FINANCIAL SERVICES TRIBUNAL

A7/2019

In the matter between:

SHANEEL MAHARAJ Applicant

And

FINANCIAL SECTOR CONDUCT AUTHORITY Respondent

Coram: L G Nkosi -Thomas SC, N. Nxumalo and Z. Mabhoza

Summary: Reconsideration of the FSCA decision declining an application to exempt the applicant from the qualification requirement in terms of section 44(1) and (4) of the FAIS Act read with those of section 281 of the FSR Act. Application dismissed for failure to make out a proper case for relief under the applicable sections.

DECISION

A. INTRODUCTION

1. This is an application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 *(FSR Act)* for the reconsideration of the decision of the Financial Sector Conduct Authority (the FSCA), dated 27 May 2019[1].

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[1] Record: p 3-4.

2. The above decision was a sequel to the applicant's application, submitted on 1 May 2019, for his exemption[2] from compliance with following:

2.1. the qualification requirement prescribed in the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 ("the Fit and Proper Requirements")[3]; and

2.2. the requirements to pay the fee as prescribed in paragraph 3.3 of the Determination of Fees payable to the Registrar of Financial Providers.[4]

3. That application was based on following broad bases:

3.1. that since the qualification that he obtained in May 2009 does not meet the requirements of the FSCA to be appointed a representative he wishes to be exempt from the above requirements; and

3.2. that despite having been a representative since March 2013, he was only made aware, on April 2019, that his existing qualification does not meet the requirements of the FSCA.

4. On 27 May 2019, the FSCA declined the application to exempt the applicant from the qualification requirement in terms of section 44(1) and (4) of the FAIS Act (henceforth referred to as "the impugned decision") in the following terms:

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2 Record: p.7 and further.

3 Record, p. 9, para .3.

4 Record, p. 7, Published by government Notice No.89 in Government Gazette 41432 of 9 February 2016.

"*5. The Authority has considered the application for exemption and your circumstances as set out therein and is not satisfied that reasonable grounds exist to warrant an exemption from the qualification requirements. The Authority is of the view that if an exemption is granted as contemplated it would conflict with the public interest, prejudice the interests of clients and frustrate the achievement of the objects of the Financial Advisory and Intermediary Services Act, 2002.*

6. In light of the above, and the reasons set out in the Authority's letter dated 14 May 2019, the application for exemption from the qualification requirements is declined."

B. BEFORE THIS TRIBUNAL

5. As stated, the applicant brought this application in terms of section 230 of the FSR Act for a reconsideration of the impugned decision[5].

6. The grounds for the application appear from, inter alia, an undated document captioned "*Motivation for appeal of decision*".[6] In it, the applicant states, inter alia, that:

6.1. He only found out in 2019 when he applied for a representative role that the qualification he holds does not meet the requirements of the FSCA;

6.2. He requests exemption from the applicable requirements pending his completion of an approved and accredited course; and that

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5 Record, p. 3-4.

6 Record, p. 7.

6.3. He honestly did not know that the qualification he currently holds does not meet the requirements.

7. Before us, the FSCA opposed the application for exemption on grounds that the application amounts to an abuse of process and that it is frivolous and vexatious within the contemplation of section 234(4) of the FSR Act inasmuch as it is was improperly issued without reasonable grounds and that, on the merits, the applicant has simply failed to make out a proper case for the relief sought.

8. On 12 July 2019 and by way of a letter, the FSCA advised the secretariat of this Tribunal that the reasons for the impugned decision are contained in its letter of 27 May 2019 and proceeded to tabulate therein the facts and information upon which the impugned decision is based.

9. In its letter of 27 May 2019, the FSCA stated that the reasons for the impugned decision are to be found in its earlier letter of 14 May 2019.[7] There, the following reasons are, inter alia, proffered:

9.1. In terms of section 23 of the Fit and Proper Requirements, a representative must have a qualification recognised by the FSCA;

9.2. In terms of section 4(4) of the Exemption of Services under Supervision in terms of the Requirements and Conditions, 2008 ("the 2008 Exemption of Services under Supervision"), a representative may work under supervision for a period not exceeding six(6) years after date of first appointment, whilst obtaining the required

7 Record, p. 3, para 6.

qualification and must obtain a recognised qualification by a certain date therein specified;

9.3. On 1 February 2019, the 2008 Exemption of Services under Supervision was withdrawn;

9.4. In terms of the provisions of the Exemption of Services under Supervision No. 2 of 2018,[8] a supervised representative must within six years from the date of first appointment as a representative of a specific financial product, comply with the qualification requirement for that specific financial product;

9.5. The applicant has had more than six (6) years since date of first appointment to comply with the qualification requirements but had failed to take steps to obtain such a qualification;

9.6. One of the objectives of the Financial Advisory and Intermediary Services Act, 2002 ("the Act") is to professionalise the financial services industry and to protect consumers hence the imposition of the qualification requirements;

9.7. The National Treasury has expressed South Africa's commitment to a global financial regulatory reform agenda aimed at strengthening financial stability such to entail a strong regulatory framework, supervision and a proscription of financial service providers operating outside of the regulatory framework;

9.8. The applicant's conduct constitutes a total disregard of the peremptory requirements of the Act;

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8 Published by FSCA FAIS Notice 86 of 2018.

9.9. The FSCA is not persuaded that reasonable grounds warranting an exemption exist and holds the view that granting an exemption, in the circumstances, would be in conflict with the public interest, would prejudice the interests of the consumers of the financial service rendered and would frustrate the achievement of the stated intention of the Act.

10. Significantly, the applicant was afforded the opportunity to address these concerns by the FSCA before the publication of the impugned decision. The applicant not only failed to frontally address these issues in his response to the FSCA but also failed so to do in the application for the reconsideration of the impugned decision currently before this Tribunal.

C. THE APPLICABLE STATUTORY PROVISIONS AND ANALYSIS

11. Section 44(1) of the Act provides, in material part, that:

> ***"44 Exemptions by registrar and Minister***
>
> *(1) The registrar may on or after the commencement of this Act, but prior to the date determined by the Minister in terms of section 7 (1), exempt any person or category of persons from the provisions of that section if the registrar is satisfied that-*
>
> *(a) the rendering of any financial service by the applicant is already partially or wholly regulated by any other law; or*
> *(b) the application of the said section to the applicant will cause the applicant or clients of the applicant financial or other hardship or prejudice; and*
> *(c) the granting of the exemption will not-*
> *(i) conflict with the public interest;*
> *(ii) prejudice the interests of clients; and*
> *(iii) frustrate the achievement of the objects of this Act."*

12. Section 44(4), in its turn, provides that:

> *"(4) (a) The registrar may in any case not provided for in this Act, on reasonable grounds, on application or on the registrar's own initiative by notice on the official web site, exempt any person or category of persons from any provision of this Act."*

13. Section 281 of FSR Act is equally implicated in this case. It provides, in material part, that:

> ***"281 Exemptions***
>
> *(1) The responsible authority for a financial sector law may, in writing and with the concurrence of the other financial sector regulator, exempt any person or class of persons from a specified provision of the financial sector law, unless it considers that granting the exemption-*
> *(a) will be contrary to the public interest; or*
> *(b) may prejudice the achievement of the objects of a financial sector law.*
> *(2) Subsection (1) applies to the granting of exemptions if a financial sector law does not provide a power to grant exemptions.*
> *(3) If a financial sector law provides a power to grant exemptions, the responsible authority must-*
> *(a) grant the exemption in terms of the relevant provisions of the financial sector law; and*
> *(b) when deciding whether to grant an exemption, comply with the requirements of subsection (1) in addition to any requirements specified in the financial sector law.*
> *(4) The responsible authority must publish each exemption."*

14. Additionally, section 23 of the Fit and Proper Requirements of 2017 and the 2008 and 2018 Exemptions of Services under Supervision referred to above are implicated.

15. Cumulatively, these sections provide the FSCA with statutory authority grant an exemption from compliance with a financial sector law on reasonable grounds shown. The following are the jurisdictional factors for the exercise of this statutory authority:

15.1. That the rendering of the service by that person is partially or wholly regulated by another law; or

15.2. That the application of the provisions of the Act will cause that person or clients of that person financial or other hardship or prejudice; and

15.3. The granting of the exemption will not conflict with the public interest, prejudice the interest of client and frustrate the achievement of the object of the Act.

16. Neither the application that served before the FSCA nor the one before us traverses the jurisdictional factors referred to above, apart from financial hardship to the applicant aspect,[9] despite the applicant having been afforded the opportunity to do so.

17. The application that served before the FSCA simply made out no case for relief under the statutory provisions referred to above.

18. The FSCA urged upon us to summarily dismiss this application in terms of section 234(4) inasmuch as it contends it is frivolous, vexatious or trivial. That section confers such statutory authority upon this Tribunal.

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9 Record, p. 7.

19. It is well established that although our Courts have inherent power to prevent the abuse of its process in the form of frivolous or vexatious litigation[10] this power is one which must be exercised with great caution, and only in a clear case because Courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action.[11]

20. The word "*vexatious*" in its legal sense means "*frivolous, improperly instituted without sufficient ground, to serve solely as an annoyance to the defendant*".[12]

21. It has been held that vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; "*abuse*" connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive.[13]

22. The Constitutional Court in *Lawyers for Human Rights v Minister in The Presidency and Others*[14] held in this regard as follows:

> *"What is vexatious? In Bisset* the *court said this was that was frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant . . . (a)nd*

Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271; Corderoy v Union Government 1918 AD 512 at 517.

11 Western Assurance Co case at 273.

12 Fisheries Development Corporation of SA Ltd v Jorgensen And Another; Fisheries Development Corporation of SA Ltd v Awj Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) at 1339E-G.

13 Ibid.

14 2017(1) SA 645(CC) at [19].

... frivolous complaint[.] That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious." [emphasis added]

23. Although the application has been instituted *"without sufficient ground"* as it did not address some jurisdictional factors dealt with above despite the invitation by the FSCA, one cannot find any factual basis to conclude that the failure to bring the application within the four corners of section 44 of the Act was accompanied by the intention to cause annoyance to the counter-party.[15]

24. The fact of the matter is that the application falls to be dismissed for failure to make out a proper case for relief. It is, accordingly, not necessary to decide whether this is a proper case for the invocation of the provisions of section 234(4) of the Act.

25. The applicant was invited to make submission on the jurisdictional factors referred to above by the FSCA and woefully failed so to do. When the second opportunity presented itself in the form of the application for the reconsideration of the impugned decision, armed with the full reasons thereof he, yet again, elected not to deal therewith.

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15 Compare - The purpose of the Vexatious Proceedings Act 3 of 1956 was discussed in *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) at 112F–H where the following was held:

> *'This purpose is "to put a stop to **persistent and ungrounded institution of legal proceedings**". The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court". This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have **repeatedly** been subjected to the **costs, harassment and embarrassment** of unmeritorious litigation; and the public interest that the functioning of the court and the administration of justice proceed unimpeded by the clog of groundless proceedings.'*

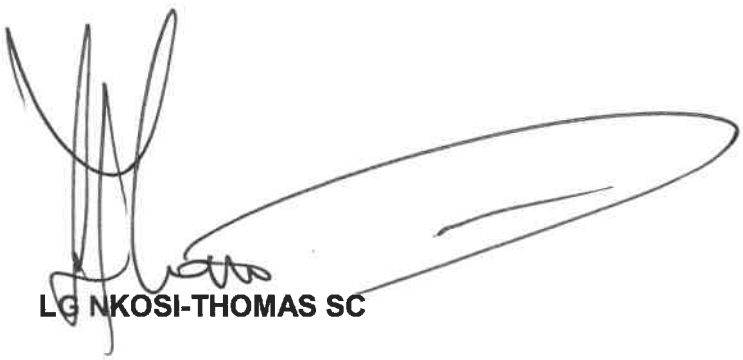
26. In the circumstances, the application falls properly to be dismissed.

27. In regard to the question of costs, the FSR Act provides that an applicant such as the one before us may be mulcted with costs only under exceptional circumstances. I do not consider this case to be such a one. It is, indeed, so that no proper case has been made out on the papers, however and as stated above, I do not consider that the applicant sought to annoy the counterparty. Further, the parties were not legally represented, and, therefore the issue of costs does not arise.

28. Accordingly, no order as to costs is made.

29. The following order is made:

29.1. This application is dismissed.



LG NKOSI-THOMAS SC

CHAIRPERSON

SANDTON

17 JANUARY 2020