THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PA2/2021

In the matter between:

VIVA LIFE INSURANCE LIMITED — APPLICANT

and

THE PRUDENTIAL AUTHORITY — RESPONDENT

DECISION

1. The applicant is Viva Life Insurance Ltd. It is a relatively small licensed life insurance company and its shares are held by Ignition Telecoms Investments (Pty) Ltd and forms part of the greater ITI Group. If regard is had to its premium income, the impression is that it acts as an in-house life insurer for the Group. A further impression is that the Group is not much concerned about the corporate individuality of the members of the Group and that the business is conducted as that of one happy family.
2. The Prudential Authority issued an administrative order and a directive against Viva pursuant to a cash sweeping process that Viva had been applying during the period 1 August 2019 until 13 February 2020.
3. The process was as follows: During March 2019, the Applicant entered a cash sweeping transaction arrangement with ITI. The arrangement entailed the granting by the Applicant of monthly recurring interest-free loans to ITI. The monthly recurring loans were repayable by ITI within the calendar month each loan was granted. The capital value of each monthly loan

supposedly was not to exceed R7.7 million. This self-imposed limit was not respected and during February it rose to R19.9 million. The arrangement was be in place for an undetermined period. There is no record setting out the terms of the arrangement. The loans were intended to optimise the utilisation of free cash to reduce interest rate exposure and costs in the ITI group of companies. The arrangement commenced in March 2019 and endured until February 2020. The aggregate capital value of the arrangement as at February 2020 was R166 485 725.00. The aggregate value of the swept funds repaid by ITI to the Applicant at the end February 2020 was R120 285 725.00.

4. It is undisputed that this arrangement contravened the Insurance Act 18 of 2017 in numerous aspects:

   (a) Viva Life failed to adopt, implement and document an effective governance framework in terms of section 30(1)(a) of the Insurance Act[1] by participating in a cash sweeping transaction without approval from the board and without proper documentation and oversight which resulted in Viva Life failing to meet its Minimum Capital Requirement (MCR);

   (b) Viva Life failed to meet its MCR for the period 1 August 2019 until 13 February 2020, as required in terms of section 36(1) of the Insurance Act;[2] and

   (c) Viva Life failed to obtain the PA's approval in terms of section 38(1)(e) of the Insurance Act[3] before concluding transactions contemplated in section 45 of the Companies Act 71 of 2008, namely by providing direct or indirect financial assistance

[1] "An insurer and a controlling company must adopt, implement and document an effective governance framework that provides for the prudent management and oversight of—
(*a*) in the case of an insurer, its insurance business, and which adequately protects the interests of its Policyholders." Emphasis added.

[2] "An insurer must at all times maintain its business in a financially sound condition, by holding eligible own funds that are at least equal to the minimum capital requirement or solvency capital requirement, as prescribed, whichever is the greater."

[3] "An insurer . . . may not, without the approval of the Prudential Authority—
(*e*) conclude a transaction contemplated in section 45 (loans or other financial assistance to directors) of the Companies Act."

to a related or interrelated company, or to a related or interrelated company or corporation, or to a member of a related or interrelated corporation.

5. The Prudential Authority (PA) in consequence imposed on 4 March 2021 an administrative penalty of R3 000 000 (three million rand) in terms of section 167(1) of the Financial Sector Regulation Act 9 of 2017 on Viva. R2 000 000 (two million rand) of the penalty amount was suspended for a period of three years from the date of the order and is subject to Viva Life not committing a similar offence during this period. The remaining penalty of R1 000 000, inclusive of costs, had to be paid within 14 working days from the date of the order.
6. The PA, additionally, directed Viva, in terms of section 143 of the FSRA, not to pay dividends for a period of 12 calendar months effective from the same date. It explained: "Kindly note that the PA deems this directive necessary to ensure that the insurance business of Viva is prudently managed."
7. The applicant applies for the reconsideration of the two decisions in terms of sec 230(2) 0of the FSRA. The parties have waived their right to a formal hearing and the application is decided on the papers with reference to the heads of argument filed. Copious use will be made of them.

THE ADMINISTRATIVE PENALTY ORDER

8. The applicant accepts that it contravened the Insurance Act in the three respects set out but seeks reconsideration of the administrative penalty by an order setting aside the Penalty Amount and substituting it with a wholly suspended penalty and/or a reduced amount on the basis that the value of the Penalty Amount is not –

   (a) appropriate for the nature, extent and the short duration of the contravention, taking all mitigating factors into account;

   (b) proportionate to the nature, scale, and complexity of the business of Viva Life; and

   (c) in keeping with previous administrative penalties that have been imposed.

9. The approach to the decision in the grounds and the heads of argument is somewhat of a gun-shot one with generalised allegations. In particular, the basic approach to reconsideration applications concerning the exercise of a discretion by the PA/FSRA imposing an administrative penalty was ignored. This Tribunal has stated the approach often – see e.g., *MET Collective Investments (RF) (Pty) Ltd v Financial Sector Conduct Authority* (Case No A23/2019 par 67 and will do so again:

   "The ordinary rule is that a higher body is not entitled to interfere with the exercise by a lower body of its discretion unless it: failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously; or exercised its discretion upon a wrong principle. There is no reason why we should not apply the same approach during an application for reconsideration."

10. In considering the application it will accordingly be necessary to isolate those aspects of the argument that relate to the test.

11. Section 167(2) lists the factors, including extenuating circumstance, that the PA must and may consider in determining an appropriate penalty. The PA listed the factors and considered each and explained whether it was applicable or not. The bald allegation that the PA paid lip service to the factors is not justified and it is unnecessary for present purposes to regurgitate the arguments that were presented to the PA and again to the Tribunal.

12. An analysis of relevant factors reduces them to the following: (a) there was no need to impose a penalty because there is no need to deter the type of conduct involved; (b) the amount of the penalty in the context of the size of the business of Viva Life is "inappropriate"; (c) the PA erred in holding that Viva Life was reckless and did not warn it of the possibly of such a finding; (d) the PA overemphasised the absence of a written contract regulating the

swap; and (e) the swap had could not have had an effect on the financial soundness of the applicant and had no impact on the financial system and stability.

13. Lack of documentation is of the essence of the contravention of sec 30(1)(a). The inter-company arrangement was nowhere recorded. There is no record, save for the post events say-so on behalf of the company of the self-imposed internal limit of R7.7million. There is no recorded explanation why the limit was introduced or exceeded from the start. It is accordingly difficult to understand how the PA could have over-emphasised the absence of a contract.
14. It is facile to argue that because because Viva is a wholly-owned subsidiary there was no risk and that the holding company would comply with the terms of the oral/tacit/implied contract. The relevant question is whether it could, and even if it could, that does not mean that there was no risk that it would be able to do so.
15. The basic problem is that the applicant still refuses to appreciate what it did. It lent its funds to the group. The loan may have been void, as the applicant accepts. If not void, it created a potential risk to both the applicant and the system. Failures of one financial institution usually has a knock-on effect, albeit small. It was not a case that the applicant 'intermittently' failed to maintain its MCRs – it failed to maintain those requirements for each month save for the bookkeeping entry at the end of the month. And its intermittent sweeping back was just good enough to enable it to provide false quarterly reports to the PA, representing that the MCRs were maintained for the full period and to enable it to declare a dividend of R2million during December.
16. Although this may be the first instance detected by the PA and the only instance (albeit over a period) by the applicant, does not mean that a deterrent penalty is not appropriate or justified. The type of contravention is not easy to establish and, in this case, may not have

been established had the Board of the applicant not appreciate the risk to the company and to the directors and instructed the company to inform the PA, which it did to its credit.

17. As to recklessness: the PA, at some level, expressed the view that the applicant acted intentionally. The applicant submitted to the PA that it did not know that it acted unlawfully. The applicant knew that it had to retain a MCR level, it knew that that it did not have board approval to sweep, it knew that it had to keep records, it knew that it was not permitted to support the holding company financially, and it had to know that an interest-free loan assists. This smacks of dolus eventualis.

18. The reaction of the Board when it was told part of the story shows that those responsible were reckless. Unsurprisingly, the CFO resigned and did not give her version. The PA was provided with the lawyerly version.

19. The last real issue under this heading is the size of the penalty with reference to the size of the applicant. This aspect was considered in detail by the PA and it is not alleged that the PA erred when it determined the penalty with reference to the profit of the company. The directors were able during the sweeping operation to declare a dividend of R2 million to the holding company. Against that must be considered the interest saved by the controlling company – the "gift" to it from the applicant. The penalty was appropriate – even on the low side.

THE DIRECTIVE

20. That leaves for consideration the direction, in terms of section 143 of the FSRA, not to pay dividends for a period of 12 calendar months. The applicant baldly submitted that the mandatory consultation process that had to be followed under the section was not followed. That is factually incorrect. Viva was informed of the prospect and its only response was that it requested the PA to reconsider and to allow it to pay dividends if payment would be appropriate.

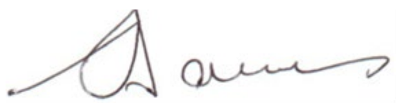
21. The applicant further submitted that the reason that “the PA deems this directive necessary to ensure that the insurance business of Viva is prudently managed” is meaningless and fanciful. Oner would have thought that once Viva declared a dividend at a stage when it ought not to have done so on statements that did not reflect the true position but only a temporary one and on a misrepresentation to the PA the reason is not meaningless or fanciful.

22. The final submission is that the the PA decided on this action “seemingly without discussion or motivation” – once again a submission without substance. The committee knew of the option, it was recommended to it, there was no opposition to the recommendation, and it decided to follow the recommendation.

ORDER

23. The application is dismissed.

Signed on behalf of the Tribunal on 13 October 2021.



LTC Harms (deputy chair)