THE GOVERNMENT GAZETTE OF MAURITIUS

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BEFORE THE FINANCIAL SERVICES REVIEW PANEL

2022 FSRP 1

In the matter of:

A Company

Applicant

V/S

The Financial Services Commission

Respondent

(*Published by the Financial Services Review Panel under section 66(7) of the Financial Services Act*)

DETERMINATION

In a letter dated [*edited for confidentiality*], served on the Board of Directors of A Company (the applicant), the Enforcement Committee (EC) set up under section 52 of the Financial Services Act 2007 (the FS Act) informed the said applicant that following an on-site inspection by the Financial Services Commission (the respondent) from [*edited for confidentiality*] to [*edited for confidentiality*], it was noted that numerous breaches of statutory obligations had been committed by the applicant.

Previously on [*edited for confidentiality*], the applicant wrote to the FSC stating that following the said on-site visit, it was committed to "*act, redress matters and ensure a continuity in the same direction in compliance with the codes, rules, regulations and legislation*."

By way of a letter dated [*edited for confidentiality*] and pursuant to section 53(1) of the FS Act, a notice of the intention of the respondent to refer the matter to the EC was sent to the applicant.

The applicant was informed that its representations were not to the satisfaction of the respondent and in accordance with section 53(1) of the FS Act, the matter has been referred to the EC for whatever actions it deemed fit to take.

The applicant was further referred to the Enforcement Manual and Administrative Penalties Framework which had already been published on the FSC's website with regards to its enforcement process.

In that letter dated [*edited for confidentiality*], already referred to above and pursuant to section 53(3) of the FS Act, the EC notified the applicant that it had been acting in breach of the FS Act, the Financial Intelligence and Anti-Money Laundering Act 2002 (the FIAMLA), the Financial Intelligence and Anti-Money Laundering Regulations 2018 (FIAML Regulations) and the United Nations (Financial Prohibitions, Arms Embargo and Travel Ban) Sanctions Act 2019 (UN Sanctions Act).

In its **'Decision Notice'** letter dated [*edited for confidentiality*], the EC informed the applicant of the numerous breaches which it had committed contrary to the various sections of the FIAMLA, the FIAML Regulations and the UN Sanctions Act. The applicant is being reproached for having committed 14 breaches of the law for which it had decided to impose an administrative sanction pursuant to sections 7(1)(c)(v) and 52(3) of the FS Act.

In calculating the required administrative sanction, the EC notified the applicant that it was the FSC's policy to resort to the 'Administrative Penalty' set out in the Administrative Penalties Regulatory Framework.

After having taken into consideration various factors like (a) financial benefit the applicant had derived from the alleged breaches, (b) seriousness of the alleged breaches, (c) mitigating and aggravating factors, (d) adjustment for deterrence, (e) likelihood that the administrative penalty would cause serious financial hardship to the applicant, (f) the applicant's written representations made in a letter dated [*edited for confidentiality*]and (g) the applicant's denial that it had breached the provisions of the FIAMLA, FIAML Regulations and the UN Sanctions Act, the EC decided to impose on the applicant an administrative penalty amounting to MUR 1,622,900.

Pursuant to section 53(4) of the FS Act, the EC informed the applicant that should it feel aggrieved by the decision of the EC, it could within 21 days of the issue of the said written notice lodge an application with the secretary of the Review Panel stating the reasons (grounds of appeal) for a review of the EC's decision to impose such an administrative penalty.

In a letter dated 21 July 2021 which is within the statutory delay provided under the FS Act, Senior Attorney informed the secretary of this Review Panel that the applicant which had

retained his services was aggrieved by the abovementioned decision of the EC dated [*edited for confidentiality*] and that pursuant to section 53(4) of the FS Act, it was giving notice for a review of the EC's decision.

In the meantime, the applicant also applied before the Review Panel for a suspension of the EC's decision to impose such an administrative penalty on it. On 27 July 2021, the FSC informed the members of the Review Panel in the presence of all parties concerned that it was resisting the application to review the EC's decision but was not objecting to the motion for its stay which was granted by the Review Panel.

In a letter dated 20 August 2021, Senior Attorney appearing for the applicant put in the statement of case of his client. However, for the purpose of this determination, we do not propose to set out in detail all the grounds that have been put forward to challenge the decision of the EC to impose an administrative penalty on the company in the amount of MUR 1,622,900.

Learned counsel for the applicant at a sitting of the Review Panel held on 26 April 2022, informed us that he proposed to raise some points in law which according to him would dispose of this matter.

In fact, according to learned counsel, these points in law had already been raised in six of the applicant's grounds of appeal before us, namely grounds 1, 2, 3, 4, 9 and 10. He pointed out to us that grounds 1, 2, 3, 4 questioned the legality of the Administrative Penalties Regulatory Framework relied upon by the EC to impose such administrative penalty and that grounds 9 and 10 related to whether the EC should not have taken regulatory action against the company only where it had refrained or negligently failed to comply with the provisions of the FIAMLA, its ensuing Regulations and the UN Sanctions Act 2019.

Besides these two above points, learned counsel assisting the company has taken up a further point in that FIAMLA is not a relevant Act for which the EC may have a reasonable cause to initiate disciplinary actions under section 53(1)(a) of the FS Act. In support of learned counsel's contention, we were referred to the First Schedule of the FS Act which lists out these "Relevant Acts", namely: Captive Insurance Act, Insurance Act, Private Pension Schemes Act, Protected Cell Companies Act, Securities Act, Securities (Central Depository Clearing and Settlement) Act and Trusts Act. Obviously, FIAMLA is not listed as a relevant Act.

We were referred to section 53(1)(a) of the FS Act which provides that "*Where the Chief Executive has reasonable cause to believe that a licensee - (a) has contravened any relevant Act, any direction or order issued under a* ***relevant Act*** *or any condition of the licence;… he may refer the matter to the Enforcement Committee for such action as the Enforcement Committee may deem fit appropriate*" (Emphasis is highlighted)

Learned counsel assisting the applicant has submitted to us that since FIAMLA is not a relevant Act for the purpose of initiating disciplinary proceedings under section 53(1)(a) of the FS Act, the FSC was wrong to have taken disciplinary actions against his client.

We however, agree with the reply of learned counsel for the FSC that section 53(1)(a) of the FS Act is not the only instance available to the EC to proceed against a licensee with a view to impose disciplinary actions under the FS Act. Besides section 53(1)(a) of the FS Act, there are other provisions under section 53(1)(b), (c), (d), (e), (f) and (g) empowering the EC to initiate disciplinary actions against a licensee, namely where the latter: (a) is carrying out his business in a manner which threatens the integrity of the financial system of Mauritius or is contrary or detrimental to the interest of the public, (b) has committed a financial crime, (c) no longer carries out the business activity for which it is licensed, (d) has failed to commence business within 6 months from the date on which it is licensed and (e) is not a fit person.

Our attention was drawn by learned counsel for the FSC that in its letter dated [*edited for confidentiality*], the FSC informed the Director of the applicant of its intention to refer the matter to the EC pursuant to **section 53(1)** of the FS Act. (Emphasis is highlighted). It is apposite to reproduce one paragraph of this letter which reads as follows: "*The commission wishes to inform you that the representations made is not to its satisfaction and that you have been referred to the Enforcement Committee (the Committee) in accordance with* ***section 53(1)*** *of the Financial Services Act 2007 for such action as the Committee may deem appropriate*". (Emphasis is highlighted).

There is no doubt that neither the respondent nor the EC had stated that it had resorted itself to section 53(1)(a) of the FS Act when initiating disciplinary proceedings against the applicant contrary to the submission of learned counsel for the applicant.

More importantly, in its letter dated [*edited for confidentiality*] and addressed to the company, we have noted under paragraph 1.4 of the "**Decision Notice**" pursuant to section 53(3) of the FS Act that the Enforcement Directorate had given notice to the applicant of its intention to refer the matter to the EC under section 53(1) of the FS Act without specifying

which particular subsection of the Act the EC had in mind. Thus, it is clear that the EC did not resort specifically to section 53(1)(a) of the FS Act to initiate disciplinary proceedings against the applicant. However, we are of the view that simply referring the matter to the EC under section 53(1) of the FS Act without formally specifying which particular paragraph of section 53(1) is wrong in law as we consider that the applicant has not been properly informed of the precise breaches of the law under which the matter was referred to the EC in spite of having provided the respondent with a "*forward-looking remedial plan*" in the own words of the respondent.

Section 53(1) of the FS Act provides as follows:

53. Disciplinary proceedings

(1) Where the Chief Executive has reasonable cause to believe that a licensee -

(a) has contravened any relevant Act, any direction or order issued under a relevant Act or any condition of the licence;

(b) is carrying out his business in a manner which threatens the integrity of the financial system in Mauritius or is contrary or detrimental to the interest of the public;

(c) has committed a financial crime;

(d) no longer fulfills any condition or criterion specified under the relevant Act for the grant of a licence;

(e) no longer carries out the business activity for which it is licenced;

(f) has failed to commence business activity within 6 months from the date on which it is licenced;

(g) is not a fit and proper person;

he may refer the matter to the Enforcement Committee for such action as the Enforcement Committee may deem appropriate.

Being given that the FSC has failed to specify under which particular subsections of section 53(1) of the FS Act it had referred the matter to the EC and consequently initiated disciplinary actions against the respondent company, we consider that the referral was flawed

and that the decision of the EC to impose on the respondent an administrative penalty cannot be upheld.

We find it appropriate to quote the following passage from the decision of the Supreme Court in **The Grand Bay Pharmacy Ltd V The Pharmacy Board 2018 SCJ 221 -**

> *The duty to act fairly will be assessed by reference to a wide range of factors including the nature of the individual's interest and the impact of the decision upon it, the type of the decision being given, whether the decision is preliminary or final, the subject matter of the decision, and the terms of any relevant statutory provisions.*
>
> **[Halsbury's Laws of England Fourth Edition 2001 Vol. 1(1) at para. 96].**

In that connection, the need to afford a fair trial and adequate opportunity to be heard was highlighted in ***Ridge v Baldwin [1963] 2 All ER 66 at 81****. The Court observed that: "The body with the power to decide cannot lawfully proceed to make a decision until it has afforded the person affected a proper opportunity to state his case".*

The duty to act fairly in affording a proper opportunity to be heard is even more pronounced where a decision affects directly a person's property rights or his livelihood ***[MClnnes v Onslow Fane [1978] 3 All ER 211****.* (Emphasis is underlined)

In light of our above analysis, we find that the applicant has not been given a proper opportunity to state its case and made aware under which specific breaches of the law the matter was referred to the EC. Accordingly, on this issue only, we are minded to cancel the decision of the EC and the sanction imposed on the applicant. But being given that a most important point in law has been raised in grounds 1, 2, 3 and 4 of the applicant's grounds of appeal, we consider that it is our duty to rule on it.

Grounds 1, 2, 3 and 4 of applicant's grounds of appeal question the legality of the Administrative Penalties Regulatory Framework (APRF) relied upon by the EC to impose an administrative penalty on the applicant. It is the contention of learned counsel for the applicant that the APRF: (a) is illegal and unlawful as no FSC Rules have yet been published in the government gazette, (b) has no force of law, (c) is merely a document setting out the non-exhaustive approach to be adopted when imposing an administrative penalty, (d) is deemed to have no force of law inasmuch as no FSC Rules have been made by the respondent with a view to state in what circumstances the EC has considered the breaches were moderate and (e) was not yet issued at the time the EC considered the alleged gross income derived by the applicant.

In her reply, learned counsel for the respondent has submitted that both the FS Act and the FIAMLA empower the respondent to impose sanctions on a non-compliance financial institution by virtue of section 7(1)(c)(v) of the FS Act and 18(3) of the FIAMLA. We find no fault with that submission. However, inasmuch as section 7(1) (c) (v) of the FS Act gives powers to the respondent to impose an administrative penalty, it is the contention of learned counsel that notwithstanding the fact that the APRF has not been prescribed, published in the government gazette or no regulations have been issued to capture the so called regulatory framework, the EC can still legally act on the said framework to impose such penalty as stated therein.

We cannot agree with this contention. It is not disputed that such APRF has never been the subject of any FSC Rules, regulations or been published in the Government Gazette although under section 93(1) and (2) of the FS Act, it is provided that:

93. FSC Rules

(1) The Commission may make such FSC Rules as it thinks fit for the purposes of the relevant Acts.

(2) Any FSC Rules made by the Commission under the relevant Acts shall not require the prior approval of the Minister and -

(a) may provide for the taking of fees and levying of charges; and

(aa) notwithstanding section 53, may provide for the imposition of an administrative penalty in relation to such matters as may be prescribed; and

(b) shall be published in the Gazette.

Further under section 94 of the FS Act, it is provided that the Minister may make such regulations as he thinks fit for the purposes of this Act.

We take note of the fact that no FSC Rules or regulations have been made to capture the contents of the APRF under which the respondent had relied to impose a penalty sanction on the applicant except that same has been published on the respondent's website. It was incumbent on the respondent with regard to the fundamental principle of legality as stated in **Indigo Marketing Company Limited v The Mauritius Revenue Authority [210 SCJ 394]** that "*such principle, in conformity with section 10(4) of our Constitution, requires that there*

should be a law which is prescribed in clear, ascertainable and non-retrospective manner for it to be applicable and enforceable to govern the conduct of all citizens". The learned Judge went on to say that a health warning by way of a Minister's "determination" which had not been published in an enactment could not create any binding legal obligation. Similarly, we are of the view that to render the APRF legally binding, the respondent should have made the appropriate FSC Rules to capture its contents and caused them to be published in the Gazette so that as has been aptly stated in the case of **Indigo Marketing Company Limited (Supra)**, "*A legal situation as already created by regulations and which are in force* ***cannot be varied by administrative discretionary measures*** *which go beyond the existing provisions already established by these regulations*". (Emphasis is highlighted).

In the light of our analysis of the arguments offered by both sides under grounds 1, 2, 3 and 4, and the conclusion reached, we rule that the respondent was wrong to have relied on the APRF which to all intents and purposes had no force of law.

Accordingly, taking into consideration our decision already reached that the applicant had not been properly informed of the precise reason as to why the matter was referred to the EC and that the APRF had no force of law, we cancel the decision of the EC reached on [*edited for confidentiality*] whereupon it imposed an administrative penalty amounting to MUR 1,622,900 on the applicant.

Having concluded that there is no case against the applicant, we do not propose to consider the other issues which have been raised with regard to grounds 9 and 10.

G. Angoh GOSK

(Chairperson)

Y. Jean-Louis

(Vice-Chairperson)

S.Lalmahomed

(Member)

13th June 2022