

**THE FINANCIAL SERVICES TRIBUNAL**

**Case No: A23/2018**

In the matter between:

**K & L BROKERS CC**

Applicant

and

**FINANCIAL SECTOR CONDUCT AUTHORITY**

Respondent

Panel: Adv W Ndinisa (chair), Mr Juanito Damons and Mr Ahmed Jaffer

For the Applicant: Mr van der Spuy

For the Respondent: Ms NZ Mshunqane and BJJ Bredenkamp

Hearing: 17 April 2019

Date of decision: 6 May 2019

Summary: Application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSRA") - Failure to comply with requirements in section 44(4) of the FAIS Act (Financial Advisory and Intermediary Services Act) to exempt sole key individual and representative from completing required regulatory examinations – Costs and exceptional circumstances

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## DECISION

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### A INTRODUCTION

1. The Applicant lodged an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act No 9 of 2017 (“FSRA”).
2. The subject of this application arises from the decision of the Respondent dated 11 October 2018 (“the October 2018 decision”),<sup>1</sup> to decline the Applicant’s application in terms of section 44(4) of the Financial Advisory and Intermediary Services Act No 37 of 2002 (“the FAIS Act”).
3. The Respondent concluded in its October 2018 decision that it was not satisfied that reasonable grounds existed to warrant exemption. The Respondent is of the view that the exemption will conflict with public interest, prejudice the interest of clients and frustrate the object of the FAIS Act.
4. Mr Van der Spuy, who is the sole proprietor and key individual of the Applicant, lodged an application to be exempted from the examination requirements as envisaged in the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 (“the 2017 Fit and Proper Requirements”)<sup>2</sup>.
5. The Respondent refused to grant the Applicant an exemption in terms of section

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<sup>1</sup> The October 2011 decision should be read together with the letter from the Respondent dated 3 July 2018

<sup>2</sup> Board Notice 194 of 2017

44(4) of the FAIS Act on the basis, amongst others, that:

5.1 if regard is had from the date of appointment of Mr van der Spuy, and the general dispensation granted to the industry, the Respondent is of the view that Mr Van der Spuy have had sufficient time to comply with the examination requirements;

5.2 the conduct of Mr van der Spuy indicates a lack of commitment and a disregard of the peremptory requirements of the FAIS Act;

5.3 it will conflict with the public interest, prejudice the interest of client and frustrate the achievement of the object of the FAIs Act; and

5.4 in view of the above, the Respondent is not satisfied that reasonable grounds exist to warrant an exemption from the examination requirements.

6. We are now required to determine whether the Respondent's decision in rejecting the exemption application of the Applicant is justified?

**B THE RESPONDENT'S DECISION REGARDING THE EXEMPTION APPLICATION**

7. The October 2018 decision sets out in detail the reasons why the Applicant had failed to make out a case for exemption which *inter alia*, were based on the following reasons namely:

7.1 the Applicant failed to comply with section 26 of the 2017 Fit and Proper Requirements which, amongst other things, requires that a financial

services provider (who is a sole proprietor), key individual and representative must successfully pass the applicable regulatory examination before that person's authorisation, approval or appointment;

- 7.2 the Applicant has not taken any steps towards complying with the qualification requirements and no explanation has been provided for such failure;
- 7.3 the Respondent noted that Mr Van der Spuy only wrote both the RE5 and RE1 examinations once, that is on 28 May 2012 and 11 June 2012 respectively;
- 7.4 Mr Van der Spuy is required to obtain 60 credits at NFQ level 4 by 31 December 2009 and according to Inseta records of results, he had only obtained 30 credits at NFQ level 4;
- 7.5 The Respondent had on numerous occasions taken regulatory actions against the Applicant for failure to comply with the requirements of the FAIS Act;
- 7.6 In considering an exemption application, the Respondent must consider the interest of the public. The potential harm to the consumers of financial services is self-evident if they conduct financial services business with a person who does not know and/or understand the obligations and responsibilities imposed on such person by the FAIS Act;  
and
- 7.7 the regulatory framework of the FAIS Act provides for certain fundamental requirements of which the competence requirement is one

of them.

8. The Respondent has considered the submissions made by the Applicant as the basis for its 2018 Exemption Application and noted the following:

8.1 It is widely recognised and accepted that the regulation has and always will have a negative financial impact on and/or may have create other burdens for regulated persons. This must have been with the contemplation of the lawgiver when it decided to introduce the competency requirements;

8.2 Therefore, the question, *inter alia*, is not whether it creates hardship but rather what reasonable grounds exist in relation to that hardship to support an application for exemption, for example whether the hardship you experience is excessive in relation to other persons that must comply with the same requirements and having cognisance of the purpose of the requirements and the objective of the FAIS Act. In the absence of such information, the Respondent is of the view that merely claiming that compliance with the requirements creates hardships does not constitutes reasonable grounds as contemplated in section 44(4) of the FAIS Act; and

8.3 The position of the Mr van der Spuy does not really differ from that of any other persons that is in similar position and who has to comply with the examination requirements.

9. In respect of the medical condition of Mr van der Spuy, the Respondent stated

that that it has taken into consideration of his medical condition. However the Applicant has not taken any steps to find alternative methods to comply with the requirements.

## **C THE STATUTORY SOURCE OF THE APPLICATION**

### Regulatory Examinations and Qualifications

10. The Determination of Fit and Proper Requirements for Financial Services Providers, 2008 (“the 20108 Fit and Proper Requirements”)<sup>3</sup> required financial service providers, key individuals and representatives who were authorised, approved or appointed between 30 September 2004 and 31 December 2007 to comply with their qualification requirements.<sup>4</sup>
11. On 1 April 2018 the 2008 Fit and Proper Requirements was repealed and replaced with the 2017 Fit and proper Requirements.
12. In respect of general competence requirements, section 12(b) of the 2017 Fit and Proper Requirements provides that an FSP, key individual and representative must comply with minimum requirements set out in Parts 2, 3, 4 and 5 of Chapter 3 of the 2017 Fit and Proper Requirements.
13. Section 23 of the 2017 Fit and Proper Requirements provides that a key individual must have a qualification recognised by the Respondent in terms of section 24.
14. Section 52(1) which deals with the transition period, provides that the

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<sup>3</sup> Board Notice 106 of 2008

<sup>4</sup> Section 10 of the 2008 Fit and Proper Requirements.

qualifications obtained by an FSP, key individual or a representative –

14.1 relating to a particular financial product and particular financial service in relation to a specific category of FSP in respect of which the FSP, key individual or representative was authorised, approved or appointed prior to 1 January 2010; and

14.2 that complied with the relevant requirements set out in section 10 of the Notice on Determination of Fit and Proper Requirements for Financial Services Providers, 2008, published as Board Notice 106 of 2008,

is deemed to meet the minimum qualification requirements set out in Part 3 of Chapter 3 of the 2017 Fit and Proper Requirements, but only insofar it relates to that particular financial product and particular financial service in respect of which it was so authorised, approved or appointed.

Requirements of Exemption

15. Section 44(4) of the FAIS Act provides that the Respondent may exempt any person, on reasonable grounds, from any provisions of the FAIS Act, provided the Respondent is satisfied that:-

15.1 the rendering of financial services by that person is already partially or whole regulated by another law; or

15.2 the Application of a provision of the FAIS 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 clients and frustrate the achievement of the object of the FAIS Act.

16. What is apparent from the reading of section 44 of the FAIS Act is that the powers of the Respondent is qualified, that is the Respondent may only exempt a person if reasonable grounds exist to do so and only if the Respondent is satisfied. Therefore in exercising the Respondent's discretion, it is necessary to have regard to the qualifying factors set out in section 44.

#### **D APPLICANT'S GROUNDS FOR RECONSIDERATION**

17. In essence, the Applicant's motivation to apply for exemption from the 2017 Fit and Proper Requirements to successfully complete the regulatory examination were, amongst other things, the following, namely:

17.1 if the application for exemption is not granted, the Applicant will suffer financial hardship and render him unemployed;

17.2 that he suffers from permanent cognitive disorder (mental ability) cause by severe case of encephalitis which was contracted since the year 2000;

17.3 in addition to the above, clients of the Applicant will be prejudiced if the Respondent refuse to grant exemption from the examination requirements to the Applicant as majority of whom have retained his



services for many years and enjoyed long-standing client base which serves as testimony of his ability to carry out his responsibilities and duties; and

17.4 further, the Applicant has pointed out that as a result of two home violent invasion in 2012 and 2017, he suffered from post-traumatic stress disorder, which is an on-going disorder.

18. Further, the Applicant states as his ground of his application that many years of experience have placed him in good stead to properly advise his clients and provides sound financial service to existing and new clients.

*Powers of the Tribunal*

19. The Applicant requests the Tribunal to make the following orders, namely:

19.1 The decision of the Respondent to decline the Applicant's application for exemption from examination requirements in terms of the 2017 Fit and Proper Requirements is turned over.

19.2 Alternatively, the Applicant is afforded an opportunity to take the necessary examinations in an alternative manner which takes the medical limitations of the Applicant into consideration.

20. Section 234(1)(a) of the FSRA circumscribes the powers of the Tribunal with respect to the decisions of the Respondent. The Tribunal can either set aside the decision and remit the matter back to the Respondent for further consideration or dismiss the application. There is no room for the

Tribunal to substitute the Respondent's decision for its own.<sup>5</sup>

21. The Respondent submitted in line with the reasoning in the *V Masango v Financial Sector Conduct Authority* that the Tribunal's powers are indeed circumscribed when it comes to the type of decisions of the Respondent forming a subject matter of this application<sup>6</sup> and further that it is not open to it to substitute such decisions. We agree with this submission.

*Application for reconsideration have no practical effect*

22. The Respondent submitted that the application for reconsideration, based on its facts, will not have practical effect. Ms Mshunqane, in developing her argument on behalf of the Respondent, stated that should the Tribunal remit back the matter to the Respondent, such an order will not result in the approval of the exemption sought.
23. We were referred to the case of *Legal Aid South Africa v Magidiwana and Others*<sup>7</sup> where it was stated that courts ought not to decide issues of academic interest only. We have no doubt that in appropriate cases this Tribunal would not make determinations that will have no practical effect.
24. However, the Applicant in this application made submissions, amongst other things, in respect of his medical condition and financial hardship. We opt not to deny him assessment of this concerns.

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<sup>5</sup> Victor Masango v Financial Sector Conduct Authority Case No.A19/2018, par 12

<sup>6</sup> Section 234(1)(a) and (b) of FSCA

<sup>7</sup> 2015 (2) SA 568 (SCA)

## **E SUBMISSIONS ON MERITS**

25. The Applicant, in support of his application for exemption from examinations, persists, that Mr Van der Spuy suffers from permanent cognitive disorder (mental condition) caused by a severe case of encephalitis which was contracted in 2000.<sup>8</sup>
26. Further, the Applicant submits that Mr Van der Spuy suffers from post-traumatic stress disorder which is according to him an on-going condition that further limits his ability to study and concentrate for extended period of time.
27. Furthermore, the Applicant submitted that if his licence is revoked, he will suffer financial hardship and prejudice.
28. Further, in support of his the Applicant submitted, amongst other things, as part of his grounds for reconsideration, that:-
- 28.1 his extensive experience assists where his memory fails him and he can refer to relevant legislation and guidance documents; and
- 28.2 he has undertaken to complete on-line training course presented by Sanlam Limited which meets the Class of Business Training and Product-Specific Training requirements.
29. The Respondent made the following submissions in respect of financial or other forms of hardship to the Applicant or his clients:

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<sup>8</sup> Records, p3

29.1 the Respondent stated the following in paragraphs 12 and 13 of its letter dated 3 July 2018:

“12. ....It is widely recognised and accepted that regulation has and always will have a negative financial impact on and/or may create other burdens for regulated persons. This must have been within the contemplation of the lawgiver when it decided to introduce the competency requirements.

13. Therefore, the question, inter alia, is not whether it creates hardship but rather **what reasonable grounds exist in relation to that hardship to support an application for exemption**, for example whether the hardship you experience is excessive in relation to other persons that must comply with the same requirements and having cognisance of the purpose of the requirements and the objectives of the Act. In the absence of such information, the Respondent is of the view that merely claiming that compliance with the requirements creates hardship does not constitutes reasonable grounds as contemplated in section 44(4) of the Act.” (own emphasis); and

29.2 in respect of non-discretionary financial services in respect of long-term insurance products or financial services in respect of a Tier 2 financial products, completion of regulatory examination is not required. Therefore the Applicant is at liberty to pursue other opportunities.

30. Further, the Respondent submitted the following in respect of causing prejudice

to the interest of his client:-

30.1 the Applicant did not express himself in his application for exemption on the aspect of prejudice to the interest of clients should the Applicant successfully complete the regulatory examinations required in terms of the 2017 Fit and Proper Requirements. According to the Respondent, the Applicant attempted to address this aspect late on his application for reconsideration; and

30.2 further, the Applicant did not provide information on his 2018 application for exemption to show that the granting of the application will not prejudice the interest of client. The Respondent noted that the only moment the Applicant responded to this aspect was when the latter state that none of his client are prejudice by his illness as some supported him since 1992 and are aware that Mr van der Spuy did not lose his intellect and professional knowledge.

31. Furthermore, in respect of the requirement that the granting of the exemption will not conflict with the public interest and frustrate the achievements of the objects of the FAIS Act, the Respondent submitted that:-

31.1 the Applicant was required to show that the granting of the exemption will not conflict with the public interest and not frustrate the achievement of the objects of the FAIS Act. According to the Respondent, the Applicant did not deal with this requirements; and

31.2 on the facts of the case and the belated arguments of Mr van der Spuy

in his grounds for reconsideration, it can never be seen to be in the public interest or to further the objects of the FAIS Act to allow Mr van der Spuy to be permanently exempted from regulatory examinations.

32. After having perused the records in this matter, we agree with the submissions of the Respondent that the Applicant did not show that the granting of the exemption will not conflict with public interest and not frustrate the objects of FAIS Act.

33. We have note with concern during the hearing of the matter that the Applicant could not provide any satisfactory response on the following aspects which reflects bad on his application for exemption from regulatory examination:-

33.1 Mr van der Spuy only wrote the RE5 and RE1 examinations once on 28 May 2012 and 11 June 2012 respectively and no further attempts were made to complete the regulatory examinations successfully. Put differently, the Applicant failed to take advantage of the lengthy period granted to financial services providers enabling them to comply with the successfully completing regulatory exams;

33.2 Mr van der Spuy, on his own version, only failed the regulatory examinations by 1% and thereafter did not bother to make further attempts towards successfully completing the examinations;

33.3 even though Mr van der Spuy could be exempted from successfully completing RE1 and RE5 regulatory examinations, he will remain in violation of section 12(b) of the 2017 Fit and Proper Requirements which requires key individuals like Mr van der Spuy to comply with qualification

requirements;

33.4 the numerous regulatory actions taken by the Respondent when the Applicant failed to submit financial statements and/or reports in time, when required to do so in terms of legislation;

33.5 Mr van der Spuy made a similar application to be exempted from regulatory examinations and same was declined in 2015. He never provided an explanation why he ignored such a decision; and

33.6 Mr van der Spuy continued doing business for a period for almost 3 years, knowing very well that he was not compliant with the required competency requirements and was not exempted.

34. Further, we note the contents of the letter dated 18 May 2018 from Mr Chris Eloff, a clinical psychologist which states, amongst other things, that Mr van der Spuy has a condition which caused permanent cognitive disability to the extent that he cannot perform study/examination process. We are not persuaded by the content of the letter in that Mr van der Spuy:

34.1 did manage to undertake an examination with Inseta in 2010 despite the effect of his mental that commenced in the year 2000;

34.2 has failed by 1% when he tried to write the RE1 and RE5 regulatory examinations and that indicates that he was not far to successfully completing the regulatory examination; and

34.3 submitted that he has extensive experience which has taught him in

instances of memory failure to offer sound and accurate advice to his clients and refer to relevant legislation and guidance documents.

35. We are of the view that Mr van der Spuy, being the person who seeks exemption, carries the onus to satisfy the Respondent on reasonable grounds (that is objective facts) that all the requirements referred to in section 44(1) (b) and (c) of the FAIS Act were met.<sup>9</sup>

36. By not dealing with all the criteria referred to in section 44 of the FAIS Act, the Applicant's application for exemption from RE1 and RE5 did not have a good prospect of success.

37. Further, the manner in which the Applicant handled his regulatory duties and obligations, that is:-

37.1 submitting financial information and reports late, and

37.2 continuing to conduct business for a period of about three (3) years from when his 2015 application for exemption was declined;

did not assist the application of the Applicant.

38. In the case of *Joka v the Registrar of Financial Service Providers*<sup>10</sup> at paragraph 38 the Board of Appeal stated the following:

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<sup>9</sup> TJ Makuwa v The Registrar of Financial Services Providers – case No A20/2016, at par 18

<sup>10</sup> Case No. A4/2014



*“In the context of a country like South Africa where most consumers of financial services have no sound knowledge and understanding of the general financial investment environment and are mostly reliant on FSP’s when they make important financial decisions, and are as a result most vulnerable in that regard, the need to require appropriate set standards of financial services is critical. It ensures that financial services are provided with the necessary competence and clients are provided with the required quality of service.”*

39. We were referred to the matter of *Anna Christiana De Wet v Financial Sector Conduct Authority*<sup>11</sup> (“De Wet”) at paragraph 20 where this Tribunal, amongst other things, stated that:

*“There is no doubt that when a Registrar has to consider exemption application, the interest of the public is paramount.”*

40. We have no doubt that, on the evidence on the record, the Respondent was obliged to insist that the Applicant complies with the obligations imposed on him by the 2017 Fit and Proper Requirements, in particular relating to the examination requirements.
41. Therefore we are of the view that the Respondent was justified to decline the 2018 application for exemption from the regulatory examinations in respect of RE1 and RE5.

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<sup>11</sup> Case No. A5/2008

42. *Regarding costs*, the Respondent correctly noted that this Tribunal may order costs in exceptional circumstances. We were to the case of *P Pieters v Sapcor Harrismith (Pty) Ltd* (“the Pieters case”)<sup>12</sup> where this Tribunal considered in details with reference to high court authorities on what constitute exceptional circumstances.

43. In short, *the Pieters case*, in line with the authorities cited therein<sup>13</sup>, acknowledges, amongst other things, that exceptional circumstances should be determined on case by case basis and includes something out of the ordinary, unusual and uncommon.

44. We do not find it as something out of the ordinary and/or unusual and/or uncommon for the Applicant to approach this Tribunal for purposes of reconsideration of the decision of the Respondent to decline Mr van der Spuy’s application for exemption from regulatory examinations.

45. We have considered that Mr van der Spuy is not a person who is trained in law and to met out legal costs without more on his conduct will be unfair.

## **F CONCLUSION**

46. Having considered the evidence and the reasons provided on the record, we therefore find that the decision of the Respondent for refusing the exemption application is justified.

47. In light thereof, the application for reconsideration is dismissed.


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<sup>12</sup> Case no. FSP 14/2018

<sup>13</sup> *MV AIS Mamas Seatrons Maritime v Owners, MV AIS Mamas 2002* (6) SA 150 © at 157 E – F and *Avnit v First Rand Bank Limited* [2014] ZASCA at 132

**G THE ORDER**

1. The application for reconsideration is dismissed
2. No order as to costs



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**CHAIRPERSON**

**AVD W NDINISA**