



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

DELETE WHICH IS NOT APPLICABLE

[1] REPORTABLE: YES / ~~NO~~

[2] OF INTEREST TO OTHER JUDGES:

YES / ~~NO~~

[3] REVISED

DATE 3/4/19 SIGNATURE [Signature]

CASE NO: A267/2018

In the matter between:

SOUTH AFRICAN RESERVE BANK

Appellant

and

BANK OF BARODA (SOUTH AFRICA)

Respondent

JUDGMENT

LOUW, J (LANGA AJ concurring)

[1] During September and October 2016, the South African Reserve Bank ("the SARB") conducted an inspection at the Bank of Baroda ("the bank") to determine compliance by the bank with the provisions of the Financial Intelligence Centre Act 38 of 2001 ("FICA") and the Money Laundering and Terrorist Financing Control Regulations ("the regulations") promulgated in terms of FICA. On 15 December 2016, the SARB advised the bank by letter that it had made 14 findings of non-compliance. The findings which are relevant to the present matter, are findings 3, 4, 6, 7 and 8.

[2] In terms of findings 3 and 4, the SARB found that the bank had failed to comply with the requirement in s 28 of FICA, read with regulations 22B, 22C and 24(4), that the bank report all cash transactions exceeding the prescribed threshold of R24 999.99 within two business days of the transaction occurring. It found that the bank had either incorrectly reported or omitted to report seven cash transactions in excess of the threshold amount (finding 3) and had failed to file cash threshold reports (CTR's) within the prescribed time (finding 4).

[3] In terms of findings 6, 7 and 8, the SARB found that the bank had failed to formulate and implement internal rules, processes and working methods, as required by s 42 of FICA read with regulation 27, to enable it to detect

and report suspicious and unusual transactions as required by s 29 of FICA. More particularly, it firstly found that in cases where the bank's automated transaction monitoring system flagged possibly suspicious and unusual transactions, the bank's process of investigating such alerts was inadequate in instances when it decided against reporting a transaction as it failed to document its reasons for so deciding (finding 6). Secondly, the SARB found that the bank's internal rules were imported from its data centre in India and were not customised for the South African environment (finding 7). Thirdly, it was found that the bank had not applied sufficient scrutiny or care when processing transactions involving loans and fund transfers among entities within the same group and had failed to review its system alerts in respect of inter-group transactions to determine whether such alerts were reportable under s 29 (finding 8).

[4] In its letter of 15 December 2016, the SARB required of the bank to provide the Registrar of Banks with its comments on the findings by no later than 15 February 2017; to provide the Registrar with quarterly update reports on the progress made in rectifying the identified issues, the first of which would be due by 31 March 2017; and to have resolved all deficiencies by no later than 31 December 2017. The letter also informed the bank that, following the completion of the inspection, an independent internal review of the inspection findings would be undertaken to determine whether any administrative sanction, in terms of s 45C, should be imposed and, should

it be found appropriate to impose an administrative sanction, the intention thereof would be communicated to the bank.

[5] The bank submitted its comments on the findings on 15 February 2017 and submitted its first quarterly report on 31 March 2017. On 12 April 2017, the SARB informed the bank in writing of its intention to impose administrative sanctions in terms of s 45C(5) of FICA and afforded the bank an opportunity to make representations. The intended administrative sanction in respect of findings 3 and 4 was a fine of R1 million and for findings 6, 7 and 8 a fine of R10 million. On 19 June 2017, after considering representations filed by the bank in respect of the intended administrative sanctions, the SARB imposed the intended sanctions.

[6] The bank thereafter appealed, in terms of s 45D of FICA, against the SARB's decision to the Appeal Board established in terms of 45E of FICA. The Appeal Board, chaired by Hartzenberg J, upheld the appeal in respect of findings 6, 7 and 8 and set the administrative penalty of R10 million aside. The appeal in respect of findings 3 and 4 was partly upheld and the administrative penalty of R1 million which was imposed, was set aside and substituted with an administrative penalty of R400 000.00.

[7] The SARB now appeals to this court against the orders of the Appeal Board. In terms of s 45D(11)(a) of FICA, a decision of an appeal board may

be taken on appeal to the High Court as if it were a decision of a magistrate in a civil matter.

[8] The first issue raised by the appellant in this appeal concerns the manner in which the provisions of FICA and the regulations should be interpreted. Before the Appeal Board, it was submitted on behalf of the SARB, relying on the judgment of the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹, that a purposive interpretation should be applied. The submission on behalf of the bank, relying, *inter alia*, on the judgment of the Constitutional Court in *Democratic Alliance v African National Congress*² and that of the SCA in *Oilwell (Pty) Ltd v Protec International Ltd*³, was that it is a well-established principle that provisions that give rise to criminal and administrative penalties must be interpreted restrictively in cases of doubt and ambiguity. The Appeal Board held that, despite the valiant effort by the SARB to persuade it that FICA does not expose an accountable institution, such as the bank, to a possible criminal prosecution, it was clear that this was not so as ss 51, 51A, 52, 53 and 54 of FICA, as well as s 29(8), specifically criminalise not only the conduct for which the penalties were imposed on the bank but the failure of virtually any duty imposed in FICA on accountable institutions. It found that it was not possible to distinguish the matter before it from the *DA v ANC* decision and accordingly held that the penal provisions in FICA have to be

¹ 2012 (4) SA 593 (A)

² 2015 (2) SA 232 (CC)

³ 2011 (4) SA 394 (SCA)

interpreted restrictively. The following *dicta* which were quoted from the *DA v ANC* judgment⁴ by the Appeal Board bear repetition:

"In case of doubt we are obliged to interpret (penal) prohibitions restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised.

The restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.

This court has endorsed this approach. And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common-law presumption in favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution."

[9] Before us, the argument on behalf of the SARB was a different one. It was submitted that FICA was enacted to secure vital national objectives and that its principal aim is the combating of money laundering activities

⁴ Paras 129 -131

and the financing of terrorist and related activities.⁵ Therefore, so it was submitted, even assuming that the restrictive interpretation principle is applicable in the present context, it is merely one interpretive principle which must be applied together with and mindful of the other interpretive principles, which are well established and which include a strong emphasis on the need for purposive interpretation. In this regard, counsel for the appellant relied on the following *dicta* in the judgment of the Constitutional Court in *Road Traffic Management Corporation v Waymark (Pty) Limited*⁶, with emphasis added by counsel:

"[29] The principles of statutory interpretation are by now well-settled. In Endumeni, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –

- (a) the language used in the light of the ordinary rules of grammar and syntax;*
- (b) the context in which the provision appears; and*
- (c) the apparent purpose to which it is directed.*

⁵ See s 3 of FICA.

⁶ [2019] ZACC 12 (12 April 2019)

[30] What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

[31] Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court."

[32] Allied to these factors, courts must also interpret legislation to promote the spirit, purport an object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to single but laid the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa'."

[10] It was submitted that, when one deals with a provision which imposes administrative or criminal penalties, this strong emphasis on purposive interpretation cannot be discarded. I disagree with the submission. The Constitutional Court in *Waymark* was dealing with the general principles of statutory interpretation. It was not dealing with statutes which contain administrative or criminal penalties, which is what was dealt with in *DA v ANC*. If counsel's argument were accepted, it would result in the judgment in *DA v ANC* being ignored or being regarded as wrong. In my view, the Appeal Board correctly held that the present matter could not be distinguished from the decision in *DA v ANC* and that the penal provisions in FICA had to be interpreted restrictively. That will obviously also apply to the regulations.

[11] I proceed to deal with the Appeal Board's findings in respect of the penalties which were imposed by the SARB. The penalty of R1 million related to findings 3 and 4. Section 28 of FICA provides as follows:

An accountable institution and a reporting institution must, within the prescribed period, report to the Centre⁷ 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 the reporting institution from the client, or from a person on behalf of the client, or from a person on whose behalf the client is acting.”*

Regulation 22B reads as follows:

The prescribed amount of cash above which a transaction must be reported to the Centre under section 28 of the Act is R24 999.99 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.

[12] In regard to finding 3, the bank's alleged non-compliance consisted of various deposits by the Consulate General of India which have been conveniently summarised as follows in the judgment of the Appeal Board:

⁷ The Financial Intelligence Centre established by s 2 of FICA

"5.1 On 15 April 2014 the Consulate made two deposits namely the amounts of R49 745.00 and of R10 670.00. However, only the former deposit of R49 745.00 was reported. The respondent's contention remained that the aggregate amount of R60 415.00 should have been reported and that the failure to report the amount of R10 670.00 constitutes non-compliance with FICA.

5.2 On 29 April 2014 two deposits were made namely R31 405.00 and R275.00. Only the first deposit was reported and not the aggregate of the two transactions.

5.3 On 20 April 2015 there were two deposits, R52 023.00 and R7 200.00. Only the first deposit was reported and not the aggregate of the two deposits.

5.4 A deposit of R25 000.00 made on 16 July 2015, was not reported.

5.5 On 4 August 2015 the deposits made were R24 700.00 and R840.00. Neither one of the two transactions were reported.

5.6 On 11 August 2015 three deposits were made namely R16 625.00, R10 250.00 and R14.60 respectively. None of these transactions were reported. The three amounts add up to R26 889.60.

5.7 On 26 October 2015 again three deposits were not reported. The amounts were R24 718.00, R16 725.00 and R7 885.00. The aggregate of the three amounts is R49 328.00"

[13] In the first three instances, two deposits were made on the same day, one being above and the other below the threshold. The one above was reported, but not the one below. In the last three instances, more than one deposit of less than R24 999.99 was made on the same day but the aggregate of the amounts was more than R24 999.99.

[14] The deposits were all made by the Consulate. The SARB required that all deposits by one client on one day that are in excess of the threshold have to be reported irrespective of what the underlying transactions were or whether the cash was received from one client of the Consulate or from various of its clients. The evidence of the bank before the Appeal Board was that the Consulate receives cash for services rendered to different clients and that it was under the impression that the transactions were not linked. It did not believe that the multiple deposits were fractions of a single deposit. The Appeal Board found that there was no reason to regard the bank's attitude as unreasonable and that the requirement of the SARB negated the clear wording of the regulation that the aggregate of smaller transactions have to be reported only "*if it appears to an accountable institution*" that the transactions are linked, to be considered fractions of

one transaction. The Appeal Board accordingly found that the SARB erred when it took the six transactions into account when it imposed the R1 million penalty.

[15] The submission on behalf of the SARB in this appeal was that the bank had to apply its mind to whether the transactions are linked, and could not simply presume, without more, that they are not and that this duty is particularly acute when understood in the light of FICA's purposes. The submission is *contra* the bank's evidence in its founding affidavit before the Appeal Board. The evidence of Mr. Jha, the bank's acting chief executive, in his founding affidavit was that the bank was aware that the Consulate collects cash from various sources, such as fees paid by the public for visas and related services. It was also aware that the consular office prefers, for security reasons, not to accumulate large amounts of cash and, depending on the cash flow on any particular day, may make several cash deposits daily. This was not an unusual occurrence. He stated that there was absolutely no basis on which it could reasonably be concluded that such multiple deposits might be linked so as to be considered fractions of one transaction. This evidence was uncontradicted. The SARB contended in its answering affidavit that the bank's allegations were irrelevant as FICA's requirements govern the obligations of an accountable institution, and not the relationship that the client of that institution has with its customers.

[16] The difficulty with the SARB's contention is that, on a plain reading of regulation 22B, it only requires of an accountable institution to report multiple transactions of amounts less than R24 999.99 "*if it appears*" to the accountable institution that the transactions are linked and to be considered fractions of one transaction. Mr. Jha's evidence of the bank's knowledge of the manner in which the Consulate conducted its transactions with the bank, was undisputed. It follows that the Appeal Board correctly held that the SARB erred when it took the six transactions into account when it imposed the R1 million penalty.

[17] In regard to finding 4, the bank's non-compliance related to the late reporting of three cash deposits. In terms of regulation 24(4), a cash transaction report (CTR) must be sent to the Centre within two business days after any employee of an accountable institution has become aware of such transaction. The instances of late reporting of cash threshold transactions related to the following deposits:

- A deposit of R52 023.00 made on 24 April 2015 which was only reported on 31 December 2015, eight months late.
- A deposit of R30 650.00 made on 8 May 2015 which was only reported on 31 December 2015, seven months late.

- A deposit of R39 500.00 made on 16 November 2015 which was only reported on 21 April 2016, five months late.

[18] The bank in its founding affidavit before the Appeal Board conceded its non-compliance in this regard. It does not appear from the judgment of the Appeal Board that it took these non-compliances into account when it reduced the penalty of R1 million to R400 000.00. My understanding of the judgment is that the penalty of R400 000.00 which the Appeal Board found would be fair, related only to the non-reporting of the R25 000.00 deposit on 16 July 2015, referred to in paragraph 5.1 of the judgment of the Appeal Board quoted in paragraph 12 above. The finding in respect of that non-reporting by the SARB was not contested by the bank.

[19] The evidence of Mr. Jha in the bank's founding affidavit in regard to these instances of late reporting was the following:

"27. As SARB is aware, the Appellant does not itself conduct 'front office' operations where it directly receives cash deposits from its customers. Such cash deposits are made at the Appellant's correspondent banks (First National Bank and Nedbank) and the Appellant is therefore limited to the bank statements it receives from its correspondent banks in order to review and report cash transactions in excess of the threshold. As such, the basis of the Appellant's cash reporting functions is a 'line by line' review of the bank statements from the two

correspondent banks. That review is conducted by the Appellant's compliance department.

28. The internal rules in this regard have been improved and the directive originally proposed to be issued by SARB (as appears from Appendix 4) had in fact already been implemented during 2016.

29. That enhanced methodology currently works well and the Appellant is now in all respects compliant. No doubt this has greatly contributed to the deletion of the proposed directive from the sanction."

[20] If the appeal board had taken the instances of late reporting into account when deciding to reduce the penalty of R1 million, it may or may not have imposed a penalty of more than R400 000.00. We were, however, informed that this appeal has not been brought on the basis that the amounts of the sanctions which were imposed by the Appeal Board were wrong. It is therefore not necessary to consider whether or not the penalty of R400 000.00 should be increased.

[21] I proceed to deal with the SARB's appeal against the Appeal Board's setting aside of the administrative penalty of R10 million which was imposed in respect of findings 6, 7 and 8. Section 29 of FICA imposed a duty on the bank to report suspicious or unusual transactions to the Centre. Section 42, as it read at the time, provided that an accountable institution

must formulate and implement internal rules, including rules concerning *“the steps to be taken to determine when a transaction is reportable to ensure the institution complies with its duties under this Act”*⁸

[22] Finding 6 was that the SARB was of the view:

- a. that the bank’s investigation comments and reasons for not reporting FCRM alerts to the FIC were not sufficiently documented; and
- b. that the bank’s alert review procedure was not documented to include details such as the management of recurring alerts.

[23] The Appeal Board said in its judgment that it was the SARB’s view that it could request an institution to develop a system that would make it easy for it to conduct an inspection. The Appeal Board found that this was not correct as SARB could only request an institution to develop its system in accordance with what FICA and the regulations require it to do. Regulation 27 provides that the internal rules of an accountable institution concerning reporting of suspicious and unusual transactions must:

⁸ Section 42(1)(d)

- "(a) *provide for the necessary processes and working methods which will cause suspicious and unusual transactions to be reported without undue delay;*
- (b) *provide for the necessary processes and working methods to enable staff to recognise potentially suspicious and unusual transactions or series of transactions;*
- (c) *provide for the responsibility of the management of the institution in respect of compliance with the Act, these regulations and the internal rules;*
- (d) *allocate responsibilities and accountability to ensure that staff duties concerning the reporting of suspicious and unusual transactions are complied with;*
- (e) *provide for disciplinary steps against the relevant staff members for non-compliance with the Act, these regulations and the internal rules; and*
- (f) *take into account any guidance notes concerning the reporting of suspicious or unusual transactions which may apply to that institution."*

[24] The Appeal Board found that if FICA has to be interpreted restrictively, as it should, no duty has been created for the bank to document reasons for decisions and alert review procedures. It accordingly found that, insofar

as the R10 million penalty was based on the non-compliance of this alleged duty, the decision to impose the penalty was wrong.

[25] In the present appeal, the argument on behalf of SARB in respect of finding 6 centred around the bank's failure to document its reasons for deciding against reporting transactions that had been flagged as possibly suspicious or unusual. It was contended that the Appeal Board erred in concluding that the regulatory regime does not require the internal rules of the bank to provide for this. The argument was that regulation 27(a), quoted above, requires that an accountable institution's internal rules must provide for the "*necessary*" processes and working methods and that the regulation should, therefore, be interpreted to necessarily include an obligation to document reasons for deciding not to report a transaction which was flagged as suspicious or unusual by the bank's automated system. This argument will, obviously, require a purposive interpretation of regulation 27(a). I have already indicated that I agree with the finding of the Appeal Board that the Act and the regulations must be restrictively interpreted. But even if purposely interpreted, regulation 27(a) cannot be interpreted to require of an accountable institution to document its reasons for deciding against reporting transactions that had been flagged as possibly suspicious or unusual. What it requires, is that the internal rules must provide for the necessary processes and working methods which will cause transactions which have been found to be suspicious and unusual to

be reported without undue delay. That does not permit of an interpretation that if a transaction has been flagged by the bank's automated system as suspicious or unusual, but is found by the bank's employees not to be such, that the bank has an obligation to document the reasons for such finding. If that is what SARB requires, it would have been an easy matter for the legislature to include that as a further requirement of regulation 27.

[26] Findings 7 and 8 were the following:

Finding 7

- a. The rules in question were deployed and managed from the Data Centre in India and were not customised for the South African environment; and
- b. The FCRM⁹ system was not configured or did not enable the bank to monitor individual customer transactions against the customer's own profile.

Finding 8

The bank had not:

⁹ Financial Crime Risk Manager system

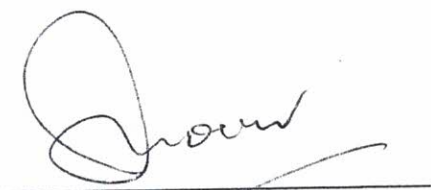
- a. applied sufficient scrutiny or care when processing transactions involving loans and fund transfers among entities within the same group; and
- b. reviewed FCRM system alerts in respect of inter-group transactions to determine whether such alerts were reportable under section 29.

[28] The Appeal Board referred in its judgment to paragraphs 34 - 38 of the founding affidavit of Mr. Jha in which he said that, due to the bank's global reach, its operations are subject to the global supervision of top banking regulators and that its anti money-laundering and terrorist control measures are robust and stringent to meet with the standards of various regulators. He also stated that the bank's internal rules create a large range of alerts in respect of the identification of possible suspicious and unusual transactions and that, over the course of approximately the last two years, the bank's internal rules which regulate the investigation of alerts, had led to the investigation and reporting of some 40 transactions as suspicious and unusual. The Appeal Board points out that the SARB did not find any fault in the bank's handling of all those matters and did not find any contravention of, or non-compliance with the provisions of s 29 of FICA. In respect of finding 7, the Appeal Board said in its judgment that it was significant that no specific aspects in which the system should be changed had been given by SARB. In respect of finding 8, the Appeal Board says in its judgment that it was difficult to understand exactly what the SARB had

in mind, especially in view of the fact that not a single failure to report a suspicious and unusual transaction could be found and that cogniscance should be taken of the fact that the bank regarded the Gupta group of clients as "*high risk*" and scrutinised their transactions with enhanced due diligence.

[29] Counsel for SARB made no submissions in respect of the conclusions of the Appeal Board in respect of findings 7 and 8 but did not abandon its appeal in that regard. I need say no more than that, in my view, the Appeal Board correctly found that findings 7 and 8 could not be sustained for the reasons set out in its judgment.

[30] In the result, the appeal is dismissed with costs, including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'J W Louw', is written over a horizontal line. The signature is fluid and cursive.

J W LOUW

JUDGE OF THE HIGH COURT

Counsel for appellant: Adv. S Budlender; Adv. M Finn

Instructed by: Gildenhuys Maltaji Inc, Pretoria

Counsel for respondent: Adv. G Marcus SC; Adv C McConnachie

Instructed by: Mervyn Taback Inc, Johannesburg.