CASE NUMBER: FIA/AB 10/2021

IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE ACT, 2012

In the matter between:

PSG WEALTH MANAGEMENT (NAMIBIA) (PTY) LTD **APPELLANT**

and

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY ("NAMFISA") **FIRST RESPONDENT**

FINANCIAL INTELLIGENCE CENTRE **SECOND RESPONDENT**

DECISION

Introduction

1. The appellant is a stock broker, a member of the Namibian Stock Exchange ("NSX") established in terms of the Stock Exchanges Control Act, No. 1 of 1985. The NSX is a regulatory body in terms of Schedule 4, item 5 and has regulatory functions in relation to the appellant.

2. The Namibia Financial Institutions Supervisory Authority, the first respondent herein, is for purposes of the Financial Intelligence Act, No. 13 of 2012 ("the FIA") a supervisory body in relation to the appellant in terms of Schedule 2 of that Act.

3. The Financial Intelligence Centre was cited in this appeal as the second respondent but has not entered an appearance to oppose. We will refer to the first respondent only as "the respondent" or NAMFISA and to the second respondent as the FIC.

4. The FIA was substantively amended with effect from 21 July 2023. Unless the context indicates otherwise, reference to the FIA in this appeal means the FIA prior to the 2023 amendments.

5. In terms of Schedule 1, item 12 of the FIA the appellant is an accountable institution, being a member of the NSX. Consequently, the appellant has the obligations imposed on accountable institutions by the FIA.

6. In accordance with the construct of the FIA, both the respondent in its capacity as a supervisory body and the FIC have the legal obligation to ensure compliance with the FIA and to impose administrative sanctions on offending accountable or reporting institutions.

Brief chronology of events

7. This matter has a drawn-out history.

8. During 2013 the FIC performed an assessment of the appellant to obtain evidence that anti-money laundering (AML) and combating the financing of terrorist activities (CFT) measures described in terms of the AML compliance programme of the appellant existed and operated effectively. The FIC thereafter provided the appellant with a compliance assessment report ("CAR") dated 5 August 2013.

9. Evidently the respondent conducted a compliance assessment on the appellant's AML compliance program during 2016 and issued a CAR to the appellant on 17 August 2016.

10. This was followed by an onsite AML/CFT/CPF compliance assessment of the appellant during January 2017 in terms of the FIA and the Inspection of Financial Institutions Act, No. 38 of 1984. On 28 February 2017, the respondent provided the appellant with the CAR.

11. By letter dated 6 March 2017, the appellant gave a written response on the NAMFISA CAR and on 11 April 2017 the respondent gave feedback on the appellant's response

of 6 March 2017. The appellant by letter dated 28 April 2017 responded to the NAMFISA feedback of 11 April 2017.

12. By letter dated 28 June 2017 the appellant submitted a progress report to NAMFISA as undertaken in the appellant's letter of 28 April 2017. On 18 April 2018 NAMFISA gave feedback to the appellant's report. On 27 April 2018 the appellant responded to the NAMFISA feedback to which the latter replied on 30 August 2018.

13. On 21 December 2018 the appellant gave a progress report in response to the respondent's reply of 30 August 2018 and informed NAMFISA that its new Risk Management and Compliance Programme (RMCP) would be formally implemented from January 2019. The Authority was informed that the RMCP replaced the PSG Internal Rules.

14. By letter dated 5 February 2019, the respondent notified the appellant of the intention to impose an "administrative sanction".

15. The appellant responded to the aforementioned notice letter by way of a letter dated 19 March 2019.

16. On 2 September 2019 the respondent served notice (hereafter "the Penalty Notice") on the appellant of the respondent's decision (hereafter "the Penalty Decision") to impose a financial penalty on the appellant in the amount of N$2 million of which N$1 million was conditionally suspended for two years ("the N$2 million penalty"). The appellant was required to pay the remaining N$1 million within 30 work days from 2 September 2019 into a designated bank account.

17. Section 56(1) of the FIA provides that the respondent or the FIC may impose an administrative sanction on an accountable institution when satisfied on the facts and information that the institution *inter alia* "*(a) has failed to comply with a provision of [the FIA] or any order, determination or directive in terms [thereof]*". The administrative sanction that the respondent imposed was a financial penalty referred to in section 56(3)(f) of the FIA.

18. Following the Penalty Notice of 2 September 2019, the appellant lodged this appeal on 10 June 2020, within the 30-day period which commenced on 11 May 2020 required by section 58(2) of the FIA. At that juncture the Appeal Board was not yet constituted.

19. After promulgation of the Regulations published under Government Notice No. 48 of 16 March 2021 amending the Regulations made under the Financial Intelligence Act published under Government Notice No. 3 of 28 January 2015, the members of the Appeal Board were appointed by the Minister responsible for finance with effect from 12 April 2021.

20. The appellant then delivered its revised notice of appeal complying with the Amendment Regulations on 2 September 2021.

21. The appeal was heard by the Appeal Board on 5 September 2022 (one of nine different appeals) and its decision was supposed to have been handed down on 21 November 2022. Unfortunately, during the hearing of another appeal one of the parties raised a concern regarding the appointment of an Appeal Board member who previously was the chairperson of the respondent's board.

22. As it turned out, the Appeal Board member in question recused himself from the Appeal Board for purposes of all appeals directed towards decisions taken by the respondent during the period he was the chairperson of its board.

23. A replacement Appeal Board member was appointed with effect from 25 June 2024. Thereafter the parties in this appeal were afforded the opportunity to agree on whether they would want the appeal to start *de novo* or if the Appeal Board, inclusive of the replacement member could proceed to consider the appeal record and make a decision on the appeal.

24. The parties agreed that the Appeal Board as constituted with the replacement member could consider the record and proceedings and hand down its decision in this appeal.

Preliminary issues

The impermissible collateral challenge argument

25. The respondent, both in its heads of argument and during oral argument before the Appeal Board argued that the appellant made an impermissible collateral challenge on the decision of the FIC in determining the amount of the financial penalty as stipulated by section 56(3)(f) of the FIA. The appellant's appeal, it was argued, is not directed at the FIC's decision pursuant to section 56(3)(f) of the FIA.

26. Nevertheless, on a proper reading of the appellant's notice of appeal, it is clear that such argument cannot be sustained. Paragraph 2.2 of the notice of appeal states:

> "*The appellant hereby notes an appeal against the whole of the decision taken by NAMFISA to impose an administrative sanction upon the appellant (and in as far as it may be necessary, against any determination by the Centre of the financial penalty), purportedly in terms of section 56(3)(f) of the Act and communicated to the appellant by way of the letter of imposition, and against any and all underpinning decisions and findings, including those articulated in the letter of imposition.*" (Emphasis added.)

27. The appellant therefore noted an appeal directly against the decision of the FIC to determine the financial penalty. Consequently, the appellant has not raised an impermissible collateral challenge as defined in *Black Range Mining (Pty) Ltd v Minister of Mines and Energy N.O and Others*[1] where the Supreme Court held-

> "*As a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists: a typical example is where the subject is threatened with coercive action by a public authority into doing something or refraining from doing*

[1]2014 (2) NR 320 (SC) at p329 par [20]

something and the subject challenges the administrative act in question 'precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question'. It must be the right remedy sought by the right person in the right proceedings."

28. The appellant quite evidently appealed against the decision of the FIC to determine in terms of section 56(3)(f) the financial penalty the respondent imposed on the appellant.

The nature of the appeal

29. Mr. Kauta on behalf of the respondent argued that the Appeal Board's authority in terms of section 58 the FIA is to hear and decide narrow appeals. He referred the Appeal Board to the decision of the South African Appeal Board in *Hyde Park Auto (Pty) Ltd T/A Sandton Auto v Financial Intelligence Centre*[2] and the South African High Court case of *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre*[3] as authority for this proposition.

30. In *Hyde Park* the Appeal Board held:

"*Such an appeal (as the present) is an appeal against the exercise of a discretion exercised in the light of the requirements listed in sec 45C(2). In this regard the judgment in Federal Mogul Aftermarket SA (Pty) Ltd v Competition Commission and another, 2005 (6) BCLR 613 (Competition AC) is apposite ...*

The Court added:

'This court does not enjoy an unfettered discretion to interfere with the 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 the 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

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[2] Case 12/3/5 delivered on 1 March 2019
[3] 2021 JDR 2254 (GP)

on appeal has limited power to interfere. It can only do so on certain well-recognised grounds, namely, where the court a quo/exercised its discretion capriciously, or upon a wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reasons."

31. The Court in *Harlyn Trading International* held:

"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 those 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. As stated by the court in Florence v Government of the Republic of South Africa:

> *"[113] Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."*

[32] A court therefore does not have the power to substitute its value judgment for the FIC's or the Appellate Board's in the absence of (i) a mistake of fact, (ii) a mistake of law, or (iii) evidence that the discretion was not exercised judiciously. The reason for this limitation is explained by the Constitutional Court in Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited & Another 2015 (5) SA 245 (CC)...

[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."[4] (Emphasis added.)

32. However, although *Hyde Park* and *Harlyn Trading* with respect correctly state the position in South African law pertaining to appeals before the Appeal Board of the Financial Intelligence Centre Act, No. 38 of 2001 (hereafter "the FICA"), i.e. that such appeals are narrow in scope, in our view the proposition is not the correct exposition of the position in Namibian law *ex facie* section 58 of the FIA.

33. Sections 58(4) and (5) of the FIA state:

> "*(4) An appeal is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal.*
>
> *(5) Despite the provisions of subsection (4) the appeal board may-*
>
> *(a) summon any person who, in its opinion, may be able to give information for the purposes of deciding the appeal or who it believes has in his, her or its possession, custody or control any document which has any bearing upon the decision under appeal, to appear before it on a date, time and place specified in the summons, to be questioned or to produce any relevant document and retain for examination any document so produced;*
>
> *(b) administer an oath to or accept an affirmation from any person called as a witness at an appeal; and*
>
> *(c) call any person present at the appeal proceedings as a witness and interrogate such person and require such person to produce any document in his, her or its possession, custody or control.*"

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[4] *Harlyn Trading* at p12-13, par [31]-[32].

34. The FICA's current section 45D under the heading "**Appeal**" has not been initially part of that Act as passed in 2002. By virtue of the Financial Intelligence Centre Amendment Act, No. 11 of 2008[5] section 45D was added to the FICA. The substituted section 45D(3) and (4) stated:

"(3) An appeal is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal.

(4) Despite the provisions of subsection (3) the appeal board may -

(a) summon any person who, in its opinion, may be able to give information for the purposes of the appeal or who it believes has in his, her or its possession, custody or control any document which has any bearing upon the decision under appeal, to appear before it at a time and place specified in the summons, to be questioned or to produce that document, and retain for examination any document so produced;

(b) administer an oath to or accept an affirmation from any person called as a witness at an appeal; and

(c) call any person present at the appeal proceedings as a witness and interrogate such person and require such person to produce any document in his, her or its possession, custody or control, and such a person shall be entitled to legal representation at his or her own expense.". (Emphasis added.)

35. By comparing sections 58(3) and (4) of the FIA with sections 45D(3) and (4) of the amended FICA it can be readily seen that they are identical.

36. Appeals decided by the FICA Appeal Board on the basis of section 45D(3) and (4) were in nature wide appeals. We will revert to this aspect hereunder.

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[5] Available at https://www.saflii.org/za/legis/num_act/ficaa2008323.pdf

37. In 2017, the FICA was again amended by the Financial Intelligence Centre Amendment Act, No. 1 of 2017[6]. That Act commenced on 13 June 2017. Sections 45D(3) and (4) were substituted and currently read as follows:

"*(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.*

(3A) Subject to subsection (4), no oral or written evidence or factual information and documentation, other than that which 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.

(3B) Despite subsection (3), the chairperson of the appeal board may on application by-

(a) the appellant concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation not made available to the Centre or the supervisory body prior to the making of the decision against which the appeal is lodged; or

(b) the Centre or the supervisory body concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation to be submitted and introduced into the record of the appeal.

(3C) If introduction by an appellant of further oral and written evidence or factual documentation is allowed into the record of the appeal under subsection (3B) (a), the matter must be submitted to the Centre or the supervisory body in question for reconsideration.

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[6] Available at https://www.treasury.gov.za/legislation/regulations/FICA/FIC%20Amendment%20Act%201%20of%202017.pdf

(3D) When an appeal is submitted to the Centre or a supervisory body as contemplated in subsection (3C), the appeal is deferred pending the final decision of the Centre or the supervisory body.

(3E) If, after the Centre or the supervisory body concerned has made a final decision as contemplated in subsection (3D), the appellant continues with the appeal by giving written notice to the appeal board, the record must include the further oral evidence properly transcribed, the written evidence or factual information or documentation allowed, and the further reasons or documentation submitted by the Centre or the supervisory body concerned.

(4) For the purposes of allowing further oral evidence in terms of subsection (3B) the appeal board may-

(a) summon any person who, in its opinion, may be able to give information for the purposes of the appeal or who it believes has in his, her or its possession, custody or control any document which has any bearing upon the decision under appeal, to appear before it at a time and place specified in the summons, to be questioned or to produce that document, and retain for examination any document so produced;

(b) administer an oath to or accept an affirmation from any person called as a witness at an appeal; and

(c) call any person present at the appeal proceedings as a witness and interrogate such person and require such person to produce any document in his, her or its possession, custody or control, and such a person shall be entitled to legal representation at his or her own expense."

38. The 2017 FICA Amendment changed the scope of the appeal under FICA from a wide appeal to a narrow appeal. This can be seen from section 45D(3) which required the Appeal Board to only have regard to "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". This is in stark contrast to the previous

iteration of that section which allowed the Appeal Board to decide appeals on "the affidavits and supporting documents presented to the appeal board by the parties to the appeal".

39. The transition from a wide to a narrow appeal was confirmed by the decision of the FICA Appeal Board decision of *Mit Mak Motors CC v The Director: The Financial Intelligence Centre and another*[7] (*per* Judge WJ Hartzenberg presiding). This decision was decided just after the commencement of the 2017 FICA Amendment Act on 13 June 2017.

> "*[14] Before dealing further with the argument it is necessary to consider the appeal procedure prescribed in the FIC Act. Originally Section 45D (3) of the FIC Act stipulated that an appeal would be a re-hearing. It read as follows:*
>
> > *"An appeal is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal."*
>
> *Section 45D(4) provides that the appeal board can summon any person, who in its opinion may be able to give information for the purposes of the appeal or who is in possession of a document which has a bearing on the appeal to give evidence or to produce the document.*
>
> *[15] In terms of Act 1 of 2017, the FIC Amendment Act, Section 45D(3) has now been amended to read as follows:*
>
> > *"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."*
>
> *[16] Simultaneously new subsections (3A), (3B), (3C), (3D) and (3E) were inserted in the FIC Act. They read ...* [8]

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[7] Appeal No12/3//5 delivered on 3/11/2017 at p12 par [21]
[8] Subsections (3A), (3B), (3C), (3D) and (3E) were quoted in full above.

[17] *It is evident that the Legislature deemed it necessary to do away with a situation where the appeal board was to adjudicate afresh not only on the evidential material available to the Centre or supervisory body when the decision was taken, but also on new evidence that could be introduced by affidavit. This would result in a full-blown hearing in terms of sub-section 45D(4). In this instance, the appeal is confined only to the record which was before the decision maker at the time when the decision was taken. On good cause shown further evidence can be introduced in the record. "Good cause" would certainly entail an acceptable explanation why the evidence had not been proffered earlier, that the evidence is material and that if it w a s before decision maker it could have led to a more lenient penalty. In exceptional cases in criminal appeals, courts of appeal allow appellants, on good cause shown, to introduce evidence that can lead to the setting aside, or substitution of a conviction or to a different sentence.*

[18] *If someone who is aggrieved by an administrative act wants to have such administrative action set aside or varied, he has to do so in the High Court, by way of review in terms of Rule 534. That remedy is available to anybody upon whom administrative sanctions in terms of section 45C of the FIC Act had been imposed. The FIC Appeal Board proceedings differ from review proceedings. It is evident that the Legislature created an appeal procedure where the tribunal was created specifically for such purpose and in this instance, to consider whether the FIC applied the provisions of section 45 properly or not. The result is inevitable. When hearing an appeal, this board is entitled to intervene when the FIC has made a mistake either in its evaluation of the facts or in its interpretation of the law. The only other basis upon which it can intervene is when the sanction imposed is shockingly inappropriate.*" (Emphasis added.)

40. The Appeal Board in the *Mit Mak* matter therefore distinguished between the full rehearing procedure (wide appeal) under the 2008 FICA Amendment and the appeal confined only to the record which was before the decision maker at the time when the decision was taken (narrow appeal) under the 2017 FICA Amendment.

41. Put differently, all appeals decided by the Appeal Board between 27 August 2008 and 13 June 2017 were based on section 45D added to the FICA by virtue of 2008 FICA Amendment and were wide appeals. Appeals decided after the commencement of the 2017 FICA Amendment were decided on the basis of the amended section 45D which limited appeals to narrow appeals.

42. It is in this context that the Court's decision in *Hyde Park Auto* and *Harlyn Trading International* regarding the power of the Appeal Board to intervene in a decision of the FIC must be understood. The Appeal Board and Court in those decisions were concerned not with a wide appeal, but with a narrow appeal.

43. At the hearing Mr. Kauta assertively sought to further convince the Appeal Board were limited to narrow appeals with reference to *JSE Limited and another v The Registrar of Security Services and another*[9] a decision of the Appeal Board of the Financial Services Board ("the FSB") which was the financial regulatory agency responsible in South Africa for the non-banking financial services industry from 1990 to 2018. On 1 April 2018, its responsibilities were split into two new agencies the Financial Sector Conduct Authority for conduct regulation and the Prudential Authority for prudential regulation.

44. The respondent at inception in 2001 was modelled after the FSB and in many respects the enabling Acts of the two entities were identical.

45. In *JSE Limited* retired South African Supreme Court Judge Harms held -

> "*12. Although this Board has more than once dealt with the nature of appeals to it and its powers, the issues were again raised. It is fortunately no longer necessary to rely on our own jurisprudence because the Supreme Court of Appeal has since adopted the same approach.*
>
> *13. In Registrar of Pension Funds v Howie NO and Others [2015] ZASCA 203; [2016] 1 All SA 694 (SCA), the court said at para [6]:*

[9] Case number: A25/2016 delivered on

"The powers of the Appeal Board are set out in s 26B(15) of the [FSB] Act. These read as follows:

'The appeal board may -

(a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or

(b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine.'

The appeal is accordingly of the second type referred to in Tikly. The Appeal Board decides whether the Registrar's decision was right or wrong. Its decision either affirms or replaces that of the Registrar.

14. The second type as defined in Tikly is –

'an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.'"[10]

46. In *Registrar of Pension Funds v Howie*, which Judge Harms referred to in his decision, the South African Supreme Court on 2 December 2015 held:

"*[5] If anyone is aggrieved by any decision by the Registrar, including any decision pursuant to s 14 of the Act, they are entitled to lodge an appeal against that decision with the Appeal Board in terms of s 26(1) of the FSB Act. The composition of the Appeal Board is set out in s 26A of the FSB Act. It must be chaired by a retired judge or an advocate or attorney with a minimum of ten*

[10] At p6-7

years experience. Its proceedings must be heard in public (s 26B(9)) and parties are entitled to representation by a legal representative (s 26B(8)). An appeal is decided on the written evidence, factual information and documentation submitted to the Registrar before the decision that is the subject of the appeal was taken (s 26B(10)).

[6] The powers of the Appeal Board are set out in s 26B(15) of the Act. These read as follows:

'The appeal board may-
(a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or
(b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine.'

The appeal is accordingly of the second type referred to in Tikly. The Appeal Board decides whether the Registrar's decision was right or wrong. Its decision either affirms or replaces that of the Registrar." (Emphasis added and footnotes removed.)

47. Mr. Kauta relied on paragraph [6] of *Registrar of Pension Funds v Howie* and on that basis alone sought to persuade the Appeal Board that it had a narrow discretion, limited to narrow appeals.

48. However, the appeals before the FSB Appeal Board were not always narrow appeals. In *Nichol and Another v The Registrar of Pension Funds and Six Others*[11] the South African Supreme Court on 29 September 2005 held[12]:

"*[21] In terms of s 26(7), the Commissions Act 8 of 1947 applies to the Appeal Board and it thus has all the powers of a High Court to summon and examine witnesses and to call for the production of books, documents and objects. It has very wide powers on*

[11] 2005 JDR 1138 (SCA)
[12] At p14-15

appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to. In addition, it is empowered under s 26(2A) to grant interim relief by suspending the operation or execution of the decision appealed against and, under s 26(14), it can make an appropriate order as to costs.

[22] The Appeal Board therefore conducts an appeal in the fullest sense - it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information." (Emphasis added and footnotes removed.)

49. Mr. Kauta indeed submitted that the appeal before the NAMFISA Appeal Board is an appeal in the wide sense, on the same bases as was considered in *Nichol*.

50. The variance between the two Supreme Court judgments on the same issue, concerned with the same Appeal Board is easily explained with reference to the evolution of the FSB Act, No. 97 of 1990[13] itself, which in respect of its Appeal Board followed a similar amendment trajectory as the FICA Appeal Board.

51. In 2005, when *Nichol* was decided, section 26(7) and of the FSB Act provided:

"*(7) For the purposes of an appeal the Commissions Act, 1947 (Act No.8 of 1947), shall apply to the board of appeal and witnesses and their evidence as if the board of appeal were a commission to which the said Act applied and the chairman of such board were the secretary thereof.*"

52. Section 26(7) of the FSB Act (at the time of *Nichol* was decided) is identical to section 24(3) of the NAMFISA Act.

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[13] Available at https://www.gov.za/sites/default/files/gcis_document/201503/act-97-1990.pdf

53. Section 26(10) of the FSB Act stipulated:

"*(10) The board of appeal may after hearing the appeal-*
(a) confirm, set aside or vary the relevant decision of the executive officer; and
(b) order that the decision of the board of appeal be given effect to."

54. Section 26(10) of the FSB Act (at the time *Nichol* was decided) is identical to section 24(6) of the NAMFISA Act.

55. The Supreme Court in *Howie* considered an FSB Act that was substantially amended. Section 26(7) was repealed and replaced with section 26B(10) (to which the Court referred[14]) by virtue of the Financial Services Laws General Amendment Act, No 22 of 2008.[15]

56. Section 26B(10) provided:

"*(10) An appeal is decided on the written evidence. factual information and documentation submitted to the decision-maker before the decision which is the subject of the appeal was taken.*"

57. Section 26B(10) does not have an equivalent in the NAMFISA Act and explains the difference between *Nichol* and *Howie*.

58. Mr. Tötemeyer who appeared on behalf of the appellant argued that appeals before the Appeal Board are wide and not narrow. As authority he referred the Appeal Board to *Baxter*[16] where the author relying on *Tikly v Johannes NO*[17] referred to three categories of appeal namely, reviews, ordinary appeals and wide appeals. The author further noted:

"*If ... the right to appeal is an ordinary or wide appeal, the wisdom of the decision may be considered. An ordinary appeal involves a 'rehearing on the merits but limited to*

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[14] At par [5]
[15] Available at https://www.gov.za/sites/default/files/gcis_document/201409/a22-08ocr.pdf
[16] Administrative Law, 3d Edition, a seminal work on the subject matter, widely quoted in administrative law decisions by Courts and Tribunals
[17] 1963 (2) SA 588 (T) at 590F-591A

the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong'[18]*. Such an appeal is referred to as an ordinary appeal because it corresponds to the normal appellate jurisdiction of the courts. A 'wide appeal' involves a complete rehearing of, and fresh determination of the merits of, the matter with or without additional evidence or information... Usually, however a wide appeal is intended.*"[19] (Emphasis added.)

59. In *Tikly* the Court was concerned with "the correct construction of sec. 19 (5) [of the Group Areas Development Act, 69 of 1955], as amended by sec. 15 of Act 81 of 1959 which stated:

"*An appeal lodged in terms of sub-sec. (4) shall be heard by a revision court consisting of a magistrate or retired magistrate and two assessors appointed by the Minister which shall determine the basic value of the affected property, and its determination shall be final.*"

60. The Court held:

"*The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:*

(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 evidence or information;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

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[18] *Supra* at 590F
[19] At pages 256 and 257

(iii) *a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.*"[20]. (References to case law removed.)

61. The Court further held that the "sense in which 'appeal' was used in the section must be determined from its context in the Act."[21]

62. Having regard to the construct of section 58 of the FIA and for the reasons already set out above, in our view the appeal envisaged under section 58 of the FIA is a wide appeal and involves a full rehearing of the matter. That this is so, is clear from the following:

62.1. As a general rule section 58(4) states that appeals must be decided on the affidavits and supporting documents presented to the Appeal Board by the parties to the appeal. The section does not limit the appeal to the record of proceedings before the FIC or the respondent as is the case with the current FICA.

62.2. Section 58(5) allows the Appeal Board to summon persons to testify at an appeal hearing, including persons present at the hearing. The Appeal Board may also require any such person to produce any document in his, her or its possession, custody or control for the purposes of deciding the appeal.

62.3. Thus, a party is not confined to the record of what happened before the original decision maker.

63. This is what distinguishes the appeal procedure in the FIA from the prevailing provisions in the FICA. The FIA envisages a complete rehearing of the matter, a fresh determination on the merits.

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[20] At 590F-591A
[21] At 591A

64. With respect, as the Supreme Court did, we caution that parties should not blindly follow precedent in South Africa but should analyse the proper context within which decisions by South African Courts and Tribunals are decided. This would ensure that the Appeal Board's attention is properly focused on the issues that require adjudication.

65. Since appeals brought before the Appeal Board are wide appeals, the Appeal Board is therefore at liberty to determine the appeal on that basis. Consequently, the Appeal Board is not limited in its decision-making to the grounds for interfering with the decision of the original decisionmaker (whether the FIC or a supervisory body such as the respondent) as propounded in *Hyde Park Auto* and *Harlyn Trading International*.

66. Consequently, the Appeal Board is duty-bound to consider all the evidence which was placed before us.

67. Nevertheless, the Court in *Harlyn Trading International* also held that the construct of section 45D(7) of the FICA (identical to section 58(8) of the FIA) signifies that the Appeal Board's powers are narrow, not unlimited in deciding the outcome of an appeal.[22] In this regard:

67.1. Section 58(8) states:

"*The appeal board may-*

(a) confirm, set aside or vary a decision of the Centre or supervisory body; or

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

67.2. Section 45D(7) provides:

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[22] *Supra* at p12 par [30]

"The appeal board may-

(a) confirm, set aside or vary the relevant decision of the Centre or supervisory body; or

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

68. Apart from minor differences the two sections are identical. The powers of the FICA and by extension the FIA Appeal Board in the context of sections 45D(7) and 58(8) are finite, limited to confirmation, setting aside or varying the original decision or referring it back to the decisionmaker for consideration or reconsideration, regardless of whether the Appeal Board concerned is dealing with a narrow or wide appeal. This in our view is the import of the dictum in *Harlyn Trading International* that the "Appeal Board's powers are furthermore narrow as appears from the provisions of section 45D(7) of FICA."

69. This is so since neither the FIA Appeal Board nor the FICA Appeal Board has the power to substitute the decision of the respective FIC's with their own. There is no such express authority reserved for them in either section 45D(7) or section 58(8).

70. This is borne out by the decision of *Potgieter and Another v Howie and Others NNO*[23]. The Court was concerned with the question of whether the Appeal Board in question could substitute its decision for the decision of the Johannesburg Stock Exchange ("JSE"). The Court held at paragraph [36]:

"[36] It is therefore logical to accept that the absence of an express provision empowering the appeal board with the jurisdiction to substitute its own decision in place of the decision of the JSE is an indication that the appeal board cannot assume

[23] 2014 (3) SA 336 (GP)

such powers on its own. The appeal board could therefore not substitute its own decision in place of the decision appealed against."[24] (Emphasis added)

71. It is undeniably correct that as a creature of statute, the Appeal Board concerned cannot expropriate or exercise powers outside the scope of section 45D(7) (South Africa FICA) or section 58(8) (Namibia FIA).

72. However, in a later decision of the South African Supreme Court in *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board*[25] the Court held at paragraph [40]-

"*Tellumat's argument correctly proceeded from the premise that the Registrar's decision in terms of s 14 is administrative action. As the function of the Appeal Board is to 'confirm, set aside, or vary' that decision and to order that the decision of the Appeal Board be given effect to, the Appeal Board's decision either reaffirms the Registrar's decision or substitutes it with a varied or different decision.*"

73. It appears that the Supreme Court in South Africa thus held the view that the FSB Appeal Board in varying a decision may substitute it with a varied decision or a different decision. However, with respect the Court in our view made an *obiter* remark as the issue was not expressly argued during the hearing.

74. Our High Court in *Registrar of Pension Funds v Board of Appeal Established in Terms of Act 3 of 2001 and another*[26] expressly approved and applied the dictum of *Potgieter and Another v Howie and Others NNO* at paragraph [36] above. With reference to section 24(6) of the NAMFISA Act (which provides that the Appeal Board established under that Act may, after hearing an appeal, confirm, set aside or vary the decision of the chief executive officer, and, which are in those respects cast in terms identical to section 45D(7) and section 58(8)), the Court held at par [107]:

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[24] *Supra* p347 para [36]
[25] A judgment in which handed down simultaneously with *Howie*. The two appeals arise out of the same decision by the Board of Appeal (See *Howie p3, paragraph [1]*)
[26] 2024 JDR 4262 (Nm)

"Section 24(6) does not empower the Appeal Board to replace or substitute the decision of the Registrar dated 9 December 2022 with its own decision and to order the Registrar's rejection of the Rule Amendment 3 with the approval of the said rule and directing the Registrar to sign a letter approving the Rule Amendment 3. By so doing, the Appeal Board acted ultra vires its powers."[27]

The appellant's main grounds of appeal

75. The appellant raised various grounds of appeal in its notice of appeal and heads of argument, but emphasized the following during argument before the Appeal Board:

Failure of the application of the mind by NAMFISA

75.1. NAMFISA failed to take into account relevant considerations and to ignore irrelevant considerations.

75.2. In particular, NAMFISA did not take into account remedial steps the appellant took in determining the sanction it eventually imposed.

Failure to comply with directives issued by FIC and NAMFISA

75.3. In considering the guilt of the appellant, the respondent considered that the appellant failed to comply with directives of the FIC and NAMFISA in consequence to the CAR issued by each authority.

75.4. The respondent failed to appreciate that in fact there were no directives issues in consequence to each CAR.

75.5. The respondent failed to appreciate that the CAR issued by the FIC in August 2013 and the CAR issued by the respondent on 28 February 2017 made recommendations and did not issue directives in terms of section 54 of the FIA.

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[27] At p34

Abdication or fettering of decision-making authority by the FIC

75.6. There was a failure by the respondent to appreciate and apply the important distinction between 'in consultation' and 'after consultation' leading to a violation of section 56 of the FIA in the decision-making process which resulted in the FIC not in fact determining the financial penalty as required by section 56(1)(f).

Failure to apply audi alteram partem rule

75.7. A fundamental failure of the respondent's right to be heard ("*audi alteram partem*") occurred at various instances, starting with the failure to provide adequate information to allow for meaningful representations to be made *ab initio*. Further violations of that right occurred during the ensuing process, including in relation to the proceedings before the respondent's enforcement committee and the enforcement policy applied in arriving at the Penalty Decision.

No factual basis for imposing sanction

75.8. The respondent erred in law and/or in fact and/or misdirected itself in seeking to invoke section 56 of the FIA in the circumstances of the case. A fundamental failure on the part of the respondent to properly apply the mind to relevant matter, and to ignore irrelevant matter, occurred, which resulted in a misdirection. Such misdirection is manifested by the respondent concluding without the necessary factual underpinning that an administrative sanction was merited. No basis existed, in the first place, for an administrative sanction to be imposed.

The appellant's submissions

Failure of the application of the mind by NAMFISA

76. It was appellant's contention that the respondent failed to apply its mind to relevant considerations, in particular the remedial actions of the appellant as set out in detail in its progress report dated 21 December 2018.

77. Reference was made to the respondent's enforcement brief (PSG29) prepared for a meeting of its enforcement committee. The purpose of PSG29 was to set out the appellant's non-compliance with its AML/CFT/CPF obligations.

78. It was noted in PSG29 that lack of progress in implementation of previous proposed remedial actions raised doubts if the appellant would ever implement remedial actions on its own accord to remedy the non-compliance as there was lack of satisfactory progress towards the remedying the non-compliance. As a result, the N$2 million financial penalty was proposed.

79. Mr. Tötemeyer further made the following submissions:

79.1. At the meeting of the enforcement committee on 12 December 2018 the points mentioned in PSG29 were repeated and the same penalty was proposed.

79.2. Thereafter, in the 21 December 2018 progress report the appellant furnished the respondent with a lengthy exposition with annexures detailing the remedial actions it took in developing and adopting of a risk-based approach. The exposition also detailed the findings of an internal audit report which confirmed that 17 of the 19 audit findings were addressed.

79.3. Attached to the progress report was the appellant's risk management and compliance program (RMCP) which set out the risk-based approach of the appellant in dealing with clients. Furthermore, customer due diligence, recordkeeping, account and transaction monitoring procedures were elaborately explained.

79.4. The remedial steps were taken over a considerable period of time in 2018 in conjunction with the respondent. At the time of the enforcement committee meeting on 12 December 2018, the respondent was aware of most of the

remedial steps taken by the appellant and was well-placed to inform the enforcement committee of the progress that the appellant made. Those remedial steps addressed all of the findings by the respondents as well as the appellant's internal audit.

79.5. The respondent in its notice of intention to impose an administrative penalty dated 5 February 2019 reiterated that the appellant made unsatisfactory progress in the implementation of remedial actions to address recurrent non-compliance, that its transgressions were ongoing and that in the circumstances appropriate enforcement action had to be taken against the appellant to enforce compliance. The respondent noted that it took into consideration the factors mentioned in section 56(2) of the FIA, which compelled the respondent to take into account "any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance".

79.6. However, no mention of or any reference to the appellant's progress report of 21 December 2018 and the steps it took to remedy transgressions were made in the respondent's 5 February 2019 letter, in which the respondent notified the appellant that it intended to impose the N$2 million financial penalty, which was the same sanction proposed in the enforcement brief and accepted by the enforcement committee.

79.7. This demonstrated that the respondent did not apply its mind to what the appellant reported in its 21 December 2018 progress report regarding the remedial actions it took and which addressed all the issues raised by the respondent in its 5 February 2019 notice.

79.8. The appellant in its founding affidavit detailed its criticisms against the respondent's 5 February 2019 notice, particularly that the respondent did not take into account the appellant's 21 December 2018 progress report. In the respondent's answering affidavit it did not deny or in any way placed in issue that the 21 December progress report addressed all the points raised by the respondent in its 5 February 2019 notice.

79.9. In the appellant's response dated 19 March 2019 to the respondent's 5 February 2019 notice, the 21 December 2018 progress report was attached and the remedial steps taken by the appellant were detailed. The appellant complained that the respondent made no reference to the 21 December progress report.

79.10. The first mention of the 21 December progress report was in respondent's Penalty Notice dated 2 September 2019, which again stated that the appellant didn't make satisfactory progress in remedying non-compliance. The respondent's view "regarding PSG's progress report of 21 December 2018", was that it noted the progress highlighted therein. However, "PSG's contraventions with the FIA and subordinate legislation as detected in 2013 and 2017 are serious, severe and repetitive."

79.11. The financial penalty imposed on 2 September 2019 remained the same from the onset, being the N$2 million penalty. The penalty thus does not reflect any consideration by the respondent of the 21 December 2018 progress report and is a manifestation that the respondent failed to apply its mind.

Failure to comply with directives issued by FIC and NAMFISA

80. In respect of this ground of appeal Mr. Tötemeyer submitted that the enforcement brief dated 5 December 2018 (PSG29) alleged that the appellant failed to fully comply with the directives contained in the FIC CAR of 2013 and CAR of 2017.

81. He further submitted that the Penalty Notice charged the appellant with a failure to comply with directives issued in terms of section 54(2) of the FIA on the basis that the appellant did not comply with directives issued by the FIC and the respondent in 2013 and 2017 respectively.

82. Mr. Tötemeyer submitted that neither the FIC nor the respondent issued directives in the respective CARs of 2013 and 2017. He contended that the 2013 CAR only contained recommendations and ended with the FIC congratulating the appellant for its "commendable efforts", stating that there was room for improvement and urging the appellant to consider the "observations and recommendations... and all guidance notes"

in order to "enhance FIA compliance and overall effectiveness of AML/CFT controls". Similarly, the 2017 CAR did not contain directives. It made recommendations and urged the appellant to consider the findings.

83. Consequently, insofar as the impugned decision was based on non-compliance with directives in the respective CARs, that would be wrong.

Abdication or fettering of decision-making authority by the FIC

84. Concerning the ground of appeal pertaining to abdication or fettering of decision-making authority by the FIC, Mr. Tötemeyer contended:

84.1. The FIC and the respondent did not comply with Section 56(3)(f). In terms of section 56 various stages are set out for the FIC or the respondent (as the only supervisory body currently specified in terms of the FIA) within which they should exercise their decision-making authority.

84.2. The imposition of an administrative sanction is subject to the following:

84.2.1. Whenever the respondent wants to impose any of the sanctions set out in subsection (3)(a) to (e) above, it could do so only after consultation with the FIC and *vice versa*.

84.2.2. If the respondent or the FIC wants to impose a financial penalty referred to in subsection (3)((f), a different procedure applies. The FIC had to first determine the quantum of the penalty, which may not exceed N$10 million. However, before the FIC could determine the penalty, it must consult with the "relevant supervisory or regulatory bodies". It is only after such consultation that the FIC could determine the penalty. It is only after the FIC determines the quantum of the penalty in this way, that the respondent or the FIC may impose the penalty.

84.2.3. Therefore, the FIC had to determine the penalty after it consulted the respondent and Namibian Stock Exchange (NSX, the regulator for the appellant). Neither the respondent nor the NSX may set the quantum of the financial penalty. That is the statutory duty of the FIC after the necessary consultations.

84.3. The FIC before determining the quantum of the financial penalty had to listen to and give serious consideration to the views of the respondent and the NSX and afterwards the FIC had to decide on its own. It had to exercise its own mind.

84.4. The minutes of the enforcement committee meeting held on 12 December 2018, under the heading "proposed administrative sanction against PSG Wealth Management" the respondent proposed that the N$2 million penalty be imposed on the appellant. It is recorded that all members of the enforcement committee agreed to the recommendation, including Ms. Z. Barry, Deputy Director of the FIC.

84.5. At paragraph 7.2 (under the heading "Consultation process with FIC", which was an agenda item of the meeting) the consultation between the FIC and the respondent was discussed. Ms. Barry is recorded as having said that it would be time consuming and cause delays in the process if the FIC was still to be consulted. Ms. Barry was of the view that since she was already representing the FIC as a member on the enforcement committee there was no need to further consult the FIC via formal letters. The implication of that statement was that the respondent's chief executive officer could make the final decision on the financial penalty once agreed at the enforcement committee meeting.

84.6. In this regard the FIC fettered or abdicated its responsibility to determine the quantum of the penalty after consultation with the respondent and left the final decision on the financial penalty to the respondent.

84.7. The record indicates that one other enforcement committee meeting was held on 25 April 2019. The minutes made one reference to the appellant where it was mentioned that appellant together with other entities submitted their

representations on the respondent's notice of intention to impose an administrative sanction within the 30-day periods that were stipulated in the notices. And further that the respondent would assess the representations and submit recommended actions for considerations by the enforcement committee. Thereafter no further enforcement committee discussions regarding the proposed penalty imposed on the appellant were reflected anywhere in the appeal record.

84.8. In the respondent's answering affidavit, its chief executive officer Mr. Kenneth Matomola noted that the "penalty imposed was determined by the FIC, in consultation with NAMFISA" (at par 91).

84.9. This was wrong in law since the respondent didn't have the legal authority to determine the financial penalty in consultation with the FIC. The FIC was required to determine the penalty after consultation with the respondent. The respondent thus failed to appreciate the nature and extent of its statutory powers and duties and functions relevant to the imposition of the financial penalty.

84.10. Nevertheless, in a letter dated 21 June 2019 under the heading "FIA S. 56(3) CONSULTATION//[PSG] WEALTH MANAGEMENT (PTY) LTD" the Director of the FIC directed a letter to the chief executive officer of the respondent and stated *inter alia* that:

"*The FIC as such, in terms of section 56(3)(f), herewith determine that a justifiable fine which will be proportionate to the non-compliance observed, will be that of NAD5 million (five million Namibian dollars) of which NAD4 million (four million Namibian dollars) is suspended for five years on condition that no further non-compliance with the identified FIA sections is observed for the duration of the period of suspension. In this regard, NAMFISA may consider adding any further conditions of suspension to ensure an overall conformation to FIA compliance is honed.*"

84.11. The appeal records and pleadings do not reflect any discussion of the determination made by the FIC in the letter of 21 June 2019. In fact, despite the

determination that the penalty to be imposed should be the one of N$5 million of which N$4 million should be conditionally suspended for five years, ("the N$5 million penalty') the Penalty Notice of 2 September 2019 imposed the N$2 million penalty as agreed at the enforcement committee meeting of 12 December 2018.

84.12. The FIC did not therefore determine the penalty as required under section 56(3)(f). The final decision on the quantum of the financial penalty which was imposed on the appellant was taken by the wrong decision-maker, being the respondent.

Failure to apply audi alteram partem rule

85. On this ground counsel for the appellant submitted:

85.1. As a general proposition, where a person's rights will be affected by an administrative decision-maker, that person has the right to be heard prior to the decision being made. Anything adverse which a decision maker may harbour against an affected person should be brought to that person's attention. This will enable the person to properly respond thereto.

85.2. As a general rule, a person must be afforded the right to be heard before the decision is taken.[28] Failure to properly hear an affected person is a breach of article 18 of the Constitution and should lead to the setting aside of the decision since not affording an affected person *audi alteram partem* on its own vitiates the decision.

85.3. The principle of *audi alteram partem* requires on the procedural level that the decision-maker must give the interested party access to all relevant material and information in order to make meaningful representations.

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[28] Reference was made to *Viljoen and Another v Inspector-General of the Namibian Police* - 2004 NR 225 (HC) where the Court accepted this principle as a general proposition of our law, at p243C

85.4. Furthermore, a statute need not say that an affected person has *audi alteram partem* for the principle to apply. If a statute authorises an administrative body to take a decision which may adversely affect another's rights, that person has the right to be heard, regardless if the statute expressly gives the right to *audi alteram partem*. The rights entrenched by article 18 are superimposed over all statutory provisions.[29]

85.5. Section 56 envisages a decision with four stages: The first stage is that in terms of section 56(1) the respondent or the FIC must, before they impose an administrative sanction, be satisfied on available facts and information that an accountable institution such as the appellant has failed to comply with -

(a) a provision of the FIA or any regulation, order, determination or directive issued in terms thereof;

(b) a condition of a licence, registration, approval or authorisation issued or amended in accordance with the FIA or any other law; or

(c) has failed to comply with a directive issued in terms of section 54(1) or (2) of the FIA.

85.6. The fact that the FIA does not say that an accountable institution is entitled to *audi alteram partem* at this stage does not mean that such institution does not have the right to be heard. The appellant should have been heard at that stage already as article 18 is superimposed on section 56.

85.7. The enforcement policy in any event allows for *audi alteram partem* at stage 1 of the decision-making process contemplated by section 56 where in paragraph 9.6 it requires the respondent before imposing an administrative sanction to give the institution concerned written notice informing it of the alleged nature of the

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[29] Reliance was placed on *Viljoen and Another v Inspector-General of the Namibian Police* (*supra*) where the Court held at p241E-F that an unfair decision is liable to be set aside based on a person's common-law right to be heard, reinforced by the constitutional right to fair and reasonable administrative action under art 18 of the Constitution.

non-compliance, of any previously issued directive on the matter and of the intention to impose an administrative sanction. The institution is afforded 30 days after the notification to make written representations.

85.8. Any representations by the institution concerned must be referred to the responsible General Manager who may convene an enforcement committee meeting for deliberation and recommendation to the Registrar.

85.9. Before making recommendations adverse to the appellant to the Registrar, the enforcement committee was supposed to afford the appellant an opportunity to address any such recommendations or at least make representations on any such recommendations. This opportunity was not afforded to the appellant.

85.10. The enforcement policy also allows for a second round of *audi alteram partem* in paragraph 11.4.2 which stipulates that should the Registrar decide to impose an administrative sanction he or she must, within 10 working days after receipt of the enforcement committee's recommendation, in writing, inform the affected institution of such intention and the amount or particulars of the intended administrative sanction. The Registrar must also advise the institution that it may make written representations to the Registrar on the amount or particulars of the intended administrative sanction.

85.11. In terms of paragraph 11 of the enforcement policy, since the Registrar intended to impose an administrative sanction, the appellant had to be afforded an opportunity to make representations before the Registrar imposed the sanction.

85.12. The respondent did not comply with the enforcement policy and in fact denied the appellant an opportunity for *audi alteram partem* before imposing the Penalty Decision on 2 September 2019. During April 2019 the appellant prepared a presentation for the respondent setting out its remedial steps and compliance with the FIA and sought an opportunity to meet with the respondent. However, despite promises that a meeting would be arranged, that was never done.

85.13. In the appellant's heads of argument, the further point is made that if the respondent consulted with the FIC and another relevant regulatory body as required by the relevant provisions of the FIA, the respondent failed to disclose the content of any such consultations and/or what was conveyed to the respondent by the FIC or the relevant regulatory body or regulator. This failure infringed the appellant's rights in terms of article 18 of the Constitution and the common law to make meaningful representations thereon (particularly in as far as adverse considerations were therein entertained or advanced), and which should have been disclosed to the appellant in the notice letter in order to allow the appellant to make representations thereon. If such consultations occurred, the respondent failed to disclose the content of submissions made by the FIC and/or the NSX (being the regulatory body to the appellant) and failed to afford the appellant an opportunity to make representations thereon, thus violating *audi alteram partem*.

85.14. In the context of section 56(3)(f), if there were consultations between the FIC and the respondent regarding the quantum of the financial penalty, adverse considerations were taken into account and in respect whereof the appellant was not afforded an opportunity to make representations.

85.15. In addition, the appellant should have been given the respondent's enforcement policy and the administrative fine matrix which was used in determining the administrative sanction imposed. The appellant should have been afforded the opportunity to make representations on the letter of 21 June 2019 since an adverse decision pertaining to the appellant was made therein. The respondent has not given the appellant such information and an opportunity to make representations.

85.16. Article 18 further required that the appellant should have been given copies of the enforcement policy and the minutes of the enforcement committee meeting which discussed the appellant. Reliance was placed on *Onesmus vs the Permanent Secretary*[30] for the proposition that the appellant should have been

[30] 2010 (2) NR 460 (HC)

given a copy of the enforcement policy and the administrative fine matrix, where the High Court held[31]:

> "*The fact is that the so-called policy (on which the Permanent Secretary relies for the reason of the applicant's transfer) is nowhere to be found in writing. I do not query the Permanent Secretary's entitlement to lay down policies for his staff members. But relying on policies existing in the minds of people only, and which cannot be ascertained by reference to written documents, would almost always be unreasonable (for that reason alone) and its procedural implementation unfair, unless it can be proven that the policy is so well known that it is hardly necessary to put it in writing. How can any person be afforded the right to be heard, and to make meaningful representations, if the policy is not readily ascertainable and known.*"

85.17. The FIC letter of 21 June 2019 was first seen by the appellant when it was included in NAMFISA record. Before then, the appellant did not have sight of that letter. The appellant was also not afforded an opportunity to make representations on the letter to the FIC concerning what is recorded therein.

85.18. In the final analysis, the respondent did not afford the appellant the right to be heard and to make meaningful representations before the Penalty Decision was imposed. On this basis the respondent's Penalty Decision should be set aside.

The respondent's submissions

Failure of the application of the mind by NAMFISA

86. On this ground of appeal, it was contended by Mr. Kauta on behalf of the respondent that:

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[31] at p466, par [13]

86.1. The appellant commenced the enquiry regarding whether the respondent failed to properly apply its mind at the incorrect starting point in its contention that the respondent did not consider the appellant's 21 December 2018 progress report.

86.2. In *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre*[32] the Court recognized three stages in instituting an administrative sanction.

86.3. In the first stage the FIC or the supervisory body must satisfy itself that a breach of the law has indeed taken place. This jurisdictional determination must be made in terms of section 45C(1) of the FICA (identical to section 56(1) of the FIA) which must be satisfied before determining the appropriate sanction.

86.4. In *Kabinet Van Die Tussentydse Regering Vir Suidwes-Afrika en 'n Ander v Katofa*[33] it was held that-

> "*when a Law authorizes someone to perform some action or take some decision when he is convinced of the existence of some fact or circumstance ("satisfied") and he then makes a decision or performs an action because he is so convinced, the reasons for his conviction are not objectively justiciable. This does not mean that such a person's decision cannot be contested. It can be contested, but only on certain limited grounds, as indicated in Shidiack v Union Government (Minister of Interior) 1912 AD 642.*[34]

86.5. This is the point of departure to determine if the decision of the Registrar should be set aside. Once the Registrar is satisfied within the context of stage 1, i.e. section 56(1), the only basis upon which his decision can be contested is on the limited grounds set out in *Shidiack v Union Government*.[35]

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[32] *Supra*
[33] 1987 (1) SA
[34] At p731I-732A
[35] The Court held at pages 651-652:
"There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of the statute-in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision in equitable or wrong"

86.6. In *MEC for Environmental Affairs and Development Planning v Clairison's CC*[36] the Court held at par [22]-

> "*The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained ... in Bel Porto School Governing Body v Premier, Western Cape and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs.*[37]

86.7. In *R v Dhlumayo*[38] the Court determined 16 principles which should guide an appellate court in an appeal purely upon fact. These include that an appellant is entitled as of right to a re-hearing. The findings of the Registrar should be approached with due deference taking into account the Registrar's expertise in matters such as this. Where there has been no misdirection on fact the assumption is that his conclusion is correct and the appeal board may only reverse it if satisfied that it is wrong. If he did misdirect himself, the question will be whether that error negated the conclusion. If it is merely left in doubt as to the correctness of the conclusion, it will uphold the decision.

86.8. The principles set out in *Ex parte Neethling*[39] also apply namely that -

> "*the power to interfere on appeal is limited to cases in which it is found that the court vested with the discretion did not exercise the discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.*"

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[36] 2013 (6) SA 235 (SCA)
[37] At p240-241, footnotes removed.
[38] 1948 (2) SA 677 (A).
[39]

86.9. Moreover, when the respondent's Registrar evaluated whether he was satisfied on available facts and information that the appellant failed to comply with the FIA, or any order, determination or directive or has failed to comply with a directive under section 54(1) or (2), he considered the 2013 and 2017 CAR as well as the recommendation of the enforcement committee.

86.10. The appellant did not take the 2013 FIC CAR nor the 2017 NAMFISA CAR on review to the High Court. For that reason, it must be accepted that the appellant acknowledged the correctness of those compliance reports. In this regard counsel relied on *Brown v Financial Services Board*[40] where the South Africa High Court held at paragraph [33]:[41]

"*Assuming, for purposes of argument, that Brown could show that the inspection report contains false or inaccurate information, he faces the difficulty that he was well aware of the contents of the inspection report but voiced no complaints regarding its veracity or accuracy at the time when application was made for the curatorship order. To my mind this precludes him from seeking to rescind the curatorship order on the basis of alleged fraud and untruths in the inspection report. As was held by Thirion J in Port Edward Town Board v Kay and Another:*

'In my view, if a litigant, knowing that the evidence adduced against him in the course of a case is perjured or that a fraudulent concealment of evidence which is relevant to the decision of the case has occurred, deliberately omits before judgment to challenge or refute the evidence when he is in a position to do so, he cannot afterwards claim restitution in integrum in respect of the judgment obtained against him on account of the fraud.".

86.11. *Harlyn Trading International* describes stage 2 and 3 as follows[42]:

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[40] 2013 JDR 2099 (WCC)
[41] At p20-21
[42] At p16 par [38]

"*In the second stage, the FIC is required to form a prima facie view about whether to implement an administrative sanction for that breach and if so, what that sanction should be. The FIC will thereafter communicate the view to the affected party and invite representations. Thirdly, the FIC will determine the appropriate sanction and "must" do so having regard to the factors in section 45C(2) and the options available to it as set out in section 45C(3) and (4) of FICA.*"

86.12. Stage 2 in *Harlyn* is referenced in section 56(2) and (5) of the FIA, and stage 3 in section 56(3) of FIA, which provides that the Centre or a supervisory body after consultation with each other, and where applicable, after consultation with relevant regulatory body, may impose any one or more of the administrative sanctions mentioned in section 56(3)(a)-(f).

86.13. In the stage 2 process, the respondent considered the submission of the appellant dated 19 March 2019, which was in response to the Notice of Intention to impose of 5 February 2019. Attached to the 19 March submission was the appellant's progress report of 21 December 2018.

86.14. What the appellant sought to do by virtue of the 19 March submission and the 21 December progress report was to impugn the findings of the 2013 CAR and 2017 CAR, which it was not at liberty to do since it didn't challenge their findings by means of a review.

86.15. At best the appellant should have sought to reduce the penalty imposed by the respondent on the basis of the remedial steps and compliance of the appellant at that juncture.

86.16. The respondent did consider the content of the 21 December 2018 report. Reference was made to paragraph 5.3.2.1. and 5.3.2.2.

86.17. The Appeal Board should approach the findings of the respondent with due deference taking into account the respondent's expertise in matters such as this. Reference was made to *Bato Star Fishing (Pty) Ltd v Minister of Environmental*

Affairs and Tourism and Others[43] where the South African Constitutional Court accepted at par [46] that deference refers to:

"*judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.*"[44]

The Court held:

"*[It] is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.*[45]" (footnotes omitted)

86.18. In this regard, *Kamuhanga NO v Master of the High Court and Others*[46] also noted that rulings of the Master of the High Court particularly on the facts 'ordinarily deserve some deference'. The Master can be equated to the Registrar.

86.19. Consequently, since the Appeal Board must approach the decision of the Registrar insofar as he stated that the appellant's progress reports have been taken into account with deference, the Appeal Board must accept that the respondent considered the 21 December 2018 progress report when the administrative penalty was imposed.

86.20. The Appeal Board can only interfere in respect of stages one and two (set out in *Harlyn*) if the appellant can show that NAMFISA acted (i) mala fide; (ii) from ulterior and improper motives; (iii) had not applied its mind to the matter (iv)

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[43] 2004 (4) SA 490 (CC)
[44] At p513
[45] At p.514
[46] 2016 (1) NR 141 (SC)

did not exercise its discretion at all; (v) or it had disregarded the express provisions of the statute.

86.21. Those were not the premises on which the appellant sought to impugn the respondent's discretionary powers to impose an administrative sanction on the appellant. Consequently, the appellant's appeal is flawed.

86.22. In addition, the appellant's appeal is flawed because the appellant failed to appreciate that section 56(3)(f) enjoins the FIC and only the FIC to determine a financial penalty as an administrative sanction after consultation with NAMFISA and where applicable with other regulatory bodies. The ultimate decision maker of a financial penalty is the FIC and not NAMFISA.

Abdication of decision-making authority

87. On this ground of appeal, it was contended by Mr. Kauta on behalf of the respondent that:

87.1. In terms of section 56(3)(f) the ultimate decisionmaker regarding a financial penalty is the FIC and not the respondent. However, any decision of the FIC can only be taken after consultation with the respondent and the NSX.

87.2. The appellant elected not to appeal the FIC's decision but argued that the FIC have been consulted contrary to the requirements of section 56(3)(f) of the FIA. In counsel's view the appellant launched a collateral attack on the validity of the FIC's decision, which in law is impermissible.

88. We have dealt with the respondent's contention that the appellant made an impermissible collateral attack on the FIC's decision at the onset of this decision. As already highlighted, our view is that since the appellant directly appealed the FIC's determining of the financial penalty, there is no impermissible collateral attack

89. Evidently, Mr. Kauta agreed with Mr. Tötemeyer that the guiding authorities made a distinction between a statutory requirement for decision-makers to act "in consultation"

or "after consultation" with another entity. With reference to *Minister of Health and Social Services v Medical Association of Namibia Ltd*,[47] counsel submitted that "after consultation" requires no more than that the FIC's ultimate decision (to determine a financial penalty) must be taken in good faith after consulting the respondent and giving serious consideration to its views.

90. Regarding Ms. Barry's statement at the enforcement committee meeting of 12 December 2018 where she noted that it would be time consuming and cause delays in the process if the FIC was still to be consulted and since she was already representing the FIC as a member on the enforcement committee there was no need to further consult the FIC via formal letters, Mr. Kauta submitted that this statement must be understood in the context within which it occurred. The enforcement committee meeting was held at the stage just prior to the issue of the notice of intention (dated 5 February 2019) to impose the financial penalty in terms of section 56(5).

91. Moreover, the letter from the FIC Director dated 21 June 2019 (where it was directed that the N$5 million penalty should be imposed) was before the Penalty Notice of 2 September 2019 and reference was made to the respondent's administrative sanction matrix. The Registrar in imposing the penalty after 21 June 2019 then considered the respondent's administrative fine matrix and decided to impose the N$2 million penalty instead of the N$5 million penalty.

Failure to comply with directives issued by FIC and NAMFISA

92. On this ground of appeal Mr. Kauta submitted that when regard is had to section 54(2), it was clear that the 2013 CAR as well as the 2017 CAR contained directives which the appellant failed to comply with.

93. Section 54(2) provides-

"*The Centre or a supervisory body may in writing, over and above any directive contemplated in subsection (1), issue a directive to any accountable institution,*

[47] 2012 JDR 1072 (NmS)

category of accountable institutions, reporting institution, category of reporting institutions or other person to whom this Act applies..."

94. The respondent's directives were that the appellant was required to submit remedial and progress reports.

Failure to apply audi alteram partem rule

95. Regarding the next ground of appeal, counsel on behalf of the respondent submitted:

95.1. The appellant's right to be heard regarding the imposition of an administrative sanction is only in relation to the respondent and not the FIC.

95.2. One cannot read into section 56(3)(f) of the FIA a right for the appellant to be heard when the respondent and the FIC are carrying out their statutory duties. In other words, there is no right for the appellant to be heard before the FIC determines the financial penalty or a right to be heard when the FIC consults with the respondent in order to determine such penalty.

95.3. The ultimate decision-maker for purposes of determining a financial penalty under section 56(3)(f) of the FIA is the FIC after consultation with the respondent. There is no right for the appellant to be heard during this process.

95.4. The appellant is given the right to be heard in relation to the respondent's notice of intention to impose an administration sanction under section 56(5) which provides that before imposing an administrative sanction, the respondent must give the appellant reasonable notice in writing of the nature of the alleged non-compliance, the intention to impose an administrative sanction, the amount or particulars of the intended administrative sanction and in terms of section 56(5)(d)-

"*advise that the [the appellant] may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed.*"

95.5. The respondent had complied with its statutory obligations by following due processes and after having considered relevant jurisdictional factors. In particular, the respondent acted fairly by giving the appellant the opportunity to be heard through written representations, in accordance with section 56(5) of the FIA, which is in accordance with the *audi alterum partem* rule.

95.6. Moreover, the appellant availed itself of the right to make representations under section 56(5) of the FIA.

95.7. The right to *audi alteram partem* did not start with the section 56(5) notice. The appellant was furnished with the 2013 CAR by the FIC as well as the 2017 CAR by the respondent and given the opportunity to make representations. The appellant also made use of the opportunity and made representations.

95.8. There was overreliance by the appellant on the cases of *Viljoen v Inspector-General*[48] and *Nakanyala v Inspector-General Namibia and Others*[49] which do not support the proposition that at every stage in the section 56 process an institution such as the appellant should be given *audi alteram partem*.

The merits

96. As mentioned at the onset of this decision, in our view the Appeal Board is seized with a wide appeal, regard being had to the provisions of section 58(4) and (5) of the FIA as well as the authorities we referred to.

97. The appeal hearing is therefore a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information.[50] For that

[48] *Supra*
[49] *Supra*
[50] *Tikly v Johannes NO supra*

reason the authorities that Mr. Kauta relied on do not assist the Appeal Board as those cases are concerned with the exercise of a narrow discretion.[51]

98. On the appeal ground that the FIC abdicated its decision-making authority and gave the respondent the authority to determine the financial penalty contrary to section 56(3)(f) of the FIA the following is pertinent:

98.1. Mr. Matomola the respondent's Registrar unequivocally stated in the answering affidavit at paragraph 91:

"*The financial penalty was appropriate, proportionate and had a deterrent effect. The various non-compliance* (sic) *constituted contraventions of the FIA and related legislation. The penalty was further considered in consultation with the FIC.*".

98.2. The minutes of the meeting of 12 December 2018 indicate that the members of the enforcement committee (which include Ms. Barry) **agreed** that the N$2 million penalty should be imposed on the appellant.

98.3. In addition, the FIC through its Deputy Director informed the meeting that it would be time consuming and cause delays in the process if the FIC was still to be consulted. Ms. Barry was of the view that since she was already representing the FIC as a member on the enforcement committee there was no need to further consult the FIC via formal letters.

98.4. The impression was given that the respondent was at liberty to make the final decision on the financial penalty once agreed at the enforcement committee meeting. The events that followed bear this out.

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[51] *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre; Kabinet Van Die Tussentydse Regering Vir Suidwes-Afrika en 'n Ander v Katofa; Shidiack v Union Government; MEC for Environmental Affairs and Development Planning v Clairison's CC; Registrar of Pension Funds v Howie; JSE Limited and another v The Registrar of Security Services and another (supra)*

98.5. After the enforcement committee meeting of 12 December 2018, the notice of intention to impose the N$2 million penalty followed on 5 February 2019.

98.6. On 21 June 2019 FIC Director informed the respondent's Registrar that the FIC determined a N$5 million penalty should be imposed on the appellant.

98.7. On 2 September 2019, the Registrar imposed the N$2 million penalty on the appellant. Quite clearly the FIC Director's determination of 21 June 2019 was not adhered to by the Registrar.

98.8. Nowhere in the appeal record is there any explanation for the Registrar's non-adherence to the 21 June determination. It seems clear to us that the Registrar labouring under the misconception that the financial penalty must be determined in consultation with the FIC as set out in the respondent's answering affidavit coupled with the FIC's position that since its Deputy Director is a member of the enforcement committee there was no need to further consult the FIC via formal letters.

98.9. Section 56(3)(f) of the FIA requires of the FIC to determine a financial penalty not exceeding N$10 million after consultation with the respondent and any other applicable regulatory body.

98.10. Quite clearly the contention by Mr. Matomola in the answering affidavit that the financial penalty imposed was determined by the FIC in consultation with NAMFISA breaches the requirement of section 56(3)(f).

98.11. Decision-making where the requirement is that one functionary needs to make a decision in consultation with another happens when the two decision-makers agree.

98.12. Concurrence or agreement though is not the requirement for valid decisions under section 56(3)(f). The jurisdictional requirement is that the FIC must

decide the quantum of the penalty after consultation with the respondent and the NSX.[52]

98.13. There is a difference between taking a decision "in consultation" and "after consultation". In *Minister of Health and Social Services v Medical Association of Namibia Ltd*[53] the Supreme Court held[54]:

> *"[76] ... The phrase 'after consultation' was interpreted to mean that consultation must take place, but the repository of the power need not agree with those he was called upon to consult. In Van Rooyen and Others v The State and Others 2001 (4) SA 396 (T) (2001 (2) SACR 376; 2001 (9) BCLR 915) at 453 the following was stated in this regard:*
>
> > *'The meaning of the phrases in consultation with and after consultation with are now well established. In consultation with requires the concurrence of the other functionary (or person) and if a body of persons, that concurrence must be expressed in accordance with its own decision-making procedures. After consultation with requires that the decision be taken in good faith after consulting and giving serious consideration to the views of the other functionary (or person). . . .*
> >
> > *In the former case the person making the decision cannot do so without the concurrence of the other functionary (or person). In the latter case he or she can.'*
>
> *[77] It was furthermore stated in the case of Hayes and Another v Minister E of Housing, Planning and Administration, Western Cape, and Others 1999 (4) SA 1229 (C) at 1242H – J as follows:*

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[52] See also: *McDonald and Others v Minister of Minerals and Energy and Others* 2007 (5) SA 642 (C), par [17] and [18]; *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA), par [9].
[53] 2012 (2) NR 566 (SC)
[54] At par [76]

'In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. The parties or their representatives could be physically present at such a meeting or conference, but not necessarily so. In these times of advanced communication technology, persons or parties can consult with one another in a variety of ways, such as fax or e-mail or, in a somewhat less sophisticated way, by correspondence.'"

98.14. Counsel for the respondent also agreed that the required jurisdictional standard for determining the financial penalty is that propositioned in *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd* and that the FIC is the final decision-making authority on the quantum of the financial penalty in relation to section 56(3)(f).

99. In our view, then, the abdication of authority by the FIC coupled with the misconstruction of the statutory roles of the FIC and the respondent in the context of section 56(3)(f) is a vitiating irregularity going to the heart of the decision to impose the financial penalty.

100. The FIC did not therefore determine the penalty as required under section 56(3)(f). The decision on the quantum of the financial penalty which was imposed on the appellant was taken by the wrong decisionmaker, being the respondent. For that reason, the decision was a nullity, a fatal flaw in the decision-making process.

101. In *Hofmeyr v Minister of Justice and Another*[55] the Court held[56]

"*It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of*

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[55] 1992 (3) SA 108 (C)
[56] At p117E-H

Baxter Administrative Law (at 443), 'pass the buck' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity. See Leach v Secretary for Justice, Transkeian Government 1965 (3) SA 1 (E) at 12H-13B; Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander 1983 (4) SA 689 (C) at 720E-H; Cooper en Andere v Minister van Gevangenisse 1977 (4) SA 166 (C) at 173H-174C; confirmed on appeal by the Full Bench; see Minister of Prisons v Cooper and Others 1978 (3) SA 512 (C). See, too, Baxter (op cit at H 442-4); Steyn (op cit at 224); De Smith Judicial Review of Administrative Action 4th ed at 309-11; Wade Administrative Law 6th ed at 368-70 and the numerous decisions cited by these learned authors."[57]

102. On the appeal ground that there was failure of the application of the mind by the respondent, the following considerations apply:

102.1. It is common cause that the respondent's first mention of the 21 December 2018 progress report (in which the appellant indicated that the necessary remediation happened and that the appellant was in compliance with the FIA and its regulations) occurred in the Penalty Notice of 2 September 2019.

102.2. Mention of the 21 December report happened in the context of the Registrar responding to the submissions the appellant made in its response of 19 March 2019 to the notice of intention to impose the penalty of 5 February 2019.

102.3. Under paragraph 4 of the Penalty Notice with the heading "**Assessment of PSG's progress on implementation of remedial actions**" the Registrar noted:

"*4.1. NAMFISA's assessment of PSG's progress reports of 28 June 2017 and 27 April 2018 revealed unsatisfactory progress in implementation of remedial actions to address the non-compliance detected in the years 2013 and 2017 respectively.*

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[57] Referred to with approval in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at p28 par [39] at fn27

4.2. The unsatisfactory progress referred to above was communicated to PSG by NAMFISA in its feedback report dated 30 August 2018. The said communique does not preclude the imposition of administrative sanctions for contraventions with FIA and subordinate legislation."

102.4. No mention is made of the 21 December 2018 report where the Registrar sets out his evaluation of the appellant's progress in the Penalty Notice.

102.5. In paragraph 5.3.2 under the heading "AD PARAGRAPHS 3, 4, 5 AND 7 [OF THE APPELLANT'S 19 MARCH 2019 RESPONSE]" it is noted:

"5.3.2.1. In respect of paragraphs 3, 4, 5 and 7 of PSG's written representations, NAMFISA reiterates that the progress reports submitted to NAMFISA by PSG prior to 20th December 2018 indicates unsatisfactory progress towards remediation of compliance deficiencies. To this effect, NAMFISA expressed its dissatisfaction in its feedback report to PSG, dated 30th August 2018. Regarding PSG's progress report of 21 December 2018, NAMFISA noted progress highlighted therein. However, PSG's contraventions with the FIA and subordinate legislation as detected in 2013 and 2017 are serious, severe and repetitive."

103. From the first consideration of the administrative sanction proposed to be imposed on the appellant at the enforcement committee meeting of 12 December 2018 to the imposition of the financial penalty in the Penalty Notice of 2 September 2019 the position of the respondent has been consistently unchanged and the N$2 million sanction remained the same throughout.

104. For instance, in the enforcement brief of 5 December 2018 concerning the appellant under paragraph 6 with the heading ("PSG progress on implementation of remedial actions") it was stated:

"6.1 NAMFISA's assessment of PSGs' formal response dated 28th April 2017 and progress report dated 28 June 2017 uncovered lack of satisfactory progress in

implementation of remedial actions to address the non-compliance detected by NAMFISA in the year 2017 ...

6.2 Furthermore, on 27th April 2018 PSG submitted the proposed remedial actions to NAMFISA which it intends to implement to remedy the non-compliance detected by NAMFISA in the year 2017. Notwithstanding the aforementioned submission, lack of progress in implementation of previous proposed remedial actions casts doubts as to whether PSG will ever implement remedial actions on its own accord to remedy the non-compliance ..."

105. In the notice of intention to impose the administrative sanction dated 5 February 2019 the respondent noted, under the heading "Assessment of PSG's progress on implementation of remedial actions":

"*4.1. NAMFISA's assessment of PSG's progress reports of 28 June 2017 and 27 April 2018 revealed unsatisfactory progress in implementation of remedial actions to address the non-compliance detected during the years 2013 and 2017 respectively.*

4.2. The unsatisfactory progress referred to above was communicated to PSG by NAMFISA in its feedback report dated 30 August 2018. It is important to note that the said communique does not preclude the imposition of administrative sanctions in the event there is lack of progress towards remediation of non-compliance findings."

106. We have referred to paragraph 4 of the Penalty Notice where similar wording occurs.

107. In our view the respondent did not apply its mind to the content of the 21 December 2018 progress report. It mere reference to the said report, almost in passing, does not give us the necessary conviction that in fact the respondent fully considered the report in the context of the decision it was required to make.

108. Deference does not imply that the Appeal Board should simply accept the *ipse dixit* of the decision-maker to the effect that it had considered a fact. In *Bato Star* the Court held at paragraph [48]-

"*This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.*"[58] (Emphasis added.)

109. In *Traube v Administrator, Transvaal, and Others*[59] the Court held:

"*There is, however, a further ground. In North West Townships (Pty) B Ltd v The Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8D - G Colman J, in a frequently quoted passage, said this:*

'Of the many cases which discuss and apply the rules of administrative law relating to the rights of Courts to overrule quasi -judicial or administrative decisions a number were cited to us. I do not think, however, that I need go beyond the terms in which the relevant principle was formulated by Stratford JA in Union Government v Union Steel Corporation SA Ltd 1928 AD 220 at 237, a formulation which has been reiterated on many occasions since.... What the learned Judge of Appeal said was that interference on ground of unreasonableness was justified only if the unreasonableness was so gross that there could be inferred from it, mala fides or ulterior motive or a failure by the person vested with the discretion to apply his mind to the matter. The last-mentioned possibility has been held in other English and South African cases to include capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles.'

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[58] At p515
[59] 1989 (2) SA 396 (T) confirmed on appeal

...

In the first place I agree with the applicant's counsel that the fourth respondent erred in isolating the qualification of suitability referred to in s 10(1) of the Public Service Act. He should have weighed that qualification together with the others mentioned in the section, ie level of training, relative merit and efficiency. What is more important, however, in this context is that the fourth respondent only took into account factors adverse to the applicant. He failed to have regard to a single factor in her favour. ... I have no doubt at all that, if one has regard objectively to the affidavit of the fourth respondent, he failed to apply his mind at all to the relevant factors and on the other hand he took into account matters which he was precluded by his own prior agreement from considering." (Emphasis added.)

110. It therefore follows that the decision of the respondent must be set aside.

Conclusion

111. In our view, the irregularities set out above is sufficient cause for the Appeal Board to set aside the decision to impose on the appellant a financial penalty of N$2 million.

112. Consequently, it becomes unnecessary to consider the further grounds of appeal argued on behalf of the appellant.

113. Nevertheless, in our view whenever the FIC or a supervisory body issues a notice of intention to impose an administrative sanction under section 56(5) it would be reasonable notice as required by that section to fully disclose the basis upon which the decisionmaker seeks to impose the sanction in order to be compliant with article 18 of the Constitution. As was held in *Viljoen v Inspector-General*[60] article 18 of the Constitution entrenched the right to fair and reasonable administrative justice and applies whether express provision is made in a statute for *audi alteram partem* or not.

114. For example, to be fair and reasonable within the dictates of article 18:

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[60] *Supra.*

114.1. Where the decisionmaker informs the institution or person concerned of the nature of the alleged non-compliance, the decisionmaker should include as much specificity as possible and refer to relevant sections of the FIA or other laws which have been contravened.

114.2. The decisionmaker should detail all factors which contributed to the making of the decision to impose an administrative sanction and all adverse conclusions that were drawn during forums (such as enforcement committee meetings minutes, the administrative sanction matrix) pertaining to the institution or person subject to the section 56(5) notice.

114.3. The respondent should in compliance with *Onesmus v Permanent Secretary: Finance and Others*[61] also give the enforcement policy to the institution concerned.

115. In our view all such information and disclosures should be made to the institution concerned when the section 56(5) notice of intention to impose an administrative penalty is given to the institution. It is at that juncture that the respondent has made the provisional decision adverse to institution concerned and when *audi alteram partem* arises. All other steps are preliminary to the section 56(5) notice, which is a statutorily entrenched right to *audi alteram partem*. To illustrate, if the Registrar disagrees with the recommendation from the enforcement committee to impose an administrative sanction, no decision adverse to the institution concerned has been made and no *audi alteram partem* arises. Put differently, the enforcement committee makes recommendations only. When the Registrar agrees with the enforcement committee and accepts the recommendation the right to be heard arises.

116. In other words, it is only when the Registrar has formed the view that an administrative sanction should be imposed and the probable sanction has been determined with reference to the factors set out in section 56, that *audi alteram partem* arises.

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[61] *Supra*

117. The Amendment Act which became effective on 21 July 2023 amended section 56(3) of the FIA and deleted all requirements pertaining to consultation between the FIC and the supervisory body in the imposition of an administrative sanction generally and in the imposition of a financial penalty in terms of section 56(3)(f). Nevertheless, in our view under the pre-amended FIA *audi alteram partem* would also have arisen prior to the FIC finally determining the quantum of the financial penalty (after consultation with the supervisory body and where applicable the regulatory body concerned).

118. In the appeal to the *Traube v Administrator, Transvaal, and Others* the Appellate Court held with regards to the *audi alteram partem* principle in the context of the legitimate expectation regime:

> "*As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.*"[62]

119. In *Phillemon v Minister of Justice and Another* [63] the High Court held at par [57]-

> "*In casu, I find that the applicant's appointment as legal aid counsel was withdrawn by the minister without affording her audi. This constitutes a violation of the applicant's common-law and constitutional right to be heard before an adverse decision is taken against one.*"

120. The critical juncture therefore at which *audi alteram partem* should be afforded to a party is before the adverse decision is finally taken and not when the preliminary steps that lead to the decision is being considered.

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[62] At p758D-E
[63] 2020 JDR 0784 (Nm)

121. The Appeal Board does not have the statutory authority to substitute the decision of the respondent with a decision of its own based on the powers it has in terms of section 58(8) of the FIA. We refer to what we stated at the onset of this decision already regarding the wide appeal we were required to determine.

122. We have decided that that the decision of the respondent must be set aside as being a nullity and therefore the decision is not capable of being varied[64]. In the premises the following order is made:

1. The appeal succeeds.

2. The fees paid by the appellant in respect of the appeal must be refunded to the appellant.

3. There is no order as to costs.

AHG Denk	JD Mandy	V. Kavari
Chairperson	Member of the Appeal Board	Member of the Appeal Board

APPEARANCES

APPELLANT: Mr R. Tötemeyer SC with Mr. D. Obbes
Instructed by ENSAfrica

FIRST RESPONDENT: Mr. P. Kauta with Ms. M. Kuuzeko
Instructed by Dr. Weder Kauta and Hoveka

Appeal Board in terms of Financial Intelligence Act 13 of 2012 FIA Appeal Board 9 APR 2025 Republic of Namibia

[64] *Potgieter and Another v Howie and Others NNO supra* p346-347 paras [32] –[36]

SECOND RESPONDENT: No Appearance