IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Appeal No.**12/3/1/5-BOBSA**

In the matter between:

BANK OF BARODA (SOUTH AFRICA) Appellant

And

SOUTH AFRICAN RESERVE BANK Respondent

DECISION

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1. The Appellant appeals against the decision of the Respondent to impose financial penalties totalling R11 million, which are comprised of:

   1.1 A financial penalty of R1 million for an alleged failure to report cash threshold transactions (CTR's) over the amount of R24 999.99 in terms of section 28 of FICA. ("Financial Intelligence Centre Act 38 of 2001").

   1.2 A further penalty of R10 million, coupled with a directive to take remedial action for the Appellant's alleged failures to ***"formulate and implement adequate processes and working methods in respect of section 42(1)(d) of FICA, read with regulation 27 of the FICA Regulations".***

2. The Respondent conducted inspections at the Appellant's premises between 19 September 2016 and 7 October 2016. On 15 December 2016, it informed the Appellant of such findings. It indicated that the purpose of the inspection was, inter alia, to assess the level of compliance with the requirements of FICA in respect of the preservation of information to identify the proceeds of unlawful or money-laundering activities[1] , to file reports in terms of sections 28, 28A and 29 of FICA and to establish and implement internal rules in terms of section 42 of FICA. In an annexure to the said letter it recorded its findings and indicated in which respects the Appellant was non-compliant. It afforded the Appellant until 31 December 2017 to comply.

3. One of the findings by the Respondent, in respect of the alleged non-compliance with section 28 of FICA was:

"This office found that BOB [2] had either omitted to report or incorrectly reported seven cash threshold reports (CTR) for the period reviewed".

4. Section 28 read as follows:

"An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount-

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1 It was at that stage common knowledge that the Gupta family and a number of legal entities under their control were customers of the Appellant. The Gupta family was allegedly very much involved with State capture and the laundering of money acquired in the process.

2 The Appellant

(a) ***Is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting, or***

(b) ***Is received by the accountable institution or the reporting institution from the client, or from a person on behalf of the client, or from a person on whose behalf the client is acting."***

Section 22B of the FIC Regulations prescribes the threshold of the transactions that are to be reported is R24,999.99.

5. The Respondent's alleged non-compliance consisted of various deposits by the Consulate General of India, more specifically:

5.1 On 15 April 2014 the Consulate made two deposits namely the amounts of R49,745.00 and of R10,670.00. However, only the former deposit of R49,745.00 was reported. The Respondent's contention remained that the aggregate amount of R60,415.00 should have been reported and that the failure to report the amount R10,670.00 constitutes non-compliance with FICA.

5.2 On 29 April 2014 two deposits were made namely R31,405.00 and R275.00. Only the first deposit was reported and not the aggregate of the two transactions.

5.3 On 20 April 2015 there two deposits, R52,023.00 and R7,200.00. Only the first deposit was reported and not the aggregate of the two deposits.

5.4 A deposit of R25,000.00 made on 16 July 2015, was not reported.

5.5 On 4 August 2015 the deposits made were R24,700.00 and R840.00. Neither one of the two transactions were reported.

5.6 On 11 August 2015 three deposits were made namely R16,625.00 R10,250.00 and R14,60 respectively. None of these transactions were reported. The three amounts add up to R26,889.60.

5.7 On 26 October 2015 again three deposits were not reported. The amounts were R24,718.00 R16,725.00 and R7,885.00. The aggregate of the three amounts is R49,328.00.

6. In terms of section 24(4) of the Regulations all threshold transactions are to be reported within two business days after the date of each such transaction. The instances of the late reporting of these cash threshold transactions (CTR's)constitute instances of late reporting or failure to report for which the financial penalty of R1 million was imposed and which related to the following deposits namely:

6.1 A deposit of R52,023.00 made on 24 April 2015 was only reported on 31 December 2015, 8 months later.

6.2 A deposit of R30,650.00 made on 8 May 2015 was only reported on 31 December 2015, 7 months later, and

6.3 A deposit of R39,500.00 made on 16 November 2015 was only reported on 21 April 2016, 5 months later.

7. In respect of the financial penalty of R10 million, the provisions of sections 29 and 42 read with Regulation 27 of FICA, formed the basis of the imposition of the penalty.

7.1 Section 29 imposes a duty on the Appellant to report suspicious or unusual transactions to the FIC.

7.2 Section 42 stipulates the following:

'(1) An accountable institution must formulate and implement internal rules concerning –

(a) the establishment of verification of the identity of persons whom the institution must identify in terms of Part 1 of this Chapter;

(b) the information of which record must be kept in terms of Part 2 of this Chapter;

(c) the manner in which and place at which such records must be kept;

(d) the steps to be taken to determine when a transaction is reportable to ensure the institution complies with its duties under this Act; and

(e) Such other matters as may be prescribed.

(2) Internal rules must comply with the prescribed requirements.

(3) An accountable institution must make its internal rules available to each of its employees involved in transactions to which this Act applies.

(4) An accountable institution must on request make a copy of its internal rules available to –

(a) the Centre;

(b) a supervisory body which performs regulatory or supervisory functions in respect of that accountable institution."

7.3 In terms of section 27(b) of the FIC Regulations, an accountable institution must provide for the necessary processes and working methods to enable staff to recognize potentially suspicious and unusual transactions or series of transactions.

8. The relevant findings recorded in the annexure to the letter of 15 December 2016 are:

8.1 Finding 6 was that:

a. the investigation comments and reasons for not reporting to the FIC were not sufficiently documented, and

b. the alert review procedure was not documented to include details such as the management of recurring alerts, linking of transactions with a customer's profile, sources of customer information consulted during alert investigations, and timelines for concluding alerts.

8.2 Finding 7 was that:

a. the rules in question were deployed and managed from the Data Centre in India and were not customised for the South African environment; and

b. the FCRM system was not configured or did not enable BOB to monitor individual customer transactions against the customer's own profile.

8.3 Finding 8 was that the Appellant had not:

a. applied sufficient scrutiny or care when processing transactions involving loans and fund transfers among entities within the same group; and

b. reviewed FCRM system alerts in respect of inter-group transactions to determine whether such alerts were reportable under section 29 .

9. On 15 February 2017 the Appellant commented on the initial findings. It also sent a quarterly report to the Respondent. Thereafter, in a letter dated 12 April 2017, the Appellant received a notification in terms of section 45C(5) of FICA. The sanctions that were eventually imposed were proposed but the Appellant was afforded until 10 May 2017 to advance reasons why the proposed sanctions should not be imposed.

10. On 15 May 2017, the Appellant made detailed representations on why such sanctions should not be imposed. Apart from reasons advanced during the appeal by counsel, the Appellant emphasized all its efforts to try and meet the demands of the Respondent. After having considered the representations the Respondent imposed the financial penalties in question on 19 June 2017.

11. In paragraphs 34-38 of the founding affidavit Mr. Jha, on behalf of the Appellant, alleged that due the Appellant's global reach, its operations are subject to the global supervision of top banking regulators and that its anti money-laundering and terrorist control measures are robust and stringent to meet with the standards of various regulators. The Appellant's internal rules create a large range of alerts in respect of the identification of possible suspicious and unusual transactions. Over the course of approximately the last two years the Appellant's internal rules, regulating the investigation of alerts, had led to the investigation and reporting of some 40 transactions as "Suspicious and Unusual".

12. The Respondent did not find any fault in the Appellant's handling of all those matters and did not find any contravention of, or non-compliance with the provisions of section 29 of the FIC Act. It is not surprising that Mr. Jha emphasised that the specific purpose of the inspection was to ascertain whether the Appellant was compliant with the provisions of section 29 of FICA and that the Respondent had to admit that the Appellant came to the correct conclusion in every single instance.

13. The Appellant informed the Respondent that the Consulate accepts payments for various services, such as payment for visas, on a daily basis. The Consulate, for safety reasons, did not want to be in possession of large amounts of cash, hence more than one deposit was made on a single day. Furthermore, in respect of the deposit of R25,000.00 that was not reported, the explanation proffered by the deponent to the affidavit accompanying the notice

of appeal ,was that this was a once-off oversight by operating staff due to a misconception of the threshold limit. The staff member was wrongly under the impression that it was not necessary to report transactions of R25,000.00 and less whereas the reality was that all transactions of R25,000.00 and more had to be reported. It was a one cent mistake on R25,000.00, or a .0000004% mistake. In respect of the late reporting of the three threshold transactions in finding 4 the Appellant pointed out that as it does not have a front office where it receives cash deposits, it has to rely on information from its correspondent banks, First National Bank and Nedbank, to see whether cash threshold deposits had been made. However, the Appellant had subsequently changed their compliance procedures to avoid oversights like that in future.

14. The Respondent relies on some of the averments made by the deponent to the founding affidavit in this matter in litigation between itself and twenty Gupta-linked entities. The situation is that the Appellant issued 38 notices on 6 July 2017 informing individual members of the Gupta family, their associates, and more than 20 Gupta-linked companies that it intended to terminate their banking services. It regarded the Gupta-linked entities as high- risk clients and exercised enhanced due diligence with the handling of those accounts. The closing of the accounts was to avoid the risk of contravening FICA and its Regulations.

15. On 24 July 2017, 20 of the Gupta-linked entities launched an urgent application in the Gauteng North Division of the High Court, seeking an interim interdict to prevent the Respondent from terminating its banking services. Fabricius J

dismissed the application on 21 September 2017. In paragraph 41 of his judgment he expressed the following:

"[T]he [Bank of Baroda] is subject to a number of statutory provisions which in the main seek to uphold the integrity of the financial system in the country. It seeks to uphold such integrity with honest transparency..... Where a contractual party, subject to specific regulatory provisions seeks to act honestly and openly to safeguard its rights, and to uphold the integrity of the relevant financial order, and the other party on the face of it seeks to undermine and subvert it to its own benefit, the balance of convenience in my view clearly favours the former".

16. The Appellant emphasized certain extracts of Mr Jha's affidavit in respect of the said interim interdict application which is reiterated herein:

"To be clear, the [Gupta-linked entities] pose the single greatest risk to the Bank of breaching FICA and the other legal requirements set out above. Between the period of 16 September 2016 and 14 July 2017, the Bank has made no less than 45 suspicious transaction reports to the Financial Intelligence Centre on the applicants, individual members of the Gupta family and other companies associated with the Gupta family who have also received notice of termination of their accounts. These suspicious transactions amount to over R4,25 billion.

Given this volume of suspicious and unusual transactions, there is a risk that the Bank may, through inadvertence and despite its best efforts, miss further suspicious transactions, or fail to fully record and maintain its contemporaneous investigation and a decision, which would expose it to the real risk of having its operations suspended and further sanctions imposed".

17. The Respondent has also drawn the tribunal's attention to what was said by Mr. Jha in that litigation and in particular highlighted the second of the two paragraphs quoted:

> ***"In finding number 8, the SARB reviewed the Bank's various reports to the Financial Intelligence Centre on "suspicious and unusual transactions" (USTs) under section 29 of FICA. The basis of finding 8 is that the respondent correctly identified and reported all UST's to the Centre, and no such transaction escaped its supervision.***
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> ***However, the Bank's internal procedures did not cope with the duty to cope contemporaneously, the exact progress of its investigations in respect of each UST. I point out that the "suspicious and unusual" transactions forming the basis of that finding 8, relate only to transactions executed by the applicants[3]".***

18. Both parties are *ad idem* that this appeal constitutes a wide appeal. Until 13 June 2017 section 45D(3) of FICA provided that an appeal **"is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal"**. Moreover section 45D(4) gave powers to the board to summon any person to give evidence or present relevant documents to the board. The members of the board were entitled to question and even cross-examine witnesses.

19. Section 45D(3) was replaced by a new subsection 3 and 3A:

> ***"(3) An appeal is decided on the written evidence, factual information and documentation submitted to the Centre or the supervisory body before the decision which is subject to the appeal was taken.***

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[3] The fact that the past tense was employed by Mr. Jha is significant according to the Respondent.

(3A) Subject to subsection (4), no oral or written evidence or factual information and documentation, other than that was available to the Centre or supervisory body and the written reasons for the decision of the Centre or the supervisory body, may be submitted to the appeal board by a party to the appeal".

20. The parties to an appeal may apply to have outside evidence admitted for consideration by the appeal board in terms of section 45D(3C)-(3D). A party wishing to have such evidence considered must show good cause for its acceptance by the appeal board.

21. As a result of the amendment, what was a wide appeal was restricted to a narrow appeal. In ***Tickly & Others v Johannes, N O & Others***, 1963 (2) S A 588 (TPD) at 590 G-H Trollip J indicated that the word "appeal" can have different meanings:

> ***"(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional or new information .....***
>
> ***(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information the decision under appeal was given, and in which the only determination is whether that decision was right or wrong. .....".***

22. It is clear that the amendment changed the procedure of an appeal. It was common cause that the amendment does not change the Appellant's right to a wide appeal and there is no reason to differ from that view. Suffice to say that most of the matters that form the basis of this appeal, date back to prior to 13

June 2017.We are of the view that it would seriously impair the Appellant's right to a fair appeal if it is not allowed to explain exactly what the position was when the actions for which the penalties had been imposed were taken. Consequently, all the evidence presented by the parties has to be taken into account.

23. The Appellant's first attack against the imposition of the penalty of R10 million in respect of findings 6,7 and 8 is that the Respondent imposed them prematurely. In the letter of 15 December 2016, the Appellant was afforded until 31 December 2017 to develop a system that would be acceptable to the Respondent. The sanctions were imposed on 19 June 2017 i.e. more than six months before 31 December 2017.

24. The Appellant further contends that FICA has to be interpreted restrictively in favour of the Appellant. It indicated that non-compliance with sections 28 and 42(1)(d) of FICA as well as regulation 27 thereto does not only give rise to the imposition of administrative penalties, but sections 51 and 52 of FICA elevate a failure to report a cash threshold transaction (CTR) in terms of section 28, or to report to a suspicious or unusual transaction in terms of section 29 to a criminal offence. Likewise, section 29(8) of the FICA Regulations criminalises a failure to comply with section 27 of the FICA Regulations.

25. The argument is that it is a well-established principle that provisions that give rise to criminal and administrative penalties must be interpreted restrictively in cases of doubt and ambiguity. In ***Democratic Alliance v African National***

Congress, 2015 (2) SA 232 (CC), particularly paragraphs 129-131 thereof the following was said by Cameron J, Froneman J and Khampepe J in respect of the interpretation of section 89(2)(c) of the Electoral Act, No 73 of 1998:

"In case of doubt we are obliged to interpret penal prohibitions restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalized.

The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.

This court has endorsed this approach. And in deed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common law presumption in favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution".

26. In ***Oilwell (Pty) Ltd v Protec International Ltd***, 2011 (4) SA 394 (SCA) the court was required to interpret the Exchange Control Regulations that gave rise to both criminal sanctions and administrative penalties. It was held that a restrictive interpretation had to be applied.

27. The Appellant relies heavily on the judgments in ***Hira v Booysen***, *1992 (4) SA 69 (A)* and ***Woodlands Dairy (Pty) Ltd and Another v Competition Commission***, 2010 (6) SA 108 (SCA) to bolster its contention that a restrictive

interpretation has to be applied. In both these matters the statutory provisions in question did not provide for criminal sanctions, but only for administrative penalties.

28. The Respondent emphasized that FICA was enacted to further national objectives and in particular to combat terrorist activities and money laundering. Therefore, it would be wrong to stifle the powers of supervisory bodies under FICA which exercise its powers to attain the objects of FICA, its Regulations and Guidance Notes as well as Public Compliance Communications issued by the Centre.

29. The Respondent referred to the definition of "this Act" in section 1 of FICA and indicated that the Regulations forms part of FICA and further relied on section 4(c) of FICA[4]. It appears that its interpretation of section 4(c) boils down to an understanding that it is empowered to compile its own regulations in respect of the duties of accountable institutions, and that once those regulations had been conveyed to the relevant institution, FICA prescribes that the institution is bound by the Respondent's regulations.

30. Relying on the judgment in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***, 2012 (4) SA 593 SCA paragraph 18 the Respondent indicated that a purposive interpretation is to be followed. It is argued that that the judgment in ***DA v ANC*** *supra* is distinguishable from this matter in that in this

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[4] It reads: "4 *To achieve the objectives the Centre must*
(a)..... (b) ..... (c)monitor and give guidance to accountable institutions, Supervisory bodies and other persons regarding the performance and compliance by them of their duties and obligations in terms of this Act or any directive made in terms of this Act."

matter the Appellant is not exposed to a possible criminal penalty whereas in that matter heavy criminal sentences could be imposed. Reference is made to section 45C(8)[5] of FICA which provides that a administrative penalty may not be imposed if the respondent (the Appellant in this case) has been charged with a criminal offence in respect of the same set of facts. The argument presumably must be understood to mean that if the supervisory institution decides to impose a financial penalty it is disqualified from charging the accountable institution criminally. It actually accentuates the fact that the institution in question finds itself on the proverbial horns of a dilemma as it can either be criminally prosecuted or administratively penalised. One wonders whether a criminal court, in the case where a criminal prosecution is preferred, must have to interpret FICA differently[6] from what the Respondent maintains is the correct interpretation[7] for the purposes of this case.

31. The Respondent relied on the decision in ***Pather v Financial Services*** **[2017] ZASCA 125** and argued that this matter is not criminal in character and that the civil standard of proof i.e. a balance of probability should be applied. The Respondent did not specifically deal with the judgment in ***Hira v Booysen*** *supra.*

32. Despite the valiant effort by the Respondent to persuade this tribunal that FICA does not expose an accountable institution to a possible criminal prosecution it is clear that it is not so, as sections 51, 51A, 52, 53 and 54 of FICA as well as

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5 It reads: *"An administrative sanction contemplated in this sanction may not be imposed if the respondent has been charged with a criminal offence in respect of the same set of facts"*

6 Restrictively

7 Purposively.

section 29(8)[8] specifically criminalise not only the conduct for which the penalties were imposed upon the Appellant but virtually the failure of any duty imposed on accountable institutions in FICA. It is impossible to distinguish this matter from the decision in ***DA v ANC*** *supra.* It follows that the penal provisions in FICA has to be interpreted restrictively and that the Respondent's argument that the principles enunciated in the ***Pather***[9] matter *supra,* are applicable, cannot be sustained.

33. The Respondent's view that it can request an institution to develop a system that would make it easy for it conduct an inspection is not correct. The Respondent can only request an institution to develop its system in accordance with what FICA and the Regulations require the institution to do. Section 27 of the Regulations impose a duty on the institution to:

(a) provide processes and working methods so that STRs[10] be reported without delay:

(b) provide processes and working methods to enable its staff to recognise potential STRs;

(c) to provide for the responsibility of the management to comply with FICA, the FICA Regulations and its internal rules;

(d) allocate responsibilities and accountability to ensure that staff duties concerning the reporting of STRs are complied with;

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8 It reads: *"Any accountable institution which fails to develop internal rules in accordance with regulation 25, 26 or 27 is guilty of an offence"*

9 It must be borne in mind that in the **Pather** matter there was blatant commercial fraud.

10 Suspicious or unusual transactions

(e) provide for disciplinary steps against relevant staff members for failure to comply with FICA, its Regulations and the institution's internal rules; and

(f) take into account any guidance notes about the reporting of STRs which may apply to it.

34. The functioning of this institution is dependent on its staff. The institution must arrange its management in such a way that STRs are detected and reported. Particular staff members must be appointed in this respect and must be subject to censure if they should fail to do so. It all has to do with the institution's administration. If the duty to take guidance notes into account is interpreted to mean that not only internal measures must be streamlined but that the institution must also, if the supervisory body so requires, develop a method to streamline the supervisory body's inspections, it increases the duties of the institution beyond what FICA prescribes. That is contrary to the envisaged restrictive interpretation. A restrictive interpretation will be that only guidance notes that give guidance on duties created in FICA have to be taken into account.

35. Objectively viewed, the inspection that gave rise to the sanctions was aimed at ascertaining whether the Appellant had a system in place that could detect and report STRs. The Appellant knew that it had high risk clients. It applied enhanced due diligence. Its FCRM generated alerts in respect of STRs. The Appellant's reporting officer investigated all those transactions. The Appellant reported 45 of the transactions as STRs. During the inspection each one of the transactions where alerts came up was thoroughly investigated. The

Inspectorate could not fault the reporting officer with anyone of his decisions. In practice the Appellant's system enabled it to comply with FICA.

36. The inspection must have been a tedious exercise since the documents that were considered by the reporting officer had also to be considered by the members of the Inspectorate. Their task would have been a lot easier if the reporting officer had documented his thought processes when he came to the conclusion that, despite the alerts, transactions were not reportable. If FICA is interpreted restrictively, as it has to be interpreted, no duty has been created to document reasons for decisions.

37. Finding 6, which is the first of the findings that caused the Respondent to impose the R10 million penalty emanates from the fact that it failed to document reasons and the alert review procedure. FICA does not create such a duty. Insofar as the penalty was based on the non-compliance of this alleged duty the decision to do so was wrong.

38. Before dealing with findings 7 and 8 it is apposite to refer to what was said in paragraph 27 of the judgment in ***Netstar v Competition Commission of South Africa***, 2011) SA 171 (CAC):

> ***"In Woodlands Dairy the initiation of a complaint was likened to a summons in that it must contain sufficient particularity and clarity to survive the test of legality and intelligibility. This is not to say that what is required of a complaint is the level that is demanded in pleadings. .... What is required is that the conduct said to contravene the Act must be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is and be able to prepare to meet and rebut it".***

39. Finding 8 was in respect of the Appellant's failure to apply sufficient care involving loans and fund transfers among entities within the same group and its failure to review the FCRM system alerts in respect of inter-group transactions. It is difficult to understand exactly what the Respondent had in mind, especially in view of the fact that not a single failure to report a STR could be found. Moreover, cognisance must be taken of the fact that the Appellant regarded the group of clients, the subject of the complaint, as "high risk" clients and scrutinized their transactions with enhanced due diligence. This finding seems to be based on rules that would only be applicable on an extremely purposive interpretation of FICA to the effect that not only the legislature but also the supervisory body has legislative powers.

40. Finding 7 was based on the fact that the Appellant's internal rules were deployed and managed from a data centre in India and that the system did not enable the Respondent to monitor individual customer transactions against the customer's own profile. Significantly no specific aspects in which the system must be changed have been given.

41. Although the Appellant's internal rules are managed from a data centre in India it must be borne in mind that the Appellant explained that it is used globally and that its rules in respect of the detection and reporting of STRs are robust and stringent. In the founding affidavit Mr. Jha stated the following:

"I respectfully do not agree that any (and certainly not any substantial) "customization" of the Appellant's internal rules is required for purposes of the "local" risks it faces. Nor indeed were any such adaptations or amendments suggested by the SARB. That

notwithstanding, the Appellant has in any event embarked on a detailed review process to assess what, if any, amendments would be helpful and then to implement such changes. I am of the opinion that if changes to the internal rules were to be made, those would be minor".

42. Challenged to give specific ways in which the rules are to be "customised", the Respondent in the answering affidavit suggests that automatic teller machines should impose monetary thresholds in South African Rand, that international transfers should be recorded and reported in local currency and that it should address risks which are prevalent in South Africa such as corruption and wildlife poaching. The Appellant's answer thereto is that it has no automatic teller machines, that international transfers are recorded and reported in local currency and that corruption and wild life poaching is not limited to South Africa only.

43. In the result the findings 6, 7 and 8 cannot be sustained insofar as they are to the effect that the Appellant was non-compliant. The penalty of R10 million stands to be set aside. There is a further reason why this penalty must be set aside and that is that the Appellant had been given until 31 December 2017 to update its system to the liking of the Respondent. It appears from the papers that the Appellant reacted positively to the demands of the Respondent, and without questioning whether it was obliged to do so or not, tried to comply with those demands. The Respondent imposed the penalty on 19 June 2017. It was premature in terms of its own timetable.

44. As to the reporting of the cash threshold transactions (CTR's) and the penalty of R1 million imposed as a result of findings 3 and 4 it is apposite to refer to FICA Regulation 22B. It reads:

> ***"The prescribed amount of cash above which a transaction must be reported to the Centre under section 28 of the Act is R24 999.99 or an aggregate of smaller amounts which combine to come to this amount if it appears to the accountable institution or reporting institution concerned that the transactions involving those smaller amounts are linked to be considered fractions of one transaction."*** (Own emphasis)

45. The first three[11] of the seven transactions in respect of which the Appellant was allegedly non-compliant were instances where two deposits were made by the Consulate on one day. One of the deposits was above the threshold but the second one was below the threshold. The threshold transaction was reported but not the transactions below the threshold. The last three[12] of the seven transactions are instances where more than one deposit of less than R24,999.00 was made on one day and the aggregate of the amounts[13] added up to more than R24,999.99.

46. The deposits in question were all made by the Consulate. The position is that the Consulate receives cash for services rendered to different clients. There is nothing before the Tribunal to demonstrate that the deposits made in one day, were linked or were fractions of one transaction. The Respondent required that all deposits by one client on one day that are in excess of the threshold

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11 See paragraphs 5.1, 5.2 and 5.3 above

12 See paragraphs 5.5, 5.6 and 5.7 above

13 Two on 5 August 2015 and three each on 11 August and 26 October 2015.

have to be reported regardless of what the underlying transactions were or whether the cash was received from one client or from various clients. That negates the clear wording of the Regulation, namely that only if it *appears* to the accountable institution that the transactions are linked, to be considered fractions of one transaction.

47. The Appellant indicated that it was specifically under the impression that the transactions were not linked. The Appellant did not believe that the multiple deposits were fractions of a single deposit. There is no reason to regard that attitude as unreasonable. It follows that the Respondent erred when it took these six transactions into account when it imposed the R1 million penalty.

48. Appellant was clearly non-compliant in respect of its failure to report the R25,000.00 deposit. It is indeed a very technical way in which the Appellant failed to comply with its duties. It was also non-compliant in respect of the three transactions mentioned in finding 4. It is clear that the Appellant did not detect these transactions and therefore did not report them. The Appellant alleged that it has improved its system to avoid such oversights in future.

49. As the penalty of R1 million was imposed on the wrong assumption that in respect of six of the instances in finding 3 the Appellant had failed to comply with FICA whereas that was not the position, this tribunal is at large to set aside that penalty and replace it with a penalty that it regards as appropriate in the circumstances.

50. As the principal objective of the FIC is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities[14] accountable institutions must be extremely diligent to perform their duties, and must expect stiff penalties in case of non-compliance. Although the Appellant contends that the failure to report the R25,000.00 transaction ought to be treated as an instance where the maxim *de minimis non curat lex* is applied, the reality still is that there was non-compliance.

51. Cognisance is taken of the fact that this Tribunal does not have an unfettered discretion to interfere with the penalty imposed. However, in instances where the penalty is startingly inappropriate, there are grounds to interfere. Nothing deters this Tribunal from determining whether the penalty was appropriate. The proportionality test has been applied by our authorities. The prime purpose of imposing a penalty is to attain the objective of deterrence, however sight should not be lost of the fairness aspect to the offending party. A penalty of R400,000.00 will be a fair one in the circumstances.. [15]

52. The Appellant is substantially successful in this matter and it will be fair if the amount of R10,000.00 that was paid when the appeal was noted stands as a first payment of the administrative penalty of R400,000.00.

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14 Section 3(1) of FICA

15 Mit Mak Motors CC v The Director: The Financial Intelligence Centre find the Financial Intelligence Centre's decision of the Appeal Board No. 12/3/1/5

The following order is made:

1. The administrative penalty of R10 million imposed for failure to comply with section 42 read with Regulation 27 of FICA is set aside.

2. The administrative penalty imposed for failure to comply with section 28 of FICA read with Regulation 22B is set aside and substituted with an administrative penalty of R400,000.00.

3. The amount of R10,000.00 paid by the Appellant when the appeal was noted can stand as a first payment towards the administrative penalty of R400,000.00.

CHAIRMAN OF THE FIC APPEAL BOARD 23/05/2018
JUDGE W.J. HARTZENBERG

23/05/2018

MEMBER OF THE FIC APPEAL BOARD
ADV H KOOVERJIE SC

23/05/2018

MEMBER OF THE FIC APPEAL BOARD
ADV E PHIYEGA

DATE OF DECISION: 23 MAY 2018