CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 271/19

In the matter between:

HITJEVI OBAFEMI TJIROZE Applicant

and

APPEAL BOARD OF THE FINANCIAL SERVICES BOARD First Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY Second Respondent

MARCUS LEKGALOA SENYATSI Third Respondent

Neutral citation:	*Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Madlanga J (unanimous)
Decided on:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 July 2020.

ORDER

On direct appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is refused.
2. The applicant must pay the second respondent's costs on an attorney and client scale.

JUDGMENT

MADLANGA J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] It seems impolite and harsh to start a judgment by telling a litigant that her or his cause must fail. But, if there ever was a candidate for that kind of opener, this is it. As will soon become clear, the application for leave to appeal directly to this Court is so woeful as to cry out for dismissal. And that is an issue we could have dealt with by summarily issuing an order without writing a judgment. This judgment has been necessitated by the question whether the applicant, Mr Hitjevi Obafemi Tjiroze, must pay the costs of the second respondent, the Financial Sector Conduct Authority,[1] on an attorney and client scale.

[1] At the time the proceedings commenced, this litigant was called the Registrar of Financial Services Providers.

Background

[2] The dispute arises from an error in the second respondent's notice of intention to oppose. This was a notice filed in review proceedings instituted by the applicant in the High Court of South Africa, Gauteng Division, Pretoria. In the notice the second respondent erroneously referred to itself as the "Registrar of Financial Services Board" instead of the "Registrar of Financial Services Providers"; the misnaming thus being in the use of "Board" instead of "Providers". All other particulars were correctly reflected. The second respondent brought an application for leave to amend the notice in order to reflect its name correctly. Inexplicably, the applicant opposed this interlocutory application, arguing that the notice of intention to oppose should be set aside, and the main application heard unopposed.

[3] Senyatsi AJ granted the application for leave to amend the notice of intention to oppose. This was because the applicant had failed to substantiate the factual or legal basis for the prejudice he claimed he would suffer if leave to amend was granted. The applicant then applied for leave to appeal this decision, which the High Court refused for lack of reasonable prospects of success. It also held that, in any event, the impugned order was not appealable as it was not a final judgment.

[4] The applicant thereafter instituted an urgent application in the High Court for the *ex post facto* recusal of Senyatsi AJ and "nullification" of both the judgment granting the amendment and the one refusing leave to appeal. He averred that Senyatsi AJ had a conflict of interest arising from, amongst others an alleged prior association with Norton Rose Fulbright and an alleged direct family relation between Senyatsi AJ and a Mr Nare Senyatsi, an employee of the second respondent. He substantiates the conflict of interest by stating that Norton Rose Fulbright represented Sanlam in CCMA proceedings against the applicant. The applicant came out the victor in those proceedings. And he claims that Norton Rose Fulbright was now getting its revenge against him through Senyatsi AJ.

[5] The applicant claimed that the urgency arose from the fact that the taxation of costs was imminent. Once the costs had been taxed, the second respondent would be entitled to enforce the "*fraudulently* obtained" orders. He refused to oppose the taxation itself because if he entered that fray, he would be acquiescing to what he termed "unlawful and irregular" proceedings.

[6] Holland-Muller AJ dismissed the urgent application with costs for lack of urgency. He also held that: the prayer for recusal was not competent, since Senyatsi AJ was *functus officio*;[2] the relief of nullification was not competent; and the allegations about Senyatsi AJ's association with an employee of the second respondent were vague and unsubstantiated.

[7] Undeterred, the applicant has approached this Court directly. He pegs its jurisdiction on the basis that his section 34 right to a fair hearing has been undermined by collusion between the second respondent and Senyatsi AJ. This, because the Judge "knowingly held an interest in the matter". The applicant is seeking: leave to appeal the High Court judgments and orders of Senyatsi AJ and Holland-Muller AJ; the *ex post facto* recusal of Senyatsi AJ for the reason mentioned above; a declaration that Senyatsi AJ's judgments and orders relating to the interlocutory amendment application are nullified; an order that the amendment application be heard *de novo*; a declaration that the answering affidavit in the urgent application that was determined by Holland-Muller AJ should not have been considered by the High Court; and an order setting aside the costs orders against the applicant in the amendment and urgent applications.

[8] Regarding the answering affidavit that the applicant contends ought not to have been taken into account in determining the urgent application, he claims that it was defective for failure by the commissioner of oaths to reflect the date, manner and place of attestation. Finally, the applicant disputes the second respondent's standing; he sets out no basis for this. That, of course, is curious – if not nonsensical – when regard is

[2] Literally "having performed the office". This doctrine determines that once a judge renders a decision, she or he no longer has authority to re-examine the matter.

had to the fact that at the centre of this entire saga is the order granted in the second respondent's favour in the amendment application.

[9] The second respondent opposes the application before us on various grounds. First, it argues that the matter is moot. That is so because: the second respondent is now the Financial Sector Conduct Authority (FSCA);[3] in the pending review the FSCA has since been substituted for the Registrar of Financial Services Providers; the amendment that the applicant is seeking to undo related to the citation of the second respondent before that substitution; the applicant did not oppose the substitution; and that substitution now exists in fact and in law.

[10] The second respondent points out – correctly in my view – that the applicant's true aim in all this litigation is for the main application, i.e. the pending review application, to proceed unopposed. It is not surprising that the applicant argues that even the urgent application in the High Court should have proceeded unopposed. The second respondent observes that, instead of filing a rule 30 notice for the setting aside of the answering affidavit as an irregular step,[4] the applicant wishes to treat these opposing papers as a nullity.

[11] The second respondent argues that an *ex post facto* recusal application and consequent nullification of a judgment is not competent in our law. It avers that, in any event, Senyatsi AJ was not conflicted. It explains that: as at the time he determined the amendment application, Senyatsi AJ had not been with Norton Rose Fulbright for about two decades as he had last been with that firm in 1999; and Mr Nare Senyatsi is not

[3] The second respondent explains that in terms of section 300(3) of the Financial Sector Regulation Act 9 of 2017 it was substituted with the Financial Sector Conduct Authority in the proceedings. Section 300(3) provides:

> "The Financial Sector Conduct Authority must be substituted as a party in any pending proceedings, whether in a court, tribunal or before an arbitrator or any other person or body, that have been commenced but not finally determined immediately before the date on which this section comes into effect, for the Financial Services Board, the Directorate of Market Abuse, where applicable, or a registrar in terms of a financial sector law other than the Banks Act."

[4] Rule 30(1) of the Uniform Rules of Court provides that "[a] party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside".

directly related to Senyatsi AJ and does not even know him.[5] The applicant baldly asserts that Mr Nare Senyatsi was lying.

[12] The second respondent prays for a punitive costs order because of the applicant's blatantly vexatious litigation tactics and downright abuse of court process.

[13] The applicant has filed a replying affidavit without this Court's leave. In it, he acknowledges that he is not permitted by this Court's rules to file a replying affidavit as of right, but files it nonetheless. Amongst other things, he argues that the second respondent's answering affidavit in this Court should be disregarded because it was not preceded or accompanied by a notice of intention to oppose. He accordingly asks that this application continue unopposed.

[14] Let me deal with this last point raised by the applicant immediately. Although the second respondent did not file a notice of intention to oppose, we should not be overly technical. It is plain from the answering affidavit that the second respondent is opposing. In any event, in terms of section 173 of the Constitution,[6] this Court is at liberty to regulate its own process.

Jurisdiction

[15] The applicant claims that this Court's jurisdiction is engaged because his right to a fair hearing has been infringed. Additionally, he argues that this is a matter of public importance, as public trust and confidence in the Judiciary will be undermined if this violation of his right to a fair hearing is allowed.

[5] This explanation has been given through a confirmatory affidavit deposed to by Mr Nare Senyatsi.

[6] Section 173 of the Constitution states:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[16] In order to reach the question whether the applicant's fair hearing right has been infringed, the underlying factual question whether Senyatsi AJ was conflicted must first be resolved. In truth, therefore, this is a factual dispute dressed in constitutional garb. That does not engage our constitutional jurisdiction.[7] That should be the end of the matter. But – based on the applicant's appetite for litigating – we cannot put it past him that he may take his fight to a court that does have jurisdiction. So, if there is way of ending this saga, it is best that it be done. Is there?

Interests of justice

[17] As discussed below, there is a basis for non-suiting the applicant purely on the basis of mootness arising from the fact that the second respondent is now the FSCA. And the applicant has not suggested a basis for the exercise of our discretion to consider the application despite its mootness.[8]

[18] The applicant has also not proffered any exceptional circumstances warranting a direct appeal. Therefore, it is not in the interests of justice to grant leave to appeal.

[19] I proceed to substantiate on mootness.

Mootness

[20] It is trite that a case is moot "if it no longer presents an existing or live controversy".[9] This is the case here. If Senyatsi AJ is recused, and his order granting leave to amend the citation of the second respondent is overturned, this will have no practical effect on the parties or anyone else. Neither the Registrar of the Financial Services "Provider" nor the Registrar of the Financial Services "Board" remains a

[7] *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 222; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[8] On this Court's exercise of discretion to entertain a matter despite its mootness, see *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 9; *President, Ordinary Court Martial v Freedom of Expression Institute* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 16.

[9] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

respondent in the main application. That is so because of the substitution of the FSCA in terms of section 300(3) of the Financial Sector Regulation Act[10] and under the notice of substitution filed on 13 April 2018. And since the respondent has not opposed that substitution, it stands. The application falls to be dismissed on this basis as well.

[21] To put what I am saying in the preceding paragraph beyond question, the applicant cannot approach any other court pursuing the same causes he is pursuing before this Court.

Costs

[22] Based on the above finding that this matter does not raise a constitutional issue, the principles set out in *Biowatch*[11] do not apply. There is no reason not to award costs against the applicant. The question is: is the punitive scale prayed for warranted?

[23] In *Public Protector v South African Reserve Bank* Mogoeng CJ noted that "[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process".[12] Although that was in the minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J further noted that "a punitive costs order is justified where the conduct concerned is 'extraordinary' and worthy of a court's rebuke".[13] Both judgments referred to *Plastic Converters Association of SA*, in which the Labour Appeal Court stated:

> "The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably

[10] See above n 3.

[11] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 23.

[12] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 8.

[13] Id at para 226.

> vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."[14]

[24] The applicant has been litigating frivolously and vexatiously at great expense to the second respondent. In so doing, he has defamed a member of the Judiciary and gratuitously accused some individuals of lying under oath without an iota of evidence in substantiation.

[25] Ultimately, the finality of the main application has been delayed. In the process, the second respondent has been required to expend considerable time and funds defending frivolous, prima facie defamatory applications. And at the centre of all of this is the applicant's refusal to accept Senyatsi AJ's order, which did no more than to allow an amendment to a notice to oppose the applicant's review application, so that the notice could reflect the correct name of one of the respondents. Crucially, that name had been reflected incorrectly through undeniable inadvertence.

[26] Despite an assertion to the contrary by the applicant, the correction of the name did not cause him any prejudice. This litigation, which is plainly vexatious, is but an attempt by the applicant to hold onto what he misguidedly perceives to be an advantage. The subtext is that an amendment will result in him losing that advantage; and that is what will cause him "prejudice". That, of course, has never been our law on what constitutes prejudice of the nature that may result in an amendment being denied. Prejudice that may lead to the refusal of an amendment is not about the mere loss of a procedural advantage or even the possibility of losing the case itself as a result of the grant of the amendment.[15] The norm is always to grant an amendment if it will not cause the other side an injustice that is incapable of being compensated by an

[14] *Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46.

[15] Indeed, in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 294B the Court held that "[t]he fact that an amendment may cause the other party to lose his case against the [party seeking the amendment] is not of itself 'prejudice' of the sort which will dissuade the court from granting it".

appropriate award of costs.[16] Despite woefully falling short of meeting that test, the applicant has lamentably litigated all the way to this Court. That calls for a showing of this Court's displeasure.

[27] Additionally, in all three applications (including the one before this Court), the applicant has attempted to attack the second respondent's opposition on the basis of minor technicalities. This, purely to have the applications proceed unopposed notwithstanding the second respondent's clear intention to oppose all three applications. In doing so, the applicant is abusing the court process.

[28] The applicant, though self-represented, is a legal professional.[17] As such, he should understand the import of his allegations and the impact of his numerous nonsensical applications. In fact, he states that he does understand the potentially defamatory nature and weight of his allegations against Senyatsi AJ.

[29] The cumulative effect of all this calls for a punitive costs order.

Order

[30] The following order is made:

1. Leave to appeal is refused.
2. The applicant must pay the costs of the second respondent on an attorney and client scale.

[16] In the oft-cited case of *Moolman v Estate Moolman* 1927 CPD 27 at 29 Watermeyer J held:

> "[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed."

[17] The applicant himself explained that he worked as state counsel for seven years conducting prosecutions in the Office of the Prosecutor-General of Namibia. Thereafter, he worked for Sanlam first in Namibia and later in South Africa as a legal advisor, and in legal compliance, respectively.