THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Ntlemeza v Helen Suzman Foundation [2017] ZASCA 93 (9 June 2017)

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today dismissed an appeal by Lieutenant-General Mthandazo Berning Ntlemeza (General Ntlemeza) against a judgment of the Gauteng Division of the High Court, Pretoria (Mabuse, Kollapen and Baqwa JJ sitting as court of first instance). The appeal concerned the question whether General Ntlemeza ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigations (DPCI), pending the finalisation of an application for leave to appeal filed in the SCA.

The appeal emanated from the following factual background. On 10 September 2015, General Ntlemeza was appointed National Head of the DPCI by the erstwhile Minister of Police, Mr Nkosinathi Phiwayinkosi Thamsanqa Nhleko. Before this, General Ntlemeza had served as acting National Head of the DPCI for a period of approximately one year. During March 2016 General Ntlemeza's appointment was challenged in the Gauteng Division of the High Court, Pretoria, by the first and second respondents, the Helen Suzman Foundation (HSF) and Freedom Under Law NPC (FUL), respectively. These institutions are non-profit organisations concerned with promoting constitutional values and the rule of law, and brought the application to review and set aside General Ntlemeza's appointment in their own and the national interest. Their principal ground of review was that Minister Nhleko had failed to take into account materially relevant considerations, more particularly, he failed to have proper regard to a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza's integrity was called into question.

That case was *Sibiya v Minister of Police & others* (GP) unreported case no 5203/15 (20 February 2015), which concerned the suspension of Major General Shadrack Sibiya, a Provincial Head of the DPCI. General Ntlemeza had accused General Sibiya of being involved in the illegal rendition of certain Zimbabwean citizens. In deciding the matter, Matojane J made adverse findings against General Ntlemeza. He stated that the decision to suspend General Sibiya 'was taken in bad faith and for reasons other than those given. It [was] arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it [was] unlawful as it violate[d] applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair'. General Ntlemeza lodged an application for leave to appeal that judgment and General Sibiya applied for leave to execute the order setting aside his suspension. In his assessment of the merits of the two applications, Matojane J once again made remarks calling into question General Ntlemeza's integrity. He accused General Ntlemeza of misleading the court by not informing it of a report by the National Independent Police Directorate which exonerated General Sibiya. According to Matojane J, General Ntlemeza referred only to a prior report by the Provincial Independent Police Directorate, which incriminated General Sibiya. He went on to say: 'In my view, the conduct of [General Ntlemeza] shows that he is biased and dishonest. To further show that [General Ntlemeza was] dishonest and lack[ed] integrity and honour, he made false statements under oath'. Matojane J dismissed the application for leave to appeal and granted the application to execute. Subsequent attempts by General Ntlemeza to appeal the *Sibiya* judgment were unsuccessful.

It was on the strength of the *Sibiya* judgment that HSF and FUL sought to review General Ntlemeza's appointment. A full court (the high court) comprising three judges (Mabuse, Kollapen and Baqwa JJ), perhaps because of the national importance of the case, was constituted to hear the review application brought by HSF and FUL to have General Ntlemeza's appointment set aside. As Part A of that application, HSF and FUL sought an interim interdict preventing General Ntlemeza from exercising any power or discharging any function or duty as head of the DPCI, pending the final determination of the review application. The application for interim relief was dismissed by Tuchten J. A judgment by the high court in the review application (Mabuse J, with the other two judges concurring) was delivered on 17 March 2017. The high court held in favour of HSF and FUL. It reasoned that s 17CA of the South African Police Service Act 68 of 1995 (the Act), in terms of which General Ntlemeza was purportedly appointed, required an appointee as National Head of the DPCI to be a fit and proper person who is also conscientious and has integrity. The high court had regard to the decision of the Constitutional Court in *Democratic Alliance v*

President of the Republic of South Africa & others [2012] ZACC 24; 2013 (1) SA 248 (CC) (the *Simelane* judgment), which involved the appointment of Mr Menzi Simelane as National Prosecuting Authority Head, and held that the Minister, like the President, had an obligation to ensure that there were no disqualifying factors impinging on the appointment of an individual as the Head of an important national constitutional institution. The high court considered the judicial pronouncements by Matojane J that reflected negatively on General Ntlemeza, to be crucial in the assessment of whether the criteria set by s 17CA of the Act had been satisfied for the appointment of General Ntlemeza. The high court held that the Minister was not entitled to ignore Matojane J's findings concerning General Ntlemeza's lack of honesty and integrity. It found that it was for the Minister to determine positively from the objective facts whether General Ntlemeza was a fit and proper person. It reasoned that Minister Nhleko had failed to do so and concluded that Minister Nhleko acted irrationally and unlawfully in failing to take into account relevant factors such as the findings by Matojane J. It made an order that, inter alia:

'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.'

As mentioned, General Ntlemeza subsequently applied to the high court for leave to appeal that order (the principal order). HSF and FUL, in turn, filed a counter-application, in terms of which they sought, inter alia, as a matter of urgency, 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. That court dismissed General Ntlemeza's application for leave to appeal and upheld the counter-application. It is the grant of the latter application that was the subject of the appeal before the SCA. This application was brought in terms of s 18 of the Superior Courts Act. Section 18 of the Superior Courts gives an aggrieved party an automatic right of appeal 'to the next highest court' against a decision of the high court ordering the execution of an earlier ruling issued by it, pending the finalisation of an appeal or an application for leave to appeal.

Also pending before the SCA at the time that this appeal was heard, was General Ntlemeza's petition for leave to appeal against the refusal by the high court of his application for leave to appeal against the principal order. The SCA was thus in a curious position, created by s 18 of the Superior Courts Act, where two parallel processes were being conducted in an appeal court in one case.

In the SCA, General Ntlemeza relied on a jurisdictional point which, according to him, was dispositive of the appeal. He framed the proposition as follows:

'In terms of s 18(1) of the Superior Courts Act, a pending decision on an application for leave to appeal or an appeal was a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind set out in the preceding paragraph. It was contended that sequentially the application for leave to appeal by General Ntlemeza had been refused before FUL's counter-application was upheld and thus the high court was precluded from considering HSF and FUL's counter-application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent.'

Importantly, the SCA, at the outset, dealt with the importance of the DPCI by locating it in its constitutional and statutory setting. It noted that the South African Police Service Act 68 of 1995 (the Act), in terms of which the DPCI was established, has its genesis in s 205 of the Constitution, which provides that the National Police Service must be structured to function in the national, provincial and, where appropriate, local spheres of government. The SCA also had regard to the provisions of s 17 of the Act which established the DPCI, and in particular, s 17CA(1) which requires the National Head to be, inter alia, a fit and proper person who was also contentious and had integrity.

In consideration whether General Ntlemeza's contention regarding s 18 of the Superior Courts Act was sustainable, the SCA proposed first, to consider the position at common law in relation to such applications before the enactment of s 18 of the Superior Courts Act. And in the instance of it being held that the preliminary point is without substance, the SCA would then deal with the further provisions of s 18 to determine whether HSF and FUL satisfied its requirements thereby justifying the grant of the execution order by the high court.

With regards to the common law position prior to the enactment of s 18 of the Superior Courts Act, the SCA considered the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty)* 1977 (3) SA 534 (A) which held that in an application for leave to execute, the onus rested on the applicant to show that he or she was entitled to such an order. In that case, the court went on to hold that an order granting leave to execute pending an appeal was one that had to be classified as being purely interlocutory and was thus not appealable. The SCA, however, noted that there were exceptions to the rule that purely interlocutory orders were not appealable, and highlighted cases where this rule was relaxed on the basis that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable.

The SCA also considered the import of Rule 49(11) of the Uniform Rules, which restated the common law position and formed the basis upon which applications of the kind in question were determined. With the advent of s 18 of the Superior Courts Act, this rule was repealed. It read as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

Several changes to the common law position were introduced by s 18, and the SCA considered some of these changes.

The SCA noted that s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, the court continued, it granted a party against whom such an order was made, an automatic right of appeal. In addition s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not granted and that the other party 'will not' suffer such harm.

At para 25 of the judgment, the court said:

'In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, has substance, it is necessary to consider the provisions of s 18(1) and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a case the default position is that the operation and execution of the principal order is suspended pending 'the decision of the application for leave to appeal or appeal'. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed ….'

The court continued, at para 26, stating that:

'Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court's judgment on the merits of General Ntlemeza's appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a decision that is the 'subject of an application for leave to appeal or appeal' is suspended pending the decision of either of those two processes. Section 18(5) defines

what the words 'subject of an application for leave to appeal or appeal' mean: '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.'

The SCA noted that when the high court made its decision on the merits of General Ntlemeza's appointment on 17 March 2017, that order immediately came into operation and could be executed. When General Ntlemeza, on 23 March 2017, filed his application for leave to appeal, the order (the principal order) of that court was suspended pending a decision on that application. HSF and FUL's 'counter-application', seeking the execution order, the SCA continued, was thus well within the parameters of s 18(1). The question that arose, the court said, was whether the dismissal of General Ntlemeza's application for leave to appeal prior to a decision on the execution application removed the jurisdictional underpinning for an execution order? The court said that it did not.

In its reasoning, the SCA said that:

'[28] The primary purpose of s 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high.'

The SCA found that the preliminary point on behalf of General Ntlemeza did not accord with the plain meaning of s 18(1). The SCA agreed with HSF and FUL that 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. In addition the court said that contextually, the power granted to courts by s 18 must be seen against the general inherent power of courts, which power is enshrined in the s 173 of the Constitution, to regulate their own process.

The SCA thus found that General Ntlemeza's preliminary point was without a basis and said:

'[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Courts must be the guardians of their own process and be slow to avoid a to-ing and fro-ing of litigants. The high court's order achieved that end. A proper case had been made out by HSF and FUL for anticipatory relief. The high court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallize the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point.'

The SCA gave short shrift to the further point raised by General Ntlemeza regarding the failure by the high court to deliver reasons for the judgment, 'immediately', as envisaged in s s18(4)(i) of the Superior Courts Act. The high court's order was handed down on 12 April 2017 and the reasons for the order were provided on 10 May 2017. It was submitted on behalf of General Ntlemeza that since s 18(4)(i) states that a court must immediately record its reasons for ordering 'otherwise', the high court by not doing so was in contravention of a peremptory provision, which must be seen in conjunction with the provisions of s18(4)(iii) that provides that the court hearing the automatic appeal must deal with it as a matter of extreme urgency. The consequence, so it was contended, was that General Ntlemeza was frustrated in asserting his constitutionally guaranteed right of access to court. The suggestion was that this invalidated the proceedings related to the application for leave to execute the principal order. The SCA noted that:

'[34] General Ntlemeza filed his notice of appeal in this court a day after the order upholding the application for leave to execute was issued, on 13 April 2017. The application for leave to appeal in relation to the principal order was filed on 21 April 2017. General Ntlemeza's notice of appeal was amended on 11 May 2017, after the high court had provided its reasons. The present appeal was heard on 2 June 2017. Far from being frustrated, General Ntlemeza has had a speedy hearing. Furthermore, since the order to execute was suspended pending the finalisation of the present appeal, no prejudice appears to have been occasioned. Simply put, the purpose of s 18(4) namely, to ensure a speedy appeal, was achieved. That being said it would be a salutary practice to provide reasons *pari passu* with the order being issued.'

The SCA then went on to consider whether the high court in granting the order to execute had due regard to the relevant provisions of s 18 and found that it had. On this score, the SCA said that the high court could not be faulted in its finding that HSF and FUL proved exceptional circumstances were present as envisaged in s 18(1), and further, that HSF and FUL had proved, on a balance of probabilities, that they and the public, would suffer irreparable harm if the court did not make the order and that General Ntlemeza would not suffer irreparable harm if the court so ordered.

The SCA said the following:

'[45] The proper functioning of the foremost corruption busting and crime fighting unit in our country dictates that it should be free of taint. It is a matter of great importance. The adverse prior crucial judicial pronouncements and the place that the South African Police Service maintains in the constitutional scheme as well as the vital role of the National Head of the DPCI and the public interests at play, are all factors that weighed with the court in its conclusion that there were exceptional circumstances in this case.'

In considering the requirement of irreparable harm to General Ntlemeza, the SCA said that his complaint appeared to be restricted to him suffering reputational harm. The SCA in dealing with this question stated that the high court could not be criticized for its approach to the question of irreparable harm. The high court took into account that the reputational damage complained of by General Ntlemeza did not occur as a consequence of its judgment but because of the findings of Matojane J. The SCA said the following:

'[46] [The high court] took into account that he continued to be paid his full salary and that he still had the possibility of vindication by way of an appeal, should it ensue as a result of a favourable outcome of his petition and a subsequent appeal to this court.'

As against the question of possible reputational harm, the SCA had regard to the high court considering the public interest and the crucial place that the DPCI enjoys in our young democracy.

The court also remarked that the present Minister of Police, Mr Fikile Mbalula, did not seek to defend Minister's Nhleko's decision to appoint General Ntlemeza. On 11 April 2017 Minister Mbalula withdrew the application for leave to appeal.

As regards the costs, the court noted that even though General Ntlemeza was pursuing the appeal in his personal capacity, it became apparent, at the end of the proceedings before it, that his case was funded by the State. The SCA said that it could not scrutinize the propriety of that course. It went on to say that in so far as appeal was concerned, it must follow that General Ntlemeza has to pay the costs personally.

In the end, the SCA said:

'[50] It must by now be apparent that the appeal is bound to fail. The effect of the order that follows is that the high court's execution order set out in para 16 above remains extant with the consequence that General Ntlemeza is unable to return to his post pending the final determination of the present application for leave to appeal and/or any further appeal processes in relation to the merits of his appointment.

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