IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

Appeal Number: 12/3/1/5/HTI/fic/2/20

In the matter between:

HARLYN TRADING INTERNATIONAL (PTY) LTD **APPELLANT**

and

THE FINANCIAL INTELLIGENCE CENTRE **FIRST RESPONDENT**

THE DIRECTOR - ADV. ZEELIE XOLISILE- KHANYILE **SECOND RESPONDENT**

Appeal Panel: LTC Harms (Chair); L.G Nkosi-Thomas SC and N. Nxumalo
For the Appellant: Adv De Villiers, instructed by Deneys Zeederberg Attorneys
For the First and Second Respondents: Adv F Latif of Financial Intelligence Centre
Hearing: 25 September 2020

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

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DECISION

A. INTRODUCTION

1. This is an appeal in terms of section 45D of the Financial Intelligence Centre Act 38 of 2001 ("**the FIC Act**"), against the administrative sanction imposed by the Financial Intelligence Centre ("**the Centre**"), the first respondent herein, against the appellant, Harlyn Trading International (Pty) Ltd ("**Harlyn**"), for its non-compliance with the registration and reporting obligations, in respect of 75 cash receipts above the prescribed threshold.

2. Harlyn is a reporting institution, listed in item 1 of Schedule 3 to the FIC Act, that carries on the business of dealing in motor vehicles, having commenced operating as such during 1998. Accordingly, Harlyn was, at all material times hereto, obliged to register with,[1] and report to,[2] the Centre as from 1 March 2011.

3. It is common cause that at the time of its first inspection by the Centre, on 16 November 2018, Harlyn had failed to do so. In particular, Harlyn had not complied with:[3]

   3.1 its registration obligations as set out in section 43B (1); and

   3.2 its reporting functions, in respect of 75 cash transactions above the prescribed limit, as provided for in section 28 of the FIC Act read with Regulation 22B of the Money Laundering and Terrorist Financing Control Regulations ("**the Regulations**").

4. Harlyn does not dispute the factual finding of non-compliance referred to above. It, however, avers that the said non-compliance was occasioned by: "**The simple fact … that the [it] was not aware of its registration reporting (sic) duties and when it was made aware thereof, and after various attempts were unsuccessful, it eventually managed to register and report all but 22 of the 75 transactions.**"[4]

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1 Section 43B (1) of the FIC Act read with those of Regulation 27A (1) of the Money Laundering and Terrorist Financing Control Regulations (**"the Regulations").**

2 Section 28 of the FIC Act read with Regulation 22B of the Regulations.

3 Record, p. 151, para 74.1, p. 292, para 30.

4 Record, p. 292, para 29.

5. The administrative sanction appealed against is:

5.1 The financial penalty in the amount of R 1,278,948.00 of which R 639,474.00 (50%) is payable and the balance conditionally suspended for three years; and

5.2 The administrative penalty to remediate the outstanding transactions within thirty days of receipt of the Notice of Administrative Sanction ("**the notice**") and confirm in writing to the Centre that it has done so.

B. CONDONATION

6. The decision appealed against is dated 10 December 2019 and was received by the appellant on 11 December 2019.[5]

7. This appeal was lodged on 23 January 2020, outside of the 30-day period provided for, in peremptory terms, under section 45D(1)(b) of the FIC Act.

8. Harlyn maintains that the appeal was not lodged out of time since the 30-day period provided for in section 45D(1)(b) of the FIC Act is to be reckoned exclusively of Saturday, Sunday or public holiday.

9. Although the Centre does not oppose the condonation application it maintains that properly construed, 45D(1)(b) of the FIC Act affords a would-be appellant a period of

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[5] Record, p. 23, para 32.

30 calendar days after receipt of the notice, to lodge the appeal. That is undoubtedly correct.

10. Section 4 of Interpretation Act 33 of 1957 provides, in material part, that:

> **"Reckoning of number of days**
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> **When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday."**

11. The above provision finds application *in casu*. Accordingly, this appeal was lodged out of time.

12. As the Centre does not oppose the conditional condonation application, we would grant condonation of the late noting of this appeal.

C. COMMON CAUSE FACTS

13. On 16 November 2018, the Centre conducted its first inspection on Harlyn and determined that:[6]

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6 Record, p. 149, paras 68 and 69, p. 291, para 28.

13.1 Harlyn, having commenced its operations during 1998, was obliged to register with the Centre by 1 March 2011 and had not so registered in terms of section 43B (1) of the FIC Act;

13.2 A total of 75 cash threshold transactions**,** to the total value of R 12 789 481.66, had not been reported to the Centre; and that

13.3 At the time of the inspection, Harlyn was not aware of its registration and reporting obligations in terms of the FIC Act.

14. On 18 June 2019, the Centre issued a notice of intention to impose an administrative sanction, in terms whereof Harlyn was notified of the nature of the non-compliance, the preliminary administrative sanction and was called upon Harlyn to show cause why the preliminary administrative sanction should not be made final.[7]

15. On 19 October 2019 and in response to the above, Harlyn did not dispute the factual finding of its non-compliance with the registration and reporting provisions of the FIC Act but raised certain mitigating circumstances for the Centre's consideration during the sanctioning process, namely:[8] [9]

15.1 That it had since registered with the Centre on 18 June 2019;[10]

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7 Record, pp. 180, 168 and 292.

8 Record, p. 185.

9 Record, p. 180, para. 74.

10 Record, p. 188.

15.2 That it had since reported 69 out of the 75 identified reportable transactions, with the remaining 6 being incapable of reporting because it had insufficient information in its possession;[11]

15.3 That it had implemented certain internal processes and procedures;

15.4 That it had provided training to its reporting officer and appointed an external consultant to ensure compliance with the FIC Act;

15.5 That it had a gross turnover of R 85,8 million for FY 2017/ 2018 and had 29 employees;

15.6 That in order to protect its reputation, the administrative sanction should not be made public; and

15.7 That, if imposed, the preliminary financial penalty would negatively impact its commercial viability.

16. Subsequently, and on 10 December 2019, the foreshadowed administrative sanction was, finally, imposed in terms of the notice as set out in paragraph 5 above.[12]

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11 Record, pp. 183 and 191.

12 Record, p. 26.

D. THE APPEAL

17. Harlyn's appeal is based on alleged arbitrariness, irrationality and disproportionality of the administrative sanction.

18. Harlyn contends, in this regard, that:

18.1 Its representations were not considered by the Centre since it was a foregone conclusion, as recorded in the Notice of Intention to Impose an Administrative Sanction dated 13 June 2019, that it would impose a financial penalty calculated at 10% of the value of the reportable transactions;[13]

18.2 The final penalty had no regard to any of the reported transactions as the reported transactions in the amount of R 9,404,965.00 were not discounted against the total amount found to be unreported during the first inspection;[14] and that

18.3 The FIC Act makes no provision for the "**mathematical tool**" used by the Centre in its computation of the quantum of the financial penalty leviable and thus, so goes the contention, the Centre's use of such a tool is unlawful.[15]

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[13] Record, p. 14, para 7.

[14] Record, p. 15, para 8.

[15] Record, p. 16, para 11.

19 Ultimately, Harlyn challenges the Centre's utilisation of the **"mathematical tool"** in the computation of the financial penalty leviable and contends that certain of the mitigating circumstances that it has raised were ignored by the Centre.

E. THE LAW

20 Section 45C(1) of the FIC Act affords the Centre the discretion to impose an administrative sanction when satisfied, on available facts and information, that a reporting institution is non- compliant with the provisions of the FIC Act.

21 Section 45C(3) of the FIC Act is the empowering provision for the Centre to impose any one or more of the administrative sanctions therein set out which include a financial penalty of the sort here imposed.

22 When determining the appropriate administrative sanction, the Centre is enjoined to take the following factors into account: [16]

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

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

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

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[16] Section 45C (2).

22.4 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

22.5 any other relevant factor, including mitigating factors.

23 In terms of section 45C(6)(a) and after considering any representations made and the factors listed in section 45C (2), the Centre may impose an administrative sanction that it considers appropriate in the circumstances.

24 Mr Latif, appearing for the Centre, helpfully summarised the legal principles applicable to the FIC Act administrative sanctioning process as follows:

24.1 The Centre has a discretion to impose an appropriate administrative sanction on non-compliant institutions; [17]

24.2 The purpose to be served by the imposition of an administrative sanction is deterrence; [18]

24.3 Persons active in a particular economic sphere should keep themselves informed of all legal requirements including their statutory compliance obligations;[19]

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17 JSH Motors CC t/a Honda Jhb South v the FIC – Appeal Board decision dated 8 August 2016, page 6 at 9.

18 JSH Motors CC (supra) at para. 14.

19 JSH Motors CC(supra) at para. 11.3.

24.4 Financial administrative sanctions may be imposed upon a first offender institution that is ignorant of its statutory compliance obligations;[20]

24.5 When determining the appropriate administrative sanction, a distinction should be drawn between wilful, gross and negligent non-compliance;[21]

24.6 The Appeal Board does not enjoy unfettered discretion to interfere with the penalty imposed and should do so where there is an error of fact or law and where the penalty is startlingly inappropriate;[22]

24.7 Trade in luxury motor vehicles is a convenient vehicle for money laundering hence it is necessary to send a strong message to the industry at large that non-compliance has serious financial consequences; [23] and

24.8 The degree of culpability is a factor to be taken into account in determining the appropriate sanction based upon the facts of each case. [24]

F. ANALYSIS

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20 Cozitone (Pty) Ltd t/a Cash Inn v the FIC- Appeal Board decision dated 8 August 2016.

21 Ibid.

22 Ibid.

23 Hyde Park Auto (Pty) Ltd t/a Sandton Auto v the FIC, Appeal Board decision dated 1 March 2019.

24 McCarty (Pty) Ltd t/a Mercedes Benz Lifestyle Centre , Menlyn v FIC, dated 20 September 2019.

25 The proper approach on appeal before this Appeal Board was articulated, in **Mit Mak Motors v FIC**,[25] as follows:

> **"The FIC Appeal Board proceedings differ from review proceedings. It is evident that the Legislature created an appeal procedure … to consider whether the FIC applied the provisions of section 45 properly or not. The result is inevitable. When hearing an appeal, this board is entitled to intervene when the FIC has made a mistake either in its evaluation of the facts or in its interpretation of the law. The only other basis upon which it can intervene is when the sanction imposed is shockingly inappropriate."**

26 Thus, absent a misdirection on the facts, or on the law, the appeal falls to be dismissed. Additionally, this board must intervene where the sanction imposed is "**shockingly inappropriate**".

27 We have already stated that the factual finding regarding Harlyn's non-compliance with its registration and reporting obligations is not challenged, as are the factual findings on the 75 unreported transactions.

28 In regard to the error of law, Harlyn contends that the Centre's utilisation of the "mathematical tool" in the sanctioning process is unlawful because the tool is not provided for in the FIC Act and **"it puts all first offenders into the negligence box with an automatic 10% penalty.**"[26]

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[25] Appeal Board Decision of 3 November 2013 at para [18].

[26] Harlyn's Heads of Argument, para 11.

29 We do not agree. This Appeal Board had occasion to deal with this very issue and held as follows in that regard:[27]

> **"… In order to have parity in the imposition of sanctions it is understandable that certain yardsticks be laid down, but those yardsticks should only serve as guidelines and thereafter the FIC should take all circumstances into account when determining the appropriate penalty."**

30 That is exactly what happened *in casu.*

31 The Centre, having made factual findings of statutory non-compliance on common cause facts, held that Harlyn was negligent, [28] in the following terms:

> "**7.2 At the time of the inspection, Harlyn was not aware of its registration and reporting obligations in terms of the FIC Act. The institution therefore had no prior knowledge of these obligations and was negligent in failing to register with the Centre and to report 75 cash threshold transactions to the Centre."**

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[27] Mit Mak Motors v FIC at [27].

[28] Record, p. 29, para 7.2.

32 The criterion set out in paragraph 58 of the Centre's answering affidavit was merely used as a guideline[29] in the sanctioning process.

33 There was neither a mechanical application thereof, abdication nor unlawful dictation resulting in a failure by the administrative functionary to exercise a public power properly reposing in her.[30]

34 Having found Harlyn to have been negligent, the Centre proceeded to exercise its discretion in terms of section 45C(3) of the FIC Act, had regard to the mitigating factors which it tabulated at paragraphs 7.1 up to 7.6 of the notice of sanction,[31] in terms of section 45C (2) and ultimately imposed:

34.1 A financial penalty in the amount of R 5,000.00 for non-registration;

34.2 A financial penalty in the amount of R 1,278,948.00 which represents 10% of the value of the unreported reportable transactions of which R 639,474.00 (50%) is payable and the balance is conditionally suspended for three years; and

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29 Record, p. 146, para 58.

30 See **President of the Republic of South Africa & Others v South African Rugby Football Union & Others** ("*SARFU*"), 2000 (1) SA 1 (CC) at par. 38. Unlawful dictation is a form of abdication where a functionary vested with a power, does not of his own accord decide to exercise the power, but does so on the instructions of another. See **SARFU** at par. 40. The functionary vested with a power is permitted only to consult with and to consider the views of others but not "*to adopt the role of rubber stamp*". Whether there has been an abdication must be decided on the facts of each case. See **Minister of Environment Affairs and Tourism & Another v Scenematic Fourteen (Pty) Ltd**, 2005 (6) SA 182 (SCA) at par. 20, **Walele v City of Cape Town & Others**, 2008 (6) SA 129 (CC) at par.144.

31 Record, pp. 28 -29, para 7.

34.3 A directive to remediate the outstanding transactions within thirty days in terms of Directive 3/2014.

35 We are thus satisfied that the "**tool**" was not applied mechanically *in casu* but only as a guideline since the Centre had proper regard to the factors enumerated in section 45C(2) prior the imposition of the administrative sanction.

36 Guidelines and parameters within which an administrative functionary ought to exercise her discretion are common place in our legal system and internationally.

37. By way of example, the Competition Act 89 of 1998 ("**the Competition Act**") empowers the Competition Tribunal to impose administrative penalties in regard to prohibited practices.[32]

38. An administrative penalty imposed by the Competition Tribunal may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.[33]

37 Equally, the Criminal Law Amendment Act 105 of 1997 regulates the imposition of discretionary minimum sentences for certain serious offences.

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[32] Section 59 of the Competition Act.

[33] Section 58 (2) of the Competition Act.

38 On the international plane, the Brazilian Law No. 12.846, otherwise known as the "Clean Company Act" ("**CCA**")[34] provides, regarding possible monetary penalties depending upon the presence or absence of aggravating or mitigating factors specified in the CCA, that companies may incur fines of up to twenty percent of the entity 's gross revenue "**from the fiscal year prior to the initiation of administrative proceedings**," or up to **"three times the value of the benefit sought or achieved."**[35]

39 Accordingly, the application of the criterion as a guideline by the Centre is legally competent.

40 Harlyn's counsel urged upon us to find that the administrative sanction is "**shockingly inappropriate**".

41 In this connection, we were referred to certain cases in which the Centre imposed a less severe sanction to a non-compliant reporting institution.

42 It has to be emphasised, in this regard, that the time has come for this body to jettison the lenient approach hitherto adopted since the FIC Act has been in operation for nearly 20 years.

43 A dealer who, after all these years, neither registers nor reports reportable transactions is *prima facie* grossly negligent. Such a dealer is reasonably expected

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[34] This law was passed August 2013 and came into force in January 2014 in Brazil and it targets corrupt practices among business entities doing business in Brazil.

[35] Clean Company Act, art. 6(I); Decreto No. 8.420, art. 20(11).

to know the law in the area in which she operates. Her ignorance should no longer be excusable.

44 The approach of the Appeal Board in the first cases was, understandably, lenient because at the time the FIC Act and the Regulations were new. There can be no justification for the continued lenient approach.

45 A firm approach is indicated because of the extensive awareness campaign undertaken by the Centre from 1 April 2010 up to 31 March 2019, which included:[36]

45.1 Issuing 56 guidance products providing clarity on the interpretation and implementation of the FIC Act;

45.2 Conducting 262 public awareness sessions nationally with stakeholders including reporting institutions;

45.3 Publication of 92 articles and notices in various media platforms aimed at advancing compliance awareness; and

45.4 Entering into partnerships with motor vehicle associations.

46 As a direct consequence of the above, as at 31 March 2019, CTR's in excess of 48 million and suspicious transaction reports (STR's) in excess of 1,8 million were

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[36] Record, p. 141, para 38.

made.[37] Of the 48 million CTR's received, approximately 326 000 were received from motor vehicle dealers.[38]

47 A further reason for the adoption of a firm approach is deterrence financial crime and money-laundering in South Africa. Deterrence of these offences can hardly be achieved through administrative sanctions akin to "a slap on the wrist".

48 The Director of Centre states, in her answering affidavit, that although the Centre has had some successes it acknowledges that "**it has only touched the tip of the iceberg … and recognises that more needs to be done to successfully combat ongoing illegal activities.**"[39]

49 It follows that Harlyn's was *prima facie* grossly negligent. This becomes all the more so when one has regard to Harlyn's attitude toward its statutory obligations after the first inspection on 16 November 2018. In this regard, Harlyn:

49.1 Registered with the Centre on 18 July 2019, a period of approximately 8 months after the inspection and after receipt of the notice of intention to sanction on 13 June 2019;

49.2 Began remediating the 75 transactions on 13 October 2019, a period of approximately 11 months after the inspection, 3 months after registering with the Centre and 4 months after receiving the notice of intention to sanction; and

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37 Record, p. 142, para 40.

38 Record, p. 142, para 41.

39 Record, p. 142, para 43.

49.3 At the date of issuing the notice of sanction, had not reported 22 transactions resulting the Centre issuing a special directive that the remaining 22 transactions be remediated in 30 days of the directive.

50. We are, accordingly, satisfied that the administrative sanction imposed is not "**startlingly inappropriate**".

G. CONCLUSION

51. Based on all of the above we would dismiss the appeal.

52. During oral argument, we enquired of Mr. de Villiers if Harlyn would be opposed to an order deferring payment of the financial penalty until January 2021 and directing that same be paid in six equal monthly instalments.

53. Mr. De Villiers informed us that as he had no instructions to that effect, he was unable to agree thereto.

54. Mr Latif, for his part, informed us that the Centre had no objection to the proposed terms.

55. In the result we make the following order:

a. Condonation of the late noting of this appeal is granted.

b. This appeal is dismissed.

c. Harlyn is ordered to pay the financial penalty in the amount of R 644,474.00 (R 5,000.00 + R 639,474.00) in six equal monthly instalments commencing on 30 January 2021.

L G NKOSI-THOMAS SC

FOR THE FIC APPEAL BOARD PANEL

6 OCTOBER 2020