

BOARD OF APPEAL OF THE FINANCIAL SERVICES BOARD**CASE NO: A42/2015**

In the appeal of:

XIRHANDZWA FUNERAL SERVICES**APPELLANT**

And

REGISTRAR OF FINANCIAL SERVICES PROVIDERS**RESPONDENT**

DECISION- REASONS

On the 10th May 2016, the Panel Board heard the appellant's appeal and found it to be fatally defective for its lack of compliance with Section 26 of the Financial Services Board Act, (Act No 97 of 1990) ("the FSB Act") and as such, the order dismissing the appellant's appeal was granted with no order as to costs. I mentioned that reasons will be furnished. I now give reasons.

1. The subject of the appeal is the registrar's decision dated the 30th June 2015 to withdraw the appellant's authorisation on the basis that it failed to pay its prescribed levy in the amount of R10 694.59 (the registrar's decision)¹.

¹ Page 5 of the record, registrar's notification of the decision to withdraw appellant's license.

2. The appellant lodged its appeal on the 11th November 2015, more than 4 months after the registrar's decision. The period for the lodging of an appeal to the board is prescribed in Section 26 (2) of the FSB Act and it reads:

"26. Appeal against decision of decision- maker,

2. An appeal must be lodged within 30 days of the person becoming aware of, or ought to have become aware of a decision..."

3. In determining whether an appeal was lodged within the prescribed period, Section 26 (2) calls for two alternative enquiries, namely it encompasses the enquiry as to when an appellant actually becomes aware of the registrar's decision alternatively the enquiry as to when the appellant ought to have become aware of the registrar's decision. In its letter of the 11th November 2015, the appellant through its own sole member, Rev. Maluleke, stated in that letter, that on the 11th November 2015, when on his way from Johannesburg he visited the respondent's offices and was surprised to discover that the appellant's licence has been withdrawn. He further states that he did not receive any letter relating to the

notice or withdrawal of the license. He only knew of the process taken on the day of the 11th November 2015 when he visited the respondent's office.² The registrar, however, submits that the appellant's contention about its awareness of the registrar's decision addresses only the first enquiry in terms of Section 26 (2) of the FSB Act. The appellant, as the contention goes, has failed to address the second enquiry which is the most problematic for the appellant. The second enquiry in essence entails a reasonable person's test: when will the reasonable Financial Services Provider (FSP) in the appellant's position ought to have become aware of the decision.

4. It is not in dispute that the registrar sent all her notifications and the final decision to the appellant's correct address. The evidence submitted by the registrar, emanating from the record, is that the registrar relied on the information submitted to her by the appellant in its application form to notify the appellant about the registrar's intended action and subsequent decision. To this end, the registrar's letters were all posted via registered mail to the appellant's postal address on record with the registrar.

² Letter by the appellant, dated 11th November 2015, pg 1 of the record, appeal for the suspension of licence.

5. It is apposite to refer to paragraph 3.5 of page 10 of the registrar's reasons. In this sub-paragraph, the registrar dealt with the manner in which the various letters, the notices reflecting the registrar's intention as well as the ultimate withdrawal in June 2015 were sent and the subparagraph states the following:

"3.5. The letters (dated 10th and 27 February 2015) were, however, returned to the registrar's office as unclaimed and according to the post office's parcel tracking receipt, the letter of 30th June 2015 has still not been collected by the appellant (proof hereof is attached as annexure E). It is therefore submitted that the registrar had duly notified the appellant of her intended action and subsequent decision as contemplated in Section 9 of the Financial Advisory and Intermediary Services Act, 37 of 2002. The appellant, however, failed to collect the letters from the post office."

6. The appellant's response is in the letter dated the 25th January 2016 that contains grounds of appeal. The information regarding the aspect referred to in the respondent's reasons is in paragraph 4 of the appellant's letter of the 25th January 2016 and the relevant part of the

paragraph reads:

"I solemnly truly inform you that I did not receive any letters related to notice or intention to withdraw the licence."

7. The onus is on the appellant to ensure that it uplifts correspondence sent from the office of the registrar to the address recorded on its application. Further, to update its records within 15 days should there be any changes to its recorded address. No such changes were communicated to the registrar.

- 7.1. In its grounds of appeal, appellant did not deal with the reasons or failed to provide any explanation why it did not uplift the various notices sent by the registrar. In this regard, evidently, the following causes are common from the record:

- 7.1.1. It is common cause that the appellant failed to pay its prescribed levy,

- 7.1.2. The appellant knew that if it fails to pay its prescribed levy, the consequences would be that it will lead to the withdrawal of its license.

7.1.3. In the absence of explanation why the appellant did not uplift the various notices sent by the registrar, it was submitted by Mr Bredenkamp who appeared for the registrar that it should be accepted that Mr Maluleke, knew what he was going to be confronted with, on uplifting the notices from the registrar. I agree with the submission made by Mr Bredenkamp.

7.2. The objective evidence presented by the registrar is that the letters or notices were sent to the appellant's identified address. There is also objective evidence referred to in paragraph 3.5 of the registrar's reasons, i.e annexure E that shows that the notices or letters were delivered but not collected by the appellant.

7.3. The text in Section 26 (2) has therefore been met by the respondent. From the record appellant does not dispute that the notices were not collected. I therefore find, on the preponderance of probabilities, on the evidence before us, that the appellant ought to have been aware in July 2015 about the registrar's decision cancelling its license. I agree with the respondent's submission that the reason why the appellant failed to uplift the registrar's decision does not

matter much as appellant might have known what he was to be confronted with on uplifting the mail from the postal box.

7.4. A reasonable FSP in the appellant's position would have uplifted the decision within the reasonable period after the 8th July 2015, when the registrar's decision was sent to the appellant. The appellant does not dispute having received the postage slips from the identified postal address in the application form, being P.O Box 1237 Malamulele but contends that he did not receive the letters and/or notices from the registrar. No explanation from the appellant regarding any such registrar's notification sent to the identified address.

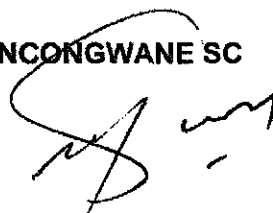
8. According to the objective evidence, the registrar's notification was delivered on or about 8th July 2015 and the appellant should have filed its appeal within 30 days from that date. It has been shown by the registrar that the appeal was lodged outside the prescribed time period. The question that remains is whether the Appeal Board has the power to condone the late filing of the appeal and thereafter deal with the merit of the appeal.

9. It has now on more than one occasion found by the Appeal Board that if the appeal is lodged outside the prescribed time period there is no appeal and that the appeal board does not have the power to condone the late filling of the appeal. In this regard I refer to **Cyclone Matibe Makola v The Registrar**, delivered by the Appeal Board on the 12th May 2015 and also refer to the **Hortors Group Pension Fund v The Registrar Pension Fund** delivered by the Appeal Board on the 28th April 2016. This appeal is been decided on the basis that it is a narrow appeal and the Appeal Board confines itself only to the information that served before the registrar and the Appeal Board can only intervene if it found that the Registrar acted in a manner that was wrong.
10. During the hearing of the appeal, Rev Maluleke sought to rely on a completely new factual statement in that, the postal box was owned by a third party who did not pick up the slips from the post box. He made a submission that he never received any notification slips from that third party. This factual statement cannot be dealt with as it should have been introduced in terms of Section 26 (12) (b) of the FSB Act, if the appellant intended that it should form part of the evidence in this appeal. Appellant should have applied for the introduction of that piece of evidence to go into the record.

11. Even if we entertain this version for a minute, it basically suggests that all three notification slips sent by the registrar over the period of 10th February, 27th February and 30th June 2015, were not given to the appellant. This version is not supported by evidence and in any event, highly improbable to be believed, as such it is rejected.
12. Consequently the appeal had to fail on the basis that it was lodged out of time.

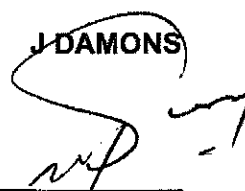
DATED 7TH JULY 2016 AT BROOKLYN, PRETORIA

A.T NCONGWANE SC



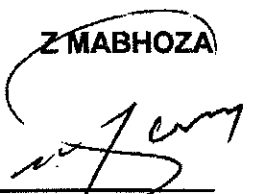
(Chairperson)

J DAMONS



(Panel member)

Z MABHOZA



(Panel member)