

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 84366/19

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 19 MAY 2023

SIGNATURE

In the matter between:

SEHLAPELO, ELIZABETH BRIDGETTE

Applicant

And

**THE OFFICE OF THE OMBUD FOR FINANCIAL
SERVICES PROVIDERS**

First Respondent

**THE BOARD OF DIRECTORS FOR THE OFFICE
OF THE OMBUD FOR
FINANCIAL SERVICES PROVIDERS**

Second Respondent

THE FINANCIAL SECTOR CONDUCT AUTHORITY

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

**THE OMBUD FOR FINANCIAL
SERVICES PROVIDERS**

Fifth Respondent

***Coram:* Millar J**

***Heard on:* 12 April 2023**

Delivered: 19 May 2023 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to this *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 19 May 2023.

Summary: Administrative Law: Application in terms of PAJA for condonation and for review of decision to dismiss Deputy Ombud appointed in terms of FAIS Act on 22 March 2018 – inordinate delay in bringing the application – no acceptable explanation for delay – furthermore, no prospects of success – application dismissed with costs

ORDER

It is Ordered:

1. The application is dismissed with costs.
-

JUDGMENT

MILLAR J

[1] This is an application in which the applicant, the former Deputy Ombud for Financial Services, seeks to review and setting aside her dismissal from the position on 22 March 2018. There is also an application for condonation for the late bringing of the review.

[2] The first respondent is the Office for the Ombud for Financial Service Providers established in terms of s 20 of the Financial Advisory and Intermediary Services Act¹ (FAIS Act). The second respondent is the Board of Directors for the Office of the Ombud for Financial Service Providers. It is this Board which appointed the applicant to the position of Deputy Ombud on 12 April 2016.²

¹ 37 of 2002.

² The applicant was appointed in terms of s 21(1)(b) of the FAIS Act.

- [3] The statutory framework within which the appointment and dismissal of the applicant occurred, was replaced on 1 April 2018. The third and fifth respondents respectively replace the first and second respondents in terms of the Financial Sector Regulation Act.³ The decision to appoint or remove which hitherto was made by the first and second respondents is now within the domain of the fourth respondent.⁴ Since the first and second respondents are defunct, they did not oppose the present application. Similarly, the fourth respondent, the Minister of Finance, also did not oppose the application. For convenience, in this judgment, the third and fifth respondents will be referred to collectively as ‘the respondents’.
- [4] On 12 April 2016, the applicant was appointed as Deputy Ombud. Although an office bearer in terms of the Act, she was required to sign an employment agreement which she did. This agreement set out inter alia the expectations of the Board in regard to performance as well as conduct. After being appointed, she underwent induction. Being the Deputy Ombud, she worked under the supervision of and in close concert with the Ombud. Initially, performance appraisals showed her to be within the average of what was expected.
- [5] On 5 June 2017, just over a year after she started her duties, an email was circulated by a senior case manager in the office who reported to the applicant, containing a presentation. This it seems was sent for consideration, comment and ultimately vetting. The presentation contained what the Ombud considered to be fundamental flaws. These were not noticed by the applicant and in the circumstances the Ombud addressed an email to the applicant on 8 June 2017 raising her concerns with the standard of the applicant’s work.

³ 9 of 2017.

⁴ Amended section 21 now specifically vests the Minister with the power to appoint and remove the ombud and deputy ombud. The Board only determines the remuneration and other terms of appointment.

- [6] On 26 June 2017, a meeting took place between the applicant and the Ombud at which concerns regarding her performance were discussed. The following day, 27 June 2017, the applicant addressed an email to the Board seeking its intervention in the relationship between herself and the Ombud. The email contained several allegations of personal conflict, harassment, and intimidation. This was the first of a series of three grievances lodged by the applicant with the Board against the Ombud.
- [7] On 30 June 2017 the Ombud wrote to the applicant informing her of the intention to investigate her conduct with a view to instituting disciplinary proceedings. An independent firm of attorneys was appointed to investigate the applicant's performance.
- [8] The applicant was invited to make herself available to participate in the investigation but refused to do so ostensibly on the basis that the Ombud, her immediate supervisor had no authority to institute any investigation into her performance and that it was only the Board itself that could do so.
- [9] On 11 August 2017, the applicant was given notice to attend a disciplinary enquiry and furnished with a charge sheet which outlined the charges.
- [10] The enquiry was scheduled to take place on 16 August 2017 but at the request of the applicant and her legal representative, this was postponed to 31 August and 1 September 2017. Despite the arrangement of the date, neither the applicant nor her representative attended. A medical certificate was sent to the Chair of the enquiry which purported to represent that the applicant was unfit to attend the proceedings. This was apparently in consequence of a knee injury sustained on 25 August 2017. After careful consideration of the contents of the certificate, the Chair ruled that it disclosed no basis for the applicant's failure to attend. Since there was no one present for the applicant and no application for a postponement, the enquiry continued in the applicant's absence.

[11] In consequence of the applicant's failure to attend the enquiry, it proceeded in her absence and she was found guilty of all the charges that had been proferred against her. A recommendation was made to the Board in terms of s 21(4) of the FAIS Act, that the applicant be invited to make submissions as to why removal from office should not be considered and subject to the submissions for the Board to then decide on whether to remove the applicant or not.

[12] After receipt of the findings and recommendations of the disciplinary enquiry, the Human Resources Committee considered the findings and recommendations of the disciplinary enquiry and on 22 November 2017 referred the matter to the Board. On 6 February 2017 the Board invited the applicant to make written representations on the findings and recommendations. The applicant submitted representations but failed to address any of the charges or findings on their merit. The submissions rather mirrored the stance adopted by the applicant from the start and repeated in each of the grievances she lodged against the Ombud. The applicant summed up her stance on the matter in the concluding remarks in her submissions as follows:

"The Board's attention is drawn to the following facts without getting into the merits of the case:

- Failure by the Ombud to act in accordance with the requirements of section 21 of FAIS Act, in a desperate attempt to arrive quickly at her systematic plans.*
- I have not been afforded an opportunity to defend or state my case as indicated herein above, even when there were valid and pressing reasons beyond my control which the Ombud was aware of. This is contrary to the requirements of the law.*

- *I was not afforded an opportunity to present my case and rebut the charges in order for the presiding officer to make an informed and considered decision.*
- *I consider the process to have been procedurally unfair, not that I agree that substantially it would have been fair either.”*

[13] After consideration of the submissions made by the applicant, the Board resolved to remove the applicant. She was informed of this on 23 March 2018 and that it would be with effect from 30 April 2018. Thereafter, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). This matter was finalized on 26 September 2018.

[14] It is not in issue between the parties that the present application for review falls squarely within the ambit of the Promotion of Administrative Justice Act⁵ (PAJA). Proceedings in terms of this Act are in terms of s 7(2) to be instituted within 180 days. It was not in issue between the parties that since the matter had been erroneously referred to the CCMA, this option having been incorrectly made available to the applicant by the Board, that the calculation of the 180-day period was to be reckoned from 27 September 2018 and not 22 March 2018. Accordingly, the application ought to have been brought by no later than 26 March 2019. However, the application was only brought on 7 November 2019, some 7 months after the elapse of the 180-day period. I will return to this aspect later in this judgment.

[15] It is the applicant’s case that her dismissal as Deputy Ombud was neither lawful nor procedurally fair. The applicant’s case was cast squarely within PAJA and in particular:

⁵ 3 of 2000. The appointment and removal of the Deputy Ombud in terms of s 21 of the FAIS Act falls squarely within the definition of “administrative action” set out in s 1 of PAJA. The office of the Ombud is listed as a schedule 3A Public Entity in terms of the Public Finance Management Act 1 of 1999. See also *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2008 (3) SA 91 (E) at para 53 in which it was held: “*what makes the power involved a public power is the fact that it has been invested in a public functionary who is required to exercise it in the public interests and not in his or her own private interest or at his or her own whim.*”

[15.1] That the decision to remove her was not procedurally fair.⁶

[15.2] That the decision to remove her was for a reason not authorized by law.⁷

[15.3] That the decision was taken for an ulterior motive or purpose.⁸

[15.4] That in taking the decision relevant factors were not considered.⁹

[15.5] That the decision was taken because of the unauthorized dictates of another person.¹⁰

[15.6] That the decision was arbitrary or capricious.¹¹

[16] I intend to deal with each of the grounds of review set out in paras 15.1 to 15.6 above in turn.

THE DECISION TO REMOVE HER WAS NOT PROCEDURALLY FAIR.

[17] It is readily apparent that at each stage of the process preceding the disciplinary enquiry and at the enquiry itself, the applicant was invited to participate and present her version.¹²

⁶ PAJA - Section 6(2)(c).

⁷ Ibid Section 6(2)(e)(i).

⁸ Ibid Section 6(2)(e)(ii).

⁹ Ibid Section 6(2)(e)(iii).

¹⁰ Ibid Section 6(2)(e)(iv).

¹¹ Ibid Section 6(2)(e)(vi).

¹² *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para 187 in which it was stated: “The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the audi principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision. This is essential to rationality, the sworn enemy of arbitrariness. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.”

- [18] The decision of the applicant to withhold her participation from the process was deliberate. Faced with a situation not dissimilar to the one in the present matter, the Supreme Court of Appeal in *Old Mutual v Gumbi*¹³ found:

"A mere production of the medical certificate was not, in the circumstances of this case, sufficient to justify the employee's absence from the enquiry. As the certificate did not allege that he was incapable of attending at all, the chairman was entitled to require him to be present at the resumed enquiry so as to himself enquire into his capacity to participate in the proceedings. These facts play a major role in determining unfairness when the interests of both parties are taken into account."

- [19] The Court went on to find:

"When all these facts are viewed objectively, it cannot be said that Old Mutual has acted procedurally unfairly in continuing with the enquiry in the employee's absence and dismissing him for the misconduct of which he was found guilty. The employee and his representative are the only persons to blame for his absence."¹⁴

- [20] The fact that the applicant at every turn, save in making submissions to the Board, refused to participate when invited to do so does not render the process unfair.

- [21] The decision of the applicant to refuse to participate in the initial investigation and then the disciplinary enquiry was advertant and it does not lie in her mouth to assert that the process which she was invited to but eschewed was unfair. There is in the circumstances, no merit to this ground of review.

¹³ [2007] 4 All SA 866 (SCA) at para [19].

¹⁴ Ibid para [21].

THE DECISION TO REMOVE HER WAS FOR A REASON NOT AUTHORIZED BY LAW.

[22] The FAIS Act, besides providing for the appointment of a Deputy Ombud by the Board, also provides for the removal of a Deputy Ombud by the Board. S 21(4) provides:

"The Board may on good cause shown, after consultation with the Advisory Committee, remove the Ombud or a deputy ombud from office on the ground misbehaviour. incapacity or incompetence after affording the person concerned reasonable opportunity to be heard."

[23] It is not disputed that the decision to remove the applicant was taken by the Board or that the Board is empowered to do so. There is simply no merit to this ground of review.

THE DECISION WAS TAKEN FOR AN ULTERIOR MOTIVE OR PURPOSE AND RELEVANT FACTORS WERE NOT CONSIDERED

[24] There was no basis laid for these grounds of review. The Board was furnished with the findings and recommendation of the disciplinary enquiry and was obligated¹⁵ to act upon it. There were no defects in the decision-making¹⁶ process of the Board and the applicant was unable to point to any.

THE DECISION WAS TAKEN BECAUSE OF THE UNAUTHORIZED DICTATES OF ANOTHER PERSON.

¹⁵ *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* 2013 (5) SA 24 (SCA) at para 47.

¹⁶ *C and M Fastners CC v Buffalo City Metropolitan Municipality* [2019] ZAECGHC 22 at para 64 in which it was stated: *"In this matter there were considerable defects in the decision-making process. There was at best no proper reasoning or justification for the decisions taken (if indeed the cancellation was a decision properly taken which is doubtful) these taken in bad faith, irrational and wrongly taking into account considerations given inappropriate weight. This implicates improper purpose and ulterior motive."*

[25] The high-water mark of this ground of review is the nebulous allegation that:

"180. In this regard, I deem it unnecessary to repeat the grounds set out under the heading "The action was taken for an ulterior purpose or motive", save only to emphasise that Bam was determined, for reasons unknown to me, to remove me from office, even if it meant that my removal was unlawful.

181. The Board, in this regard, allowed Bam's dictates, which were not warranted by the FAIS Act, to determine whether or not I am to be removed as Deputy Ombud".

[26] The court in *Sibiya v NUM*¹⁷ held the following:

"The mere fact that an employer may have a motive to rid itself of a particular employee does not ipso facto justify the inference that any subsequent charge brought against the employee which might lead to his dismissal was not genuine or bona fide or was effected for an ulterior purpose referred to. Whilst the establishment of a pre-existing motive to get rid of an unpopular employee would sound warning bells which ought to result in this court's scrutiny of the genuineness of the professed motive for dismissal relied on by respondent, the mere existence of such a motive does not lead to an inescapable conclusion that the dismissal was effected for the hidden motive rather than for the reasons professed by respondent. One has to examine all the facts and circumstances prior to coming to such a conclusion of bad faith in respondent's motives."

[27] There is nothing before the Court to indicate that the Board did not act independently in reaching the decision that they did. The fact that the Ombud initiated the process of investigation and then saw the process through, does

¹⁷ [1996] 6 BLLR 794 (IC) at page 797.

not elevate her actions in the discharge of her own duties as Ombud to “unauthorized dictates”. There is no merit in this ground of review.

THE DECISION WAS ARBITRARY OR CAPRICIOUS.

[28] This ground of review was asserted as follows:

“182. As a result of the conduct Bam, and the corresponding omission of the Board, the decision to remove me as Deputy Ombud was not only irrational, but it was also arbitrary, regard being had to the above background.

183. I also submit that, in light of the fact that my removal was contrary to the prescripts of the FAIS Act, it undermined the rule of law. I submit that conduct which undermines the rule of law, as envisaged in section 1 of the Constitution is unlawful and must therefore be set aside”.

[29] The circumstances leading to the decision of the Board to remove the applicant from her position are not in dispute. Absent a proper engagement on the issues by the applicant at each stage of the process including when called upon to make submissions to the Board, I find that the decision of the Board was entirely consonant with what it had before it for consideration.¹⁸

[30] Again, there was nothing placed before the Court to indicate any basis for impugning the decision of the Board on the ground asserted. This ground of review is without any merit.

¹⁸ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) at paras [30] – [32]; see also *Director-General, Department of Home Affairs and Others v Link and Others* 2020 (2) SA 192 (WCC) at para [64] -*“In the absence of any ‘good’ reasons for them, the decisions were arbitrary and capricious and were not rationally connected to the information which was before the decision-maker at the time. They were also liable to be set aside on the grounds that they were taken without a mandatory and material conditions (i.e. the furnishing of adequate reasons) which was prescribed by an empowering provision, being complied with...”*

CONDONATION

[31] The reason proffered by the applicant for the delay in bringing the application is that by virtue of her impecuniosity, and, notwithstanding that the same firm of attorneys has acted for her from at least April 2018, a succession of advocates who had agreed to act for the applicant *pro amico*, had failed to settle the papers in the application timeously.

[32] In other words, the applicant's attorney was not at fault himself in the delay in bringing the application – both he and the applicant relied on the succession of advocates.

[33] Unfortunately, however, there is no explanation for the long periods of inaction between the engagements with the different advocates and the impression created is that there was no appreciation of the fact that the institution of the application may be time barred or that there would be a consequence if it was not brought timeously. Furthermore, the third, fourth and fifth respondents were only joined to these proceedings on 22 January 2022, some 42 months after it ought to have been brought and 33 months from when it was brought.

[34] While there is an explanation for the 7-month delay, there is no explanation for the further 33-month delay. The application was simply not competent until the further respondents were joined.

[35] It was held in *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City*¹⁹ that:

“[18] A legality review, unlike a PAJA review, does not have to be brought within a fixed period. However, whilst the 180-day bar set by s 7(1) of PAJA (which may be extended under s 9) does not

¹⁹ 2021 (3) SA 25 (SCA). See also *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at paras [22] – [23].

apply to a legality review, in both the yardstick remains reasonableness. It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.

[19] *The test for assessing undue delay in the bringing of a legality review application is: first, it must be determined whether the delay is unreasonable or undue (this is a factual enquiry upon which a value judgment is made having regard to the circumstances of the matter); and, second, if the delay is unreasonable, whether the courts discretion should nevertheless be exercised to overlook the delay and entertain the application.”*

[36] It was held in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* ²⁰ that insofar as PAJA reviews are concerned, any delay beyond the 120-day period is *per se* unreasonable and that absent condonation, the court has no authority to entertain the review application.

[37] In *Cape Town City v Aurecon SA (Pty) Ltd*²¹ it was held that the factors to be considered in an application for condonation are:

“ . . . the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised and the prospects of success”.

²⁰ [2013] 4 ALL SA 639 (SCA) at paras [26] and [27].

²¹ 2017 (4) SA 223 (CC) at para [46].

- [38] In considering the factors set out in Aurecon, the delay before the institution of the proceedings in the present matter was certainly a lengthy one. This is particularly so when one has regard to the fact that the applicant was represented by attorneys from the outset and at least for a period of a year before the expiry of the 180-day period. This is based on the calculation of the period as contended for by her.
- [39] While no explanation has been proffered for the inaction on the part of the applicant's attorney, this has been laid squarely at the door of a succession of advocates who purportedly let both the attorney and the applicant down. Neither the applicant nor her attorney takes any responsibility, instead proffering a self-serving excuse. The applicant must take responsibility for both her own dilatoriness as well as that of her attorney ²² (if he was at all).
- [40] Finally, the last consideration is the prospects of success in the review application. For the reasons set out above, I am not persuaded that any of the grounds of review are meritorious and for that reason, condonation is refused, and the application must fail.
- [41] In regard to costs, there is no reason that costs should not follow the result.
- [42] In the circumstances, it is ordered:
- [42.1] The application is dismissed with costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

²² See Saloojee v Minister of Community Development 1965 (2) 135 (A) at 141.

HEARD ON: 12 April 2023

JUDGMENT DELIVERED ON: 19 May 2023

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INSTRUCTED BY: BOWMAN GILFILLAN INC.

REFERENCE: MR. B SIBIYA

NO APPEARANCE FOR THE 1ST, 2ND & 4TH RESPONDENTS.