IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Appeal No: 12/3/1/5-OM/FIC(5/22)

In the matter between:

Brainwaves Projects 1195 CC t/a Outeniqua Motors Appellant

and

The Financial Intelligence Centre Respondent

Tribunal Members: LTC Harms (Chair), MG Mashaba and SM Maritz

Appearance for Appellant: Mr JM Barnard

Appearance for First Respondent: Mr M Sibanda

Date of Virtual Hearing: 14 November 2022

Date of Decision: 24 November 2022

DECISION

[1] This is an appeal in terms of section 45D of the Financial Intelligence Centre Act 38 of 2001 ("the Act") against administrative sanctions (financial penalties, the other sanctions do not arise) imposed by the Respondent on the Appellant.

[2] The Appellant is a motor vehicle dealer as defined in terms of section 45C(6) of the FIC Act selling second-hand cars with its offices situated at George, Western Cape Province.

[3] The Appellant was in terms of regulation 24(4) of the Regulations required to submit a report under section 28 which had to be sent to the Respondent as soon as possible but no later than two (2) days after the Appellant or any of its employees had become aware of a transaction or a series of transactions that had exceeded the prescribed threshold.

[4] Regulation 22B of the Regulations sets the prescribed amount for cash threshold reporting. The prescribed limit in terms of section 28 is R24 999.99 or the equivalent foreign denomination value calculated at the time that the transaction is concluded. This means that all cash transactions exceeding R24 999.99 (R25 000 and more) had to be reported to the Respondent by the Appellant in terms of section 28.

[5] On 21 September 2018 the Appellant conducted an inspection ("the first inspection") on the Appellant's business premises and established that between 1 April 2013 and 20 September 2018 the Appellant had not reported or failed to timeously report to the Respondent a total of 67 cash transactions in the excess of the prescribed statutory threshold at a total of R3 927 139.00.

[6] On 10 March 2020 the Respondent imposed an administrative sanction on the Appellant which including the following:

> [6.1] A penalty of R392 713.00 for failing to report 67 threshold cash transactions to the Respondent, of which R196 000 (50% of the R392 713.00) was payable, with the balance of R197 713 conditionally suspended for three years. (The appellant subsequently paid the unsuspended portion.)
>
> [6.2] A directive to remediate all transactions within 30 days of receipt of the Notice and to confirm in writing to the Respondent in terms of Directive 03/2014 ("Directive 3"), the remediation of such transactions or reasons for failure to remediate.

[7] On 19 May 2021, the Respondent conducted a second inspection on the Appellant's premises and established that

> (a) the Appellant had not reported 34 of the 67 cash threshold transactions as directed in terms of section 45D(c) totalling R2 128 159.00; and
>
> (b) between 22 September 2018 and 19 May 2021 a total of 34 other new cash threshold transactions in excess of the prescribed statutory threshold, to the value of R2 511 890.00, had not been reported and/or timeously reported.

(It is coincidental that the number of unreported transactions in both instances was 34.)

THE PENALTIES

[8] As a result of the failure (mentioned in (a)) to have complied with the Directive, the Respondent imposed an administrative sanction in terms of sec 45C(3)(e) on the Appellant, namely, a financial penalty of R50 000. In addition, since the condition for the suspension of part of the original penalty was not fulfilled, the suspended amount of R197 713 became payable.

[9] Due to the contravention of sec 28 read with Regulation 22B and 24(4) – item (b) above – the Respondent imposed a financial penalty of R2 511 890.00 for failing to report and/or timeously report 34 cash threshold transactions to the Respondent, of which R1 255 945.00 (50%) was payable, with the balance conditionally suspended for three years.

[10] The Appellant was afforded an opportunity to pay the financial penalty of R1 502 658.00 (R50 000.00 + R1 255 945.00 + R196 713.00) via 24-monthly instalments and provision was made for a discount, but the particulars are not relevant for present purposes.

TEST ON APPEAL

[9] The appeal is essentially about the quantum of the financial penalties. As the 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.' (See: Siqala Auto t/a Ford Woodmead vs FIC).

FAILURE TO COMPLY WITH THE DIRECTIVE

[10] We first deal with the failure of the Appellant to have complied with the Directive of the Respondent – item (a). The Appellant raised three points. The first is one of substantial compliance. The Act does not allow for substantial compliance. There is either compliance or there is not. In any event, the Appellant's contention that it substantially complied with the previous directive is flawed. At the date of the second inspection the Appellant had of the 34 transactions remediated two correctly, unsuccessfully remediated five transactions (listing incorrect transaction dates/amounts) and not remediated 27 transactions.

[11] To the extent that the Appellant relies on impossibility of compliance or lack of gross negligence, the answer is that the Appellant was aware of its obligation to comply with the directive and failed to engage with the Respondent for its failure to remediate the cash threshold transactions in terms of Directive 3. As counsel for the Respondent pointed out, the FIC did not expect Outeniqua to do the impossible. That is why the FIC issued directive

3/2014,181 and that the remediation directive pointed Outeniqua's attention to Directive 3/2014. It invited Outeniqua to invoke the mechanisms in this directive.'[2]

[12] Mr Barnard further argued that the Respondent erred in law in imposing a R50 000 penalty together with the suspended portion of the previous penalty in the amount of R196 000.00 as that amounted to double penalization of the Appellant. According to him this could not be in the interest of justice, rational, reasonable, or proportionate. The penalty in the amount of R50 000.00 was for failing to comply with the Directive issued in terms of section 45C(3)(c) of the FIC Act and the penalty of R196 713.00 is the amount which was suspended in terms of the first administrative sanction imposed on 10 March 2020. The two penalties relate to different transgressions and do not amount to double penalization.

FAILURE TO COMPLY WITH SECTION 28 –(b) above

[13] A later reconciliation of the transactions on the goAML platform revealed that of the 31 transactions identified as not reported during the second inspection, the Appellant remedied 14 transactions, unsuccessfully attempted to remedy 12 transactions (listing

---

[1] "2.2 Where a person/institution becomes aware of a reporting failure to the centre, such person/institution has to mitigate the loss of intelligence data to the Centre in the following manner:

2.2.1 inform the Centre in writing of the reporting failure immediately after becoming aware of such failure. The notification must be sent to the Executive Manager, Compliance and Prevention, Financial Intelligence Centre; and

2.2.2 request an engagement with the Centre to discuss relevant mitigation factors."

[2] "8.3 A directive to remediate all outstanding transactions within thirty days of receipt of this notice and confirm in writing to the Centre in terms of directive 03/2014, the remediation of such transactions or reasons for failure to remediate."

incorrect transaction dates/amounts/incorrectly consolidating transactions) and did not remediate five transactions (which relate to foreign clients and/or cancelled deals). From the above it is clear that the Appellant has failed to report the correct information to the Centre as prescribed in terms of Regulation 22C and as a result thereof it was in non-compliance with the reporting requirements in terms of section 28.

[14] Mr Barnard argued that when imposing the second sanction the Respondent ignored and/or did not consider submissions made by the Appellant. This, according to him, was fatal and should lead to upholding of the appeal and reference back to the Respondent for reconsideration. We disagree because the argument is based on an incorrect premise. The argument is based on the fact that two emails containing submissions were not attached to the Respondent's papers. The one is in the record (at 109). It contains nothing that was not dealt with in the Authority's decision. The other is not in the record and the Appellant did not bother to disclose it. If one reads the grounds of appeal, which, after mentioning the missing email, lists the facts the Respondent allegedly failed to consider, one can safely assume that the missing email dealt with one or more of those issues. If regard is had to the decision, it is apparent that the Respondent did consider all the relevant points listed, and the Respondent's answering affidavit states as much (Record p 83 et seq). See also the Notice of Administrative Sanction, dated 30 March 2022, where the Respondent recorded that "subsequent to the first assessment of the matter, Outeniqua Motors submitted its representations, which the Centre has considered in its entirety." The Appellant, in the replying affidavit, complained that its own bald allegations were met by bald denials, but Mr Barnard wisely did not pursue that argument.

[15] It is accordingly evident on the facts of this matter that the Respondent before imposing a second sanction duly considered the representations of the Appellant and did not misdirect itself when imposing the sanction.

[16] Also in this context, the Appellant sought to distinguish between non-compliance and late compliance. As said, the FIC Act and Regulations do not distinguish between late and non-reporting. Late reporting equals non-reporting and the Appellant's attempted remediation of the transactions could hardly be regarded as compliance or as mitigating. In this instance, much of the late reporting occurred because of the notice of the second inspection or because of the inspection.

[17] The main argument of the Appellant was that the penalty was imposed on the finding that the Appellant's non-compliance had been wilful, and that supposition was incorrect. The problem with the argument is that it was not foreshadowed in the Notice of Appeal. The only attack as far as *mens rea* is concerned, was in para (a) of the Notice of Appeal – and that, as well as (b) to (f) and (k) such as a crash of the computer system and lack of knowledge of the dual reporting requirement – concerned the first inspection, not the second. Three grounds, which could relate to *mens rea* (paras (j), (m) and (n)) are new grounds on which an appellant may not rely - see sec 45D(3).

[18] The essence of the Respondent's finding on what one could refer to as *dolus eventualis* is the fact that at the time of the second inspection the Appellant knew what its obligations and the consequences of non-compliance were. The Appellant was, at the time, an active member of the Independent Dealer Association and was aware of its reporting obligations. Paragraph 9.1 of the Respondent's first administrative sanction recommended to the Appellant to "acquaint itself and comply with the Centre's new registration and reporting system, goAML, all Directives, Guidance Notes and Public Compliance Communications, all of which are available on the Centre's website at www.fic.gov.za." Notwithstanding all information at its the Appellant nevertheless failed to remedy the existing deficiencies and merrily continued with its old habits. Of the 54 cash transactions

covered by the second inspection, only 20 were correctly reported, leaving the 34 that led to the sanction. And of this number, 22 were instances of cash received at the premises.

[19] The Appellant sought to justify some of its failures. One is that cash received from foreigners was not reported because someone (who we are not told) believed that the Respondent could trace the information about the client through some or other government agency and that the reporting duty could therefore be ignored. The excuse is cynical.

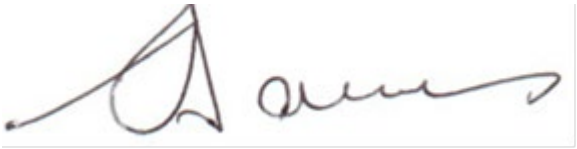
[20] Another justification was that in some instances the transaction was aborted or not perfected at the time of receipt of the cash. Once again, the justification is rejected because it does not explain the general pattern of conduct.

[21] The final submission was that (some) non-compliance was technical and that the sanction was disproportionate. We disagree. In imposing the financial penalty, the Respondent considered the Appellant's financial position, the possible repercussions the intended penalty could have on the Appellant, the degree of the transgression and the fact that this was the second occasion the Appellant failed to report cash threshold transactions. Considering the number (34) of cash threshold transactions the Appellant failed to report the financial penalty imposed by the Respondent did not fail muster.

[22] Accordingly, the appeal against the administrative sanction must be dismissed.

ORDER: The appeal is dismissed.

SIGNED at PRETORIA on this 22 day of NOVEMBER 2022 on behalf of the Panel.



_____

LTC Harms (Chair)

With the Panel also consisting of:

MG Mashaba

SM Maritz