



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED

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

From: The Registrar, Supreme Court of Appeal

Date: 15 December 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of these cases and does not form part of the judgments of the Supreme Court of Appeal

Today the Supreme Court of Appeal upheld an appeal by the Johannesburg Society of Advocates (the JSA) and the General Council of the Bar of South Africa (the GCB) against a decision of the Limpopo Division of the High Court, Polokwane (per Makgoba JP and Mabuse J) (the high court) readmitting the respondent, Mr Sethe Nthai, as an advocate.

Mr Nthai had been admitted as an advocate in 1988. He held chambers in Pretoria and Johannesburg and was a member of both the Johannesburg Society of Advocates (JSA) and the Pretoria Society of Advocates (PSA). Senior status was awarded to him in December 2006.

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. Mr Nthai met on a number of occasions with the CEO of one of the claimant companies in the matter. During these meetings, Mr Nthai attempted to solicit 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.

When these allegations came to light, the PSA and JSA commenced disciplinary proceedings against Mr Nthai. He did not participate in the proceedings and was found guilty in his absence of, among other things, corruptly attempting to solicit a bribe. On 15 April 2013, Mr Nthai was struck from the roll of advocates by the Pretoria High Court.

In October 2018, Mr Nthai applied to the high court to be readmitted as an advocate. Despite opposition by the PSA, the JSA and the Legal Practice Council, the application succeeded before the high court.

On appeal, the SCA held that because the high court had misconceived the nature of the proceedings (it proceeded as if the professional bodies concerned were adversarial litigants), it had found that the GCB and its constituent Bars did not have *locus standi* in the readmission application; and that they: (i) had been stripped of their role as *custodes morum* of the advocates' profession; (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. The SCA concluded that it was plain that the GCB, the PSA and the JSA had a direct and substantial interest in the matter and, far from lacking standing to participate in the application, were necessary parties.

The SCA took the view that it is difficult to imagine a more egregious transgression of the norms of professional conduct. It described Mr Nthai's transgression as a staggering breach not just of almost every conceivable ethical duty of counsel, but also the most basic standards of human decency.

In the view of the SCA, the high court had misconceived the nature of the enquiry. Where a person applies for readmission, who has previously been struck off the roll on the ground of not being a fit and proper person, such a person has a heavy onus to discharge. It is for the person to convince the court that there has been a genuine, complete and permanent reformation; that the defect of character or attitude which led to being adjudged not fit and proper no longer exists.

The SCA found that the high court had been far too receptive to Mr Nthai's explanation. In readmitting Mr Nthai, the high court emphasised the importance of forgiveness. The question is not whether he has been punished enough. It is rather whether he is a person who can safely be trusted to faithfully discharge the duties and obligations relating to the profession of an advocate. 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. The SCA was not satisfied that Mr Nthai had met that standard.

According to the SCA, there were, moreover, a number of telling instances where Mr Nthai's conduct post-removal demonstrated that he is fundamentally ill-suited to a profession based on integrity, candour and honesty. The SCA pointed out that his objection to the participation of the professional bodies in his readmission application, is hardly the conduct of a self-effacing, reformed individual, who is open to the scrutiny of a court. What this demonstrates, so stated the SCA, is an obstructive attitude on the part of Mr Nthai, aimed at preventing the proper scrutiny of his readmission. This was hardly the conduct of a reformed person, who deserves readmission. His persistence in turning his back on the truth, gratuitous insults and intemperate language constituted evidence that since his striking off he has developed no insight and no greater perception of what is expected of him. That is a defect of character which, going forward, is hardly likely to be ameliorated.

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, in addition to upholding the appeal and setting aside the order readmitting Mr Nthai, the SCA also referred the matter to the National Director of Public Prosecutions.
