CASE NO: FIA/AB 1/2023

BEFORE THE APPEAL BOARD ESTABLISHED UNDER SECTION 58 OF THE FINANCIAL INTELLIGENCE ACT, 13 OF 2012

In the appeal between:

BANK BIC NAMIBIA LIMITED **APPELLANT**

and

THE FINANCIAL INTELLIGENCE CENTRE **RESPONDENT**

DECISION

Introduction

1. The appellant is an accountable institution under the Financial Intelligence Act, No 13 of 2012 ("the FIA") by virtue of Schedule 4, item 4, being an institution that carries on banking business. Consequently, the appellant has the obligations imposed on accountable institutions by the FIA.

2. A financial penalty of N$5 million of which N$4 million was suspended for five years imposed by the respondent on 28 December 2020 against the appellant, is the subject of the appeal before us. At the heart of this appeal is whether the financial penalty imposed is "*startlingly inappropriate, disproportionate, unreasonable and unfair*".

3. The financial penalty was imposed in terms of section 56 of the FIA. Subsection (1) thereof provides that the respondent or a supervisory body 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]*".

4. The respondent imposed the financial penalty on the appellant on the basis that the appellant was grossly negligent in its failure to comply with an intervention order that the respondent issued in terms of section 42(1) of the FIA.

5. The appellant lodged this appeal initially on 27 January 2021. Subsequent to the publication of the Amendment Regulations on 16 March 2021 ("the Appeal Regulations") and the directive issued by the chairperson of the Appeal Board on 9 June 2023, the appellant finally noted its appeal on 26 July 2023.

6. The respondent failed to oppose the appeal and thereafter delivered an application for condonation for the late filing of its notice to oppose and its answering affidavit. The appellant opposed the condonation application. The Appeal Board heard the matter on 19 August 2024 and handed down its decision on 19 September 2024.

7. The Appeal Board's decision was that the respondent did not show sufficient cause and refused the application.

8. The matter was subsequently set down for hearing on 21 November 2024.

9. At the hearing the appellant sought condonation for the late filing of its heads of argument. Before addressing the grounds of appeal, it is necessary to consider the issue of condonation.

10. The appellant filed its application for condonation on 19 November 2024 at 12:06 p.m. by way of email supported by affidavits by both instructing and instructed counsel. The appellant's heads of argument were filed on 14 November 2024.

11. Regulation 35E of the Appeal Regulations requires an appellant to serve and file its heads of argument not less than 30 days before the hearing. By our calculation the heads should have been filed on 10 October 2024.

12. In effect, the explanation tendered on behalf of the appellant by its counsel was:

12.1. Instructed counsel calculated that the heads were due on 18 October 2024. He recalculated and was of the view the heads were due on 14 October despite instructing counsel informing him that the heads were due on 11 October. In our view the heads were due earlier, on 10 October.

12.2. October and November 2024 were instructed counsel's busiest months and he did not appreciate how much work would be required to complete the heads. He took ill from 4 to 8 November 2024 and only managed to complete the heads on 14 November 2024.

13. In terms of regulation 35E of the Appeal Regulations the Appeal Board may, on good cause shown, accept heads of argument served out of time.

14. It is well established that condonation is not "*a mere formality and will not be had for the asking*"[1]. A party seeking condonation must show good cause. This requires giving a full explanation for the non-compliance with the rules of the Court or the Appeal Board. Furthermore, the decision to grant or refuse condonation is solely within the discretion of the Appeal Board. Moreover, an application to condone non-compliance must be brought as soon as the practitioner realises his or her failure.

15. In determining whether to grant condonation, the Appeal Board considered the legal principles laid down by the Supreme Court in *Balzer v Vries*[2] where it was held that the following factors were relevant in determining condonation applications:

"*the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.*"

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[1] *Nanghama v Shijuka* 2020 JDR 0413 (Nm) at p7 par [13]
[2] 2015 (2) NR 547 (SC) at 551J-552F

16. After considering the explanation provided for the delay, the Appeal Board finds that the appellant has not adequately demonstrated good cause. Both counsels failed to inform the Appeal Board of the reasons the heads were not filed on 18 October 2024, the date instructed counsel diarised to file the heads, which would have truncated the delay significantly. An acceptable explanation was also not given why the application for condonation was only delivered on 19 November 2024. Moreover, the delay in filing the heads (26 days) and the application for condonation was excessive.

17. This has led to the Appeal Board having to first consider the application for condonation causing the Board to be greatly inconvenienced by this late delivery, having to prepare sufficiently to be able to consider whether to exercise its discretion to hear the matter.

18. Consequently, the appellant's application for condonation is refused.

19. Nevertheless, regulation 35E(2) of the Appeal Regulations stipulates that the "*practice directions of the High Court pertaining to the heads of argument apply in all circumstances where heads of argument are required*". Paragraph 20(8) of the Consolidated Practice Directives of the High Court states:

"*Where the legal practitioners of both parties fail to file heads of argument in terms of subparagraph (3), the presiding Judge may, in his or her discretion, strike the application from the roll or hear it without heads of argument.*"

20. In the exercising of our discretion and due to the importance of the matter, in particular since this is the first appeal where the Appeal Board is deciding on the imposition of a penalty and it is clear that the appellant is serious about appealing the decision of the respondent, we decided to consider the appeal without regard to the written heads filed out of time.

The facts

21. The appellant was registered as a commercial bank in June 2016. By May 2019, the appellant had been subjected to various compliance inspections by the respondent, with

the latest audit by the respondent conducted in 2018. The respondent did not pick up any breaches of the FIA during the referenced periods.

22. As an accountable institution, the appellant delivered to the respondent a number of cash threshold transactions and suspicious transactions between May and July 2019.

23. Nevertheless, on Tuesday 9 July 2019 at 15h18, the appellant received an intervention order from the respondent in respect of the account relevant to a suspicious transaction that the appellant reported involving an amount of N$140,000. The intervention order required that the appellant should ensure that no transactions were to be carried out in respect of the account concerned that would amount to a reduction or depletion of the account holder's positive account balance. The order was valid for 12 days and was issued under section 42 of the FIA.

24. The appellant's anti-money laundering officer emailed the order to the appellant's relevant business unit which included various senior managers and the relevant branch manager who had to block the account. However, the account was only blocked at 12h51 on 10 July 2019. By then N$3,000 were withdrawn from the account.

25. On 30 April 2020 the respondent served the appellant with a notice in terms of section 56(5) of the FIA. The notice informed the appellant that the respondent became aware of the appellant's non-compliance with the intervention order and also that the respondent proposed to impose a financial penalty of N$5 million on the appellant for the non-compliance.

26. On 22 May 2020, the appellant responded in writing to the notice of 30 April 2020. The appellant explained why it believed the administrative sanction would be grossly disproportionate, unjustified and unfair.

27. On 28 December 2020, the respondent notified the appellant by way of a notice under section 56(7) of the FIA of its decision to impose a penalty of N$5 million of which N$4 million was conditionally suspended for five years.

28. The key considerations the respondent took into account in determining the financial penalty included the following:

28.1. Although the amount of funds withdrawn (N$3,000) was minimal, the appellant's control failure was severe and serious as it rendered the banking industry vulnerable to money laundering (ML), terror financing (TF) and proliferation financing (PF) activities.

28.2. The appellant's control environment and mechanisms related to the implementation of intervention orders were regarded as inadequate to ensure effective compliance with anti-money laundering (AML), combatting of financing of terror (CFT) and combating of proliferation financing (CPF) policies.

28.3. Non-compliance with a crucial obligation such as the implementation of an intervention order demonstrated that the appellant's compliance program was not effectively implemented to mitigate ML/TF/PF risk exposure and further action had to be undertaken to ensure effective implementation to mitigate overall ML/TF/PF risk exposure.

28.4. The appellant's contravention, although not wilful, amounted to gross negligence.

29. The respondent acknowledged that the appellant had no history of non-compliance with intervention orders or of administrative or supervisory action taken against the appellant.

30. As mentioned already, the appellant appealed the respondent's decision to impose the financial penalty. In essence, the appellant's case is that the penalty is startlingly inappropriate, disproportional and unfair in the circumstances of the case, for the following reasons:

30.1. The limited duration of the breach;
30.2. the minimal value of the funds that were affected by the breach;

30.3. the absence of any real prejudice to any ongoing investigation;

30.4. the absence of any monetary gain by the appellant or any related parties;

30.5. the absence of any previous supervisory or enforcement action against the appellant;

30.6. the steps taken by the appellant to stop the non-compliance by effectively blocking the account on the same day that it became aware that the intervention order was not being enforced;

30.7. the absence of any pattern or tendency of the mistake by the appellant's relevant employee or its employees in general to create unsafe practices;

30.8. the absence of any attempt to conceal non-compliance;

30.9. the absence of any history of prior contravention or non-compliance;

30.10. the absence of any prior criticism of the appellant for contravention or non-compliance;

30.11. the appellant's continued co-operation at every stage of the process with the respondent;

30.12. the presence of an effective compliance program within the appellant; and

30.13. the appellant's commitment to prevent the further contraventions.

31. On the appellant's version there is no issue that it had failed to comply with section 42 of the FIA. The appellant also does not dispute that its employees were negligent in not ensuring compliance with the written direction that the respondent issued under section 42.

32. Mr. Maasdorp for the appellant addressed the Appeal Board at length with reference to decisions by the Namibian superior courts, this Appeal Board, the Namibia Financial Institutions Supervisory Authority, South African superior courts, Appeal Boards set up under similar legislation in South Africa, and by Australian courts under comparable legislation. We are indebted to counsel for his thorough and incisive analyses of the issues and the law relevant to this matter.

33. The gist of the appellant's argument was that the respondent erred on the facts in material respects and also erred on the application of the law to the facts, in that it did not afford proper recognition to the principles of proportionality, uniformity, or

consistency. Consequently, the respondent imposed a penalty that was startlingly inappropriate, disproportionate, unreasonable and unfair.

Applicable legal principles

34. The FIA empowers the respondent to implement measures aimed at identifying criminal proceeds, curbing money laundering, and addressing the financing of terrorism and the proliferation of weapons of mass destruction.[3]

35. In *Truck World (Pty) Ltd v the Financial Intelligence Centre and Another*[4] the South African Appeal Board of the Financial Intelligence Centre Act stated the following regarding the failure of accountable and reporting institutions to register under that Act, and to report transactions that were reportable:

"*Although there are no allegations of terrorism and money laundering in this case, it is important to emphasise, as the respondent did, the need for a high level of compliance with the Act by accountable and reporting institutions. Compliance with the Act is one of the fundamental pillars for a successful anti-money laundering regime, and cooperation by accountable and reporting institutions is vital to the fight against money laundering and the financing of terrorist activities.*"[5]

36. The Appeal Board in *Truck World* further cautioned that-

"*The objectives of the [FICA] and the efficacy of the regulatory system created by the Act will be severely undermined if accountable and reporting institutions do not comply with the Act.*"[6] [7]

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[3] *Kunene Ramapala Incorporated v Financial Intelligence Centre Appeal No: 12/3/1/5/KRAI/FIC(3/24)* a decision of the Appeal Board of the Financial Intelligence Centre Act, delivered on 16 October 2024 decided under the South Africa Financial Intelligence Act, No. 38 of 2001, which is substantially similar to the FIA.
[4] Appeal No 12/3/1/5-TW/FIC (3/21), delivered on 16 September 2021. The Appeal Board was chaired by the late Justice Makgoro, erstwhile Justice of the Constitutional Court of South Africa.
[5] At p17 par 29
[6] At p17-18, par 31
[7] This proposition was confirmed by the South African High Court in *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre* - 2021 JDR 2254 (GP) at p4 par [14]

37. The respondent has been afforded wide powers to discharge its legal mandate including the powers to issue written directions under section 42 of the FIA, which provides:

"*(1) If the Centre, after consulting an accountable or reporting institution, has reasonable grounds to suspect that a transaction or a proposed transaction may involve the proceeds of unlawful activities or may constitute money laundering or the financing of terrorism, it may direct the accountable or reporting institution in writing not to proceed with the carrying out of that transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period determined by the Centre, which may not be more than 12 working days, in order to allow the Centre-*

(a) to make the necessary inquiries concerning the transaction; and

(b) if the Centre thinks it appropriate, to inform and advise an investigating authority or the Prosecutor-General.

(2) An accountable or reporting institution which fails to comply with a direction made under subsection (1) commits an offence and is liable to a fine not exceeding N$100 million or, where the commission of the offence is attributable to a representative of the accountable or reporting institution, to such fine or imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment."

38. Although the term "intervention order" does not appear in section 42, the appellant accepted that terminology for the written direction contemplated by that section.

39. Non-compliance by an accountable institution with a section 42 written direction is a criminal offence punishable by a maximum fine of N$100 million. Where the commission of the offence is attributable to a representative of the accountable institution, such representative could be sentenced to such fine or imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.

40. Quite clearly, considering the criminal penalty set out in section 42(2), the Legislature regards non-compliance with the obligation set out in section 42(1) in a very serious light.

41. Section 56(1)(a) gives the respondent the authority to -

"*impose an administrative sanction referred to in subsection (3) on any accountable institution ... when satisfied on available facts and information that the institution ... has failed to comply with a provision of [the FIA] or any regulation, order, determination or directive issued in terms of [the FIA]; ...*"

42. In a decision of the Appeal Board of the FICA[8] in *Hyde Park Auto (Pty) Ltd T/A Sandton Auto v Financial Intelligence Centre*[9] regarding a contention that negligence must be established before an administrative sanction could be imposed:

"*The argument regarding negligence is misdirected. Fault or blameworthiness is not a requirement for the imposition of a sanction – transgression is the statutory jurisdictional fact. The degree of blameworthiness is a factor which may be taken into account in determining what an appropriate sanction would be in the special circumstances of the case.*" (Emphasis added.)

43. This statement in *Hyde Park Auto* was confirmed by the Appeal Board in *Truck World (Pty) Ltd and the Financial Intelligence Centre and Another*[10], as an accurate proposition of the law. The Appeal Board confirmed that "failure [to comply with a provision of the FICA on its own... does not avert an administrative sanction".[11] It was further held that while breach of the FICA could be remedied *ex post facto*, such breach could not be expunged. The offending act is "*a failure to comply with a provision of this Act*". An accountable institution cannot avoid an administrative sanction because it has remedied the failure.[12]

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[8]Retired Judge Harms, erstwhile Deputy President of the South Africa Supreme Court of Appeal wrote on behalf of the Appeal Board
[9] Case 12/3/5 delivered on 1 March 2019
[10] Appeal No 12/3/1/5-TW/FIC (3/21), delivered on 16 September 2021,
[11] At p9 par 16.1
[12] At p9-10, par 16.2

44. Section 56(3), in turn, provides that the respondent may impose one or more of the following administrative sanctions:

44.1. A caution not to repeat the conduct which led to the non-compliance referred to in section 56(1);

44.2. a reprimand;

44.3. a directive to take remedial action or to make specific arrangements;

44.4. the restriction or suspension of certain identified business activities;

44.5. suspension of licence to carry on business activities; or

44.6. a financial penalty, not exceeding N$10 million, as determined by the Centre, after consultation with the relevant supervisory or regulatory bodies.

45. The respondent may in terms of section 56(4)(c) suspend any part of an administrative sanction on any condition the respondent considers appropriate for a period not exceeding five years.

46. Section 56(5) determines that -

"Before imposing an administrative sanction, the [respondent] must give the [accountable] institution ... reasonable notice in writing -

(a) of the nature of the alleged non-compliance;

(b) of the intention to impose an administrative sanction;

(c) of the amount or particulars of the intended administrative sanction; and

(d) *advise that the [accountable] institution ... may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed*. (Emphasis added)

47. Section 56(6) states:

"*After considering any representations and the factors referred to in subsection (2), the [respondent], subject to subsection (8)*[13]*, may impose an administrative sanction the [respondent] considers appropriate*." (Emphasis added.)

48. Section 56(2) sets out the factors the respondent must consider in determining an "*appropriate administrative sanction*", which are:

(a) the nature, duration, seriousness and extent of the relevant non-compliance;

(b) whether the institution or person has previously failed to comply with any law;

(c) any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance;

(d) any steps taken or to be taken against the institution or person by-

(i) another supervisory body; or

(ii) a voluntary association of which the institution or person is a member; and

(e) *any other relevant factor, including mitigating factors.*"

49. In *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre*[14] it was held by the High Court in respect of section 45C of the South African Financial

[13] Subsection (8) provides that the respondent must, prior to taking a decision contemplated in section 56(6), consult the relevant regulator, where applicable.
[14] 2021 JDR 2254 (GP)

Intelligence Centre Act (FICA) which, apart from some differences, is identical to section 56 of the FIA:

'*Section 45C contemplates* ***three stages*** *in instituting an administrative sanction:*

Firstly*, the FIC must satisfy itself that a breach has indeed taken place. This jurisdictional determination must be made in terms of section 45C(1) which must be satisfied before determining the appropriate sanction.*

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 [representations and] factors in section 45C(2) and the options available to it as set out in section 45C(3) and (4) of FICA.*" (Emphasis and paraphrasing added.)

50. Regarding the nature of an administrative penalty, the Appeal Board in *Hyde Park Auto (Pty) Ltd t/a Sandton Auto*[15] referred with approval to a decision of the Competition Appeal Court in *Federal Mogul Aftermarket SA (Pty) Ltd v Competition Commission and another*[16] where that Court held that the payment of an administrative penalty can never be equated to the imposition of a fine by a criminal court. The proceedings of a tribunal, which eventually lead to the imposition of the administrative penalty, are civil and not criminal in nature.

51. On blameworthiness for a contravention of a provision of the FIA it was held[17] that -

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[15] Supra
[16] 2005 (6) BCLR 613
[17] In FICA Appeal Board case *Mit Mak Motors CC v The Director: The Financial Intelligence Centre and another*, Appeal No12/3//5 delivered on 3/11/2017 at p12 par [21]. The Appeal Board was chaired by Judge WJ Hartzenberg who served on the bench of the South African High Court from more than 20 years.

"[There] are multiple degrees of negligence. The terms culpa lata (gross negligence); culpa (negligence); culpa levis (slight negligence); and culpa levissima (the slightest negligence) are part of South African law[18]*"*.

52. As noted herein already, the degree of blameworthiness impacts the determination of what an appropriate sanction should be in the circumstances of a particular case[19]. In *JSH Motors CC t/a Honda JHB South* v *The FIC*[20], it was held:

"*We agree that wilful non-compliance with the provisions of the FIC Act should be met with harsh penalties. Taking into consideration the objective of the FIC Act, negligent non-compliance of the FIC Act should warrant a harsh penalty. However a distinction should be drawn between wilful non-compliance and negligent non-compliance. The penalty should also be considered in instances where there are gross negligence and negligence of a lesser nature.*"[21]

53. With regards to gross negligence and negligence it was held by the South African Supreme Court in *Transnet Ltd t/a Portnet v The Owners of the Mv "Stella Tingas" and Another:*[22]

"*Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear ... that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. ... If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. ... On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to*

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[18] In this regard Namibian law is similar.
[19] *Hyde Park Auto (Pty) Ltd T/A Sandton Auto supra*
[20] A decision of the FICA Appeal Board under the chairpersonship of Judge WJ Hartzenberg, Case No. 12/3/1/5-JSH Motors delivered on 8 August 2016
[21] At p11-12, par [15]
[22] 2003 (2) SA 473 (SCA) at p480-481, par [7].

amount to gross negligence ... It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. ... It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity." (Emphasis added)

54. Section 56(2) of the FIA (section 45C(2) of the FICA) sets out the factors that the respondent **must** consider in imposing an appropriate administrative sanction. In accordance with the golden rule of interpretation of statutes, words in a statute are to be given their grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.[23] We propose to evaluate the meaning of each factor set out in section 56(2).

54.1. The first factor to be considered is "*the nature, duration, seriousness and extent of the relevant noncompliance*" (section 56(2)(a)). To our mind this factor comprises different components, as follows:

(a) The "*nature of the relevant noncompliance*" denotes the type, character, and inherent attributes of the specific non-compliance committed by the regulated entity or individual. To interrogate this aspect, the respondent or by extension the Appeal Board is enjoined to determine questions such as (without in any way determining a *numerus clausus*):

- What obligation was breached? (i.e. whether the breach was administrative, procedural, or substantive).

[23] See for example: *Torbitt v Tie International University of Management* (SA 16-2014) [2017] NASC (28 March 2017).

- What is the purpose of the obligation? (i.e. is the rule breached is central to AML/CFT/CPF efforts, such as client due diligence and reporting duties?)
- Was it a technical/clerical issue or a systemic/deliberate failure? (for example, a minor administrative lapse (like late reporting) differs from systemic non-compliance (such as failing to implement a risk-based approach entirely)).
- Which part of the law was not complied with?
- What is the regulatory importance or risk associated with the obligation that was breached? (i.e. what is the level of risk that the non-compliance posed to the integrity of the financial system? Was the conduct a breach of a substantive obligation, which poses a high risk to the financial system or merely an administrative or procedural breach which poses a low risk. In other words, was the breach isolated or systemic?

(b) The "*duration of the relevant noncompliance*" specifically refers to how long the accountable institution or person failed to comply with their obligations and whether the breach was a once-off event or a continuous breach that persisted over days, months, or even years. The longer the non-compliance, the higher the-

- potential risk to the financial system;
- opportunity for money laundering or terrorist financing to occur undetected.
- indication of poor governance or lack of commitment to AML/CFT/CPF compliance.

(c) The "*seriousness of the relevant non-compliance*" focuses on the gravity or weight of the breach, i.e. how serious is the risk or harm created by the non-compliance? Key considerations could include:

- Whether the breach could have enabled criminal activity.
- Whether clients or transactions were left unmonitored.

- The scale of the institution's exposure to risk during the period of non-compliance.

(d) The "*extent of the relevant non-compliance*" refers to the scope and breadth of the non-compliance, in other words, how widespread was the failure? Did it affect a few clients or the entire institution? Some key considerations might include:

- Whether the non-compliance was isolated or systemic across departments, branches, or client types.
- What was the volume of transactions or clients involved?
- Whether the failure was a localized incident or institution-wide.

54.2. The second factor is "*whether the institution or person has previously failed to comply with any law*" (section 56(2)(b)). This factor considers the institution's compliance history and examines whether the institution has previously breached FIA obligations.

54.3. The third factor is a consideration of "*any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance*" (section 56(2(c)). This aspect looks at whether the institution has taken corrective action to fix the breach and measures proactive steps to close compliance gaps. If the institution has remedied the breach quickly and effectively, this can be a mitigating factor. However, remedial action after the fact doesn't erase the initial breach, but it demonstrates willingness to comply.

54.4. The fourth factor concerns the question of whether there are "*any steps taken or to be taken against the institution or person by another supervisory body or a voluntary association of which the institution or person is a member*" (section 56(2)(d)). The factor involves an assessment of any sanctions or disciplinary actions that another regulator or industry association has already imposed or intends to impose on the same institution or person for the same conduct (or related conduct). This means that if such regulator or association has initiated or

concluded disciplinary actions (e.g., fines, suspension of membership), the respondent must take this into account before imposing additional penalties.

54.5. The fifth factor set out in section 56(2)(e) denotes that the respondent is entitled to take additional circumstances into account beyond the specific factors listed in section 56(2). This broadens the scope of considerations the respondent must take into account. It gives the respondent the discretion to consider anything else that may impact the appropriateness of the sanction.

55. In *JSH Motors CC t/a Honda JHB South*[24] the South African Appeal Board held:[25]

"[S]ection 45C(2) clearly enjoins [the Appeal Board] to take the nature, duration and seriousness of the non-compliance, the question whether the institution has previously failed to comply, any remedial steps to prevent a recurrence of the non-compliance and mitigating factors into account."

56. In *McCarthy (Pty) Ltd t/a Mercedes-Benz Lifestyle Centre, Menlyn v Financial Intelligence Centre*[26] the Appeal Board stated regarding section 45C(2):

"The [factors contained in section 45C(2) imply], *as one would have expected, that the emphasis is on the nature, duration, seriousness and the extent of the relevant non-compliance. Items (b) and (c) may, depending on the fact, be either aggravating or mitigating. The last item on the list (e) includes aggravating and mitigating circumstances. It is under this item, where moral culpability or its degree is taken into account. It may be aggravating or mitigating.*"

57. In *Sunward Motors (Pty) Ltd v The Financial Intelligence Centre and Another*[27] the South African High Court had opportunity to reflect on the factors to be considered before an administrative sanction imposed under section 45C of the FICA. The Court

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[24] *Supra* at p10 par [14]
[25] This dictum was cited with approval by the South African High Court in *Sunward Motors (Pty) Ltd v The Financial Intelligence Centre and Another* - 2022 JDR 1617 (GP) at p9, par [17], decision by bench consisting of two judges.
[26] Case 12/3/1/5 – Mercedes Benz/FIC (1/19) delivered on 20 September 2019.
[27] 2022 JDR 1617 (GP) at p9, par [17]

also considered whether guidelines used by the FIC for imposing an administrative sanction were correct for purposes of determining which sanction to impose. The Court referred with approval to the decision of the Appeal Board in *MET Collective Investment RF (Pty) Ltd v Financial Conduct Sector Authority*[28] where it was held as follows:

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

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

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

58. It is therefore established that the respondent must, after consideration of section 56(2)(a) enjoin the factors set out in section 56(2)(b) to (e) of the FIA as to whether they are aggravating or extenuating of the noncompliance complained of before the respondent would be in a position to assess what the appropriate penalty should be.

59. It has been held that in considering an appropriate administrative penalty deterrence is either one of the most relevant considerations or the paramount consideration, especially considering the broader scheme and objective of legislation such as the FIA,

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[28] Case 823/2019 dated 29 July 2020

which is to combat serious crimes such as money laundering and the financing of terrorism.

59.1. In *Michael Berman v The Financial Services Board*[29] the Financial Services Appeal Board held that deterrence was the primary purpose of imposition of an administrative penalty. The Appeal Board qualified its statement by holding that "*the element of proportionality always requires the circumstances of the contravention and those of the offender be given due consideration.*"[30]

59.2. In *Michael Berman* the Financial Services Appeal Board quoted author Karen Yeung with approval[31] where she stated in an article entitled "Quantifying Regulatory Principles: Australian Competition Law Penalties in Perspective":

> "*Because regulatory law's central concern is to modify behaviour by reference to its perceived undesirable effects on collective welfare, rather than to express moral condemnation of the offence, the theoretical justification for punishment of those who violate regulatory law appears to rest firmly on the deterrence theory of punishment...*
>
> *A penalty scheme must not be too out of step with societal notions of fairness and justice, lest it fail to inculcate those who violate the law with a sense of the wrongfulness of their conduct, and lead to an erosion of public confidence in the regulatory system. Accordingly, it is suggested that a fair and effective regulatory penalty should combine the essential features of both models: penalties should be set at a level which [is] sufficiently high to deter future contraventions of the law, provided that any given penalty is not disproportionate to the seriousness of the offence.*" (Emphasis added.)

59.3. In *JSH Motors* the FICA Appeal Board held:

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[29] Delivered on 17 February 2009
[30] On page 8 of the decision
[31] On page 9-10 of the decision

"*More importantly because one of the objects of imposing penalties is deterrence, the Second Respondent [the South African FIC] is of the view that extremely harsh penalties are to be imposed in every instance, and did so in this case regardless of the moral guilt of the perpetrator*."[32] (Emphasis added]

59.4. In *JSH Motors* decision the Appeal Board criticized such approach on the basis that the FIC was of the view that it could only impose a lesser penalty if exceptional circumstances existed.[33]

59.5. In *Mit Mak Motors*[34] the FICA Appeal Board quoted with approval the decision in *Michael Berman* that "deterrence was the primary purpose of the imposition of our administrative penalty" but that "the element of proportionality should always be considered."

59.6. In *Mit Mak Motors* the Appeal Board restated the principle that in criminal cases courts try to achieve parity in respect of sentences for the same offence, regardless of whether sentencing is to be done in the same case or in different courts. However, the Appeal Board noted the following[35]:

"*But it is also a fixed principle that courts have to individualise the sentence imposed on a particular offender. In the matter of S v Giannoulis, 1975 SA 867 (AD) at 837F Holmes JA explained the approach of a court of appeal in such a case as follows:*

'1. In general, sentence is a matter for the discretion of the trial court. Disparity in sentences imposed on participants in an offence whether tried together or in separate courts will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

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[32] On page 10 of the decision
[33] On page 11 of the decision
[34] *Supra*
[35] Supra at p12-13, par [22]

2. *Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal and there are not personal factors warranting such disparity with the sentence, interference ... may be warranted*".

59.7. In *Truck World*[36] the Appeal Board held[37]:

"*Two types of deterrence are recognised. The one, general deterrence targets deterring others and is aimed at potential offenders in the belief that the threat of similar punishment will cause the potential offender to refrain from committing the offending act. The other, individual deterrence is aimed at deterring the offender from reoffending. In this regard, the following remarks by the learned authors Rabie et al are insightful*:

'*[t]he idea is that [people], being ... rational creature[s], would refrain from the commission of crimes if [they] know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or the imposition of punishment on others, which should cause a person to think twice before ... commit[ting] a crime*". (Emphasis added and footnotes removed.)

59.8. The Appeal Board in *Truck World*[38] stated with regards to non-compliance with the FICA-

"*The gravity of the non-compliance must be assessed against, amongst others, the backdrop of the object of the Act, the mischief which it seeks to address, the impact of the mischief sought to be addressed, the purpose of the reporting obligations as well as the functions of the Centre.*"[39]

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[36] *Supra*
[37] at p24, par 49
[38] *Supra*
[39] At p15, par 25

And-

"*The respondent highlighted the devastating ramifications of money laundering not only for any country's financial sector, but for its society at large. It goes without saying that unchecked criminal activity incentivises and exacerbates the opportunity for crime.*"[40]

59.9. In *Sunward Motors (Pty) Ltd*[41] the South African High Court cited with approval[42] the dictum in *Mit Mak Motors* (that deterrence was the primary purpose of the imposition of an administrative penalty) and in *MET Collective Investment RF (Pty) Ltd v Financial Conduct Sector Authority*[43] where it was stated:

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

59.10. In the FICA Appeal Board's most recent decisions the following are apposite:

(a) In *Kunene Ramapala Incorporated v Financial Intelligence Centre*[44] the FIC's principle position viz., "in determining sanctions, deterrence is the primary goal", was confirmed.[45]

(b) In *Tana Africa Capital Managers (Pty) Ltd* v *Financial Sector Conduct Authority*[46] in a decision under the FICA, the Tribunal held:

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[40] At p16, par 28
[41] *Supra*
[42] at p11, par [22]
[43] Case 823/2019 dated 29 July 2020
[44] Appeal No 12/3/1/5 KRAI / FIC (3/24) delivered on 16 October 2024
[45] At p28, par [41]
[46] Appeal Number: 12/3/1/5-TACM/FSCA (4/24) delivered on 6 November 2024

> *"The risk management in terms of the Act, is all about compliance. Failure to fully comply, will result in administrative sanction. One of the purposes is deterrence. The specific institutions and the industries in general are discouraged from future non-compliance that will expose the institution to the risk of being unable to meet the objectives of the Act. That is, unable to identify the proceeds of unlawful activities, to identify persons involved in money laundering activities; offences relating to the financing of terrorist and related activities and proliferation financing activities. Administrative sanctions are not only about the past, future, but are also to motivate and enhance risk management and compliance at all levels for the future and unforeseen circumstances."*[47].

60. Nevertheless, as was held in *Michael Berman* and confirmed in *Mit Mak Motors*, the principle of deterrence must be tempered by the countervailing principle of proportionality. We find no reason to disagree with this proposition as an accurate statement of our law when it comes to determining an appropriate penalty under section 56 of the FIA.

61. The maximum financial penalty that the respondent may impose in terms of section 56(3)(f) of the FIA is N$10 million. In arriving at an appropriate penalty in the absence of any guidelines[48] by the respondent for the determination of penalties, the starting point for setting a penalty are the factors set out in section 56(2) of the FIA. This is borne out by the various case law authorities referred to above.

62. In *McCarthy (Pty) Ltd t/a Mercedes-Benz Lifestyle Centre*[49] the Appeal Board emphasised that in determining an appropriate administrative sanction the FIC or supervisory body should firstly enquire into "*the nature, duration, seriousness and the extent of the relevant non-compliance.*" It is only after this enquiry has been made that further aggravating and mitigating circumstances should be considered.

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[47] At p At p10-11, par [37]
[48] The FICA Appeal Board and the High Court of South Africa has consistently agreed that the use of guidelines by the FIC in determining a financial penalty is not contrary to the provisions of the FICA subject thereto that they are not blindly followed without considering the particular facts in each case. (See e.g. *Sunward Motors (Pty) Ltd v The Financial Intelligence Centre and Another* - 2022 JDR 1617 (GP); *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre*2021 JDR 2254 (GP))
[49] *Supra.*

63. In our view this denotes that an appropriate sanction should be tailored to specific conduct and should reflect the seriousness and impact of the breach to ensure that less serious breaches attract lighter penalties, and serious breaches attract heavier sanctions. This is at the heart of proportionality. In this regard guidelines that the FIC or supervisory body may have developed remain just that. They should not be elevated to a rigid, inflexible standard to be applied regardless of the circumstances of each case.[50]

64. This approach finds resonance in the judgment in *Namibia Competition Commission v Frans Indongo Group and another*.[51] In that case the respondent failed to notify the Competition Commission of a merger before its consummation. Although this was not a deliberate transgression of the Competition Act, No. 2 of 2003. the High Court found that a penalty was warranted.

65. The Court held[52]:

"[It] is important, in imposing penalties for contravention of certain provisions of the Act, to consider that not all contraventions have the same level of blameworthiness. This court, in Namibian Association of Medical Aid Funds v Namibian Competition Commission recognised and correctly so, that 'failure to notify and prior implementation cases involve different considerations from cartel and abuse [of] dominance contraventions'." (Emphasis added and footnotes removed.)

66. In the Court's view the higher the blameworthiness of a transgressor or the more serious the transgression, the higher the administrative penalty to be imposed.

67. The Court further expands on this notion as follows:

"Having said this, the court should not be understood to be downplaying the contravention of the provisions of s 42 as not being serious. The contravention is serious in its own right but on the facts of this case, as discussed above, it should not be dealt

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[50] *Hyde Park supra at par [12]*
[51] [2021] NAHCMD 297 (4 June 2021)
[52] At par [107]

with in harshest terms as the other species of contraventions that are deliberate, calculated and have had debilitating consequences to the industries or the consumers concerned." (Emphasis added.)

68. The Court also cautioned regarding guidelines that the applicant proposed to assist the court in the determination of the appropriate penalty:

"[*95] To this extent, the assistance sought to be rendered to the court is limited and if blindly followed, may lead the court to the untenable situation where it may inadvertently close it eyes to factors that are relevant but have escaped the attention of the applicant because they are not listed. Alternatively, the applicant, because of its position and interests, may not place them in the equation either at all or give insufficient weight to them. The result would be that the court may, in those circumstances, fail to properly exercise discretion in imposing its punitive powers appropriately.*"[53]

69. A further consideration that applies in determining whether a penalty is appropriate concerns what was stated in *Mit Mak Motors*, with reference to *S v Giannoulis,* namely that courts have to individualise the sentence imposed on a particular offender. Therefore, disparity in sentences imposed on participants in an offence does not necessarily warrant interference on appeal. Uniformity in sentences should not be elevated to a principle. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal and there are not personal factors warranting such disparity with the sentence, interference could be justified.

70. Counsel on behalf of the appellant in our view correctly argued that the Appeal Board should take into account the principles of proportionality, consistency and uniformity against the backdrop of deterrence. We agree that all these principles are relevant in determining an appropriate penalty. Nevertheless, we maintain that factors set out in section 56(2) of the FIA juxtaposed against the broader societal objective the FIA seeks to achieve, is the foundation of this enquiry. We revert to this aspect hereunder.

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[53] On p25-26

71. The powers of the Appeal Board are limited to those set out in section 58(8) of the FIA which provides that the Appeal Board may:

> "*(a) confirm, set aside or vary the relevant decision of the [respondent] or supervisory body; or*
> *(b) refer a matter back for consideration or reconsideration by the [respondent] or the supervisory body concerned in accordance with the directions of the appeal board.*"

72. It was held in *Harlyn Trading International*[54] that the power of the respondent to impose a financial penalty and determine the quantum of that penalty is a true discretion that "*flows from the provisions of section 45C(1)(a)*[55] *[of the Financial Intelligence Centre Act (FICA)], which states that the FIC:*

> "*... may impose an administrative sanction on any accountable institution, reporting institution or other person to whom this Act applies when satisfied on available facts and information that the institution or person ... (a) has failed to comply with a provision of this Act or any order, determination or directive made in terms of this Act ...*"[56]

73. On the powers of a court to interfere with the decision of an administrative or statutory body, the Court in *Harlyn Trading International*[57] went on to state that:

> "*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*

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[54] *Supra*
[55] Sec 45C(1)(a) of the FICA is identical to sec 56(1)(a) of the FIA.
[56] *Harlyn Trading International supra* at p12, par [28]
[57] *Supra*

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."[58] (Emphasis added.)

74. According to the Court in *Harlyn Trading International* the nature of an appeal before the Appeal Board of the FICA is essentially that of a narrow appeal.

75. In our decision *Prudential (Namibia) Unit Trusts Ltd v Namibia Financial Institutions Supervisory Authority and Another*[59] we considered a number of authorities and concluded that appeals heard by the Appeal Board are wide appeals, which involve a

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[58] *Supra* at p12-13, par [31]-[32].
[59] Case FIA/AB2/2021 delivered on 9 April 2025

complete rehearing of, and fresh determination of the merits of the matter with or without additional evidence or information.[60]

The facts and the law

76. The fundamental consideration of the respondent for imposing a fine of N$5 million on the appellant of which N$4 million was conditionally suspended is the respondent's assessment of the degree of blameworthiness of the appellant.

77. According to the respondent, the appellant's contravention, although not a wilful act, amounted to gross negligence. The reason given by the respondent for this finding was that the appellant as an accountable institution "benefits from awareness and guidance from the FIC through industry meetings, guidance notes, circulars, directives etc. It has a positive duty to comply with its obligations in terms of the FIA, including the adequate and continuous training of staff dealing with AML related activities, which it is expected to be well aware of."

78. Apart from this general statement, there are no facts to support the finding of gross negligence. The uncontested facts are that the respondent's written direction under section 42 of the FIA was received on Tuesday 9 July 2019 at 15h18, which required the appellant to ensure that no transactions were to be carried out in respect of the account concerned that would reduce or deplete the account holder's positive account balance. The appellant's anti-money laundering officer emailed the order to the appellant's relevant business unit which included various senior managers and the relevant branch manager who had to block the account. However, the account was only blocked at 12h51 on Wednesday 10 July 2019. By then N$3,000 were withdrawn from the account.

79. In our view the conduct of appellant's branch manager and by extension the appellant was negligent; however, the appellant's conduct is not indicative of gross negligence.

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[60] *Tikly v Johannes NO* 1963 (2) SA 588 (T) at 590F-591A

80. As was stated by the South African Supreme Court in *Transnet Ltd t/a Portnet,*[61] to qualify as gross negligence the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care.

81. In our consideration, the appellant's negligence in timeously implementing the appellant's written direction under section 42 of the FIA does not involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme or as a total failure of care. Consequently, the finding of gross negligence by the respondent in relation to the appellant non-compliance with section 42 is based on an incorrect or wrong legal principle, premised as it were on a mistake of fact. As a result, the penalty imposed is startingly inappropriate, disproportionate, unreasonable and unfair.

82. Since the respondent applied incorrect considerations when it imposed the penalty in question on the appellant, the Appeal Board is at liberty to vary the respondent's decision regarding the penalty and to substitute it with an appropriate penalty.

83. As mentioned with reference to *JSH Motors, McCarthy (Pty) Ltd t/a Mercedes-Benz Lifestyle Centre* and *Sunward Motors*, the departure point in determining an appropriate penalty is for the respondent or the Appeal Board (where required to impose a penalty as in the present matter) to consider section 56(2)(a), i.e. what is "the nature, duration, seriousness and extent of the relevant non-compliance"? In this regard the following matters require consideration:

83.1. The nature of the non-compliance:

(a) The obligation that was breached involves the non-compliance with a written direction of the respondent. We agree with the respondent's statement in its 28 December 2020 notice of imposition of the penalty

[61] *Supra*

that although "the amount of funds depleted were minimal, [N3,000], the control failure was severe and serious".

(b) The section breached is central to AML/CFT/CPF efforts since the intervention order was aimed at preventing any reduction or depletion of the positive balance of the account affected.

(c) In our view the appellant's failure was institution-wide in the sense that there were no checks and balances in place to determine if the relevant branch manager implemented the intervention order, despite the fact that the appellant's AML officer and several senior bank managers were aware of the order. It seems the branch manager was left to her own devices and only implemented the respondent's written direction after 12h00 noon the following day. This gives the impression of a *laissez faire* attitude to implementing the order. By then the mischief that the respondent's order sought to prevent already manifested. Even though only N$3,000 was withdrawn, if the person in question had motives to carry out terrorist activities they could do quite easily. For example, a Molotov cocktail does not cost a lot of money to manufacture.[62]

(d) Although the appellant's conduct was a breach of a substantive obligation, it did not pose a high risk to the financial system even of the entire N$140,000 was withdrawn. However, it would pose a threat if the amount in question would be used to finance terrorism.

(e) Nevertheless, the breach that occurred was an isolated event.

83.2. The duration of the non-compliance: The appellant failed to comply with its obligations for a relatively short period of time. The breach was a once-off event.

83.3. The seriousness of the non-compliance:

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[62] An incendiary bomb, typically a bottle filled with a flammable liquid and a wick that is ignited before throwing.

(a) The risk or harm created by the appellant's non-compliance was not grave, although as mentioned the N$3,000 withdrawn could have enabled criminal activity. During the period of non-compliance, the account in question was left unmonitored and the entire N$140,000 could have been withdrawn with more serious implications.

(b) However, the appellant's exposure was limited to the amount in the account, being N$140,000.

83.4. The extent of the non-compliance: The non-compliance was not widespread and affected only one client. The volume of the transactions involved was relatively minimal and the failure was a localized event.

84. This analysis gives a holistic view of the nature, duration, seriousness and extent of the appellant's non-compliance. What follows should be a consideration of section 56(2) (b) to (e) to determine whether any aggravating or mitigating factors are present. Section 56(2)(e) could include considerations of moral culpability or its degree.[63]

85. Section 56(2)(b) must be considered next i.e. "*whether the institution or person has previously failed to comply with any law*". The appellant had an effective compliance program, was regularly tested through audit procedures and performed effectively in the identification and reporting of the relevant transactions. No breaches of the FIA or any other law had been found.

86. In terms of section 56(2)(c) a consideration of "*any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance*" must be made. The uncontroverted evidence is that the appellant had taken effective steps to stop the non-compliance by effectively blocking the account once it became aware that the intervention order was not being implemented. The appellant committed to use the incident as a case study in its compliance training program and updated its compliance

[63] *McCarthy (Pty) Ltd t/a Mercedes-Benz Lifestyle Centre supra*

programme to ensure that any future interventions orders would immediately be given effect to.

87. Section 56(2)(d) concerns the question of whether there are "*any steps taken or to be taken against the institution or person by another supervisory body or a voluntary association of which the institution or person is a member*". The evidence is that there are no such steps taken or to be taken against the appellant.

88. Finally, section 56(2)(e) allows the respondent or the Appeal Board to take additional circumstances into account beyond the specific factors listed in section 56(2)(a) to (d). In this regard it is to be noted that-

88.1. The appellant is a first offender and had never before failed to comply with *any* law.

88.2. The appellant's breach did not cause any prejudice to any ongoing investigation.

88.3. Neither the appellant nor any related parties gained anything from the breach.

88.4. There was no evidence of any pattern or tendency by the appellant to create unsafe practices and the appellant co-operated with the respondent at every stage of the process.

88.5. The breach committed by the appellant also constitutes a criminal offence, punishable up to a maximum fine of N$100 million or, since the commission of the offence is attributable to a representative of the appellant, to such fine or imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.

89. In our view the "nature, duration, seriousness and extent" of the appellant's non-compliance warrants the imposition of a financial penalty. A caution, reprimand or any of the other options available under section 56(3) would not be a sufficiently proportional to the non-compliance in question.

90. The maximum financial penalty that the Appeal Board may impose in terms of section 56(3)(f) of the FIA is N$10 million. In the circumstances of this matter the maximum financial penalty would not be appropriate.

91. The next enquiry involves a consideration of what would be a deterrent, proportional penalty taking into account the extenuating and mitigating factors as well as the principles of uniformity.

92. The seriousness of the appellant's non-compliance in the context of its obligations to comply with the object of the FIA, which is to combat money laundering, financing of terrorism and proliferation financing cannot be ameliorated by counsel's suggested penalty of 10% of N$140,000 (N$14,000) as an appropriate penalty. In our view such penalty is wholly inappropriate.

93. In *Namibia Competition Commission v Frans Indongo Group* the Court made the following pertinent remarks at paragraphs 114 to 116 (as paraphrased):

"*[114] I have taken into account the fact that the failure to report merger in this case was not deliberate. ...*

[115] I also consider that the respondent was the one that reported the transaction itself, which should serve to render its contravention less detestable. It should also be borne in mind that the transaction is not one that involves cartel conduct or exclusionary behaviour. It is also worth noting that the Commission found that there was no loss sustained and it approved the merger subsequently.

[116] It appears plain that the respondent did co-operate with the applicant in this matter. Furthermore, there is no evidence of any profit derived by the respondent from the merger. It is also worth considering that the respondent has not previously been found to have contravened the Act, this being its first brush with the law as it were. ..."

94. The Court also took into account "pecuniary fines that have been imposed in South Africa between the years 2003 and 2018 **for this type of contravention**."[64] (Emphasis added) Despite diligent search the Appeal Board could not trace comparable case law in South Africa or elsewhere for the type of non-compliance the appellant committed in the present matter so as to compare administrative sanctions.

95. The Court observed however:

"*It is also important to follow precedents regarding penalties, especially from other jurisdictions with a longer experience and application of this field of the law, with a pinch of salt. This is because where the law has long been in operation, for instance in Europe and South Africa, one may find that the penalties imposed may be high today. A survey of the past may well show that they were low at the beginning but were increased over time as a result of the incidences of contravention. In this regard, Namibia should travel her own road in a gradual fashion and not fast-forward her actions in order to keep up with the neighbours and other distant households, no matter how attractive that may seem.*"[65] (Own emphasis.)

96. The Court concluded its judgment as follows:[66]

"*I come to the considered view the penalty cannot be arrived at in a scientific manner, considering that the applicant's approach did not properly take into account all the factors that weighed in the respondent's favour. A penalty that represents double the filing fee, namely N$125 000, would, in my considered view be apposite in the peculiar circumstances of this case.*"

97. Having regard to the nature, duration, seriousness and extent of the appellant's non-compliance and the need to set a deterrent penalty not only specifically in relation to the appellant but generally in relation to all accountable and reporting institutions in the context of the object of the FIA to combat money laundering, terror financing and proliferation financing, and the role of the respondent in that regard and having taken

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[64] At par [117]
[65] At par [108]
[66] At par [118]

all mitigating and aggravating factors into consideration, we are of the view that a penalty of three times the value of the potential loss using the amount sought to be transferred out of the account and which led to the intervention order (N$140,000) would be appropriate.

98. Thus, the penalty we impose is the amount of N$420,000. The amount of N$5,000 the appellant paid when it noted the appeal can stand as a first payment of the penalty imposed.

99. We make no order as to costs.

100. The following order is made:

1. The appellant is ordered to pay the amount of N$415,000 as a financial penalty for the contravention of section 42 of the Financial Intelligence Act, No. 13 of 2012.
2. The penalty is to be paid within 60 days from the date of this decision.
3. The matter is removed from the roll and is regarded as finalised.

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

APPEARANCES

APPELLANT: Mr R. Maasdorp
Instructed by Ellis Shilengudwa Incorporated

RESPONDENT: No Appearance