IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Appeal Number: 12/3/1/5-BBISA/SARB (2)/23

In the matter between:

THE STATE BANK OF INDIA Appellant

and

THE PRUDENTIAL AUTHORITY Respondent

Appeal Panel: C Pretorius, Adv M Le Roux SC and Adv Ndumiso Nxumalo

For the appellant: Adv J P V McNally SC instructed by Webber Wentzel (Dawid de Villiers)

For the respondent: Adv M Majozi

Hearing: 10 April 2024

Contraventions of Fic Act – bank- findings- penalties

DECISION

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[1] The State Bank of India, the SBI, appeals the imposition of a financial penalty by the Prudential Authority, the South African Reserve Bank, firstly in terms of section 45C (3) (e) of the Financial Intelligence Centre Act 38 of 2001 ("the Act") and, secondly in terms of section 45C(1)(c) of the Act.

[2] The appeal is under section 45D of the Act.

CONDONATION

[3] The SBI requests condonation for the late filing of the appeal as the late filing of the appeal was not intentional nor tactical. It was due to certain circumstances that it could not lodge the appeal timeously.
The respondent did not oppose the application for condonation. The application for condonation is granted.

[4] The SBI is an accountable institution as it is an entity that carries on the business of a bank as defined in the Banks Act 94 of 1990. ("the Banks Act") and read with Schedule 1 of the Financial Intelligence Centre Act 38 of 2001.

[5] The Prudential Authority, PA, is a juristic person operating within the administration of the Reserve Bank (sec 32), and it is the responsible authority under the Banks Act in terms of Schedule 2 of the FIC Act.
It is, in terms of section 45 of the Act, responsible for supervising and enforcing compliance with the FIC Act by all accountable institutions regulated or supervised by it.

[6] It is the duty and responsibly of the SBI to fully comply with the provisions of the FIC Act and it is the responsibility of the PA to supervise and enforce compliance with the FIC Act.

[7] The appeal is on two bases, namely, that the PA erred in finding the

SBI non-compliant, and secondly, or in the alternative, that the PA did not take the remedial steps by the SBI into consideration when making certain findings and subsequently imposing certain sanctions. According to the SBI these findings and sanctions were irrational, unlawful and inappropriate.

[8] The SBI seeks to set aside the Final Findings and the subsequent administrative sanctions imposed. In the alternative the SBI seeks a reduction of the financial penalties imposed as part of the administrative sanction.

[9] The PA opposes the appeal as according to the PA the common cause facts are dispositive of the primary and alternative relief sought. The SBI has to prove that the PA erred in its findings and that the sanction is startingly inappropriate in the circumstances.

[10] Such an administrative sanction, imposed in terms of section 45C(3) of the Act, may only be rescinded or varied by this Tribunal if the Tribunal finds that the sanction is startlingly inappropriate, that is if the deviation as to what is objectively lawful, reasonable, or procedurally fair, is so severe that it elicits a sense of shock or disbelief.

[11] The onus thus rests on the SBI to prove that the imposed sanction is startingly inappropriate.

THE CONTEXT OF THE APPEAL

[12] The PA argues that the appeal must be considered against the

backdrop of South Africa's obligations to the Financial Action Task Force ("FATF"), which sets the Anti Money Laundering/Combatting Financing Terrorism ("AML/CFT") standards for countries.

[13] The grey-listing of South Africa took place on 24 February 2023 after an assessment in 2019 by a peer review process.
South Africa's evaluation was found to be poor, across all immediate outcomes assessed.

[14] One of the remedies emanating from the grey listing is for all supervisors, including the Centre, to ensure that they demonstrate that all AML and CTF supervisors apply and monitor implementation to follow up remedial action and to ensure that effective, proportionate and dissuasive sanctions are exacted.

[15] The PA and the country's responsiveness to combatting AML and CTF is considered in how it deals with compliance with the FIC Act.

[16] These obligations should not cause unjustified findings and administrative sanctions to be endorsed by this Tribunal. It is solely a factor to take into consideration when deciding whether an allegedly startingly inappropriate sanction has been levied by the PA.

BACKGROUND:

[17] The PA conducted the first inspection at the premises of the SBI from 4 September to 26 September 2014 in terms of section 45B of FICA. Thereafter the PA conducted a second inspection from 4 to 15 May 2020.

[18] The PA issued findings and a directive to the SBI recommending various remedial measures in terms of sections 43A(3)(c) and 43A(3)(d) of FICA.

[19] The PA required that the SBI provide the PA with quarterly updates of the remedial steps taken. These updates were provided by SBI between November 2020 and March 2022.

[20] On 26 July 2022 the PA notified the SBI that it intended to impose administrative sanctions on the SBI in terms of section 45C of the Act.

THE 2020 FINDINGS

[21] The findings that attracted sanctions were in relation to the SBI's contravention of sections of the FIC Act and its ancillary Regulations in relation to –

[21.1] the Risk Management and Companies Program (RMCP);

[21.2] the Customer due Diligence-(CDD) and Enhanced Due Diligence (EDD);

[21.3] the Cash Transaction Reports – (CTR) and

[21.4] governance – Anti Money Laundering/ Combatting Finance Terrorism (AML/CTF).

RMCP

[22] The PA found that there was non-compliance related to fundamental compliance obligations and demonstrated a weak compliance culture and internal controls that detrimentally affected the soundness of the

SBI's compliance regime thereby not complying with the provisions of section 42(1) and 42(2) of the Act read with GN7 of 2017.
This finding was similar to which the PA found in 2014 when the SBI was found to be non-compliant and not implementing the obligations as set out in section 42 of the Act.
GN 7 was issued after the 2014 inspection and before the 2020 inspection. It provides guidance to accountable institutions on various FICA obligations, including the development and implementation of a RMCP in accordance with section 42. The PA found that SBI failed to develop a comprehensive RMCP.

[23] The SBI disputes the findings of the PA, where the PA found that no rationale was provided on different risk rating scores allocated to the different risk factors and that the SBI had not given evidence of the rationale behind risk mitigation decisions, the controls thereof and the data analytics to accompany any decision taken.

[24] Furthermore, the SBI's risk assessment did not evidence risk factors related to fraud, FICA compliance, corruption, in country specific risk factors, international risk factors and best standards and institution specific factors such as business lines and how these factors are interrelated.

[25] Although the SBI submitted that, according to the SBI, the remedial actions by the SBI in respect of these findings were satisfactory and sufficient to address the purported non-compliance and deficiencies identified by the PA, the SBI argues that these findings should not have been made.

[26] The submissions by the SBI are that the SBI had taken remedial steps, after the finding of non-compliance, thereby admitting that there had in fact been non-compliance.

[27] The argument raised by the SBI is that the SBI adequately remedied the deficiencies identified by the PA in respect of documenting its governance structures.

[28] The SBI admits that the deficiencies identified by the PA in its findings relating to suspicious and unusual transactions. The PA found that SBI had ineffective monitoring rules in the form of its AMLOCK transaction monitoring system as SBI could not evidence that the rules were able to allow for peer profiling and could not differentiate between various products and types of transactions in its monitoring.

[29] Furthermore, SBI's system rule thresholds applied to many transactions in a day and the account turnover breaching threshold limit was excessive and ineffective. SBI could not evidence that it had effectively or adequately implemented the transaction monitoring system.

[30] Further non-compliance was that certain transaction monitoring system alerts were closed after 15 business days and SBI could not provide alert data for transaction monitoring alerts generated between 1 January 2016 to 26 February 2020, a period of more than four (4) years.

[31] SBI's suspicious and unusual transaction alerts from 1 January 2016 until 29 February 2020 were closed without adequate reasons for not

reporting to the FIC within the prescribed period of no longer than 15 days.

[32] These must be regarded as serious instances of non-compliance and cannot be overlooked as submitted by SBI merely because SBI had remedied these instances of non-compliance.

[33] Section 29 of FICA places an obligation on persons carrying on a business or manages a business or who is employed by a business to report suspicious transactions when such persons know or ought to have known or suspect that such a transaction has happened.

[34] The PA in the Final Findings, when dealing with compliance with Directive 5 sets out:

> *"According to paragraph 3.1.10 and 3.1.17..... reporters must ensure that the detection methodology and effectiveness of automated transaction monitoring system (ATMS) are validated and tested to ensure that the system is detecting potentially suspicious and unusual transactions or series of transactions, resulting in the generation of high-quality alerts, and is being effectively utilised by the reporter.*
>
> *Reporters must ensure that the detection methodology, including algorithms, scenarios, threshold settings or rules used by the ATMS are sufficient to address the associated money laundering and terrorist financing risks applicable to the reporter."*

[35] SBI's counsel argued that a restrictive interpretation of Directive 5 and section 29 of FICA should be applied. If such an approach is taken, then, according to the SBI, the SBI did comply with section 29 of FICA and/or

Directive 5.

[36] Once more SBI relies on the fact that they have adequately remedied any deficiencies and should therefore not be sanctioned.

THE CDD and EDD

[37] The PA found that there was non-compliance with CDD and EDD requirements in terms of section 21 to 21H of FICA.

[38] The PA found that 31% of customer relationships reviewed were non-compliant with section 21 of FICA and SBI's own RMCP requirements. Seven customer relationships reviewed were found to be non-compliant with section 21 of FICA and SBI's RMCP requirements.

[39] These findings are not disputed by SBI, but the SBI submits that the findings should have been removed as they had been remedied. These findings were repeat findings as the same findings had been found in 2014.

[40] The measures taken to remedy these findings were during the period November 2020 until 2 December 2022. These remedial measures would obviously not have taken place had the PA not conducted the inspection in May 2020.

CTR REPORTING

[41] The PA found that the SBI had failed to submit CTR's timeously and furthermore, had failed to report CTR's which had to be reported. These

findings were in relation to sections 28 and 42 of the FIC Act and Regulation 22(b), 22(c) and 24(4) of the Regulations. It revealed weakness in SBI's management systems and internal controls which lead to the loss of timely intelligence being passed to law enforcement agencies for investigation. The SBI did take steps to remedy deficiencies identified by the PA, but this was a repeat offence from 2014.

GOVERNANCE OF AML/CFT

[42] The PA found that SBI had failed to comply with the provisions of sections 42A (2), 42A (3) and 42(1) of FICA read with Guidance Note 7.

[43] The PA found that SBI had failed to perform adequate oversight relating to the CTR's and suspicious and unusual transaction reporting.

[44] In particular SBI had failed to conduct EDD measures in accordance with section 42(2)(m) which provides:

> *"42 (2) A Risk Management and Compliance Programme must...*
> *(m) provide for the manner in which and the processes by which enhanced due diligence is conducted for higher-risk business relationships and when simplified customer due diligence might be permitted in the institution."*

[45] The finding was that the SBI had failed to conduct EDD measures in accordance with the above section in the case of the High Commissioner/ Consulate Head along with his immediate family that were rated as high risk and considered politically exposed persons as indicated in the AML risk-rating contained in CDD relationships.

[46] Once again the SBI relies on the fact that it had taken adequate remedial action in respect of CTR's and STR's. Furthermore, SBI relied on the remedial action taken in respect of EDD.

[47] It was submitted by SBI that these were minor cases of non-compliance in respect of suspicious transaction reports as well as the scale of deficiencies related to CTR submissions. SBI submits that the deficiencies relating to EDD requirements were minor as it only related to one client.
Directive 5/2019 must be interpreted regarding the ordinary grammatical meaning. There is no doubt, uncertainty, or ambiguity and therefor the argument that it should be restrictively interpreted is not applicable.

[48] It must be mentioned that this one client was not an ordinary client, but the High Commissioner and his family. The argument that the deficiencies had been remedied and therefore should not attract any sanction cannot, in these circumstances, be entertained.

SANCTIONS

[49] Section 45C(2) provides that a supervisory body must consider:

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

(b) whether the institution or person has previously failed to comply with any law;

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

(d)...; and

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

[50] In terms of section 45C (6) the PA may impose an administrative sanction, after considering any representations and the factors mentioned in section 45C (2), which the PA considers appropriate in the circumstances.

[51] It is trite that the Tribunal*" 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."* Fedgroup Life Limited v Prudential Authority appeal number 12/3/1/5-FGLL/SARB (4/21)(para 22).

[52] SBI submitted various quarterly reports after the inspection from November 2020 until March 2022 and in not one of these reports did the SBI contest the findings of the PA, nor did it reserve its right in relation to any of the findings made by the PA.
It did not submit that the findings by the PA were irrational or unlawful.
It was argued by SBI, in all instances of non-compliance which had been remedied there should be no sanction. This is not a correct proposition as the fact of remediation can only be a mitigating fact in these circumstances.

[53] If the test as set out in *Democratic Alliance v President of the Republic of South Africa 2013(1) SA248 (CC)* is applied this Appeal Board finds that there is a rational objective between the material that was available to the PA and the conclusion the PA drew at the end of the inspection.

[54] SBI was given notice, by the PA, on 26 July 2022 of its intention to impose sanctions in relation to all four of the above sections:

[54.1] The intended sanction in respect of RMCP, section 42(1), 42(2), and 42(2A) of FICA read with FIC Guidance Note 7, was R4 million, of which R1 million was to be suspended for 36 months.

[54.2] The intended sanction in respect of CDD, in terms of section 45 (C)(3)(e) of the FIC Act, non-compliance with section 21 to 21H in respect of CDD, was R5 million of which an amount R2,5 million was to be suspended for 36 months.

[54.3] The intended sanction for governance of AML and CFT compliance, in terms of section 45(C)(3)(e) of the FIC Act, was R1,250 million.

[54.4] The total intended sanctions were R 10 million of which an amount of R3.5 million was suspended for 36 months on certain conditions.

[55] On 4 October 2022 SBI submitted representations, detailing the remedial changes it had taken and made. SBI requested the PA to take into consideration the

significant expenses that SBI had incurred to remedy and improve its systems and processes; the participation of professional firms to improve compliance with its obligations; senior management of SBI being totally committed to ensure compliance with its obligations by SBI; the very small operations conducted by SBI in South Africa and SBI's head office being committed to facilitate the South African branch to improve compliance with its obligations.

[56] SBI submitted that the intended imposition of the financial penalties

were unduly harsh and requested the PA to consider the remedial steps it had taken.

[57] The PA considered the fact that the finding in relation to RMCP was a repeat offence. It took note that the SBI had made a net profit of R41 million.

[58] It was submitted on behalf of SBI that the panel must have regard to the decision of *Fedgroup Life Limited v Prudential Authority appeal number 12/3/1/5-FGLL/SARB (4/21)* where it was found in para(38) that "... *the PA had failed to consider the prime statutory factors of nature, duration, seriousness, and extent of the relevant non-compliance. Paying lip service by reciting the Act is insufficient. The decision must reflect how the factors were taken into account.*"

[59] The present matter is distinguishable from the Fedgroup case. In the Fedgroup case the PA had prescribed the directive steps and provided a time-line for completion but imposed the penalty while the appellant was complying and before the time had expired.

[60] In *Trenditrade 23(Pty)Ltd t/a Landrover Sandton v FIC*, case no 12/3/1/15-LRS-FIC (2)/19 (24 February 2020) at para 17 the Tribunal confirmed that the exercise of a supervising body exercising its discretion can be overruled because a sanction is excessive or startingly inappropriate.

[61] The PA had taken the representations of SBI into consideration and as a result had mitigated the penalties by reducing the amounts that had

been imposed.

[62] The PA had found that the non-compliance in relation to the RMCP was a repeat offence, as the same findings had been made in 2014 when no financial penalties were imposed.

[63] A further fact that was considered by the PA was that SBI had made a profit of R 41 million.

[64] The PA benchmarked the sanction against previous sanctions which were issued to Investec in the amount of R 20 million together with a directive. HSBC was sanctioned in the amount of R25 million together with a directive, ABSA was sanctioned in an amount of R 10 million together with a directive and China Construction Bank was sanctioned in an amount of R5 million.

[64] The representations by the SBI were considered in respect of the RMCP, as the initial administrative sanction that was proposed by the PA was an amount of R 4 million of which R1million was suspended for 36 months. The reason, according to the PA, was that the non-compliance was serious and extensive.

[65] The penalty imposed was mitigated due to the SBI's representations, as well as taking into consideration the provisions of section 45 C (2) of FICA.

[66] A financial penalty of R 4 million with R1.5 million suspended was ultimately issued as the sanction. A reduction of R 500 000.00 in the

amount that had to be paid.

[67] The PA considered the non-compliance in relation to the CDD and found that the non-compliance was related to fundamental compliance obligations and extended over a prolonged period. According to the PA this demonstrated a weak compliance culture and revealed systemic weakness in the SBI's management systems and internal structures.

[68] Furthermore, this was a repeat offence. The PA initially proposed a penalty of R5 million with R2,5 million suspended for 36 months.

[69] Once more the mitigating facts and representations were considered and the PA decided to impose a financial penalty of R 5 million and increased the suspended portion to R3 million, a reduction of R500 000.00

[70] The PA found in relation to CTR that non-compliance related to a fundamental non-compliance obligation of 2.44% over a period.
Once more it demonstrated weakness in the SBI's management system and internal controls. It also caused a loss of timely intelligence.
This was a repeat finding as the same finding was made in 2014. It was subsequently remedied.

[71] In the circumstance the PA considered a caution to be the proper sanction.

[72] The PA found on governance that there was non-compliance related to fundamental compliance obligations which involved multiple non-compliance areas for an extensive period. It was found that there were

serious and systematic weaknesses in SBI's management systems and internal control.
This caused to the loss of timely intelligence.

[73] Due to the fact that this was not a repeat non-compliance from the previous inspection, having regard to the representations by the SBI, the remedies by the SBI and comparing the proposed penalty to those sanctions of other banks, the proposed penalty was reduced from R1 250 000 to R 1 million.

[74] The overall result of the representations, the remedial actions taken by SBI, the factors listed in section 45C (2) and a comparison with sanctions imposed on other banks, is that the PA reduced the financial penalty from R10.5 million to R10 million.
The suspended portion of the fines were increased from R3.5 million to R4.5 million.

[75] The SBI had to pay R 6.75 million as per the proposal by the PA.
Due to the mitigating facts set out above it was reduced to R 5.5 million – a reduction of R1.25 million.

[76] The Appeal Board has taken all the facts into consideration, that is the 2014 report, the 2020 inspection report, SBI's quarterly reports regarding remediation and SBI's representations.
The Appeal Board has listened to arguments from both parties and perused the extensive heads of argument by both parties.

[77] The main attack by SBI on the 2020 inspection is that as all the non-

compliance issues had been resolved by remediation there should not be any findings against SBI and subsequently no penalties should have been issued.

[78] If there had been compliance from the outset it would not have been necessary to remediate and to supply quarterly reports of the relevant remedies.

[79] The Appeal Board finds on a balance of probabilities, that SBI was non-compliant in all instances as found by the PA and that there is no reason to interfere with any of the findings. These findings of non-compliance are hereby confirmed.

[80] The Appeal Board has considered all the facts, the remedies by the SBI and all mitigating facts as set forth in the representation by the SBI, as well as the fact that the PA reduced the proposed penalties after receiving the representation by SBI.

[81] The Appeal Board cannot find that the penalties imposed by the PA is startingly inappropriate.

ORDER

1. The appeal is dismissed.

Signed on behalf of the Tribunal on 25 April 2024.

C Pretorius

(Member)