IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

2017.05.10
DATE

SIGNATURE

CASE NUMBER: 23199/16
DATE: 10 May 2017

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

V

THE MINISTER OF POLICE	First Respondent
MTHANDAZO BERNING NTLEMEZA	Second Respondent
DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Third Respondent
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT Fifth Respondent

JUDGMENT

MABUSE J: (Kollapen J and Baqwa J concurring)

[1] To avoid any confusion I will in the course of this judgment use the citation of the parties as in the main application. This counter-application was the second of the two long applications that we dealt with on 12 April 2017. The first of these two applications was an application for leave to appeal.

[2] Initially there were two applications for leave to appeal, one brought by the first respondent, the Minister, who at the hearing was represented by Adv. BR Tokota (SC) assisted by Adv. M Gwala and the second application was brought by the second respondent Gen. Mthandazo Berning Ntlemeza ("Ntlemeza"). Ntlemeza was represented by Adv. N Dukada (SC) assisted by Adv. Z Madlanga. Because the applicants had, in their counter-application, challenged the constitutionality of section 18 of the Superior Courts Act 10 of 2013 ("the Act") and had sought an order declaring the said section unconstitutional and invalid to the extent that it removed judicial discretion and peremptorily required an applicant to satisfy all the requirements of subsections 18(1) and (3) in order to execute and enforce an order, the fifth respondent, the Minister of Justice and Constitutional Development ("the Minister of Justice"), joined the fray. Adv. F Kerachi represented the Minister of Justice. Her role was merely to take care of the

interests of the Minister of Justice insofar as such interests related to the challenge to s 18 of the Act.

[3] By notice of withdrawal dated 11 April 2017 and filed with the registrar of this Court on the same date, the Minister withdrew his application for leave to appeal. That the Minister had withdrawn his application for leave to appeal was confirmed by Mr. Tokota (SC) and he had in the said notice of withdrawal tendered costs. After the Minister had formally withdrawn his application for leave to appeal, only Ntlemeza's application for leave to appeal remained and we dealt with it.

[4] Having heard arguments from both sides in Ntlemeza's application for leave to appeal and having refused such an application with costs, we turned our attention to the counter-application brought by the applicants, Helen Suzman Foundation ("HSF") as the first applicant and Freedom Under Law ("FUL") against both the Minister of Police ("the Minister") as the first respondent and Ntlemeza as the second respondent.

[5] The said counter-application was brought in terms of s 18(1) and (3) of the Act. This section provides that:

"(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the

subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) ...

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

[6] According to the notice of motion the applicants in the counter-application sought the following relief that:

"1. This application is enrolled as an urgent application and, insofar as may be necessary, any non-compliance with the Rules of this Honourable Court is condoned and this application is to be heard as one of urgency under Rule 6(12) of the Uniform Rules of Court ("the Rules");

2. The operation and execution of the order granted by Mabuse, Kollapen and Baqwa JJ under case number 23199/16 on 17 March 2017 ("the Order") are not suspended by any application for leave to appeal or any appeal, and the Order continues to be operational and enforceable and will operate and be executed in full until the final determination of all present and future leave to appeal applications and appeals in respect of the Order. A copy of the Order is annexed hereto marked "NoA1";

3. In the alternative to 2:

3.1 section 18 of the Superior Courts Act, 2013 ("the Act") ("section 18") is declared to be unconstitutional and invalid to the extent that it removes judicial discretion and peremptorily requiring an applicant to satisfy all the requirements in section 18(1) and (3) in order to execute and enforce an order;

3.2 Section 18(3) is to be read as follows:

"(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders, unless the court holds that, in the interests of justice, the party who applied to order otherwise in terms of subsection (1) does not need to establish any of the requirements in this subsection (3) and/or to establish the presence of exceptional circumstances as contemplated in subsection (1)."

3.3 In the alternative to 3.2 above:

3.3.1 the declaration of invalidity in 3.1 is suspended for a period of 12 months to allow the Legislature an opportunity to correct the defect;

3.3.2 until the replacement or amended legislation comes into force, section 18(3) of the Act is to be read as set forth in 3.2 above; and

3.3.3 should no replacement or amended legislation come into force within the period set forth in 3.3.1 above, section 18(3) is amended to read as set forth in 3.2 above.

3.4 The operation and execution of the Order are not suspended by any application or leave to appeal or any appeal, and the Order continues to be operational and enforceable and will operate and be executed in full until the final determination of all present and future leave to appeal applications and appeals in respect of the Order;

4. The costs of this application are to be costs in the appeal, save in the event that any of the respondents opposes the relief herein, such opposing respondent(s) should then be ordered to pay, jointly and severally the one paying the others to be absolved, the costs of this application, including the costs of two co8unsel, as follows:

4.1 the first and second respondents (insofar as they oppose) are to pay on the scale as between attorney and own client, in their personal capacities, alternatively, official capacities;

4.2 the third and fourth respondents (insofar as they oppose) are to pay on the scale as between attorney and own client, in their official capacities;

4.3 the fifth respondent (insofar as he opposes) is to pay on the scale as between party and party, in his official capacity.

5. Granting further and/or alternative relief."

[7] This application was opposed only by Ntlemeza who had, for that purpose, delivered an answering affidavit. As pointed earlier because of the relief that the applicants sought in paragraph 3 of the Notice of Motion the Minister of Justice and Constitutional Development, the fifth respondent, joined the fray only for the purpose of arguing the relief sought by the applicants in paragraph 3 of the Notice of Motion. Having listened to the argument by Ms. Steinberg for the applicants and Mr. Dukada, counsel for the second respondent, we granted the following order and having done so promised to furnish reasons in due course:

"1. The application is granted.

2. The operation and execution order granted by this Court under number 23199/16 on 17 March 2017 is not suspended and will continue to be operational and executed in full whether or not there are any applications for leave to appeal or whether or not there is any petition for leave to appeal against the said order.

3. The second respondent in the counter-application is hereby ordered to pay the costs of this counter-application."

These are therefore the reasons.

[8] On 17 March 2017 we made the following order in the written judgment that was handed down on the said date:

"1. The decision of the Minister of 10 September 2015 in terms of which Major General Ntlemeza was appointed the National Head of the Directorate of Priority Crimes Investigations is hereby reviewed and set aside.

2. The first and second respondents, in their official capacities, are hereby ordered to pay the applicants' costs, including the costs consequent upon the employment of two counsel."

This is the order that Ntlemeza intended to challenge in his aforementioned application for leave to appeal. The application was refused in an unanimous *ex tempore* judgment by Baqwa J in which Kollapen J and myself agreed. The fact that the application for leave to appeal had been refused did not mean that the door was closed to Ntlemeza. He could still approach the Supreme Court of Appeal with a petition for leave to appeal. Fearing that if the order that we made on 17 March 2017 was suspended in terms of the provisions of s 18(1) of the Act and fearing furthermore that a similar situation might arise in the event of the Minister or Ntlemeza seeking or petitioning the Supreme Court of Appeal for leave to appeal and were granted such leave the applicants launched this counter-application.

[9] Now I turn to the reasons on the basis of which the applicants brought the counter-application. Ntlemeza was, until 17 March 2017, when the court made the aforegoing order, the National Head of the country's premier investigative agency of the State, the Directorate of Priority Crimes Investigations, known by its acronym "DPCI". This investigative agency, as

its name indicates, focuses on priority crimes. It has exclusive jurisdiction and a constitutional mandate to investigate and eradicate corruption and other forms of priority crimes. Ntlemeza was, in his aforementioned capacity, one of the highest ranking police officials who wielded enormous power and had formidable constitutional responsibilities, in this country.

[10] It is not in dispute that Ntlemeza was found by this Court in 2015, in particular by Matojane J, in the judgments of Major General Shadrack Sibiya v Minister of Police and Others to have been dishonest, duplicitious, dishonourable and to have acted in bad faith and for ulterior motives. Ntlemeza lodged an application for leave to appeal against such findings but the said application was refused with costs by the said Judge. Subsequently the Minister petitioned the Supreme Court of Appeal for leave to appeal against Matojane's findings. The said petition was unsuccessful. The petition was placed before Cachalia and Pillay JJA who, on the 26th of May 2015, made the following order:

"The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard."

Currently there is no appeal against the findings by Matojane J. Consequently the remarks have now become dispositive of his fate. Despite all the judicial pronouncements which went to the core of his impropriety, in September 2015 the Minister appointed Ntlemeza in

complete disregard of the observations made by a superior court about him, to the National Head of the Police.

[11] Mr. Calim Muhamhad Rajab ("Rajab") on whose supporting affidavit the application relied in this counter-application, testified that our constitutional democratic system cannot tolerate Ntlemeza remaining in office any longer. The prospect of him continuing to occupy that office, someone whom the superior court has pronounced lacked honour and integrity and who was at all material times disqualified from being appointed to the highest office is inconsistent with the provisions of s 17 CA 1 of the South African Police Service Act No. 68 of 1995 ("the SAPS Act"). His continued occupation of that office in the face of the lingering remarks made by a superior court, will unavoidably cause irreparable harm to the administration of justice, the ongoing cases, the public and the public perception. The findings against Ntlemeza have now become public knowledge. What impression in the perception of the public will Ntlemeza's continued occupation of this office create?

[12] In order to succeed with the counter-application, the applicants must prove, on a balance of probabilities, the following requirements that:

12.1 there are exceptional circumstances for the granting of an order to bring the judgment into operation, notwithstanding an appeal by Ntlemeza;

12.2 the applicants will suffer irreparable harm should the judgment not be put into operation pending the outcome of the appeal; or

12.3 General Ntlemeza will not suffer irreparable harm should the judgment be enforced pending the outcome of the appeal.

[13] Mr. Dukada submitted that the applicants have failed dismally to prove any of the abovementioned requirements. Ntlemeza bemoans the fact that Rajab has not, in his supporting affidavit, made any reference to the remarks of Tuchten J, relating to the pronouncements made by Matojane J about his integrity. He contended that the conclusions made by Matojane J, that he was dishonest, duplicitious, and acted in bad faith and for ulterior motives were negatived by the remarks made by Tuchten J. He claimed, on that basis, that he was vindicated by Tuchten J; and more importantly that it was not necessary for him to appeal against the pronouncements by Matojane J.

[14] The starting point on this aspect was that Matojane J, and not this Court, made adverse remarks about Ntlemeza. Ntlemeza and the Minister sought leave from Matojane to appeal the Sibiya judgment and leave to appeal was refused. The Minister thereafter petitioned the Supreme Court of Appeal for leave to appeal against Matojane J's judgment in which he made the remarks about Ntlemeza. The Minister's application for leave to appeal was

dismissed by the Supreme Court of Appeal. Consequently the Supreme Court of Appeal has tacitly endorsed the judicial pronouncements by Matojane J in the Sibiya judgments.

[15] We pointed out in paragraph 36 of the main judgment that:

"[36] The judgments are replete with the findings of dishonesty and mala fides against Major General Ntlemeza. These were judicial pronouncements. They therefore constitute direct evidence that Major General Ntlemeza lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as more important as that of the National Head of the DPCI, where independence, honesty and integrity are paramount to qualities. Currently no appeal lies against the findings of dishonesty and impropriety made by the Court in the judgments. Accordingly, such serious findings of fact in relation to Major General Ntlemeza, which go directly to Major General Ntlemeza's trustworthiness, his honesty and integrity, are definitive. Until such findings are appealed against successfully they shall remain as a lapidary against Lieutenant General Ntlemeza."

[16] It is our considered view that those remarks which constituted the foundation upon which the applicants launched the main application themselves constitute exceptional circumstances as envisaged by s 18(1) of the Act.

[17] In the recently decided case of **UFS v Afriforum and Another (2016) ZA SCA 165 (17 November 2016)** ("the UFS v Afriforum case") the SCA had an occasion to consider the proper interpretation of s 18. It noted that s 18 proceeds from the well-established premise of the common law that the granting of the relief of this nature constitutes an extra-ordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. With approval the SCA quoted the following paragraph from the judgment of Sutherland J in **Incubeta Holdings (Pty) Ltd v Ellis and Another 2014 (3) SA 189 (GK)**. At the time Sutherland made that remark he was dealing with the provisions of s 18(3) of the Act. He was considering the impact of s 18 on Rule 49(11). During his exercise he had an occasion to consider the test to be applied when faced with an application of this nature. He had the following to say:

"A hierarchy of entitlement has been created, absent from the common law test. Two distinct findings of fact must now be made, rather than weighing up to discern a "preponderance of equities"."

[18] Sutherland J held that s 18 introduced a new dimension to the test for granting the relief under Rule 49(11). That test, according to him, is twofold; first, whether or not exceptional circumstances exist; and second, proof on a balance of probabilities by the applicant of;

(a) the presence of irreparable harm to the applicant who wants to put into operation and to execute the order; and

(b) the absence of irreparable harm to the respondent, who seeks leave to appeal.

[19] With regard to the first requirement, in other words, whether or not exceptional circumstances exist, exceptionality must be fact specific, this means that the circumstances which are or which may be exceptional must be located within the predicaments in which the given litigants find themselves. This first leg of the test does not change the common law position. It is the second leg of the test that has somewhat stringent requirements of proof. Section 18 introduces the requirement of proof on a balance of probabilities that, firstly, the applicant stands to suffer irreparable harm if the order is not granted and secondly, conversely, that if the order is granted, the respondent will not suffer any such irreparable harm. In performing this exercise the Court looks to both sides. Where there is potentially irreparable harm or prejudice to both parties the Court should refuse the application as it will no longer balance the two in the interest of justice.

[20] Finally, and what is of paramount importance the SCA had in paragraph 15 in the UFS v Afriforum case the following to say:

"The prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief."

On the basis of the aforegoing, Ms. Steinberg argued that if a Court of appeal was likely to uphold the appeal, the lower court will be less inclined to grant the exceptional remedy in terms of which the judgment is executed pending the appeal.

[21] There is no definition of exceptional circumstances. In **MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another 2002 (6) SA 150 C at page 156 I to 157** Thring J had an opportunity to deal with the term "exceptional circumstances". Relying on his assessment of some authorities he came to the conclusion that:

"What does emerge from an examination of the authorities, however, seems to me to be the following:

1. *What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is expected in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.*
2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*

4. *Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different."*

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."*

It is not necessary, for the purposes of this judgment, that I set out the authorities on which he relied when he made the above remarks.

[22] Having made those remarks he continued at page 157 E to F as follows:

*"... the phrase "exceptional circumstances" must, both for the specific reason mentioned by Jones J and by reason of the more general consideration adumbrated by Innes ACJ in Norwich Union Life Insurance Society v Dobbs** 1912 AD 395, be given a narrow rather than a wide interpretation."*

In conclusion he had the following to say:

"I conclude, to you the phraseology of Comrie J in State v Mohammed 1999(2) SACR 507 (C), that to be exceptional within the meaning of the subparagraph, the circumstances must be 'markedly unusual or specially different'."

[23] I now turn to the exceptional circumstances that the applicants relied on. Ms Steinberg, counsel of the applicants, had argued in her heads of argument that the lawful functioning of the DPCI was essential to South Africa's nascent constitutional democracy. She relied on the fact that a full bench of this Court had found that Ntlemeza had been unlawfully appointed and of supreme importance that at the time of his appointment he was not fit and proper as required by s 17(CA) of the SAPS Act to be so appointed. If this Court's judgment of 17 March 2017 is upheld, the effect thereof would be that all the decisions made by Ntlemeza since his appointment were unlawful following his invalid appointment.

[24] In support of their case, the applicants relied on a paragraph of the unreported judgment of Prinsloo J in **Helen Suzman Foundation v Minister of Police and Others (2015) ZAGPPHC 47 (6 February 2015)** ("Prinsloo J's judgment"). The said learned judge had the following to say in paragraph 30 of his judgment:

"30. As the first leg of the test, I am of the view that exceptional circumstances are indeed present in this case; it involves the reputation and smooth functioning of one of the top corruption busting and crime fighting units in the SAPS. The case has revoked nationwide interest and concern and on the public perception of the criminal system itself is at stake, particularly in this country which suffers from high levels of corruption, often involving senior public officials."

[25] The applicants' counsel cited the following events as exceptional circumstances:

25.1 The findings in the Sibiya judgment;

25.2 the importance of the office of the DPCI;

25.3 the duties and functions of the National Head;

25.4 the influence that the National Head has over ongoing high profile and critical investigations;

25.5 the fact that there are no prospects of success on appeal.

[26] In the judgment that we handed down on 17 March 2017 we confirmed that in the light of the Sibiya judgments Ntlemeza lacked the fitness and propriety necessary for public office and that he should not be permitted to continue as the National Head of the DPCI. We pointed out furthermore his dishonesty and lack of integrity permanently disqualified him from being appointed to any public office. Accordingly this Court cannot allow a person it regards as unfit for any public office to continue in high public office for one day longer than is necessary. Finally, Ntlemeza's prospects of success on appeal are severely limited by the finding that his appointment was both procedurally and substantially unlawful. Accordingly I am satisfied that the applicants have satisfied the requirements of "exceptional circumstances".

[27] The applicants have brought this counter-application in the interest of the public. So it was argued by Ms. Steinberg. She placed reliance in this respect on Prinsloo J's judgment, paragraph 33, to support her submission that it is now being accepted by the Courts as a proper approach to assess harm. The harm the applicants identified was harm to the public interest and to the integrity of the DPCI and generally to the SAPS. This Court has already found that, on the strength of the remarks by Matojane J, the appointment of Ntlemeza as head of the DPCI was unlawful. The public perception of, and its trust in the DPCI, will be compromised. The public will have very little respect for the office of the DPCI if Ntlemeza continues to occupy that office despite the lingering reports.

[28] In paragraph 23.2 of his answering affidavit Ntlemeza had stated that:

"A removal from office, even if it is momentary, will be a devastating blow to my long and unblemished career as a high profile senior policeman because colleagues, various public officials I deal with and members of the public generally would have a wrong perception about myself."

It is important to point out that it was not as a consequence of the main application that his impeccable reputation was severely dented. That happened once Matojane J's pronouncements were published. It was not the full bench in the main application that made the sketching remarks about him. Accordingly an enforcement order will have no effect at all on his reputation. With regard to financial harm, Ntlemeza, although having been removed as

the National Head of the DPCI, will continue to retain his status as a member of both the SAPS and the DPCI although in a different capacity. So he will continue to earn his income. Should the Appeal Court vindicate him, Ntlemeza will most definitely be entitled retrospectively to receive his salaries. Therefore there will be no harm that Ntlemeza will sustain if the order of 17 March 2017 is actuated.

[29] Finally, Ntlemeza contended that enforcing the order of 17 March 2017 pending appeal will harm the office of the DPCI. Counsel for the applicants bemoaned lack of substantiation of this contention by Ntlemeza. The end result was that the applicants were unable to deal with it in their replying affidavit as it was vague and unsubstantiated. In my view, the integrity of the DPCI will be compromised and its name blemished if Ntlemeza continued to occupy the office of the National Head of the DPCI pending the appeal despite the remarks by Matojane J. The Minister can always appoint someone as his replacement in terms of s 17 CA (1)(a) of the SAPS Act. In the result we were satisfied that the applicants had met the requirements of s 18 of the Act and hence the order that we made.

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree

for N. KOLLAPEN
JUDGE OF THE HIGH COURT

I agree

S.A.M. BAQWA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. CA Steinberg*
Instructed by:	*Webber Wentzel*
Counsel for the first respondent:	*Adv. BR Tokota (SC)*
	Adv. M Gwala
Instructed by:	*The State Attorney*
Counsel for the second respondent:	*Adv. N Dukada (SC)*
	Adv. Z Madlanga
Instructed by:	*Ngidi & Company Inc.*
Counsel for the fifth respondent:	*Adv. Kerachi*
Instructed by:	*The State Attorney*
Date Heard:	*12 April 2017*
Date of Judgment:	*10 May 2017*