IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

In the matter between Case No.12/3/1/5–JSH Motors

JSH MOTORS t/a HONDA JHB SOUTH CC **APPELLANT**

and

THE DIRECTOR: THE FINANCIAL INTELLIGENCE CENTRE **FIRST RESPONDENT**

THE FINANCIAL INTELLIGENCE CENTRE **SECOND RESPONDENT**

DECISION

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[1] The Appellant appeals against a decision of the Second Respondent (*"the FIC"*) which imposed administrative sanctions on it ("the Appellant") in terms of section 45(3)(a) read with sections 45C(1) and 45C(6)(a) of the Financial Intelligence Centre Act 38 of 2001, as amended (*"the FIC Act"*) . The sanctions constituted two penalties of R5 000.00 and R754 741.00 respectively. The appeal is not directed against the penalty of R5 000.00. It is directed against the financial penalty in an amount of R754 741.00 that was imposed in terms of section 28 read with section

22B of the FIC Act in respect of cash transactions that were not reported to the FIC ***("the cash threshold transactions").***

[2] The Appellant's business is that of a dealer in motor vehicles. It commenced business during 2004. Due to the nature of its business it was required to register as a reporting institution in terms of section 43B(1) and schedule 3_ of the FIC Act, read with Regulation 27A (1) of the Money Laundering and Terrorist Financing Control Regulations. The Appellant was required to register on or before 1 March 2011. (A new business has 90 days within which to register).

[3] The Financial Intelligence Centre (*"the FIC" or "the Second Respondent"*) conducted an inspection into the affairs of the Appellant on 9 October 2014. It was established that the Appellant had failed to register as a reporting institution and had further failed to notify the FIC of at least 108 cash threshold_transactions for the period between 2010 and up to the date of the inspection. The FIC calculated the total amount of cash received in in respect of the aforesaid cash threshold transactions_in the business to have been R7 547 410.00.

[4] On 30 September 2015, the FIC notified the Appellant of its intention to impose administrative sanctions on it due to its failure to register with the FIC and its failure

to report the aforesaid cash threshold transactions. The appellant was informed that the FIC intended to impose a penalty of R5 000.00 for the failure to register and a further R754 741.00 for its failure to report the cash threshold transactions.

[5] The Appellant was invited to make representations regarding the imposition of the penalties. The following representations *inter alia* were made in an e-mail dated 19 October 2015 namely that:

5.1 It had been unaware of the requirement to register and accordingly to report the said cash threshold transactions;

5.2 It had immediately registered after the inspection with the FIC and co-operated with the inspection team;

5.3 It was also stated that Its employees had been educated in respect of the requirements of the FIC Act and it had adhered to the recommendations in the inspection report;

5.4 It denied any dishonesty or fraud.

[6] It was further the Appellant's case that the Second Respondent erred in imposing the penalty of R754 741.00 for the failure to report the cash threshold transactions on three different grounds namely:

6.1 The first is that it failed to take certain relevant considerations raised by the Appellant into account;

6.2 Secondly that the Second Respondent violated the principle of equality in that the penalties imposed on other entities were less severe than those upon the Appellant. A number of penalties were imposed on other entities which were proportionally less severe and that some of them were suspended wholly or in part;

6.3 Thirdly that the Appellant was required to show exceptional or compelling circumstances which would warrant a substitution or reduction of the financial penalty.

[7] The FIC made *inter alia* the following submissions that:

7.1 that the representations of the Appellant had been considered, particularly by the Enforcement Adjudication Panel, who considered the matter in totality including the Appellants representations.

7.2 It emphasized the aggravating factors which warranted the penalty imposed. Emphasis was placed on section 45C(3)(e) of the FIC Act which provided for maximum penalties of R10 million on natural persons and R50 million on legal persons.

7.3 The purpose for the imposition of penalties is deterrence and the main objective of the FIC Act is to curb terrorism and money laundering. Hence severe penalties were justified.

7.4 A policy to impose a penalty of 10% of the aggregate amount of the cash threshold transactions that had not been reported had been adopted by the Respondent.

7.5 It distinguished this matter from other matters and more specifically the number of transactions not reported was much more than other cases where smaller penalties were imposed and the penalty or portion thereof was suspended.

7.6 It contended that a number of the 108 cash threshold transactions still remain unreported.

7.7 the aggravating factors outweigh the mitigating factors if any factors in the case of the Appellant. In fact no mitigating factors existed if reference was made to the principle: "**Ignorance of the law is no excuse". S v De Blom 1977(3) SA 513(A).**

therein found that in respect of taking money out of the country both the Appellant and her husband knew that it could only be done with the necessary permission and concluded that they conspired to do so stealthily.

11.2 Furthermore the Court found that since she had previously taken jewellery out of the country and brought it back, there was a reasonable possibility that her version could be accepted that she did not require the said authorisation. The appeal against the conviction in respect of the money failed but the conviction in respect of the jewellery succeeded.

11.3 The Court discussed the question of *mens rea* and emphasised that when a statute or regulation is interpreted there is a presumption against blameless liability (see p.532 B and C). It was further held that the expression: ***"ignorance of the law is no excuse"*** was not applicable in our law (p. 529 H). However, in the case where a reasonable person ought to be aware of statutory prohibitions but negligently failed to do so, his/her negligence would be sufficient to find that he/she had the necessary *mens rea* to warrant a conviction (p. 531 H – p. 532 B). The opening portion of the headnote gives a very good summary of what was decided in the judgment. The English translation thereof on (p. 514 E and F) reads:

> ***"At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the***

present day concept of mens rea in our law. But the approach that it can be expected from a person who, in the modern State, wherein many facets of the acts and omissions of the legal subjects are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved."

[12] The foremost aggravating factor which the FIC raised was the fact that 108 cash threshold transactions had not been reported, prior to the 9 October 2014, despite a directive that the transactions must have been reported as soon as possible. It was contended that only 60 transactions were reported shortly after the inspection. Attempts to report the further transactions were only a year later when the Appellant was notified of the FIC's intention to impose the penalties. To date it appears that a few transactions remain unreported. Mr Minty, on behalf of the Appellant, in two replying affidavits proffered an explanation for the failure to report transactions. He stated that the appellant was unable to reconcile some of the inspectors' findings with the bank statements, that certain deposits could either not be identified with reference to the specific transactions or the customers' ID numbers were not available. The Appellant had however continued reporting the transactions by fax due to these difficulties. The Second Respondent argued that the fact that the Appellant experienced such difficulties was indicative that it did not have a proper system in place.

[13] However in our opinion, we do not agree with this argument. Cognisance must be taken of the fact that the transactions date as far back as 2010, 2011, 2012, 2013 and 2014.

[14] We further find that the premise from which the FIC proceeded to impose the penalties in question, is not correct. It has bound itself to a policy which applies 10% in respect of each unreported cash threshold transaction as the starting point regardless of the circumstances of the case. That cannot be correct as section 45C(2) clearly enjoins it to take the nature, duration and seriousness of the non-compliance, the question whether the institution has previously failed to comply, any remedial steps to prevent a recurrence of the non-compliance and mitigating factors, into account.

More importantly because one of the objects of imposing penalties is deterrence, the Second Respondent is of the view that extremely harsh penalties are to be imposed in every instance, and did so in this case regardless of the moral guilt of the perpetrator. Furthermore, the Second Respondent's reliance on the maxim that ***"ignorance of the law is no excuse"*** is clearly not applicable in our law. By binding itself to a policy of imposing penalties of 10% on the total of the threshold

transactions infers that the representations by the Appellant were ignored and not considered by them. It must be pointed out that the argument by the Appellant that the FIC had been of the view that it could only impose a lesser penalty if exceptional circumstances existed, is not correct. What was stated by the FIC was that if there is no appeal, the imposition of the penalty must be published, unless exceptional circumstances exist why it should not be published as is provided for in section 45C (11) of the FIC Act.

[15] This tribunal is therefore at liberty to impose a different penalty. We agree that wilful non-compliance with the provisions of the FIC Act should be met with harsh penalties. Taking into consideration the objective of the FIC Act, negligent non-compliance of the FIC Act should warrant a harsh penalty. However a distinction should be drawn between wilful non-compliance and negligent non-compliance. The penalty should also be considered in instances where there are gross negligence and negligence of a lesser nature. We acknowledge that failure to report, the amount of money is determining the seriousness of the non-compliance. Although cognisance is taken of the fact that no fewer than 1914 motor vehicle dealers were registered with the FIC as at 31 March 2013, it must be accepted that the Appellant was unaware of its duty to register and to report threshold transactions. Although cognisance is taken of the factor that numerous transactions were not reported, it

must not be over emphasized. It registered immediately and took measures, by instructing its employees, to ensure that cash threshold transactions will be reported in future. We are satisfied that it complied with the other directives of the FIC upon being informed. We are further of the view as was done in other cases, a penalty or a portion thereof warrants a suspension.

[16] We further find that there was no wilful non-compliance with the FIC Act. In our view, reportable transactions of the order of R7 million not being reported we find a penalty of R150 000.00 to be appropriate. It would also be fair to suspend a portion of the penalty for a period of two years on condition that the Appellant not be found not to have complied with the requirements imposed upon it by the FIC Act. R75 000.00 of the amount of R150 000.00 is to be suspended.

[17] As there is no appeal against the penalty of R5 000.00 for not having registered with the FIC that penalty is confirmed.

[18] The Appellant has paid an amount of R10 000.00 when it noted the appeal. The Board was requested to rule on this aspect. The objective of the payment was to avoid frivolous appeals or appeals that are noted but delayed in order to avoid the

payment of penalties. In this case the Appellant was substantially successful. The amount of R10 000.00 can stand as a first payment on the penalty which is to be paid within fourteen days of this decision.

[19] As the appeal was substantially successful there will be no order as to costs.

The following order is made:

1. The penalty of R5 000.00 for not having registered with the FIC is confirmed.
2. The penalty of R754 741.00 is set aside and replaced with the following: "The Appellant is ordered to pay a penalty of R150 000.00 to the FIC in respect of its failure to report cash threshold transactions to the FIC. R75 000.00 of the amount of R150 000.00 is suspended for a period of two years from date of this decision on condition that the Appellant not be found not to have complied with the requirements imposed upon it by the provisions of the FIC Act, during the period of suspension.
3. The amount of R10 000.00 paid to the FIC, when the appeal was noted, stands as a first payment in respect of the penalties which have to be paid within fourteen days from the date of this decision.

4. A further amount of R70 000.00 must be paid to the FIC, within fourteen days of this decision, into the banking account supplied by the FIC to the Appellant.

5. No order as to costs.

Dated at Pretoria this 9th day of August 2016.

W J HARTZENBERG
CHAIR

H K KOOVERJIE S C
MEMBER

M E PHIYEGA
MEMBER