THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

Case №: 12/3/11/5-Waterford

In the matter between:

BOUNDLESS TRADE 11 (PTY) LTD t/a WATERFORD LANDROVER Appellant

and

FINANCIAL INTELLIGENCE CENTRE Respondent

Tribunal: H Kooverjie SC (chair), L Nkosi Thomas SC and L Makhubela

Hearing: 26 June 2019

For the appellant: Adv J Hoffman

For the respondent: Adv F Latif

Summary: administrative sanction – what constitutes gross negligence

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DECISION

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1. This is an appeal against the administrative sanction imposed by the respondent, the Financial Intelligence Centre (**Centre**) on the appellant, Boundless Trade 11 (Pty) Ltd t/a Waterford Landrover, in terms of section 45C(3)(c) of the Financial Centre Intelligence Act 38 of 2001, ("***FICA***") which

was amended by the Financial Sector Regulation Act 9 of 2017 with effect from April 2018.

2. On 23 November 2018, the respondent imposed an administrative sanction on the appellant for non-compliance with the provisions of FICA. The sanction was as follows:

- A reprimand for failing to timeously comply with the directive as issued by the Centre in terms of section 43A (1) of FICA.

- A financial penalty of R2,846,971.00 (20% x R14,234,851.31) for failing to comply on 110 counts in terms of section 28 of the FIC Act, read with regulation 22B and 24(4) of the Money Laundering and Terrorist Financial Control Regulations (**"the Regulations"**).

- A caution not to be non-compliant with section 28 of FICA.

- A directive to remediate all outstanding unreported cash threshold transactions within 15 days of issuing the sanction.

3. The sanction was considered on at least 3 occasions and upon final consideration, the appellant was directed to pay R500,000.00 (approximately 17%) of the financial penalty on or before 20 December 2018, with the remaining R2,346,971.00 (approximately 83%) penalty suspended for a period of three years on condition that the appellant remains fully compliant with its obligations in terms of 28 of the FICA Act. Section 28 requires of an accountable institution to report its cash transactions received from its clients.

4. The issue for determination is whether the financial penalty and the directive to remediate were justified. The appellant contends that the sanction was excessive and unjustified.

5. The following facts are not in dispute and are common cause that:

5.1 the appellant operated as a motor vehicle dealer since 1999;

5.2 the appellant only registered with the Centre on 7 July 2010;

5.3 between 2010 and 2016, the appellant filed three cash threshold reports (CTR's) with the Centre on the old registration system;

5.4 between 2016 and 9 November 2017, the appellant filed its CTR's with the Centre on the new registration system;

5.5 on 12 May 2017, the appellant, notified its staff to report the CTR's in order to comply with its dual reporting obligations.

6. On 9 November 2017, the Centre conducted its inspection and found that the appellant had failed to report at least 116 transactions of which.

6.1 6 of the 116 transactions were timeously reported;

6.2 45 of the 116 transactions were reported late and only after 30 May 2017;

6.3 65 of the 116 transactions were not reported at all at this stage.

7. When the Centre conducted its final inspection report on 29 November 2017, it

found the appellant still non-compliant with regard to 110 transactions, and instructed the appellant to remediate the unreported transactions within 7 days.

8. On 14 August 2018, and upon a consideration of the non-compliance identified in the final inspection report, the respondent advised the appellant that its failure to comply constituted gross negligence.

9. The Centre informed the appellant that it intended to impose a financial penalty of around R14.2 million and afforded the appellant an opportunity to make representations in this regard.

10. In response, representations were made by the appellant namely that:

10.1 the transactions were reported as soon as it became aware of the dual reporting obligations and all outstanding reports were filed by 4 December 2017;

10.2 its non-compliance was not deliberate and it had fully co-operated during the inspection and subsequent thereto it had remediated all unreported transactions;

10.3 it provided training to its employees and implemented the new process and procedures to ensure future compliance with the FICA, which included introducing a risk management and compliance programme;

10.4 the intended financial penalty would have negative consequences on the business. It contended the appropriate sanction would be to reprimand the appellant, *alternatively* a sanction limited to its failure to comply with the Directive 4, *further alternatively* a fully suspended

financial penalty.

11. At this juncture it must be mentioned that the appellant submitted that it was never aware of Directive 4 up until it was raised by the Centre.

12. Upon considering the said representations, the Centre concluded that:

12.1 the non-compliance remains serious and the transgressions go back to 5 years;

12.2 at the time of imposition of the sanction, the appellant was registered with the Centre where it had reported only 31 CTR's despite being aware of its dual reporting obligations. It's failure to report the other transactions constituted gross negligence.

12.3 by end of November 2018, the appellant only remediated 86 CTR's from the 110 transactions;

12.4 the Centre submitted that in its reconsideration, both aggravating and the mitigating factors were taken into consideration. In particular that the appellant provided training to its employees, implemented new processes and procedures to ensure future compliance with FICA and had introduced a risk management and compliance programme. The appellant's financial position was also considered.

13. On 23 December 2018, the sanction was considered for a third time which resulted in this appeal.

14. The legislative prescripts applicable is Section 45(1)(a) of the FICA, which makes provision for the Centre to impose an administrative sanction after being satisfied with the available facts and information before it.

15. The administrative sanctions are prescribed in section 45(C)3 of FICA and are listed therein namely:

- a caution not to repeat the conduct which led to the non-compliance;
- a reprimand;
- a directive to take remedial action or to make specific arrangements;
- the restriction or suspension of certain specified business activities;
- a financial penalty not exceeding R 10 Million rand in respect of the natural persons and R 50 Million Rand in respect of any legal person.

16. By virtue of Section 45(C)(2) of FICA, in determining the appropriate administrative sanction, the Centre is required to take the following factors into account namely:

a. the nature, duration, seriousness and extent of the relevant non-compliance;
b. whether the institution or person has previously failed to comply with any law;
c. any remedial steps taking by the institution or person to prevent a recurrence of the non-compliance;
d. any steps taken or to be taken against the institution or person by another supervisory body or relevant association of which an institution or person is a member; and

e. any other relevant factor, including mitigating factors.

17. We further find guidance in the ***Hyde Park Auto***[1] matter which set out a three-stage inquiry in determining an appropriate sanction. It is summarized as follows:

- The first question is whether the appellant was guilty of the transaction alleged? In essence whether the appellant had failed to comply with the provisions of section 45C (1) of FICA?
- The second consideration is whether the formalities was complied with before the sanction was imposed (namely sections 45C (5) and (6) of FICA)?
- Once these factual enquiries are established, the third step would then be to consider the appropriate administrative sanction.

This process allows one to determine whether the Centre exercised its discretion capriciously and upon a wrong principle which resulted in the sanction being startingly inappropriate.

18. It has been recognised that ordinarily, the purpose of an administrative penalty is to ensure compliance with the legislation and to give the regulatory authority an effective means of enforcing it. Contraventions have to be discouraged and offences punished for the system to be viable.[2]

19. The issue at the heart of the dispute is to determine the extent of the appellant's non-compliance namely whether it was wilful, gross or negligent. In this regard,

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1 Hyde Park Auto (Pty) Ltd t/a Sandton Auto and Financial Intelligence Centre Case Nr 12/3/5 dated 21 February 2019 ,para 6

2 Pather and another v Financial Services Board and others 2017 4 All SA 666 (SCA) at para 10

reference is made to the We **Buy Cars** matter, where this Tribunal considered when a party was considered to be grossly negligent. The tribunal referred to the **Transnet Limited** matter[3] where Scott JA acknowledged that gross negligence is not an exact concept, and stated:

> ***"It follows, I think to qualify as gross negligence, the conduct in question although falling short of dolus eventualis must involve a departure from the standard of a reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk taking, a complete obtuseness of mind or where there is no conscious risk taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity".***

20. The appellant contended that the basis of its non-compliance did not constitute gross negligence. It was emphasized that even though the appellant was aware of its dual reporting obligations prior the inspection but it was not aware that it had an obligation to report cash deposits made into its bank account.

21. It was argued, on behalf of the Centre, that this explanation does not pass muster. The Centre persisted that the appellant's conduct in its reporting demonstrated gross negligence. Between May 2017 to November 2017 the appellant failed to report the CTR's timeously and expeditiously as it was required to do.

22. More particularly, although it became aware around 12 May 2017 that it had a duty to remediate all unreported cash threshold transactions, it only commenced

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[3] MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Others 2003 (2) SA 473 SCA, para 7

remediating the identified transactions from 9 June 2017, almost a month after it became aware of its dual reporting obligations.

23. Furthermore, by 9 November 2017, at the time of the first inspection, only 47 of the 110 transactions were remediated. The remaining transactions were only reported after the inspection on 9 November 2017. Such conduct constitutes gross negligence.

24. The Centre has compiled a guideline for imposing sanctions. Such Guidelines determine the sanction based on the degree of fault. The Guideline itself was not a point in dispute. As alluded to above, it is the degree of blameworthiness which is the determining factor.

25. In argument, the appellant's submissions were essentially the following:

25.1 it first became aware of its contraventions of the Act when it was advised thereof in May 2017;

25.2 immediate steps were taken to register on the Go-AML system on 24 May 2017;

25.3 the appellant identified and reported all the CTR's. It had remediated 47 of them by the time the respondent conducted the inspection in November 2017 (being 5 months later);

25.4 after the first inspection, the appellant also engaged the services of Eas-eFICA to comply with the internal risk management and compliance programme. There was further training and a compliance programme

was implemented in its business in January 2018. By 2 November 2018, 86 of the 110 unreported CTR's were reported;

25.5 they were however unable to register the remaining 24 CTR's. At some point the appellant advised that it is in a process of engaging the services of a tracing agent to assist in a further attempt to remediate the 24 remaining customers. The appellant was in fact questioned as to why it did not do so earlier;

25.6 it was under the *bona fide* mistaken belief that it was only required to report transactions which constituted physical cash that was handed in at the dealership. It was always aware of its general compliance obligations regarding the reporting of cash threshold transactions. It was on this basis that only reported 31 of the CTR's were reported. These 31 CTR's were reported on the basis that physical cash was paid by the customers to the appellant at its dealership;

25.7 further in argument counsel argued that the appellants are not legally trained to interpret section 28 of FICA; and insofar their understanding was concerned, it was only physical cash transactions that had to be reported.

26. The Centre placed emphasis on the fact that cognisance should be taken of the appellant's failure to report at least a substantial portion of the transactions between May and November 2017 – 47 transactions does not even constitute 50% of the of the CTR's which should have been reported.

27. In summary the timeline illustrates the reporting as follows:

- The appellant became aware of its dual reporting obligations in May 2017.
- In July 2017, only 33 of 110 transactions were reported.
- No transactions were reported in August 2017.
- In September 2017, it only reported 3 transactions.
- In October 2017, it reported 11 transactions.
- No transactions were reported in November 2017.
- When the first inspection was conducted in November 2017, only 47 transactions were reported. 63 of the 110 transactions remained unreported.

28. One must be mindful of the fact that a Tribunal does not have an unfettered discretion to interfere with the imposition of the penalty. Even if it holds a differing view that another penalty was appropriate, this Tribunal cannot merely substitute the finding of the Centre.

29. In **Federal Mogul Aftermarket SA (Pty) Ltd v Competition Commission and Another 2005(6) BCLR 613 ("Competition Appeal Court)** the Court stated:

> "***This Court does not enjoy unfettered discretion to interfere with the Tribunal's assessment and imposition of an administrative penalty. Even if we decided that a different penalty was appropriate, we are not merely at large to substitute our findings for that of the Tribunal. This approach consistent with the general principle that in an appeal against the exercise of its discretion by a court of a statutory body, the court on appeal has no right to interfere. It can only do so on certain well recognised grounds,***

namely, where the court a quo exercised its discretion capriciously or upon a wrong principle or where it has not brought it unbiased judgment to bear on the question or where it has not acted for substantial reasons."

(Own emphasis)

30. We note that in argument the explanation proffered for this delay was that the reporting was laborious and took extensive time. The appellant's explanation for the delay is reiterated:

"***Upon receipt of the email instruction from Mr. Isaacs dated 25 May 2017, Ms. Prinsloo commenced with the identification and reporting of the transactions. As a rough procedure, Ms Prinsloo started with the most recent transactions as the information pertaining to them was more readily accessible and she had wanted to complete as many reports as possible in the least amount of time. This resulted, at the time of the inspection at Waterford, in some 45 transactions being reported, albeit with some rejections due to the absence of information. The balance of the transactions i.e. the older transactions were being investigated on an on-going basis by Ms. Prinsloo. This was a laborious task which she did in-between her other work and involved searching for transaction records in Waterford's active manually. She had intended to complete the work and then to lodge all reports. This was not completed by the time of the inspection because she did not have enough time which to conduct her investigations. The outstanding reports were all filed***

by 04 December 2017- this being as soon as she was humanly capable of doing so given the circumstances".

31. We note that the appellant claims that Ms Prinsloo was not able to finalise the reporting. She also had other work to do in between the reporting. It may have been a laborious task but the reporting should have been prioritized. We note that the majority of the CTR's were not reported when the inspection took place.

32. We further take cognisance of submissions on the part of the appellant regarding the remaining transactions which were not reported. The appellant informed this Tribunal, is that it was unable to remediate the 24 out of the 110 transactions as it had difficulty in tracing its customers. In this regard it requested this Tribunal to rather amend the "remediation" order. A reasonable and justified order which should be considered that "***it shall attempt to report all reasonable commercial endeavours.***"

33. The reality remains that the appellant may never be able to comply with the said 24 transactions. Insofar as being unable to report the said transactions, the Centre referred us to the relevant Directive (i.e. Directive 3/14) which *inter alia* informs the reporting instructions that if it experiences difficulty in its reporting, then it is required to contact the Centre. The appellant submitted that it was never aware of this Directive.

34. We note that the Centre had considered the penalty on three occasions, each

time reducing the penalty further. Currently the financial penalty contributes 17% of the total financial penalty, being R500,000.00, with the remaining 83% being suspended for 3 years on condition that the appellant remains fully compliant.

35. With regard to gross negligence, the prescribed penalty as per the guidelines is 20% of the value of the transactions not reported. From the record, we note that the Centre considered the mitigating factors, which included the financial c circumstances the appellant would find itself in if the penalty of 17% was imposed.

36. This Tribunal would only interfere in exceptional circumstances where the penalty is grossly inappropriate and imposed arbitranly. We cannot find that the Centre exercised its discretion, arbitrarily, or that the sanction was inappropriate or that the sanction was imposed on a wrong principle.

37. The question then remains whether the sanction was excessive?

38. It is trite the sanction should be proportionate. Previously the Appeal Board of the Financial Services Board, in the **Michael Berman v The Financial Services Board** matter[4], (dated 17 February 2001), remarked:

> "***This type of conduct calls for a penalty that sends a message to the public that deflect from the object of the Act are taken seriously and that anyone that might consider embarking on that type of***

[4] Para 8 and 11 of the decision.

conduct, will be harshly treated. Having said that, however the element of proportionality always requires the circumstances of the contravention and those are offended to be given due consideration." (Own emphasis)

"***To determine whether we are entitled to interfere on this basis whilst measuring the importance of determination against other relevant factors involved at the penalty that meets the requirements of proportionality."***

39. We note even when the Centre became aware of its obligation to report, it failed to comply substantially. By November 2017, at first inspection stage, it reported only 45 transactions.

40. Cognisance is taken of the fact that the degree of blameworthiness is a factor, but not the only factor when determining the appropriate sanction. Moreover, the Guidelines is a framework which assists the Centre, provided it is not applied inflexibly. In this instance we note the Centre reduced the 20% base to 17%, even though the appellant was assessed on the gross negligence baseline.

41. However, we deem it appropriate to amend the remedial order to order to give efficacy to the reporting obligations. As alluded to above, the reality is that the appellant may never be successful in reporting some or all of the outstanding 24 transactions.

42. In the premises the appeal can therefore not succeed. The following order is made.

The sanction is as follows:

(1) A reprimand for failing to timeously comply with the Directive 4 as issued by the Centre in terms of section 43A (1) of the FICA;

(2) The appellant is directed to pay a penalty of R500 000.00 (17% of the total financial penalty being R2,846,971.00). The remaining 83% being R2,346,971.00 is suspended for a period of 3 years on condition that the appellant remains fully compliant with its obligations in terms of Section 28 of the FICA;

(3) A caution not to be non-compliant with section 28 of the FICA;

(4) A directive to remediate all outstanding unreported cash threshold transactions within one month of the issue of this order;

(5) A directive to remediate all the outstanding unreported CTR's within 1 (one) month of issuing this order. The appellant is required to report in writing to the Centre on the transactions it experiences difficulty in, particularly, setting out the difficulties it encountered in respect of each transaction.

(6) 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.

SIGNED at **PRETORIA** on this 18th day of **JULY 2019** on behalf of the Tribunal.

H KOOVERJIE