IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETORIA

CASE NO.: 46358/2021

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

DATE SIGNATURE

In the matter between:

Matsi Law Chambers Inc Applicant

(Old name: Matsi Mailula Inc Attorneys)

and

Lesiba Jeremiah Mailula First Respondent

Lesiba Mailula Attorneys Inc Second Respondent

JUDGMENT

SARDIWALLA J:

Introduction

[1] This the second section 18 application in terms of section 18 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act").

[2] This second section application was instituted on 13 September 2021 and on 14 March 2022, the application was before me brought by the applicants against seeking that despite any application for leave to appeal the, based on exceptional circumstances that the order of Baqwa J that was made on 18 December 2020 under case number 93439/2019 remains operational and executable.

[3] On even date I handed down the following order:

> "1. In order to avoid any confusion between the parties, it is hereby confirmed that since there is no direct appeal against the order of Baqwa J that was made on 18 December 2020 between these parties, that order remains effective and executable, and there is no need for this Court to grant any leave for its execution.
> 2. No order as to costs."

Background

[4] The first respondent was a legal practitioner employed by the applicant's law firm. Following a separation between the parties, litigation ensued between the parties regarding the distribution of files.

[5] On 18 December 2020 Baqwa J made an order the following order:

> "1.1 the first respondent is directed to return to his former employer, the applicant, within two (2) weeks of the date of the court order, any of the original client case files that he (the first respondent), took from the applicant, upon his resignation from the applicant.
>
> 1.2 The first respondent is directed to give the applicant, within 10 (ten) days of the court order, copies of termination of mandate documents and notices of substitution in respect of the clients of the applicant, whose legal cases or matters the first respondent and/or second respondent have been duly mandated by clients to take over from the applicant.

1.3 the first respondent and second respondent are directed not to subject for taxation any party and party bill of costs in respect of any of the finalised matters, for the first respondent and/or the second respondent has been duly mandated to take over from the applicant, unless and/or before they obtain and incorporate the applicant's bill of costs for the disbursements paid or incurred and fees for the work done by the applicant. In this regard the applicant is ordered to submit to the second respondent its bill of costs within a period of 2 (two) months after receiving the original cases files from the second respondent as directed in this order.

1.4 In the event that any client of the applicant duly terminated the mandate of the applicant in favour of the respondents, it is confirmed that the applicant is entitled to the reimbursement for disbursements it paid and/or incurred and fees for the services it rendered in respect of each case file, up to the date of such change or termination of mandate. In this regard and in the event that any client terminated the mandate previously given to the applicant, a written document must be submitted by the respondents in proving same, failure (should read failing) which it is confirmed that the applicant still holds mandate to act for each client for all intents and purposes.

1.5 It is confirmed that even in the event that some clients terminated the mandate previously given to the applicant, respondents had and still have no right to remove the original case files from the applicant, which files are confirmed as the property of the applicant on the basis of which the applicant will be able to prepare its bill of costs for each of those terminated or finalised files to ensure that applicant's recovery of its file costs (so called disbursements) and accrued fees that the applicant is entitled to for the services it rendered up to the date of such termination of its mandate.

1.6 In the event that the first respondent fails and/or refuses to comply with paragraph of this court order, any relevant office of the Sheriff of this court is ordered and authorised to attend and enter the premises or offices of the second respondent or any offices and/or property at which the files may be hidden, using any effective method (including being accompanied by the SAPS), at which premises or offices or property the Sheriff must remove any and all of the original case files that the first respondent removed from the applicant's offices upon his resignation. The list of the said case files must be furnished to the Sheriff or Sheriffs by the applicant. The file list is annexure "A", and part of this court order.

1.7 deleted.

1.8 No order as to costs.”

[6] The respondents then made an urgent application for the suspension of Baqwa’s order. This was dismissed on 15 January 2021 by Davis J. There were two parts to the application and Davis J made an order in terms of part A of the proceedings.

[7] Davis J’s decision was taken on appeal and dismissed on 14 June 2021. This application was taken on leave to appeal which was also dismissed on 2 October 2021.

[8] An application for reconsideration of the SCA decision was launched that is still pending.

[9] Part B of the urgent application was the rescission application against Baqwa’s order which was heard by Lazarus AJ. I am unsure if the judgment has been handed down or is still pending on that.

[10] The first section 18 application by applicant to execute order of Davis J was heard by E Labuschagne AJ on 16 November 2021 and judgment handed down on 26 November 2021 dismissing the application.

[11] On 10 September 2021 Judge Seneke dismissed the applicant’s contempt of court application stating that a court would not be quick to hold a litigant in contempt where there is an application for leave to appeal against a related order unless there was a clear order in terms of section 18 of the Superior Courts Act declaring that order executable. It is on this basis that the applicant brings the present second section 18 application.

Applicant’s case

[12] It is the applicants submission the normal suspension of Baqwa J’s order

made on 18 December 2020 be removed pending the respondents application for leave to appeal, if any. That whilst it is the legal position that an order that is subject of an appeal or pending appeal is suspended, section 18 of the Act permits the party in whose favour the order was made to lift the suspension of the order upon showing exceptional circumstances on a balance of probabilities and that the applicant will suffer irreparable harm if the relief is not granted.

[13] It is the applicant's submission that the respondents are only appealing the order of Davis J made on 15 January 2021 and not the order of Baqwa J made on 18 December 2020. The applicant is uncertain as to whether the respondent are able to set Part B of the urgent application down for hearing given that Part A which was the order by Davis J was dismissed. The applicant expressed concern that the recission application was not set down in excess of a period of 5 months.

[14] It submitted that this conduct of the respondents committed against the applicant and the service providers began in 2019 and has dragged on for 3 years which is unfair. That a separation agreement was entered into between the parties including a removal of a restraint of trade clause allowing the first respondent to take over litigated mandates where a client "agrees". This however did not permit the first respondent to come to the applicant's office and select near completed files and take originals without the client's authorization or leaving a duplicate file or any record keeping with tax related laws with regards to tax records. There is no proof that the client agreed and the respondents bare the onus of proof that the files were taken in respect of the separation agreement. The interdict application before Baqwa J was against the applicant's real right to physical files and related fee interests.

[15] The first respondent undertook to make copies of the files and return the original which he later did not honour. That the Court was correct in finding that the first respondent had no defense. Further that his surname could confuse clients to believe he is still working for the applicant. Confidentiality clauses at 6.1 to 6.4 of the separation has been breached. The first respondent has failed to explain his actions of removing the files against the separation agreement that he signed.

[16] The applicant submitted that the fees earned and recovery of settled

disbursements constitute company income without which the latter will not be able to operate as a company. That the gifts bestowed on the first respondent did not include the original company files and records without a client signed mandate transfer documents. The applicant earned the fees and not the respondents. That even if there is a proper mandate it is not acceptable to leave the applicant without a duplicate case file. The first respondent has no right in law or any document to deprive the applicant of his company records and fees earned. If there is a client agreed mandate the date of the signing of that agreement is the date on which the respondents commence earning a fee. The conduct of the first respondent is a deliberate and calculated attempt to cripple the applicant. Without the file the applicant cannot engage meaning on the file and recover fees.

[17] Exceptional circumstances to permit the order of Baqwa J remaining effective are:

17.1 The conduct of the respondents has crippled the business of the applicant;

17.2 There was no opposition on paper in the matter before Baqwa J at the hearing on 18 December 2020;

17.3 Despite the lack of papers the Court requested the respondents version at the hearing which was not forthcoming;

17.4 There is nothing before the Court to show why a duplicate file would not suffice for the first respondent's exit;

17.5 There is no basis that the respondent's deserve the applicant's fees;

17.6 The applicant is facing pending litigation on some of the files the respondents are withholding

17.7 Some of the applicants have reported him to the Legal Practice Council and the applicant is unable to answer for the absence of the files;

17.8 Clients continue to contact and visit the applicant's firm and are surprised at the removal of the files;

17.9 The applicant is without record of its work;

17.10 The making of copies of the files does not place the respondents at a disadvantage but rather the applicant; and

17.11 There is no proof that the clients have ceded the files to the respondents.

[18] That there is no *bona fide* defence before the Court. There is no irreparable harm that the respondents would suffer by making copies of the files. There has been untold harm and inconvenience to the applicant for almost three years and there is no prospects of the respondents succeeding in the appeal. On the totality of the evidence a case has been made out in terms of section 18 which the court should grant with costs on a punitive scale between attorney and client.

Respondent's case

[19] The respondents submitted a *point in limine* that this Court lacked jurisdiction in terms of section 18 of the Act as there is a pending leave to appeal before the SCA . That in the event of the appeal being found in favour of the respondents it would have a rippled effect on the order of 18 December 2020. If both the leave to appeal and recission application are found in favour of the respondents that the matters would be remitted back to court for proper ventilation of the issues. That the applicant failed to apply for leave to execute knowing that the respondents had filed a leave to appeal. The respondents withdrew the leave to appeal as they believed it would be academic as the execution of the order of 15 January 2021 was taking place regardless of the pending leave and failure by the applicant' to seek leave to execute the order. The applicant's non-compliance with section 18 of the Act is dispositive of the matter.

[20] The order of 15 January 2021 is now the subject of an application for leave to appeal which has been filed with the registrar. The section 18 application is defective because the applicants had already executed the orders of 15 January 2021 and 18 December 2020 without seeking leave to appeal by seizing 30 files from the respondents on 10 February 2021. That the applicant is abusing court process after seizing the files realising that it did not comply with section 18 and therefore is bringing this application. Further that the founding affidavit of the applicant is defective as the deponent and Commissioner has not signed and initialled each page of the affidavit. The applicant has failed to seek leave to correct the defects from this Court. That the judgments of both Baqwa J and Davus J are intertwined. Further that Davis J extended the order of Baqwa J and ordered the respondents to comply by no later than 26 January 2021 and on this basis alone the application

should be dismissed.

[21] That if the court finds that the applicant's application has merit that the respondents in the alternative raise *lis alibi pendens* in that the second section 18 application is the same as the first section 18 application, between the same parties, same cause of action, bearing same case numbers, seeking the same relief and the first application was set for hearing. The applicant has not withdrawn the first application and has brought a section 18 application which is an abuse of court process.

[22] The respondents submit that it was irrelevant for the applicant in this application to deal with issues and material facts that were before Baqwa J when the applicant is supposed to demonstrate that it meets the requirements of section 18. That in any event Baqwa J's decision is subject of a pending recission application. It submits that whether the leave to appeal has merits or not is for the SCA to decide and not the High Court, Pretoria.

[23] That the applicant is not only required to prove irreparable harm but also to prove exceptional circumstances exist, from the papers of the applicant nothing regarding exceptional circumstance can be gleaned upon and the applicant has incorrectly relied on historical facts to substantiate its relief which facts are irrelevant. There is no harm to the applicant but there is irreparable harm to the respondents as the effect that the order will have is to render the appeal and the recission if found in favour of the respondents inoperable as the applicant would have already executed the order. That the files are in dispute and whether they belong to the applicant. Further that the clients the applicant alleges is suffering harm, the files have been finalised and accounted for. The applicant ahs failed to prove the requirements of irreparable harm and exceptional circumstances and should be dismissed.

Law and analysis

[24] Section 18 of the Superior Courts Act reads as follows:

> "18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and **unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.**

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

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

(4) If a court orders otherwise, as contemplated in subsection (1) —

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

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

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

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

[25] This Court in dealing with an application in terms of section 18(4) of the Superior Courts Act in ***Myeni v Organisation Undoing Tax Abuse and Another***[1], in his decision Judge President D Mlambo referred to the ***Ntlemeza v Helen Suzman Foundation and Another***[2] which dealt with the issue of the execution of a principal judgement and order, he said the following at paragraphs 11 to 16:

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[1] 15996/2017) [2021] ZAGPPHC 56 (15 February 2021)

"[11] In *Ntlemeza*, the SCA was similarly seized with an automatic appeal against an execution order made by a full court of the High Court.[7] In that matter, the High Court presided over the review application to have General Ntlemeza's appointment set aside. The High Court set aside the appointment of General Ntlemeza on grounds of unfitness ("the principal order"). Subsequently, General Ntlemeza applied for leave to appeal the principal order. The respondents in turn filed a counter-application for a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal.

[12] The full court dismissed the application for leave to appeal and upheld the counter-application and ordered that the principal order be executed in full during the appeal process ("the execution order"). The date of the execution order was 12 April 2017 the reasons of which were provided on 10 May 2017. General Ntlemeza exercised his automatic right to appeal the execution order "to the next highest court" (the SCA) as provided for in section 18(4)(ii).

[13] The question on appeal before the SCA was whether General Ntlemeza ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigation pending the finalisation of an application for leave to appeal filed in that court. The point was raised on behalf of General Ntlemeza that, because at the time when the application in terms of section 18(3) was made to the High Court there was no appeal pending against the principal order, the respondents' application for execution was premature. It was submitted that the jurisdictional point was dispositive of the appeal before the SCA.

[14] The SCA considered the power granted to the court in terms of section 18 taking into consideration the general inherent power granted to courts in terms of section 173 of the Constitution[8] to regulate their own process. The court held as follows:

"[29] The preliminary point on behalf of General Ntlemeza …. does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended."

[2] 2017 (5) SA 402 (SCA)

[15] It is so that in the *Ntlemeza* matter, General Ntlemeza had not yet filed an application for leave to appeal to the Supreme Court of Appeal at the time the execution order in terms of section 18 was granted. To recap, the section 18 execution order was granted on 12 April 2017. The application for leave to appeal against the High Court's execution order was filed a day later namely on 13 April 2017. The application for leave to appeal against the principal order was filed on 21 April 2017 (which was well within the time limit prescribed by the Rules).**[9]** General Ntlemeza filed his application for leave to appeal the 12 April order within the period allowed in section 17(2)(b). The urgent appeal in terms of section 18(4) was heard by the SCA on 2 June 2017. In the present matter, the applicant's right to file an application for leave to appeal to the SCA has lapsed.

[16] The difference between the factual matrix in the *Ntlemeza* matter and the present matter is obvious: In the *Ntlemeza* matter, the application for leave to appeal against the principal order was filed well within the one-month time period stipulated in section 17(2)(b) of the Act. Also, at the time when the urgent appeal served before the SCA, the application for leave to appeal the principal order had, as already mentioned, been filed well within the prescribed time limits which is not the case before us."

[27] In applying the facts of the *Myeni* and *Ntlemeza* cases *supra*, it is common cause that the respondents did not file any leave to appeal against the order of Baqwa J made on 18 December 2020. Instead, the respondents opted to file a recission application against his decision. It is also common cause that the leave to appeal before the SCA is against the order of Davis J made on 15 January 2021. This is the simple difference between the factual matrix that was referred to the *Ntlemeza* matter and the present matter in that the appeal was not against the principal order but against a related order. The appeal before the SCA of Davis J's order whilst related to the order of Baqwa J made on 18 December 2020 was not the principal order which was the subject of this second section 18 application. There is no direct appeal against the order of Baqwa J on 18 December 2020, the result of which is that the section 18 application seeking that the order of Baqwa J under case number 93439/2019 is executable and operational despite any pending application for leave to appeal or appeal initiated by the respondents is premature. There is no direct leave to appeal against the order of Baqwa J and the order therefore remains operational.

[28] Section 18(1) provides that "…unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an appeal for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal." The wording of section 18(1) is clear that in the absence of an application for leave to appeal or an appeal, the judgment and order in question is not suspended and is in fact deemed final. For this reason, there is no need for this court to consider any point *in limine* or preliminary issue as the application was premature.

Conclusion

[29] Having regard to the above case law that if there is no appeal against a principal order the section 18 application is premature, there is no reason for this court to consider the requirements of section 18 or to grant any relief for execution of the order of Baqwa J under case number 93439/2019 and the order remains final and executable.

[30] In the result I make the following order:

1. In order to avoid any confusion between the parties, it is hereby confirmed that since there is no direct appeal against the order of Baqwa J that was made on 18 December 2020 between these parties, that order remains effective and executable, and there is no need for this Court to grant any leave for its execution.

2. The application for leave to appeal is dismissed.

3. No order as to cost.

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SARDIWALLA J

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	**Adv M L MATSI**
Instructed by:	**Matsi Law Chambers Inc**
For the Respondent:	**Adv. N MOROPENE**
Instructed by:	**Lesiba Mailula Attorneys Inc**