APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Case 12/3/1/5 – LRS/FIC (2/19)

In the matter between

TRENDITRADE 23 (PTY) LTD (t/a LAND ROVER SANDTON) Applicant

and

FINANCIAL INTELLIGENCE CENTER Respondent

Appeal panel: LTC Harms (chair); Adv H Kooverjie SC and Mr J Damons

For the appellant: Adv JM Hoffmann instructed by SWVG Attorneys

For the respondent: Adv F Latif of FIC

Hearing: 24 February 2020

Summary: Failure to register by motor dealer and to report cash threshold transactions – administrative sanction – gross negligence

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JUDGMENT

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1. 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 23 November 2018, on the appellant, for having failed to comply with its reporting duties of cash receipts above the prescribed level in terms of section 28.

2. It is common cause that the appellant had failed in its reporting duties imposed upon an entity that carries on the business of dealing in motor vehicles (Schedule 3) in respect of 180 transactions totalling R 27 685 637.20. Due to an error common to the parties, the initial administrative sanction imposed by the Centre was calculated with reference to a transaction value of R36 685 637.20 and the administrative sanction imposed, R7 337 120.00, amounted to 20% of the value. The greater part was suspended and the appellant was required to pay R2 million within a given period. The 20% was based on the Centre's sanction guidelines in the event of a finding that the appellant had been grossly negligent for not complying with its reporting duties.

3. When the error was discovered and mentioned for the first time in the replying affidavit before us, the Centre revised its calculation with reference to the correct figures but applying the same principles and percentage calculation imposed a financial administrative sanction of R5 537 127.00, being 20% of the transaction value of which R1.5 million was payable and the balance conditionally suspended for three years (obviously running from the date of the first sanction notice, 13 March 2019).

4. In determining the 20% as its base, the Centre applied its sanctioning guidelines which provide that if a reporting entity knew of its duty to report but failed to do so it was deemed to have been grossly negligent. It is common cause that the appellant knew of its reporting duty at least as of 12 May 2017 but in spite of that it failed to report the historical transactions consistently, but did so in drips and drabs namely: 16 on 29 May 2017, 2 in July 2017, 15 during August 2017, 110 during October 2017 when it was informed of an intended

inspection by the Centre, and then reported 25 during January 2019 after the notice of intention to impose a sanction had been received.

5. The appellant, in its notice of appeal, appealed only the extent of the administrative sanction, accepting the factual findings made against it, and that it acted in contravention of the Act. (The reprimand for late registration, the caution against a repeat and the direction to remediate outstanding unreported transactions are not matters that concern the appeal.) It then submitted that the sanction was too harsh because it failed to take into account the mitigating factors in the case, namely that the financial impact of the appellant's business taking into account its low net income; its apology for the contravention which arose as a result of ignorance rather than malice; the fact that it engaged a consultant and introduced systems and protocols to prevent future contraventions; that it took immediate steps to remediate the unreported transactions; co-operated with the Centre in its investigation; and that the purpose of deterrence was achieved because of the steps taken.

6. In the light of these factors the notice proposes a reprimand, a final warning, or a wholly suspended financial sanction.

7. Although the finding of gross negligence is a finding which, in terms of the notice was accepted, the appellant in the founding affidavit sought to excuse itself from complying with the dual reporting duty on the basis that the appellant at all times held the bona fide view that the obligation was limited to physical cash received at its dealership and not in respect of cash paid into its bank account.

8. No basis for the belief has been provided and a simple say-so is not good enough. As we point out in the Cedar Isle Auto decision[1], such a belief could only have been the result of gross negligence. However, in this case it does not matter. The sanction was imposed because of the non and late reporting of transactions after 12 May 2017, when the duty to report was specifically drawn to the attention of the appellant. (The deponent ignored the relevant email in her affidavits and only referred to the follow-up email of 25 May 2017.)

9. The explanations and excuses why the transactions were not immediately reported after that date included the late registration on the goAML system. The appellant was informed of its obligation on 2 May 2017 but only completed its registration on 22 May 2017. There is no explanation for the delay.

10. The other reasons were that a previous financial manager, who left in July 2016, had not kept adequate records and that it took time and effort to recover the documents from the archive; that it was difficult to contact certain customers for documentation (what was required, we have not been told); and that the system rejected some reports.

11. These explanations lose all credence if regard is had to the fact that the appellant was able to report 2016 transactions, some that were done under the regime of the previous financial manager, on 29 May 2017, and that those transactions concluded under the new regime were not. For instance, why was transaction 175, concluded on 20 April 2017, but only reported on 6 October 2017? And why were transactions 176 to 180, concluded during July and

[1] Cedar Isle Case 12/3/1/5 – CIA/FIC (4/19)

September, reported late? And why the hiatus between October 2019 and January 2019?

12. In the replying affidavit, the appellant sought to introduce new facts namely that the documents were not orderly stored and the problems it had in respect of its ability to recover its documents from storage. No reason was given why this information was not placed before the Centre as required by the Act or stated in the founding affidavit.

13. In any event, for an organisation of the size and nature of the appellant, that is obliged to keep its records under different laws, the failure to do so constitutes gross negligence.

14. Counsel for the appellant in his main submission submitted that the financial sanction was arbitrary and that the reliance on criteria is irrational. This issue was not raised in the notice of appeal and the Centre was not called upon to deal with it. When asked, counsel could not propose any rational model for determining a sanction. In any event, the submission, which he qualified, that the quantum of a transaction has nothing to do with the degree of culpability is without any merit. It assumes that a thief who steals R10 should be dealt as one who stole R1million and vice versa.

15. Another issue raised was that if a transaction is reported “shortly” after becoming aware of the reporting duty, that failure should not be regarded as gross negligence but as “mere” negligence, attracting a lesser administrative sanction of 10%. This tribunal has, on occasion, adopted the approach in respect of a report filed within the two-day limit since knowledge of the reporting duty. Those are not the facts in this case.

16. Finally, the appellant sought to draw comparisons between the facts of this case and other matters heard by this tribunal. In most instances, the tribunal confirmed a sanction where the amount immediately payable amounted to about 5% of the transaction value – as is the case here. But in one instance, namely that of *Boundless Trade 11 (Pty) Ltd t/a Waterford Landrover v FIC*, the percentage was 4%. Since that appellant and the present appellant are related companies and since the facts are broadly similar, it was submitted that we should reduce the percentage accordingly.

17. Such argument misses the point. As we have repeatedly stated, the issue is whether the imposition of the sanction in this case, which requires the exercise of a discretion, can be overruled because the sanction was 'excessive or startlingly inappropriate'. The fact that the sanction in another matter was different does not make the sanction 'excessive or startlingly inappropriate'.

18. Reverting to the grounds of appeal, all the matters mentioned were indeed taken into account by the Centre in suspending more than R4million of the sanction imposed. It follows that the application stands to be dismissed.

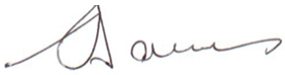
19. The only remaining issue is the date of payment which, in terms of the second notice, was 1 November 2019. The notice allowed 14 days for payment but considering the time of the financial year, it would be fair to set the payment date at 1 April 2020.

ORDER

a) The appeal is dismissed and the decision of the Centre is confirmed save that the payment date is set at 1 April 2020.

b) No order for repayment is made in terms of section 45D(10)(b) of the FIC Act

Signed on behalf of the Appeal Board on 2 March 2020



LTC Harms (Chair)