

IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Appeal Number: 12/3/1/5-FSCA (1/23)

In the matter between:

JANNIE PARSONS FUTURE FINANCIALS (PTY) LTD

Appellant

and

FINANCIAL SECTOR CONDUCT AUTHORITY

Respondent

Appeal panel: LTC Harms, Adv Siphokazi Jikela SC and Adv Mustaque Holland

For the appellant: Adv F.J Labuschagne instructed by Van Huyssteens Commercial Attorneys

For the respondent: Mr B Bredenkamp for the FSCA

Date of Decision:

14 July 2023

Summary: Hearing: Failure to develop, document maintain and implement a programme for anti-money laundering and counter-terrorist financing risk management and compliance – Contraventions of FIC Act – financial penalty imposed.

DECISION

INTRODUCTION

1. The Appellant appeals the imposition of a financial penalty by the Respondent (“the Authority”) in terms of sec 45C(3)(e) of the Financial Intelligence Centre Act 38 Of 2001 (“the FIC Act”).
2. The appeal is under section 45D of the FIC Act.

RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

3. We use by way of background the following information from the Notice of Admirative Action that was issued by the Authority.
4. The Appellant is an accountable institution in terms of item 12 of Schedule 1 of the FIC Act.
5. It is the duty and responsibility of the Appellant to fully comply with the provisions of the FIC Act and it is the responsibility of the Authority to supervise and enforce compliance with the FIC Act.
6. On 18 and 19 October 2021, and as part of its supervisory duties, the Authority conducted a desk-based and virtual inspection in respect of the Appellant in terms of section 45B of the FIC Act to determine its level of compliance with the FIC Act. The inspection found that the Appellant was non-compliant with the FIC Act.

7. On 14 December 2022, the Authority imposed a total penalty of R870 000.00 on the Appellant, suspending R470 000.00 thereof. The financial penalty was imposed for the following contraventions of the FIC Act:
 - 7.1 Section 42(2) and 42(2) of the FIC Act. Failure to develop, document maintain and implement a programme for anti-money laundering and counter-terrorist financing risk management and compliance (“RMCP”);
 - 7.2 Section 21(1) of the FIC Act. Failure to establish and verify the identity of clients in accordance with the RMCP; and
 - 7.3 Section 28A read with section 26A – 26C of the FIC Act.
8. The Appellant conceded that it contravened these sections 21(1), 42(1), 42(2) and 28(A) read with secs 26A – 26C of the FIC Act.

GROUND OF APPEAL

9. On 14 January 2023, the Appellant lodged an appeal against its penalty and the grounds of appeal may be summarised briefly as follows:-
 - 9.1 The Authority failed to appropriately consider and apply the factors as set out in section 45(C)(2) of the FIC Act as well as the mitigation facts advanced by the Appellant before imposing the financial penalty, which negates the need to impose any financial penalty in that:

9.1.1 The Appellant had taken remedial steps on its own accord in order to comply;

9.1.4 The Appellant's products are low risk from a money laundering and terror financing perspective; and

9.1.5 The Authority has not provided the Appellant with adequate reasons for imposing the administrative sanction save to state that non-compliance was serious.

10. With regard to the order sought by Appellant in terms of section 45D(7), the grounds of appeal do not specify the order sought, however, after initially contending that no financial penalty should have been imposed, its complaint advanced at the hearing of the appeal veered toward varying the quantum of the financial penalty imposed.

LEGAL FRAMEWORK:

Administrative Sanctions

11. Administrative sanctions are dealt with in section 45C of the FIC Act and accordingly, the Authority may impose an administrative sanction on any accountable institution when satisfied on available facts and information that the institution has failed to comply with a provision of the FIC Act or any order, determination or directive made in terms of the FIC Act (section 45C(1)).

12. When determining an appropriate administrative sanction, the Authority must consider the following factors (section 45C(2)):

“(a) The nature, duration, seriousness and extent of the relevant noncompliance;

(b) ...;

(c) any remedial steps taken by the institution or person to prevent a recurrence of the noncompliance;

(d) ...; and

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

13. The Authority may impose any one or more of the following administrative sanctions (sec 45C(3)):

“(a) A caution not to repeat the conduct which led to the noncompliance;

(b) A reprimand;

(c) a directive to take remedial action or to make specific arrangements;

(d) the restriction or suspension of certain specified business activities; or

(e) a financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.”

14. After considering any representations and the factors referred to in subsection (2), the Authority may impose an administrative sanction the Authority considers “appropriate” (sec 45C(6)).

THE TEST ON APPEAL

15. In essence this this appeal is about the quantum of the financial penalty imposed upon the Appellant. It is trite that the ordinary rule is that a higher body is not entitled to interfere with the exercise by a lower body of its discretion unless it: failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle.¹

ANALYSIS AND FINDINGS

Remedial Steps (Section 45C(2)(c):

16. Although the Appellant had taken remedial steps they only took place after the Authority's findings in December 2021 that the Appellant was in fact in contravention of the FIC Act and after the Appellants had four (4) years to become compliant with the sections contravened.
17. Despite taking remedial steps the Appellants were still found to non-compliant in certain respects. In the Notice of Intention to Sanction dated 24 June 2022, the Authority acknowledged that the remedial steps taken by the Appellant was the reasons why the Authority elected not to proceed to issue directives.

¹ *Sunward Motors (Pty) Ltd v The Financial Intelligence Centre*: Case No.A4/2021, High Court, Gauteng Division, Pretoria; *Group Six Trust t/a Audi Centre Mbombela and The Financial Intelligence Centre*, Case 12/3/1/5

Seriousness of the Appellant's contraventions: section 45C(2)(a):

18. At the hearing of the appeal the Appellant conceded that in terms of its licence conditions, it was also authorised to render intermediary services in respect of investments in collective investments schemes, which does not give credence to the Appellant's contention that the Appellant's products are low risk from a money laundering and terror financing perspective. Even if that were to be the case, section 42 of the FIC Act requires all accountable institutions to develop, document, maintain and implement a programme for anti-money laundering and the counter-terrorist financing risk management and compliance and a breach of section 42 of the FIC Act is not merely bureaucratic in nature and should be adhered to.
19. Section 42(2)(a) of the FIC Act states that a Risk Management and Compliance Programme ("RMCP") must enable an accountable institution to identify, assess, monitor, mitigate and manage the risks that the provision by the accountable institution of products or services may involve of facilitate money laundering activities or financing of terrorist and related activities.
20. Accordingly, the Authority is correct in its assertion that the obligations on the Appellant exist irrespective of the risk rating of its clients and/or products, and this risk rating is not considered as a relevant factor under section 45C(2) of the FIC Act.

Any other relevant factor: International Standards:

21. In terms of section 58(5)(c) of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”), the Authority must have regard to international regulatory and supervisory standards set by standard setting bodies in which it participates. In the context of contraventions of the FIC Act, these include the FATF Standards.
22. Accordingly, in terms of section 45C(2)(e) of the FIC Act, the Authority must consider any other relevant factor when considering an appropriate sanction and in this context such sanction must be effective, proportionate and dissuasive.
23. In the circumstances, we can find no grounds to interfere with the Authority’s decision to impose an appropriate sanction for the Appellant’s transgression of provisions of the FIC Act or the quantum of the financial penalty imposed.

ORDER:

- (a) The appeal is dismissed, and the decision of the Authority is confirmed.

Signed on behalf of the Appeal Board on 14 July 2023.



Adv M. Holland