IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

APPEAL NO: 12/3/1/5-CPP/FIC(2/24)

In the matter between:

CAPITAL POINT PROPERTIES (PTY) LTD **APPELLANT**

and

FINANCIAL INTELLIGENCE CENTRE **RESPONDENT**

Appeal board: LTC Harms (chairperson), S Mahabeer SC and M Holland

For the appellant: R Watson

For the respondent: M Sibanda

Hearing (virtual): 7 August 2024

JUDGMENT

1. The appellant, Capital Point Properties (Pty) Ltd, is a property practitioner (estate agent) and its sole shareholder and director is Mr J Kleu. The appellant is an accountable institution and Mr Kleu its compliance officer in terms of the Financial Intelligence Centre Act 38 0f 2001 ('the Act').

2. This is an appeal against administrative sanctions imposed on the appellant under sec 45C(3)(c) of the Act by the respondent, the Financial Intelligence Centre.

3. In terms of sec 45C(1)(a), the Centre may impose an administrative sanction on an accountable institution to whom the Act applies when satisfied on available facts and information that the institution—has failed to comply with a provision of the Act or any order, determination or directive made in terms of the Act.

4. An appeal is decided on the written evidence, factual information and documentation submitted to the Centre before the decision which is subject to the appeal was taken unless permission was sought and granted to submit further evidence (sec 45D(1) to (3A)).

5. An application by the appellant for the submission of further evidence was withdrawn prior to the hearing of the appeal.

6. It needs to be noted that that the decision of the Centre had to be based on "available facts and information". The founding affidavit of 74 pages in support of the appeal, insofar as it was not argumentative and presented Mr Kleu's alleged interpretation of the Act (both irrelevant and inadmissible), dealt with facts that were not before the Centre and therefore inadmissible for purposes of the appeal.

7. In addition, the appellant chose not to file a replying affidavit to the Centre's answering affidavit and did not deal with the documents attached thereto. Those facts are, accordingly, undisputed.

8. Now for the main point: the Centre did not, as required by Rule 11, file a certified record simultaneously. It did so later. This excited the appellant and his attorney and led to an application or request that the answering affidavit should be considered as *pro non scripto* to teach the Centre a lesson that it, too, should respect the rules of the Board and comply with its duties towards the public. (The irony is that the appeal was lodged out of time and that what is sauce for the goose is usually sauce for the gander.) Unsurprisingly, no authority for this submission was presented and we do not believe that a similar argument has ever before been made – forget upheld – in any court.

9. While alleging prejudice, Mr Watson could not point to any document in the certified record that was not already attached to the sworn papers before the Board or in the possession of the appellant. Under sec 45D(5), the chairperson of the appeal board determines the rules of the appeal and *any other procedural matters relating to an appeal*. As chairperson and author of this judgment I decided that because the Board does not play procedural games and that since the Act requires that the appeal must be decided on the written evidence, factual information and documentation

submitted to the Centre before the decision which is subject to the appeal was taken, the late filing of the record could not be fatal, especially since all the documents had already been identified under oath and that the certified record added nothing new. The certified record is also not "further documentation" which requires a remittal of the matter to the Centre. To the extent that condonation is required, it is granted.

10. The nature of an appeal in respect of fact was set out in *Rex v Dhlumayo* 1948 (2) SA 677) (AD) and the *imposition* of an administrative sanction is an appeal against the exercise of a discretion and absent a finding that the Centre exercised its mind capriciously, upon a wrong principle or that it failed to bring an unbiased judgment to bear on the question of an appropriate penalty the test is whether the sanction was excessive or startlingly inappropriate.

11. The Centre determined that the appellant contravened the following provisions:

    a) Directive 1 of 2013 of the Centre;

    b) sec 43B read with Regulation 27A(3);

    c) sec 42(1) and 42(2) of the Act; and

    d) sec 28A(3) of the Act.

12. The appellant did not, during the proceedings before the Centre, dispute these factual allegations. During the appeal, Mr Watson conceded that the appellant had committed the contraventions (a), (b) and (c) listed. He, however, strenuously argued that the appellant had not contravened sec 28A(3). He relied in this regard on the affidavit of Mr Kleu. We shall deal with the legal contention. The argument included a submission that the Centre's interpretation is overbroad.

13. The provision is in simple language and the rule that penal provisions should be restrictively interpreted adds nothing to the clear language:

> An accountable institution must upon—(b) notice being given by the Director under section 26A (3), scrutinise its information concerning clients with whom the accountable institution has business relationships in order to determine whether any such client is a person or entity mentioned in the proclamation by the President or the notice by the Director.

14. The appellant's version is that Mr Kleu believed that because he did not deal with client funds and that because the conveyancers and others had to perform a scrutiny duty it was unnecessary for him to do so (A40 to 42). In short, he did not scrutinise the available list to determine whether clients were listed. The defence is thus not one of compliance, it is more in the nature of a lack of *mens rea*, which may affect the administrative penalty but does not present an excuse for non-compliance.

15. As to lack of *mens rea*, the Centre had informed the appellant in its final inspection report of 17 July 2023 (A267 to 293) what had to be done to comply with the provision. It indicated in clear terms that the appellant had not complied with the provision and it instructed the appellant to implement remedial actions including to "scrutinise its clients against the TFS list in terms of section 28A(3) of the FIC Act and keep record thereof'" and it had to report within 30 days on its implementation – which he did not do.

ADMINISTRATIVE SANCTIONS

16. The Centre may impose the following administrative sanctions:

    a) a caution not to repeat the conduct ;

    b) a reprimand;

    c) a directive to take remedial action or to make specific arrangements, and

    d) financial penalty not exceeding R 50 million in respect of any legal person.

17. Before imposing an administrative sanction, the Centre must give the institution reasonable notice in writing (sec 45C(5))

    a) of the nature of the alleged noncompliance;

    b) of the intention to impose an administrative sanction, and

    c) of the amount or particulars of the intended administrative sanction.

18. The Centre, pursuant to an inspection by another regulatory body during February 2022, conducted its first inspection of the appellant's business on 22 May 2023. The appellant was issued with a draft report on 21 June, indicating the preliminary findings and it was given the opportunity to comment. No comments or response were received.

19. Thereafter, on17 July 2023, the Centre issued its final inspection report. Once again, the appellant did not respond.

20. On 8 December 2023, the Centre issued the appellant with a Notice of Intention to Sanction. The appellant was requested to submit representations and its annual financial statements before 15 January 2024. The appellant failed to respond and after further notification the appellant responded on 3 February 2024.

21. The Notice of Sanction which imposed administrative sanctions is dated 4 March 2024. The sanctions were a caution, reprimand and directive, and administrative financial penalties.

22. The Notice of Appeal attacks the Notice of Intention many times on essentially two grounds which we now discuss.

THE INTENTION

23. The first attack on the Notice is that it fairly interpreted does not evince an intention to impose any administrative sanction if the appellant were to remediate the shortcomings. This, it is said, is how the appellant interpreted the notice. To quote the heads of argument:

> All of the sanctions were, in the different senses and different degrees set out above, imposed in violation of the Respondent's obligations under s45C(5), which failures were material in that they both misled the Appellant as to the need to make submissions and in any event denied the Appellant the right to make effective submissions thereupon.

24. The document must be read as a whole. It bears the title "Notice of Intention to Impose n Administrative Sanction". It quotes sec 45C(5) and then states that the Notice is submitted in compliance thereof. After setting out the statutory contraventions and the fact that the appellant had contravened them, there followed a heading "Intended Administrative Sanction" followed by a statement that the Centre "intends to impose an administrative sanction on the appellant." It lists the possible sanctions that it may impose and lists the factors, to the extent applicable, that it had to consider in terms of ss (2). It proceeded to state that it "intends" to impose the relevant sanctions and explains that the contraventions "may" lead to the permitted sanctions.

25. The use of "may" means in context that unless otherwise convinced that is what may follow. This is expressed in a subsequent section:

> In terms of section 45C(5)(d) of the FIC Act, Capital Point is hereby afforded the opportunity to submit written representations as to why the intended administrative sanction should not be imposed. The institution, may consider addressing the factors as listed section 45C(2) of the FIC Act (attach hereto as Annexure A), to the extent that they apply. The institution is further invited to address whether exceptional circumstances exist as to why the sanction should not be made public in terms of section 45C(11) of the FIC Act. . . . The

> representations must be submitted . . . on or before 15 January 2024. If no representations have been received by the above-mentioned due date, it will be accepted that Capital Point has elected not to submit any representations.

26. The document proceeded with a section that dealt with the final administrative process:

> It is pointed out that the above intended administrative sanction is based upon a preliminary assessment of the matter. After the due date for the submissions of any representations, the Centre will reconsider the matter in light of any representations received and the factors listed in section 45C(2) of the FIC Act and make a final decision on the imposition of an appropriate administrative sanction.

27. The document is capable of one meaning only. If Mr Kleu at the time interpreted the document differently, he was not merely mistaken but closed his eyes to the glaringly obvious and was reckless.

THE AMOUNT

28. The second attack on the notice relates the requirement that it had to state "*the amount* or particulars of the intended administrative sanction".

29. The notice, in two instances, stated that the Center intended to impose "a financial penalty in terms of section 45C(3)(e) that may not exceed . . . R50 million". The submission was that since the actual "amount" of the intended sanction was not stated but only the permitted maximum, this statutory jurisdictional fact for the imposition had not been complied with and that, therefore, the appeal should be upheld and the imposition of the financial penalties set aside.

30. This Appeal Board dealt with the issue before and said that the Act is unambiguous by requiring a statement of the intended amount (despite Mr Sibanda's argument) and if an amount was not stated the question is whether the failure to comply with the provision had any effect on the appellant's representations, and if not, non-compliance is not material and should be ignored.

31. Mr Watson accepted this statement as correct but submitted that non-compliance was in this instance material. The problem is that the appellant chose not to make any submissions about anything, including quantum, even though the maximum amount permissible was mentioned. If he did not think it necessary to make submissions about R50 million, why would he do so if the intention to impose R108 000.00 (twice) had been stated? He also made no representations about the R10 000.00 that had been stated. Although the appellant was expressly requested to deal with extenuating circumstances and a copy of the section was provided, he simply did nothing in response – in line with his cold-shouldering of prior notices from the Centre.

32. His general (late) representation is quoted in the decision letter, and it was limited to the size of the appellant's business and that fact that it had remediated two ((a) and (c) mentioned) of the four contraventions. No reference was made to the other two contraventions, namely (b) and (d).

33. There was also no denial of the allegations in the Notice of Intention that Mr Kleu knew of the obligations and that the appellant had failed to comply with them and there was no indication of the improbable hermeneutical deconstruction of sec 28A which appears in his affidavit.

34. We consequently conclude that the failure to state an amount in the intention notice was not material and therefore not fatal to the subsequent proceedings.[1]

THE NON-FINANCIAL SANCTIONS

35. The appellant's lengthy argument in the heads and in the affidavit on the caution, reprimand and directive appears to boil down to this: the uncertainty as to the conduct these sanctions were directed; how they can be imposed for failure to do something which has actually been done unless under a mistake of fact, and that they are vague and pointless and serve no practical purpose because the appellant had remedied its transgressions.

36. These objections are without any merit. The Act prescribes them, and the sanctions imposed used the wording of the Act with reference to each of the contraventions listed earlier. We fail for instance to understand a submission that a caution not to repeat the conduct that led to the non-compliance would be vague or of no practical effect. The purpose of these sanctions is obvious: they make it rather difficult for the appellant to rely in future on lack of *mens rea* or extenuating circumstances; and they ensure that the appellant remains aware of its statutory duties.

37. The fact that a transgression has been rectified does not mean that it was not a transgression and cannot or should not be subject to a sanction.

[1] Cf *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre and Another* (A267/2020) [2021] ZAGPPHC 618 (20 September 2021)

THE FINANCIAL SANCTIONS

38. The attack on the financial penalties were the usual and have been disposed of by the Full Bench and Full Court of the High Court in *Harlyn*[2] and *Volvo*.[3] We do not consider it necessary to repeat what the Courts have said and deal only with two broad aspects that may be considered relevant to the facts of this case.

39. The first is that in applying its guidelines, the Centre based the amounts on the finding that the appellant had been grossly reckless in contravening the mentioned provisions. The ultimate finding was based on the allegation in the Notice of Intent that the appellant knew of its statutory obligations and nevertheless proceeded with non-compliance. That was not disputed before the penalty was imposed. The Centre dealt with the finding in detail in the answering affidavit, and that Mr Kleu chose not to deal with those facts in a replying affidavit.

40. The second is that the Centre did not consider the extenuating circumstances as required by the Act. The problem with this broad submission made in different terms is, as mentioned, that the appellant was expressly invited to make submissions and all that Mr Kleu said, belatedly, was that the appellant was a small enterprise that generates just over R2million p.a., that two matters have been rectified, and that it is happy to work with the Centre to improve compliance. These submissions were fully noted in the Sanction Notice. Then, the appellant had filed an application for the submission of further evidence in which it, inter alia, sought to introduce facts relating to extenuation – but it withdrew that application. However, in the founding

[2] Supra.
[3] *Volvo Group Southern Africa (Pty) Ltd v Financial Intelligence Centre* (A277/2021) [2023] ZAGPPHC 219.

affidavit, there are sections dealing with the subject (especially par 31.4 with about 12 sub-paragraphs) without stating much more. There is, accordingly, no merit in the submission.

CONCLUSION

41. The appellant raised many issues mostly on the assumption that form trumps substance, and that repetition strengthens an argument. We have sought to identify the essence of the appeal in this judgment after considering the record (and, for future reference, there is nothing in Part B which adds anything), the heads of argument and the oral argument. We did not deal with matters such as costs or the decision to publish the sanction because they have been decided before and repetition is not required.

ORDER: The appeal is dismissed.

Signed on behalf on the Appeal Board panel on 13 August 2024.

LTC Harms