CASE NUMBER: FIA/AB 2/2021

IN THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE ACT, 2012

In the matter between:

PRUDENTIAL (NAMIBIA) UNIT TRUSTS LTD **APPELLANT**
(now known as M and G INVESTMENTS UNIT TRUSTS (NAMIBIA) PROPRIETARY LIMITED

and

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

DECISION

Introduction

1. The appellant is a unit trust management company established under the Unit Trusts Control Act, No. 18 of 1981. The appellant is regulated by the Namibia Financial Institutions Supervisory Authority (NAMFISA), the first respondent in this appeal as a financial institution under the NAMFISA Act, No. 3 of 2001. For purposes of the Financial Intelligence Act, No 13 of 2012 ("the FIA"), NAMFISA is a supervisory body under Schedule 2 of the FIA in relation to the appellant.

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

3. The FIA was substantively amended with effect from 21 July 2023 and therefore reference to that Act in this appeal unless the context indicates otherwise, means the FIA prior to the 2023 amendments.

4. In terms of the FIA Schedule 1, item 14(e), the appellant is an accountable institution, being an entity regulated by the respondent and conducting business as a unit trust manager. Consequently, the appellant has the obligations imposed on accountable institutions by the FIA.

5. 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 under the FIA to ensure compliance with that Act and to impose administrative sanctions on offending accountable or reporting institutions.

Brief chronology of events

6. This matter has a protracted history.

7. During 2012 the FIC performed an assessment of the appellant in terms of the Financial Intelligence Act, No 3 of 2007 ("the 2007 Act"). The assessment was intended to understand the methods and processes used by the appellant to monitor and detect suspicious transactions. The FIC thereafter provided the appellant with a compliance assessment report ("CAR").

8. The CAR notified the appellant of various areas in which it was non-compliant.

9. The respondent conducted an AML/CFT/CPF compliance assessment of the appellant on 19 and 20 September 2016 in terms the FIA and the Inspection of Financial Institutions Act, No 38 of 1984.

10. On 6 February 2017, the respondent issued a CAR in respect of an onsite assessment that it conducted to assess the compliance status of the appellant.

11. By letter dated 02 September 2019, the respondent notified the appellant of the intention to impose an "administrative sanction".

12. The appellant responded to the aforementioned notice letter by way of a letter dated 10 October 2019.

13. The respondent communicated its decision to impose an administrative sanction upon the appellant in the Penalty Notice by way of a letter dated 11 May 2020.

14. On 11 May 2020 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$5 million of which N$4 million was conditionally suspended for five years. The appellant was required to pay the remaining N$1 million within 30 work days from 11 May 2020 into a bank account that the respondent designated.

15. 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.

16. Following the Penalty Notice of 11 May 2020, the appellant lodged this appeal on 10 June 2020, within the 30-day period from 11 May 2020 required by section 58(2) of the FIA.

17. 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 Appeal Board was appointed by the Minister responsible for finance with effect from 12 April 2021.

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

19. The appeal was heard by the Appeal Board on 5 September 2022 and its decision was supposed to have been handed down on 21 November 2022. Unfortunately, in the hearing of another appeal one of the parties in that appeal raised a concern regarding the appointment of one of the Appeal Board members who previously was the Chairperson of the board of the respondent.

20. 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.

21. 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, comprising the replacement member could proceed to consider the appeal record and make a decision on the appeal.

22. 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 for consideration

The impermissible collateral challenge argument

23. The respondent in their heads of argument 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 is argued, is not directed at the FIC's decision pursuant to section 56(3)(f) of the FIA.

24. The respondent persisted with its "impermissible collateral challenge" argument at the hearing of the appeal.

25. Nevertheless, on a proper reading of the appellant's notice of appeal, it is clear that such argument is without foundation. 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.)

26. 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 accurately 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 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.*"

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

The nature of the appeal

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

28. Mr. Kauta on behalf of the respondent referred the Appeal Board to the case of *Hyde Park Auto (Pty) Ltd T/A Sandton Auto v Financial Intelligence Centre*[2] and *Harlyn Trading International (Pty) Ltd v The Financial Intelligence Centre*[3] as authority for the proposition that the FIA Appeal Board is concerned with narrow appeals in accordance with section 58 of the FIA.

29. 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 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.*"

30. 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*

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

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.)

31. 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.

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

32. Sections 58(4) and (5) of the FIA (Namibia) 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."

33. The FICA's section 45D under the heading "**Appeal**" was not 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 new 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 -

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

(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.".

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

35. 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.

36. 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 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

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

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.

(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.*" (Emphasis added.)

37. 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".

38. 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.

[7] Appeal No12/3//5 delivered on 3/11/2017 at p12 par [21]

"*[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]

[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

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[8] Subsections (3A), (3B), (3C), (3D) and (3E) were quoted in full above.

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.)

39. 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).

40. 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 thus 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.

41. 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.

42. Mr. Tötemeyer who appeared on behalf of the appellant argued that appeals before the Appeal Board are wide and not narrow. As authority counsel referred the Appeal Board to *Baxter*[9] where the author relying on *Tikly v Johannes NO*[10] 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 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'*[11]*. 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.*"[12]

43. 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.*"

44. The Court held:

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

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[9] Administrative Law, 3d Edition, a seminal work on the subject matter, widely quoted in administrative law decisions by Courts and Tribunals
[10] 1963 (2) SA 588 (T) at 590F-591A
[11] *Supra* at 590F
[12] At pages 256 and 257

(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;*

(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.*"[13]. (References to case law removed.)

45. The Court further held that the "sense in which 'appeal' was used in the section must be determined from its context in the Act."[14] The Court proceeded to analyse the context and concluded that the right to an appeal envisaged under the Act in question was a right to a wide appeal.

46. 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:

46.1. Section 58(4) states as a general rule 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.

46.2. 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

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[13] At 590F-591A
[14] At 591A

require any such person to produce any document in his, her or its possession, custody or control for the purposes of deciding the appeal.

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

47. 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.

48. 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.*

49. Moreover, the cases to which Mr. Kauta referred the Appeal Board invariably deals with reviews or narrow appeals, where the Court's has a narrow discretion and may only interfere in the decision on the basis that the decision-maker (i) acted mala fide; (ii) acted from ulterior and improper motives; (iii) had not applied its mind to the matter (iv) did not exercise its discretion at all; or (v) disregarded the express provisions of the statute.[15]

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

51. 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.[16] In this regard:

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[15] See for instance: *Hyde Park Auto (Pty) Ltd T/A Sandton Auto supra; Hyde Park Auto (Pty) Ltd T/A Sandton Auto v Financial Intelligence Centre supra; North-West Township (Pty) v Administrator Transvaal 1975 (4) SA (T) Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Afrika) 1928 AD 220*

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

51.1. 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.".

51.2. Section 45D(7) provides:

"*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.".

52. Apart from minor differences the two sections are identical. The powers of the FICA and FIA Appeal Boards 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."

53. 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).

54. This is borne out by the decision of *Potgieter and Another v Howie and Others NNO*[17]. 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:

"*[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 such powers on its own. The appeal board could therefore not substitute its own decision in place of the decision appealed against.*"[18] (Emphasis added)

55. 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).

56. Our High Court in *Registrar of Pension Funds v Board of Appeal Established in Terms of Act 3 of 2001 and another*[19] 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 identical terms as section 45D(7) and section 58(8)), the Court held at par [107]:

"*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.*"[20]

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[17] 2014 (3) SA 336 (GP)
[18] *Supra* p347 para [36]
[19] 2024 JDR 4262 (Nm)
[20] At p34

The appellant's main grounds of appeal

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

Sanction imposed by respondent on non-compliance findings under the 2007 FIA

57.1. The Penalty Decision indicates that the respondent sought to place reliance on alleged non-compliance findings raised by the FIC during 2012 to seek to impose an administrative sanction relying on the FIA. The FIA was brought into force on 21 December 2012. It was submitted that the reliance by the respondent upon sections of the FIA's predecessor, the Financial Intelligence Act, No. 3 of 2007 ("the 2007 FIA") is, in law, unsound, particularly as section 56(1) of the FIA authorises the imposition of an administrative sanction only when the respondent is "satisfied on available facts and information that an institution or person has failed to comply with a provision of the FIA and any regulation, order, determination or directive issued under the FIA. Section 1 of the FIA defines "this Act" as including "regulations and determinations", but not as including the 2007 FIA. The transitional provision contained in section 73(2) of the FIA also does not find application because that could only concern the imposition of a sanction under the repealed 2007 FIA, which is not what the respondent sought to do.

Abdication of decision-making authority

57.2. There was a clear 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

57.3. A fundamental failure of the appellant'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.

Transgression of section 54(2)(a) of FIA

57.4. Additionally, the non-receipt by the appellant of an important letter from the respondent (dated 12 April 2018) was not considered in arriving at the Penalty Decision. Consequently, the respondent concluded that the appellant failed to comply with a directive and thus committed a transgression of section 54(2)(a) of the FIA.

No factual basis for imposing sanction

57.5. 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

58. Regarding ground 1 (*Sanction imposed by respondent on non-compliance findings under the 2007 FIA*), Mr. Tötemeyer made the following submissions:

58.1. According to the respondent the FIC CAR indicated that the appellant failed to properly complete information pertaining to occupation and source of income and that this constituted a contravention of sections 13 and 14 of the 2007 FIA and regulation 12 of the regulations published thereunder.

58.2. The appellant was made aware of the results of the FIC CAR by way of letter dated 13 November 2012. However, at the time of the 2012 Assessment, the FIC did not indicate that there was a contravention of the 2007 FIA. Instead, the FIC recommended that the appellant addressed identified "weaknesses" in its monitoring systems which the 2012 Assessment had identified.

58.3. In its Notice of Intention to Impose a Penalty dated 2 September 2019 and the Penalty Notice dated 11 May 2020, the respondent indicated that in the course of monitoring and supervising the appellant it was detected by the respondent and the FIC that the appellant was *inter alia* non-compliant in the following respects:

(a) Information pertaining to occupation and source of income was not completed properly. This included information on occupation and place of employment for clients who are natural persons, and business activities if funds involved in the transactions originated from business activities. Thus, the appellant was not complying with sections 13 and 14 of the 2007 FIA and Regulation 12 of the regulations issued under the 2007 FIA.

(b) The appellant's monitoring systems did not adequately integrate or take into account client profile information in order to detect unusual transactions to be investigated. The failure to adequately monitor transactions due to the inadequate source of income/funds information, which undermined efforts to compile adequate client profiles. Therefore, the respondent did not comply with section 21 of the 2007 FIA.

58.4. The appellant maintained in its founding affidavit that the respondent sought to place reliance on "alleged non-compliance findings raised by the FIC during 2012" in order to impose an administrative sanction in terms of the FIA. This,

despite the fact that section 56(1)(a) authorises the respondent to only impose an administrative sanction when "satisfied on available facts and information that the institution or person - (a) has failed to comply with a provision of this Act and any regulation, order, determination or directive issued under this Act..."

58.5. The respondent stated in its answering affidavit that-

(a) on the facts the acts of non-compliance were detected in 2012 and the respondent noted repetitive acts of non-compliance in its 2016 inspection (at par 91);

(b) even though the assessment and the findings were based on the 2007 FIA, the respondent was required to conduct ongoing assessments by virtue of its supervisory role in terms of FIA and the NAMFISA Act (at par 92);

(c) on the basis of section 73(2) of the FIA, the assessments and findings made under the 2007 FIA were deemed to have been made in terms of FIA (at par 93);

(d) the appellant was penalised for the non-compliance detected in 2012 and 2016 (at par 124).

58.6. The appellant noted in its replying affidavit that the respondent could not rely on the FIA of 2012 to penalise the appellant in respect of conduct which occurred before the 2012 Act came into operation. The 2012 FIA and the 2007 FIA differed in material respects. For example, the earlier FIA did not contain the same provisions regarding administrative sanctions as the later FIA.

58.7. The transitional provisions contained in section 73(2) of the 2012 FIA do not avail the respondent who sought to rely on section 73(2) as justification for penalising the appellant for conduct which the FIC discovered when it did a compliance inspection under the 2007 FIA.

58.8. Section 73(2) of the 2012 FIA provides:

> "*Any regulation made or any exemption, notice, circular, determination or guidance issued or any other thing done under the Act repealed by section 72 is deemed to have been made, issued or done under the corresponding provision of this Act.*".

58.9. The respondent erred in law by assuming that the import of section 73(2) is that conduct that transgressed provisions of the 2007 FIA could be punished under the 2012 FIA.

58.10. The principle of "ejusdem generis" applies in the interpretation of section 73(2). This principle is one of statutory construction which states that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned.

58.11. Thus, where section 73(2) states that any regulation made or any exemption, notice, circular, determination or guidance issued or any other thing done under the 2007 FIA is deemed to have been issued or done under the 2012 Act, it does not imply that conduct of the appellant, who is subject to the regulatory scheme under the 2007 Act, is deemed to be conduct of the appellant under the 2012 FIA. Such an interpretation goes against the grain of principles of fairness.

59. Concerning ground 2 (*Abdication of decision-making authority*), Mr. Tötemeyer contended:

59.1. 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.

59.2. Firstly, section 56(1) determines that the either the FIC or the respondent may impose an administrative sanction on an accountable institution such as the appellant, when satisfied on available facts and information that the institution-

"(a) has failed to comply with a provision of [the FIA] or any regulation, order, determination or directive issued in terms of [the FIA];

(b) has failed to comply with 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)"

59.3. Secondly, in determining an appropriate administrative sanction, the FIC or the respondent must consider the factors stipulated by section 56(2).

59.4. Thirdly, section 56(3) establishes the various administrative sanctions that the FIC or the respondent may impose. In total, six different sanctions may be imposed, which include under subsection (3)-

(a) a caution;
(b) a reprimand;
(c) a directive to take remedial action or to make specific arrangements;
(d) a restriction or suspension of certain identified business activities;
(e) a suspension of licence to carry on business activities; and
(f) a financial penalty not exceeding N$10 million.

59.5. The imposition of an administrative sanction under section 56 is subject to the following:

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

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

59.5.3. Therefore, the FIC only determines the penalty after it consulted the respondent and Namibian Stock Exchange (NSX). 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.

59.6. Consequently, *in casu* the FIC was required to determine the quantum of the financial penalty but after listening to and giving serious consideration to what the respondent and the NSX had to say. The FIC had to give serious consideration to their views and afterwards the FIC had to decide on its own. It had to exercise its own mind.

59.7. 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" and in "considering the appropriate amount, NAMFISA adopted the matrix system". (at par 82.)

59.8. This was wrong in law since the respondent couldn't adopt the matrix system and determine the penalty in consultation with the FIC. The FIC was required to determine the penalty after consultation with the respondent.

59.9. The record further indicated that the FIC abdicated its responsibility to determine the quantum of the penalty after consultation with the respondent.

59.10. Reference was made to a meeting between the respondent and the FIC on 19 August 2019. This meeting took place two weeks before the respondent despatched its notice of intention to impose a penalty dated 2 September 2019.

59.11. In the respondent's "Enforcement Brief" dated 5 December 2018 which deals with the appellant and Prudential Asset Managers, the recommended penalty was N$1.5 million of which N$750,000 was conditionally suspended for 2 years.

59.12. In the respondent's "Enforcement Brief" dated 25 June 2019 which deals with the appellant, the recommended penalty was N$2 million of which N$1 million was conditionally suspended for 2 years.

59.13. Both these Enforcement Briefs predated the meeting of the respondent and the FIC of 19 August 2019.

59.14. During the meeting of 19 August 2019, under agenda item 5.1 (with the heading "Imposition of administrative sanctions on PSG Wealth Management, Simonis Storm Securities (Pty) Ltd, IJG Securities, Stanlib Namibia Unit Trust Management Company, Prudential Unit Trust and Prudential Asset Managers Company") the FIC and the respondent discussed the penalties to be imposed on the aforementioned entities.

59.15. The minutes record that the "FIC Director advised that NAMFISA may go ahead and impose the amount initially recommended, i.e. N$2 million of which N$1 million is suspended for 2 years on condition that no further contraventions with the FIA or subordinate instrument (sic)", and that the "FIC Director however stressed the point that going forward, if it was necessary to suspend a portion of a financial penalty, a longer period should be considered, as long as it does not exceed the prescribed period of five years".

59.16. There was agreement between the FIC and the respondent that in respect of other entities the sanction imposed should be N$2 million of which N$1 million is conditionally suspended for 2 years. With regards to the appellant and Prudential

Asset Managers the "FIC indicated that ... as long as there is no deviation from the Matrix, and the period of suspension is longer than 2 years, the FIC has no objection to the recommended penalty amount". This made it clear that the recommended sanction to be imposed on the appellant and Prudential Asset Managers should be N$2 million of which N$1 million would be conditionally suspended for longer than 2 years.

59.17. Finally, the FIC director concluded that "NAMFISA can take any decision it deems fit as far as administrative sanction is concerned. The FIC will only give support [where] possible to ensure that administrative sanctions imposed are proportionate and dissuasive".

59.18. The respondent thereafter imposed a financial penalty on the appellant of N$5 million of which N$4 million was conditionally suspended for 5 years. Discussion regarding this penalty was not reflected anywhere in the appeal record and therefore the FIC did not determine the penalty. The meeting of 19 August 2019 envisaged a penalty of N$2 million of which N$1 million would be conditionally suspended for longer than 2 years.

59.19. Consequently, the sequence of events indicated that there was an abdication by the FIC of its decision-making authority to the respondent. Effectively the respondent was given *carte blanche* to decide on the appropriate administrative sanction.

59.20. 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.

60. On ground 4 (*transgression of section 54(2)(a) of FIA*) which was argued before counsel for the appellant addressed ground 3 (*failure to apply audi alteram partem rule*)) the following submissions were made:

60.1. It was the respondent's contention in the Penalty Notice that the appellant committed in an action plan dated 28 February 2017, to remediate all deficiencies as enumerated in the NAMFISA onsite compliance assessment report by 31 March 2018. The appellant failed to submit a progress report by 31 March 2018 after which the respondent directed the appellant in a letter dated 12 April 2018 to submit the outstanding progress report. The appellant did not submit any progress reports. Therefore, the appellant failed to comply with the directive contained in the 12 April 2018 letter.

60.2. In the appellant's founding affidavit, the following appears at par 15.2:

"*However, the appellant did not receive the reminder letter allegedly addressed to it by NAMFISA on 12 April 2018. Moreover, I have followed up with the appellant's offices and there is no record of such letter dated 12 April 2018.*"

60.3. There was ample opportunity based on what appellant stated in par 15.2 for the respondent to disprove the statement.

60.4. The respondent stated at paragraph 43 of its answering affidavit that by way of the 12 April 2018 letter the appellant was required to submit a progress report highlighting its progress in implementing the remedial actions as per the action plan provided. The progress report had to be accompanied by the necessary supporting documents as evidence. However, the appellant failed to file the progress report and its failure to do so constituted a contravention of section 54(2)(a) of the FIA and the FIC Directive 2 of 2017.

60.5. At paragraph 120 of the respondent's answering affidavit in answer to paragraph 15.2 of the appellant's founding affidavit, the respondent stated:

"*The Authority could only have considered the remediation actions if it was furnished with feedback in respect of its findings. On 12 April 2018, the Authority requested an update on the intended remediation actions by the appellant, I refer to the said letter ("KM2"), as no progress reports were submitted.*".

60.6. In its replying affidavit the appellant responded to both paragraphs 43 and 120 of the respondent's answering affidavit and reiterated that the appellant did not receive the letter of 12 April 2018. Consequently, the appellant's failure to submit the required progress report could not constitute a contravention of section 54(2)(a) of the FIA or of the FIC Directive 2 of 2017.

60.7. The appellant through its deponent Mr. Ziyaad Bassadien further "[pointed] out that despite this being in issue before this appeal was lodged, the respondents (sic) also do not indicate when, where and how the letter of 12 April 2018 was allegedly transmitted, and it also fail (sic) to attach any proof of such transmission to the answering affidavit. The first time the existence of the letter of 12 April 2018 came to [the appellant's] attention was when reference was made thereto in the first respondent's [Penalty Notice]".

60.8. Mr. Bassadien further stated that he requested the appellant's information technology department to check the relevant email records and that Mr. Daron Avinir conducted a verification exercise on 22 February 2022, but did not detect any email received from the respondent on or about 12 April 2018. Mr. Avinir deposed to a confirmatory affidavit.

60.9. In the appellant's view therefore, it has been conclusively proved based on the papers before the Appeal Board and having regard to the opportunity availed to the respondent to prove delivery of the 12 April 2018 letter, that in fact the said letter has not been delivered to the appellant.

60.10. The non-receipt of the letter of 12 April would have been and was a relevant consideration which should have been considered by the respondent before any decisions were taken to impose any form of sanctions.

61. On ground 3 (*failure to apply audi alteram partem rule*) counsel for the appellant submitted:

61.1. As a general proposition, where a person's rights will be affected by an administrative decisionmaker, 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.

61.2. Failure to properly hear an affected person should lead to the setting aside of the decision since not affording an affected person *audi alteram partem* on its own vitiates the decision.

61.3. As a general rule, a person must be afforded the right to be heard before the decision is taken.[21]

61.4. 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*. Article 18 implies the right to be heard since the rights entrenched thereby are super imposed over all statutory provisions.[22]

61.5. Section 56 envisages a decision with many facets. Firstly, 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 respondent has failed to comply with -

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

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[21] 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

[22] 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.

(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.

61.6. 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.

61.7. 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 the common law and article 18 of the Constitution 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 a relevant regulatory body to the appellant) and failed to afford the appellant an opportunity to make representations thereon, thus infringing the fundamental principle of *audi alteram partem*.

61.8. 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

61.9. In addition, the appellant should have been given an opportunity to make representations on the respondent's enforcement policy, all the factors referenced in it and the "matrix" which was allegedly used in determining the

administrative sanction imposed. The respondent has not given the appellant such an opportunity.

61.10. Regarding the respondent's enforcement policy (attached as Annexure KM3 to the respondent's answering papers) the appellant submitted:

(a) Annexure KM3 was not provided to the appellant prior to the current appeal. In terms of paragraph 9.6 thereof a notice inviting representations from an affected person or institution must be issued before an administrative sanction was imposed. The respondent did not comply with paragraph 9.

(b) In terms of KM3, an enforcement committee had to make recommendations to the chief executive officer of the respondent ("the Registrar") on the appropriate administrative sanction or action to be imposed and/or taken in terms of paragraph 9 of KM3.

(c) 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.

(d) In terms of paragraph 11 of the enforcement policy, if the Registrar intended to impose an administrative sanction the affected institution had to be afforded an opportunity to make representations before the Registrar imposed the sanction.

(e) The respondent did not comply with its enforcement policy in ensuring the two *audi alteram partem* processes envisaged in paragraphs 9 and 11 were availed to the appellant.

(f) In *Onesmus v Permanent Secretary: Finance and Others*[23] the High Court held[24]:

> "*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.*"

61.11. In the final analysis, the respondent consequently did not afford the appellant the right to be heard and to make meaningful representations.

62. Regarding ground 5 (*No factual basis for imposing sanction*) counsel for the appellant submitted:

62.1. The respondent erred in law and/or in fact and/or misdirected itself in making the findings recorded in paragraphs 3.1.1 and 3.1.2 of the Penalty Notice.

62.2. The respondent erred in law and/or in fact and/or misdirected itself in making the findings recorded in paragraphs 3.2.1 - 3.2.6 of the Penalty Notice.

62.3. The respondent erred in law and/or in fact and/or misdirected itself in making the findings recorded in paragraph 4 of the Penalty Notice.

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[23] 2010 (2) NR 460 (HC)
[24] at p466, par [13]

62.4. The respondent erred in law and/or in fact and/or misdirected itself in making the findings recorded in paragraphs 6.3.1.1- 6.3.4.2 of the Penalty Notice.

62.5. The Penalty Notice was replete with conclusions and labels but failed to properly and with sufficient detail (providing the factual underpinnings) articulate the reasons for imposing the administrative sanction. Furthermore, the reasons and factors considered by the respondent and the FIC in arriving at the Penalty Decision, was based on the failure by the appellant to provide information not previously requested by the respondent and only referenced for the first time in the letter of imposition.

62.6. The Notice of Imposition which preceded the Penalty Notice indicated that the respondent made up its mind with regards to the contraventions of the FIA attributed to the appellant. The Notice contained phrases such as "not completed properly" (paragraph 3.1.1); "did not adequately integrate or take into account" and "failure to adequately monitor" (paragraph 3.1.2); "minimal progress" (paragraph 4); "failure to submit" (paragraph 5); "severe, serious, perpetual and warrant administrative sanction" (paragraph 6); "the above non-compliance by PNUT were found to be severe, serious and repetitive" (paragraph 7.1), amongst others.

62.7. The respondent acted with a close mind without any factual basis being laid for the conclusions drawn, which infringed upon the appellant's rights under Articles 12 and 18 of the Constitution.

The respondent's submissions

63. Regarding the first ground of appeal (*Reliance by respondent on FIA 2007 for non-compliance findings*) argued by the appellant, Mr. Kauta made the following submissions:

63.1. The 2012 CAR in respect of the appellant done by the FIC was properly considered by the respondent for purposes of imposing an administrative sanction.

63.2. This is so since section 73(2) of the FIA provides that-

> *"(2) Any regulation made or any exemption, notice, circular, determination or guidance issued, or any other thing done under the Act repealed by section 72 is deemed to have been made, issued or done under the corresponding provision of this Act."* (The emphasis was provided by the respondent in its heads of argument)

63.3. Section 72 of the FIA repealed its predecessor statute, being the 2007 FIA.

63.4. Consequently, any assessment done in terms of the repealed 2007 FIA including the 2012 assessment by the FIC is deemed to have made, issued or done under the corresponding provision of the FIA.

63.5. Even though the 2007 FIA did not contain the same provisions pertaining to administrative sanctions as the FIA, in the clear wording of section 56 of the FlA nothing prevents the respondent from considering the findings of 2012 assessment.

63.6. The 2012 assessment of the appellant is a relevant factor that must be considered by the respondent in determining the appropriate administrative sanctions as it informs the duration and extent of the appellant's non-compliance, whether the appellant has previously failed to comply with any law and whether the appellant has taken any remedial steps.

64. On the appellant's second ground of appeal (*Abdication of decision-making authority*), it was contended on behalf of the respondent that:

64.1. 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.

64.2. Insofar as the appellant contended that the NSX also had to be consulted for purposes of imposing an administrative sanction, specifically a financial penalty, the appellant as a unit trust manager is not regulated by the NSX and consequently there was no duty to consult the NSX in order to determine the appropriate penalty.

64.3. 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.

65. 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

66. Evidently, Mr. Kauta agreed with Mr. Tötemeyer that the guiding authorities made a distinction between a statutory requirement for decisionmakers to act "in consultation" or "after consultation" with another entity. With reference to *McDonald v Minister of Minerals and Energy*[25] counsel submitted that 'after consultation' requires no more than that 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.

67. On the next ground of appeal (*transgression of section 54(2)(a) of FIA*) the following are pertinent regarding the respondent's submissions:

67.1. In the heads of argument of the respondent, only one reference is made regarding the respondent's directive in its letter of 12 April 2018 as follows:

"*On 12 April 2018 the Authority responded to the 28 February 2017 action plan. The Authority requested the appellant to submit a progress report highlighting*

[25] 2007 (5) SA 642 (c) at 649B-D

its progress in implementing the remedial actions as per the action plan provided accompanied by the necessary supporting documents as is evidence."

67.2. Mr. Kauta, at the hearing of this appeal handed an email to the Appeal Board and the appellant purporting to prove delivery of the 12 April 2018 letter to the appellant. At that juncture, the email was not part of the appeal record or the pleadings in the appeal.

67.3. The appellant objected to the admission of the email on the basis that receipt of the 12 April 2018 letter by the appellant has been placed into dispute from the onset of the appeal and that the respondent had ample opportunity to deal with the issue.

67.4. Mr. Kauta argued that the email should be admitted into the appeal record since the appellant argued that the Appeal Board was seized with a wide appeal.

67.5. Mr. Kauta submitted that when the appellant disputed receipt of the 12 April letter in its founding affidavit, the respondent attached the letter to its answering papers. The appellant in reply stated that the appellant never received the 12 April letter.

68. Regarding the next ground of appeal (*failure to apply audi alteram partem rule*) counsel on behalf of the respondent submitted:

68.1. 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.

68.2. 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.

68.3. The ultimate decisionmaker 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.

68.4. The appellant contended that the noun "determination" is defined in section 1 of the FIA to mean "a determination made under this Act and published by notice in the *Gazette*". By extension the requirement in section 56(3)(f) that an administrative sanction that may be imposed in the form of "a financial penalty, not exceeding N$10 million, as determined by the Centre" means that the determination of the financial penalty must be published by notice in the Government Gazette.

68.5. The appellant's notice of appeal proceeds on the basis that there is no *audi alteram partem* because effectively there is no determination (as defined by section 1 of the FIA) published in the Gazette. However, the word "determine" in section 56(3)(f) does not mean a "determination" as defined. It means the conclusion of a dispute by rendering of a final decision. Consequently, the FIC is the final decisionmaker for purposes of section 56(3)(f).

68.6. 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.*"

68.7. 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)(d) of the FIA, which follows the *audi alterum partem* rule.

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

68.9. The right to *audi alteram partem* does not start with the section 56(5) notice. The appellant was furnished with the 2012 CAR by the FIC as well as the 2016 CAR by respondent and given the opportunity to make representations. The appellant also made use of the opportunity and made representations.

69. Regarding ground 5 (*No factual basis for imposing sanction*) counsel for the respondent submitted:

69.1. The appellant was given the 2012 FIC CAR as well as the respondent's CAR of 2016 which set out the factual basis for the decision to impose the financial penalty.

69.2. In particular, the appellant undertook to remedy all weakness identified in the 2016 CAR by 31 March 2018.

69.3. Considering the facts of the matter and with reference to guiding case law authorities, the decision to impose the financial penalty was rational, reasonable and lawful.

The merits

70. 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.

71. 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.[26]

72. The appellant's first attack on the respondent's decision to impose a financial penalty concerned the fact that the sanction was based in part on non-compliance findings made by the FIC under the 2007 FIA.

73. It is common cause that, as Mr. Matomola on behalf of the respondent expressly stated in its answering affidavit, the appellant was penalised for the non-compliance detected in 2012 and 2016. The issue therefore is, not that any transgressions under the 2007 FIA were taken into account as an aggravating factor, but that the respondent was possessed of the legal authority to punish the appellant for violations of the 2007 FIA.

74. The first matter to be decided then is if the respondent was entitled to impose the financial penalty because of the appellant's non-compliance with the 2007 FIA. In other words, does the FIA authorise the respondent to penalise the appellant for conduct that were transgressions of the 2007 FIA?

75. It's the respondent's contention that the transitional provisions of section 73(2) which deems any regulation made or any exemption, notice, circular, determination or guidance issued or any other thing done under the 2007 FIA to have been made, issued or done under the corresponding provision of this Act.

76. In our view the respondent's position is without any foundation for the following reasons:

    76.1. Section 73(2) is a transitional provision whose very purpose is to manage the shift or changeover from an old law or regulatory framework to a new one. It outlines how the existing state of affairs should be treated and provides clarity to ensure continuity and legal certainty during the transition period.

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[26] *Tikly v Johannes NO supra*

76.2. Thus, any regulation made or any exemption, notice, circular, determination or guidance issued under the 2007 FIA are kept in force as long as there is a corresponding provision under the FIA in terms of which such regulation could be made or exemption, notice, circular, determination or guidance issued.

76.3. It was the respondent's contention that the phrase "or any other thing done under the [2007 FIA]" should be given its widest amplitude so that any CAR issued under the 2007 FIA is deemed to be a CAR issued under the FIA and therefore the respondent was at liberty to penalise the appellant for any non-compliance with provisions of the 2007 FIA.

76.4. In *Grobbelaar v De Vyver*[27] Schreiner JA, said:

"*The instrument of interpretation denoted by ejusdem generis or nascitur sociis must always be borne in mind where the meaning of general words in association with specific words has to be ascertained.*"[28].

76.5. The principle of *ejusdem generis* "is a principle which is very usually applied to the construction of clauses where words of limited meaning are followed by others of general application".[29]

76.6. Thus, the phrase "or any other thing done under the [2007 FIA]" must be read *ejusdem generis* with "regulation made or any exemption, notice, circular, determination or guidance issued" and thus denotes any instrument similar to a regulation, exemption, notice, circular, determination or guidance, like a directive, for instance which is not specifically mentioned by section 73(2).

76.7. Compliance assessments are done in order to detect whether an accountable institution for example complies with the applicable legislation. The CAR that is issued in consequence relate whether or not the institution is compliant or not. Thus, the CAR issued under the 2007 FIA would document incidences of

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[27] 1954 (1) SA 255 (A)
[28] Quoted from the headnote
[29] *Colonial Treasurer v Rand Water Board* 1907 TS 479, at p 484

non-compliance for purpose of determining whether or not enforcement measures should be applied to ensure compliance. The enforcement measures would be determined with reference to the enforcement regime in the 2007 FIA. A CAR would not be of the same genus as a regulation, exemption, notice, circular, determination or guidance envisaged under section 73(2).

76.8. Even if section 73(2) had the effect that an assessment issued under the 2007 FIA applied as if issued under the 2012 FIA, it would not mean that non-compliance issues detected under the 2007 Act could be sanctioned under the 2012 Act. For one, a completely different enforcement regime applied under the 2007 FIA. For example, under Part V, section 37 of the 2007 FIA, if the Bank of Namibia suspected that an accountable institution has committed an act or an omission which may constitute an offence in terms of the 2007 FIA, it must, institute an inquiry to establish whether an offence has been committed.

76.9. If the person conducting an inquiry in terms of section 37 found that an accountable institution has committed an offence as charged, that person could order the forfeiture to the State by way of penalty of the whole or a part of an amount deposited or secured by the institution in terms of section 37(3).

76.10. There is no basis in law on which the respondent can rely to punish incidences of non-compliance with the 2007 FIA under the provisions of the 2012 FIA. If the respondent wanted to punish the appellant for transgressions under the 2007 FIA, it had to invoke that Act as if it was not repealed and follow the provisions thereof. In this regard section 11(2)(d) and (e) of the Interpretation of Laws Proclamation No. 37 of 1920 provides:

"*Where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not –*

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed; or

79. On the second appeal ground argued on behalf of the appellant, viz., 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:

79.1. Mr. Matomola unequivocally stated in the answering affidavit on behalf of the respondent that the "penalty imposed was determined by the FIC, in consultation with NAMFISA" and in "considering the appropriate amount, NAMFISA adopted the matrix system".

79.2. The minutes of the meeting of 19 August 2019 indicate that the FIC and the respondent agreed on the financial penalties to be imposed.

79.3. In addition, the FIC informed the meeting that the respondent could take any decision it deems fit on administrative sanctions. The FIC would give support where possible to ensure that administrative sanctions imposed are proportionate and dissuasive.

79.4. At the 19 August 2019 meeting the recommended penalty for the appellant was N$2 million of which N$1 million would be conditionally suspended for a period longer than 2 years. This was confirmed by the two Enforcement Briefs of 5 December 2018 and 25 June 2019 which predated the 19 August meeting.

79.5. Two weeks after the 19 August meeting, the respondent served the appellant with a notice of intention to impose a penalty of N$5 million of which N$4 million was conditionally suspended for five years.

79.6. There is no indication in the appeal record of how the respondent arrived at this penalty but it seems clear that the respondent having been given the authority to take any decision it deems fit on administrative sanctions the respondent imposed the penalty of N$5 million which is a significant increase over the N$2 million penalty.

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

79.8. 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).

79.9. There is a difference between taking a decision "in consultation" and "after consultation". In *Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another*[33] the Supreme Court agreed[34] with the dictum in *Van Rooyen and Others v The State and Others*[35] where the following was stated:

"*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."

79.10. Counsel for the respondent 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 in fact strongly emphasised that the FIC is the final decision-making authority in relation to section 56(3)(f).

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[33] 2012 (2) NR 566 (SC)
[34] At p591 par [76] and par [78]
[35] 2001 (4) SA 396 (T) at p453

80. 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) regarding the nature of the consultation required, is a vitiating irregularity going to the heart of the decision to impose the financial penalty. Due to the requirements of section 56(3)(f) not having been met, the decision to impose the penalty is a nullity.

81. In *Hofmeyr v Minister of Justice and Another*[36] the Court held[37]

> "*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 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.*"[38]

82. We agree with counsel for the respondent though that the phrase "as determined by the Centre" in section 56(3)(f) does not denote a "determination" as defined in section 1 of the FIA. If the Legislature required the FIC to make a determination of the financial penalty under section 56(3)(f), which required to be published by notice in the

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[36] 1992 (3) SA 108 (C)
[37] At p117E-H
[38] 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

Government Gazette, it would have used the word "determination" in that section. Instead, the phrase "determined by the Centre" is employed.

83. We further agree with counsel for the respondent that there was no duty to consult with the NSX as a regulatory body for purposes of section 56. The appellant is an accountable institution regulated by the respondent and who conducts business as a unit trust manager in terms of Item 14(e) of Schedule 1 of FIA. The appellant is not regulated by the NSX and therefore no duty to consult it as a regulatory body arises *in casu*.

84. Regarding the question of whether or not the appellant committed a transgression of section 54(2)(a) of FIA, we note the following:

84.1. Section 58(4) of the FIA states as a general rule:

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

84.2. Mr. Kauta's attempt to hand the Appeal Board an email at the onset of the appeal hearing in an attempt to prove delivery of the 12 April 2018 letter (which email was not part of the appeal record) is tantamount to counsel seeking to testify on matters that were clearly placed in dispute in the appellant's founding papers. No explanation was proffered on the reasons why the email was not incorporated in the respondent's answering affidavit to enable the appellant to respond thereto in its replying papers. We therefore are unable to attach any weight to the said email.

84.3. In *Mostert v Minister of Justice*[39] the Supreme Court held with regards to providing evidence in affidavits[40]:

"*The point raised by him is not a purely legal point and it should therefore have been raised in the founding affidavit of the appellant. If it was so raised it would*

[39] 2003 NR 11 (SC)
[40] At p29H-I

have been open to the respondent to put evidence before the Court that it in fact complied with it, or if it had not, to state that that was the case. (See Cape Town I Municipality and Another v Belletuin (Pty) Ltd 1979 (2) SA 861 (A) at 885A-B and Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324-5)". (Emphasis added.)

84.4. The 12 April 2018 letter contained a directive to the appellant to deliver a progress report regarding the implementation of measures to address the weaknesses identified in the 2016 CAR issued by the respondent.

84.5. The non-compliance with the directive was one of the factors that the respondent considered in the imposition of the financial penalty and therefore the 2016 CAR stated that the appellant transgressed section 54(2).

84.6. We agree with counsel for the appellant that based on the papers before the Appeal Board and having regard to the opportunity availed to the respondent to prove delivery of the 12 April 2018 letter, the said letter has in fact not been delivered to the appellant.

85. In our view, the respondent took into account contravention of section 54(2) and the FIC Directive 2 of 2017 as an important factor in determining the financial penalty imposed on the appellant.

86. The respondent has not indicated which portion of the penalty is attributed to non-compliance with section 54(2) and the FIC Directive and therefore that portion forms part of the financial penalty omelette earlier alluded to.

87. 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$5 million of which N$4 million was conditionally suspended for five years.

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

89. 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*[41] 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.

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

90.1. 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.

90.2. 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.

90.3. The respondent should in compliance with *Onesmus v Permanent Secretary: Finance and Others*[42] also give the enforcement policy to the institution concerned.

91. 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

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[41] *Supra.*
[42] *Supra*

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.

92. 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.

93. The FIA Amendment Act which became effective on 21 July 2023 amended section 56(3) and deleted all requirements pertaining to consultation between the FIC and supervisory 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).

94. 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.*"[43]

[43] At p758D-E

94. 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.

95. The Appeal Board may in terms of section 58(8) of the FIA -

(a) confirm, set aside or vary a decision of the FIC or a supervisory body such as the respondent; or

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

96. 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.

97. 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[45]. 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

J.D Mandy

V. Kavari

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

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

SECOND RESPONDENT: No Appearance