IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

Case №: **12/3/1/5SM/FIC(3/20)**

In the matter between:

SUNWARD MOTORS (PTY) LTD Appellant

and

THE FINANCIAL INTELLIGENCE CENTRE First Respondent

THE DIRECTOR - ADVOCATE KHANYLE Second Respondent

Tribunal: H Kooverjie (chair), D Brooking, L Dlamini

Summary: Deterrence is the objective of imposing regulatory penalties. The factors set out in section 45C of the Financial Intelligence Centre Act, 38 of 2001 have to be considered by the Centre.

DECISION

A THE APPEAL

1. The appellant appeals the decision of the respondents in respect of the administrative sanction imposed.

2. On 26 March 2020, the first respondent, the Financial Intelligence Centre ("***the Centre***") imposed an administrative sanction against the appellant for non-compliance with the provisions of the Financial Intelligence Centre Act, 38 of 2001 ("***the FIC Act***") as follows:

2.1 reprimand for failing to timeously register with the Centre and failing to comply with the directive O2/2014;

2.2 financial penalty of R21,204,480.00 (20% of R10,602,400.00 for failing to comply with 108 counts with section 28 of the FIC Act of which R530,000.00 (25% is payable), with a balance of R1,590,480.00 (75%) conditionally suspended for 3 years;

2.3 a directive to remediate all unreported and all rejected transactions as identified on goAML, within 30 (thirty) days of receipt of this notice and confirm in writing to the Centre that the remediation of such transactions or reasons for the failure to remediate;

2.4 a caution not to repeat the conduct that led to the non-compliance.

B CONDONATION

3. Before considering the substantive aspects in this matter, it is necessary to firstly deal with the appellant's condonation application for the late filing of its appeal. It is required that an appeal must be lodged within 30 (thirty) days of receipt of the sanction in terms of section 45D 1(b) of the FIC Act.

4. Condonation may be granted on good cause shown in terms of section 45D(1)(c). We note that the appellant has further complied with the Rules of the Appeal Board in that the application was supported with an affidavit. The Centre did not oppose such application. The appellant has proffered an explanation which

demonstrates good cause. In effect the application was late by several days. The appeal that should have been instituted by 13 May 2020, was only instituted on 25 May 2020.

5. We refer to the often cited case of **Melanie v Santam Insurance Co Ltd**[1], where the relevant factors were listed when considering what constitutes "***good cause***":

> "***In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for what would be piecemeal approach incompatible with a true discretion…What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help the issue and strong prospects of success may tend to compensate for a long delay. And Respondent's interests in finality must not be overlooked."***

6. Having considered the appellant's explanation and the fact that the period of *lateness* was not extensive, we are satisfied that sufficient cause has been shown. Condonation for the late filing of the appeal is hereby granted.

C SUPPLEMENTARY AFFIDAVIT

7. The Centre applied in terms of section 45D(3B)(b) of the FIC Act to file its supplementary affidavit on the basis that the appellant in its replying affidavit

[1] 1962(4) SA 531A at 532 C - F

raised new allegations and/or information which were material and which the Centre was obliged to respond to.

8. We note that the Centre therein deals with the new allegations and information set out in the appellant's replying affidavit. Such new matter pertained to allegations by the appellant that the Centre failed to respond when the appellant sought assistance and that there were deficiencies on the part of the Centre in their reporting systems. Having considered such further matter, we find that same has a bearing on the issues for determination in this appeal. In light thereof the respondent's supplementary affidavit is admitted as part of the record of these appeal proceedings.

D RECONSIDERATION OF THE PENALTY

9. Due to the appellant informing the Centre that nine of its transactions totalling to R456,300.00 identified during the first inspection were concluded by Pradz Trading CC, (a former entity where the records were unavailable), the Centre reconsidered the penalties.

10. Consequently thereafter on 28 July 2020, the Centre issued a revised financial penalty now reduced to R2,029,220.00 (20% of R10,146,100.00) for failing to comply on 99 counts (in terms of section 28 of the FIC Act) of which R507,000.00 (25% is payable), with a balance of R152,220.00 (75%) conditionally suspended for 3 years. It is this revised penalty that is subject to the appeal.

11. The appellant seeks to set aside, *alternatively* reduce the financial sanction and set aside the directive to remediate the transactions not reported on the grounds

that:

11.1 the Centre's decision was premised on incorrect findings of fact and law;

11.2 the Centre erred in finding the appellant to be "***grossly negligent***" in failing to comply with its reporting obligations;

11.3 the Centre erred in issuing a directive to remediate the transactions not reported and/or rejected on knowing that such remediations would be impossible;

11.4 the appellant would be subjected to the full penalty eventually as it would not be able to report the said impossible transactions.

12. On 18 July 2016, a first inspection was conducted where it was established that the appellant was previously registered as Pradz Trading CC for approximately 10 years and then converted to a private company, Sunward Motors (Pty) Ltd; and over which period 32 cash threshold transactions (CTR's) to the value of R22,295,600.00 were not reported to the Centre.

13. Over 2 years later, a second inspection was conducted on 23 August 2018 where the Centre found that:

13.1 Although the appellant was required to register as a motor vehicle dealer with the Centre since 2012, it only registered on 4 March 2015 more than 2 years later.

13.2 Two employees were utilizing the same login credentials, which constituted a contravention of the Directive 02/2014.

13.3 The appellant did not remediate the 32 CTR's identified during the first inspection.

13.4 During the second inspection it was further found that between 1 August 2016 to 29 August 2018, 76 transactions to the value of R8,306,800.00 were unreported. From the 76 CTR's, 60 were not reported and 16 were reported late.

14. The Centre submitted that in exercising its discretion regarding an appropriate sanction, it considered the following namely:

14.1 It accepted that since the appellant was not aware of its registration obligations, the appellant was "***negligent***" merely in failing to timeously register with the Centre.

14.2 It further demonstrated the appellant to be negligent in failing to comply with directive 02/2014, as it accepted that the appellant was not aware that the login credentials could not be shared by employees.

14.3 However with regard to the appellant's reporting obligations, the Centre found the appellant to be grossly negligent for failing to comply with section 28 of the FIC Act, bearing in mind the 32 CTR's during the first inspection and 78 CTR's during the second inspection (total of 108 counts).

E DISCRETION EXERCISED IN IMPOSING SANCTIONS

15. Ultimately, the core issue for determination is whether the administrative sanction imposed was justified.

16. It is trite that the legislative provisions in determining the administrative sanctions are set out in section 45C(3) of the FIC Act, which allows the Centre to consider one or more of the following sanctions namely:

16.1 a caution not to repeat the conduct which led to the non-compliance;

16.2 reprimand;

16.3 a directive to take remedial actions or to make specific arrangements;

16.4 the restriction of suspension of certain specified business activities; or

16.5 a financial penalty not exceeding R10 million or less in respect of natural persons and R50 million in respect of any legal persons.

17. The Centre is further entitled to make recommendations to the relevant institutions, direct payment of the imposed financial penalty or suspend any part of the sanction on any condition the Centre deems appropriately for a period not exceeding 5 years.

18. The core factors in determining what constitutes an appropriate administrative sanction is set out in section 45C(2) of the FIC Act, where the Centre must take into account the following factors namely:

18.1 the nature, duration, seriousness and extent of the relevant non-compliance;

18.2 whether the institution or person has previously failed to comply with any law;

18.3 any remedial steps taken by the institution a person to prevent a recurrence of the non-compliance;

18.4 any steps taken or to be taken against the institution or person by another supervisory body or a voluntary association of which the institution or person is a member; and

18.5 any other relevant factor including mitigating factors.

19. As part of this process, the Centre is required to have regard to the representations made on behalf of an institution or person against whom a sanction is intended to be imposed.

20. It is noted that the appellant does not appeal the reprimand for the late registration, the caution nor the publication.

21. The highwater mark of the appellant's case is *inter alia* that the reporting system of the Centre was slow and unresponsive. There had been no forthcoming assistance from the Centre so that the appellant could effectively timeously and adequately report the CTR's. It was on that basis that the reports remained rejected despite the appellant's continuous attempts to resubmit its reports.

22. In addition, the appellant advanced the following contentions regarding the inappropriateness of the penalty namely:

22.1 The Centre applied the wrong principle as the penalty imposed is premised on the value of the CTR's that were not reported.

22.2 The imposed penalty does not take into account the personal circumstances, the facts and the nature and extent upon which there has been non-compliance.

22.3 The Centre utilizes a mathematical tool imposing sanctions. The application of this tool is flawed as it puts all offenders automatically into categories of negligence.

22.4 The suspension of the 75% of the penalty is in fact not a reduction but merely a postponement. This is because the appellant would be unable to report the 14 CTR's it identified due to the lack information of the persons, it would eventually be subjected to the full penalty.

22.5 The goAML system is inefficient and inaccessible for extended periods of time.

22.6 The respondent's finding that the rejected CTR's amounted to wilful disobedience was incorrect and the finding of "***gross negligence***" was highly inappropriate.

23. The CTR's which remained unreported or reported later, was due to the software and reporting problems the appellant experienced.

24. It is trite that this Appeal Board does not have an unfettered discretion to interfere with the penalty imposed. Only in instances where penalties are startingly inappropriate would there be grounds to interfere.

25. The Centre in fact took into account the factors set out in section 45C(2), where it was *inter alia* required the following that:

25.1 to consider the nature, duration, seriousness and extent of the non-compliance;

25.2 the Centre in fact did consider the representations made by the appellant;

25.3 the sanction process was conducted in a manner where the mitigating factors were taken into account;

25.4 the Centre utilized a guideline when imposing financial penalties. The main objective is to ensure measure of consistency when institutions or persons are found to be have been non-compliant. However the Centre acknowledges that it is not legally bound to follow this criteria;

25.5 each matter is considered on its own merits by the Centre.

26. The appellant's contention that the late reporting of transactions does not constitute non-compliance is flawed. The Centre argued that section 28 of the FIC Act attracts the same penalty as non-reporting. This was confirmed by the Appeal Board in the **Land Rover Sandton** matter[2] and the **Fury Ford Woodmead** matter.[3]

27. The FIC Act and the regulations do not distinguish between non-reporting and

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2 Land Rover Sandton v FIC Appeal Board decision dated 2 March 2020

3 Siquala Auto (Pty) Ltd t/a Fury Ford Woodmead Appeal Board decision dated 3 August 2020

rejected reports. Reports which have been rejected or unreported attract the same penalties, as ultimately they have not been submitted as a report to the Centre.

28. With regard to the revised penalty, it has not been disputed that the appellant failed to report 23 CTR's which were identified during the first inspection to the value of R1,839,300.00, and that at the time of the second inspection, 76 transactions at the value of R8,306,800.00 were reportable, 60 of which were not reported and 16 were reported late. Therefore the Centre calculated the penalty based on the 99 transactions (namely 76 transactions identified in the second inspection and 23 CTR's identified in the first inspection) amounting to a total of R10,146,100.00.

29. The appellant specifically argued that:

29.1 the extent of the remediation should have been taken into consideration. It is trite that remediation is certainly a mitigating factor to take into account when the Centre determines an appropriate sanction;

29.2 the Centre not only failed to assist the appellant, but ignored the appellant when it made repeated attempts to report the said transactions. Moreover the Centre's goAML platform was slow and unresponsive.

29.3 To refute these allegations the Centre in its further supplementary affidavit contended that:

29.3.1 There were limited queries during 2016 and 2017 from the appellant.

29.3.2 On 2 March 2017, it responded to three queries of the appellant which related to the manner of reporting CTR's.

29.3.3 During 2019 and 2020 only three calls was made by the appellant to the Centre's Call Centre which all related to registration related queries and were resolved.

29.3.4 The goAML message board reflected the status of reports submitted. The reasons for the rejection are made available on this system and the appellant was made aware thereof.

29.3.5 Its goAML platform was neither slow nor unresponsive. The Centre receives anything between 8,000 – 12,000 reports daily.

29.3.6 Already in March 2017 the appellant was advised on how to view rejected reports on the goAML platform.

30. The Centre submitted that the appellant remains "***grossly negligent***". Non-compliance with its reporting obligations is considered by the Centre to be a serious contravention. Without the reporting of both CTR's and suspicious and unusual transactions, the Centre is unable to fulfil its legislative mandate in assisting the law enforcement authorities in combating financial crime.

31. The appellant was considered to be a second time offender. Since 2016 the appellant was aware of its reporting obligations. Despite this, two years later when the inspection was conducted, the Centre found that the 23 transactions identified in 2016, remained unreported. Post 2016, the Centre still identified transactions that were either reported late or not reported at all.

32. As already alluded to above, the Appeal Board does not have an unfettered discretion to interfere with the penalty imposed. In instances where the penalty is startingly inappropriate there are grounds to interfere. We must appreciate that the prime purpose of imposing regulatory penalties is to attain the objective of "***deterrence***". However on the same token, sight should not be lost of the fairness aspect to the offending party.[4] In considering whether the penalty in this instance was appropriate, it is necessary to understand and appreciate the objective and intention behind imposing regulatory penalties.

33. In **Federal Markets SA (Pty) Ltd v Competition Commission and Another (2005) 56 BCLR 613 (Competition Appeal Court)**, the following was stated:

> "***The court does not enjoy an unfettered discretion to interfere with a Tribunal's assessment and the imposition of an administrative penalty. Even if we decide that a different penalty was appropriate we are not merely at large or substitute our finding of that of a Tribunal. This approach is consistent with the general principle that in an appeal against the exercise of a discretion by a court or statutory body, the court on appeal has limited powers to interfere. It can only do so in certain well recognised grounds namely where a court a quo exercises its discretion***

[4] South African Reserve Bank v Bank of Baroda (2019) 6 SA 174 GP at para 51

capriciously, upon a wrong principle or where it has not its unbiased judgment to bear the question or where it has not acted for substantial reasons."

(our underlining)

34. More recently the Tribunal in **MET Collective Investment RF (Pty) Ltd v Financial Conduct Sector Authority, case no 823/2019 dated 29 July 2020**, the FSCA Tribunal identified a mitigating factor that should be taken into consideration and stated:

> "***Deterrence must be considered in conjunction to the degree to which a person cooperates with the regulator in relation to the contravention and any submissions made by the person including mitigating factors referred to in those submissions.***"

35. More importantly it was further emphasized that the legislative prescripts requires that when considering an appropriate sanction, factors such as the nature, duration, seriousness of the non-compliance and extent of the non-compliance must be considered. The appropriate penalty can only be assessed after consideration of all the relevant facts whether they are aggravating or extenuating.[5]

36. It must be appreciated that the purpose for the imposition penalties is deterrent and the main object be of the FIC Act is curb terrorism and money/laundering. The penalty must have the effect of sending a message to the public that the conduct of institutions or person not complying with the law, will be dealt with

[5] The METCI decision, para 66

harshly.[6]

37. We find that there is nothing untoward for the Centre to have graded the penalties under the categories of "***negligence***", "***non-compliance***", "***gross negligence***" and "***wilful non-compliance***". Such formulation was initiated by the Centre upon the direction of the Appeal Board in the **JSH** matter.[7]

38. The Centre's approach in respect of the aforesaid categories was indeed considered in the **Mit Mak Motors** matter. Therein the Appeal Board found that the FIC's criteria should only serve as guidelines. At all relevant times the FIC is statutorily obliged to consider all relevant circumstances when determining the appropriate penalty.[8]

39. It is therefore that the Tribunal found in **METCI** that the strict application of mechanical checklists in determining any sanction can be problematic. It is trite that adoption of guidelines are there to assist decision makers in the exercise of their discretionary powers as long as they are not rigidly and inflexibly applied.[9]

40. One must further take cognisance of the fact that although the Appeal Board initially considered lenient penalties, such leniency was not always appropriate in the industry that we find ourselves in, and in accepting that the main purpose for the imposition of the sanctions and penalties was for a deterrent purpose. The aforesaid position was recently expressed in the Appeal Board's decision

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6 Michael Berman v The Financial Services Board

7 JSH Motors t/a Honda Johannesburg South Africa v The Director Financial Intelligence Centre, Case No 12/3/1/5

8 Mit Mak Motors matter, para 26

9 BP Southern Africa v MEC Agriculture, Conservation, Environment and Land Affairs 2004(5) SA 124 W at 211 – 212, 228 and 229

of **Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre, Appeal No 12/3/1/5HT/fic/2/20 dated 25 September 2020**.

41. In addition to the factors listed in section 45C of the FICA Act, the penalty must be administratively fair, reasonable and lawful. The process of imposing penalties on transgressions constitute administrative sanctions, therefore it must satisfy the requirements for just administrative action in terms of section 33(1) of the Constitution, namely that:

> "***That everyone has a right to administrative action that is lawful, reasonable and procedurally fair.***"[10]

42. The global approach to regulatory penalties is that it was intended to have a deterrent effect. In **Trade Practices Commission v Stihl Chain Saws (Australia) (Pty) Ltd [1978] ATPR41-091**, the Court stated as follows:

> "***The penalty should constitute a real punishment proportionate to deliberation with which a defendant contravenes the provisions of the Act. It should be sufficiently high to have a deterrent quality and it should be kept in mind that the Act operates in a commercial environment where deterrence of those minded to contravene its provisions is not likely to be achieved by penalties which are not realistic. It should reflect the will of parliament and the commercial standards laid down in the Act must be observed, but not too high so as to be oppressive.***"[11]

43. The emphasis has been that for a fair and effective regulatory regime to be

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10 Mit Mak Motors matter, para 13; Pather and Another v Financial Services Board, the Enforcement Committee and The Minister of Finance (2017) ZASCA 125 dated 28 September 2017

11 SCR [1991] ATPR 41-076, paras 52, 152

sustained, penalties should be set at a level sufficiently high to deter future contraventions of the law, provided that such penalty is not unfairly disproportionate to the seriousness of the offence.

44. Having set out the objective of penalties and the fact that certain factors have to be considered as set out by the Legislature, it is necessary to consider if the Centre was justified in finding the appellant grossly negligent.

F GROSS NEGLIGENCE

45. The concept "***gross negligence***" was considered in **Boundless Trading 11 (Pty) Ltd t/a Waterford Land Rover and the Financial Intelligence Centre, Case no 12/3/1/11/5-Waterford, at para 19**, where reference was made to the Transnet matter where Scott JA acknowledged "***gross negligence***" is not an exact concept and stated:

> "***It follows to qualify as gross negligence the conduct in question although falling short of dolus eventualis must involve the departure from the standard of a reasonable person to such an extent that it may properly be categorised as extreme.***
>
> ***(i) It must demonstrate where there is found to be conscious risk taking, a complete obtuseness of mind or where there is no conscious risk taking, a failure to take care. If something less were required, the distinction between ordinary and gross negligent would lose its validity."***

46. On 24 January 2020, the appellant in response to the Centre's intention to impose penalties, had made various submission as per Annexure **"XK4"**. The

following is highlighted from their response that:

46.1 the appellant admits that they did not take the issue of reporting serious prior to the inspections;

46.2 they were unable to adequately report as they did not have the details of the individuals they had dealing with;

46.3 they were late in registering with the Centre;

46.4 they were not cautious enough to ensure that the necessary information details of their clients were furnished; and

46.5 they had earnestly set out to remediate the CTR's which were not previously reported.

47. The appellant submitted that the Centre failed to take into account the fact that 89 CTR's for the period 5 January 2017 until 15 May 2017 were submitted and thereafter a further 102 CTR's for the period 15 May 2017 to 11 February 2019 were submitted. The conduct of the appellant could therefore not have been grossly negligent.

48. From the appellant's submissions we note that the main reasons for the CTR's not being reported were due to its weak record keeping. Since the appellant failed to secure the necessary FICA documentation from its clients, it had difficulty with its reporting procedures.

49. The appellant's counsel further argued that a distinction should be drawn

between the failure to report and attempted reporting. In instances where the CTR reports were either rejected by the system during the reporting stage or where the CTR's were late, such conduct cannot fall into the category of non-reporting. From the list furnished by the appellant, it was emphasized that 21 CTR's could not be reported and 87 CTR's were rejected.

50. However there is no satisfactory explanation as to why the 23 transactions identified already in 2016, were not reported by 2018 when the second inspection was conducted.

51. Even reports which were rejected were not timeously filed despite the appellant being well aware of its reporting obligations. A further issue raised was the penalty amount. In the papers the appellant argued that the amount of R10,000 was an appropriate penalty but later conceded that a penalty of R200,000.00 would be appropriate.

52. It was also argued that one cannot use the value of unreported CTR's when calculating the value of the penalties. We do not agree. Cognisance must be taken of the fact that various regulatory regimes have their own penalty procedures and systems in place. It cannot therefore be gainsaid that the Centre's consideration of the value of the unreported CTR's was unreasonable and inappropriate.

53. The penalty is required to be sufficiently high in order to have a deterrent effect. However due consideration must be given to the factors listed in section 45C of FIC Act. The Centre in this instance have demonstrated that due consideration was given thereto.

G CONCLUSION

54. Having considered the Centre's conduct and the factors took into account in determining the penalty, the Appeal Board does not find the penalty "***startingly inappropriate"***. Even if we were to decide that a different penalty may be appropriate, we are not able to substitute the decision of the Centre.

55. Even if we accept the appellant's version namely that it had difficulty in reporting the said CTR's, we find the appellant "***grossly negligent***". It became evident that the lack of adequate record keeping, resulted in the appellant being unable to report the CTR's adequately. On their own version, they admitted that they did not take their reporting obligations seriously but later realised that it was one of their core responsibilities. In the premises the appellant failed to take due care to ensure that it reported the CTR's timeously and adequately. Such conduct demonstrates more than "***negligence***" on their part.

56. In the premises we make the following order:

    (1) the appeal is dismissed

SIGNED at **PRETORIA** on this **30th** day of **NOVEMBER 2020** on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

D Brooking

L Dlamini