**IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE**

Appeal no.: **12/3/1/5-MIT MAK MOTORS**

In the matter between

**MIT MAK MOTORS CC** Appellant

and

**THE DIRECTOR: THE FINANCIAL INTELLIGENCE CENTRE** First Respondent

**THE FINANCIAL INTELLIGENCE CENTRE** Second Respondent

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**DECISION**

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[1] The business of the Appellant is that of a dealer in motor vehicles. In terms of section 43B(1) of Act 38 of 2001, the Financial Intelligence Centre Act (the FIC Act) the Appellant was obliged to register as a reporting institution with the Second Respondent (the FIC). Registration was to be effected before 1 March 2011. The Appellant only registered as a reporting institution on 29 August 2014 i.e. 3 years and five months late. In addition, thereto the Appellant did not report 106 cash threshold transactions ("CTRs") in terms of section 28 of the FIC Act, and two suspicious transactions ("STRs") in terms of section 29 of the FIC Act, until 26 September 2016.

[2] In terms of a notice, dated 29 March 2017 the First Respondent imposed a final administrative sanction of R1 035 654.00 on the Appellant and the breakdown thereof was as follows:

- R5 000.00 for failing to timeously register as a reporting institution in terms of section 43 of the FIC Act;
- An amount of R952 284.00 being 10% of R9 522 840.00 (being the aggregate of the 106 CTRs not reported in terms of section 28 of the FIC Act); and
- R78 370.00 being 10% of a suspicious transaction of R783 700.00 not reported on terms of section 29 of the FIC Act.

[3] Prior to the imposition of the aforesaid sanction, on 6 January 2017, a Mr. P Smit, the executive manager of the FIC addressed a "Notice of Intention to Impose an Administrative Sanction and Recommendation" to the Appellant. The following sanction was proposed therein:

3.1 A directive that all outstanding transactions be reported within 20 working days;

3.2 A directive that the sale of two vehicles to a Mr. Mathebula to the value of R783 700.00 be reported to the Second Respondent as a suspicious and unusual transaction; and

3.3 The imposition of a financial penalty in the amount of R2 066 308.00 composed as follows: R5 000.00 for failure to register as a reporting institution, R1 904 568.00 being 20% of

R9 522 840.00 for failure to report the 106 CTRs and R156 740.00 being 20% of R 783 700.00. In the document the Appellant is "afforded" until close of business on 13 January 2017 to submit written representations contesting the conclusion that the FIC Act had been contravened and advancing mitigating factors in respect of the proposed sanction.

[4] The Appellant appointed legal representatives, Stratlaw (Pty) Ltd. The following contentions were advanced on the Appellant's behalf: The Appellant, which is owned by first generation Bulgarian immigrants, relied on the advice of external advisors to ensure compliance with statutory obligations. It was always been committed to proper corporate governance and compliance with the law and has not been subject to any investigations. It has co-operated fully with the FIC during the inspection. It has taken the necessary action to have its Rachel de Beer Street branch registered, with the FIC before 13 February 2017, (The Appellant ran its two branches, one in Gerrit Maritz Street and one in Rachel de Beer Street, as one business.) It has further made provision in its business to report CTRs within the prescribed reporting period. As to the Appellant's failure to have reported 106 CTRs it indicated that 96 transactions had since been reported, that the files of the other transactions had been misplaced during the relocation of the dealership but would be reported before 13 February 2017. The STRs were due to a misunderstanding reported as CTRs but the mistake was detected and immediately rectified. Its reporting officer had been sent on a training course and that proper internal procedures were provided to employees. An electronic information management system had been

implemented and the assistance of a firm of attorneys and an accountant had been obtained to ensure compliance with the FIC Act.

[5] It alleged that its annual turnover for the 2014/15 tax year was R79 406 680.00 and indicated that the Appellant had registered with a financial services provider, Independent Dealer Association Risk Management (Pty) Ltd.(IDA) before 2014. At that point it did not have its own licence. IDA appointed Moonstone Compliance (Pty) Ltd (Moonstone) to ensure that there was compliance with relevant legislation and in particular the FIC Act. Moonstone conducted regular audits and furnished the compliance reports. The reports in particular dealt with compliance with the FIC Act. For instance, the 2013 report was to the effect that Moonstone was to ensure that the Appellant had been registered with the Second Respondent. Later reports certified that the Appellant had complied with its duty to report CTRs and STRs. The Appellant submitted that it had been misled that it was in full compliance with all of its statutory obligations.

[6] Furthermore, the Appellant indicated that payment of the penalties would be detrimental to the Appellant's future growth and would lead to retrenchment of some of its employees. The Appellant has over the years built up a good reputation that would be affected by the publication of the penalties. It was pointed out that Moonstone advised the Appellant that it need not report CTRs if the clients paid cash transactions at the bank and not at its premises. It was the Appellant's policy not to receive cash in excess of R5 000.00 at its premises and all the 106 CTRs which had not been reported

related to transactions where the clients had paid the amounts directly into the appellant's bank account.

[7] In the affidavit accompanying the notice of appeal Mr. Petkov, the manager of the Appellant, explains that on 6 September 2016, he was advised by a senior member of the motor trade, a certain "*uncle John*" that it was statutorily obliged to register with the FIC and was required to report each CTR irrespective of the fact that it does not accept cash on its premises. It was then that the Appellant attempted to register with the FIC on 7 August 2016, which attempt was unsuccessful. Thereafter on 13 September 2016 the Appellant liaised with one Elna at the FIC in an attempt to solve the registration problem. On 19 September 2016 the Appellant received a notice of an inspection by the FIC. On 22 September 2016, Elna enquired if it had been registered. On 26 September 2016 a two-day inspection commenced where the Appellant cooperated with the inspectors. Thereafter the CEO of the Appellant, Mr Petkov and the staff attended a training session managed by the FIC at the premises of "*We Buy Cars*" and have since been compliant with its obligations in terms of the act.

[8] During the hearing of the appeal Mr. Latif explained to the Board that the attempt to register on 7 September 2016 failed because the Appellant had already been registered with the FIC during 2014. Between August 2014 and September 2016, the FIC's computer system was changed to a new system. However, the Appellant remained a registered member on its system.

[9] From the facts alleged, cognisance must be taken of the Appellant's conduct in respect of the aforesaid transactions. It is clear that although the Appellant was well out of time before it first registered with the FIC, it made an effort to comply with its obligations in terms of relevant legislation at all material times. It is noted that although it procured the services of a compliance company, it was unfortunately misled. When it became aware of such misrepresentations, it immediately took effective steps to rectify its position.

[10] The Appellant's case is that the sanction imposed is disproportionate with the transgressions. It emphasises that it co-operated at all times, that it took remedial steps to prevent a recurrence and to ensure future compliance and that it registered and that outstanding CTRs and STRs were reported and that all new CTRs and STRs are reported. Moreover, the First Respondent did not consider the following mitigating factors, namely that:

- The Appellant is a first offender;
- The sanction represents 50% of its profit for the 2016 tax year profit, which was an exceptionally good year for the Appellant whose profit for the 2015 tax year was R53 262.00;
- The respondent did not properly distinguish between gross negligence and lesser degrees of negligence[1]; and

[1] In the First Respondent's Answering Affidavit in paragraph 113 he stated the following: "It is pointed that during the enforcement process, the Centre was of the view that the appellant was grossly negligent and not wilfully non-compliant. Had the Centre held the latter view, then the administrative sanction would have been far harsher and accompanied by criminal charges."

- The Appellant was genuinely led to believe by Moonstone that if it does not receive cash in amounts higher than R5 000.00 at its premises that it had no duty to report to the FIC[2].

[11] The FIC was aware of the Appellant's status namely that; the Appellant started as a trader during 2005, the FIC had conducted an inspection on 26 September 2016 and detected the late registration, its failure to report CTRs and STRs, the Appellant's explanation that it relied on the advice of a compliance consultant, appointed by it.

[12] The FIC's contends that it had reconsidered the penalty and even reduced it substantially, except the R5 000.00 penalty for failing to register. On this basis, the penalty was appropriate. The Panel was advised that it has formulated guidelines when considering penalties. In essence it distinguishes between wilful non-compliance, gross negligence and negligence. In order to be fair and objective, it applies a formulated penalty criterion. In the case of negligent non-compliance, the penalty for non-registration is R5 000.00 and for non-reporting 10% of the value of the transactions not reported. In the case of gross negligence, the penalty for non-registration is R10 000.00 and for non-reporting is 20% of the value of the transactions not reported. In the case of wilful non-compliance the penalty is the maximum penalty in terms of Section 45C(3)(e) of the Act[3].

[13] The primary contention on behalf of the FIC is that the process of imposing penalties on transgressors is an administrative action. The act of imposing

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[2] Paragraph 112 of the Answering affidavit reads: "The Centre re-asserts that appellant's non-compliance was serious extensive and occurred over a period of more than five years, during which time the appellant was aware or ought to have been aware of its compliance obligations in terms of the FIC Act."

[3] That is a penalty of R10 million in the case of natural persons and R50 million in the case of legal persons.

penalties must satisfy the requirements for a just administrative action in terms of section 33(1) of the Constitution. It i.e. ***"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".*** The argument proceeds that if the action had been legal, reasonable and procedurally fair and in terms of Act 3 of 2000, PAJA this tribunal is not at large to interfere with the penalty imposed.

[14] Before dealing further with the argument it is necessary to consider the appeal procedure prescribed in the FIC Act. Originally Section 45D (3) of the FIC Act stipulated that an appeal would be a re-hearing. It read as follows:

> ***"An appeal is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal."***

Section 45D(4) provides that the appeal board can summon any person, who in its opinion may be able to give information for the purposes of the appeal or who is in possession of a document which has a bearing on the appeal to give evidence or to produce the document.

[15] In terms of Act 1 of 2017, the FIC Amendment Act, Section 45D(3) has now been amended to read as follows:

> ***"An appeal is decided on the written evidence, factual information and documentation submitted to the Centre or the supervisory body before the decision which is subject to the appeal was taken."***

[16] Simultaneously new subsections (3A), (3B), (3C), (3D) and (3E) were inserted in the FIC Act. They read:

*"(3A) subject to subsection 4, no oral or written evidence or factual information or documentation, other than which was available to the Centre or supervisory body, may be submitted to the appeal board by a party to the appeal.*

*(3B) Despite subsection (3), the chairperson of the appeal board may on application by –*

*(a) The appellant concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation not made available to the Centre or supervisory body prior to the making of the decision against which the appeal is lodged; or*

*(b) The Centre or supervisory body concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation to be submitted and introduced into the record of appeal.*

*(3C) If introduction by an appellant of further oral and written evidence or factual documentation is allowed into the record of the appeal under subsection (3B) (a), the matter must be submitted to the Centre or supervisory body in question for reconsideration.*

*(3D) When an appeal is submitted to the Centre or supervisory body as contemplated in subsection (3C), the appeal is deferred pending the final decision of the Centre or supervisory body.*

*(3E) If, after the Centre or supervisory body has made a final decision as contemplated in subsection (3D), the appellant continues with the appeal by giving written notice to the appeal board, the record must include the further oral evidence, properly transcribed, the written evidence or factual information or documentation allowed, and the further reasons or documentation submitted by the Centre or supervisory body concerned*

[17] It is evident that the Legislature deemed it necessary to do away with a situation where the appeal board was to adjudicate afresh not only on the evidential material available to the Centre or supervisory body when the decision was taken, but also on new evidence that could be introduced by affidavit. This would result in a full blown hearing in terms of sub-Section 45D(4). In this instance, the appeal is confined only to the record which was before the decision maker at the time when the decision was taken. On good cause shown further evidence can be introduced in the record. "Good cause" would certainly entail an acceptable explanation why the evidence had not been proffered earlier, that the evidence is material and that if it was before decision maker it could have led to a more lenient penalty. In exceptional cases in criminal appeals, courts of appeal allow appellants, on good cause shown, to introduce evidence that can lead to the setting aside, or substitution of a conviction or to a different sentence.

[18] If someone who is aggrieved by an administrative act wants to have such administrative action set aside or varied, he has to do so in the High Court, by way of review in terms of Rule 53[4]. That remedy is available to anybody upon whom administrative sanctions in terms of section 45C of the FIC Act had been imposed. The FIC Appeal Board proceedings differ from review proceedings. It is evident that the Legislature created an appeal procedure

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[4] Rule 53(1) reads as follows: " Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal , board or officer performing judicial , quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

where the tribunal was created specifically for such purpose and in this instance, to consider whether the FIC applied the provisions of section 45 properly or not. The result is inevitable. When hearing an appeal, this board is entitled to intervene when the FIC has made a mistake either in its evaluation of the facts or in its interpretation of the law. The only other basis upon which it can intervene is when the sanction imposed is shockingly inappropriate.

[19] As aforesaid, the FIC's relies on a guided formula namely the three criteria and three possible sanctions: If the transgression was wilful, the sanction is the maximum penalty prescribed in section 45C(3)(e) namely R10 million in the case of an individual R50 million in the case of a legal *persona.* In instances of gross negligence where there is a failure to report the penalty, 20% of the aggregate of the value of the transactions not reported is appropriate and in the case of failure to register in terms of section 43B(1) a straight penalty of R10 000.00; and in the case where the FIC is of the view that there was negligence, the penalty for failure to report is 10% of the aggregate of the transactions not reported and in the case of a failure to register in terms of section 43B(1) the penalty is R 5 000.00[5].

[20] Mr. Latif explained that the FIC aims at being fair and these criteria are workable in respect of all transgressors. It is certainly laudable that the FIC strives to achieve parity in respect of sanctions imposed, but an approach as set out in the previous paragraph has the effect of disregarding the seriousness or not of the particular transgression viewed in terms the

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[5] These figures are contained in a table on page 322 of the record.

provisions of Section 45C(2)[6]. Moreover it makes it impossible for the FIC to even consider the alternative sanctions prescribed in Section 45C(3)[7]. It negates the personal circumstances of a particular transgressor.

[21] The approach disregards the fact that there are multiple degrees of negligence. The terms *culpa lata*, gross negligence; *culpa,* negligence, *culpa levis,* slight negligence and *culpa levissima,* the slightest negligence, are part of the South African law. It stands to reason that a person who does not know that he has to register with a supervisory body but in order to cover himself, employs a professional company to advise him, and acts on such advice, is less culpable than one who just does nothing.

[22] It is so that in criminal cases, courts try to achieve parity in respect of sentences for the same offence, regardless of whether sentencing is to be done in the same case or in different courts. But it is also a fixed principle that courts have to individualise the sentence imposed on a particular offender. In the matter of **S v Giannoulis, 1975 SA 867 (AD) at 873F** Holmes JA explained the approach of a court of appeal in such a case as follows:

> "*1. In general, sentence is a matter for the discretion of the trial court. Disparity in sentences imposed on participants in an offence whether tried together or in separate courts will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle,*

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[6] The section enjoins the FIC to take into account the nature, duration, seriousness and extent of the non-compliance, whether there was previous non-compliance, what remedial steps had been taken to prevent a recurrence of the transgression and the existence or not of non-compliance with the rules of another supervisory body or voluntary institution to which the transgressor belong.

[7] These sanctions are a caution, a reprimand, a directive to take remedial action or a restriction or suspension of certain business activities.

***at variance both with a flexible discretion in the trial court** and with the accepted limitation of appellate interference therewith.*

2. *Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal **and there are not personal factors warranting such disparity** with the sentence, interference..... may be warranted".* (Own emphasis)

[23] Reference is further made to a matter of Appeal Board of the Financial Services Board in re: **Michael Berman v the Financial Services Board of 17 February 2001**, where it was acknowledged that deterrence was the primary purpose of the imposition of our administrative penalty. Therein Friedman J remarked at page 8 of the decision *"This type of conduct calls for a penalty that sends a message to the public that practices that deflect from the object of the Act are taken seriously and that anyone that might consider embarking on that type of conduct will be harshly treated. Having said that, however, the element of proportionately always requires the circumstances of the contravention and those of the offender be given due consideration."*

Cognisance is taken of the fact that this Board does not have unfettered discretion to interfere with the penalty imposed. However, in instances where the penalty is startlingly inappropriate, there are grounds to interfere. In this regard the matter of **Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another 2005 (6) BCR 613 CAC at 636** is instructive and also considered by Friedman J at p11 the following was held: *"To determine whether we are entitled to interfere on this basis involves measuring the importance of determine against other relevant factors involved at a penalty that meets the requirements of proportionality ..."*

[24] It is the FIC's case that it was initially of the view that the Appellant was grossly negligent and therefore indicated that it intends to impose a sanction of 20% on the aggregate of non-reported transactions, and a sanction of R5 000.00 for not registering before August 2014. At this juncture, it must be pointed out that there is an anomaly in their proposed sanction. In terms of its very guidelines, with regard to gross negligence an amount of R10 000.00 is considered appropriate and in the case of negligence R5 000.00. However, after considering the representations on behalf of the appellant the FIC changed its initial view and decided that the Appellant, had not been grossly negligent but just negligent.

[25] Regardless of whether this is an appeal against the sanction imposed or whether it is the review of an administrative sanction the Panel has difficulties in the FIC's conclusion that the Appellant was grossly negligent. As alluded to above, the FIC was aware that through the officials of the FIC the Appellant attempted to comply with all its legislative obligations, had previously employed a specialist compliance company and on whose advice, it thought that it was in compliance. When advised otherwise, it immediately took effective steps to rectify its position. Certainly, the Appellant's conduct cannot be considered to be grossly negligent and in our view, the FIC's approach was startlingly inappropriate.

[26] As alluded to above, the notion of the FIC that it will be fair to have three tiers of possible sanctions and that, according to a transgressor's degree of negligence or possibly wilfulness, he will become liable to be sanctioned to one of the three possible prescribed sanctions cannot be correct. In order to

have parity in the imposition of sanctions it is understandable that certain yardsticks be laid down, but those yardsticks should only serve as guidelines and thereafter the FIC should take all relevant circumstances into account when determining an appropriate penalty.

[27] If it was not for the fact that the purpose of the FIC Act is to combat terrorism and money laundering and that in imposing sanctions deterrence has to be taken into account as a factor, this is a case where a total suspension of the sanction would not have been inappropriate. From the facts in this matter, the appellant's negligence was of a slight degree. Hence, the total penalty imposed of R1 035 754.00 is disproportionate. A more realistic sanction would have been a penalty of 50% of the amount of R1 035 754.00. The total sanction would have amounted to R517 877.00. However, in further considering the mitigating factors it is fair to suspend half of the amount for two years on condition that the Appellant not be found to be in breach of its obligations in terms of the FIC Act. The result is that the Appellant is to pay an amount of R258 938.50 and that payment of R258 938.50 be suspended for two years on condition that the Appellant is not found to be in breach of its obligations in terms of the FIC Act.

[28] The parties are in agreement that in this case the order of costs should follow the event that is the successful party is entitled to its costs. The Appellant has been successful in its appeal. As the FIC will be ordered to pay the Appellant's costs, no order will be made in respect to the amount of R10 000.00 paid by the Appellant when it lodged the appeal.

The following order is made:

1. The sanction imposed by the FIC is set aside and substituted with the following: "A financial penalty of R517 877.00 is imposed on Mit Mak Motors CC for its failure to register in terms of section 43B(1) of Act 38 of 2001 and to report transactions in terms of sections 28 and 29 of the said Act.

2. The payment of R258 938.50 of the aforesaid amount of R517 877.00 is suspended for two years on condition that the Appellant not be found to be in breach of its obligations in terms of Act 38 of 2001.

3. The remaining amount of R258 938.50 is to be paid to the Second Respondent within 14 days of this order at the address and into the banking account supplied to the Appellant by the Second Respondent.

4. The Second Respondent is to pay the Appellant's costs of the appeal.

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Chairman of the FIC Appeal Board

W J Hartzenberg

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Member of the FIC Appeal Board

Adv H Kooverjie SC

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Member of the FIC Appeal Board

Adv E Phiyega

Date of Decision : 03/11/2017