CASE NO: FIA/AB 2/2024

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

In the appeal between:

NAMIBIA POST LIMITED (NAMPOST) **APPELLANT**

and

THE FINANCIAL INTELLIGENCE CENTRE **RESPONDENT**

DECISION

Introduction

1. On 23 November 2023, the respondent notified the appellant in writing (the notification is hereafter referred to as "the Penal Notice") of the following decision regarding the appellant:

> "*1. The Financial Intelligence Centre (FIC) took into account the remedial action that Namibia Post Limited took since the offsite compliance assessment. Same will be tested during the next on-site Compliance Assessment.*
>
> *2. Considering the above, an administrative penalty in terms of Section 56(3)(f) of the FIA is imposed against its initial failure, as at the time of the offsite assessment, to comply in that your AML/CFT/CPF compliance program did not adequately outline the implementation of Targeted Financial Sanctions (TFS), as outlined in Guidance Note 07 of 2023; and also the implementation of*

Politically Exposed Persons (PEPs) measures as outlined in Revised Guidance 01 of 2019.

3. *That in terms of section 56 of the FIA, Namibia Post Limited is hereby issued with a financial penalty in the amount of NAD 1.0 Million (One Million Namibia Dollars), due to aforementioned non-compliance found with sections of the FIA and the PACOTPAA.*

4. *The fine so imposed must be paid within 14 (fourteen) working days of receipt of this notice, in terms of section 56(9) of the FIA, to the Bank of Namibia, Account number: 164 007; Branch code 980 172, Current Account, with reference "FIC Administrative Penalty". Failure may compel the FIC to institute civil action in the High Court of Namibia, as contemplated in section 56(10) of the FIA.*

5. *Namibia Post Limited is further notified in terms of section 56(7)(b) of the FIA that it has the right to appeal against the decision of the FIC. A written Notice of Appeal must be lodged in the manner prescribed by the Amendment of Regulations issued under the FIA.*

6. *That Namibia Post Limited is notified that the confidentiality of the Administrative Penalty imposed will be preserved and the Administrative Penalty imposed will not be made public in its name.*"

2. During the hearing it transpired that the appellant, in the abundance of caution, paid the penalty of N$1 million to the FIC within the 14 days specified in par 4 of the Penal Notice.

3. On 14 December 2023, the appellant appealed against "*the respondent's decision communicated to the [appellant] on 14 November 2023, to impose an administrative penalty of NAD 1 million...*"

4. The appellant further appealed against all findings underpinning the orders contained in par 2 and 3 of the Penal Notice.

5. As things turned out, the respondent advised the Appeal Board during a status hearing on the matter held on 16 October 2024 that it would not oppose the appellant's appeal. Consequently, the respondent did not file a notice to oppose the appeal or an opposing affidavit.

6. The matter was set down for hearing of the appeal on an unopposed basis. The hearing took place on 2 December 2024.

The facts

7. In terms of Schedule 1, item 10 of the Financial Intelligence Act, No. 13 of 2012 ("the FIA") the appellant is categorized as an accountable institution. Consequently, the appellant has the obligations imposed on accountable institutions by the FIA and its Regulations.

8. The respondent conducted sectoral risks assessments ("SRAs") during November 2022 to February 2023. On 13 June 2023 the respondent served a compliance assessment report ("CAR") on the appellant setting out findings in respect of the appellant in consequence to the SRA. In conducting that SRA, the respondent relied on compliance and anti-money laundering policies which the appellant submitted in 2021 at the respondent's request.

9. The CAR indicated that the respondent reviewed the appellant's compliance program in accordance with the requirements of the FIA, focusing on targeted financial sanctions and high-risk clients such as politically exposed persons. The CAR's findings included that the appellant's compliance program did not adequately outline the implementation of:

    9.1. Targeted financial sanctions, which involved asset freezing without delay and prohibition from making funds, assets or services available for the benefit of sanctioned individuals, entities or groups as outlined in the respondent's Guidance Note. No. 7 of 2023 ("GN 7/23").

9.2. Deliberate measures to identify politically exposed persons ("PEPs") and subject them to required controls including seeking management approval before continuing with a business relationship; subjecting PEPs to enhanced due diligence as outlined in revised Guidance Note 1 of 2019 ("GN 1/2019").

10. In addition, the respondent attached to the CAR Directive No. 1 of 2023 ("DR 1/2023") which deals with the mandatory application of targeted financial sanctions. GN 7/2023 expands on the practical application of DR 1/2023.

11. The CAR further contained directive to the appellant to-

11.1. study DR 1/2023 as well as revised GN 1/2019 and GN 1/2023 to "ensure the implementation of effective controls".

11.2. address the following by 30 June 2023:

(a) avail the respondent with a formal response to the CAR findings;
(b) avail the respondent with a revised AML/CFT/CPF compliance program and policy which makes provision for the implementation of targeted financial sanctions; and
(c) to ensure effective implementation of the aforesaid measures.

12. On 26 June 2023 the appellant directed a request for an extension of its response due by 30 June 2023 because its revised AML/CFT/CPF compliance program and policies would only be available by end of September as a result of its internal compliance requirements and the implementation of the final module of its automated transactional monitoring tool on 6 June 2023, amongst other reasons.

13. On 11 July the respondent replied and while noting the appellant's request for an extension, directed that the appellant should have interim measures in place to address the control shortcomings identified in the CAR if not already implemented after the CAR was issued. The 11 July notice concluded by formally notifying the appellant that the respondent would within three weeks conduct a follow-up FIA compliance

assessment to test the effectiveness of interim controls that should have been implemented since the CAR was provided to the appellant.

14. Shortly thereafter, on 18 July 2023, the respondent served a notice on the appellant requiring the latter to furnish it with the appellant's amended AML compliance program by 7 August 2023. The appellant was further advised that it was under enforcement considerations in accordance with section 56 of the FIA.

15. On 4 August 2023 the appellant provided the respondent with updated policies comprising its compliance program required by the FIA and also evidence of its interim control measures in compliance with the CAR. The appellant expected that the respondent would do the follow-up assessment for validation as indicated by the respondent in its 11 July notice.

16. On 20 October 2023 the respondent served a notice on the appellant in terms of section 56(5) of the FIA. The notice advised the appellant that it was in non-compliance with GN 1/2019 and DR 1/2023 and that the respondent intended imposing a penalty of N$3 million on the appellant. The latter was advised that it could make written representations as to why the intended financial penalty should not be imposed.

17. On 31 October 2023 the appellant furnished the respondent with detailed submissions which served to persuade the respondent to reduce the penalty to N$1 million. The appellant was informed of this fact in a letter dated 14 November 2023.

18. These events culminated in the appeal that the appellant launched on 14 December 2023.

19. In its appeal, the appellant raised several grounds, with the key point being that the respondent's order to impose a fine of N$1 million was unlawful and should be set aside because (1) the order exceeded the respondent's authority causing it to act *ultra vires*, (2) the order was procedurally and substantively unreasonable and unfair and substantively irrational and arbitrary and (3) the respondent exercised its discretion on incorrect facts and legal principles.

The law

20. In *Ngavetene and Others v Minister of Agriculture, Water and Forestry and Others*[1] the High Court accepted as a correct proposition of our law that a public body which owes its legal existence and derives its power from a statute can do no valid act unless thereto authorised by its enabling legislation. If not so authorised such public body would act *ultra vires*.[2] If an administrative body acted *ultra vires*, the purported action is void from the onset and thus a "*nullity in law*"[3].

21. Moreover, the presumption against the retrospective operation of legislative measures is almost universally recognized. The presumption has been articulated by courts in various jurisdictions, including the famous statement by Justice Wightman in the English case *Phillips v. Eyre* (1870), where he emphasized that retrospective laws are not favoured unless there is clear and unambiguous legislative intent. In *Curtis v Johannesburg Municipality*[4] Innes CJ reiterated this principle. The Namibian Supreme Court confirmed that this presumption forms part of our law in *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Another*[5].

22. The presumption is designed to protect persons from the unfairness of having their actions judged by laws that were not in effect at the time those actions were taken.

Did the respondent exceed its authority and act *ultra vires*?

23. As was set out herein already, the respondent in its compliance assessment report ("CAR" served on the appellant on 23 June 2023) identified alleged transgressions of-

    23.1. DR 1/23 and its associated guidance note GN 7/23 (which deals with targeted financial sanctions, involving asset freezing and prohibition from making funds,

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[1] 2019 (1) NR 129 (HC). Although the Supreme Court reversed in part and confirmed in part the High Court decision, the correctness of the *ultra vires* doctrine as espoused by the court *a quo* was not controverted by the Supreme Court.
[2] *Ibid* at p142-143 par [53]
[3] *Ehika Fishing (Pty) Ltd v Minister of Fisheries and Marine Resources and Others* 2021 (1) NR 142 (HC) p148 at par [20]
[4] 1906 TS 308 at 311
[5] 2018 (3) NR 664 (SC) at p690 par [110]

assets or services available for the benefit of sanctioned individuals, entities or groups); and

23.2. The revised GN 1/2019 concerned with deliberate measures an accountable institution should take to identify politically exposed persons ("PEPs") and subject them to required controls and enhanced due diligence.

24. DR 1/23, GN 7/23 and the revised GN 1/2019 came into operation only on 17 April 2023.

25. However, the CAR for the appellant was conducted from November 2022 to February 2023. When the report was issued, the respondent only had information on the appellant's compliance and anti-money laundering policies submitted in 2021.

26. This aspect is underscored by the respondent in its letter to the appellant dated 10 November 2023 under cover of which the appellant was penalised in the amount of N$1 million. The reason for the imposition of the penalty is stated as being the result of the appellant's initial failure "*as at the time of the offsite assessment to comply in that your AML/CFTCPF compliance program did not adequately outline the implementation of targeted financial sanctions, as outlined in Guidance Note 07 of 2023; and the implementation of Politically Exposed Persons measures as outlined in Revised Guidance 01 of 2019*".

27. The respondent therefore penalised the appellant on the basis of alleged transgressions that were identified during November 2022 to February 2023 and on the basis of information regarding the appellant that was submitted to the respondent in 2021. However, the directive and guidance notes that the respondent is alleged to have transgressed only entered into force on 17 April 2023.

28. The respondent does not have any authority under the FIA or any other law to penalise the appellant for actions that occurred when DR 1/23, GN 7/23 and the revised GN 1/2019 were not in force. In effect the respondent imposed the penalty on the appellant with retrospective effect thereby violating the presumption against retrospective

application of laws. In so doing the respondent acted *ultra vires*. In the result the order to impose a penalty of N$1 million on the appellant is a nullity in law.

29. It is for good reason therefore that the respondent wisely desisted from opposing the appellant's appeal.

30. Our finding in favour of the appellant on this point is dispositive of the appeal and we do not deem it necessary to consider the further grounds of appeal raised by the appellant.

In the result, the following order is made:

1. The appeal succeeds.

2. The N$1 million that the appellant paid to the respondent in consequence to its order of 10 November 2023 must be repaid to the appellant within 30 days from the date of this decision.

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

4. 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. Maasdorp
Instructed by Ellis Shilengudwa Inc.

RESPONDENT: No appearance