THE APPEAL BOARD OF THE FINANCIAL INTELLIGENCE CENTRE

Appeal no. 12/3/1/5 –Ayoba FX

In the matter between:

AYOBA FOREIGN EXCHANGE (PTY) LIMITED Appellant

and

FINANCIAL SURVEILLANCE DEPARTMENT

OF THE SOUTH AFRICAN RESERVE BANK Respondent

DECISION

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[1] This is an appeal against the imposition of financial penalties in terms of section 45C of the Financial Centre Act, No. 38 of 2001 ("the Act") by the Respondent. The Appellant is an authorised dealer with limited authority ("an ADLA") in foreign exchange. The sole shareholder in the Appellant is Mr. Seenivasan Reddy. The Respondent is a supervisory body who is responsible for ADLA's in terms of the Act its Regulations and the Exchange Control Regulations. The issue on appeal is not directed at the merits but whether fair process was followed by the Respondent in respect of its decision.

[2] The penalties imposed are:

2.1 A financial penalty of R80 000.00 for failing to comply with Section 21 of the Act.[1]

2.2 A financial penalty of R50 000.00 for failing to comply with Section 43 (a) of the Act.[2]

2.3 A financial penalty of R50 000.00 for failing to comply with section 43 (b) of the Act.[3]

2.4 A directive, in terms of Section 45C(3)(c) of the Act directing the Appellant to present a remedial action plan.

2.5 In addition the Appellant's licence was suspended, and on 3 March 2016 permanently withdrawn.

[3] During an inspection at the Appellant's head office in Sandton between 14 June 2014 and 25 June 2014 a number of contraventions of the Exchange Control Rulings and Regulations, the FIC Act and Regulations thereto were detected. The findings of the inspection were *inter alia* that the Appellant failed to appoint a compliance officer, its internal rules failed to comply with the prescribed requirements, it failed to identify clients in terms of section 21 of the Act and moreover failed to provide proper training to its employees to enable them to comply with the provisions of the Act. The Appellant was directed to rectify those contraventions. Further off-site inspections were conducted, inspection reports prepared and the Appellant was requested to adhere to its non compliance and respond to the findings made.

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[1] Failure to verify the identity of clients, properly.
[2] Failure to provide training to its employees to enable them to comply with the provisions of the Act.
[3] Failure to appoint a compliance officer.

[4] During May 2015 a further inspection was undertaken and arranged with Mr. Reddy. Although there was improvement of the Appellant's compliance with the Act, it was found that it still remained non-compliant in a number of respects and in particular, in respect of the identification of its clients, the appointment of a compliance officer, its internal rules and in respect of training of employees. Consequently directives were issued by the Respondent detailing the measures to be implemented to remedy and prevent the recurrence of non compliance with the provisions of the Act and the Regulations thereto.

[5] On 1 June 2015 the Appellant applied for permission from the Respondent to appoint a Mr. Day, an exchange control officer. He was known to the Respondent and suspected of exchange control contraventions previously in his capacity as an exchange control officer with another ADLA. The Appellant was informed on the very same day that the Respondent strongly recommends that Mr. Day not be appointed as exchange control officer.

[6] Mr. Reddy met with members of the Compliance and Enforcement Division as well as the ADLA supervision Unit on 9 June 2015. The issue concerning the identification of its clients was discussed and Mr. Reddy was informed that the inspectors were of the view that some of the transactions, concluded by the Appellant, were suspicious and irregular. He was requested to refer all transactions in excess of R50 000.00 to the Respondent for approval.

[7] However the Appellant failed to report any such transactions of the month of June. On the 1st of July 2015 the Appellant was requested, by e-mail, to provide the Respondents with client's identification in respect of seven transactions in excess of R50 000.00, processed by the Appellant on 29 June 2015.

[8] At the request of Mr. Reddy there was an "off record" meeting between himself and members of the Respondent on 7 July 2015. The officials of the Respondent who attended the meeting were Messrs. A Malherbe, F Buys and J Joubert. During that meeting it transpired that the seven transactions had been processed by Mr. Day without the necessary documentation after he had assured Mr. Reddy that he would have it available within 72 hours. No such documentation was ever provided. Moreover in instances where the Appellant made use of the services of referral agents it relied on copies of documents provided by the agents. He did not see the clients nor their original documents. In addition thereto it transpired that in order to persuade the Respondent that the Appellant had unimpaired capital of R1 million, it had channelled client funds to the particular account, and that in fact it did not have that amount of unimpaired capital.

[9] A letter of intention to impose sanctions and inviting a reply was addressed to the Appellant on 10 July 2015. The Appellant was informed that it was still non-compliant with Sections 21, 42, 43(a) and 43(b) of the Act. It was further established that the Appellant remained non compliant in terms of Section 21 of the Act, read with their Regulations by failing to establish and identify

clients. The following sanctions were proposed to be implemented in terms of Section 45 of the Act, namely:

9.1. For the contravention of section 21 of the Act, a financial penalty of R880 000, of which 580 000 would be suspended for 12 months on condition that no further contraventions of section 21 occur during the period of suspension.

9.2 For the contravention of section 42 of the Act, a financial penalty of R50 000 suspended for 30 days on condition that the deficiencies are remedied within the period of suspension.

9.3 For the contravention of section 43(a) of the Act, a financial penalty of R100 000, of which R50 000 is suspended for six months on condition that the relevant deficiency is remedied within the period of suspension.

9.4 For the contravention of Section 43(b) of the Act, a financial penalty of R50 000 suspended for 90 days on condition that the relevant deficiency is remedied within the period of suspension. Furthermore the Respondent was afforded an opportunity to respond to the aforesaid notice.

[10] Thereafter the Appellant was informed, on 17 July 2015, that its ADLA licence had been suspended with immediate effect and that it was to make

representations why it should not be withdrawn permanently. The Appellant was further invited to motivate why Mr. Reddy should still be regarded as a "fit and proper person" in terms of the Exchange Control Rulings.

[11] There was a reply to the letters of 10 July and 17 July 2015 by the Appellant's attorney. The most important representation on behalf of the Appellant was that Mr. Reddy indicated that he must sever all ties with the Appellant and that a person who is "fit and proper" with sufficient unimpaired capital should be considered. Although some of the penalties were accepted the contention was that the other penalties were not to be imposed and that there was not to be a finding that Mr. Reddy was not "a fit and proper person" in terms of the Exchange Control Rulings.

[12] Further queries were directed to the attorneys of the Appellant on 20 November 2015. The queries once again related to the following aspects; the failure to properly identify its clients, Mr. Reddy accepting the assurance of Mr. Day that he would supply proper client identification, (which he failed to do), despite being warned by the Respondent against his appointment ,the position of Mrs. Dhlamini in the Appellant's business, the deliberate misrepresentation as to the unimpaired capital and the basis upon which Mr. Reddy could possibly be regarded as a "fit and proper person".

[13] The attorney of the Appellant replied by 3 February 2016. The response was, to put it mildly, vague.

[14] A panel consisting of Mr. Joubert (Chairman), Mrs. Roux, Mr. Buys, Mr. Basson and Mr. Malherbe once again, convened and they discussed the non-compliance and the proposed sanctions. They were of the view that the Appellant clearly contravened the Act, its Regulations as well as the Exchange Control Regulations and Rulings and he was clearly guilty of a number of serious misrepresentations. They also discussed the possibility of a reduction of the proposed sanctions.

[15] The Enforcement Panel of the Compliance and Enforcement Division of the Respondent was convened on 19 February 2016. The panel consisted of Mr. Malherbe as chairman, Mr. Basson, Ms Dheda, Mr. Delport and Mr. Blignaut. According to the minutes of the discussion one of the purposes of the meeting was "*To consider all the available information and representations made in the Ayoba matter and make a decision as to whether or not a recommendation has to be made to the Head of the Department to impose administrative sanctions in terms of section 45C of FICA".*

[16] The chairman reminded the panel members to consider all the factors contained in Section 45C(2) of the Act. The members considered all the relevant documentation and representations on behalf of the Appellant. The panel found that the Appellant was non-compliant over an extended period and such non-compliance was serious and involved an element of organised crime, the Appellant continued with irregular transactions despite a stern warning to refrain from it and the Appellant had made misrepresentations to

the members of the Respondent. More lenient sanctions than previously proposed were recommended[4].

[17] The Head of the Department considered all the documents together with the panel's findings and recommendations on 26 February 2016. He decided to implement the proposed sanctions. The Appellant was informed accordingly.

[18] The Appellant's notice of appeal was to the following effect that the Respondent had: failed to take the factors set out in Section 45C(2) of the Act into account, failed to state the reasons for its decision, failed to take into account difficulties experienced by the Appellant and failed to give proper consideration to the aspects in which the Appellant complied with the Act.

[19] Upon receipt of the record the Appellant filed a supplementary affidavit. The Appellant maintains that the panel discussions of 5 February 2016 and 19 February 2016 were *quasi* judicial decisions that were flawed in that they were taken by panels chaired respectively by Mr. Joubert and Mr. Malherbe who were both present at the "off record" discussions with Mr. Reddy on 7 July 2015. He maintains that it was a transgression of the maxim *nemo judex in causa sua.*

[20] In a further replying affidavit Mr. Malherbe explained that in the Department there is a two-tiered determination and decision-making process followed by the Department in implementing penalties in which a panel and the head of

[4] The sanctions recommended were the sanctions eventually imposed.

the Department participate. The panel makes recommendations to the Head of the Department but the eventual decision to impose penalties is made by the Head of the Department.

[21] Each one of the members of the two panels made affidavits. The first panel was chaired by Mr Joubert. Ms. Roux and Mr. Buys were members of the ADLA Supervision Division. The other two members of the panel were Mr. Malherbe and Mr. Basson of the Compliance and Enforcement Division. The main focus of the meeting was to consider the Appellant's licence should be suspended and whether Mr. Reddy is a "fit and proper" person to hold a license[5]. The panel considered the proposed sanctions. The recommendations adopted by the panel were unanimously accepted by all panel members. The other members of the panel stated that they regarded the input of Joubert and Malherbe of significant relevance due to their close involvement in the investigation process, but they had applied their minds independently and were not influenced unduly by Malherbe or Joubert.

[22] As to the second panel Malherbe states that purpose and constitution of the second panel and his involvement therein were as follows: The panel convened on 19 February 2016 and consisted of 5 members of the Compliance and Enforcement Division, himself and Mr. Basson, Ms. Dheda, Mr Delport and Mr. Blignaut. He chaired the meeting because of his close involvement in the investigation in connection with Ayoba's FICA and

[5] It is significant that in the reply by the Appellant's attorney to the queries of the Department on 31 August 2015 his attorney, Mr. Strauss states the following: "After consulting with counsel, it was agreed by Reddy that he would remove himself from any involvement with Ayoba, resign as a Director of Ayoba and seek a purchaser for his entire shareholding therein"

Exchange Control compliance. The panel considered the draft guidelines for penalties and considered the Department's findings in respect of Ayoba's non-compliance with the FIC Act and Regulations, Ayoba's contentions and to formulate a recommendation to the Head of the Department. Malherbe states that because of his involvement in the investigation he could inform the members of all relevant facts. The recommendations were adopted unanimously and all the members stated that they applied their minds independently and were not improperly influenced by Malherbe or Joubert. Malherbe proposed that the penalties initially proposed be reduced significantly. He disavowed any vestige of bias.

[23] Mr. Mazibuko, the Head of the Financial Surveillance Department of the SA Reserve Bank explained that he was authorized to impose administrative sanctions in terms Section 45C(3) of the Act. He stated that when he considered this matter he was handed a substantial file with *inter alia* on-site inspection reports, dated 21 October 2014 and 15 June 2015, all the relevant correspondence between officials of the Department and the Appellant, statistics of ADLA's, Appellant's financial statements, the minutes of the two panels, revised penalty guidelines and a draft letter intended to be addressed to the Appellant. Upon considering the information contained therein, he was satisfied that that there was sufficient evidence of non-compliance with the Act and Regulations as set out in the draft letter and that the penalties proposed were appropriate, reasonable and justifiable. He stated that when he accepted the recommendations he acted independently and did not regard his discretion to be fettered in any way.

[24] At the hearing Mr. Riley informed the Board that he would not argue that there were no contraventions of the Act and the Regulations and that he would also not argue that the Appellant had not properly been informed of the reasons for the findings and the penalties. His sole point of attack pertained to unfair administrative action. There exists a reasonable suspicion of bias and that because of the *nemo judex in sua causa* principle the contraventions and penalties must be set aside.

[25] The decision not to argue that there were no contraventions or that the penalties were excessive or that the Appellant had not been informed of the reasons for the sanctions, was a wise one. It is clear that the evidence against the Appellant was overwhelming. The penalties were appropriate. Moreover the Appellant had been invited, on more than one occasion, to proffer reasons why he should not be sanctioned and why penalties should not be imposed. His response did not pass muster.

[26] The working of the Department, as far as ADLA's are concerned, and insofar as it is relevant for this appeal, consists in the first instance of supervision. There are a number of officials of the Respondent whose duty it is to undertake inspections and make enquiries to ascertain whether an ADLA complies with the provisions of the Act and the Regulations. If there is non-compliance they have to address the problem. As is evident from the facts of this matter the problems are discussed and remedial measures are proposed. An inspection report is sent to the ADLA. If thereafter the problems have not

been solved the members of the Compliance and Enforcement Division make contact with the relevant ADLA. Again they have discussions and suggestions of remedial measures. As is also evident, before any action is decided upon the person in question receives a letter in which the relevant contraventions are pointed out and his response is invited. This letter is known in the Department as an a*udi*[6] letter. In this case the Appellant got two *audi* letters.

[27] If the problems have still not been rectified, the Department must clearly consider sanctions. This is where the Head of the Department comes in. Evidently he cannot go out on inspections nor get involved in ongoing correspondence with individual concerns. He will receive recommendations from the officials in the Department together with all the material available in the Department. It is his duty then to consider whether the recommendations were justified on the evidence available. It is for him to decide whether to adopt, reject or amend the recommendations.

[28] It is evident that the Head of the Department must be furnished with all relevant information before he makes a decision. The officials who worked closely on the project will be best equipped to supply the information. It is difficult to envisage a panel discussion which is not attended by the individuals who were involved in the investigation and able to report and make recommendations to the Head of the Department, which would fully apprise him of all the relevant facts and considerations. In this connection Mr. Maritz's submission that instead of just furnishing a report and making

[6] It is to provide for the most basic principle of fair administrative action, and for that matter of justice, namely to hear the views of the other side – *audi alteram partem.*

recommendations to the Head of the Department, the investigators consider other knowledgeable individuals to be part of the panel and give their input. It will be illogical and impractical for the Department to allow a panel not involved in the investigation at all and cause them to determine possible contraventions, sanctions and penalties.

[29] It is necessary to try and understand the Appellant's basis of appeal. It would seem as if it is of the view that the panel fulfils some *quasi –judicial* function when it compiles a summary of the relevant facts and makes recommendations to the Head of the Department. As it is trite law that before exercising such a function the functionary must heed the *audi alteram* rule, it seems to be the Appellant's perception that it must also get an opportunity to be heard by the panel.

[30] The flaw in that approach is that the panel does not fulfil a *quasi-judicial* function as has been discussed in paragraphs 28 above. Unless the Head of the Department reacts in some or other way, which only he is entitled to do, the report has no status at all and nothing will come of it.

[31] It will serve no purpose to discuss all the different reported judgments to which we have been referred to. We accept that when the circumstances of a case are such that the conduct of a functionary can give rise to even just a suspicion of bias, an appeal tribunal will be entitled to set aside a decision which was contaminated by that conduct. However before such a step can be taken it must be clear that an aspect which could or might have negatively

reflected against the person in question has been wrongly brought to the notice of the decision maker.[7] It must further be clear that if the person in question had an opportunity he could have furnished an explanation that would have taken the sting out of the that particular aspect. In addition thereto there must at least be a possibility that but for that conduct the decision maker could have come to a different conclusion.

[32] The Appellant has failed to indicate anything out of step on the part of the Respondent and its argument that the Head of the Department only rubberstamped the final report of the panel is without substance. The appeal cannot therefore succeed.

[33] The Appellant has paid an amount of R10 000.00 in terms of Section 45D(1)(b) of the Act when it lodged the appeal. The purpose of such payment is evidently to discourage hopeless or frivolous appeals or appeals that are only noted to delay matters. Mr. Reddy co-operated with the Department during the investigation and although he was not successful with the appeal it cannot be said that the Appellant did not have a genuine belief of possible success with the appeal. It will be fair if that amount stands as a first payment towards the penalties imposed on the Appellant.

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[7] In its appeal documents the Appellant contended that admissions made by Mr. Reddy during the "off the record" discussion were privileged and that Mr. Joubert and Mr. Malherbe were not entitled to include information so obtained in the final report. That argument was abandoned during the hearing as it was common cause that that information is not privileged and cannot possibly be privileged.

The following order is made:

1. The appeal is dismissed;

2. The amount of R10 000.00 paid by the Appellant when the appeal was noted stands as a first payment in respect of one of the three penalties payable by the Appellant.

SIGNED AT PRETORIA ON THIS 28th DAY OF NOVEMBER 2016.

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W J HARTZENBERG CHAIR

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H K KOOVERJIE SC MEMBER

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M E PHIYEGA MEMBER