IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

CASE REF 12/3/1/5-WBC

In the matter between:

WE BUY CARS (PTY) LTD Appellant

and

THE DIRECTOR: FINANCIAL INTELLIGENCE CENTRE First Respondent

FINANCIAL INTELLIGENCE CENTRE Second Respondent

DECISION

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1. The Appellant is a dealer in motor vehicles. The First Respondent is the Director of the Second Respondent, the Financial Intelligence Centre. For ease of reference both Respondents will be referred to as "the Respondent". The appeal is against the imposition of one of two penalties upon the Appellant on 22 September 2017 for failure to comply with the provisions of the Financial Intelligence Centre Act, 38 of 2001 (FICA).

2. The two penalties were comprised of a penalty of R5 000.00 for its failure to comply with Section 43B(4) of FICA[1] and a financial penalty of R2 145 031.00 for failing to report 170 cash threshold transactions (CTRs) in terms of Section 28 of FICA. Seventy five percent of the second penalty was suspended for three years on condition that the Appellant remains fully compliant with its obligations in terms of FICA. Consequently the penalty entailed that the Appellant had to

[1] The Appellant changed its name from Micra Motors CC to We Buy Cars (Pty) Ltd and failed to notify the Respondent.

pay an amount of R550 000.00 on or before 15 October 2017. The appeal was lodged 27 October 2017.

3. The grounds of appeal were based on the contentions that the Respondent wrongly found the Appellant to have been grossly negligent and that the Respondent failed to take the mitigating circumstances into account, thereby failing to reduce the penalty.

4. It is the Appellant's case that a Mrs Marais was appointed by the appellant to take care of all its responsibilities in terms of FICA. She created the impression that she dealt with all the Appellant's FICA obligations and that the Appellant was fully compliant therewith. The directors had no reason to think otherwise. At same point during her employment it was discovered that Mrs Marais misappropriated an amount of R655 963.22. Consequently this led to her dismissal on 2 April 2016.

5. Her responsibilities were then allocated to Mrs. Fick. When Mrs. Fick attempted to enrol the Appellant on the Respondent's Go-AML system she was unable to do so. This caused the FIC to conduct an inspection on 1 June 2016. It then transpired that 170 CTRs had not been reported.

6. The Appellant eventually enlisted the services of Probeta Training during September 2016. ProBeta Training presented a training course and educated the Appellant of his obligations in terms of FICA. The Appellant also obtained the services of a legal concern Stratlaw (Pty) Ltd to assist it with making representations to the FIC.

7. By 25 January 2017 Mrs. Fick managed to update the Appellant's information with the Respondent, with the exception of 36 transactions, where it was found that vital information of its clients was not recorded in these transactions. The Appellant reported all the CTRs and also the STRs successfully with the respondent. The Appellant co-operated with the Respondent, acted on its recommendations and implemented its procedures and policies.

8. It is the Appellant's case that it was all Mrs. Marais' fault that the Appellant was non-compliant in respect of the updating of its information and the reporting of the CTRs and STRs. The Appellant contended that the management and in particular the directors had no reason to suspect that the Appellant was non-compliant. By the time the Appellant became aware thereof, not only was a substantial amount of money misappropriated but the Appellant was seriously non-compliant with its obligations in terms of FICA. It was then that it immediately tried its best to rectify the position.

9. The Respondent points out that on 23 September 2014 the FIC conducted its first inspection on the Appellant with its registration and reporting obligations in terms of FICA. The inspection team consisting of Elna Potgieter and Vanessa Lombard who advised Mrs. Marais, Mrs. Fick and a director Mr. Van der Walt on the manner the Appellant was required to comply with its obligations in terms of FICA.

10. At that stage the inspection team was under the impression that as the Appellant was registered as a reporting institution, albeit late, it was properly registered. It was unaware of the fact that the Appellant had changed its status from a close corporation to a limited liability company with a different name.

11. The conclusions of the inspection team were articulated as follows in the Inspection Report and same was conveyed to the Appellant as follows:

" a) Registration with the Centre (Section 43B of the FIC Act)

Although the RI[2] is registered with the Centre, it has not registerd within the prescribed time i.e. 1 March 2011

b) Duty to file cash threshold reports (CTRs) with the Centre (section 28 of the FIC Act)

Although proof of reporting was given to the inspection team in respect of cash amounts directly received and paid to the RI's clients, no independent evaluation could be done by the inspection team due to lack of record keeping. No

[2] Reporting Institution

conclusion can therefore be made in respect of the RI's level of compliance in respect of cash received and paid out to clients

CTR's are not filed within the prescribed 48 hour period and as such the RI is not in a good position to comply with section 28 of the FIC Act.

c) ***Duty to file suspicious and unusual transaction reports (STRs) with the Centre (section 29 of the FIC Act.***

The RI does not have processes and documentation in place to assist with the identification of of STRs, and as such it is not in a good position to comply with section 29 of the FIC Act.

Recommendations

The RI must ensure that all CTRs are filed with the Centre within the prescribed 48 hours after becoming aware of it.

The RI must within 3 (three) months from the date of receipt of this report, implement processes and procedures setting out the obligations and practical guidelines on how to identify and report CTRs and STRs. The RI must also ensure that each staff member is familiar with the obligations imposed on the RI, specifically the identification and reporting of suspicious and unusual transactions"

12. A perusal of that report would have made it clear to the board of directors of the Appellant that some measures had to be taken to ensure that there was a proper identification of CTRs and STRs, that such transactions were properly documented and reported to the Respondent and that training of its staff by a training institution is required to take place within three months of such report. Not only was Mrs. Marais involved with what transpired during that inspection but also Mrs. Fick and Mr. Van der Walt, one of the directors. There is no indication that any attempt was made to give effect to the Respondent's recommendations. Objectively viewed the Appellant was aware that it was late with its CTR reports, that it did not know how to deal with STRs and that it had to arrange for proper training of its employees.

13. We are of the view that the explanation proffered as to why it remained non-compliant, except to blame Mrs. Marais is not sustainable. The Appellant as a

reporting institution that has the obligation to comply with FICA. Section 29 of the FIC Regulations read as follows:

"The internal rules of an accountable institution concerning reporting of suspicious and unusual transactions must –

(a) provide for the necessary processes and working methods which wil cause suspicious and unusual transactions to be reported without undue delay;
(b) provide for the necessary processes and working methods to enable staff to recognise potentially suspicious and unusual transactions or series of transactions;
(c) provide for the responsibility of the management of the institution in respect of compliance with the Act, these Regulations and the internal rules;
(d) allocate responsibilities and accountability to ensure that staff duties concerning the reporting of suspicious and unusual transactions are complied with;
(e) provide for disciplinary steps against the relevant staff members for non-compliance with the Act, these Regulations and the internal rules; and
(f) take into account any guidance notes concerning the reporting of suspicious and unusual transactions which may apply to that institution."

14. It is irresponsible, inadequate and not sufficient for a reporting institution to appoint a staff member to take care of its obligations. Internal rules and processes have to be developed so that the institution is able to identify reportable transactions and ensure that staff members will report such transactions. It is a fundamental requirement that all relevant staff members be trained to detect and report such transactions and must further be prone to possible censure if they fail to do so.

15. There is no doubt that the Appellant was specifically made aware of these duties in the first Inspection Report when regarding the 2014 inspection. Despite such awareness, it only arranged for the training of staff after the second inspection, nearly two years later. Only during 2017 had the Appellant appointed Mr. Rein, a chartered accountant, with experience of FICA obligations. It is noted that during 2016 the Appellant had a turnover of R830 509 838.00. The Appellant does business literally all over the country.

16. The Appellant contends with the Respondent's finding that it was grossly negligent in respect of the failure to report the CTRs. In the first place it is

argued that the Appellant was only found to be negligent in respect of its failure to register its changed status and name with the Respondent and not grossly negligent. The Respondent's argued that the Appellant was unaware of the fact it had not been properly registered thereby being remiss with its registration. The Respondent imposed the administrative sanction which is imposed in cases of negligence, i.e R5 000.00 as opposed to R10 000.00 in cases of gross negligence.

17. The Appellant argued that finding the Appellant to be grossly negligent instead of just negligent regarding of its failure to report CTRs, is fatally flawed. We do not deem it necessary to go into an extensive discussion of what the difference between ordinary negligence and gross negligence is, except to refer to the judgment of Scott J A in ***Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas" and another,*** *[2003] 1* ***All S A*** *286 at 291* where at paragraph 7, the learned Judge of Appeal said the following:

> ***" I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity"***

18. In respect of the Appellant's failure to report CTRs it is accepted that the Appellant did not consciously take the risk but that there was a total failure to take care. Apart from appointing Mrs. Marais and Mrs. Fick to administer its FIC obligations, the management of the Appellant failed to ensure that there was a system in place where employees were trained to detect reportable transactions and to report them. Moreover, no procedure was in place where these employees could be censured. More importantly despite the explicit instruction to arrange for proper training of its staff, it failed to do so. The only plausible conclusion that can be made is that there was a total failure to take care. The finding that the Appellant had been grossly negligent was justified.

19. With regard to the Appellant's contention that the Respondent failed to take extenuating circumstances into account, it must be borne in mind that before it submitted its representations in response to the Respondent's notice of intention to impose sanctions of 23 February 2017, the failure to report CTRs and STRs was calculated to be R2 145 031.00 for the CTRs and R44 640.00 for the STRs. The entire amount was payable with no portion being suspended.

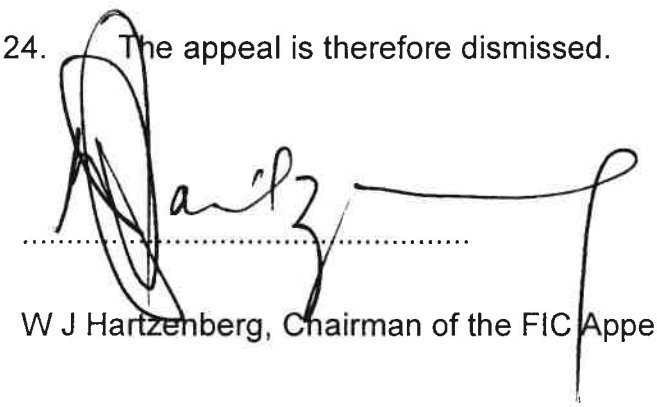
20. The penalty that was eventually imposed was the effective payment of R550 000.00. This meant that instead of having to pay an amount of R2 189 671.00, an amount of R1 595 031 (of the original proposed penalty of R2 145 031.00) was suspended for three years on condition that the Appellant complied with its obligations in terms of FICA and the penalty of R44 640.00 was not imposed at all.

21. Hence there is no merit in the Appellant's submission that the suspension of more than 75% of a proposed penalty is not an alleviation of its position. It is clear that the Respondent took the Appellant's representations into account.

22. This Appeal Board is therefore of the view that the penalty is appropriate. In the result there is no justifiable basis upon which this tribunal can interfere with the penalty imposed by the Respondent.

23. As the appeal is unsuccessful, the amount of R10,000.00 is forfeited. It therefore follows that no order is warranted in this regard.

24. The appeal is therefore dismissed.



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W J Hartzenberg, Chairman of the FIC Appeal Board

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H Kooverjie SC, Member of the FIC Appeal Board

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M. E Phiyega, Member of the FIC Appeal Board

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Date

13 JUNE 2018

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