IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

APPEAL NO: 12/3/1/5-ST/FIC (5/21)

In the matter between:

SCOIN TRADING PROPRIETARY LIMITED **APPELLANT**

and

FINANCIAL INTELLIGENCE CENTRE **RESPONDENT**

Appeal Panel: LTC Harms (Chair); Adv S Mahabeer SC and PJ Veldhuizen

For the Appellant: Adv Lowies

For the Respondent: Adv Latif of FIC

Hearing: 22 March 2022

Summary: Failure to report cash threshold transactions – administrative sanction – Appeal

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DECISION

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1 This is an appeal against the Administrative Sanction imposed by the Respondent on the Appellant on 22 July 2021 for non-compliance with the provisions of section 45C(3)(e) of the Financial Intelligence Centre Act 38 of 2001 (**the FIC Act**) for having failed to comply with its reporting duties of cash receipts above the prescribed level in terms of section 28.

2 The Appellant is a reporting institution, listed in item 2 of Schedule 3 to the FIC Act, being an institution that carries on the business of dealing in Kruger rands.

3 It is common cause that the Appellant failed consistently in its reporting duties over several years, from at least 2011, and that the Respondent had sanctioned the Appellant on two previous occasions.

4 In the most recent inspection, the Respondent found no less than 61 failures to report and imposed a sanction, including a financial penalty of R2 625 770.00 as follows:

4.1 R108 720.00 (R1 087 200.00 x 10%) for failing to comply on 17 counts (proof Kruger Rand transactions) with section 28 of the FIC Act, of which only R54 360.00 (50%) was payable, with the balance conditionally suspended for three years.

4.1.1 R2 462 050.00 for failing to comply on 44 counts (other transactions) with section 28 of the FIC Act.

4.1.2 R55 000.00 which was conditionally suspended in terms of the administrative sanction imposed on the Appellant on 25 March 2015.

4.2 Due to financial considerations, the payable portion of the financial penalty was reduced to R2 571 410.00 (R54 360.00 + R2 462 050.00 + R55 000.00), with the balance conditionally suspended for three years.

4.3 The R2 571 410.00 was to be paid via twenty-four monthly instalments, the first being due on 1 September 2021 and the last on 1 August 2023.:

4.4 The other terms of the sanction are not relevant for present purposes.

5 After the imposition of the Administrative Sanction, the Appellant remediated 25 transactions, however, one transaction (number 21) was not reported, and two transactions were reported with incorrect transaction dates (numbers 4 and 22).

6 Mr Lowies, in a commendably brief argument, raised three main issues. The first dealt with the procedural requirements for the imposition of an administrative penalty. Section 45C(5) states:

(5) Before imposing an administrative sanction, the Centre or supervisory body must give the institution or person 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.

7 Apart from mentioning in the notice what the maximum penalty under the Act is – which, in the circumstances of the case could never have been considered – it omitted to comply with (c), namely the amount or particulars of the intended administrative sanction.

8 Mr Latif sought to justify this omission by relying on an earlier decision of this Board which allegedly held that by stating in the notice the the amount of the intended penalty, FIC would be pre-judging the penalty. If that is what the Board held, it was clearly wrong. The Act is unambiguous. If, however, the penalty finally imposed is the same or similar to the one notified, it may (depending on the circumstances) indicate that the FIC had closed its eyes to or ignored the representations under (d).

9 The question in this case is whether the failure to comply with (c) had any effect on the applicant's representations. The answer is no. Mr Lowies could not indicate any and we could not conceive of any, which means that the failure had no material effect on the result.

10 The second issue raised by Mr Lowies relates to the guidelines applied by the FIC in determining the appropriate financial sanction. The issue has a long history and has been the subject of many decisions of the Board but, more importantly, it was dealt with by the Full Court in **Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre and Another (A267/2020) [2021] ZAGPPHC 618**. It is accordingly unnecessary to deal with the issue again.

11 The main thrust of the Appeal is that the sanction is startlingly inappropriate. In this regard, the Heads of Argument dealt with the issue as if this were a criminal appeal, which it is not.

12 The Respondent highlighted that an institution's non-compliance with its reporting obligations is serious. Cash threshold reporting in terms of section 28 provides the Respondent with a mechanism to proactively monitor and report on cash transactions that may be linked to money laundering activities so that potential proceeds of crime are timeously identified and investigated. This obligation serves as the central pillar of South Africa's anti-money laundering regime. When institutions fail to submit such reports, the Respondent cannot fulfill its legislative mandate to combat financial crime, increasing South Africa's risk of money laundering and terrorist financing.

13 According to the Respondent, the undisputed facts justified the imposition of a financial penalty, which was calculated following the Respondent's sanctioning guideline.

14 In this matter, we are dealing with a serial offender which, if not reckless, indeed borders thereon. The FIC found that there was wilful non-compliance by the applicant with its obligations. We concur. There is no explanation offered as to why the transgressions occurred. There must have been a chain of persons who were involved: the salesperson, the cashier, the bookkeeper, the person who banked the money, etc.

15 The burning question which remains unanswered is why the Appellant, which now no longer takes cash to avoid the transgressions complained of, did not implement this step sooner. The Respondent has been lenient on the Appellant in previous sanctions, but clearly, this had no effect on the Appellant. This conduct must count against the Appellant's argument that the sanction imposed is startlingly inappropriate.

In the circumstances, we find that a substantial sanction is warranted.

16 In the matter of *Group Six Trust t/a Audi Centre Mbombela and The Financial Intelligence Centre,* Case 12/3/1/5 heard on 16 September 2019, the Appeal Board quoted the well-known passage from *Federal Mogul Aftermarket SA (Pty) Ltd v Competitions Commission and another*, 2005, (6) BCLR 613 (Competitions AC) where it was held that it is trite that this Board

> *"does not hold an 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 finding for that of the Tribunal. This approach is consistent with the general principle that in an appeal against the exercise of its discretion by a court with statutory body, the court on Appeal has limited power 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 an unbiased judgment to bear on the question or where it has not acted for substantial reasons."*

17 It is common cause that the Respondent misinterpreted the Appellant's annual financial statements*. In casu*, the Respondent confirmed that it took the Appellant's financial position into account to arrive at the quantum of the sanction to be imposed. The Respondent recognised a profit of R9,587,747.00 instead of the Appellant having sustained a loss of R9,587,747.00 for the year ending 30 September 2020. This misinterpretation results in a swing of over R19,000,000.00. Since it informed one of the bases of the Respondent's calculation of the sanction it amounts to a misdirection, affording the Appeal Board the discretion to interfere with the sanction.

18 It is furthermore trite that the sanction should be proportionate.

19 In the light of the misdirection, and taking into account the seriousness of the matter and the sustained failures by the Appellant to meet its obligations, we are at liberty to substitute the sanction with a more appropriate sanction. To this end, we propose reducing the financial penalty by one-third.

20 As the Appellant has been substantially successful in reducing the financial penalty, we decide that the R10,000,00 paid by the Appellant when the Appeal was noted is to be deducted from the financial penalty imposed.

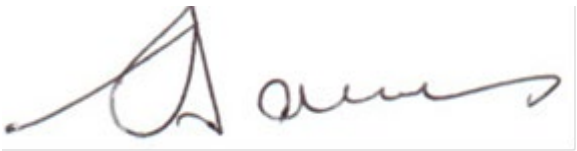
21 We make no order as to costs.

The following Order is made:

1. The payable portion of the financial penalty is reduced to R1,712,844.70 (R2 571 410.00 – R848,565.30 [1/3 reduction] – R10,000.00 [appeal fee]).

2. The R1,722,933.80 may be paid in twenty-four equal monthly instalments of R71 368.00, the first payment to be made on 1 May 2022.

Signed on behalf of the Appeal Board on 1 April 2022.



LTC Harms