

SOUTH AFRICA / JUDGMENT

**Amalgamated Real Estate Principals Group
CC t/a Charter Property Sales v The Home
Trader (Eastern Cape) (Pty) Ltd t/a East Cape
Property Guide (16/CR/Feb07) [2013] ZACT
14; [2013] 1 CPLR 282 (CT) (8 March 2013)
[2013] ZACT 14**

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Andreas Wessels

CASE / FILE NUMBER

16/CR/Feb07

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THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:16/CR/Feb07

(007302 and 015776)

In the matter between:

Amalgamated Real Estate Principals

Group CC t/a Charter Property SalesApplicant

And

The Home Trader (Eastern Cape) (Pty) Ltd

t/a East Cape Property GuideRespondent

Panel : Norman Manoim (Presiding Member) Yasmin Carrim (Tribunal Member) Andreas
Wessels (Tribunal Member)

Heard on : 12 November 2012

Order issued on : 12 November 2012

Reasons

issued on : 08 March 2013

Reasons for Decision

Introduction

On 12 November 2012 the Competition Tribunal (“Tribunal”) heard an application to condone the late filing of an amendment to a referral application, brought by the Applicant in terms of section 51 of the Competition Act of 19981 (“the main matter”). The respondent opposed the application to condone the late filing of the amendment application and in turn applied for the main matter to be dismissed. The application for condonation was dismissed and the application for dismissal of the main matter was granted (CT case number: 16/CR/Feb07) on 12 November 2012. The reasons for our decision follow.

The Applicant in the main matter and in this matter is Amalgamated Real Estate Principals Property Group CC t/a Charter Property Sales (“Charter”), a business in the estate agency market. The sole member of the business is Mr Eldrich Page.

The Respondent is Home Trader (Eastern Cape) Ltd t/a East Cape Property Guide (“East Cape Guide”), a property publication for the region of the Eastern Cape.

Although the respondent is an applicant and the applicant a respondent in the dismissal application of the main matter for ease of reference Charter will be referred to as the applicant and East Cape Guide as the respondent.

Background

The referral

The basis of the Applicant’s section 51 referral (also referred to as the main matter) appears to be that the Respondent utilised a “non-reference policy” in terms of which estate agents cannot make references to the commission which they charge in the adverts they place in the Respondent’s publication.² The Applicant argued that for an estate agent to succeed it was essential for it to advertise in the East Cape Guide. The Respondent’s

requirement that Charter may not advertise the commission it intended to charge on the basis of the non-reference policy was

argued as being anticompetitive, because it effectively denied him access to the Property Guide,”³ alternatively that access was allowed, albeit, on a conditional basis.⁴

The referral itself has a complicated history. During January 2006, Charter had lodged a complaint with the Competition Commission

(“Commission”). The essence of the complaint was that the East Cape Guide would not permit Charter (and other estate

agents) permission to advertise the commission they would charge to clients.⁵ Charter wanted to place an advertisement in the East Cape Guide to the effect that it would only charge 3% commission as opposed to the customary 7.5% commission that may be charged by estate agents. While the Commission was still in the process of investigating the complaint, Charter lodged an

application for interim relief against the Respondent and Star Property Guide.⁶This application was heard on 19 January 2007 and on that day the parties arrived at an agreement in terms of which the East Cape Guide agreed to accept Charter's adverts on condition these complied with the ASA rules.⁷ Examples of the type of adverts that were acceptable to the Respondent(s) were attached to the settlement agreement.

Subsequently and during January 2007, the Commission non-referred Charter's complaint.⁸

Charter then referred the complaint to the Tribunal in terms of section 51 of the Act.⁹

However, Charter's referral was difficult to comprehend and lacked essential factual averments which would support a theory of competitive harm. Our earlier summary in paragraphs 5 and 6 have been inferred from the oral arguments made by Mr Page in the hearing of this matter.

At that time, the Respondent opposed the referral, raised an exception and also sought a dismissal of the referral on the basis that the Tribunal lacked jurisdiction to hear the matter because the complaint now put forward by Charter had not been referred to the Commission beforehand.¹⁰ In any event, Charter had already been granted relief (as a result of the interim relief application)¹¹ and had been afforded an opportunity to place an advertisement in the East Cape Guide which he had failed to take up.¹² Instead, he now insisted on placing an advertisement which in the opinion of the Respondent was in contravention of the ASA rules.¹³ This was a regulatory issue and not a competition law concern.¹⁴

Charter did not amend its papers in response to the exception. Following a pre-hearing, the Tribunal issued directions on 06 August 2008, directing Charter to file an application for amendment of its complaint referral by 05 September 2008. Charter failed to do so. The Respondent filed a dismissal application on 15 October

2008. On 06 February 2009 after hearing the dismissal application, the Tribunal did not grant the Respondent's application but granted a costs order against Charter and barred the Applicant from taking any further steps until such costs were paid. These costs were eventually paid by Charter in April 2010.¹⁵

Charter was not represented by attorneys in any of these applications. Mr Page, the sole member of Charter, represented the entity. In an attempt to assist this unrepresented applicant, the Tribunal, gratuitously referred Mr Page to a number of attorneys and

organisations from which he could obtain legal assistance.¹⁶ Unfortunately, in spite of these efforts, he was unsuccessful in securing such assistance.

The amendment application which was supposed to have been brought in 2008 was eventually only filed by Charter on 07 August 2012, almost four years later.

This was met by a letter from the Respondent objecting to the application due to the long delays. The Respondent refused to file an answer because it considered the matter to be closed, alternatively already decided by the Tribunal due to the *res judicata* principle in law.¹⁷

On 03 October 2012, the Tribunal sent a letter to the parties, stating that the application was extremely late and an application to condone the late filing thereof would first have to be heard. In response, the Respondent revived its dismissal application and opposed the condonation application.

Dismissal application

The Respondent sought a dismissal of the main matter on the basis that relief had already been granted to Charter as a result of the settlement agreement in the interim relief application.¹⁸ However, Charter had not made use of the relief granted by the Tribunal.¹⁹ Furthermore, the subject of referral by Charter was not a competition issue (for which it had already obtained relief) but a regulatory issue.²⁰ The Applicant's advertisements could not be published because such advertisements contained harsh allegations about other estate agents and contravened the ASA's code of conduct.²¹ That is why the settlement agreement contained the proviso that the Respondent would only accept Charter's adverts if they complied with the ASA rules.

In any event, the Applicants' pleadings were defective and incapable of response, given that there was no cause of action

established and that many attachments were either incomplete or to be added.²²

Furthermore, the Respondent argued, the Tribunal has provided the Applicant with ample opportunities to amend the original complaint referral. The Tribunal has also recommended that the Applicant seek pro bono legal assistance, however, this route proved to be futile for the Applicant because from the correspondence it seems that the Applicant would not heed the advice given by the various pro bono attorneys assigned to the case.

Finally, the Respondent argued that the amendment application filed in August 2012 itself was defective and still did not disclose a proper cause of action. The Respondent had been required to defend itself, at great cost, against Charter's persistence in pursuing this matter, in which the latter had already been granted relief. The Respondent had been prejudiced and would be further prejudiced if the matter was allowed to carry on in this vein.²³ Accordingly it asked for a dismissal of the complaint referral in the alternative a dismissal of the condonation application.

Hearing

At the hearing of the matter, the Chairperson sought clarity from Mr Page as to whether or not he understood the application for the dismissal of the main matter and granted him an opportunity to respond to it.²⁴ From his submissions it was clear that Mr Page understood that the Respondent had applied for a dismissal of the main matter (section 51 referral).²⁵ When asked to summarise his complaint against the Respondent, Mr Page submitted as follows –

The Respondent's refusal to permit him to place an advertisement in which he justified or explained the reasons for his lower commission of 3%, was anticompetitive because it was "essential for an agent to advertise in the East Cape Guide";

Clients, prospective buyers and sellers, were sceptical about low commissions and he would therefore have to provide an explanation for that in his advert;

The East Cape Guide was owned by estate agents and this was unlawful and anticompetitive.²⁶

When asked why he had not taken the opportunity afforded to him from the settlement reached at the interim relief application hearing, Mr Page provided some garbled explanation.²⁷ It appears though that in his mind and despite his consent to the advertisement that had been attached to the settlement agreement at that time, this type of advertisement was not "really" the advertisement that he wanted to place in the East Cape Guide. However, he accepted that he ought to have read that agreement more closely before signing it.²⁸ This was the first occasion when this argument was raised by Mr Page.

Further probing of the issues by the panel revealed the following. Charter followed a different business model to other estate agents in the industry. Mr Page explained that unlike certain other estate agents he only charged a commission of 3%. He did not market properties for sale in the East Cape Guide but instead marketed them through word of mouth, the internet and through newsletters distributed at schools.²⁹ Because of this different model, sellers were sceptical of his ability to market their properties and he was unsuccessful in procuring the right mix of stock (relating to properties for sale).³⁰ In his view, if he simply advertised his low commission rate in the East Cape Guide without explaining the reasons for it, prospective

clients would remain sceptical about the low commission. This is why he was insistent on inserting an explanation in his advertisement

which had been rejected by the East Cape Guide.

During this exchange, it also emerged that Charter was no longer in operation and Mr Page himself had now moved to Kuils River in the Western Cape.³¹

The Respondent argued that this complaint was a new one and directed against the entire industry rather than only the Respondent.³² Charter had already been given relief by the Tribunal. To date Mr Page had not approached them to place an advertisement in accordance with the settlement agreement namely an advertisement that was in compliance with the rules of the ASA.³³ If Mr Page had a complaint about the ASA rules he should lodge his grievance in that forum and not at the Tribunal. Nevertheless, and despite the fact that Charter was no longer in business, the Respondent was still willing to accept an advertisement along the lines of that in the settlement agreement and gave such undertaking to the Tribunal.³⁴

Assessment

Charter has already been afforded an opportunity to test its unique business model by being allowed to place advertisements in the East Cape Guide stating the level of his commission. It was granted this relief in the interim relief application. To date Mr Page has not taken that opportunity and therefore is not in a position to assess whether his advertising would or would not benefit his business model or the level of scepticism of prospective clients. Given that Charter still has the opportunity to approach the Respondent with an advertisement that is compliant with the ASA rules, nothing can be gained by allowing him to persist with abadly articulated complaint and for which the relief sought was clearly not competent for the Tribunal to grant. For example, in the course of the hearing, Mr Page alleged that ownership by estate agents of the publication was unlawful and that we should order a divestiture.³⁵ Apart from the fact that such ownership was not per se unlawful under the Competition Act, Mr Page could not identify who these agents were. No names were put forward and nor were these entities joined as parties.

In any event, by Mr Page's own admission, and notwithstanding the low commission, the concern from prospective clients was not that he did not advertise his own services as an agent in the East Cape Guide but that he did not market their properties in that publication, which he did not do pursuant to a different business model which he had adopted.

We are of the view, that nothing can be gained for the Applicant by permitting it with yet another opportunity to amend his papers,

which it in any event has been unable to do in the last 4 years, in circumstances such as these where

- 1) Charter has already been given the relief it has sought, namely to advertise the level of commission charged by Charter in the East Cape Guide;
- 2) a complaint that is more a regulatory issue than a competition issue, supported by the fact that despite the length of time and the indulgences extended to it by this Tribunal, Charter is still unable to articulate a theory of harm under competition law;
- 3) Charter is no longer in business in the Eastern Cape; and
- 4) the relief of divestiture sought against unknown persons which is not within the Tribunal's competence.

Moreover, in our view permitting an unrepresented Applicant - whose case is not properly articulated and who by his own admission seems to have a gripe with the industry (not merely with the Respondent) and then by his own actions fails to take the opportunities offered to him - would not be in the public interest. Both parties in a case such as this stand to be prejudiced by the continued time, effort and money spent in proceeding with this matter at the Tribunal. Fairness to both parties requires us to dismiss the main matter (16/CR/Feb07) referred in terms of section 51 of the Act and consequently to dismiss the application to condone a late filing of the amendment to that application.

CONCLUSION

Having regard to the facts above, the Tribunal accordingly makes the following order:

In the application for condonation:

The application is dismissed.

The Applicant is to pay the costs of the Respondent, including the costs of one counsel.

In the main application, namely the complaint referral (CT case number: 16/CR/Feb07):

There is no order as to costs.

08 March 2013

YASMIN CARRIM DATE

Norman Manoim and Andreas Wessels concurring

Tribunal Researcher: Nicola Ilgner

For the Applicant: EL Page

For the Respondent: Greta Engelbrecht instructed by Strauss Scher

1Act No. 89 of 1998, as amended.

2See page 3 of the transcript.

3See page 2 of the transcript.

4See page 4 of the transcript.

5The complaint had been extended to the Star Property Guide by the Complainant.

6See CT case number: 44/CR/May07.

7Advertising Standards Authority.

8See Commission Notice of Non-referral dated 22 January 2007.

919 February 2007.

10See page 2 of the Respondent's Founding Affidavit, dated 15 October 2008 and page 3 of the Respondent's Answering

Affidavit, dated 25 October 2012.

11See paragraph 6 above.

12See pages 7 and 11 of the transcript.

13See page 24 of the transcript.

14See pages 12 and 13 of the transcript.

15See page 7 of the Respondent's Answering Affidavit, dated 25 October 2012.

16Tribunal letter to Mr Page, dated 01 August 2011.

17See KPMG's letter to Charter, dated 28 August 2012.

18See page 26 of the transcript and page 16 of the Respondent's Answering Affidavit, dated 25 October 2012.

19See pages 21 and 29 of the transcript.

20See page 24 of the transcript.

21See page 24 of the transcript.

22See KPMG's letter to Charter, dated 20 May 2011.

23See page 15 of the Respondent's Answering Affidavit, dated 25 October 2012.

24See page 1 of the transcript.

25See pages 2 – 4 of the transcript.

26Our summary of Mr Page's arguments.

27See pages 29 and 30 of the transcript.

28See page 29 of the transcript.

29It seems that he raised some advertising revenue through these newsletters.

30See page 36 of the transcript.

31See page 32 of the transcript.

32See page 19 of the transcript.

33See page 21 of the transcript.

34See page 26 of the transcript.

35See page 16 of the transcript.

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