

## **THE FINANCIAL SERVICES TRIBUNAL**

Case №: A25/2023

In the matter between:

**JEROME PETER RAYMOND MICHAELS**

Applicant

and

**FINANCIAL SECTOR CONDUCT AUTHORITY**

Respondent

Tribunal: LTC Harms (chairperson), Adv W Ndinisa and Mr JP Veldhuizen

For Applicant:

Adv Winston Erasmus

For Respondent:

Ms Ziyanda Mshunqane, counsel for the  
Financial Sector Conduct Authority

Date of hearing: 13 October 2023

Date of reasons: 1 November 2023

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") – decision falling within the ambit of section 218(a) of the FSR Act – the aggrieved person test – whether the person's legal rights have been affected not whether the person is dissatisfied

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### **REASONS FOR DECISION**

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#### **Introduction**

1. The applicant is Mr Jerome Peter Raymond Michaels. He approached this Tribunal to reconsider and set aside what he referred to as the respondent's decision.

2. The respondent is the Financial Sector Conduct Authority (“the Authority”) established under the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”). One of the functions of the Authority is the supervision of compliance with and enforcement of the Financial Advisory and Intermediary Services Act, 37 of 2002 (“the FAIS Act”).
3. The application was dismissed after argument, reasons to follow. These are the reasons.

#### Brief background

4. A brief background to this matter is that on 8 June 2023, Ms Soretha de Bruin (de Bruin), an investigator of the Authority duly appointed in terms of section 134(1) of the FSR Act, deposed to an affidavit in an *ex parte* application lodged by the National Director of Public Prosecutions (“the NPA”) for a preservation order in respect of bank accounts held in the name of the applicant and a company (FBK) of which he was the sole director.
5. The preservation order was granted on 20 June 2023.
6. As the basis of the application for reconsideration, the applicant has singled out paragraph 42 of de Bruin’s affidavit, which states, “*therefore, based on the above evidence it is reasonable to conclude that FBK and/or Michaels contravened section 7(1) of the FAIS Act*”. According to the applicant: -
  - 6.1 the statement means that de Bruin “*decided*” that he had contravened the FAIS Act before he was even questioned

under section 136 of the FSR Act, flouting the principles of due process (procedural fairness);

6.2 de Bruin's "*decision and conduct should be regarded as been done by the FSCA*"; and

6.3 "*this decision was serious and final which the FSCA acted upon and provided a basis for the NPA Asset Forfeiture Unit to institute proceedings against Michaels*".

7. Ms de Bruin's affidavit was drafted at the Financial Intelligence Center's (FIC) request. Section 76 of the FSR Act requires cooperation between state organs, specifically between financial sector regulators and the FIC. She was merely a witness for the NPA, nothing more.

Authority's point *in limine*

8. The Authority raised a point *in limine* in its response to the application for reconsideration. It submitted that no "decision" was taken by the Authority in relation to the applicant, that de Bruin's affidavit does not purport to state otherwise, and that the affidavit is not a "decision" as defined in section 218(a) of the FSR Act.
9. The Authority submitted that a "person aggrieved" for purposes of section 230(1) of the FSR Act must be determined with reference to the concept of a "decision" in terms of section 218(a) of the FSR Act. Relevant for present purposes is that "decision" means a "decision by a financial sector

regulator in terms of financial sector law in relation to a specific person.”<sup>1</sup>

10. Further, the Authority submitted that the test in this regard (aggrieved person test) is whether a person’s legal rights have been affected, not whether the person is dissatisfied with the conclusion.
11. The Authority may to instruct an investigator appointed by it to conduct an investigation where, amongst other things, it reasonably suspects that a person may have contravened, may be contravening, or may be about to contravene a financial sector law for which it is the responsible Authority. The FAIS Act is such a law. This is in terms of section 135(1)(a) of the FSR Act.
12. Ms de Bruin stated that the Authority, in terms of the available information, had reason to suspect, amongst other things, that the applicant may have contravened section 7(1) of the FAIS Act and that the investigation in respect of the applicant had only commenced.
13. After setting out the fact thus far established, she concluded her affidavit (in paragraph 42) by expressing her view that it is reasonable to conclude that the applicant and the company contravened section 7(1) of the FAIS Act.
14. De Bruin was appointed to investigate the applicant and his company in terms of section 134(1) of the FSR Act. This provision does not confer decision-making powers to an investigator. She was not delegated to

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<sup>1</sup> See the decision of Hollenbach A7/2020



make decisions and absent a delegation under section 71, she could not make any decision on behalf of the Authority (section 71(7)).

15. Further, what de Bruin stated in paragraph 42 of her affidavit, which the applicant used as the basis for his application, is her opinion based on the facts set out by her earlier. Her opinion had no legal relevance – it was for the Court who was seized with the matter to determine whether the facts justified her conclusion. Neither the court (in the *ex parte* application for preservation order) nor the Authority's decision-makers are bound by the concluding opinion expressed in de Bruin's affidavit.
16. The present application is in any event an abuse of process and vexatious. The applicant seeks to have the affidavit deleted from the court file and to undo the preservation order based on a decision of this Tribunal which is an administrative body. We cannot and would not interfere with court proceedings.
17. Lastly, it is important to appreciate and distinguish between the Authority's investigative and administrative functions. The Tribunal said in the case of *JP Markets case*<sup>2</sup>, as follows: -

*“[24] Although the word “decision” is defined for purposes of our jurisdiction, it does not mean that it lost its inherent meaning. The decision referred to is an adjudicative decision where the FSCA is the final arbitrator and not a decision taken during an investigative process which*

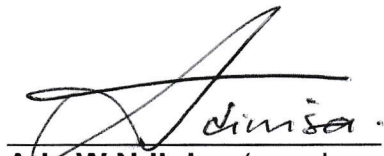
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<sup>2</sup> A42/2020

is not determinative of the issue. This basic principle appears from several decisions, albeit in different statutory contexts such as *Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Others* 2001 (4) SA 411 (SCA); *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA) and *Corpco 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA).” (Own emphasis.)

18. For the above-stated reasons, the application for reconsideration was summarily dismissed.

Signed on the 1<sup>st</sup> day of November 2023

A handwritten signature in black ink, appearing to read 'Ndinisa', is written over a horizontal line.

**Adv W Ndinisa** (member of the panel)

With the panel consisting also of:

**LTC Harms** (chairperson of the panel); and

**Mr PJ Veldhuizen** (member of the panel)