APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Case 12/3/1/5 – Mercedes Benz/FIC (1/19)

In the matter between

McCarthy (Pty) Ltd t/a

Mercedes-Benz Lifestyle Centre, Menlyn Appellant

And

FINANCIAL INTELLIGENCE CENTRE Respondent

Appeal panel: LTC Harms (chair); Adv Thami Ncongwane SC and Adv William Ndinisa

For the appellant: Adv C McConnachie instructed by Edward Nathan Sonnenberg

For the respondent: Adv F Latif of FIC

Hearing: 16 September 2019

Summary: Failure to report cash threshold transactions – administrative sanction – appeal - gross negligence

DECISION

This is an appeal against an administrative sanction imposed in terms of sec 45C(3)(c) of the Financial Intelligence Centre Act 38 of 2001 by the respondent, the Financial Intelligence Centre, on 14 March 2019, on the appellant, McCarthy (Pty) Ltd t/a Mercedes-Benz Lifestyle Centre, Menlyn, for having failed to comply with its reporting duties of cash receipts above the prescribed level.

THE STATUTORY SETTING

Part 3 of the Act deals with reporting duties and section 28, in particular, provides that a reporting institution must, in the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess the prescribed amount is paid or received by the reporting institution from the client.

The appellant is a reporting institution because it conducts the business of dealing in motor vehicles. Such dealers and dealers in Kruger Rands have been identified as outlets that provide a perfect vehicle for money laundering. It is not without significance that the last four cases, including the two today, before this Board concern dealers in luxury vehicle who have received huge cash deposits into their bank accounts for payment of vehicles over a period of time without complying with their reporting duty.

In terms of section 51, a reporting institution that fails within the prescribed period to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is guilty of an offence and is subject to administrative sanctions.

A person convicted is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R100 million rand.

Furthermore, the Centre may impose an administrative sanction on any person to whom the Act applies when satisfied on the available facts and information that the institutional failed to comply with provisions of the Act.

The Centre found that the appellant, that was duly registered and had from time to time complied with its reporting duties, during the period 1 July 2012 to 29 June 2017 failed to report 175 cash transactions to the total value of more that R23 million – not much different from the figures in the recent *Hyde Park Auto* case. These were divided between non-reported (104) and late reported (71). All were cases where the client had made a cash payment to a bank to the account of the appellant.

As has been noted before by this Board, an appeal is decided on the written evidence, factual information and documentation submitted to the Centre before the decision which is subject to the appeal was taken unless permission was sought and granted to submit further evidence, which did not happen in this case (sec 45D(1) to (3A)).

It has also been said before that the nature of the appeal in respect of the imposition of an administrative sanction is an appeal against the exercise of a discretion (*Federal Mogul Aftermarket SA (Pty) Ltd v Competition Commission and another*, 2005 (6) BCLR 613 (Competition AC)) and the payment of an administrative penalty cannot be equated to the imposition of a fine by a criminal court; and absent a finding that the Centre exercised its mind capriciously, upon a wrong principle or that it failed to bring an unbiased judgment to bear on the question of an appropriate penalty the test is whether the sanction was 'excessive or startlingly inappropriate'.

The sanctions imposed were a financial penalty, part of which was suspended, and a caution and directive to remedy all unreported transactions. The financial sanction was payment of R 4 672 792.00 (20% of the transaction values) of which the appellant has to pay 25% (R 1 170 000) and the balance was suspended for three years.

The appellant accepts that it contravened the Act to the extent found by the Centre and that the caution and directive are appropriate sanctions. It appeals the imposition of the financial penalty on three grounds.

GROUNDS OF APPEAL

The first ground of appeal is that the Centre committed a material misdirection in concluding that the appellant was grossly negligent in failing to file its cash threshold reports on time. The second is that the Centre committed a material misdirection in applying a blanket 20% sanction on the value of the 175 transactions in issue; and the third ground is that the financial penalty imposed is startlingly inappropriate and disproportionate as the Centre failed to give appropriate weight to the mitigating circumstances.

THE SANCTIONING SCHEME

Section 45C must be read as a whole to understand its import and functioning.

Sub-section (1) vests the power to impose an administrative sanction for a failure to comply with that Act in the Centre. These sanctions are listed in ss (3), and include a financial penalty. Part of an administrative sanction may be suspended (ss (4)(c)).

Before imposing an administrative sanction, the Centre must give the institution reasonable notice in writing— (a) of the nature of the alleged non-compliance; (b) of the intention to impose an administrative sanction; (c) of the amount or particulars of the intended administrative sanction; and (d) that the institution or person may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed (ss (5)).

After considering any representations and the factors referred to in subsection (2), the Centre may impose an administrative sanction it considers appropriate (ss (6)).

Subsection (2) lists the factors that must be considered in determining the appropriate administrative sanction: (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 taken by the institution or person to prevent a recurrence of the non-compliance; (d) …; and (e) any other relevant factor, including mitigating factors.

This list implies, as one would have expected, that the emphasis is on the nature, duration, seriousness and extent of the relevant non-compliance. Items (b) and (c) may, depending on the fact, be either aggravating or mitigating. The last item on the list (e) includes aggravating and mitigating circumstances. It is under this item where moral culpability or its degree is taken into account. It may be aggravating or mitigating.

As we have said before, fault or blameworthiness is not a requirement for the imposition of a sanction – transgression is the statutory jurisdictional fact. The degree of blameworthiness is a factor which may be taken into account in determining what an appropriate sanction would be in the special circumstances of the case.

THE NOTICE OF INTENTION TO IMPOSE SANCTIONS

The notice of intention to impose an administrative sanction set out the background and the statutory provisions and the extent of the failure to report cash threshold transactions.

The report took cognizance of the inspection findings and the comments made by the appellant, and stated that the initial view was that the appellant had failed to comply with the provisions of the Act .

In reaching this conclusion the Centre took into account that the appellant began trading as a motor vehicle dealer in 1991; that it had failed to report 175 cash transactions in excess of the cash threshold to the value of some R23 million; that at the time of inspection it was aware of its compliance obligations and had processes and procedures regulating such applications; and that it previously had reported cash threshold transactions emanating from its bank account. It also noted that its annual turnover of close to R1 billion.

The report proceeded to state that the preliminary view was formed that the appellant's non-compliance as detailed constituted serious and extensive non-compliance with the provisions of the Act. It was further said that the institution was grossly negligent in failing to comply with its reporting obligations and that the potential financial penalty might be imposed that would not be more that the amount of about R23 million being equal to the total value of the unreported and late transactions.

The appellant was invited to make representations and a list was provided of matters which it should consider addressing in its representations. The list included details of all allegations contesting the veracity of the Center's findings of gross negligence on the part of the appellant in relation to the identified (175) instances of non-compliance, and reasons for its non-compliance with its obligations under the Act.

APPELLANT'S RESPONSE

The appellant responded by saying that although cash deposits are identified by perusing the bank statements on a daily basis, a major contributing factor towards the late reporting was the challenges experienced in identifying all the correct and mandatory information in time. It added that it had since implemented more stringent processes, notably the decentralization of its financial intelligence reporting.

The appellant proceeded to argue at some length that not all of the transactions listed by the Centre were reported late. (This argument has since been abandoned as has been pointed out before.)

As far as moral blameworthiness is concerned, it submitted in general terms that the late reporting was due to mostly practical considerations that amount to administrative non-compliance rather than willful non-compliance or gross negligence.

REASONS OF THE RESPONDENT

The Centre explained in great detail how and why the financial penalty was imposed. It began with a general exposition of money laundering and the problems involved in monitoring the movement of money. It may be summed up in a few words: it is a serious issue and therefore the civil and criminal penalties contained in the Act.

It proceeded with an explanation of its financial sanctioning criteria. These apply when non-compliance is serious and extensive. It distinguishes between negligent non-compliance (no prior knowledge of compliance obligations at the time of the inspection), gross negligent non-compliance (prior knowledge of compliance obligations at the time of the inspection), and wilful non-compliance in setting a baseline penalty.

The baseline penalty is, respectively, 10%, 20% and up to the statutory limit calculated on the total value of unreported transactions to be proportional to the extent of non-compliance.

It added that once the final quantum has been calculated in accordance with these criteria, the amount is adjusted to reflect mitigating factors through conditionally suspending an appropriate portion.

Proceeding for the general to the specific, the Centre concluded as follows (para 73 of the answering affidavit). The instances of non-compliance relate to one of the core provisions of the Act and were serious, extensive, and extended over a period of approximately five years.

The appellant was aware of its compliance obligations and in fact registered 37 transactions during that period and was accordingly grossly negligent in not complying.

It then dealt with the mitigating factors and concluded that in the light of the established facts, mitigating circumstances and financial considerations that the preliminary penalty (the full value of the transactions, namely R23 363 963.65) be reduced to 20% of the transaction values to R 4 672 792.00 of which the appellant had to pay 25% (R 1 170 000) and the balance be suspended for three years.

GROSS NEGLIGENCE

To assess the validity of the explanation given by the appellant why it was not grossly negligent, it is necessary to consider the veracity of the facts on which the appellant relied.

The appellant blamed the centralized system of reporting that it had been using because it required the identity document and proof of residential address of a customer before the central reporting officer would register a transaction. However, it is apparent from the system employed by the appellant that before a sale of a vehicle could be concluded these documents and this information had to be obtained. The excuse also does not explain why transactions were and could be reported years after the event.

The second explanation was that the Centre's reporting system required detailed client information which was not at hand at the time when the reporting duty arose. Once again, the explanation does not hold water. Motor vehicles are not sold to persons before their names, addresses and the like are not provided to a dealer and the paper work is completed. It is also noteworthy that this explanation applies to a small number of transactions during 2016 only and not the non-reporting for four years before that. And, if the required documentation was only acquired after the conclusion of the transaction one may ask why that information was all of a sudden available once the appellant received notice of an inspection, and not earlier.

It follows that absent a reasonable explanation, the Centre, being the finder of fact, had reason to conclude that since the appellant had all the necessary systems in place, was able to report and did so in 37 cases, must on the probabilities have been grossly negligent by not reporting 175 transactions over a period of five years of amounts in excess of R23 million. The appellant was given advance notice to deal with the issue appropriately and instead it relied on generalized excuses that counsel for the Centre exposed during the hearing. We find no material misdirection on this aspect.

The appellants argued that the Centre could not have found culpability because the inspection report did not deal with the issue. The argument confused the function of the inspectors with that of the Centre. The inspectors make a report of the facts and do not deal with the imposition of a sanction. The Centre decides under sec 45C (2) what conclusion can be drawn from the facts, and one is that of moral culpability and its degree.

APPLICATION OF A BLANKET SANCTION

The second ground of appeal is based on the allegation that the Centre had misdirected itself in applying a blanket 20% on the value of the 175 transactions. As indicated, the Centre used the 20% as a base line and made adjustments to it in the light of the circumstances by suspending 75% of the amount for three years. In this regard the Centre followed the guidance given by this Board, and we find no misdirection.

It was also submitted that the Centre had to distinguish between the degrees of lateness and, as we understand, break the 175 case up into a number of categories of say one day late, two days late, three years late, etc. Apart from being impractical, as counsel conceded, the Act does not distinguish between non- and late reporting. The duty is to report cash transactions of R25 000 or more within the prescribed period, which is two business days. There is a reason for this. Time is of the essence in identifying money laundering and acting appropriately in consequence. Late reporting is as bad as non-reporting. The duty of a reporting institution is to check its bank statements daily for cash deposits and to report those that exceed the limit immediately.

Although not covered by the notice of appeal or mentioned in the founding affidavit, counsel relied on the statement (mentioned above) in the answering affidavit that once the final quantum has been calculated in accordance with the negligence/gross negligence criteria, the amount is adjusted to reflect mitigating factors through conditionally suspending an appropriate portion. This he said, conflicts with the Act which requires the Centre to determine the financial penalty with reference to mitigating factors and then, separately, use the same factors to suspend part of the penalty.

Counsel may be right on a literal reading of the Act but determining the penalty and suspension is a unitary exercise. The one determines or influences the other.

However, on the facts of the matter, having regard to paragraph 73 of the answering affidavit which dealt with the facts of the case, the Centre did not adopt the 'wrong' approach in this matter.

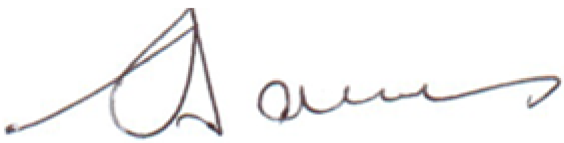
STARTLINGLY INAPPROPRIATE PENALTY

It was not suggested that the Centre had failed to have regard to all the circumstances of the case, also the mitigating factors. The argument eventually was that because the appellant was merely negligent, the appropriate penalty should have been 10% of the value of the transactions. We have already held that the premise is wrong and, in any event, the unsuspended part of the penalty is much less.

ORDER

The appeal is dismissed and the decision of the Centre confirmed.

Signed on behalf of the Appeal Board on 20 September 2019



LTC Harms (Chair)