

**N THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NUMBER.: 1890/2021

In the matter between:

PAUL LOUIS LOUW

Applicant

And

ALEXANDER FREDERICK CARTER

First Respondent

OMBUD FOR FINANCIAL SERVICES PROVIDERS

Second Respondent

JOHANNES THEODORUS OTTO

Third Respondent

DENTON DEAN HENNING

Fourth Respondent

PAUL R JOHNSON

Fifth Respondent

JUDGMENT

Beshe J

[1] This is an application aimed at having second respondent's determination dated 7 September 2016 which was filed with the court on 15 April 2019 reviewed and set aside. The determination was issued following a complaint lodged by first respondent in this matter as well as others, against the applicant. Also sought by the applicant are orders to the following effect:

That applicant be exempted from exhausting further internal remedies. Alternatively, postponing the matter sine die for applicant to pursue such internal remedies as may be necessary. Setting aside of the writ that was issued out of this court on 4 March 2021.

Parties

[2] The determination and subsequent writ sought to be set aside were in favour of the first respondent against the applicant. The second respondent issued the determination, in their capacity as the Ombud for Financial Services Providers. No relief is sought against third respondent, who is cited merely as an interested party

against whom the second respondent made a determination. He was the third respondent in the matter that served before the Ombud. Same applies to fourth and fifth respondents. They were also fourth and fifth respondents in the matter before the Ombud.

Jurisdiction

[3] Following the determination by second respondent which was lodged with this court, the writ of execution sought to be set aside was issued by this court.

Applicant's case

[4] According to the applicant, in March 2021 the Sheriff of Paarl attempted to execute a writ at his home. He realised that the writ was issued in connection with a matter that was, as far as he is concerned still pending before the second respondent. The matter was pending in the sense that he had appealed against the second respondent's decision. The latter had acknowledged receipt of the appeal but never reverted back to him. He got legal advice to take the second respondent's determination on review as opposed to seeking a rescission of the writ. It would also appear that before the writ was issued, applicant and third respondent had made some payments towards the reduction of the amount the second respondent determined they owed the first respondent.

[5] The dispute before the Ombud concerned funds that were invested through Capital Builder Investment (CBI) by the first respondent in 2009. CBI is a Close Corporation in which applicant held a 50%-member interest with third respondent. They were later joined by the fourth respondent with fifth respondent being the office manager, amongst his other responsibilities. The money invested was then transferred to first respondent's account at ODL Securities, London. The investment involved Forex trading. An amount of R800 000.00 was invested by the first respondent. It appears to be common cause that irregular trading was conducted, and that clients' mandates were exceeded by CBI officials. First respondent lodged a complaint with the second respondent (the Ombud). Briefly, complaining that he invested R800 000.00 with CBI, hoping for a good return as per their advertisement that promised a 30% return. There was an agreement that he will be paid 1000 USD

per month. That he has signed a redemption form to get the full return of his investment because since March 2011 the good return did not materialize. He later could not get hold of CBI. This is despite the fact that first respondent was advised to make direct contact with the London based company to redeem his investment. First respondent lodged the complaint with the second respondent in October 2011.

[6] Having considered the complaint, second respondent made the following determination:

‘(a) An Ombud must reduce a determination to writing, including the reasons therefore, sign the determination, and send copies thereof to the registrar and all parties concerned with the complaint and, if no notice of appeal to the board of appeal has been lodged within the period required thereafter, to the clerk or registrar of court which would have jurisdiction in the matter, had it been heard by a court.

(b) Where a notice of appeal has been lodged, the Ombud must send a copy of the final decision of the board of appeal to any such clerk or registrar.

(c) The above Honourable Court has jurisdiction by virtue of the fact that the Respondents’ known address is within the jurisdiction of the above Honourable Court.

D. THE ORDER

Particulars of the determination as appears from paragraph 37 thereof are as follows:

[37] In the premises I make the following order:

1. The complaint is upheld;
2. Respondents are ordered to pay to complainant, jointly and severally, the sum of R800 000;
3. Interest on this amount at the rate of 10,25% from August 2011 to date of payment.’

[7] The determination was made in September 2016. In October 2016 applicant addressed an email to the office of the second respondent wherein he complained that their decision was not fair. He stated reasons why he believed the decision was unfair. He then ended the communication by stating:

‘I am currently under debt review and have no funds for legal costs whatsoever. If I had resources available, I would definitely apply for leave to appeal in order for justice to prevail.’

The office of the second respondent in the next hour responded as follows:

‘Dear Mr Louw,

Thank you for your email received on even date,

You may apply for leave to appeal by sending me an email wherein you point out what your concerns are (more or less like you did here below),

You can explain to us what you do not agree with in the determination and draw attention to certain facts,

There is no standard format and no costs applicable to an application for leave to appeal. You just need to send it by no later than next week Friday.

Please let me know if this is unclear so that I can assist you with the process.

Kind Regards’

[8] Applicant also attached annexure PL31 entitled Memorandum to Ombud October 2016; Leave to appeal and provides case ref, which he states was acknowledged by second respondent but nothing further was heard from second respondent. I could not find any such acknowledgement though albeit that applicant indicated it was attached. Applicant says he did not think that not hearing from second respondent was odd because second respondent’s processes drag out, as it took five years for second respondent to take its first decision (the determination). He goes on to state that because the matter was before the criminal court, he thought the second respondent no longer retained jurisdiction over the matter. He

acknowledges however, that in the absence of an adjudication of his appeal he could not take the second respondent's decision on review. Subsequent to receiving the Rule 53 record, the notice of motion was amended by the insertion of prayer 1bis the last part of which reads thus: *"alternatively, in the event that the court finds that the applicant has not exhausted his internal remedies, and refusing exemption as contemplated in Section 7 (2) (c) of Promotion of Administrative Justice Act (PAJA), that the matter be postponed sine die in order for the applicant to pursue such internal remedies as the court may find necessary"*.

[9] It appears to be common cause that both applicant and third respondent were convicted at the conclusion of the criminal trial and ordered to refund or compensate first respondent.

[10] From what I can gather from applicant's conclusion in his founding affidavit, the following are his grounds for the review of second respondent's determination:

The Ombud came to the wrong conclusion factually and legally. He was not the cause of any loss to first respondent. His funds were lost through the trading of third respondent. First respondent's claim against him was not quantified properly. The Ombud has failed to make a finding on his appeal. By filing the determination three years after it was made and without reference to his appeal constitutes an abuse of the court process. As far as the writ of execution is concerned, that it must be set aside because it was issued five years after second respondent's determination and without informing the Registrar that part payment has taken place, thereby committing fraud on a stale judgment.

[11] It is common cause that applicant and third respondent were convicted of a criminal offence in respect of the matter. However, the writ of execution was issued based on the second respondent's determination that was filed in the Gqeberha High Court.

[12] It seems to be common cause that the review is sought in terms of the PAJA¹.

¹ Act 3 of 2000.

[13] In that respect, applicant is seeking condonation of the late filing of the review application as well as an exemption from exhausting further or other internal remedies.²

[14] In paragraph 95 of the founding affidavit,³ applicant states that in so far as the application is brought outside the 180 days' period allowed by PAJA, he only became aware of second respondent's decision on 5 July 2021. I note that this application was launched in July 2021. I am not certain what decision the applicant is referring to because as far as the second respondent's determination is concerned, as far back as October 2016 he signalled his intention to seek leave to appeal the determination. Subsequent to receiving the Rule 53 record, applicant deposed to a supplementary affidavit as provided for in Rule 53 (4). The purpose of the affidavit is, by and large to explain why he is not able to provide the acknowledgment of his application for leave to appeal the second respondent's determination. Explaining that his computer crashed with the result that he could not retrieve some of his documents on outlook. He also endeavoured to retrace his steps in so far as the leave to appeal is concerned and stated that he is able to indicate that the last time he worked on the document was on the 16 October 2016 after which he must have despatched it to the second respondent soon thereafter.

First respondent's opposition

[15] First respondent raises two points in limine:

Failure to exhaust internal remedies; and

Failure to seek a review without unreasonable delay.

Implicit in applicant's notice of motion is that he appreciates the existence of these two requirements or the need to satisfy them.

[16] First respondent draws the court's attention to Section 7 (2) (a), (b) and (c) of PAJA. As well as to Section 28 (4) of the Financial Advisory and Intermediary

² As provided for in Section 7 (2) (c) of PAJA.

³ Page 36 of the papers.

Services Act⁴ (FAIS) which provides for an appeal to the board of appeal. In this regard it is contended that this appeal procedure constitutes an internal remedy as contemplated in Section 7 (2) of PAJA. First respondent pours cold water to applicant's assertion that he submitted an application for leave to appeal, as evidenced by the absence of the acknowledgement thereof by second respondent's office. Pointed also to what has unfolded regarding applicant's initial allegation that he received one and it is attached. Further points out that in any event if he last worked on the document on 16 October 2016, he was already out of time for the submission of the leave to appeal. Furthermore, that applicant has not applied for an exemption and put up any facts establishing exceptional circumstances. The option to pursue the internal remedy is no longer open to the applicant because his right to appeal lapsed upon him failing to apply for leave to appeal within the requisite time. First respondent contends that this application falls to be dismissed on this ground alone.

[17] As far as the requirement to seek a review without unreasonable delay, it is pointed out that the requirement is that this should not be later than 180 days after the proceedings sought to be reviewed were concluded. In applicant's case, a review has only been sought four years after the proceedings in question were concluded. Further that he has not placed any facts before court that establish that it will be in the interest of justice to grant him an extension in this regard.

Second respondent's opposition

[18] As part of its opposition to the relief sought, the two points raised by first respondent are also raised by the second respondent. The following contentions are made by the second respondent:

Their determination was issued on 7 September 2016. At the time the applicant had at his disposal the right to apply for leave to appeal the decision. The court's attention is drawn to the applicable provisions of the relevant Act and the applicable Rule of the FAIS Act. Upon being unsuccessful in seeking leave to appeal from the Ombud, applicant had recourse to apply to the Board of Appeal for leave to appeal

⁴ Act 37 of 2002.

against the determination. The latter Board has since been replaced by the Financial Services Tribunal.

Second respondent denies receiving an application for leave to appeal from applicant. It is averred that the second respondent only got to know about the alleged application for leave to appeal upon receipt of this application. And to further demonstrate that no such application was submitted, applicant, even though he claims that he had received an acknowledgement of his application from second respondent, conveniently did not annex the email in question. He has also not suggested he made any follow-up with the second respondent on the progress of his application for leave to appeal. The deponent to the second respondent's answering affidavit also asserts that had an application for leave to appeal been received from the applicant, it would have been considered like those of the other respondents were considered. This, so it was contended, is a further indication that no such application was received from the applicant and that therefore he has failed to exhaust internal remedies prior to instituting these proceedings. Pointing out that the review application was prompted by the attempted execution based on the determination. Further that having succeeded in staying the execution of the writ, nothing stopped the applicant from pursuing the appeal he alleges he lodged.

[19] As far as the merits are concerned, second respondent contends that there are no valid reasons/grounds to set the second respondent's determination aside.

Applicant's reply

[20] In his reply applicant insists that an application for leave to appeal was lodged to the second respondent. Alternatively, that he should be exempted from exhausting the internal remedies. It is not altogether clear what exceptional circumstances justify the exemption sought. Regarding the merits of the application, I do not understand applicant's case to be that the second respondent's determination was arrived at in a manner that was procedurally unfair.

Parties' submissions

[21] Applicant maintains that he submitted an application for leave to appeal and suggesting that the second respondent's record is incomplete and his application for leave to appeal may have been mislaid by the second respondent's office. He then analyses the evidence that was presented before second respondent and assails its cogency. It is only in his argument that applicant suggests that the second respondent was biased (against him) and cites several other reasons why the second respondent's determination falls to be set aside.

[22] First respondent submits that the applicant has not succeeded in showing that he exhausted the internal remedies available to him. In the event that the court finds that he did lodge an application for leave to appeal, the appropriate decision or administrative action to take on review is second respondent for failure to take a decision on his appeal. Further that there has been an unreasonable delay in submitting this review application (four years).

[23] It appears to be common cause that after the filing of all requisite affidavits, second respondent filed a notice to abide the court's decision in this matter. Second respondent's argument, as I understand, is aimed at urging the court not to make a costs order against second respondent. The following submissions are put forward in this regard:

The merits of the application for review are not conceded. The second respondent "successfully" raised two points in limine as a result of which the applicant sought an amendment of its papers. The amendment in the manner sought initially was also objected to by the second respondent as a result of the objection, a proper application on motion supported by an affidavit was delivered. Second respondent argues that by opposing the application and raising the two points, it did not act recklessly or mala fide and would have succeeded in opposing the application solely on this basis. The court's attention is drawn to the need and advantages of exhausting internal remedies before a court is approached for a review. The second respondent submits that this is an appropriate case for the court to order each party to pay its own costs in so far as the applicant and second respondent are concerned.

PAJA

[24] Section 3 (1) of the Act provides that: *Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.* Even though applicant does not state that he relies on the grounds for judicial review mentioned in Section 6 of PAJA, judging from the relief he seeks based on his prayers, he is seeking judicial review of second respondent's decision in terms of PAJA.

[25] I take note of Section 3 (2) (a) of the Act which provides that:

'(2) (a) A fair administrative procedure depends on the circumstances of each case.'

[26] Section 7 of the Act lays down the procedure to be followed when instituting a judicial review. Section 7 (1) provides that:

'7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded;
or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action

in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

These are the provisions that are directly implicated in these proceedings. In the sense that they are the basis of the points in limine raised by first and second respondents.

[27] It is common cause that the review proceedings were instituted some four years after the applicant became aware of the determination, well beyond 180 days. It appears to be common cause also that he became aware of the decision during October 2016 when he made his intention to seek leave to appeal the determination known. Applicant suggests that in a bid to exhaust the internal remedies available to him, he applied for leave to appeal and has been waiting for the second respondent's decision in this regard. Second respondent on the other hand states that no such application was received. In my view, applicant's defences to the points in limine are inextricably intertwined.

[28] The defences raised by the applicant in this regard and second respondent's allegations give rise to a factual dispute. It is trite that where in motion proceedings disputes of fact have arisen on affidavits, a final order whether it be an interdict or some other form of relief, may be granted if the facts stated by the applicant which have been admitted by respondent, together with those alleged by the respondent justify such an order.⁵ In *Buffalo Freight Systems v Crestleigh Trading*⁶ it was stated that the court should be prepared to undertake an objective analysis of dispute when required to do so. Furthermore, that a court must be cautious about deciding probabilities in the face of conflicts of fact on affidavits. That judgment on the credibility of the deponent, absent direct and obvious contradictions should be left open.

[29] I will endeavour to undertake an objective analysis of the dispute of fact as it emerges from the affidavits filed.

[30] Applicant's failure to institute this review timeously is, as I understand his case, due to the fact that he was still awaiting second respondent's decision on his application for leave to appeal. He waited for approximately four years.

⁵ *Plascon-Evans v Van Riebeeck Paints* 1984 (3) SA 623 AD at 634.

⁶ 2011 (1) SA 8 SCA at 14 C-E.

[31] The applicant was seemingly spurred into action by the Sheriff's attempt to execute the writ in question.

[32] In the four years he did not make any enquiries about the progress or fate of his application for leave to appeal. Instead proceeded to make payments to reduce his "debt" to the first respondent. Whereas he stated that he received an acknowledgement of receipt of his application for leave to appeal from the second respondent, no such acknowledgement was attached as indicated. Later he stated that he could not locate the said acknowledgement due to his computer having crashed. Even though applicant asserts that he applied for leave to appeal the second respondent's decision within the time allowed for such, the respondent has shown that it could have been within stipulated time, judging from the date applicant alleges he last worked on his application for leave to appeal. It is common cause that the second respondent considered applications for leave to appeal from two other respondents against whom the determination in question was issued. As I indicated earlier in this judgment, at paragraph 95 of his founding affidavit applicant states that in so far as this application is brought outside the 180-day period allowed in PAJA, he became aware of the Ombud's decision until 5 July 2021 and that decision was in any event not in respect of his appeal. In reply and as evidenced by the email exchange between applicant and second respondent already, in October of 2016 signalled his intention to apply for leave to appeal second respondent's determination. So, it cannot be accurate that he only became aware of the decision in July 2021. In my view, his explanation for the delay in instituting this application timeously sounds improbable if one has regard to the factors stated earlier. In my considered view, the dispute whether applicant applied for leave to appeal should be decided on second respondent's version. The applicant has therefore not exhausted the internal remedies at his disposal before lodging this application. Consequently, the applicant did not bring the review application within a reasonable period as provided for in Section 7 (1) of PAJA. The applicant has also not made out a case for exemption from exhausting internal remedies as provided for in Section 7 (2) (c) of the Act. The exceptional circumstances that in his submission exist to justify the exemption are that the internal remedies that existed at the time of the issuing of the determination are no longer in existence.

[33] According to the second respondent however, the only change is that the Board of Appeal has since been replaced by the Financial Services Tribunal and that the applicant has a right to approach the Tribunal for the reconsideration of the determination. As to the question whether the applicant is still within time to approach the Tribunal in this regard, I would rather not venture into that. In *Koyabe and Others v Minister for Home Affairs and Others*⁷ it was stated that:

‘[47] Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time period for exercising an internal remedy on its own would not satisfy the duty to exhaust, nor would it constitute exceptional circumstances. Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time-period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress.’

The writ of execution

[34] I have already alluded to the grounds cited by the applicant for the setting aside of the writ. Namely that the writ was issued on a stale judgment. As indicated earlier in this judgment, the determination was filed with the Gqeberha High Court in March 2019. The writ of execution was issued by the High Court in March 2021. It could not have been issued before the filing of the determination with the High Court. In this regard as well, I am not satisfied that the applicant has made out a case for the setting aside of the writ of execution.

[35] In the result, it is my finding that the applicant did not bring the review application in terms of Section 7 (1 (a) of the Act. He has not made out a case for condonation or extension of the period referred to in Section 7 (1) of the Act. And has not made out a case for exemption.

[36] It therefore follows that the review application cannot be considered.

Costs

⁷ 2010 (4) SA 327 CC at 345 [47].

[37] I am not persuaded that there is any reason why I should not exercise my decision in favour of issuing an order that costs should follow the result despite second respondent's election to abide the decision of this court for the reasons stated by second respondent.

Order

[38] The application is dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : Adv: E. Crouse SC
Instructed by : HOWARD COLLEN INC.
11A Shirley Street
Newton Park
GQEBERHA
Ref: (H Collen)
Tel.: 041 – 365 3700

For the 1st Respondent: Adv: L. Gagiano
Instructed by : RUSHMERE NOACH INC.
5 Ascot Office Park
Conyngham Road
Greenacres
GQEBERHA
Ref: Mrs S L Lubbe-Roberts/LH/MAT39113
Tel.: 041 – 399 6735

For the 2nd Respondent: Adv: X. Hilita
Instructed by : MAMATELA ATTORNEYS INC.
C/o VAN HEERDEN ATTORNEYS INC
147 Cape Road
Glendinningvale
GQEBERHA
Ref: LVH/wb/M158
Tel.: 041 – 007 0923

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