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

CASE NO: 203/2022

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED:

DATE: 18 February 2024

SIGNATURE

In the matter between:

N S[...] obo CJW S[...]

Applicant

and

PROFESSIONAL PROVIDENT FUND SOCIETY

First Respondent

SANLAM LIFE INSURANCE LIMITED

Second Respondent

PENSION FUND ADJUDICATOR

Third Respondent

FINANCIAL SERVICES TRIBUNAL AND

DEPUTY CHAIRPERSON LTC HARMS

Fourth Respondent

E[...] S[...]

Fifth Respondent

JUDGMENT

(The matter was heard /argued in open court on 14 November 2023, and having heard both counsel for the parties, judgment was reserved. The reserved judgment was uploaded onto CaseLines and the date of uploading onto CaseLines is deemed to be the date of the judgment)

BEFORE: HOLLAND-MUTER J:

[1] The applicant, in her capacity as guardian of her minor son, moves for an order that the relevant decision, made by the fourth respondent in dismissing her complaint in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“FSR-Act”), be reviewed and referred back to the fourth respondent for re-consideration of her initial complaint.

[2] The fourth respondent’s refusal to adjudicate the complaint was squarely because of the non-joinder of the fifth respondent to the initial proceedings. The fourth respondent did not find on the merits of the complaint and indicated that it will abide with the decision of the court.

[3] The applicant applies for condonation for failure to bring her application within the 180 days provided for in section 7(1)(b) of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).

[4] It is clear that the application was served on 5 January 2022 and that the applicant’s attorney received notice of the fourth respondent’s dismissal of her complaint on 7 July 2021. The attorney forwarded the notice to the applicant on 14 July 2021. If accepted that she, via her attorney, received the notice on 7 July 2021, her review application was three days beyond the 180 days provided the review application was delivered inside the 180 days.

[5] At worst for the applicant her review application was served three days outside the 180 days. The condonation application deals with this aspect. If the court is satisfied that the review application was three days outside the 180 days, the court has to consider whether the delay was reasonable and whether the court can extend the 180 days as provided for in section 9 of PAJA.

[6] In **City of Cape Town v Aurecon SA (Pty) Ltd [2017] ZACC 5 (28/02/2017)** at par [41] and in **Asia Construction (Pty) Ltd v Buffalo City Metropolitan Municipality [2017] ZASCA 23 (24/03/2017)** at par [7] it was held that section 7(1) of PAJA refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking the judicial review. On this premises, it is clear that the applicant is deemed to have obtained notice of the decision of the fourth respondent on 7 July 2021. The review application was therefore 3 days out of time.

[7] To exercise its discretion to extend the 180 days, the applicant ought to convince the court that the delay was reasonable and that there are facts and circumstances justifying the court to condone the non-compliance of the 180 day time limit. The relevant factors include:

- * the nature of the relief sought;
- * the extent and cause of the delay;
- * its effect on the administration of justice and the other litigants;
- * the reasonableness of the explanation for the delay;
- * the importance of the issue to be raised; and
- * the prospects of success.

[8] The applicant addressed the following:

- * the concern of the minor child in the issue;
- * the delay was truly minimal under the circumstances;

* that the decision taken was not on the merits but only because the fifth respondent was not a party thereto; and

* that the prospects of success are very good.

[9] I am of the view that the reasons advanced by the applicant is not even, it I may use the term, the 'bare' necessities required. No explanation is given for what prevented the applicant to file the application within the 180 days. Nothing was stated in the founding affidavit what caused the delay and nothing said to determine whether the delay was reasonable. Not a single fact was advanced by the applicant in her application to indicate why the application was not brought within the 180 days. There in further nothing in the application that deals with the prospects of success. To merely mention that the prospect of success in very good without any factual averments to justify such claim does not take the matter any further. It has to be remembered that condonation is not there for the taking but that sufficient cause be shown to persuade a court to assist in a condonation application. All in all I am not convinced that there is sufficient cause to grant condonation.

[10] The fourth respondent clearly mentioned the lack of compliance with basic rules of litigation the failure to join the fifth respondent to the matter. This lacklustre attitude is present in the current application and the fifth respondent (as mentioned) has not been joined at all.

[11] Although certain relief is sought against the fifth respondent in the Notice of Motion, no specific joinder of the fifth respondent is sought. I could not find any interlocutory or other application on CaseLines (the electronic file of the matter) to formally join the fifth respondent to the matter. In the replying affidavit vague averments in this regard are made but no formal joinder has taken place and no court order granting such joinder can be found. If this is so, the fifth respondent is still not a party to the issue and the decision by the fourth respondent still applies.

[12] It will serve no purpose to set aside the fourth respondent's dismissal of the complaint and remit it back for re-consideration in view of the lacuna above.

[13] Although the parties indicated that this court adjudicate the merits as well, I find no purpose to do so. I don't have all the facts and I have indicated that no condonation be granted. In any event, the fourth respondent did not decide on the merits and it is not for this court to substitute the decision of the fourth respondent with court's decision. By doing so, it will amount to usurping the powers of the fourth respondent, such usurping of power not allowed under a constitutional rule of law. There is very limited scope for such usurping of power by the judiciary and the present matter does not warrant such interference.

[14] In my view the application should be dismissed and I make the following order:

ORDER:

The application is dismissed with costs on a part and party scale, the applicant to pay the costs of the parties opposing the application.

J HOLLAND-MUTER
Judge of the Pretoria High Court
17 February 2024

Matter heard on 14 November 2023

Judgment handed down on 19 February 2024

TO:

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