



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A277/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14 March 2023

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SIGNATURE

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DATE

In the matter between:

VOLVO GROUP SOUTHERN AFRICA (PTY) LTD

APPELLANT

And

FINANCIAL INTELLIGENCE CENTRE

RESPONDENT

JUDGMENT

LESO AJ

INTRODUCTION

[1] This is an appeal by the Appellant, the Volvo Group Southern Africa (Pty) Ltd ("Volvo"), against a decision of the Financial Intelligence Centre Appeal Board ("the Board") on 4 July 2021 to dismiss Volvo's appeal against the

administrative sanction¹ ("the sanction") imposed by the Financial Intelligence Centre ("the Centre") on 26 March 2020 where the Centre found that Volvo failed to report 208 cash transactions amounting to R29 122 834.47 above the prescribed threshold of R24 999.99² in terms of s 28 of the FICA as read with regulations 22B and 24(4) of the Money Laundering and Terrorist Financing Control Regulations ("the Regulations"),³ for the period 1 April 2015 to 11 August 2018.

- [2] The Centre imposed a financial penalty against Volvo for the amount of R5 824 567 ("the penalty"). The Centre directed Volvo to pay 30% of the penalty and suspended the balance of the penalty on condition that Volvo remediates the 208 cash threshold transactions within one month.

GROUNDS OF APPEAL

- [3] Volvo summarised its grounds of appeal in its heads of argument. Volvo's primary contention was that it did not receive any physical cash from the depositors who made cash deposits at the bank, and was thus not grossly negligent in failing to report the alleged 208 impugned transactions to the Centre. Volvo submits that the Board was wrong in coming to this conclusion.
- [4] Volvo argued that in the event the court find that it did in fact receive cash from the depositors, the court must consider the following Volvo raised five additional grounds of appeal:

- 4.1 The Centre failed to prove that Volvo failed to report 208 cash threshold transactions. Volvo's case is that it only failed to report 134 transactions

¹ Notice of Administrative Sanction in terms of s 45C of the FICA.

² Or an aggregate of smaller amounts which combine to come to this amount if it appears to the accountable institution or reporting institution concerned that the transactions involving those smaller amounts are linked to be considered fractions of one transaction.

³ Published under GN R 1595 in GG 24176 of 20 December 2002). The regulations were recently amended by N2943 GG 47883 on 20 January 2023 with effect from 1 February 2023. The regulations as applicable at the time are considered in this judgment.

which amount to R20 162 644. The Board erred in finding that Volvo only remedied 74 of the 208 transactions, and only after the second inspection by the Centre on 13 August 2018.

- 4.2 The Board erred in finding that the Centre was not obliged to provide guidance to Volvo regarding how to remediate the transactions despite numerous requests over time;
- 4.3 The Board erred in not making a finding in respect of Volvo's 5th ground of appeal, namely that it was unjust and unreasonable for the Centre to punish Volvo in circumstances where the Bank has already reported on the 208 transactions to the Centre in terms of its own reporting obligations in circumstances where Volvo was unable to decipher the information captured by First National Bank (the Bank) on its bank statements, and to reconcile the indecipherable information contained in the bank statements with Volvo's own records;
- 4.4 The Board erred in not accepting Volvo's version that the one month provided to remediate the outstanding 208 transactions was unreasonable, particularly in light of the global Covid-19 pandemic and the national shut down. The Board erred in finding that Volvo was at fault for poor record keeping;
- 4.5 The Board erred in finding that the Centre was not required to prove or tabulate that it considered the factors set out in s 45C of FICA when it determined the appropriate administrative sanction.

ISSUES IN DISPUTE

- [5] The main question in this appeal is whether s 28 of FICA imposes a dual reporting obligation upon the reporting institutions to report cash transactions above the prescribed threshold in respect of the same cash transaction.

MATERIAL FACTS

- [6] Volvo commenced trading as a motor vehicle dealer, in its current form, on 1 January 2015. On 13 October 2017 the Centre issued a Notice of Inspection (the first notice of inspection) calling on Volvo to furnish it with proof that it registered as a reporting institution, together with the cash threshold reports, suspicious transaction reports, and banking statements for the preceding five years.

- [7] Volvo, only registered as a reporting institution on 2 November 2017. Volvo furnished the Centre with the documents it had in respect of the inspection notice. On 13 November 2017, the Centre conducted its first inspection at Volvo's premises, and issued its first inspection report on 6 February 2018 after furnishing Volvo with a draft report for Volvo's comments.

- [8] On 27 February 2018, Volvo notified the Centre that it was experiencing difficulties remediating the historic transactions and requested guidance from the Centre. As is evident in the discussion below, the Centre contends that Volvo failed to follow Directive 03/2014, and that its complaint lacked particularity in that it did not provide the Centre with details from which the Centre could discern (i) which of the particular transactions from the list of 160 were problematic, (ii) what the difficulty with each particular transaction was; (iii) what details were available to Volvo; (iv) and how it proposed the issue could be remedied.

- [9] Volvo filed its first cash threshold report with the Centre on 1 March 2018.

- [10] On 2 July 2018, the Centre issued a second Notice of Inspection to Volvo, and on 13 August 2018 it conducted a second inspection.

- [11] On 25 September 2018 the Centre issued the second inspection report. After reviewing Volvo's bank statements for the period 1 July 2017 to 11 August 2018, the Centre identified 84 reportable cash threshold transactions which

Volvo did not report. A copy of the report was again sent to Volvo for comments, and comments were, albeit it after the deadline, provided.

- [12] On 28 September 2018 the Centre directed the respondent to remediate the 160 cash threshold transactions identified in the first inspection and the additional 84 cash threshold transactions identified in the second inspection by 30 October 2018.
- [13] On 2 November 2018, Volvo sent an email in terms of Directive 03/2014 to the Centre's Compliance Head requesting guidance on remedial actions.
- [14] The matter was subsequently referred to the Centre's sanctioning process.
- [15] On 26 March 2020 the Centre issued its administrative sanction. The ultimate penalty for the non-compliance was R5 824 567 which was 20% of the value of Volvo's unremedied cash threshold transactions of this, R 747,370.00 (30% of the total penalty) was payable on 1 July 2020, and the balance of R4, 077,297.00 was conditionally suspended for three years.

SUBMISSIONS BY THE PARTIES

Volvo's submissions

Re: Section 28 of FICA

- [16] Volvo submitted that s 28 of FICA must be read together with s 1 which deals with the definition of "cash" and Schedule 3 which provides a list of the reporting institutions. According to Volvo, the correct interpretation s 28 requires that an accountable institution OR the reporting institution report to the Centre , cash above prescribed threshold transactions where an institution has received an amount of coin or paper money from a client above the prescribed minimum threshold.
- [17] Volvo contended that it has no reporting obligation because it did not receive cash and the reasons which were advanced by the appellant why it cannot be faulted in light of its preferred interpretation of the Act are the following:

- 17.1 Volvo did not physically receive any cash (coin or paper money) from its customers because it does not accept cash for the sale of motor vehicles which are all worth more than R200 000-00;
- 17.2 Of the 244 cash transactions which were identified by the Centre, 194 cash transactions were less than R200 000-00 and 160 cash transactions were less than R101 000,-00 and the remaining transactions relate to spare parts and maintenance and not the business of selling the motor vehicle,
- 17.3 Cash being a physical object cannot be received by respective accountable or reporting institutions in the sale transaction because two different juristic entities can't have received and possess the same physical object(s);
- 17.4 Volvo gives credit to some of its customers in terms of the credit agreement, particularly in the sale of parts and servicing and repairs of the motor vehicle wherein customers make an individual cash deposit of less than R24,999.99;
- 17.5 Volvo remediated the cash threshold transactions immediately after the first inspection in November 2017. On 2 September 2017 it remediated 74 transactions before the Centre released its second report. From the above transactions, 58 transactions were remediated on time, 88 transactions were late and 60 transactions were not reported. Volvo submitted that therefore the Appeal Board erred in finding that reporting late is the same as not reporting.

[18] Volvo explained why it was not possible to reconcile some of the cash deposits made by the customers at FNB bank by stating that firstly it was not present at the bank when the customer made a deposit or when FNB employees captured the cash deposits. Consequently, Volvo does not know who made the deposits because the transactions at the bank are separate and distinct events. Secondly, when Volvo provides customers with its banking details, it assumes

that the customer will make the payment by electronic fund transfer (EFT). However there are many instances where the customer would then make a cash deposit through the banking system without forewarning Volvo. Where a deposit is paid but a client fails to raise adequate finances, the money is refunded to the client. On many occasions, customers who deposited cash, did not provide Volvo with the deposit slips relating to the deposit.

- [19] Volvo argued that the information they received from the bank regarding cash deposits is useless because FNB was remiss in its obligation to ensure that it keeps proper records of the depositor's name and the details related to the deposit as a result it did not have a single deposit slip in respect of 208 transactions and all the deposited cash which could not be traced was put in the suspense account.
- [20] Volvo emphasised that the fact that Appeal Board did not accept that it suffered prejudice because of the incomplete information contained in the bank statement means that the Appeal Board did not understand the cash deposit process, consequently the Appeal Board erred in its finding that the persons depositing cash are Volvo's clients and that there is no relationship between the bank and the person depositing cash.
- [21] Volvo submitted that the Appeal Board erred in its finding that the Bank acts as its agent. Volvo argued that it cannot be expected to report the cash transaction which the client deposited at the bank because it is not an agent of the bank and that receipt of the transfer of funds via the banking system is a separate transaction that does not involve cash as defined by s 1 of FICA. According to the appellant, there are several authorities where the relationship between the bank and its customer was found to be that of an ordinary relationship of a debtor and creditor and not as a principal-agent. Amongst other, Volvo relied on the findings of *Standard Bank of SA Ltd v Oneanate Investments(PTY)Ltd* 1995 (4) SA 510(C), *Liebenberg v Absa Bank Limited t/a Volkskas Bank* 1998 (1) ALL SA 303 (C), and *Absa Bank Bpk v Janse Van Rensburg* 2002 (3) SA 701 (SCA).

- [22] Volvo raised the issue that the Centre had no jurisdiction to impose a sanction upon it, because Volvo's business or service does not fall within the definition of motor vehicle dealer as envisaged by s 1 and schedule 3 of FICA because it sells marine equipment and service trucks and busses. Volvo explained the nature of its business in the founding affidavit by stating that *"it is a diverse business and its service include amongst other things the sale and distribution of new and used motor vehicles including trucks and buses, spare parts, service contracts, construction equipment, generator sets and engines. It operates through a network of divisions and dealerships spread through a network of divisions and dealerships spread throughout South Africa and not only motor vehicles."* It is on this basis that Volvo argued that the Appeal Board erred in its summary of realities of the commercial world alternatively the Appeal Board erred by not attaching the correct weight to Volvo's explanations in the supplementary affidavit.

Re: The administrative sanction

- [23] Volvo argued that the Centre and the Board ignored the legal factors set out in s 45C of FICA alternatively the sanction was imposed without weighing each factor and not having meaningful regard to each factor set out in the above section.
- [24] Volvo submitted that during the inspection the Centre found that it was negligent however during sanction the negligence was unfairly elevated to gross negligence by applying two different standards of behavioral conduct from the same event but with vastly different sanctions, i.e. 10% penalty for negligence and 20% penalty for gross negligence.
- [25] Volvo argued that the 30 days grace period to remediate the transaction is unfair, unreasonable and grossly impractical considering the fact that the appellant had challenges with the bank statements.
- [26] Counsel referred the court to several matters, among others *Cedar Isle Auto (PTY) Ltd v Financial Intelligence Centre, case no. 12/3/1/5-CIA/FIC (4/19)*

where the Appeal Board had to determine whether the appellant was negligent or grossly negligent as the Centre had found. Here it was held that “a *finding of gross negligence is a finding of fact and not a matter of discretion*”. In this case the appeal was dismissed, and the decision of the Centre was confirmed. In *JSH Motors T/A HONDA JHB South CC vs Director of the Financial Intelligence Centre and the Financial Intelligence Centre* case no. 12/3/1/5- the finding was “a *wilful non-compliance with the provisions of the FICA should be met with harsh penalties taking into consideration the objectives of FICA however, a distinction should be drawn between wilful non-compliance and negligent non-compliance*”.

- [27] Volvo submitted that the sanction that was imposed by the respondent was shockingly inappropriate and unjustified because the respondent did not acknowledge that there are mitigating circumstances.

The Centre's submissions

Re: Section 28 of FICA

- [28] The Centre opposed Volvo's proposition on the interpretation of s 28 of FICA. It submitted that s 28 should be interpreted in the light of the purpose of FICA and the Financial Intelligence Centre, which is to identify proceeds of crime, to combat money laundering, and the financing of terrorism. According to the respondent, s 28 can only be sensibly read as prescribing a dual reporting obligation for both institutions to report the cash transaction above the prescribed minimum threshold to the Centre because of the following reasons:

- 28.1 the Act identifies an accountable institution and a reporting institution as those juristic persons upon whom the reporting obligation rests;
- 28.2 the conjunctive “and” in s 28 binds both the accountable institution and a reporting institution;

28.3 section 28 and focuses on particulars of a transaction concluded with a client where each party is obliged to report the transaction concluded with a client from their perspectives and the obligation is triggered when, in terms of the transaction, cash exceeding the amount is received by the accountable institution or the reporting institution. If either of the institutions receives the cash, both are required to report.

- [29] Counsel for the Centre argued that FICA's primary role is to protect the integrity of South Africa's financial system and this role can only be achieved through dual reporting obligations where the Centre will be able to process, analyse, interpret, disseminate and develop financial intelligence because it relies on the information or intelligence gathered through mandatory due diligence, record keeping and reporting obligation to combat the serious combined threats of money laundering and terrorist financing.
- [30] The Centre opposed Volvo's submission that it has no reporting obligation because it did not receive physical cash by urging the court to apply a holistic approach by looking at the text, the context and the purpose of FICA when interpretation s 28. The purpose of dual reporting is to prevent money laundering mainly because money laundering is disguised to hide the source of funding and the Centre cannot combat money laundering if FICA is given meaning contradictory from the context and its purpose. The respondent explained that FICA does not define cash transactions but that Regulations 22B and Regulation 22C prescribe particulars concerning the cash transactions.
- [31] The submission by the respondent is that in terms FICA there are three *dramatis personae* which is the client, the third party and the bank. Where the bank or the appellant as a third party receives cash from the client and both the institutions must report cash so received. Counsel stated that Volvo is directly linked to the transactions because all the bank will ever know is that it has received a certain amount of cash. The other details pertaining to the transaction will be known by Volvo. On this aspect the respondent also referred to the *Cedar Isle Auto* matter.

- [32] The Centre opposed Volvo's proposition that it is not a reporting institution for the purpose of s 28. Counsel submitted that the business of dealing in motor vehicles is included within the scope of FICA. Together with the Kruger Rand industry these industries are categorised as high-risk industries requiring oversight in relation to their compliance as they operate in an unregulated industry and they trade with high-value commodities. This renders them vulnerable to money laundering.

Re: The administrative sanction

- [33] On the issue of the administrative sanction imposed on Volvo, the respondent submitted that Volvo was found to have been grossly negligent as per the FIC's sanctioning guidelines which use the degree of fault to guide the determination of the quantum of an administrative penalty. The administrative penalty was decided with reference to Volvo's conduct of disregarding obligations to report 208 cash transactions above the cash transaction threshold and failing to register with the Centre on time. The respondent argued that the Centre was entitled to impose the sanction in terms of section 45C of FICA.
- [34] The Centre conducted its sanctioning process in three stages. The first assessment was based on the inspection reports where it was found that Volvo failed to report 244 cash threshold transactions. On 28 November 2019, the Centre subsequently issued a Notice of Intention to Sanction that was received by the appellant on 3 December 2019. Volvo was invited to make representations as required in FICA. Volvo sent its representations on 7 January 2020. Volvo challenged various aspects of the Notice to Sanction. Volvo indicated that it had reported some of its transactions and that some transactions identified during the first inspection were 'mixed' transactions. Volvo could also not report on a further 134 transactions due to a lack of depositor information.
- [35] In its second assessment, the Centre considered Volvo's representations. It accepted that 23 transactions identified in the first inspection were not

reportable, and that 13 transactions from the second report were duplicated. The Centre accordingly reduced the instances of non-compliance to 208. Because Volvo had prior knowledge of its reporting obligation after the first inspection and still failed to report 84 cash threshold transactions after the first inspection, the Centre regarded Volvo's failure as gross negligence. The Centre also explained that Volvo only started remediating its historical non-compliance four months after the first inspection, and it had an unusually high incidence of rejected reports. As a result, an administrative penalty was recommended. The third assessment was conducted by the head of the Centre who considered the material before her and agreed with the recommended sanction.

THE LAW

- [36] The Financial Intelligence Act 38 of 2001 (FICA) with its Money Laundering and Terrorist Financing Control Regulations (the Regulations), the Prevention of Organised Crime Act 21 1998 (POCA), the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA) and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (POCDATARA), are legislation promulgated to specifically combat money laundering and terrorist financing in South Africa.
- [37] Chapter 1 of FICA provides that the principal objective of the Centre is to assist in the—
- (a) *identification of the proceeds of unlawful activities;*
 - (b) *combating of money laundering activities and the financing of terrorist and related activities; and*
 - (c) *implementation of financial sanctions pursuant to resolutions adopted by the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations.*

- [38] Section 1(1) of FICA provides, amongst others, the following definitions
“reporting institution” means a person referred to in Schedule 3; and

SCHEDULE 3 (LIST OF REPORTING INSTITUTIONS)

1. *A person who carries on the business of dealing in motor vehicles*
2. *A person who carries on the business of dealing in Kruger Rands.*

“Cash” means Coin and paper money of the Republic or of another country that is designated act under this Act; as legal tender and that circulates as, and is customarily used and accepted as a medium of exchange in the country of issue.

- [39] Regulation 22B of the Regulations sets the prescribed limit amount for cash transaction threshold to be reported in terms of section 28 of FICA which is R24 999.99 or equivalent foreign denomination.
- [40] Regulation 27A regulates the period for and manner of registration by accountable Institutions and reporting institutions by providing as follows: *“every accountable institution referred to In Schedule 1 of the Act and every reporting institution referred to In Schedule 3 of the Act must within the Period commencing 1 December 2010 until 1 March 2011, register with the Centre In terms of section 438 of the Act”.*
- [41] Section 28 of FICA provides that:
- (1) *“an accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount -*
 - (a) *is paid by the accountable institution or reporting institution to the client or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or*

(b) *is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting*’.

[42] Amongst others, the manner of reporting suspicious transactions and the period of reporting cash and suspicious transactions are regulated in terms of the Regulations. Section 51 of FICA provides that “*An accountable institution or reporting institution that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is guilty of an offence*”.

[43] Section 45C(1) of FICA provides for the administrative sanctions as follows:

(1) *The Centre or a supervisory body may impose an administrative sanction on any accountable institution, reporting institution or other person to whom this Act applies when satisfied on available facts and information that the institution or person—*

- (a) *has failed to comply with a provision of this Act or any order, determination or directive made in terms of this Act.*
- (b) *has failed to comply with a condition of a licence, registration, approval or authorisation issued or amended in accordance with section 45(1B)(V);*
- (c) *has failed to comply with a directive issued in terms of section 34(1) or 43A(3); or*
- (d) *has failed to comply with a non-financial administrative sanction imposed in terms of this section.*

[44] Section 45C(2) of FICA states the factors to be considered when the Centre or a supervisory body imposes a sanction as follows:

- (a) *The nature, duration, seriousness and extent of the relevant noncompliance;*
- (b) *whether the institution or person has previously failed to comply with any law;*

- (c) *any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance;*
- (d) *any steps taken or to be taken against the institution or person by—*
 - (i) *another supervisory body; or*
 - (ii) *a voluntary association of which the institution or person is a member;**and*
- (e) *any other relevant factor, including mitigating factors.*

DISCUSSION

- [45] The first issue is whether Volvo breached its reporting obligations in terms of s 28 of FICA by failing to report cash deposited into its account with the Bank. This court will go through the interpretation process in order to determine this issue.
- [46] The second issue is whether Volvo's non-compliance was grossly negligent. Counsel for the Centre explained that the Centre's sanctioning guidelines use the degree of fault to guide the determination of the quantum of and administrative penalty. The administrative sanction is decided by reference to the defaulting party's conduct.
- [47] The third issue concerns the *quantum* of the penalty which was calculated as 20% of the value of Volvo's 208 unreported cash transactions. The Centre submits that the reasons on which Volvo disputes the number of unreported transactions are not grounded in fact. Volvo submitted that the transactions that it finally reported should be excluded when the penalty is calculated, but the Centre contended that the remediation of a transgression does not erase it—'The mischief occurred when Volvo failed to report the transactions within the prescribed period of 48 hours.
- [48] Before I deal with the first issue, I will settle the issue of whether the appellant is a reporting institution in terms of the FICA as discussed in paragraph 18.

- [49] Volvo believes that it is not a reporting institution as envisaged by Schedule 3 because its business does not fall within a definition of a motor vehicle dealer. I reject Volvo's proposition outright because Public Compliance Communication 07 (PCC 07) issued by the Director of the Centre on 2 September 2011 clarified the issue. It defines the term motor vehicle as *"any self-propelled vehicle, including a vehicle having pedals and an engine, or an electric motor as an integral part thereof or attached thereto and which is designed or adapted to be propelled by these means on land, and includes any trailer and caravan."* The term motor vehicle dealer is defined as *"any person who is engaged in the business of buying, selling, or exchanging motor vehicles as described above regardless of whether such vehicles are new or second hand vehicles."*
- [50] My reflections of Volvo's submission on the nature of its business are that the list of services it provides is simply the extension of its business as described by PCC 07 and those additional services do not remove it from the list in Schedule 3. Volvo's attempt to declassify its business as regulated by FICA is totally incorrect and without any legal basis. On the contrary, FICA was amended to include the motor vehicle industry to prevent the atrocities that might occur. Volvo fits the description of motor dealer, and its submission that it falls outside the ambit of FICA is rejected.
- [51] Volvo's proposition that the respondent conceded that it is not a reporting institution is totally misleading because the respondent has opposed this view in the affidavit, at the hearing of the appeal by the Board, and in this court.

Interpreting section 28

- [52] When I read s 28, I observed the conjunction 'and' between the two institutions (accountable and reporting) followed by the obligation to report the cash transactions above the prescribed threshold. I have underlined the conjunction because it forms the most critical part of the text. As noted above, the respondent submitted that the correct interpretation of s 28 is that both

institutions must submit cash transaction reports above the threshold. Volvo argued that the correct interpretation of s 28 is that the accounting and reporting institution must individually submit reports in respect of transactions where cash was physically delivered or deposited by the client to the respective institutions, but that only the institution that received the cash has a reporting obligation.

- [53] The construction of s 28 starts with the definition of its grammar which contains a conjunction "and" which is defined as a linking word or coordinating conjunction according to the Cambridge Dictionary.
- [54] It is noteworthy that in the appeal case of *Barnardo's v Buckinghamshire*,⁴ a decision from a foreign jurisdiction, Lord Hodge with other four judges concurring makes the following analysis in Paragraph 6, "*an important part of the argument concerns the relationship between the first and second sentences of the definition. In order to assist comprehension I present the definition in a disaggregated manner, adding "(i)" and "(ii)" before each sentence, (my emphasis) although the text of the definition is simply an undifferentiated paragraph, and highlighting in italics the critical part of the definition. In paragraph 13 of the judgment it was said that "in deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument"*.
- [55] The only way to test Volvo's proposition that it is not obliged to submit cash transaction reports where it did not physically receive cash, is to read s 28 in context considering the purpose of the legislation. Section 28 defines cash to be reported as cash paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or cash received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

⁴ *Barnardo's v Buckinghamshire* in [2018] UKSC 55 paras 6.

- [56] The cash to be reported will have been received by an individual institution from a person as defined by s 28(a) and (b) or cash paid by the an individual institution from a person as defined by s 28(a) and (b). Volvo's articulation of the provision under consideration is influenced by the last part of the section which provides for cash that is received by the individual institution because of the usage of the conjunction "or". The cash can only be received by one of the institutions, hence the "or", but both institutions must report the information that they have regarding the transaction, to the Centre. The Centre will only be able to fulfil its purpose if it has all the information regarding the transaction and the bank, that received the cash, is not in a position to provide all the required information.
- [57] I will not do justice to the process if I do not deal with the background or purpose of the provision under consideration. FICA has introduced a regulatory framework of compliance measures to achieve its purpose briefly summarised by the PCC 07 as having a primary role of protecting the integrity of South Africa's financial system by identifying proceeds of crime, combating money laundering and financing of terrorism. The Act also requires accountable and reporting institutions as listed in Schedule 3 of FICA to register and report cash transactions above the threshold. The preamble of FICA, the Regulations and the Guidance Notes provide the background within which the wording of s 28 should be interpreted mainly because the appellant's industry is not regulated.
- [58] From the above discussion, it is clear that when interpreted in context, s 28 can only sensibly be interpreted to mean that the Volvo and the bank will individually report cash transactions above the threshold received by the bank. The context does not support a different interpretation. Consequently, Volvos obligation does not arise only when it physically receive above threshold. The above interpretation then settles the respondent's argument that s 28 can sensibly be interpreted to mean dual reporting.
- [59] Volvo's interpretation of s 28 is not plausible considering the purpose of the Act as foreshadowed in the Preamble. I am surprised by Volvo's claim that it was

not aware of its obligation despite the fact that the Centre had done several awareness campaigns from 1 April 2010 to 31 March 2019. One would have expected that Volvo would acquaint itself with national legislation when it started to trade and do business in South Africa. Volvo's submission that it did not understand its obligations cannot hold water. In PCC 07 the Centre provided guidance concerning compliance in terms of its statutory function.

Re: Penalty and sanction imposed

- [60] The appeal court can only interfere with the administrative sanction where the court finds that the Board and the Centre committed a mistake of fact, or mistake of law when imposing or confirming the sanction. This court would only interfere with the decision of the Board if there is evidence that the Board committed an irregularity or exercised its discretion so unreasonably or improperly as to vitiate its decision to dismiss the appeal.
- [61] Volvo's last ground of appeal is based on the administrative sanction imposed in terms of section 45C(3)(c) of FICA after the Centre conducted its inspections. The Centre established that Volvo failed to report a total of 208 cash threshold transactions. It is not in dispute that Volvo had remediated some of the transactions and that the calculation of the penalty imposed was based on the total of 208 transactions.
- [62] Volvo took issue with the fact that the Centre determined that 208 transactions were unreported cash transactions, whilst Volvo is of the view that the correct number of unreported transactions is 134. Volvo also contended that the Centre failed to consider the factors listed in s 45C(2) or to place the proper of meaningful weight on each of the factors. Volvo submitted that the Board erred by not requiring which factors were considered by the Centre and which were not.
- [63] The Centre submitted that all but two of the business activities listed in Volvo's supplementary affidavit, place it in the regulated scope of a motor vehicle

dealer. The onus fell on Volvo to identify the transactions that fell outside the scope. I agree with the Centre's submission that accounting for cash is not guesswork. Despite submitting that it does not sell vehicles for less than R200 000.00, Volvo acknowledged that customers sometimes make partial cash payments for motor vehicles.

[64] Volvo took issue with the fact that it reported 58 transactions but because it was not reported in the correct format the Centre does not want to acknowledge the reporting. Considering the purpose of the Centre, and the magnitude of its responsibility, it is untenable to think that a reporting institution can dictate to the Centre the format in which it should accept information. Using the incorrect format amounts to non-reporting. I am also of the view that the Board was correct in its view that the fact that Volvo remediated 74 reports after the first inspection is of no consequence when the sanction and penalty is to be considered, since FICA punishes non-compliance. If a transaction is not reported within the 48-hour reporting window, an accountable or reporting institution is non-compliant.

[65] In considering the respondent submission that it had regard to the degree of fault to guide the determination of the sanction, it is necessary to have regard to the facts and the circumstances which led to the respondent arriving at the sanction. In the Notice of Intention to Impose an Administrative Sanction the Centre specified the nature of non-compliance, and the intended administrative sanction. It gave Volvo an opportunity to make written representation on the Centre's findings and advance factors to be considered in mitigation of the intended administrative sanction. On 06 January 2020 Volvo was given guidance on how to make representation and on paragraph 29 of the Notice the Centre states as follows: *after due date for the submission of any representations, the Centre will reconsider the matter in light of any representation received and the factors listed in section 45C(2) of FICA and make a final decision on the imposition of an appropriate sanction.*

[66] In August 2018 Volvo informed the Centre that 160 threshold transactions identified the previous year 2017 were not reported because of insufficient

information, despite having been made aware of the requirement of registering and reporting in 2017. It is apparent from the above facts that Volvo did not bother to investigate the laws applicable to its industry and when it was then made aware, it continued with business as usual. The evidence on record supports a finding that Volvo continued to breach its obligation of submitting cash transaction reports after it was advised by the Centre to report.

- [67] Volvo was ignorant of the law, unfortunately the court cannot in the circumstances allow Volvo to shield behind its ignorance. In *Weissensee Kim v Stone-Bird investments (Pty) Ltd and others*,⁵ Moorcroft AJ stated that “no-one is expected to know all of the law but people who venture into any area of the law should familiarise themselves with what the law requires. Doing business in the field of financial management and advice requires one to become familiar with the law governing these activities, such as the FAIS Act. The failure to so familiarise oneself would be reckless or at least grossly negligent, particularly for a person who receives money from clients or deal with their money”.
- [68] On 02 February 2018, the cash transactions identified on 13 November 2017 were still not reported to the Centre. The reasons advanced by the Volvo did not persuade the court that it could not be faulted. Volvo does not only plead ignorance of the law, it blames the bank for not keeping proper records for cash deposit transactions by their clients. It escapes my mind how an organisation like Volvo is not able to reconcile payments made to their bank account. The Board and the Centre correctly defined Volvo’s action as gross negligence.
- [69] Even after the second inspection Volvo was not in the position to report transactions concluded after it was ordered “to ensure that all the CTRs identified during an inspection are filled with the Centre as soon as possible and in the future to file the Centre within the prescribed time; to obtain and keep all the necessary documents from the clients which will enable it to file intelligence reports with the Centre and to develop processes and procedures to monitor, detect and file suspicious and unusual transactions with the Centre.”

⁵ *Weissensee Kim v Stone-Bird investments (Pty) Ltd and others* 2020/19821 [2022] ZAGPJHC 817.

- [70] Having regard to the nature of the contravention, the duration of time that the respondent took to remediate some of the transactions and the fact that other transactions were still not reported at the time when the sanction was imposed by the Centre, the sanction imposed cannot be questioned. It is clear from the above facts the Centre considered and accordingly weighed the mitigating facts as presented by Volvo. In considering the said factors, this court cannot fault the Centre for its decision to impose the said sanction.
- [71] It is only through strict compliance with FICA by the accountable and reporting institutions that the Centre will be able to unearth and monitor suspicious transactions. It is clear from the preamble FICA that the Centre cannot be caught sleeping and neither should the institution identified in schedules 1 and 3 be ignorant of the consequential repercussions of unmonitored cash transactions.

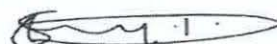
CONCLUSION

- [72] The Appeal Board correctly found that s 28 creates a dual obligation to report cash transactions above threshold, consequently, Volvo failed to comply with its obligation in terms of FICA.
- [73] No case was made out that the Boards discretion was injudiciously exercised, or that the sanction is so severe that it elicits a sense of shock or disbelief. The appellant failed to demonstrate to this court that there was any material factual misdirection on the part of the Centre, and therefore the court cannot interfere with the sanction.

ORDER

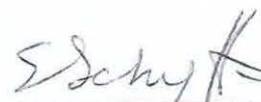
In the result the following order is granted:

1. The appeal is dismissed;
2. The appellant is ordered to pay the costs of the appeal.



JT LESO
Acting Judge of the High Court

I agree and it is so ordered:



E van der Schyff
Judge of the High Court

I agree and it is so ordered:



M Mbongwe
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the appellant:

Instructed by:

Adv. WH Pocock

Malherbe Rigg & Ranwell Inc

For the respondent:

Instructed by:

Date of the hearing:

Date of judgment:

Adv. M. Sibanda

Tshisevhe Gwina Ratshimbilani Inc

2 November 2022

14 March 2023