

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 98502/2015

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
28/06/19	
DATE	SIGNATURE

In the matter between:

HFS CONSULTING

Applicant

and

L.T.C. HARMS N.O.
(DEPUTY CHAIRPERSON OF THE
APPEAL BOARD OF THE FINANCIAL
SERVICES BOARD)

First Respondent

C DA SILVA N.O.
(DEPUTY REGISTRAR OF THE
FINANCIAL SERVICES PROVIDERS)

Second Respondent

FINANCIAL SERVICES BOARD

Third Respondent

APPEAL BOARD OF THE
FINANCIAL SERVICES BOARD

Fourth Respondent

J U D G M E N T

TEFFO, J:

Introduction

- [1] There are two applications before me. In the first application which I will refer to as the main application, HFS Consulting (*"the applicant"*) seeks to set aside the ruling of the first respondent dated 2 June 2015 on the basis that it is unlawful and unconstitutional. It also seeks ancillary relief which includes amongst others, an order to compel the second respondent to provide reasons for certain decisions, to provide documentary proof of certain allegations and to do so within 10 (ten) days from the date of service of the order. The second application has been launched by the respondents in the main application. It is an application for the rescission of an order that was granted by this court on 20 November 2017 (*"the rescission application"*).
- [2] The applicant in the main application is a consultancy that deals with financial related issues. Mr H F and Mrs S le Roux are partners in the consultancy.
- [3] The first respondent has been cited in his capacity as the Deputy Chairperson of the Appeal Board of the Financial Services Board (*"FSB"*). The second respondent has been cited in his capacity as the Deputy Registrar of the Financial Services Providers at the FSB and the third respondent is a statutory body established in terms of section

2 of the Financial Services Board Act, 70 of 1990 (*"the FSB Act"*) to oversee the activities of the financial institutions (other than banks) and, in particular, to exercise supervision over compliance with laws regulating financial institutions and the provision of financial services. The fourth respondent is a tribunal of the FSB established in terms of section 26A of the FSB Act. For convenience's sake the respondents will be referred to jointly as the respondents and where appropriate they will be referred to separately as the first, second, third and fourth respondents.

- [4] No relief has been sought against the third and the fourth respondents.
- [5] After the main application was served on the respondents, a notice of intention to oppose was filed on behalf of all the respondents.

Subsequently the second respondent filed an answering affidavit. The first respondent did not file an answering affidavit.
- [6] There were numerous attempts by the applicant to obtain default judgment against the first respondent. On the third occasion, counsel was instructed to oppose the application and it was removed from the roll. Ultimately the first respondent filed a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court. I will deal with the notice later in the judgment.

- [7] The main application was set down for hearing on 17 March 2017. At the hearing, the court ordered that the matter be removed from the roll with costs, including costs of senior counsel on attorney and client scale. The reason for the court order was, according to the record, the

fact that the papers were not properly before court in that the indexes were not properly paginated and the court and the respondents' counsel did not have the same bundles of documents. This aspect will further be dealt with later in the judgment.

[8] Subsequent thereto the applicant in the main application launched an application to rescind the order of 17 March 2017.

[9] The application was served at the offices of the respondents' attorneys of record on 20 September 2017. No notice of intention to oppose the application was filed on behalf of the respondents and the applicant enrolled the application in the unopposed motion court on 20 November 2017. The application was heard and the order of 17 March 2017, was rescinded.

[10] After obtaining the order, the applicant filed a notice of set down for the hearing of the main application dated 21 November 2017 for 5 February 2018 and served it at the offices of the respondents' attorneys. The set down prompted the respondents' attorneys to file an application for the rescission of the order of 20 November 2017 on behalf of the respondents.

[11] I was requested by the parties to hear the rescission application first. At the commencement of the proceedings I indicated that given the fact that the two applications were only set down for hearing for two days, I would hear all of them first and give judgment later.

- [12] Before I deal with the rescission application, it is prudent to give the background facts that led to the main application.
- [13] On 20 November 2013 the applicant lodged a complaint with the third respondent against JDG Trading (Pty) Ltd (JDG Trading) detailing certain contraventions which included an illegal insurance business which was allegedly operated in collaboration with RMB Structured Insurance Ltd and RMB Structured Life Limited ("*the Insurers*"). JDG Trading is a furniture retailer and a registered Financial Services Provider (FSP).
- [14] On 14 February 2014 the second respondent declined to pursue the complaint. A letter was addressed to the applicant referring it to the previous similar complaints it had lodged. The second respondent restated his previous findings which were included in a letter to the applicant dated 10 May 2010.
- [15] The applicant then sought to appeal the second respondent's refusal to provide reasons for not pursuing the complaint. On 3 April 2014 the Secretary of the Appeal Board (the Secretary) notified the applicant that the decision of the second respondent was not appealable.
- [16] On 7 April 2014 the applicant referred the decision of the Secretary to the Executive Officer of the third respondent.
- [17] Howie JA, the then Chairperson of the Appeal Board of the FSB, notified the applicant via the Executive Officer of the third respondent

on 14 May 2014 that the decision by the second respondent was not appealable.

- [18] On 29 September 2014 Howie JA instructed the Secretary to request submissions from the applicant and the second respondent regarding the applicant's right of appeal as an aggrieved person.
- [19] On 3 November 2014 the applicant lodged a complaint against Howie JA with the office of the Public Protector.
- [20] Howie JA had retired by then and Harms JA, the current Deputy Chairperson of the Appeal Board and the Appeal Panel, issued a ruling on 2 June 2015 revoking the ruling by Howie JA. The applicant was advised that an appeal hearing would be scheduled to deal with the preliminary points which would relate to whether the appeals by the applicant are proper appeals.
- [21] The applicant seeks to have this ruling set aside by means of a review under the Promotion of Administrative Justice Act, 3 of 2002 (PAJA).

The rescission application

- [22] The parties in this application will for convenience's sake be referred to as referred to in the main application. The application was brought in terms of Rule 42(1)(a) of the Uniform Rules of Court on the grounds that the order of 20 November 2017 was erroneously sought and/or erroneously granted in the absence of the respondents. The respondents also relied on common law for the relief sought.

[23] Although it has always been the stance of the first respondent's attorney that the application that was heard on 20 November 2017, was not served on him and/or the respondents, counsel for the respondents conceded during argument that the application could have been served at his offices. Mr Bloem, the attorney of record of the respondents stated in his affidavit in support of the rescission application that the application was not brought to his attention. It was submitted that the application went astray. Consequently, the respondents did not oppose it and the notice of set down of 20 November 2017 was not delivered at the respondents' attorneys' offices.

[24] Mr Bloem explained in his affidavit that he tried to obtain a copy of the application that was heard on 20 November 2017 to no avail before he filed the application for rescission. He addressed correspondence to the applicant requesting it to furnish him with a copy of the application and he did not receive any response. He also tried the office of the Registrar of this Court and he was not successful. He further stated that at that time he had addressed correspondence to the first respondent informing him that he was waiting for the re-enrolment of the matter by the applicant. He applied for leave to file a supplementary affidavit before the applicant filed its answering affidavit should he be provided with a copy of the application.

[25] Unfortunately, the applicant filed its notice of intention to oppose the application and an answering affidavit late (on 24 January 2018 and 28 February 2018 respectively after having been served with the

rescission application on 6 December 2017). Despite the fact that respondents' attorney of record requested the applicant to provide it with the copy of the application which was heard on 20 November 2016 when it filed its opposition in the application for rescission, the applicant failed to do so. No replying affidavit has been filed. The application only came to the attention of the respondents' attorney of record on 5 February 2018 when the main application was to be heard. He then made copies of the application. The respondents were only able to file their supplementary founding affidavit on 2 March 2018 together with an application for leave to file it.

[26] Although the applicant did not file any opposing papers to the respondents' application for leave to file a supplementary founding affidavit, it opposed the application on the basis that only three applications are allowed to be filed in terms of the Rules of Court and that the filing of the application was an abuse of the court process. Having considered the application and after hearing counsel for the respondents and Ms Le Roux on behalf of the applicant, I found that it was not in the interest of justice to allow the filing of the supplementary founding affidavit. I then proceeded to hear the application without the supplementary founding affidavit.

[27] The respondents contend that after the order of 17 March 2017 and prior to the order of 20 November 2017, the applicant did not address the issues that led to the removal of the matter from the roll before it re-enrolled the matter. The application of 20 November 2017 constituted

an appeal of the order of 17 March 2017. The court on 20 November 2017 was not competent to set aside an order that had been executed. The court also substituted the order of 17 March 2017 with one in terms of which the respondents have been ordered to pay costs on a scale between attorney and client. It was submitted that Ms Le Roux who argued the application on 20 November 2017 misled the court to rescind the order of 17 March 2017 in that she did not disclose the correct facts of what transpired in court on 17 March 2017. Further to the above, it was submitted that the applicant should be ordered to pay costs on a punitive scale on the basis that Ms Le Roux deliberately misled the court when she argued the application. She had accused the Judge who heard the matter on 17 March 2017 of bias and had repeatedly and in many ways accused counsel for the respondents and their attorney and had defamed them in the process. It was submitted that the deponent to the founding affidavit in support of the application had perjured himself. It was further argued that the applicant should be penalised for the way it handled the application. In support of his submissions, counsel for the respondents referred me to the typed record of the proceedings that were heard on 17 March 2017 respectively and 20 November 2017 which I will deal with later in the judgment.

- [28] In response to the allegations the applicant contended that the application for rescission does not disclose a cause of action. It should be dismissed with costs. It denied the allegations that the bundle of documents that were before the court on 20 November 2017 were not

proper as alluded to by the respondents' counsel. The applicant criticised the respondents for not opposing the application that was heard on 20 November 2017 despite the fact that the application was served on their attorneys of record. It was submitted that the court granted an order after having satisfied itself that the papers before it had been in order. It was further submitted that the application was vexatious.

[29] The issue for determination is whether the order that was granted on 20 November 2017 in the absence of the respondents, had been erroneously sought and granted within the prescripts of Rule 42(1)(a).

[30] Uniform Rule 42(1)(a) provides:

"The court may, in addition to any powers it may have mero motu or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[31] The law governing an application for rescission under Uniform Rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission.¹ It is not necessary for a party to show good cause under the subrule.² Generally a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of

¹ *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G.

² *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA (ECP) at 597I-598B.

the judgment and which would have induced the court, if aware of it, not to grant the judgment.³

[32] On 17 March 2017 the following order was granted:

"The matter be and is hereby removed from the roll with costs, including costs of senior counsel on the scale between attorney and client."

[33] On 8 May 2017 Judge furnished reasons for the abovementioned order. At paragraphs 8 to 15 of the reasons, he explained why he granted the order. In his view the respondent did not comply with the practice directives of this Court regarding the pagination and proper indexing of the papers. Despite having been properly alerted by the attorneys of the respondents that there were numerous problems in the papers, the applicant failed to reply. He further stated that the respondents did not receive a properly indexed and paginated Volume 3 and the court was not in possession of a properly indexed Volume 5.

[34] In the application that was heard on 20 November 2017 the following allegations have been made in the founding affidavit:

"5.215 During the entire hearing the Honourable Acting Judge failed to identify a single incidence of an error in indexing or pagination with reference to the court file. Neither did the Honourable Acting Judge proffer a single such error to Ms Le Roux for clarification or for correction on the court file."

5.219 Notwithstanding the fact that the Honourable Acting Judge failed during the hearing to identify a single index or pagination error

³ *Erasmus: Superior Court Practice* 2 ed (Revision Service 1, 2015) Vol 2 at D1-567. See also *Naidoo v Matlala* No 2012 (1) SA 143 (GNP) at 153C.

with reference to the court file, failed to stipulate a single such error to be corrected by Applicant in order to again enrol the matter for hearing and which resulted in a court order without legal certainty, as well as the fact that the eventual reasons as provided, related to alleged errors incapable of being corrected on the court file and, as a result, the court order being unenforceable, the Honourable Acting Judge came to the inexplicable and unwarranted conclusion that this is a case for a punitive costs order.

5.222 Such conduct gives the unfortunate impression of the court having selectively denied the existence of the evidence before the court.

5.224 In view of the said erroneous procedure as applied by the Honourable Acting Judge, the court order is subject to an application for rescission."

[35] Ms Le Roux conceded during argument that the Judge raised concerns that he was not in possession of Volume 5 of the bundle of documents before him on 17 March 2017. She further conceded that a day prior to the hearing of the matter, she went to the Judge's registrar to uplift the court file. She removed the index with an undertaking to return it to the Judge's clerk in the afternoon. The reason for that was to retype the index. When she returned to the Judge's clerk, he/she refused to accept the newly typed index after informing her that the Judge had taken the file and had left the building. She submitted that she had applied for the rescission of the order because she was under the impression that there had been a procedural mistake. A lot had been said about Volume 3 of the papers which I find irrelevant in that Ms Le Roux had ultimately conceded that what she had submitted before the

court on 20 November 2017 which had resulted in the rescission of the order of 17 March 2017, was not what had transpired in court on that day.

[36] It is clear from the papers filed and the record of the proceedings of 17 March 2017 and 20 November 2017 that the court that heard the application on 20 November 2017 had been misled about what had transpired in court on 17 March 2017. Had the correct set of facts been placed before the court on 20 November 2017, the court would not have rescinded the order that was granted on 17 March 2017. The court that heard the matter on 20 November 2017 had not been fully informed of what had happened on 17 March 2017. Ms Le Roux had an obligation to disclose sufficient relevant facts to the court that heard the matter on 20 November 2017 as the application was not opposed. The court that heard the application regarded it as a simple unopposed application while it was not.

[37] The order of 17 March 2017 had been rescinded under Uniform Rule 42(1)(a) when there had been representation on behalf of the applicant on that day. Uniform Rule 42(1)(a) was therefore not applicable.

[38] After receiving the court order of 17 March 2017 and the reasons for the order, it was not competent for the applicant to launch an application for a rescission of the order. The applicant had to deal with the concerns which were raised by the court, re-arrange the papers and re-enrol the main application for hearing. The order of 17 March

2017 was not a final order. It was an interim order which could not be rescinded.

[39] I am persuaded that the order of 20 November 2017 was erroneously sought and granted in the absence of the respondents. It should therefore be rescinded in terms of Uniform Rule 42(1)(a).

[40] The respondents had also sought an order that the notice of set down dated 21 November 2017 be set aside. It is my view that the setting aside of the above set down is of no consequence in that I had been able to hear the main application and the rescission application together.

[41] There was also an application for striking out certain parts of the applicant's answering affidavit. Counsel for the respondents did not pursue the application but referred the court to the transcribed record of the proceedings of 17 March 2017 and 20 November 2017 and asked for an order that the applicant should be penalised with a punitive costs order for saying unpalatable things about the Judge who granted an order against the applicant on 17 March 2017 and blaming him for what had transpired in court on that day.

[42] It suffices from the subparagraphs referred to *supra* (at paragraph [34] of the judgment) that Ms Le Roux who had argued the rescission application on 20 November 2017 had blamed the Judge who had granted the order of 17 March 2017 of what had transpired in court on that day. The transcribed record of that day and the reasons that had been provided for the order, do not support the allegations that had

been made by Ms Le Roux in court on 20 November 2017. They are also not supported by the concessions she had made when the rescission application was argued before me. In view of the allegations that had been made by Ms Le Roux in court on 20 November 2017 and the manner in which the application had been handled, I am persuaded to order the respondent to pay costs on a punitive costs order.

The main application

[43] The applicant contends in her papers that the ruling by the first respondent was issued without any legislative empowerment 13 (thirteen) months subsequent to the applicant's notice of appeal. It was submitted that the ruling denied the applicant the right to exhaust the appeal procedures as stipulated in section 7(2)(a) of PAJA and the right to obtain reasons from the decision-maker, the second respondent. The applicant further submitted that the intervention in the appeal procedures by the first respondent's ruling, violated its right to fair administrative procedure in terms of section 33 of the Constitution. It therefore did not have any other alternative but to approach this Court with an application for an order to declare the ruling of the first respondent unlawful and unconstitutional.

[44] Allegations have been made that the ruling by the first respondent, prevented the applicant from utilising the peremptory procedures stipulated in the Regulations. Furthermore, that there is no empowerment provided for in the FSB Act and the Regulations enabling the first respondent to intervene in the appeal procedures, and

neither is there an inherent jurisdiction in section 26B(1)(a) 6 and 7 of the FSB Act to issue the ruling. According to the applicant, the ruling provides for the points *in limine* to be heard by a panel prior to the internal remedy having been exhausted. These points *in limine* relate to the applicant's rights which are whether it has *locus standi*, whether its request for reasons is valid and whether it has the right to obtain reasons. It was submitted that a hearing on these rights involve a review of an administrative action for which the Appeal Board is only empowered to do subsequent to the internal remedy having been exhausted.

[45] Further contentions made were that it is the applicant as the appellant that drives the appeal, that decides whether it disagrees with a decision and thus determines whether it is aggrieved as stipulated in section 26(1) of the FSB Act and not the Appeal Board. The Appeal Board is only empowered to issue a judgment or a ruling in terms of section 26 B(15) of the FSB Act and that can only be done subsequent to the internal remedy having been exhausted.

[46] As regards the second respondent, it was contended that she had failed to respond to the applicant's notice of appeal in terms of Regulation 2.1 dated 28 March 2014 against her decision and provide a decision. She had kept quiet for about two years until she was served with the current application. She had only responded with an answering affidavit. The applicant further contended that the second respondent's decision was that all premiums which had been charged

by JDG Trading, had been paid over to the insurers. According to it, the decision that had been taken by the second respondent, was a denial that JDG Trading operated an illegal insurance business. It was submitted that the second respondent had denied the liability of JDG Trading's financial statements reflecting that all such premiums were recorded as insurance income but had been unable to provide documentary evidence to the contrary. The applicant further submitted that the second respondent failed to comply with her statutory obligation to provide reasons in terms of Regulation 2(3).

[47] The Executive Officer of the third respondent (the Executive Officer) had been criticised for supporting the decisions of the Secretary and the second respondent and failing to address the issue of the Secretary's empowerment to make the decision as per her letter dated 3 April 2014. It was contended that the second respondent declined to entertain a valid complaint which was lodged with the third respondent.

[48] In the answering affidavit filed by the second respondent, it was contended that the applicant's appeal before the FSB Appeal Board is time barred and the Appeal Board does not have the power to condone non-compliance thereof. This renders the current application moot. It is further contended that the applicant has launched the main application as a review application in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The application is time barred in that the court only has the power to entertain the application if the period of 180 days stipulated in section 7(1)(b) of PAJA is extended by means of a

condonation application. The applicant did not file an application for condonation.

[49] According to the second respondent, the appeal by the applicant is fatally defective and the Appeal Board should rule on this. It was contended that the applicant attempts to circumvent a ruling by the Appeal Board by seeking the relief it seeks in the current application.

[50] It was submitted that the issues for determination by the Appeal Board in the pending appeal relate to the provision of reasons by the Registrar and whether the appeal is valid or not. They overlap with the relief sought in these proceedings. It is contended that the applicant seeks to circumvent the appeal process by seeking an order from the court to compel the second respondent to provide reasons and documents in response to the appeal under circumstances where the provision of reasons as contemplated in Regulation 2(3) of the Regulations and documents for the Registrar's decision are not required.

[51] The second respondent further contended that her refusal to further pursue the applicant's complaint was not a decision as contemplated in section 39 of the FAIS Act. The applicant may be a disgruntled person but that does not amount to an "*aggrieved person*" for purposes of an appeal. An aggrieved person relates to a person who has a legitimate legal grievance. It was further contended that the applicant lacks *locus standi* to pursue the appeal in that the second respondent's decision has not adversely affected any rights of the applicant.

The condonation application

[52] For convenience's sake the parties in this application have been referred to as in the main application. As alluded to earlier in the judgment, the first respondent did not file an answering affidavit to the main application. The answering affidavit was only filed by the second respondent. The attorneys for the applicant enrolled the main application against the first respondent for hearing on 18 August 2016 in the unopposed motion court. The notice of set down was served on the respondents' attorneys on Friday, 12 August 2016. The respondents' attorneys served and filed a notice in terms of Rule 6(5)(d)(iii) on the applicant's attorneys on 17 August 2016. The main application was therefore postponed *sine die* on 18 August 2016.

[53] It was submitted on behalf of the first respondent that the condonation application was only launched at the instance of the applicant's attorneys. It is contended that the notice in terms of Rule 6(5)(d)(iii) was filed as a direct result of the applicant's enrolment of the application against the first respondent only, under circumstances where the whole application (the main application) is being opposed and the issues are not divisible. The main application against the first respondent was enrolled on short notice and the first respondent's notice in terms of Rule 6(5)(d)(iii) was served and filed within two days of the enrolment of the application. There was, according to the first respondent, no delay at all.

[54] Further contentions made were that the opposing affidavit filed by the second respondent on 11 February 2016 was in opposition of the entire application and all the relief sought by the applicant. No replying affidavit had been filed in the main application. Since May 2016 the parties' legal representatives have been in discussion about a possible settlement of the matter. The discussions thereof have been with the applicant's erstwhile attorneys of record, Finck Attorneys. The applicant's new attorneys of record, Laas Döman Attorneys, came on record in June 2016 while Finck Attorneys were still on record. Finck Attorneys only withdrew as the applicant's attorney of record in August 2016. The discussions did not involve the first respondent as he has no personal interest in the outcome of litigation save for the issue of costs. No formal steps had been taken by either of the parties subsequent to the filing of the answering affidavit by the second respondent. The notice in terms of Rule 6(5)(d)(iii) could not be filed at an earlier stage because all the issues had been dealt with in the answering affidavit filed by the second respondent and the issues are indivisible. The same issues have to be debated again in the case against the second respondent. The applicant has therefore not suffered any prejudice.

Opposition of the condonation application

[55] The applicant opposes the condonation application for the late filing of the first respondent's notice in terms of Rule 6(5)(d)(iii) on the following grounds: That the main application was served on the first respondent

personally on 10 December 2015. A notice of intention to oppose the main application was served and filed on behalf of all the respondents on 6 January 2016. No answering affidavit was served and filed by the respondents and the applicant set the main application down for hearing on 28 January 2016 in the unopposed motion court. On 27 January 2016 the respondents' attorneys sought an indulgence until 29 January 2016 from the applicant's attorneys to file the opposing papers. The main application was therefore removed from the roll and the costs were reserved. The respondents again failed to file their opposing papers by 29 January 2016 and the main application was again set down for hearing on 12 February 2016 in the unopposed motion court.

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- [56] On 11 February 2016 an answering affidavit by the second respondent was served and filed. The main application was then removed from the roll on 12 February 2016.
- [57] As a result of the first respondent's failure to file his opposing papers, Laäs Döman Attorneys, the applicant's erstwhile attorneys who took over from Finck Attorneys, served a notice of set down on the respondents' attorneys on 12 August 2016 stating that the application against the first respondent was enrolled for hearing on 18 August 2016. A notice in terms of Rule 6(5)(d)(iii) was served and filed on 17 August 2016 without an application for condonation. By agreement between the parties, the application was postponed and costs were reserved.
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- [58] The application for condonation was served on the applicant's erstwhile attorneys Laäs Döman Attorneys on 30 August 2016.

Degree of lateness

- [59] The applicant contends that the first respondent had failed to file his opposing papers for a period that exceeded six months. He notified the applicant of his intention to oppose the application on 6 January 2016. He had until 26 January 2016 to file his opposing papers. The notice in terms of Rule 6(5)(d)(iii) was only served on 17 August 2016 without an application for condonation. The application for condonation was eventually served on 30 August 2016 and the period from 26 January 2016 to 17 August 2016 is 29 weeks. The applicant further submitted that the affidavit in support of the condonation application did not stipulate the period of delay.

Explanation for the delay

- [60] The fact that Mr Bloem deposed to an affidavit in support of the condonation application, and that the allegations thereof were not confirmed by the first respondent was criticised. The applicant relied on the judgment of *Joni and others v Servest (Pty) Ltd t/a Fica Quality Cleaning Services*⁴ in support of its contention.

- [61] It was contended that the affidavit of Mr Bloem is replete with contradictions. According to him there was no delay in filing the notice in terms of Rule 6(5)(d)(iii) and as a result the period of delay was not

⁴ (C833/05 [2011] ZALCCT 19 (16 August 2011))

stipulated. The applicant submitted that the averments made on behalf of the first respondent in support of the condonation application, do not reflect a *bona fide* application for condonation. It was contended that the allegations by Mr Bloem that there was no unreasonable delay in filing the notice in terms of Rule 6(5)(d)(iii) on 17 August 2016 are contradictory to his earlier allegations that there was no delay in filing the notice.

- [62] The allegations that the Rule 6(5)(d)(iii) notice could not have been filed earlier because the second respondent's answering affidavit dealt with the entire application were denied. It was contended that the first respondent did not file an affidavit confirming that the second respondent's affidavit was also filed on his behalf and it was not mentioned anywhere in the second respondent's affidavit that the affidavit was also deposed on behalf of any other respondent, including the first respondent. The affidavit confirms that the second respondent's involvement originates from her position as Deputy Registrar of the FSP. A submission was made that the answering affidavit by the second respondent, does not reflect any contentions to rebut the applicant's allegations in respect of the first respondent's ruling of 2 June 2015. It was further submitted that it would be improper and impossible for an employee of the FSB to proffer contentions as to the validity of a ruling or judgment issued by the Appeal Board, whose very purpose and function as an independent and impartial tribunal is to judicially review administrative actions in terms of PAJA.

- [63] The applicant contended that the notice in terms of Rule 6(5)(d)(iii) has the effect that Mr Bloem could not, at any rate, have made a contention of reliance on the answering affidavit of the second respondent. The first respondent had failed to give notice of his intention to raise questions of law. He gave notice on 6 January 2016 to oppose the application and to deliver an answering affidavit in terms of Rule 6(5)(d)(i) and (ii).
- [64] It was contended that the allegation by Mr Bloem that the first respondent would not have opposed the matter because he has no personal interest in the outcome thereof, as Deputy Chair of the Appeal Board, he is never personally involved and does not oppose matters or file affidavits, and that had it not been for the prayer for costs, he would not have opposed the matter, are direct contradictions to his notification on 6 January 2016 to oppose the matter and to file an answering affidavit.
- [65] It was submitted that Mr Bloem's founding affidavit does not provide any explanation for the first respondent's failure to file an answering affidavit as he had undertaken to do.
- [66] It was contended that Mr Bloem's affidavit does not support the request for condonation as prayed for in the application.

Prospects of success

- [67] The following submissions were made in this regard: Mr Bloem's affidavit in support of the application for condonation for the late filing of

the Rule 6(5)(d)(iii) notice, does not reflect a single contention as to the prospects of success with regard to the questions of law referred to in the notice.

The importance of the case

[68] The applicant contends that Mr Bloem's affidavit does not reflect any explanation as to the importance of the case, such as, why the first respondent regards it as important to have issued a ruling of 2 June 2015, why the first respondent regards it as important that the court should find its ruling of 2 June 2015 to be lawful, why the first respondent regards it as important for the applicant not to be allowed to utilise the prescribed appeal procedures, why the first respondent regards it as important for second respondent not to be obliged to provide reasons for her decisions in terms of Regulation 2.3 and thus section 33 of the Constitution, and why he regards it as important for the Appeal Board not to be subjected to section 8(1)(d) of PAJA in judicially reviewing an administrative action, including the rights of the parties, subsequent to the appeal procedures having been exhausted.

Prejudice

[69] The allegations that the applicant did not suffer prejudice as a result of the delay by the first respondent to file opposing papers are denied. The applicant contends that it has suffered prejudice as a result of the delay thereof for over a period of 29 weeks, which included the repeated enrolment of the matter in the unopposed motion court for

which Mr Bloem failed to provide any plausible and reasonable explanation.

- [70] It was further contended that Mr Bloem's affidavit filed on behalf of the first respondent, does not give any explanation for any prejudice that the first respondent may suffer should the application for condonation not succeed. Instead, the affidavit states that the first respondent does not have any interest in the outcome of the litigation.

The law

The condonation application

- [71] Courts have a discretion whether or not to grant condonation and the discretion thereof, must be exercised judicially on a consideration of the facts of each case.⁵ In essence, it is a matter of fairness to both parties.⁶

- [72] Factors which the courts have to consider in an application for condonation are the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief sought, the other party's interest in finality, prejudice to the other side, the convenience of the court, as well as any other relevant factors.

⁵ It is ever the court's duty to do justice between man and man. See *Oriani-Ambrosini MP v Sisulu MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC).

⁶ *Cairn's Executors v Gaam* 1912 AD 181.

- [73] In *Ferris v First Rand Bank Ltd*,⁷ the Constitutional Court held that lateness is not the only consideration in determining whether an application for condonation may be granted. It held that the test for condonation is whether it is in the interest of justice to grant it and in this regard, the applicant's prospects of success and the importance of the issue to be determined are relevant factors.

Analysis

- [74] The main application consists of the founding affidavit, the answering affidavit by the second respondent, the notice in terms of Rule 6(5)(d)(iii) filed by the first respondent, the condonation application for the late filing of the Rule 6(5)(d)(iii) notice and the application to have certain paragraphs of answering affidavit to the condonation application struck out.

- [75] Counsel for the respondents has abandoned the application to strike out certain paragraphs of the answering affidavit in the condonation application. I will therefore first deal with the application for condonation.

The condonation application

- [76] The factors to be considered in an application for condonation are not individually decisive. They are interrelated and must be weighed one against the other.

⁷ 2014 (3) SA 39 (CC) at 43G-44A and the cases referred to.

Degree of lateness

[77] While the applicant contends that the notice in terms of Rule 6(5)(d)(iii) was filed 29 weeks late and that the first respondent was obliged to file the answering affidavit subsequent to filing the notice to oppose the main application, the first respondent disagrees. He contends that the answering affidavit filed by the second respondent dealt with the issues at hand. The issues are indivisible and the affidavit was filed on behalf of all the respondents after the notice to oppose was filed on behalf of all the respondents. It was submitted that the notice in terms of Rule 6(5)(d)(iii) was only filed 2 (two) days after the first respondent's attorneys were served with a notice of set down for the enrolment of the application against the first respondent in the unopposed motion court at the instance of the applicant's erstwhile attorneys, Laäs Döman Attorneys. It was argued on behalf of the first respondent that the notice was not necessary in that the first respondent was not obliged to file an answering affidavit as alluded to by the applicant.

[78] On page 358 of the bundle of documents, vol. 4 par 81, Mr H F le Roux concedes that the matter is indivisible.

[79] It is clear from the papers filed of record that the first respondent is the Deputy Chairperson of the fourth respondent and the Chairperson of the Appeal Panel which would still be seized with the appeal the applicant intends pursuing. He would not, on that basis, file affidavits in opposition of applications of this nature as that would be an invitation for him to descend into the arena as contended to by the respondents.

It is evident from the papers filed of record that the first respondent was not involved in the matter until he issued the ruling. The matter was dealt with by the second respondent. She was the correct party to file an answering affidavit which dealt with the issues at hand. The issues raised revolve around the same issues that have been raised by the second respondent in the main application and applies to all the respondents. Had the first respondent also filed an answering affidavit, the issues would have been repeated. The submissions made lose sight of the roles each of the respondents play in their different capacities.

- [80] There is therefore, merit in the submissions made on behalf of the first respondent. The notice in terms of Rule 6(5)(d)(iii) was filed on 17 August 2012 without an application for condonation. The condonation application was filed on 30 August 2012. The delay thereof was not unreasonably long as alluded to by the applicant.

Explanation for the delay

- [81] The applicant has not contended that Mr Bloem was not duly authorised to oppose the main application on behalf of the respondents including the first respondent.⁸ The notice in terms of Rule 6(5)(d)(iii)

⁸ See *Ganes and Another v Telecom Namibia Limited* 2004 (3) SA 615 (SCA) at par [19] where Streicher JA stated:

"In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised ... In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided."

addressed questions of law. It had been correctly submitted on behalf of the first respondent that by virtue of the position he holds at the Appeal Board of the FSB, the first respondent did not have to file an affidavit in opposition of matters of this nature to avoid descending into the arena. Mr Bloem, his attorney, was the person competent to depose to an affidavit in support of the application for condonation. In my view, it was not necessary for the first respondent to confirm the contents of Mr Bloem's affidavit. The judgment of Joni and others⁹ relied on by the applicant, is distinguishable. It follows that the applicant's assertion that the first respondent was required to confirm Mr Bloem's authority to depose to an affidavit in support of the condonation application on his behalf, has no merit.

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- [82] Mr Bloem explained that the notice in terms of Rule 6(5)(d)(iii) was filed 2 (two) days after he had been served with the notice of set down enrolling the matter in the unopposed motion court on 18 August 2016. Immediately thereafter, at the instance of the applicant's erstwhile attorneys, he filed an application for condonation. He explained why he did not find it necessary to file the notice in terms of Rule 6(5)(d)(iii) earlier in that according to the first respondent, the affidavit filed by the second respondent dealt with all the issues raised in the entire application. The Rule 6(5)(d)(iii) was only filed after Mr Bloem realised that the applicant was insistent in obtaining judgment against the first respondent. It cannot, therefore, be said that the period of delay was
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See also *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J, *Unlawful Occupiers, School Site of City of Johannesburg* 2005 (4) SA 199 (SCA) at paras [14]-[16].

⁹ *Supra*

not stipulated. For the same reason, the allegation that there has been no explanation why the first respondent did not file an answering affidavit, has no merit.

[83] Issues had been raised that Mr Bloem made contradictory statements in his affidavit in support of the application for condonation, in that while he mentioned that there was no delay in filing the notice in terms of Rule 6(5)(d)(iii), he also mentioned that the delay was not unreasonable. Mr Bloem's affidavit should be read in context. His explanation is that while according to the first respondent, it was not necessary to file the notice in terms of Rule 6(5)(d)(iii), he filed it eventually due to the insistence of the applicant in trying to obtain default judgment against the first respondent. The notice was filed 2 (two) days after he was served with the notice of set down of the main application against the respondent in the unopposed motion. The application for condonation was filed on 30 August 2016. According to Mr Bloem there was no delay in filing the notice and if there was a delay, the delay was not unreasonably long. I therefore do not find any contradiction in the statements made.

[84] The remainder of the issues are a repetition. The papers filed of record indicate that a notice of intention to oppose the main application, was filed on behalf of all the respondents. The first respondent has never individually undertaken to file opposing papers. The issues raised by the second respondent such as the contention that the main application is time barred, are applicable to all the respondents. It is my view that

the reminder of the issues raised by the applicant, do not have any merit.

Prospects of success

[85] The notice in terms of Rule 6(5)(d)(iii) reads:

"Kindly take notice that the first respondent gives notice of questions of law militating against the granting of the relief sought by the applicant.

1. The applicant seeks an order that the first respondent's ruling of 2 June 2015 be declared unlawful and unconstitutional and be set aside. The relief includes a constitutional issue which requires compliance with Rule 16A. There has been no such notice.

2. The first respondent's ruling was to the effect that:

2.1 He revoked a prior ruling by Howie JA (acting as Chairperson of the Appeal Board) to the effect that the applicant's appeal related to a decision which is not appealable and that he lacked locus standi;

2.2 The first respondent's ruling provided the applicant with the opportunity of a hearing on the preliminary issues relating to the appealability of the second respondent's decision and the appellant's locus standi.

2.3 In making the aforesaid ruling the first respondent acted in terms of sec 26B(1)(a), sec 26B(6) and sec 26B(7) of the Financial Services Board Act, 97 of 1990. The ruling is therefore supported by law and does not lack legality.

2.4 The applicant's review of the first respondent's ruling constitutes a review of an administrative action in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), which review had to be brought in terms of sec 7 without delay and not later than

180 days from the date from which the applicant became aware of the decision. The review is time barred and no condonation for non-compliance with the time periods has been sought.

2.5 The claim for costs is not competent in law. In making the aforesaid ruling the first respondent was exercising statutory powers in terms of sec 26B(1)(a), (6) and (7) of the Financial Services Board Act, 97 of 1990 in his capacity as Deputy Chair of the Appeal Board. The first respondent, in making the ruling, falls within the indemnification in sec 23 of the FSB Act and no allegations have been made to the contrary."

[86] The applicant contended that Mr Bloem's affidavit in support of the application for condonation, did not address the prospects of success with regard to the questions of law referred to in the notice in terms of Rule 6(5)(d)(iii). On behalf of the first respondent, Mr Bloem correctly contended that the success or otherwise of the legal contents set out in the notice in terms of Rule 6(5)(d)(iii) are all matters for legal argument. They cannot be dealt with in an affidavit but in the heads of argument.

[87] The applicant has criticised the issuing of the ruling by the first respondent that it is an unlawful interference with the appeal, it has set aside the regulation, it is an impermissible review, it is an initiation of the appeal by the first respondent, etc. According to the applicant, the hearing had to precede the issuing of the ruling. The applicant contends that the ruling reflects a misrepresentation and a unilateral decision by the first respondent and *mala fides* by the first respondent. In my view, there is no basis for this criticism.

[88] It was submitted on behalf of the first respondent that the ruling issued by him is a practice directive and that the issuing thereof is an exercise of a statutory power by the Appeal Board in terms of section 26B(7) to regulate its own processes and determine the procedure for hearing the appeal. It is a procedural ruling which is supported by law and does not lack legality as contended by the applicant.

[89] In terms of the provisions of section 26B(7) the Chairperson of a panel subject to this Act, determines the procedure for hearing the appeal.

[90] It was argued on behalf of the first respondent that the ruling thereof tends to offer an opportunity to the applicant to be heard. Without the ruling, there would be no hearing. It was pointed out that if the ruling granted by the first respondent was to be set aside, Howie J's ruling would stand. As per Howie J's ruling, the applicant lacks *locus standi* to appeal. The position would then be that the applicant would not have an appeal hearing before the FSB Appeal Board. It will be without any further remedy in terms of PAJA as any review in terms thereof, has lapsed. If the applicant sought to pursue review proceedings in the High Court, such proceedings should have been instituted without undue delay and not later than 180 days after the decision of the second respondent not to give reasons to it.

[91] There is merit in the submissions made on behalf of the first respondent.

[92] I find that there are prospects of success in the application for condonation.

The importance of the case

[93] The issues raised by the applicant in this regard are without substance. Without repeating what has been said above, it is clear from the submissions made on behalf of the first respondent that the ruling was issued in order to revive the appeal by the applicant before the appeal board. The ruling thereof, does not lack legality as contended to by the applicant. It was therefore important to issue such a ruling.

Prejudice

[94] The first respondent has explained its position regarding the matter. The respondents had long filed their notice of intention to oppose the main application. The second respondent's affidavit which addresses the allegations made in the main application, had been filed as early as 11 February 2016. The insistence by the applicant to enrol the application against the first respondent in the unopposed motion court because of his alleged failure to file an answering affidavit caused the delay according to the first respondent. No replying affidavit had been filed in this matter. The allegations made by Mr Bloem that after the filing of the answering affidavit, the attorneys of the respective parties had discussions about the matter to try and settle it, were not contested in the answering affidavit. There can be no doubt that no prejudice has been suffered by the applicant in this regard.

[95] The first respondent is merely showing the court that it has always been his intention to oppose the main application. If this application is not granted, the applicant will still persist with the enrolment of the main

application in the unopposed motion court and the first respondent will suffer prejudice if an order is granted against him in circumstances where the main application against all the respondents is indivisible.

[96] Under the circumstances I am of the view that it is in the interest of justice that I should grant condonation for the late filing of the notice in terms of Rule 6(5)(d)(iii).

The main application

The Rule 6(5)(d)(iii) notice

[97] The applicant has filed a Rule 16A notice. Paragraph 1 of the notice has been addressed.

[98] The same issue that was raised by the second respondent in her answering affidavit regarding the fact that the application by the applicant was launched more than 180 days after the date of the decision by the second respondent has been raised in the Rule 6(5)(d)(iii) notice. It was argued that no application for condonation has been filed and that without an extension of the 180 days in terms of section 9(1)(b) of PAJA, the court is precluded from entertaining the application.

[99] Where PAJA is applicable, the common law delay rule finds its basis in PAJA.¹⁰ Section 7(1) of PAJA provides:

¹⁰ See *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited (OUTA v SANRAL)* [2013] 4 All SA 639 (SCA) paras [23] to [26]; *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] 2 All SA 462

"(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."

[100] Section 9(1) provides that the period of 180 days referred to in section 7 may be extended for a fixed period by agreement between the parties or by a court on application by the person concerned. In terms of section 9(2) the court may grant an application in terms of section 9(1) where the interests of justice so require. In *OUTA*¹¹ the court referred to the two-stage enquiry at common law and said:

"Up to a point, I think, s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters."

¹¹ *OUTA v SANRAL* par [26]

[101] In *Aurecon South Africa (Pty) Ltd v Cape Town City*¹² the court held that section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review. The court further held that the plain wording of these provisions simply does not support the meaning ascribed to them by the court *a quo*, that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity.

[102] The applicant seeks to review and set aside the ruling issued by the first respondent on 2 June 2015 in terms of the provisions of PAJA. The ruling came to the applicant's attention on 2 June 2015. The application was only issued on 9 December 2015 more than 180 days after the applicant had acquired knowledge of the ruling of the first respondent. In terms of the decision of *Aurecon*¹³ the 180 days referred to in section 8(1) of PAJA starts running from the date the party seeking to review the decision had acquired knowledge of the decision or ought to have acquired it and not from the date upon which the applicant became aware of the decision being tainted. There is no agreement between the parties for the extension of the period of the 180 days as required by section 9(1) of PAJA and neither is there an application for the extension. It therefore follows that this Court has no authority to entertain the review application at all.

¹² 2016 (2) SA 199 (SCA) par [16] p 207H to p 208A

¹³ *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA)

Costs

[103] Counsel for the respondents raised some concerns regarding certain averments that have been made in the applicant's answering affidavit to the first respondent's condonation application. Initially the first respondent sought to strike out the paragraphs where the averments had been made. The application was abandoned during argument. The paragraphs referred to are the following:

Par 55.20.2

"On this basis alone, the ruling reflects a misrepresentation and a unilateral decision by First Respondent."

Par 55.21.4

"From this it is evident that the Office of the Public Protector was deliberately brought under the wrong impression that the ruling was lawful and enforceable. First respondent failed to notify said office of his subsequent clarification of the ruling being simply a practice directive."

Par 55.28

"The ruling and its procedures are unlawful and reflects on conduct of a mala fide nature and certainly not in compliance of the requirement for impartiality."

Par 56.25

"The ruling issued by First Respondent is simply the product of an unlawful conduct ..."

[104] Submissions were made that the allegations are vexatious and scandalous. They are without any factual basis. It was contended that

the first respondent had been accused of deliberately misleading the Public Protector, being *mala fide* and that the allegations thereof are defamatory of the first respondent. On this basis, counsel for the respondents asked for costs on a punitive scale.

[105] This matter was enrolled to be heard for two days. After having heard arguments on the first day, on the second day while the matter was still being argued, Mrs Le Roux decided no longer to argue the matter further on the basis that she was anticipating the court's ruling on the rescission application. She and Mr Le Roux then walked out of the court room. Mrs Le Roux indicated that she was no longer ready to continue to argue the matter further. The court continued hearing the arguments on behalf of the respondents.

[106] This conduct of Ms Le Roux prompted counsel for the respondents to ask for costs against Mr and Mrs Le Roux jointly and severally.

[107] The concerns raised on behalf of the respondents regarding the averments made in the applicant's answering affidavit opposing the first respondent's condonation application have merit taking into account the serious nature of the allegations made against the first respondent. Litigants should refrain from making allegations of this nature in their papers. I am inclined under the circumstances to order the applicant to pay costs of opposing the condonation application on attorney and client's scale.

[108] The court takes displeasure at Mrs Le Roux's conduct for not finalising her argument and leaving the court room with her husband while the

proceedings were still on. This kind of conduct should be discouraged. Mrs Le Roux who is not a legal practitioner, and has no clue as to how legal proceedings are conducted, and also lacks the requisite decorum to address the court, was effectively disrespectful. The conduct thereof warrants a cost order against the applicant together with Mr and Mrs Le Roux jointly and severally, the one paying the other to be absolved.

[109] In the result the following order is made:

1. The application for the rescission of an order that was granted by this Court on 20 November 2017 is granted with costs.
2. Condonation for the late filing of the Rule 6(5)(d)(iii) notice by the first respondent is granted with costs on attorney and client scale.
3. The application to review and set aside the ruling of 2 June 2015 by the first respondent is dismissed.
4. The applicant together with Mr and Mrs Le Roux are ordered to pay the costs of the review application jointly and severally, the one paying the other to be absolved.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORI

APPEARANCES

For the applicant	S le Roux acting in person
For the respondents	E C Labuschagne SC Rooth & Wessels Inc
Heard on	18 February 2019
Handed down on	28 June 2019

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**THE REGISTRAR OF THE HIGH COURT
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AND TO:

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