

THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

A49/2013

In the matter between

VUMA STANLEY MWELASE T/A

MASIBUMBANE INSURANCE BROKERS

APPELLANT

and

REGISTRAR OF FINANCIAL SERVICES PROVIDERS

RESPONDENT

DECISION

INTRODUCTION

1. This is an Appeal in terms of Section of 26(1) of the Financial Services Board Act 97 of 1990 as amended ("the FSB Act"). The parties to this Appeal are Vuma Stanley Mwelase t/a Masibumbane Insurance Brokers and The Registrar. For the sake of convenience the parties shall be hereinafter referred to as "the appellant" and "the Registrar" respectively.

2. The appellant is a sole proprietor financial services provider and a representative of Masibumbane Insurance Brokers. He was authorised as a financial services provider (FSP) in Short - term Insurance: Personal Lines on 11 October 2005.
3. On 30 May 2013, the Registrar made a decision to withdraw the appellant's licence to operate in terms of section 9 (1) of the Financial Advisory and Intermediary Services Act, No. 37 of 2002 (the FAIS Act). That decision is the subject matter of this appeal.

APPLICATION FOR CONDONATION

4. In view of the fact that the appeal was lodged on 8 June 2014, paragraph 4 of the Regulations in respect of Appeals to the Appeal Board required the Registrar to have filed reasons for its decision by 8 July 2013. However, reasons were only furnished on 17 September 2013.
5. As a result of the foregoing the Registrar requested condonation for the late filing of the reasons.
6. Having considered the Registrar's submissions, this Board hereby grants condonation essentially on the basis that, firstly, the delay was not unreasonable and that secondly, the appellant was not unduly prejudiced by such the delay. The late filing also appears not to have been informed by dilatoriness or disregard for the process.

MATTER FOR DECISION

7. The issue is whether or not the Registrar's decision dated 30 May 2013 was correct.

THE APPEAL

8. The Registrar debarred the Appellant on the basis that he no longer met the criterion prescribed by section 8 the FAIS Act. In particular the Registrar holds the view that the Appellant can no longer be described as a "fit and proper" person as required by the FAIS Act which places a demand on all persons to be fit and proper and to retain such status at all times during the course of their dealings with members of the public concerning activities performed in terms of the FSB Act.
9. The Registrar submits the following as grounds for invoking section 8 of the FAIS Act:
 - 9.1. The appellant is an FSP who, in 2005, was granted license to operate as such.
 - 9.2. Section 10 of the Determination of Fit and Proper Requirements for Financial Services (the Determination) as prescribed by the FAIS Act required the appellant as an FSP who was appointed prior to 1 January

2010, to have written the First Level Regulatory (RE1) examination by 31 December 2011 (deadline).

- 9.3. Deadline was extended in terms of Board Notice 61 of 2012 to 30 June 2012.
 - 9.4. The extension meant that if the appellant had written the RE1 before deadline but was unsuccessful, he would have had another three months from deadline to 30 June 2012 to rewrite the exam.
 - 9.5. The extension benefited only those who had written the exam before deadline.
 - 9.6. The appellant did not write the RE1 exam before 30 June 2012. What has been submitted as proof of the appellant's written exams indicates that the appellant wrote the RE5 exam before deadline but not the RE1 exam.
 - 9.7. The fact that the appellant failed to write the RE1 exam before deadline meant that he was not eligible to write the exam during the extended time.
 - 9.8. The appellant's failure to write RE1 exam by 30 June 2012 as required by the Determination meant that the appellant fell short of the required minimum standard for professional qualification as a competent FSP.
 - 9.9. Lack of this minimum requirement renders the appellant incapable of meeting the standard of a fit and proper person imposed on him by section 8 of the FAIS Act.
10. Those are the submissions made by the Registrar in a nutshell.
 11. Now turning to the appellant's submissions.

12. The appellant raised two issues. One issue relates to procedure and the other is a factual dispute. These will be dealt with in turn.

13. Firstly, I deal with the procedural issue.
 - 13.1. On the papers the appellant contended that he did not receive Notification of Intention to Suspend Authorisation before the decision was made on 30 May 2013. In fact he only became aware of the Registrar's decision to suspend him only after the decision was made and after his licence had been withdrawn.
 - 13.2. However, during evidence it transpired that the appellant received the Registrar's notifications as he did all other correspondence from the Registrar.
 - 13.3. The appellant conceded during proceedings that he in fact neglected to take steps to attend to the matter owing to particularly adverse personal circumstances at the time.
 - 13.4. For the sake of brevity I shall not deal with the details of the appellant's personal circumstances. It suffices to state that the appellant conceded that with the benefit of hindsight, it was not impossible for him to have sought alternative ways to deal with the matter appropriately even in those circumstances.
 - 13.5. In the premises the Board is therefore of the view that the Registrar satisfied the procedural requirements of the Act before reaching its decision on 30 May 2013.

14. I now turn to the appellant's factual contention relating to the writing of the regulatory exam prescribed by the Determination.
15. It is perhaps pertinent to state at the outset that throughout his submissions the appellant acknowledged the fact that he had to write the exam as required by the Determination and that doing so was a precondition to meeting the requirements of the FAIS Act. The factual dispute therefore relates to the nature of the exam and the timeframe within which it should have been written and not more.
16. That said, the appellant's position in this regard can be summed up as follows:
 - 16.1. The appellant first wrote the regulatory exam on 6 April 2011 for which he obtained 40%.
 - 16.2. He wrote the exam again on 16 November 2012 and obtained 54%. These results were also below the required pass rate.
 - 16.3. He attempted the exam for the third time on 25 October 2013 and only obtained 28.78%.
 - 16.4. The appellant denies that he wrote the RE5 exam instead of the RE1 exam.
 - 16.5. In the context of the above the appellant argued that:
 - 16.5.1. he wrote the regulatory exam three times since 6 April 2011 and
 - 16.5.2. consequently he refutes that he has failed to meet the requirements of the FAIS Act.

17. This Board has considered the matter and found that the FAIS Act required the appellant, as an FSP who was granted a licence in 2005, to have written the RE1 exam on or before 30 June 2013.
18. The RE1 exam relates to the general examination that all key individuals (the appellant in particular) and sole proprietors in all categories were obliged to write.
19. The appellant wrote the RE5 exams before 30 June 2012 and wrote the RE1 exam on 25 October 2013.
20. If the appellant wrote the RE1 exam before 30 June 2012 he would have been eligible to rewrite the exam again after the said date.
21. In any event the FAIS Act required an FSP in the position of the appellant to write and complete the RE1 exam not later than 31 March 2013.
22. Therefore even if it could be said that the appellant could have availed himself of the benefits of the extension to write the RE1 exam after 30 June 2012, he still would have had to complete the RE1 exam by 31 March 2013.
23. The appellant only wrote the RE1 exam on 25 October 2013 which was after the date on which he was required to have successfully completed such exam. He was unsuccessful in that exam in any event.
24. The position would have been the same if it had been argued that the RE5 exam was the competent exam for the appellant to have written to fulfill the requirements imposed by the FAIS Act.
25. In the premises it seems the appellant misguided himself regarding what was expected of him. It appears that the appellant assumed that he was merely required to sit the regulatory exams, specifically the RE1 exam. It seems he did not appreciate the fact that he was also required to successfully complete the exam and that he had to do so within a specified period of time.

26. The appellant did not obtain a pass for any of his regulatory exams either RE1 or RE5.
27. Therefore the appellant simply misdirected himself regarding what the FAIS Act actually required of him regarding the regulatory exams.
28. In light of the foregoing one needs to consider and articulate the expectations of the FAIS Act on the appellant and the Registrar.
29. The Registrar as a creature of statute is obliged to react as soon as there are indications of lack, deviation or want of compliance with the FAIS Act. This the Registrar must do irrespective of whether such indications arise out of deliberate actions, mistakes or are tied to ignorance of the need to comply. The Registrar is given no choice but to insist on compliance.
30. In the context of this case the requirement that the FAIS Act so rigorously pursues is competence. It is the curbstone on which the FAIS Act seeks to establish consistency, predictability, precedence and professionalism.
31. The Registrar sought compliance and it was left to the appellant, at the appropriate time, to convince the Registrar not to suspend or withdraw his licence. In providing no response to the Registrar when he was in a position to do so, the appellant failed to take the opportunity to explain why he had not complied with the FAIS Act.
32. In the circumstances the Registrar followed all the procedural requirements by delivering the requisite notifications to the appellant before taking the decision to suspend his licence.
33. It is also clearly correct that the appellant ought to have completed the regulatory examinations not later than 31 March 2013 which if he was to satisfy the requirements of the Act.
34. Having considered the circumstances of this particular case, we therefore find that the Registrar's decision of 30 May 2013 was correct.

35. Accordingly the appeal is dismissed.

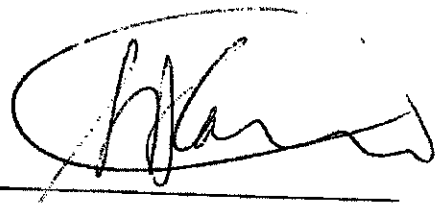
COSTS

36. Costs are a discretionary matter for the Board to decide.

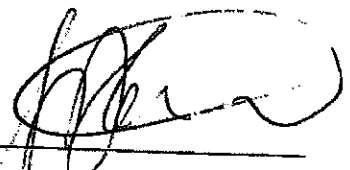
37. In deciding costs, consideration was given to the fact that the appellant seems to have genuinely misguided himself in the belief that since he had written the regulatory exams on a few occasions that in fact he had met the requirements of the FAIS Act and that consequently the decision to withdraw his licence could have been overturned on appeal.

38. In the circumstances each party shall bear its own costs.

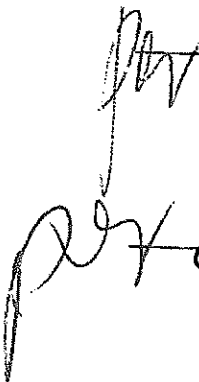
Dated at Pretoria on this 4th day of July 2014.



CHAIRMAN: L. DLAMINI



MEMBER: L. MAKHUBELA



MEMBER: N.P DONGWANA