



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 28965/22

- (1) REPORTABLE: YES
 (2) OF INTEREST TO OTHERS JUDGES: YES
 (3) REVISED

SIGNATURE

11 AUGUST 2022

DATE

In the matter between:

KHANYISA NURSING SCHOOL (PTY) LTD

APPLICANT

and

THE SOUTH AFRICAN NURSING COUNCIL

FIRST RESPONDENT

THE MINISTER OF HEALTH

SECOND RESPONDENT

**JUDGEMENT IN THE APPLICATION FOR LEAVE TO APPEAL AND S
 18(3) APPLICATION**

NDLOKOVANE AJ

INTRODUCTION

[1.] This is an application for leave to appeal by the first and second respondents, to the Supreme Court of Appeal against the judgment I delivered on 24 June 2022. The application for leave to appeal is opposed by the applicant which has also instituted an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 as amended (the Act).

[2.] For the sake of convenience, I will refer to the parties as they are cited in the main judgment. After delivery of the judgment on 24 June 2022, the first and second respondents filed a detailed notice of application for leave to appeal which contained the grounds of appeal.

The test in an application for leave to appeal

[3.] Applications for leave to appeal are governed by sections 16 and 17 of the Act. Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration.

[4.] The first and second respondents have indicated in the notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(a)(i). This was the basis upon which Mr. Pretorius, who appeared for the first and second respondents, made submissions. Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.

[5.] With the enactment of s17 of the Act, the test has now obtained statutory force and is to be applied using the word '*would*' in deciding whether to grant leave. In other words, the test is would another court come to a different decision. In the unreported

decision of the ***Mont Chevaux Trust v Goosen & 18 others***¹, the land claims court held, *albeit obiter*, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal.

[6.] In the present matter I would have to determine whether another court *would* (my emphasis) come to a different decision. I have considered the application for leave to appeal and the oral submissions of the parties.

[7.] During the course of argument Mr. Van As, on behalf of the applicant, as would be expected, submitted that there are no reasonable prospects of success on appeal and this court did not err when considering the requirements for granting the final relief which the applicant sought.

[8.] Mr. Van As as the record will reveal, made several submissions in relation to whether or not I correctly found that amongst others that the applicant is exempted from its obligation to exhaust the internal remedies in terms of the Nursing Act, 33 of 2005 ("the Act"); that the decision of the respondents dated 26 March 2022 in terms of which the full accreditation granted to Khanyisa will be effective from 1 January 2023 is reviewed and set aside, the Applicant is permitted to commence with the accredited programmes on or before 4 July 2022 at the relevant sub campuses. and that the respondents to issue the applicant with the certificates in terms of Regulation 11 of R.173.

[9.] Having considered the arguments presented by the respondents, I am of the view that there is a reasonable prospect that another court would differ with me. Consequently, leave to appeal ought to be granted to the Supreme Court of Appeal and the costs of the application for leave to appeal, be costs in the appeal.

[10.] That then brings me to the application in terms of s 18(3).

¹ 2014 JDR 2325

The execution of the contempt order

[11.] Section 18(1) of the Act provides that the execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of that application or the appeal, unless the court under exceptional circumstances orders otherwise. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted. An applicant must therefore prove both exceptional circumstances and the requisites of irreparable harm.

[12.] It is impossible to lay down precise rules as to what constitutes exceptional circumstances. Each case must be decided on its own facts. The prospect of success in the pending appeal is a relevant consideration and if it is doubtful, a court deciding an application under s 18(3) would be less inclined to grant it.

[13.] The applicant alleged that the following constitutes exceptional circumstances:

“the main application was brought on an urgent basis and premised upon the applicant's need to commence with the accredited programme on or before 4 July 2022; the applicant, on 25 June 2022, informed the students of the order and duly permitted the students to commence with registration for the classes to commence on 4 July 2022. The following are the number of students per programme that registered and enrolled for the 2022/2023 academic year at the relevant campuses. The suspension of the order resulted therein that 210 enrolled students are being deprived of the opportunity to further their education and advance their career, and this will further have detrimental effect on the hospitals as they will receive 210 fewer nursing staff which could alleviate the strain on the South African health care system; the applicant employs approximately 13 staff members at the 4 sub- campuses, and should the applicant not be permitted to proceed with the academic programmes, and these employees will all have to be retrenched as the applicant will not be able to afford their salaries”.


[14.] The respondents, in opposing such application, contends that same are superficial and vague and that there is nothing uncommon or rare in bringing this application. Further, the applicant's allegation of irreparable harm is not supported by the facts. Instead it will be the nursing council that will suffer irreparable harm as it is prevented from performing its statutory duties. I hasten to mention that I disagree with this. I accept that these allegations set out by the applicants in paragraph 13 above indeed constitutes exceptional circumstances, because, the 210 students enrolled by the applicant after the June 2022 order was granted would be highly prejudiced together with the applicant and its 13 employees if they were to undo the massive administrative task that the applicant embarked on in finally enrolling them and getting them ready to commence the training.. This alone in my view would cause them to suffer irreparable harm if an order in terms of s 17 is not made. For the educators, their economic livelihood and their families with no doubt will be compromised. On the other hand, the implementation of the order pending appeal would not cause irreparable harm to the first respondent if the applicant commences mid -year pending appeal. To this end in my view, there is insufficient evidence of any financial loss to be suffered by the respondent if the order was not suspended pending the exhaustion of appeal. Even if I am wrong in my finding of absence of harm for respondents. In these circumstances it could never be suggested, let alone concluded, that the so-called harm to the respondents outweighs the irreparable harm to applicant.

Costs

[15.] That then brings me to the aspect of costs. Although Mr *Pretorius* indicated that there is no need for this court to make a costs order in the s18(3) application, it seems to me that there is no reason to depart from the usual rule in relation to costs. The rules make provision for the applicant to bring such an application, they have done so. The respondents did oppose the application, consequently the costs ought to follow the result.

[16.] Consequently, the following orders will issue:

- (a) The first and second respondents are granted leave to appeal the judgment delivered on 24 June 2022 to the Supreme Court of Appeal.
- (b) The costs of the application for leave to appeal will form part of the costs in the appeal.
- (c) It is hereby ordered and directed that in terms of the provisions of s18(3) of the Superior Court Act 10 of 2013 as amended, this court's orders granted on 24 June 2022 2019 under Case No. **28965/22**, shall operate and be implemented with immediate effect pending the outcome of the appeal instituted by the respondents.
- (d) The first and second respondents shall pay the applicant's costs of the s.18(3) application jointly and severally, the one paying the other to be absolved.



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 11 August 2022.

APPEARANCES

FOR THE APPLICANT:	ADV. E. VAN AS
FOR THE RESPONDENTS:	ADV AA BASSON
HEARD ON:	15 JULY 2022
DATE OF JUDGMENT:	11 AUGUST 2022