APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

In the matter between: Appeal No 12/3/1/5-TW/FIC (3/21)

TRUCK WORLD (PTY) LTD Appellant

and

THE FINANCIAL INTELLIGENCE CENTRE First Respondent

THE DIRECTOR: FINANCIAL INTELLIGENCE CENTRE Second Respondent

Coram: Mokgoro J (Chairperson)
SK Hassim SC
AT Ncongwane SC

For the appellant: Mr Van Niekerk, appellant's director

For the respondents: Adv F Latif

Hearing: 16 September 2021

Summary: Appeal in terms of sec 45D of the FIC Act against a financial penalty imposed under sec 45C(3)(e); failure to register as a reporting institution (sec 43B and sec 61A); failure to report reportable transactions (sec 28 and sec 51); administrative sanction for non-compliance (sec 45C); appropriateness of financial penalty and *quantum* thereof (sec 45C(3)(e)); publication of FIC's decision and the administrative sanction (sec 45C (11)).

DECISION

A. BACKGROUND

1. The appellant is a motor vehicle dealer and therefore a "*reporting institution*" envisaged in section 1 of the Financial Intelligence Centre Act, Act No. 38 of 2001 ("**the Act**") read together with Schedule 3 thereto.

2. Under section 43B of the Act, reporting institutions must be registered with the Financial Intelligence Centre ("**the Centre**") established under section 4 of the Act. Section 28 enjoins them to report to the Centre any transaction which results in the receipt of cash from a client ("**cash transaction**") exceeding the R24 999.99, cash threshold ("**the cash threshold"**) prescribed by regulation 22B of the Money Laundering and Terrorist Financing Control Regulations [1] ("**the Regulations**"). Cash transactions exceeding the cash threshold are henceforth referred to as ***"section 28 reportable transactions****"*.

3. On 30 July 2019, the Centre conducted an inspection [2] of the appellant's affairs under section 45B of the Act and found that the appellant had failed to timeously register with the Centre. [3] The appellant was also found to have contravened section 28 of the Act in that it had failed to report to the Centre two hundred and four (204) [4] section 28 reportable transactions to the total value of R26 648 127.50 (**"the unreported transactions**") These failures constitute non-compliance as defined in section 1 of the Act. [5] The Centre accordingly imposed the following

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1 Published under GN1595 in GG 24176 of 20 December 2002.

2 On 30 July 2019.

3 In terms Regulation 27A of Money Laundering and Terrorist Financing Control Regulations all reporting institutions had a window from 1 December 2010 to 1 March 2011 to register with the Centre.

4 This appears from the (i) notification contemplated in section 45C (5) of the Act dated 8 October 2019; and the Notice of Administrative Sanction dated 19 February 2021. The final inspection report dated 13 September 2020 referred to two-hundred and eight (208) cash transactions above the cash threshold. Nothing turns on the difference.

5 "**non-compliance**" means "**an act…that constitutes a failure to comply with a provision of this Act…and which does not constitute an offence in terms of this Act**."

administrative sanction under section 45C(6)(a) of the Act read with section 45C (3) thereof:

3.1. A reprimand contemplated in section 45C (3) (b);

3.2. A directive to remediate [6] the transactions that ought to have been reported to the Centre in terms of section 28 within 10 days of 22 February 2021, being the date of receipt of the Notice of Administrative Sanction by the appellant;

3.3. A financial penalty contemplated in section 45C (3)(e) in the amount of "R2 664 812 00 (10% x R26 648 127.50)"[7]. Fifty per cent (50%) thereof (i.e., R1 332 406.00) had to be paid over a consecutive 12-month period at the rate of R111 033.00 per month commencing on 1 April 2021, with the last payment to be effected on 1 March 2022 in the amount of R111 043.00. The balance of the financial penalty was suspended for three years on condition that the appellant complied with the reporting obligations in section 28;

3.4. However, if the appellant reported all of the unreported transactions, 60% of the financial penalty (i.e., R1 598 887.20) would be suspended and 40%

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6 In other words, remedy the non-compliance by reporting the transactions as required by the Act and the Regulations.

7 Para 8.2 Notice of Administrative Sanction.

thereof (i.e., R1 065 924.80) would be payable over a 12-month period commencing on 1 April 2021; and

3.5. A caution in terms of section 45C3(a) not to repeat the conduct that led to the non-compliance.

B. COMMON CAUSE FACTS

4. It is common cause that the appellant commenced operations in 1997. It registered with the Centre on 23 July 2019. However, this happened only after the Centre had issued a notice of inspection on 11 July 2019. The appellant does not dispute that it had failed to timeously register with the Centre for which a reprimand was imposed. Nor does it dispute that it failed to report two hundred and four (204) section 28 reportable transactions.

5. There is also no dispute that the appellant partially remedied its non-compliance by reporting two hundred (200) of the unreported transactions between 13 September 2019, being the date of the final inspection report, and 19 February 2021, being the date of the administrative sanction. By 1 March 2021, all two hundred and four (204) unreported transactions had been reported.

6. There is only one jurisdictional fact for the Centre to impose an administrative sanction in terms of section 45C. The Centre must be satisfied that the reporting institution failed to comply with a provision of the Act which constitutes non-compliance as defined in section 1 thereof. Hence there is, and can be, no contest

that the Centre's power to impose an administrative sanction was triggered upon the appellant's failure to register with it and when it failed to report the two hundred and four (204) unreported transactions.

C. THE BASIS FOR THE APPEAL

7. The appellant is aggrieved by the financial penalty [8] imposed by the Centre and invokes the right to appeal to the appeal board in terms of section 45D (1) of the Act.

8. The appeal is based on the fact that (i) the appellant's failure to comply with the Act was occasioned by ignorance of the law; (ii) the non-compliance was not negligent; (iii) a reprimand would be an adequate sanction; (iv) the financial penalty is excessive and unjustified considering that all transactions have been reported and remediated since the inspection.

9. The Centre defends the financial penalty. The thrust of the Centre's crisp argument is this: The appellant's non-compliance was serious. The failure to register as a reporting institution and the failure to report cash transactions exceeding the cash threshold was negligent. Accordingly, it argues, the imposition of a financial

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[8] While the appellant states in the notice of appeal that a reprimand would have been an adequate sanction, it does not challenge the caution issued in terms of section of section 45C3(a) nor the directive to remediate the two hundred and four (204) cash transactions. Indeed, it relies on the fact that it remediated the cash transactions above the prescribed cash threshold in support of its case that the penalty is excessive and unjustified.

penalty was justifiable in the circumstances and that the financial penalty imposed is appropriate and reasonable.

D. LEGISLATIVE FRAMEWORK

10. The Act is aimed at combatting money laundering and, the financing of terrorist and related activities. To this end, the Act established the Financial Intelligence Centre. The Centre is obliged to supervise and enforce compliance with the Act [9] and may impose administrative sanctions for non-compliance. [10]

11. The Act enjoins all motor vehicle dealerships, identified as "reporting institutions" in terms of section 1 of the Act, to register with the Centre [11] and report to it all cash transactions with a client above the prescribed cash threshold (the section 28 reportable transactions). [12] These section 28 reportable transactions must be reported to the Centre, as soon as possible, but not later than two days after the reporting institution becomes aware of a cash transaction above the cash threshold or becomes aware of a series of cash transactions that has exceeded the cash threshold. [13]

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9 Section 4(g).

10 Section 45C.

11 Section 43B.

12 Section 28.

13 Regulation 24(4).

12. A reporting institution's failure to either register with the Centre or report section 28 reportable transactions constitutes non-compliance as defined in section 1 of the Act and the reporting institution is liable to an administrative sanction. [14] The failure to report section 28 reportable transactions, additionally, constitutes an offence [15] and upon conviction carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R100 million. [16]

E. COMPETENCE OF THE ADMINISTRATIVE SANCTION

13. There are two issues which we must consider before determining whether the financial penalty withstands scrutiny.

Unawareness of statutory obligations

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14.1. The first question is whether unawareness of the obligations imposed by the Act either excuses non-compliance or averts an administrative sanction.

14.2. This issue has been conclusively determined by the Appeal Board in Cozitone (Pty) Ltd t/a Cash Inn v The Financial Intelligence Centre (Case

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14 Section 61A and section 51(2) respectively.

15 Section 51 (1).

16 Section 68 (1).

No 12/3/1/5-Cash Inn, 8 August 2016). [17] The appellant's ignorance of the law therefore does not excuse non-compliance with the Act. The absence of knowledge however, may impact upon the degree of blameworthiness and is a factor to be taken into account when determining the appropriate sanction. [18]

15. In the circumstances, the Centre's finding that the appellant's failure to register with the Centre and report to it the two hundred and four (204) section 28 reportable transactions was negligent, cannot be faulted.

Can an administrative sanction be avoided because non-compliance has been remedied *ex post facto*?

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16.1. The second question is whether a reporting institution can be found to be non-compliant even though it has remedied the non-compliance, but the non-compliance was remedied only after a notice of inspection was issued by the Centre. The enquiry in this regard is whether the failure on its own constitutes non-compliance, or whether in addition thereto, a further act on the part of the reporting institution, such as a refusal to remedy the

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[17] para 30; Hyde Park Auto (Pty) Ltd v The Financial Intelligence Centre Hyde Park Auto (Pty) Ltd v The Financial Intelligence Centre Case 12/3/5 Hyde Park Auto (1 March 2019) para 15.

[18] Hyde Park Auto para 16.

failure after notice from the Centre, is necessary. The Appeal Board in Hyde Park Auto (Pty) Ltd v The Financial Intelligence Centre (Case 12/3/5 Hyde Park Auto (1 March 2019)) also found that transgression is a statutory jurisdictional fact.[19] Therefore, failure on its own does constitute non-compliance. It therefore does not avert an administrative sanction.

16.2. The Act is not open to an interpretation other than that the failure to register without more or to report a section 28 transaction constitutes non-compliance. The appellant was obliged to register as a reporting institution by no later than 1 March 2011. Immediately after midnight on 2 March 2011, the appellant was already in breach of its obligations in terms of the Act. The breach had occurred, and while it could be remedied *ex post facto*, it could not be expunged. The Act is not open to an interpretation that the failure to register with the Centre or the failure to report section 28 transactions constitutes non-compliance only if the reporting institution does not remedy its failure after being called upon to do so. To the contrary, the definition of "non-compliance" in section 1 of the Act leaves no room for doubt that the failure to comply on its own suffices. We find no ambiguity in this regard: The offending act is "*a*

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[19] Ibid para 16.

failure to comply with a provision of this Act". The appellant can therefore not avoid an administrative sanction because it has registered with the Centre and has belatedly reported the section 28 reportable transactions. This ends the enquiry.

F. IS THE FINANCIAL NATURE OF THE PENALTY APPROPRIATE?

Nature of the appeal

17. We turn to the question whether the imposition of the financial penalty by the Centre is defensible.

18. The Appeal Board in McCarthy (Pty) Ltd t/a Mercedes Benz Lifestyle Centre, Menlyn v The Financial Intelligence Centre (Case 12/3/1/5-Mercedes Benz/FIC (1/19) (20 September 2019)) discussed the nature of the appeal under section 45D and found that:

18.1. an appeal against the imposition of an administrative sanction is an appeal against the exercise of a discretion and the payment of an administrative penalty cannot be equated to the imposition of a fine by a criminal court;[20] and

18.2. absent a finding that the Centre exercised its mind capriciously, upon a wrong principle, or had failed to bring an unbiased judgment to bear on

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[20] Mercedes Benz Lifestyle Centre pp 3-4.

the question of an appropriate penalty, the test is whether the sanction was "*excessive, or startlingly inappropriate*."

Appeal Board's power to interfere on appeal with the administrative sanction imposed by the Centre

19. First, the imposition of an administrative sanction is discretionary. Second, the limitations on an appeal court's power to interfere with the sentence imposed by a trial court apply equally in appeals against administrative sanctions when considered by an appeals body such as this Appeal Board. [21] Third, flowing from the second, is that the Appeal Board like a court of appeal is not at large to impose a sanction which to its mind is the appropriate sanction unless it finds that the body imposing the sanction exercised its discretion capriciously or upon a wrong principle or where it had not brought its unbiased judgment to bear on the question or where it had not acted for substantial reasons. [22]

20. In this regard, the courts have over time developed factors to be taken into account when determining that a sentence is unreasonable :[23] It is so severe that (i) it induces a sense of shock; (ii) it is startingly inappropriate; and (iii) there is a

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21 Group Six Trust t/s Audi Centre Mombela v Financial Intelligence Centre (Case No 12/3/1/5 Audi Mombela 20 September 2019) pp. 2-3.

22 *Cf.* Hyde Park Auto, pp.3-4; Boundless Trade 11 (Pty) Ltd 11 (Pty) Ltd t/a Waterford Landover v the Financial Intelligence Centre (Case No 12/3/11/5- Waterford 18 July 2019); Federal Mogul Aftermarket SA (Pty) Ltd v Competition Tribunal and Another 2005(6) BCLR (CAC).

23 S v Bolus and Another 1966 (4) SA 575 (A) at 581 G-H; R v Zulu 1951 (1) SA 489 (N) at 497 A-B.

striking disparity between the sentence imposed by the trial court and that which the appeal court would have imposed. It is irrelevant that the court of appeal would have imposed a lesser sentence. The question which the appeals body must consider is *"whether the sentence [is] such that it could not reasonably have been imposed.* [24] A sentence "*which could not reasonably have been imposed must inevitably induce in a Court of Appeal a sense of shock or outrage*…". [25] Interference is justified if the appeal court finds that the trial court was not reasonable in the imposition of the sentence. [26] Therefore, an appeal tribunal may not readily interfere in the decision but may do so only if it finds that the penalty has been unreasonable.

21. There is no dispute that an administrative sanction in the form of a financial penalty is competent where the Centre finds that a reporting institution has failed to comply with the Act. The Act provides for this expressly in section 45C (3) (a). What we must determine however, is whether in the circumstances of this particular case, the imposition of a financial penalty was appropriate and if so, whether the *quantum* of the financial penalty was reasonable.

The Centre's sanctioning framework and considerations

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24 S v Bolus at 581 G-H.

25 S v Bolus at 581 G-H; R v Zulu at 497 A-B.

26 *Cf.* S v Kgosimore 1999 (2) SACR 238 (SCA) at para 10.

22. The Centre, as submitted, adopts a rigorous sanctioning process:

22.1. After an inspection, a draft inspection report containing the factual findings is prepared and provided to the reporting institution for comment.

22.2. This is followed by a final inspection report taking the reporting institution's comments, if any, into account. In the case of non-compliance, appropriate measures to rectify non-compliance are recommended by the inspector to the reporting institution.

22.3. Where cases of serious and extensive non-compliance with the core provisions of the Act are discovered by the inspector, in addition to recommending the remediation of non-compliance, the case is referred to the Centre for sanctioning. It determines a preliminary administrative sanction (the first assessment).

22.4. The Centre issues a Notice of Intention to Sanction contemplated in section 45C (5) of the Act. The Notice of Intention to Sanction extends to the reporting institution an invitation (i) to make written representations on why the intended penalty should not be imposed; and (ii) to present evidence in mitigation of the administrative sanction.

22.5. The Centre revisits the preliminary administrative sanction considering the representations and evidence in mitigation received from the reporting

institution and determines an appropriate administrative sanction for recommendation to the Director of the Centre (the second assessment).

22.6. If the Director is satisfied that the administrative sanction recommended is appropriate (the third assessment), the Director would impose the recommended penalty and issue a Notice of Sanction to the reporting institution. If the Director of the Centre does not agree that the recommended penalty is appropriate, the case would be referred for reassessment.

23. Section 45C (2)(a) to (e) of the Act guides the Centre's discretion when it determines an administrative sanction. In doing so, the following factors must be considered and taken into account:

"(a) the nature, duration, seriousness and extent of the non-compliance;

(b) whether the reporting institution previously failed to comply with any law;

(c) any remedial steps taken by the reporting institution to prevent a recurrence of the non-compliance;

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

(e) any other relevant factor, including mitigating factors."

24. Section 45C (2) received the Appeal Board's attention in Mercedes Benz Lifestyle Centre. The Board there explains how and at what stage the factors mentioned in section 45C (2) are weighed:

"[The] list implies, as one would have expected, that the emphasis is on the nature, duration, seriousness and the extent of the relevant non-compliance. Items (b) and (c) may, depending on the fact, be either aggravating or mitigating. The last item on the list (e) includes aggravating and mitigating circumstances. It is under this item, where moral culpability or its degree is taken into account. It may be aggravating or mitigating.

...fault or blameworthiness is not a requirement for the imposition of a sanction – transgression is the statutory jurisdictional fact. The degree of blameworthiness is a factor which may be taken into account in determining what an appropriate sanction would be in the circumstances of the case." [27]

25. The gravity of the non-compliance must be assessed against, amongst others, the backdrop of the object of the Act, the mischief which it seeks to address, the impact of the mischief sought to be addressed, the purpose of the reporting obligations as well as the functions of the Centre.

26. The Act which came into operation on 1 February 2002, established the Centre to assist in the (i) identification of the proceeds of unlawful activities; [28] (ii) combating money laundering activities and, the financing of terrorist and related activities; [29] and (iii) the implementation of financial sanctions [30] and obliges it to supervise and enforce compliance with the Act, [31] conferring upon it the power to impose administrative sanctions aimed at deterring non-compliance. [32]

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27 At p.5.

28 Section 3(1)(a).

29 Section 3(1)(b).

30 Pursuant to resolutions adopted by the Security Council of the United Nations: section 3(1)(c)

31 Section 3 (c).

32 *Cf.* JSH Motors t/a Honda Johannesburg South CC v The Director: Financial Intelligence Centre and Another, Case No 12/3/1/5-JSH Motors (5 August 2016) para 14.

27. Motor vehicle dealerships have been identified as convenient for money laundering and the financing of terrorist and related activities, as was observed by the Appeal Board in Hyde Park Auto. [33] This sets the motor vehicle trade apart from other types of businesses as the Appeal Board noted "[*it*] *is not that easy to launder large amounts through the local grocery store*". Although these remarks were made regarding the luxury motor vehicle trade, they are in our view, equally relevant to the motor vehicle trade in general. Even if we are wrong in this regard, the revenue which the appellant generated in the financial years ending 2019 and 2020 [34] rendered it vulnerable to money laundering.

28. The respondent highlighted the devastating ramifications of money laundering not only for any country's financial sector, but for its society at large. It goes without saying that unchecked criminal activity incentivises and exacerbates the opportunity for crime. Indeed, as the respondent says:

> *"36… Motor vehicle, and Kruger Rand dealers operate in unregulated industries as they are not required to register with a regulator as a condition to entering and trading in their respective markets. This, combined with the fluid and high-value nature of the commodities traded by these reporting institutions, render them vulnerable to money laundering, thus categorising them as high-risk industries, requiring oversight in relation to their compliance with the AML [Anti-Money Laundering] obligations emanating from the FIC Act. For this reason, the legislature, saw it fit to include motor vehicle and Kruger Rand dealers within the scope of the FIC Act…"*

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33 Para 30.

34 As per the appellant's financial statements for the year ended 29 February 2020 the historical figure for the financial year ending 2019 was R264 360 664.00. The figure for the financial year ending 2020 is R230 569 517.00.

29. Although there are no allegations of terrorism and money laundering in this case, it is important to emphasise, as the respondent did, the need for a high level of compliance with the Act by accountable and reporting institutions. Compliance with the Act is one of the fundamental pillars for a successful anti-money laundering regime, and cooperation by accountable and reporting institutions is vital to the fight against money laundering and the financing of terrorist activities.

30. The empirical evidence presented by the respondent supports this outlook. As at 31 March 2021, 43,000 institutions (accountable and reporting institutions) had registered with the Centre; of these 3 700 were motor vehicle dealers and 256 Kruger Rand dealers. As at 31 March 2021 these registered institutions had reported in excess of 58.8 million section 28 transactions and in excess of 2.3 million suspicious transaction reports (in terms of section 29). This enabled the Centre to provide information in approximately 32,000 national and international investigations, assist in the recovery of proceeds of crime of approximately R14.4 billion and help in 271 judicial cases.

31. It is evident from the period allowed for the reporting of section 28 transactions as well as other reportable transactions, that the registration and reporting regime in the Act is aimed at the swift identification of possible money-laundering for a speedy and effective response. The objectives of the Act and the efficacy of the

regulatory system created by the Act will be severely undermined if accountable and reporting institutions do not comply with the Act. [35]

The sanctioning mathematical tool

32. Unlike determining whether or not to impose an administrative sanction, assessing what penalty to impose does take into account the element of fault. [36]

33. In an effort to ensure equitable treatment of non-compliant reporting and accountable institutions, the Centre has framed guidelines[37] which it describes as a mathematical tool.

34. The mathematical tool has received the Appeal Board's [38] nod, as well as that of the full court in Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre (Case No A267/2000) Gauteng Division of the High Court 20 September 2021)). The Appeal Board in Hyde Park Auto has described it as *"...a useful tool to ensure more or less equal treatment of those who are subject to a sanction having failed to comply with registration or reporting obligations*". [39] The court in Harlyn Trading International, discussed the function of the "mathematical tool" and its application and found that:

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35 Cf. Harlyn Trading International (Pty) Ltd Gauteng Division of the High Court, para 14.

36 Hyde Park Auto, para 12, and para 16.

37 Cf. Hyde Park Auto, para 12.

38 Hyde Park Auto.

39 Hyde Park Auto, para 12.

"[25] The guidelines are… designed to achieve proportionality between the ultimate penalty and the extent of non-compliance. The maximum penalty authorised is R50 million for a juristic person which means that any amount below R50 million is a competent financial administrative penalty. Although the guidelines set certain baselines, the imposition of the proposed baseline would not necessarily be proportional to the non-compliance hence the discretion of the [Centre] to adjust the quantum..."

35. These are guidelines; they are not, a tariff. [40] The Centre is aware that they serve as a point of departure. If, in its discretion the Centre determines that a financial penalty is warranted in the circumstances of a particular case, the mathematical tool will be implemented to determine the *quantum* or amount thereof. The amount is adjusted should the Centre find it appropriate based on the circumstances of the case, in particular in the presence of proven mitigating factors.

36. According to the mathematical tool, the baseline financial penalty for the negligent failure to report section 28 reportable transactions is 10% of the value of the unreported transactions, and 20% thereof in the case of gross negligence.

The appropriateness of the financial penalty and the *quantum* thereof

37. In this matter the financial penalty was limited to the failure to report the section 28 reportable transactions. It was therefore not imposed for the failure to timeously register with the Centre for which there was a reprimand even though the guideline penalty for the negligent failure to register with the Centre is R5 000.00. Having

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[40] Hyde Park Auto para 12, p.6.

found that the appellant's failure to report the two hundred and four (204) section 28 reportable transactions to the value of R26 648 127.50 was negligent, the Centre applied a financial penalty equivalent to 10% thereof. This is consistent with the mathematical tool employed by the Centre.

38. The appellant disputes that it had been negligent in failing to report the section 28 reportable transactions. Its case in that regard is that it was not aware of the statutory obligation requiring it to do so.

39. This Board has on several occasions, amongst others in Cozitone [41] held that the failure by a dealer to acquaint himself or herself with the obligations under the Act, constitutes negligence. There is no reason for us to revisit this established principle, nor are we called upon to do so.

40. However, this is not the end of the enquiry. We still have to consider whether a financial penalty was appropriate in the first place and if so, whether the *quantum* or amount thereof was appropriate. In the latter enquiry, we have to examine whether the Centre had taken account of the factors listed in section 45C (2) of the Act including the mitigating factors, if any.

41. The seriousness of non-compliance must be viewed through the prism of what compliance seeks to achieve. The success of any regulatory regime is dependent

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41 Para 30. See also: Hyde Park Auto, para 15.

on the regulator's ability to monitor compliance. This ability is largely dependent on the co-operation of those who are subject to the regulation. Relevant to this matter, if reporting institutions and accountable institutions do not comply with their reporting obligations, money laundering activities could go undetected by the Centre, and in turn by law enforcement agencies. Not only will the objective of the Act and functions of the Centre be undermined, but South Africa's national and international efforts at fighting the scourge of financial crimes such as money laundering and the funding of terrorist activities could be thwarted.

42. Unless the Act is effectively enforced and compliance therewith effectively policed, the object of the Act and the functions of the Centre will be frustrated. Money laundering is not only a feature of organized crime; it is also an enabler thereof. This brings the Act within the battery of legislation aimed at the prevention and combatting of financial crimes such as the Prevention of Organised Crime Act, Act No 121 of 1998, the Prevention and Combating of Corrupt Activities Act, Act No 12 of 2004, the Protection of Constitutional Democracy against Terrorist and Related Activities Act, Act No. 33 of 2004, the Prevention and Combating of Trafficking in Persons Act, Act No. 7 of 2013, to mention a few.

43. The seriousness of the non- compliance is one of the factors to be taken into account in assessing an appropriate administrative penalty. The legislature saw it fit not only to visit non-compliance with a financial penalty with an upper limit of R10 million in respect of natural persons and R50 million in respect of any legal

person but, additionally criminalised [42] the failure to report section 28 reportable transactions and penalises non-compliance with imprisonment for a period not exceeding 15 years or a fine not exceeding R100 million. [43] The hefty penalty is an indication of the seriousness with which non-compliance with section 28 is viewed.

44. The appellant's non-compliance endured for more than eight years. The two hundred and four (204) unreported transactions cover only about half that period, namely 1 January 2015 to 30 July 2019. That has been so only because the Centre limited its inspection to this period, and not because there were no section 28 reportable transactions between 2 March 2011 and 31 December 2014.

45. A random sample of the two hundred and four (204) unreported transactions reveals large cash payments from a single individual or entity or for a single transaction. Payments in point are:

    45.1. R894 000.00 paid over 2 December 2015 and 8 December 2015, seemingly by the same person. [44]

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42 Section 51(1).

43 Section 68(1).

44 The reference for each of these nine transactions with the total value of R894 000.00 is "CB42KJ GP".

45.2. Four payments totalling R425 000.00 made on 8 January 2015. These four payments have the same reference [45]. This same reference [46] appears for payments on 19 January 2016 (R 101,000.00), 21 January 2016 (R 490,000.00) and 25 January 2016 (R 25,000.00). A reasonable inference is that these payments totalling R1 041 000.00 were made by the same person in less than 20 days.

45.3. Two payments with the same reference totalling R650 000.00 on 13 October 2016. [47] This reference [48] appears for a payment of R200 000.00 on 15 October 2016 and R200 000.00 on 19 October 2016. The reference for a payment of R194 000.00 on 20 October 2016 has similar digits [49] (but not the same). Again, one can reasonably infer that at least the first three payments which total R1 050 000.00 were made by the same person or in respect of the same transaction/s in a space of three days.

46. The failure to report such large cash transactions, some, seemingly from one source, undermines the very purpose of the Act, and the role and functions of the Centre.

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45 The reference for these four payments is "Rage."

46 "Rage."

47 "TMX10/RABS".

48 "TMX10/RABS".

49 "TM*10/RABS".

47. It is against the background of these large cash payments that the appellant's plea for a reprimand must be considered.

48. The Appeal Board has expressed the purpose of an administrative penalty as "*Deterring the [offender] and deterring others*".[50] If the sanction does not advance this purpose, then it is not reasonable, and therefore not appropriate.

49. Two types of deterrence are recognised. The one, general deterrence targets deterring others and is aimed at potential offenders in the belief that the threat of similar punishment will cause the potential offender to refrain from committing the offending act. The other, individual deterrence is aimed at deterring the offender from reoffending.[51] In this regard, the following remarks by the learned authors Rabie *et al* are insightful:

> *"[t]he idea is that [people], being … rational creature[s], would refrain from the commission of crimes if [they] know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or the imposition of punishment on others, which should cause a person to think twice before … commit[ting] a crime*".[52]

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50 Hyde Park Auto, para 30. While the Appeal Board questioned whether the debatable concept of deterrence which applies in criminal law could be applied "*without more*" to an administrative penalty it however found that a message to the industry that financial consequences will follow for non-compliance was necessary.

51 Rabie, A; Strauss, SA; and Maré, MC; *Punishment: An Introduction to Principles* 4ed (1994) Lex Patria Pretoria p. 156-157 paragraph 8.3.1 and p. 161 – 162, paragraph 8.3.2.8 and paragraph 8.3.3. See also: Hyde Park Auto para 30.

52 Rabie, A; Strauss, SA; and Maré, MC; *Punishment: An Introduction to Principles* 4ed (1994) Lex Patria Pretoria p. 156-157, para 8.3.1 and 8.3.2.1.

50. The appellant sells approximately 30 motor vehicles per month. The sale price range between R400,000.00 and R600,000.00. This is therefore not a case where it is improbable that there will be large cash transactions in the future. An appropriate penalty must have an inhibiting effect. The proverbial "slap on the wrist" will not have such an effect. A financial penalty on the other hand will have an inhibiting effect on the appellant as well as on other motor vehicle dealers similarly placed and will send a message that non-compliance shall be met with serious financial consequences. It will also send a message that the Centre views non-compliance by reporting institutions in a serious light and that, institutions must not expect to get away with a slap on the wrist.

51. A reprimand for the appellant's failure to report two hundred and four (204) section 28 transactions would therefore be wholly inappropriate. It completely ignores that the appellant had not only failed to comply with the Act but had committed a criminal offence. And not just one, but two hundred and four (204) counts. A reprimand would trivialise the appellant's non-compliance and the Centre's authority and would be inconsistent with section 45C(2)(a); it leaves out of account that (i) the non-compliance also constitutes a crime which endured for eight (8) years; and (ii) the appellant had failed to report two hundred and four (204) section 28 transactions with a total value of more than R26.6 million. A financial penalty on the other hand takes account of the factors referred to in section 45C(2)(a) and

is a deterrent not only to the appellant but also other motor vehicle dealers similarly positioned.

52. This brings us to the *quantum* of the penalty. The appellant, having been given the opportunity to respond to the "Notice of Intention to Sanction" particularising the nature of the non-compliance and intended administrative sanction, responded thereto. On 19 February 2021, the Centre issued to the appellant a Notice of Administrative Sanction embodying the nature of the non-compliance for which the appellant was being sanctioned, as well as the reasons, therefor. The administrative sanction was attached to the latter document.

53. It is evident from these two documents that the Centre did consider and take into account the appellant's response. At least the following factors were considered and taken into account in arriving at the appropriate administrative sanction:

53.1. The appellant failed to comply with the provisions of the Act because it was oblivious of its registration and reporting obligations.

53.2. It registered with the Centre on 23 July 2019, has acquainted itself with the Act and the Regulations published thereunder, as well as Directives, Guidance Notes, and public compliance communications. It also appointed an assistant to its compliance officer, provided training to its staff and implemented procedures to ensure compliance with its reporting obligations from there onwards forthwith.

53.3. With a staff complement of 20, the appellant's turnover in the financial year ending February 2019 was in the region of R250 million. In the financial year ending February 2020 the appellant's turnover was R230.5 million and profit R4,213,790.00.

53.4. Of the two hundred and four (204) section 28 reportable transactions that were found not to have been reported, two hundred (200) of them were subsequently reported. Three transactions had been rejected and only one therefore remained unreported.

53.5. This was the first inspection and the appellant had cooperated fully therewith.

53.6. The appellant's financial position as well as the possible adverse repercussions of the intended financial penalty.

54. The Centre determined the financial penalty at the 10% baseline for negligent non-compliance with reporting obligations which amounts to R2,664,812.00 (i.e., 10% of the total value of the unreported transactions (R26,648,127.50)). One of the mitigating factors which the Centre considered when adjusting and determining an appropriate penalty was the steps taken by the appellant to remedy the failure to report the reportable transactions. This resulted in the suspension of 50% of the penalty for a period of three years on condition that the appellant fully complies with the reporting obligations imposed by section 28. The effective penalty was

therefore calculated in the amount of R 1,332,406.00. Thus, the ultimate decision whether the remaining 50% of the penalty had to be paid to the Centre rested with the appellant entirely. The appellant was given the opportunity to report the four remaining unreported transactions within 10 days of the receipt of the Notice of Sanction and thereby reduce the effective financial penalty by 10%. The remaining four unreported transactions were reported on 1 March 2021 with the result that the effective financial penalty has been reduced to R1 065 924.00, this equates to 4% of the total value of the unreported transactions.

55. It is an accepted principle of law that the appropriateness of a sanction must be assessed contextually. Accordingly, the reasonableness of the financial penalty must be seen in the following context: The appellant had for more than eight years neither registered nor reported its reportable transactions. In accordance with its sanctioning guidelines, the Centre could have imposed a penalty of R5 000.00 for the appellant's failure to register with the Centre, but it decided instead to reprimand the appellant for its non-compliance. To the appellant's advantage, the Centre's inspection was confined to a 4½ year period with the result that the appellant's compliance with the Act for the period 2 March 2011 and 31 December 2014 escaped scrutiny.

56. The effect of the financial penalty on the appellant's business has been ameliorated [53] by allowing the appellant to pay the financial penalty at the rate of R88 827.00 per month over 12 consecutive periods of a month each.

57. We are not persuaded that the Centre exercised its discretion capriciously, or upon a wrong principle or that it failed to bring an unbiased judgment to bear on the question of an appropriate penalty or that the financial penalty imposed is excessive or startingly inappropriate. The Centre's discretion in the imposition of the financial penalty was not improperly and unreasonably exercised. We are accordingly of the view that the financial penalty is reasonable and there is no merit in the appeal against it.

Preservation of the confidentiality of the sanction

58. The appellant seeks to have the confidentiality of the sanction preserved because of the negative effect that publication may have on its cashflow. The default position in terms of section 45C (11) of the Act is however that the sanction and the decision of the Centre must be made public. It is only if exceptional circumstances are shown to exist, that confidentiality may be preserved.

59. Firstly, we cannot see how the appellant's "cashflow" will be affected by the publication of the sanction and the Centre's decision and it has not made out such

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53 *Cf.* Harlyn Trading International (Gauteng Division of the High Court), para 40

a case. Secondly, if the appellant had contended that the publication of the sanction and the Centre's decision will have a negative effect on its turnover, the success of its business, its reputation, or its ability to secure finance, which is not what it claims, these consequences may result in every case where an administrative sanction is imposed, and the sanction and decision are published. There is therefore nothing exceptional about the negative impact that the publication of the Centre's decision and penalty would have on the appellant's business and cashflow.

60. In view of the appellant's failure to show exceptional circumstances, the Centre's decision and the nature of the sanction imposed on the appellant must be made public as is required by section 45C (11) of the Act.

Order

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

Signed on behalf of the Appeal Board on 20 December 2021

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SK Hassim SC