IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED: NO

DATE	SIGNATURE
19 May 2022	Jehapi

CASE NUMBER: A4/2021

FIC Appeal Board Case No: 12/3/1/5/SM/FIC/3/20

In the matter between:

SUNWARD MOTORS (PTY) LTD — APPELLANT

and

THE FINANCIAL INTELLIGENCE CENTRE — FIRST RESPONDENT

THE DIRECTOR: ADV.XOLISILE KHANYILE — SECOND RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal against the whole of the administrative sanction imposed on 26 March 2020 by the first respondent, the Financial Intelligence Centre ("the FIC") and the second respondent in terms of section 45C(2) of the Financial Intelligence Centre Act 38 of 2001 ("the FICA"). The decision of the FIC came before its Appeal Board and this appeal is in terms of Rule 50 of the Uniform Rules of Court against the decision of the FIC Appeal Board dated 30 November 2020.

[2] According to the first respondent the appellant's non-compliance was grossly negligent and, the penalty was reasonable and proportional to the misconduct committed. The revised penalty of 28 July 2020 which was challenged and amounting to R2 029 220.00 related to failure in terms of section 28 of the FICA to report 99 CTR's covering a period of several years, cash threshold transactions and, 'the penalty was 20% of the value of unreported cash transactions. The FIC suspended 75% of the penalty for three years on condition that Sunward does not repeat its misconduct. The remaining 25% (R507 000.00) was payable by 1 December 2020.'

BACKGROUND

[3] The preamble to the FICA states that it was promulgated to establish the Financial Intelligence Centre ("the FIC") to combat 'money laundering activities and the financing of terrorist and related activities. The FICA imposes certain duties and obligations on certain institutions or persons it has identified, which or who are or might be at risk of being used for such prohibited activities. Reliance is based on information (intelligence) 'gathered through mandatory due diligence, and reporting obligations and record keeping. The FICA provides

for the issuance of directives by the FIC and its supervisory bodies to conduct inspections, where applicable, to provide for the imposition of administrative sanctions.

[4] The FICA has classified motor dealerships as reporting institutions as listed in Item 1 of Schedule 3 thereof. The appellant conducts business in the sale of 'pre-loved' and pre-owned motor vehicles, which business is a reporting institution in terms of the FICA. The appellant is also a family business which is managed by a couple, Mr and Mrs Potgieter, the former being deponent to the founding affidavit. The appellant was prior to the first inspection registered as Pradz Trading CC for approximately 10 years before converting to its present name in 2012. The dealership has been in operation since 2006.

[5] Two inspections in terms of section 45B of the FICA relating to the CTR's were conducted by the FIC on the appellant on 18 July 2016 and 23 August 2018. The final reports on the two inspections came out on 11 August 2016 and 3 January 2019 respectively. The purpose of the inspections was to assess 'compliance or non-compliance with the FICA. As at the first inspection in 2016 the appellant had 15 employees and its annual turnover for the financial year ending 2016 was approximately R108 million and, for the year ending 2018 was approximately R185 million and it had 20 employees.

[6] In the first report of 11 August 2016, it was found that the appellant had registered with the FICA and was therefore complaint, however, the appellant was found not to have been compliant with section 28 of the FICA (duty to file CTR's) and had not filed any suspicious and unusual transactions as provided in section 29 of the FICA. No penalty was imposed at this stage and the appellant was given a list identifying its contraventions. Directives and recommendations were given of what needed to be implemented to be compliant with the FICA.

[7] In the second report of 3 January 2019 if was found that the appellant had not complied with section 43B of the FICA in that it had registered late and, that it had not complied with login credentials as informed by directive 3. Furthermore, the appellant had not fully complied with section 28 of the FICA which provided for the duty to file CTR reports, in that transactions identified in the previous report were still not reported and, there were new CTR's identified in bank statements, receipt books which were not reported to the FIC and in some reporting was done out of time. The report mentioned lack of training of staff, and failure observe processes and procedures to file suspicious transactions.

[8] After considering the findings in the two final reports, the FIC gave notice to appellant that it intended to impose Administrative Sanction in terms of section 45C(5) of the FICA, which notice afforded the appellant opportunity to make representations before the sanction was imposed. The appellant was informed of the maximum penalty that may be imposed of not more than R10 602 400.00, which was equal to the total value of the unreported transactions, 20% of such financial penalty amounted to R2 120 480.00 of which 25% amounting to R530 000.00 was payable immediately and, the balance of 75% was suspended. The penalty initially imposed was revised by the FIC, taking into account the appellant's inability to report on nine CTR's in the amount of R456 300.00 being transactions while it operated under Pradz Trading CC. The FIC reduced the amount immediately payable to R507 000.00.

[9] The finding of gross negligence was based on considerations after the second and third assessments and after the FIC took into account representations by the appellant. It was found that the appellant had prior knowledge of its reporting obligations and that it had failed to comply despite a directive after the first inspection to remedy its transgressions.

ISSUES ON APPEAL AND RELIEF SOUGHT

[10] Firstly, the appellant is challenging the computation of the penalty imposed in respect of Cash Transactions ("CTR's"), i.e. the endorsement of the mathematical tool in the decision of the Appeal Board. Secondly, the appellant challenges the failure by the Appeal Board to have regard to the correct considerations rendering the penalty imposed on the applicant 'shockingly inappropriate and incorrect.' Thirdly, the appellant challenges the decision that the conduct of the appellant was grossly negligent. The relief sought on appeal is for a variation of the decision of the Appeal Board to reflect its decisions which found that the mathematical tool adopted by the FIC was incorrect and, to give considerations to the provisions of section 45C (2) of the FICA. Furthermore, that the financial penalty be varied to a financial penalty of "R200 000.00 whereof R100 000 is payable, the remainder suspended for a period of 3 years on condition that the appellant remain fully compliant with their FIC obligations".

THE LAW

[11] Section 45D of the FICA provides for the appeal procedure and establishment of an Appeal Board under 45E. The powers of the Appeal board are limited to those set out in section 45D (7) which provides that the Appeal Board may:

(a) Confirm, set aside or vary the relevant decision of the FIC or the supervisory body; or

(b) Refer a matter back for consideration or reconsideration by the FIC or supervisory body concerned in accordance with the directions of the appeal board.

[12] Section 45C of the FICA provides for factors and procedures to be considered when the FIC intends imposing administrative sanctions which includes the discretion to impose a financial penalty (section 45C (1)(a); factors to be considered when imposing a sanction (section 45C (2); allowing the FIC power to impose a variety of options when considering administrative sanctions; and

stipulates the amount of the penalty which may not be exceeded (45C(3) and subsection (e)). Reasonable notice should be given, describing the nature of the alleged non-compliance and calling for representations to be made as to why the sanctions should not be imposed.

[13] It is trite that on appeal a court does not have "unfettered discretion" to interfere with the findings of a tribunal, unless the court finds grounds which render the sanction imposed startingly inappropriate. The Appeal Board commenced its assessment of the appellants appeal on principles outlined in *Federal Mogul Aftermarkets SA (Pty) Ltd v Competition Commission and Another* (2005) 56 BCLR 613 (Competition Appeal Court) where the following was stated at 636 D-E:

"The court does not enjoy an unfettered discretion to interfere with a Tribunal's assessment and imposition of an administrative penalty. Even if we decided that a different penalty was appropriate we are not merely at large to substitute our finding for that of a Tribunal. This approach is consistent with the general principle that in an appeal against the exercise of its discretion by a court or a statutory body, the court on appeal has limited powers to interfere. It can only do so in certain well recognized grounds namely where a court *a quo* exercises its discretion capriciously, upon a wrong principle or where it has not brought its unbiased judgement to bear on the question or where it has not acted for substantial reasons."

[14] In *Harlyn Trading International (Pty) Ltd v The FIC and Another* (A267/2020 [2021] ZAGPPHC 618 (20 September 2021) Basson J reaffirmed the position at law in *Florence v Government of the Republic of South Africa* 2014 (6)456 (CC) when she stated:

"[31] The discretion accorded to the FIC and by extension the Appeal Board, is thus a discretion in the true sense and is so because there are a wide range of equally permissible options available to the FIC and anyone or a combination

of these options would be within the FIC's powers. Given the discretionary nature of this power, a court is not at liberty to interfere at will. Put differently, a court can neither (i) impose its opinion as to what is appropriate, nor (ii) interfere with the sanction simply because it may have imposed a different sanction.

[32] The court therefore does not have the power to substituted its value judgment for the FIC's or the Appeal Board's in the absence of (i) a mistake of law, or(ii) evidence that the discretion was not exercised judiciously" (*Trencon Constructions (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 CC at [82]–[87]

[33] The court in *Trencon* also recognized that substitution of an administrative decision will only be made in exceptional circumstances in light of the fact that the administrator is best equipped by virtue of its composition, expertise, experience and access to sources of relevant information, to make the right decision."

[15] Relevant to the issues raised in this appeal, is the contention on behalf of the appellant that the respondents failed to apply Section 45C (2) and 45C(3). Section 45C (2) makes it peremptory for the following factors to be considered before a sanction is imposed.

"(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 institutions or person to prevent a recurrence of the non-compliance;
(d) .....
(e) any other relevant factor including mitigating factors;

Section 45C (3) provides for the sanctions which may be imposed:

"(a) A caution not to repeat the conduct which led to the non-compliance referred to in subsection (1);

(b) a reprimand;

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

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

(e) a financial penalty not exceeding R10million in respect of natural persons and R50 million in respect of any legal person.

[16] It was also submitted on behalf of the appellant that the mathematical tool relied upon by the Appeal Board had disregarded the principles set out in section 45 C(2) of the FICA, thereby disregarding its own findings in *JSH Motors CC t/a Honda Jhb South v The FIC; Cortizone (Pty) Ltd t/a Cash In v The FIC and ,Mit Mak Motors CC v The FIC.* The appellant therefore challenged mainly the mathematical tool used to compute the sanction therefore an examination in this appeal is called for to determine whether the cases relied upon by the appellant support its contention that the Appeal Board found the tool to the flawed and disregarded section 45C (2) of the FICA.

[17] It was contended on behalf of the respondents that (i) the appeal did not warrant this courts interference and was incompetent. The court could only interfere where there was an error of fact, or there was a mistake of law or where the discretion was injudiciously exercised; (ii) the use of the mathematical tool was a guideline used at the starting point to calculate the penalty and that such usage was not in violation of section 45 C(2) the FICA. Furthermore, that the sanction is determined by having regard to the provisions of sections 45 C (2), (3) and (4) of the FICA; (iii) the sanction was appropriate, proportionate and reasonable.

[17] In my view it cannot be said as submitted on behalf of the appellant that the use of the mathematical tool and endorsement thereof by the Appeal Board was

incorrect. The Appeal Board in JSH *supra* as at paragraph 12,13 and 14 did not find fault with the Policy or the tool as such, however, it was critical of the manner in which the policy was applied to the facts of the case. According to the Appeal Board the FIC's adherence to the maxim "*ignorance of the law is no excuse",* was not applicable in our Law. Furthermore, there was a failure by the FIC to take cognisance of the fact that the transactions not reported preceded the date of inspection and, dated as far back as 2010, 2011, 2012, 2013 and 2014. The Appeal Board found mitigatory factors, for example, the appellant was unaware of its obligations under FICA, and that the directives given to the appellant after the inspection were complied with. It was found that in determining a sanction the FIC was enjoined to consider the factors in terms of section 45 C(2) and at paragraph 14 (JSH) the following is stated:

"We find that the premise from which the FIC proceeded to impose the penalties in question, is not correct. It has bound itself to a policy which applies 10% in respect of each unreported cash threshold transaction as the starting point regardless of the circumstances of the case. That cannot be correct as section 45 C (2) clearly enjoins it to take the nature, duration and seriousness of the non-compliance, the question whether the institution has previously failed to comply, any remedial steps to prevent a recurrence of the non-compliance and mitigating factors into account."

[18] In Cortizone *supra* the issue of wrong considerations as dealt with in JSH was again reaffirmed, that it is not about the mathematical tool used as a starting guideline that was incorrect, but it was about how section 45 C (2) was enjoined in the consideration of the penalty intended. In this instance, the Appeal Board again substituted the penalty imposed by the FIC with its penalty. In this instance the Appeal Board rejected the argument by the FIC that ignorance of the law was no excuse, where the appellant was negligent in not acquainting itself with its obligations under the Act. The Appeal Board found that appellant did not have a history of failing to comply with the Act and it co-operated with the FIC and registered.

[19] Paragraphs 19 and 20 of Mit Mak Motors CC does not make a finding that the FIC's formula (the mathematical tool) in determining a penalty was flawed. It was argued there for the appellant that the criteria and the three possible sanctions as prescribed in section 45 C (3), had the effect of 'disregarding the seriousness or not of the particular transgression, viewed in terms of the provisions of section 45 C (2)', making it impossible to consider the alternative sanctions prescribed in section 45 C (3).

[20] In my view, Mit Mak Motors CC did not reject the application of the tool but reaffirmed that the tool is to be applied to particular circumstances of a case, that is, the enjoinment of 45C(2) when considering the intended sanction. At paragraph [23] it was acknowledged (i) that 'deterrence was the primary purpose of the imposition of our administrative penalty, *Michael Berman v the FIC*, 18 February 2001 (ii) "the Board does not have unfettered discretion to interfere with the penalty imposed. However, in instances where the penalty is startingly inappropriate, there are grounds to interfere". The Appeal Board had difficulties in finding from the circumstances of that case that the appellant had been grossly negligent. There was a concession by the FIC that the appellant had not been grossly negligent but just negligent and, on those grounds the sanction was then substituted by the Appeal Board.

[21] Further, at paragraph [26] the submission by the FIC was rejected, where it contended that it was fair to determine the sanction to be imposed according to the three criteria prescribed in section 45 C (3) and, depending on the transgressor's degree of negligence or possible wilfulness. It was found that it was not proper to determine the sanction on that basis but that the three criteria could only serve as guidelines:

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

[22] In my view the facts in this appeal are distinguishable from the cases relied upon. The three cases argued in the appellants first ground of appeal were dealt with by the Appeal Board and relying on *MET Collective Investment RF (Pty) Ltd v Financial Conduct Sector Authority* case 823/2019 dated 29 July 2020 where it was stated:

> "[34] Deterrence must be considered in conjunction to the degree to which a person cooperated with the regulator in relation to the contravention and any submissions made by the person including mitigating factors referred to in those submissions.

Also in the paragraphs that follow:

> "[35] More importantly it was further emphasised that the legislative prescripts requiresthat when considering an appropriate sanction, factors such as the nature, duration,seriousness of non-compliance and the extent of the non-compliance must be considered. The appropriate penalty can only be assessed after consideration of allthe relevant facts whether they are aggravating or extenuating".

> "[37] We find that there is nothing untoward for the Centre to have graded the penalties under the categories of 'negligence', 'non-compliance', 'gross negligence and 'wilful non-compliance'. Such formulation was initiated by the Centre upon the direction of the Appeal Board in the JSH matter."

> "[38] The Centres approach in respect of the aforesaid categories was indeed considered in the Mit Mak Motors matter. Therein the Appeal Board found that the FIC's criteria should only serve as guidelines. At all relevant times the FIC is statutorily obliged to consider all relevant circumstances when determining the appropriate penalty."

"[39] It is therefore that the Tribunal found in METCI that the strict application of the mechanical checklist in determining any section can be problematic. It is trite that adoption of guidelines are there to assist decision makers in the exercise of their discretionary powers as long as they are not rigidly and inflexibly applied."

[23] In Harlyn *supra* at para [24] it was stated that the guidelines were to be used as a starting point when considering a penalty and in my view this can only be done after the gravity of the transgression and the mitigatory factors have been assessed. It is common cause that in addition to the representations in mitigation that were initially made, the appellants were given a further opportunity to supplement their representations before a second assessment. After an appeal the penalty was further reduced.

[24] The respondents argued that the sanction imposed was appropriate in that it had regard to the sanctioning guidelines and to the factors in section 45C(2) which do not stand alone and must be read with the options available in sections 45C (3) and (4). A consideration of the latter sections were instrumental in the FIC conditionally suspending 75% of the penalty imposed which resulted also in the appellant being required to pay only 5% of the unreported transactions.

[25] Although the second ground of appeal is based on the fairness of the penalty, in my view, the penalty appealed against must be dealt with as considered by the FIC and Appeal Board against the background of the third ground of appeal, being the finding that the appellant was grossly negligent. The finding of gross negligence was based on the facts being, knowledge of the appellant's reporting obligations; the failure to heed the warning after the 2016 inspection; failure to comply with directives after the latter inspection and incurring further transgressions.

[26] It was submitted on behalf of the appellant that the fine of R2 120 480.00 was excessively inappropriate because, despite reporting 89 CTR's after the first

inspection and a further 103 CTR's the penalty of 20% remained unchanged. Further, that the respondents failed to consider the fact that it was not hindered in the execution of its duties and, that there was no risk that the applicant would engage in activities prohibited by the FICA. It was also contended that respondents had not considered other sentencing options provided in section 45C(3) of the FICA. In my view, there is no merit in such argument because it pertinently refuses to acknowledge the purpose for which the FICA was promulgated. For, example, there is no manner in which the FIC can establish now whether the unreported transactions were among those prohibited by the FICA. The object of the FICA was to combat terrorism and money laundering, and it contemplates as a deterrent, the penalization of the disregard of its obligation to report each transaction above the prescribed threshold.

[27] It was contended that the appellant was not impecunious and that it displayed a reluctance to pay the penalty, even where it had been significantly reduced and where three quarters of the fine had been suspended for three years. It was also argued that while it was true that the operating profit for the year ending 2019 was R570 430.00 there was no merit in the appellant's contention that the penalty would ruin the business. The appellant had failed to interrogate its financial statements presented to the FIC; (it was noted in the respondents Heads of Argument that the financial statements had been part of the answering affidavit before the FIC and that they were erroneously omitted for this Appeal record.)

[28] The appellant had also not disclosed in this appeal (i) the gross profit of R5 702 540.00 for that year and of R5 773 138.00 of the preceding year 2018; (ii) that its operating expenses for employee costs stood at R3 284 382.00 (iv) there was a significant repayment of shareholders' loan.

[29] In addition the Appeal Board also found that the main reason for not reporting the CTR's was due to 'weak record keeping'; that there was no satisfactory explanation why the 23 transactions identified during 2016 were still not

reported by 2018 when the second inspection was conducted; there was failure to report timeously even those transactions which had been initially rejected. It was further found that due consideration had been given to factors in 45C when considering the penalty.

[30] In my view, although the Appeal Board has a wide discretion, its powers as established in Harlyn *supra* are narrow and can only be exercised as provided in sections 45D (7) of the FICA. The Appeal Board found no reason to interfere with the manner in which the FIC considered the penalty awarded. Having regard to the facts of this case, the appellant has failed to demonstrate that there is reason to interfere with the discretion exercised by the FIC in imposing the penalty, which was also endorsed by the Appeal Board. It has also been pronounced in a plethora of cases that a court of appeal is not at liberty to substitute its findings unless there was a mistake of law, and where the discretion of the court a quo, in this instance the FIC and Appeal Board, has not been exercised judiciously. Further, in a far as an administrative decision is concerned this shall only be interfered with in exceptional circumstances, consequently this appeal must fail.

[31] In the result the following order is granted:

The appeal is dismissed with costs.

Tlhapi

TLHAPI V V

(JUDGE OF THE HIGH COURT)

FJ15

I, agree

MBONGWE M

(JUDGE OF THE HIGH COURT)

HEARD ON: 20 JANUARY 2022

FOR THE APPELLANTS: ADV. R F de VILLIERS

INSTRUCTED BY: DENEYS ZEEDERBERG ATTORNEYS

FOR THE RESPONDENT: ADV. M SIBANDA

INSTRUCTED BY: TSHISEVHE GWINA RATSHIMBILANI INC

DATE OF JUDGMENT: 19 May 2022

FJ15