APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

Case 12/3/1/5 – CIA/FIC (1/20)

In the matter between

SIQALA AUTO t/a FORD WOODMEAD Appellant

and

FINANCIAL INTELLIGENCE CENTRE Respondent

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

For the appellant: Ms V Oosthuizen of Shepstone & Wylie

For the respondent: Adv F Latif of FIC

Virtual hearing: 30 JULY 2020

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

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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)(e) of the Financial Intelligence Centre Act 38 of 2001 by the respondent, the Financial Intelligence Centre, on 10 December 2019 , on the appellant, for having failed to comply with its reporting duties of cash receipts above the prescribed level in terms of section 28. (It is unnecessary to deal with the other breaches and sanctions because they are not the subject of any appeal grounds.)

2. The appellant's failure to comply with its dual reporting duty relates to cash deposits into the bank account of the appellant made by purchasers of vehicles. Section 28 of the Act states as follows:

> "***Cash transactions above prescribed limit.—An accountable institution and a reporting institution must, within 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 of the prescribed amount—***
>
> ***. . .***
>
> ***(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting."***

And regulation 22B reads:

> ***"Prescribed amount for cash transaction reporting.—The prescribed amount of cash above which a transaction must be reported to the Centre under section 28 of the Act is R24 999,99 or an aggregate of smaller amounts which combine to come to this amount if it appears to the accountable institution or reporting institution concerned that the transactions involving those smaller amounts are linked to be considered fractions of one transaction***."

3. It is common cause that the appellant failed in its reporting duties imposed upon an entity that carries on the business of dealing in motor vehicles (Schedule 3) in respect of 74 transactions totalling R5 361 712.22. The administrative sanction imposed amounted to 20% of the value and of that half was suspended, meaning that the appellant has to pay the sum of R536 171 (i.e., 10% of the transaction values) with the balance conditionally suspended for 3 years. The 20% was based on the Centre's sanction guidelines in the event of a finding that the appellant had been grossly negligent in not complying with its reporting duties.

4. As this Appeal Board has said many times before, an appeal in respect of the appropriate financial penalty imposed can only succeed if it is shown that the FIC exercised its mind capriciously, or upon a wrong principle, or that it failed to bring an unbiased judgment to bear unless the sanction was 'excessive or startlingly inappropriate'.

5. On a factual basis the applicant contends that the reports in the case of 11 matters were only late and that, accordingly, the calculation of the penalty should have been on the assumption that the value of non-compliance was about R4.2 million instead of R5 361 712.22.

6. The Act and Regulation do not distinguish between late and non-reporting. Late reporting equals non-reporting. In any event, reporting a batch of transactions concluded between 20 April and 4 October, on 24 November 2017 could hardly be regarded as compliance or as mitigating. The same can be said of the last transaction of 11 December 2017, which was reported on 16 January 2018.

7. The next ground of appeal is that its non-compliance was "innocent or negligent rather than intentional". The problem with this is that the FIC did not find that the contraventions were intentional but that the applicant was grossly negligent. In its "notice of intention to impose an administrative sanction" issued under sec 45C(5), the FIC informed the applicant that since the applicant "was fully aware of its reporting duties" its non-compliance meant that it was "grossly negligent on 74 counts." The applicant did not deal with this conclusion in its response and when the same was said in the "notice of administrative sanction", the applicant also did not deal with it in the appeal application save for stating, in general, that it was either innocent or negligent but did not act intentionally.

8. The applicant also appeals on the ground that that the applicant had not provided reasons for the penalty and that there are extenuating circumstances: the appellant has co-operated in full and has not demonstrated any wish to avoid its obligations; it showed its willingness to remedy its non-compliance and has implemented a number of steps to ensure future compliance; there is no real risk of future non-compliance or avoidance on the part of the appellant; its remedial action and compliance steps were taken well before the respondent issued its notice of administrative sanctions, and accordingly there is no reason to impose a severe penalty in order to deter non-compliance or avoidance.

9. The answer to all this is brief: the FIC gave full reasons for the penalty and how it was calculated, and it dealt in detail with all the mitigating factors mentioned in the applicant's submissions in response to the notice.

10. That brings us to the crux of the matter as argued. It is about what was said in the notice under sec 45C(5): On the basis of its preliminary view that the applicant had not been compliant with its registration and reporting obligations in terms of the Act, the notice stated that

> "it is the Centre's intention to impose an administrative sanction on [the appellant], which may include a financial penalty in terms of section 45C(3)(e) of the FIC Act, not exceeding R10 million in respect of a natural person and R50 million in respect of a legal person."

It proceeded to state that

> "having regard to the factors which the Centre must take into account under section 45C(2) of the FIC Act in determining an appropriate administrative sanction and based on the information currently at the Centre's disposal, the Centre is of the preliminary view that . . . a potential financial penalty may be imposed that may not be more than R 5 361 712.22 being equal to the total value of the unreported transactions."

11. The argument was that the FIC did not give any reasons for its initial proposal to impose a penalty of R 5 361 712.22. We fail to understand the relevance of the submission. The question we must decide on appeal relates to appropriateness of the sanction imposed and not to a potential sanction discussed earlier. In any event, the appellant misread the notice. It merely restated what the statute allowed and what a potential penalty could be – not what the actual penalty would be.

12. Another complaint is that the appellant was unaware of the penalty guidelines used by the FIC. Once again, we do not follow the reasoning. Knowledge of the guidelines could not change the facts or the submissions. These guidelines remain guidelines and have been discussed in many decisions of this Board published before and after the notice of administrative sanction of 10 December 2019. The purpose of the guidelines is to have a measure of consistency, which leads to the last point: the financial sanction imposed is not, as submitted, out of kilter with other similar appeals decided by this Board.

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

Signed at Pretoria on behalf of the Appeal Board on 3 August 2020

LTC Harms (chair)