semenya SC, who was in the company of Mr Manaka, the respondent's attorney.

10.3. Advocate Semenya SC engaged me in conversation outside the arbitration venue at Circle Chambers, Brooklyn, Pretoria away from his instructing attorney Mr Manaka. Advocate Semenya SC indicated to me that the respondent was prepared to plead guilty to unspecified unprofessional conduct and submit to the termination of his membership of both the Pretoria Society of Advocates and the Johannesburg Society of Advocates, but that he was reluctant to plead guilty to the charge sheet as formulated as it was possible that he may be criminally prosecuted on the same facts. Under those circumstances he was reluctant to waive his constitutional right to silence as a potentially accused person. He stated that for the same reason the respondent would not oppose an application brought to strike his name from the Roll of Advocates.'

[117] It must thus come as a surprise to many, not least Mr Nthai himself, that no prosecution ensued. The high court considered the amount involved 'a mere R5 million'. That characterisation, is extraordinary. To borrow from John Till

Allingham, '[R5 million] is a sum not to be sneezed at'.[68] More so, when the bribe was solicited some 12 years ago. The high court also stressed that the amount had, in any event, not been paid. However, as emerges from the arbitral award in the matter, Mr Nthai occasioned the citizens of this country actual prejudice. The arbitration award recorded that:

'The [Government] very correctly and wisely withdrew that element of its claim for costs that was attributable to Mr Nthai's work. A Tribunal cannot properly order that the costs of a Party's adviser who engages in the solicitation of bribes should be recovered from the other Party.' Thus, whilst the Government was successful in the arbitration and the Tribunal concluded that it was entitled to its costs, the Tribunal held that the fees paid to Mr Nthai could not be recovered as a result of his conduct. It appears that Mr Nthai's fees for his involvement in the matter amounted at that stage to € 432 320.21 (in excess of six million rand at the current exchange rate). The Registrar of this court will accordingly be directed to forward a copy of this judgment to the National Director of Public Prosecutions, for her attention.

[118] With regard to costs, we were informed from the bar that counsel for the GCB and the JSA acted in this appeal without fee and that an order should be made only for the recovery of their disbursements. We intend making the ordinary order with regard to costs, though we note for the information of the taxing master that the costs of counsel are restricted to the recovery of disbursements that have been made by them or on their behalf.

[68] The phrase has its roots in J T Allingham's 1799 play, Fortune's Frolic: 'Why as to his consent I don't value it a button; but then £5000 is a sum not to be sneezed at'.

[119] In the result:

(1) The application by the Pretoria Society of Advocates for leave to be joined as the third appellant in the appeal is dismissed.

(2) The application by the first and second appellants for leave to adduce further evidence is dismissed.

(3) The appeal is upheld with costs, excluding counsel's fees.

(4) The orders of the court below, dated 24 May 2019 and 18 July 2019, are set aside and each is replaced with the following:

'The application is dismissed with costs, excluding counsel's fees.'

(5) The registrar is directed to forward a copy of this judgment to the National Director of Public Prosecutions.

V M Ponnan
Judge of Appeal

APPEARANCES

For First Appellant:	P Kennedy SC (with him N Ferreira and Y Ntloko) Instructed by: Edward Nathan Sonnenbergs Inc, Sandton Webbers, Bloemfontein
For Second Appellant:	F Ismail (with him PN Smith and M Lengane) Instructed by: Edward Nathan Sonnenbergs Inc, Sandton Webbers, Bloemfontein
For First Respondent:	G Shakoane SC (with him F Khunou) Instructed by: Kgatla Incorporated, Polokwane Lovius Block, Bloemfontein
For Second Respondent:	FW Botes SC Instructed by: Bernhard van der Hoven Attorneys, Brooklyn Rosendorff Reitz Barry, Bloemfontein