IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: (YES) / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
23\2\17	[redacted]
DATE	SIGNATURE

CASE NO: 35899/2007

DATE: 24/2/2017

IN THE MATTER BETWEEN

THE LAW SOCIETY OF THE NORTHERN PROVINCES	APPLICANT
AND	
DAVID ANTHONY SMITH	1ST RESPONDENT
RAPHAEL & DAVID SMITH INC	2ND RESPONDENT

In re:

THE LAW SOCIETY OF THE NORTHERN PROVINCES	APPLICANT
AND	
RAPHAEL SMITH	1ST RESPONDENT
DAVID ANTHONY SMITH	2ND RESPONDENT
RAPHAEL & DAVID SMITH INC	3RD RESPONDENT

And in the counter application of:

RAPHAEL SMITH	1ST APPLICANT IN RECONVENTION
DAVID ANTHONY SMITH	2ND APPLICANT IN RECONVENTION
RAPHAEL & DAVID SMITH INC	3RD APPLICANT IN RECONVENTION
AND	
THE LAW SOCIETY OF THE NORTHERN PROVINCES	1ST RESPONDENT IN RECONVENTION
MINISTER OF JUSTICE	2ND RESPONDENT IN RECONVENTION

JUDGMENT

PRINSLOO, J

[1] The applicant Law Society applies, in terms of section 18 of the Superior Courts Act no 10 of 2013, for the order contained in my judgment dated 22 July 2016 to be put into effect, and not suspended, pending the decision of the respondents' application to the Supreme Court of Appeal for leave to appeal and/or any further appeal or related processes to be initiated by the respondents in any Court.

[2] For the sake of detail, I mention that the application for leave to appeal by the respondents came before me on 27 October 2016, and it was dismissed by me on the same day.

[3] It is not clear when the petition was filed with the Registrar of the Supreme Court of Appeal, but this, obviously, inspired the applicant to launch this section 18 application, which came before me on 10 February 2017.

During the proceedings before me, I was informed that the outcome of the petition proceedings had not yet been announced.

[4] Before me, Mr Watson, with Mr Premhid, appeared for the applicant and Mr Chaskalson SC, with Mr Van der Spuy, appeared for the respondents.

[5] During the course of the proceedings, counsel referred me, in particular, to three judgments which I was privileged to consider and which I found most useful for present purposes:

- *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 3 SA 189 (GJ);
- *The Minister of Social Development Western Cape and Others v The Justice Alliance of South Africa and Another* case no 20806/2013, Western Cape Division (a judgment by the Full Court of that Division, dated 1 April 2016, and evidently not yet reported);
- *University of the Free State v Afriforum and Another* dated 17 November 2016 with neutral citation [2016] ZASCA 165 (17 November 2016).

[6] The circumstances of the case, and the issues involved, appear from my judgment of July 2016, and also from my judgment refusing the application for leave to appeal. I do not consider it incumbent upon me, for present purposes, to embark upon unnecessary repetition.

Section 18 of Act 10 of 2013: Raising the Bar for an Applicant

[7] Section 18 goes under the heading in the Statute: "Suspension of decision pending appeal".

I consider it convenient to quote the relevant portions of this section:

> "(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) ... not applicable, dealing with interlocutory orders.

(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 the 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."

[8] As appears from the text, and also from observations made by the learned Judges in the three judgments I referred to, the old common law approach set out in the leading case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A), made the task of an applicant for this type of relief less onerous than is presently the case in terms of section 18 which supersedes the earlier approach.

In *South Cape Corporation*, Corbett JA, as he then was, pointed out, at 545B-G, that a Court confronted with an application to set its order in operation despite the pending appeal had a wide general discretion to grant or refuse such leave and would, *inter alia*, have regard to the following factors:

> "(1) The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
>
> (2) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
>
> (3) The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party; and
>
> (4) Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

[9] What is plain, is that the applicant (the successful party *a quo*, also described as "the victor") who wishes the order to be implemented despite the pending application for leave to appeal or appeal by the unsuccessful party (also "the appellant" or "the loser") has to prove the following on a balance of probabilities:

- There are exceptional circumstances militating in favour of the application being granted; and

- The applicant will suffer irreparable harm if the Court does not grant relief ("order otherwise"); and
- The other party (appellant/loser) will not suffer irreparable harm if the Court grants the application, or "orders otherwise" as it is put in the text.

[10] I add, on the subject of considering the text of section 18, and a proper interpretation thereof, that there was some difference of opinion between the Judges presiding over the three cases which I referred to on the question as to whether or not the prospects of success of the appeal should be considered by the Court confronted with a section 18 application.

In *Incubeta Holdings*, the learned Judge, in paragraph [26], expressed the view that the "merits", which I accept to be a reference to the prospects of the appeal, are not relevant to this kind of enquiry. He stated that the "considerations that are valuable presuppose a *bona fide* application for leave to appeal or an actual appeal. No second-guessing about the judgment *per se* comes into reckoning".

In *The Minister of Social Development*, the learned Judge, writing for the Full Court and also recognising that in *South Cape Corporation* the prospects of success were considered to be of relevance, differed from the learned Judge in *Incubeta Holdings,* and found that "it follows that the less sanguine a Court seized of an application in terms of section 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal" – see paragraph [27] of the judgment.

These words of the last-mentioned learned Judge were quoted with approval by the learned Judge of Appeal in *University of the Free State*.

So, where I refused the application for leave to appeal, I have to consider myself to be on the "more sanguine" side rather than "less sanguine". On a lighter note, for those who may be, as I was, uncertain, at first blush, about the meaning of "sanguine" it is described in the *Concise Oxford Dictionary* as "habitually hopeful, confident, expecting things to go well".

[11] I turn to the three requirements or jurisdictional facts that have to be established on a balance of probabilities by an applicant for section 18 relief.

Are there exceptional circumstances?

[12] Counsel for the applicant made the following submissions in this regard:

- The applicant Law Society is under a duty to the public to conduct investigations into members of the profession, and the appeal is hindering this duty. When the suspension of a Court order will interfere with the performance of a public duty that operates to protect the public interest, then there exists an exceptional circumstance that warrants the Court exercising its power to grant section 18 relief. The Law Society has obligations to maintain and enhance the prestige, status and dignity of the profession, to regulate the exercise of the profession, to encourage and promote efficiency in and responsibility in relation to the profession, to uphold the integrity of practitioners, to uphold and improve standards of professional conduct and qualifications of practitioners and to provide for the effective control of the

professional conduct of practitioners. It also has a duty to exercise disciplinary jurisdiction over all practitioners where necessary. The inability of the Law Society to perform these functions, and to conduct the preliminary inspection which it is authorised to do in terms of section 70 of the Attorneys Act, constitutes special circumstances;

- The longer it takes for the matter to be finalised, the greater the risk of the destruction of documents or records relevant to the Law Society's preliminary investigation. Indeed, documents sought by the Law Society have already been lost, once through the theft of documents and on a second occasion through a fire in a documents warehouse. There is an ongoing danger that relevant documents will be lost.

I was also referred to the following remarks by the learned Judge in *Incubeta Holdings* at paragraph [27]:

> "The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'.";

- Counsel also argued that the conduct of the appellant attorneys, in obstructing the efforts of the Law Society to perform its functions and conduct the preliminary inspection, constitute exceptional circumstances. As appears from the judgment, the appellant attorneys have stood in the way of the Law Society's attempts to inspect the records for more than a decade. They also refused entry to Mr Faris, the Law Society's auditor, when he arrived to inspect

the records. The instruction by the Law Society to Mr Faris to conduct an inspection was well within the powers of the Law Society.

[13] In their heads of argument, counsel for the appellants did not specifically deal with the question of exceptional circumstances but they certainly made no concessions in this regard.

[14] In all the circumstances, I have come to the conclusion, and I find, that there are exceptional circumstances present: the appellant attorneys, who are members of the Law Society and obliged to support the efforts of the latter to properly regulate the profession, have managed to hold the professional watchdog at bay for more than a decade, preventing it from inspecting its records. The inspection is provided for by statute, in the form of section 70. Section 70 is only a preliminary inspection and not designed to finally establish any wrongdoing on the part of the attorneys. It has been created as a tool to determine whether or not a section 71 disciplinary enquiry ought to be launched. I am alive to the fact that the attorneys have offered explanations and denied any wrongdoing in respect of the 31 or so serious complaints received from their erstwhile clients, and I take into consideration various other arguments offered by the attorneys, but it appears to me, on the evidence considered as a whole, that their conduct has been obstructionist and their efforts to prevent their own professional body from inspecting their records, as it is entitled, and obliged, to do in terms of the relevant legislation, does, in my view, amount to exceptional circumstances.

Will the applicant Law Society suffer irreparable harm if the section 18 relief is not granted?

[15] Counsel for the applicant argued, as already mentioned, that there is a real danger of the loss of documents and records.

[16] There is also the argument that the applicant Law Society will be unable to properly perform its statutory functions as already described. It is submitted that this is harmful to the image of attorneys and to the attorneys' profession generally, and the unfavourable impression it may create in the minds of other members of the profession and the general public, will not be easily reversed.

[17] The fact that the Law Society cannot perform its functions, could also lead to irreparable harm to all the complainants who lodged serious complaints, in many instances suggesting the inability to collect monies due to them by the Road Accident Fund.

[18] It is argued that the general investigation sought by the Law Society will serve either to uncover a pattern of misconduct, or serve to exonerate the attorneys. If there is a pattern of misconduct, the clients of the attorneys are suffering ongoing prejudice by the delay in finalising this case and obtaining redress for them. The general public is also harmed by the delays. The public's faith in the administration of justice depends, in large measure, on its faith in the integrity of legal practitioners.

[19] Under these circumstances, I have come to the conclusion, and I find, that the Law Society has discharged the *onus* of proving that it will suffer irreparable harm if the order is not granted.

Will the appellant attorneys suffer irreparable harm if the order is granted?

[20] As appears from the judgment, the attorneys have complained that their firm will suffer harm of a serious nature if they have to respect the professional privilege which they claim to exist with regard to their relationship with their thousands of clients and if they have to inform those clients that the Law Society is inspecting their affairs.

I have held that the question of professional privilege does not come into play for the reasons mentioned. The correctness of this finding is, of course, being challenged. On behalf of the applicant it was argued that the attorneys have all along adopted the view that they have nothing to hide. In that case, so it is argued, they cannot suffer any harm by disclosing their records. Indeed, they will be exonerated, also to the knowledge of their colleagues in the profession and their clients, and this will redound to their credit and benefit.

[21] It was also argued on behalf of the applicant that the bad press received by the attorneys when clients reported their grievances to the media, probably outweighs any other prejudice they may suffer as a result of a preliminary section 70 enquiry.

[22] Against this background, it was argued that it has been established, on a balance of probabilities, that the attorneys will suffer no irreparable harm if the order is granted.

[23] Apart from the arguments of perceived irreparable harm to the appellant attorneys, which I have mentioned, it was also submitted on behalf of their counsel that they will be subject to the expense and inconvenience of assembling all the documents required by the Law Society in their generalised inspection and addressing all the queries raised by the Law Society inspectors. This will be a massively time consuming exercise and therefore, in the context of a profession that charges for its time, a costly exercise. The expenses and lost professional time constitute irreparable harm because the loss will not be recoverable from the Law Society.

[24] I am not persuaded that these general arguments ought to lead to a conclusion that the Law Society failed to discharge the *onus* of proving that the attorneys will not suffer irreparable harm: they are members of the Law Society and, by statute, obliged to co-operate when their professional watchdog seeks to inspect their records. Moreover, if they had been less recalcitrant from the outset, a decade ago, the whole dispute would probably have been disposed of a long time ago.

[25] However, there is one argument offered on behalf of the attorneys which, in my view, supports a conclusion that the attorneys may suffer irreparable harm, on the probabilities, if the **main relief**, namely the holding of the preliminary inspection, is allowed to proceed despite the pending application for leave to appeal or an appeal should the application be successful. In broad terms, it amounts to this: if the general inspection, in terms of section 70, is allowed to proceed, it may well have been completed by the time the appeal comes up for decision (emphasis added).

In those circumstances, the appeal may well be rendered moot and dismissed on that ground alone in terms of the provisions of section 16(2)(a)(i) of the Superior Courts Act which stipulate:

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

For this reason, I am unable to find that the applicant has proved, on a balance of probabilities, that the appellant attorneys **will** not suffer irreparable harm if the order is granted (emphasis added).

[26] A similar situation, where it was argued that the granting of the section 18(3) relief may render the appeal meaningless, only arose in *Incubeta Holdings* and not in the other two decisions which I referred to.

[27] *Incubeta Holdings* had to do with a restraint of trade dispute. The argument of the employee respondent, confronted with the restraint of trade interdict application appears to have been that the restraint period will have lapsed by the time the appeal is heard but the learned Judge held that, in that particular case, the appeal will not be rendered meaningless because a claim for damages by the aggrieved employee will still be alive.

The learned Judge, Sutherland J, puts it as follows in paragraph [29]:

> "Furthermore, it is plain from the summary of circumstances given above that the applicants would indeed suffer irreparable harm if the order is not put into

> operation. Moreover, it is plain that Ellis will not suffer irreparable harm if the order is put into operation. Although Ellis in his answering affidavit complains that putting the order into operation will render his right of appeal meaningless, this is incorrect for the reasons mentioned above; he cannot be without practical relief. The section 18 test is met on both counts of the second leg."

The "reasons mentioned above" appear from paragraph [25] where the learned Judge concludes:

> "If the appeal is won, Ellis' loss of earnings can be sued for, and the *quantum* is feasible to compute, including the loss of interest or lost opportunity cost of being out of funds, and any such interest expended on borrowing for living expenses, if necessary. Moreover, security under rule 48(12) is available."

In the present case, it was not argued with any force that the appellant attorneys will have any remedy against the Law Society in the form, for example, of a damages claim, neither was it argued that such a claim will remain a live issue in the event of the appeal being rendered moot for the reasons mentioned.

[28] Quite apart from any other consideration, if I were to grant an order in respect of the **main relief**, namely the putting into operation of the general inspection, in the face of the argument that such an order may render the appeal moot, it would mean that I am knowingly granting an order which will, at least on the probabilities, defeat the appeal by rendering it moot. It means that I am actively undermining an appeal against my own judgment. I consider this to be an unacceptable state of affairs.

[29] In the result, I have come to the conclusion, and I find, that the applicant failed to discharge the *onus* to establish the jurisdictional requirement that, on a balance of probabilities, the applicant attorneys will not suffer irreparable harm if the **main relief** is granted in terms of section 18(3) (emphasis added).

[30] I now turn to the **alternative relief** sought in terms of section 18 (emphasis added).

Has a case been made out for a section 18 order in respect of the alternative relief sought?

[31] As an alternative to the main relief sought (implementation of my July 2016 order, involving the generalised inspection) the applicant crafted the following prayer 2 in the notice of motion:

> "2. In the alternative to prayer 1 above, that the order of Court dated 22 July 2016 shall remain in force and the relief granted therein shall be implemented in respect of all complaints lodged against the respondents with the Law Society as well as the accounting records of the firm as envisaged in section 78(5) of the Attorneys Act 53 of 1979; pending the respondents' application for leave to appeal and/or any further appeal or related processes to be initiated by the respondents in any Court."

[32] In the judgment, reference was made to the fact that the appellant attorneys, initially, also refused to furnish only the files in respect of which complaints were received from disgruntled clients of the appellant attorneys ("the complaint files"). The

attorneys argued that, also in respect of those files, the aggrieved clients had to waive their rights flowing from the professional privilege of their communications with the attorneys before the files can be released to the Law Society.

Later, as I pointed out, there appeared to be a change of stance on the part of the attorneys, when they conceded that privilege need not to have been claimed in respect of the complaint files, because the aggrieved clients, when complaining to the Law Society, waived the privilege in favour of an inspection of the files.

[33] When it came to the section 18 application, the deponent on behalf of the Smith firm said the following in the opposing affidavit:

> "At the outset I need to indicate that the Smith firm has no issue with the alternative relief sought in paragraph 2 of the notice of motion for immediate execution in respect of all documentation relevant to matters where complaints have been lodged against the Smith firm. The Smith firm tendered unconditionally to make all such documentation available for inspection more than three years ago ..."

I add that the purported tender of "more than three years ago" was not, according to the arguments of the Law Society, unconditional and satisfactory. Nevertheless, as I illustrated, it was stated emphatically in the opposing affidavit to the section 18 application that the appellant attorneys have no issue with the alternative relief sought in paragraph 2.

[34] However, almost in the same breath, the deponent added that the Smith firm "does not consent to the immediate execution of the alternative relief sought in paragraph 2 of the notice of motion to the extent that it relates to the complete accounting records of the firm including those unrelated to any complaints".

The argument appears to be that, where in prayer 2 relief is also sought to inspect the accounting records of the firm as envisaged in section 78(5) of the Attorneys Act, those accounting records relate to the records of the firm and not only to the accounting records relevant to the complaint files.

[35] As I pointed out in the main judgment, and more particularly paragraph [15] thereof, the Law Society, in the main application, also sought relief to inspect the complete accounting records as described in section 78(4) of the Attorneys Act. Such relief was also granted in paragraph 1.1 of the order which I made at the conclusion of the hearing.

I also pointed out that the relief sought in terms of section 78(4), is "self-standing" from the section 70 relief that was sought and, in addition, the constitutionality of section 78 was not challenged by the attorneys during the hearing before me.

[36] It is convenient to revisit the provisions of section 78 of the Attorneys Act which goes under the heading "Trust accounts" –

> "(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit

therein the money held or received by him or her on account of any person.

(2) ...

(3) ...

(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person, of any money invested by him or her in a trust, savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him or her.

(5) The council of the society of the province in which a practitioner practises may by itself or through its nominee, and at its own cost, inspect the accounting records of any practitioner in order to satisfy itself that the provisions of subsections (1), (2), (2A), (3) and (4) are being observed, and, if on such inspection it is found that such practitioner has not complied with such provisions, the council may write up the accounting records of such practitioner and recover the costs of the inspection or of such writing up, as the case may be, from the practitioner.

(6) For the purposes of subsections (4) and (5), 'accounting records' includes any record or document kept by or in the custody or under the control of any practitioner which relates to –

(a) money invested in a trust, savings or other interest bearing account referred to in subsection (2) or (2A);

(b) interest on money so invested;

(c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which such practitioner is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or

(d) his practice."

(I noted in the judgment that I did not find it necessary to quote the remaining eight subsections of section 78.)

[37] The appellant attorneys seem to be concerned by the definition of "accounting records" in section 78(6), which I quoted. The deponent on behalf of the attorney says the following in the opposing affidavit:

"6. The Smith firm does not consent to the immediate execution of the alternative relief sought in paragraph 2 of the notice of motion to the extent that it relates to the complete accounting records of the firm including those unrelated to any complaints, because that relief

6.1 is not confined to 'accounting records' within the ordinary meaning of the term and extends also to privileged documents that would be covered by paragraph (d) in the definition in section 78(6) of the Attorneys Act which refers to 'any record or document kept by or in the custody or under the control of any practitioner which relates to ... his or her practice' ..."

[38] The attorneys cannot have it both ways: the relief sought in terms of section 78 was "self-standing" from the section 70 relief aimed at the generalised inspection. As I mentioned, the constitutionality of the section 78 provisions are not challenged.

Moreover, counsel for the applicant argued before me that the inspectors, if the relief were to be granted in terms of prayer 2 which covers section 78(5), will be obliged to conduct the inspection of the accounting records of the attorneys within the ambit of the provisions of that subsection which is limited to the other subsections therein mentioned.

[39] I am also not persuaded that the danger of the appeal being rendered moot will come into play if the Law Society is permitted, in terms of section 18, to proceed in terms of the relief sought in prayer 2 of the notice of motion: in the first place, the appellant attorneys unequivocally subjected themselves to immediate inspection by the Law Society of the complaint files, which would include the accounting records relating to those files. In the second place, the limited inspection of the firm's accounting records as described in section 78(5), which is part of the prayer 2 relief sought, cannot, in my view, lead to irreparable harm to the appellant attorneys in the general context of this case.

[40] In the result, I have come to the conclusion that the alternative relief sought in prayer 2 of the notice of motion ought to be granted in terms of section 18(3).

Costs

[41] I am not persuaded that the Law Society was unreasonable or, in any way, acted vexatiously, by seeking the section 18 relief.

In particular, they will be substantially successful if the alternative relief is granted, as I intend to do.

[42] I pointed out in the judgment that courts are slow to award costs against the Law Society and costs are generally granted on the attorney and client scale. I see no reason for deviating from this practice.

The order

[43] I make the following order:

1. The order of Court dated 22 July 2016 shall remain in force and the relief granted therein shall be implemented in respect of all complaints lodged against the respondents with the Law Society as well as the accounting records of the firm as envisaged in section 78(5) of the Attorneys Act 53 of 1979 pending the respondents' application for leave to appeal and/or any further appeal or related processes to be initiated by the respondents in any Court.
2. The respondents, jointly and severally, are ordered to pay the costs of this application in terms of section 18 of the Superior Courts Act no 10 of 2013 on the scale as between attorney and client.

[redacted]

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 10 FEBRUARY 2017
FOR THE APPLICANTS: D WATSON & K PREMHID
INSTRUCTED BY: ROOTH & WESSELS
FOR THE RESPONDENTS: M CHASKALSON SC & C VAN DER SPUY
INSTRUCTED BY: RAPHAEL & DAVID SMITH INC
c/o LOUBSER VAN DER WALT INC