

**IN THE FINANCIAL SERVICES TRIBUNAL**

A19/2018

In the matter between:

**VICTOR MASANGO**

Applicant

and

**FINANCIAL SECTOR CONDUCT AUTHORITY**

Respondent

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**JUDGMENT**

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**Panel: Mr L Dlamini (Chair) with  
Mr A Jaffer and Adv W Ndinisa (Members)**

Summary: Reinstatement of licence – Tribunal’s powers in terms of section 234 of FSRA – Contravention of section 19 of FAIS Act and withdrawal of licence.

**A. INTRODUCTION**

1. This is an application for reconsideration of a decision in terms of section 230 (1) of the Financial Sector Regulation Act, no 9 of 2017 (FSRA).

2. On 19 September 2018 the Financial Sector Conduct Authority (the Authority<sup>1</sup>) acting in terms of section 9 of the Financial Advisory and Intermediary Services Act (FAIS Act) withdrew the licence of Victor Masango (Masango) authorising him to act as a financial services provider. The Authority's decision to withdraw Masango's licence (the decision) forms the subject matter of this application.
3. On 4 October 2018, Masango filed an application for reconsideration of the decision to the Financial Services Tribunal (Tribunal). The said application was supported by a statement dated 28 September 2018 in which Masango summarised the basis of his request to the Tribunal to have the decision set aside.
4. He seeks to be reinstated as an authorised financial services provider (FSP).

## **B. FACTUAL BACKGROUND**

5. Masango's licence to act as an FSP was issued on 3 September 2007. He traded as "Negotiated Employee Benefits" under licence number 17002. The licence entitled Masango to provide financial advisory and intermediary services in respect of Long-term insurance: Category A,B, C as well as in various other categories of Short-term Insurance including Health service benefits provided by medical aid schemes.<sup>2</sup>
6. As an FSP Masango was required in terms of section 19 of the FAIS Act to maintain full and proper accounting records on a continual basis and to

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<sup>1</sup> The term Authority and Registrar may be used interchangeably given the Authority's assumption of duties previously performed by the Registrar prior to 1 April 2018.

<sup>2</sup> See record of proceedings at page 119.

prepare annual financial statements. He was also obliged to submit these financial statements not later than four months after the end of his financial year (which fell on 28 February) or at such longer period as may be allowed by the Registrar.<sup>3</sup>

7. The Authority submitted that Masango failed to comply with the requirement relating to the submission of financial statements in respect of two consecutive financial periods; namely 2015/16 and 2016/17 financial years which were due at the latest on 30 June 2016 and 30 June 2017 respectively.
8. The Authority further submitted that Masango did not maintain a suitable guarantee or professional indemnity cover prescribed in terms of section 13 of the FAIS Act read with the General Code of Conduct for Authorised FSPs and Board Notice 123 of 2009.
9. As a result the Authority withdrew Masango's licence. He has therefore requested the Tribunal to reinstate his licence.

## **C. ISSUES**

10. This matter is concerned with whether or not the Authority's decision to withdraw the licence was justified. In this regard we:
  - 10.1. firstly, evaluate the Tribunal's power to deal with the Authority's decision, and
  - 10.2. secondly, appraise the facts forming the basis of the Authority's decision.

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<sup>3</sup> Section 19 subsection 1 (a) and (b) and subsection 2 (b)(iii).

#### **D. THE TRIBUNAL'S POWER TO DEAL WITH THE AUTHORITY'S DECISION**

11. It is important to examine the nature of the Masango's prayer in light of the orders that the Tribunal can make. He has approached the Tribunal with a request to have his licence reinstated so that he can once again conduct his business as an FSP.
12. Section 234(1)(a) of the FSRA <sup>4</sup> circumscribes the powers of the Tribunal with respect to the decisions of the Authority. The Tribunal can either set aside the decision and remit the matter back to the Authority for further consideration or dismiss the application. There is no room for the Tribunal to substitute the Authority's decision for its own.<sup>5</sup>
13. The Authority's response to the Tribunal's order remitting the matter back for reconsideration may result in the Authority reversing its initial decision. Where that occurs the Authority's subsequent decision must not be imputed to the Tribunal as its power to reverse the decision. The Tribunal's order and the Authority's decision must always be seen as separate processes albeit their sequence *ex facie* may suggest the contrary.
14. The Authority's independence to decide on the matter after it has been remitted to it remains solely in its hands as was the case before the Tribunal heard the matter save that when reconsidering the matter the Authority must take into account what the Tribunal had to say about the decision in the first instance.

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<sup>4</sup> Section 234 (1) (a) – (c).

<sup>5</sup> See Thomas vs. AGM Mapsure Risk Management (Pty) Ltd – FSP5/2018.

15. Therefore in the context of this matter Section 234 of the FSRA grants the Authority exclusive rights to decide whether or not to reinstate the licence. As such it would not be competent for the Tribunal to order the reinstatement of Masango's licence.
16. Bearing in mind that this matter involves the decision of the Authority, we would have no basis on which to reinstate Masango as "reinstatement" would amount to variation of the decision. However, in the event that the Authority was wrong in its decision, we will accordingly set the decision aside and refer the matter back to the Authority for reconsideration.

**E. WHETHER THE DECISION WAS JUSTIFIED**

17. We now turn to deal with the merits of the application.
18. In terms of the FAIS Act Masango was required to submit a compliance report (Report) not later than 28 February of each year. The Report for 2016 dated 3 March 2017<sup>6</sup> was submitted 17 March 2017.<sup>7</sup> The Report for 2017 was also out of time.
19. On 3 May 2017, the Registrar sent correspondence to Masango in which the Registrar raised a number of issues regarding the Report. The Registrar requested a response on the issues raised and gave Masango until 17 May 2017 to revert on these issues.<sup>8</sup> However, Masango did not respond or acknowledge receipt of such correspondence.
20. On the 18 May 2017 the Registrar resent the correspondence. Again, no response was received.

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<sup>6</sup> Record page 34.

<sup>7</sup> Record page 11.

<sup>8</sup> Record page 40.

21. On 30 May 2017 the Registrar wrote to Masango again requesting a response and this time warning him that “regulatory action may be taken against the FSP for non response”.<sup>9</sup> Masango still did not reply.
22. On 14 July 2017 the Registrar wrote yet another letter to Masango indicating that the matter had been “escalated” on the basis that he had not responded to three previous letters from the Registrar’s office.<sup>10</sup> Similar to prior attempts, this effort yielded no fruit. There was no response.
23. On 29 August 2017 having had no success in getting Masango to attend to the issues raised in the Report, the Registrar then sent Masango a Notice of Intention to Suspend Authorisation (Suspension Notice) of his licence issued in terms of section 9(1) of the FAIS Act.<sup>11</sup>
24. The Suspension Notice was issued on the basis that, inter alia, Masango had failed to prepare and submit financial statements on time for two consecutive financial years and that he had failed to maintain in force a suitable guarantee or professional indemnity cover which was required of him as an FSP.
25. The Registrar gave Masango from 29 August 2017 until 15 September 2017 to show cause why the suspension of his authorisation should not be effected. The Registrar also cautioned that failure to respond within the stipulated period will result in the Registrar going ahead with the suspension.
26. The Suspension Notice finally elicited a response from Masango. On the same afternoon (29 August 2017) the said notice was sent Masango

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<sup>9</sup> Record page 49.

<sup>10</sup> Record page 56.

<sup>11</sup> Record page 65.

responded to the Registrar's office stating that "I'll do them and send urgently".<sup>12</sup> However, Masango did not send any further correspondence after that.

27. On 18 September 2017 it was again the Registrar who took steps to contact Masango. He was requested to respond and was given a further extension to 26 September 2017 to reply. Masango replied on the same day stating that he had no access to a computer.<sup>13</sup> He undertook to comply in a few days presumably once he had gained computer access. However, as he had done on many previous occasions, Masango went silent and did not comply or contact the Registrar to advise on progress.
28. On 27 September 2017 the Registrar wrote to Masango once again requesting a reply. Masango was once again given the opportunity until 4 October 2017 to deal with the matter.<sup>14</sup> Typically Masango did not provide any response.
29. On 17 October 2017 the Registrar issued a Notice of Suspension of Authorisation of Masango's licence having not received a response from him regarding why the licence should not be suspended.<sup>15</sup> Masango's response followed on 24 October 2017. He wanted to know if the Registrar would accept scanned copies thus creating an impression that financial statements were ready for submission.<sup>16</sup> However, Masango did not provide copies of the financial statements.
30. After that the Registrar wrote three more letters to which Masango did not reply. The first letter was dated 8 January 2018 requesting a reply by 15 January 2018. The second letter was dated 17 January 2018 requesting a reply by 24 January 2018. The third letter was dated 26 January 2018

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<sup>12</sup> Record page 70.

<sup>13</sup> Record page 73.

<sup>14</sup> Record page 78.

<sup>15</sup> Record page 83.

<sup>16</sup> Record page 89.

requesting a response by 2 February 2018. The last letter also cautioned that the licence may be withdrawn.

31. Nothing further transpired for another eight months. Having not heard from Masango, the Registrar eventually withdrew the licence on 19 September 2018.

### **Masango's statement in support of the application**

32. A statement dated 28 September 2018 (the statement) was provided in support of this application<sup>17</sup>. The statement deals with Masango's personal circumstances that led to contraventions which form part of the basis of the licence withdrawal.

33. We briefly deal with some aspects of the statement below.

34. With regard to failure to furnish financial statements, it seems Masango consciously decided not to comply with statutory requirements because he had not paid his licence fees. His focus was on licence fees despite the fact that the Registrar's correspondence over months never made any mention of licence fees.

35. Both the statement and Masango's submission during the hearing do not properly explain why he failed to comply with the requirements of the FAIS Act. He was not able to properly explain the reason for not communicating with the Registrar regarding whatever challenges he may have experienced in doing what was required.

36. Submissions regarding his personal financial troubles and events relating to difficulties concerning his wife and family did not offer an explanation for failure to comply. Masango's own version of the events on which he

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<sup>17</sup> Record page 3.




sought to peg his inability to comply reveal that these events occurred prior to the long string of correspondence the Registrar sent him. In any event, in the few instances in which he replied Masango undertook to comply with the identified shortcomings. He did not at any stage state that he was unable to comply.

37. With regard to failure to provide professional indemnity cover, Masango particularly argued that the “product” he dealt with was virtually risk free and that as such there was no real need for him to ensure that he had cover. However, when pressed, Masango admitted that the Registrar was correct in deciding to withdraw his licence on the basis that failure to provide cover was part of what he had to do.
38. Overall, evidence showed that there was nothing preventing Masango from contacting the Registrar over a period of several months to explain his failure to comply with his statutory obligations. The absence of attempt to give an explanation, coupled with the false impression that he created that he was in a position to imminently comply with the identified shortcomings showed that he failed to maintain an open and cooperative relationship with the office of the Authority as was expected of him.
39. In general Masango’s approach to the matter was not simply of a person who was not able to comply with statutory requirements. Instead his attitude exhibited an unwillingness to meet statutory obligations binding on him and other FSPs.
40. In view of the above the Registrar’s decision to withdraw the licence was not only correct but also well justified in the circumstances.

## CONCLUSION

41. The application is accordingly dismissed.

SIGNED ON BEHALF OF THE PANEL ON 7 JANUARY 2019.



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