

# **THE FINANCIAL SERVICES TRIBUNAL**

Case №: A34/2022

In the matter between:

**T AND T UNDERWRITING MANAGERS (PTY) LTD** Applicant

and

**FINANCIAL SECTOR CONDUCT AUTHORITY** Respondent

Summary: Failure to submit financial statements in terms of section 19(1) and (2) of the Financial Advisory and Intermediary Services Act, (37 of 2002) - Non-compliance with section 36(1)(c)(v) of the Determination of Fit and Proper Requirements for Services Providers, 2017.

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## **DECISION**

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### **INTRODUCTION**

1. The Applicant, T and T Underwriting Managers (Pty) Ltd, applies for reconsideration of a decision by the Financial Sector Conduct Authority ("the Authority") in which it withdrew its licence to act as a financial services provider ("FSP") in terms of section 9(1) read with section 19(2) of the Financial Advisory and Intermediary Services Act, 2002 ("the FAIS Act").
2. The decision of the Authority is based on the grounds that the Applicant failed to comply with the provisions of the FAIS Act.
3. The rational that informs the grounds is that the Applicant contravened the following provisions:

- 3.1 Section 36(1)(c)(v) of the Fit and Proper Requirements for Financial Service Providers, 2017 (“the Fit and Proper Requirements”), read with paragraph 2.2 of the Licencing Conditions. This aspect relates to the requirement that an FSP must at all times have adequate and appropriate key individuals to effectively manage or oversee the activities of the FSP relating to rendering of financial services; and
- 3.2 Section 19(1) read with section 19(2) of the FAIS Act requires that an FSP must annually prepare financial statements to Authority not later than four months after the end of the financial provider’s financial year.
4. The factual background that led to the decision of the Authority does not appear to be in dispute and shall be briefly considered hereunder.
5. The parties agreed to waive formal hearing by the Tribunal.

## **THE FACTS**

6. At all relevant times when the Authority raised the issues of non-compliance with the provisions of the FAIS Act, Mr Hector Goneke was the sole director and shareholder of the Applicant.
7. On or about 10 June 2020 the Authority informed the Applicant that the financial statements for the years ended 28 February 2018 and 28 February 2019 were not received as required in terms of section 19(1) of the FAIS Act. The Applicant was requested to submit the outstanding

financial statements not later than 25 June 2020.

8. The Applicant, through its managing director, Mr Goneke responded on 23 June 2020, by submitting what it purported to be the financial statements as required.
9. On 25 June 2020 the Authority informed the Applicant that the financial statements submitted do not comply with section 19(1) and (2) of the FAIS Act and indicated the format required. The Applicant was requested to submit compliant financial statements not later than 10 July 2020.
10. Further, on 16 July 2020 the Authority made the Applicant aware of the non-receipt of specific information in respect of the financial statements for the year ended on 28 February 2019. Due to absence of the specified information requested, the Authority informed the Applicant it considered the financial statements to have not been received.
11. The Applicant was warned by the Authority to submit the outstanding information to avoid regulatory action being taken it.
12. On 23 July 2020 the Authority reminded Applicant about the financial statements.
13. More than twelve months later, the Authority issued a notice of intention to suspend the licence of the Applicant to act as a financial services provider in terms of the provisions of the FAIS Act. It is dated 15 November 2021 (“the Intention to Suspend”).

*Failure to appoint key individual*

14. The Intention to Suspend provides factual basis for the intended action of the Authority. The factual basis is that the Applicant, being the licensee, is operating without a key individual. Mr Goneke, being the only director of the Applicant is compelled to be a key individual.
15. For the reason that the Applicant failed to appoint a key individual, the Authority maintains that the Applicant has not satisfied it that it (the Applicant) complies with the fit and proper requirements.
16. Consequently, the Applicant contravened section 36(1)(c)(v) of the Fit and Proper Requirements read with paragraph 2.2 of the Licensing Condition.

*Failure to submit financial statements*

17. Further, the Authority provided another factual basis for the intended suspension of the Applicant. The Authority recorded that on 27 July 2020, the Applicant submitted financial statements for 2028 and 2019. The Authority noted that the financial statements did not include balance sheets, income statements and report of an independent reviewer.
18. The Authority referred to the legislative provisions regulating the submission of financial statements. According to the Authority, an FSP must annually prepare financial statement in accordance with section 19(1) and (2) of the FAIS Act and must submit such financial statements to the Authority not later than four months after the end of the provider's

financial year.

19. It is noted that the financial year end of the Applicant is 28 February and should therefore have submitted to the Authority its financial statements by 30 June of each year.
20. Further, the Authority stated that the Applicant failed to submit Annexure A to the FAIS Act Notice 82 of 2015 for both financial years. The Notice referred therein enables, amongst other things, eligible FSPs to be exempted from the requirements pertaining to the filing of audited financial statements.
21. The Applicant, after having been notified that the financial statements do not meet the requirements of section 19(1) and (2) of the FAIS Act, sent a response stating that the Applicant had requested the financial statement from the auditors.
22. According to the Notice to Suspend, on 7 August 2020 the Authority made follow up communication regarding the outstanding financial statements. The Applicant, in response, submitted draft copy of the financial statements for 2018 and 2019. Mr Goneke stated that he had signed off the financial statements and is expecting them back from the Auditors.
23. The aforementioned financial statements were reviewed by the Authority and the feedback to the Applicant was that (i) the submitted financials were not prepared in the name of T and T Underwriting Managers (Pty)

Ltd, but rather in the name of Taxi and Transport Insurance (Pty) Ltd; and (ii) the financials must be prepared in the name of the licensee.

24. The Intention to Suspend records that the Applicant had failed to submit financial statements for the following financial year(s) ended on 2018, 2019 and 2020 respectively.
25. The Applicant was afforded an opportunity to provide reasons why the suspension of the authorisation should not be effected and same was to be done not later than 15 December 2021. The Applicant was warned that failure to respond within the prescribed time, the Authority will proceed to with the suspension of the licence.
26. On or about 10 February 2022 the Authority proceeded to suspend the licence of the Applicant to act as a financial service provider (“the Notice to Suspend”).
27. In the Notice to Suspend the Authority notified the Applicant that it intends to withdraw the Applicant’s authorisation to act as a financial service provider, should it fail to rectify the contraventions mentioned in the Notice to Suspend not later than 10 May 2022.
28. The records shows that the Authority took further steps to remind the Applicant of the non-compliance with the FAIS Act. This was done on 11 May 2022 and 18 May 2022 respectively.
29. On 23 June 2022 the Authority eventually issued a notice of withdrawal of the Applicant’s licence. It is this decision that the Applicant requests

the Tribunal to reconsider.

## **GROUND FOR RECONSIDERATION**

30. The Applicant approached the Tribunal for purposes of reconsideration as stated herein above.

31. An affidavit of Mr Goneke is attached in support of the application. The affidavit of Mr Goneke refers to the Applicant's application for submission of further evidence and the following is stated: -

31.1 the Applicant is of the opinion that the financial statements submitted to the Authority by its administration manager was on time. Unfortunately, the Applicant's administration manager passed away in December 2020;

31.2 on 11 May 2022 the Applicant submitted an application to the Authority for a key individual; and

31.3 there was miscommunication between the Applicant and the Authority and did not receive some of the correspondence.

32. As noted herein above, the Applicant make application for submission of further evidence. Although the Applicant did not comply with the pre-requisite which lay the basis for admission of further evidence,<sup>1</sup> the Authority does not appear to take that point. Instead, the heads of

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<sup>1</sup> Section 24 of the Financial Services Tribunal Consolidated Rules, issued in terms of 227 of the Financial Sector Regulation Act, 9 of 2017

argument of the Authority assesses the further evidence.

33. The Authority's heads of argument states that the Applicant's grounds of application do not take issue with the correctness of the Authority's finding that the Applicant failed to comply with section 19(1) and (2) of the FAIS Act. The Authority is correct on this point.
34. Further, the Applicant does not explain or attempt to rectify the review of the Authority which stated, amongst other things, that the Applicant submitted draft financial statements in the name of Taxi and Transport Insurance (Pty) Ltd. This attitude does not assist the Applicant's application.
35. The submission of the Authority that the Applicant's failure to submit financial statement is not a minor issue, is sound. The investing public's interest must be protected and one of the ways to do so is for the Authority enforce compliance with the provisions of the FAIS Act. Therefore, the Authority is justified to make the findings recorded in the decision.
36. The Authority referred to Part 5 of the Fit and Proper Requirements, more specifically at section 36(1)(c)(v) to support its legal position and see no reason to re-stated it as it was quoted more than once in previous correspondences with Applicant.
37. Further, the Authority submitted in this regard that at the time when it made the decision, Mr Goneke was the sole director and shareholder of



the Applicant and as such, he was required to be approved as its key individual. This is in line with the FAIS Act.<sup>2</sup>

38. The Applicant submitted as part of the further evidence that it appointed Mr Pitso Maake on 20 May 2022. The Authority in response submitted that this move by the Applicant is not assisting it for the reason that Mr Goneke as the only director and shareholder of the Applicant, he was the person to be approved.
39. On or about 30 September 2022 the Applicant appointed a second director. The Authority submitted that this does not assist the Applicant as the appointment of the second director come into effect three months after the challenged decision was taken. This submission is correct.

## **CONCLUSION**

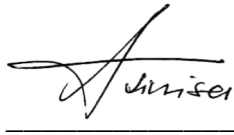
40. The application for reconsideration does not provide grounds that could justify setting aside and remitting the matter to the Authority.
41. After having assess the grounds and the reasons stated in the decision dated 23 June 2022, the Authority was not wrong.

**ORDER:** The application for reconsideration is dismissed

Signed on 5 December 2022

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<sup>2</sup> Refer to the definition of a key individual in section 1 of the FAIS Act “**key individual**”, in relation to an authorised financial services provider, or a representative, carrying on business as – (b) a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person



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**Adv W Ndinisa (Member)**

**For self and LTC Harms (Deputy Chair)**