

SOUTH AFRICA / JUDGMENT

Autobi (Pty) Ltd v Transunion Auto Information Solutions (Pty) Ltd (59/CR/May12) [2013] ZACT 7 (11 February 2013)

[2013] ZACT 7

COURT

Competition Tribunal

BEFORE

Lawrence Reyburn, Medi Mokuena, Takalani Madima

CASE / FILE NUMBER

59/CR/May12

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IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD AT PRETORIA)

Case No: 59/CR/May12

In the matter between:

AUTOBID (PTY) LTDApplicant

And

TRANSUNION AUTO INFORMATION SOLUTIONS (PTY) LTDRespondent

Panel : Lawrence Reyburn (Presiding Member),

Medi Mokuena (Tribunal Member) and

Takalani Madima (Tribunal Member)

Heard on : 01 November 2012

Order issued on : 05 November 2012

Reasons

issued on : 11 February 2013

DECISION AND ORDER

Introduction

An order in this matter was issued by the Competition Tribunal (“the Tribunal”) on 05 November 2012. For convenience the order is repeated at the end of this decision.

This is an application by Autobid (Proprietary) Limited (“Autobid”) for condonation of the late filing of a complaint referral under Section 51(1) of the Competition Act, 1989, as amended (“the Act”) in which it is alleged that the respondent, Transunion Auto Information Solutions (Pty) Ltd (“Transunion”) has contravened sections 8(a),(b),(c) and (d) and section 9 of the Act by engaging in conduct which amounts to abuse of dominance and illegal price discrimination.

Background

Transunion has for many decades compiled data on the identity of the types of motor vehicles sold on the South African market. Every model and every variant of every manufacturer’s vehicle is identified in this system by its own eight-digit code number. This code system will for convenience be referred to below as “the identity code system.” Apparently the identity code system, in conjunction with information on the year of manufacture of the vehicle, is accepted throughout the motor trade as the relevant means of identifying a type of motor vehicle.

Transunion also keeps records of the prices at which used motor vehicles are sold in South Africa and has built up a database in which all sales of used motor vehicles about which Transunion has information are recorded. These data are made available for payment to dealers in used vehicles as a guide for negotiations when next a vehicle of the relevant type is presented for sale. These data are linked in Transunion’s records to the identity code system so that the resulting database provides a comprehensive and easily accessible guide to the value of all used vehicles traded in South Africa. This combined compilation of data will be referred to below as “the value code system.”

Transunion provides its data to the trade in the form of periodically published booklets of prices which are sent to dealers, and also electronically in various formats. Transunion is based in Gauteng.

Autobid is a motor dealer based in Kwa-Zulu Natal which has historically been a customer of Transunion for access to the value code system. In more recent times it has engaged in the provision to some of its motor dealer customers of data it has compiled on the values of used motor vehicles. It provides this data service electronically. Apparently the recipients can link this data with information they receive from Transunion as subscribers to its data service, and they then have a comparative basis on which to decide on the pricing of any particular vehicle. A transaction between the seller and a buyer for the vehicle can then take place quickly and efficiently.

The summary set out above is in simple and sketchy terms. Behind it is an edifice of information technology, intellectual property and contractual rights of some complexity.

Disagreements which had been simmering between Autobid and Transunion for some time came to the boil in 2011 when Transunion sought to increase by a considerable margin its charges to Autobid for the provision of Transunion's data service concerning its value code system and to impose what Autobid regarded as harsh and unacceptable conditions for the continuation of this service. Autobid declined this proposal and on 12 April 2011 Transunion terminated its provision to Autobid of its data service. Autobid proceeded to lodge a complaint of contravention of various provisions of the Act with the Competition Commission ("the Commission") under section 49B(2) of the Act. The complaint was filed on 14 April 2011 under case no. 2011Apr5733.

On the same day Autobid filed an application for urgent interim relief at the Tribunal under section 49C of the Act, requesting an order from the Tribunal requiring Transunion to provide access by Autobid to Transunion's data services embodying the value code system pending the outcome of the complaint. The case number for this application was 32/IR/Apr11.

Autobid's legal representative responsible for lodging the complaint and the application for interim relief was attorney George Michaelides, of Gauteng, who practised under the style of Michaelides Attorneys and Conveyancers. The complaint was considered by the Commission and on 19 September 2011 the Commission issued a notice of non-referral of the complaint. In its accompanying letter to Autobid the Commission stated that it considered that Transunion's value code system was not an essential facility for Autobid's business operations, and refuted other assertions by Autobid concerning the legality of the conduct of Transunion complained of by Autobid.

Autobid's interim relief application had been opposed by Transunion and an answering affidavit was filed by Transunion. The time period for the filing of a replying affidavit expired without such a replying affidavit having been filed. Following the issuance of the Commission's notice of non-referral, Autobid had an opportunity to file a self-referred complaint with the Tribunal in terms of section 51 of the Act. Under rule 14(1)(b) of the Tribunal's rules this complaint was to have been filed within 20 business days following the date of the Commission's notice of non-referral, i.e. by 17 October 2011.

In fact Autobid's self-referred complaint was filed only on 25 May 2012, namely more than seven months following the due date of 17 October 2011. Condonation is now sought by Autobid for this late filing under the condonation provisions of rule 54(1) of the Tribunal's rules, which states that:

"A party to any matter may apply to the Tribunal to condone late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in Form CT6."

Autobid has filed an affidavit by one of its directors, Ms Leanne Gillian Martin, supporting both the condonation application under rule 54(1) and the self-referred complaint under section 51(1). Before dealing with the condonation application and the justification for it raised by Autobid it is necessary to outline some other relevant events.

High court litigation

After Autobid had filed its complaint with the Commission under section 49B(2) and its interim relief application on 14 April 2011, Transunion, considering that Autobid was illegally continuing to use data from Transunion's value code system in Autobid's data service to its customers, filed an application with the Durban division of the High Court of Kwa-Zulu Natal seeking an interdict restraining Autobid from such use. The basis of the complaint was an allegation that Autobid was infringing Transunion's copyright in the identity code and the value code systems. This High court application was filed on 9 June 2011 under case no. 6494/2011. It was opposed by Autobid and answering and replying affidavits were filed.

After hearings had taken place on 13 September 2011 and 24 October 2011 the presiding judge, Mr Acting Justice Kissoon Singh, prepared a decision but before it could be handed down he received a communication from the parties regarding new evidence, which led to an application for the admission of this new evidence. The application to admit the new evidence was heard on 30 January 2012 and was granted. Supplementary documents containing this evidence were then filed. The parties to the matter agreed that no final hearing was necessary in the light of the further evidence and the judge proceeded to write and hand down his decision. It is dated 14 March 2012. A copy of the decision was handed in at the Tribunal's hearing on 01 November 2012.

In that decision the High Court ruled that copyright subsisted in the identity code and value code systems and that this copyright was owned by Transunion. Autobid was found to have infringed the copyright and was interdicted from reproducing those codes, as incorporated in various Transunion publications, unless licensed by Transunion to do so. The order expressly provides that a licence might arise from a ruling or directive which might be issued by the Tribunal, or could arise otherwise.

It is clear from the decision that the reservation regarding a ruling or directive of the Tribunal was inserted by the judge as a precaution in view of the provisions of section 65(2) of the Act, which reads:

"If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider the issue on its merits, and –

If the issue raised in one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that –

the issue has not been raised in a frivolous or vexatious manner; and

the resolution of that issue is required to determine the final outcome of the action."

The judge was aware of the filing by Autobid of its complaint with the Commission under section 49B(2) of the Act and of the existence of the interim relief application by Autobid made under section 49(C). In his decision he states that, before he became aware of the additional evidence

referred to above, he had prepared his decision on the basis that he would refrain from granting interdictory relief to Transunion and would refer to the Tribunal the question of possible contravention by Transunion of the Act by way of the prohibited practices alleged by Autobid. This would have been his response to noting that the complaint was pending before the Commission and that the interim relief application was being pursued by Autobid.

However, what the judge learned from the additional evidence was that attorney Michaelides had absconded from his practice and

disappeared, that Michaelides had withheld from Autobid and its counsel the fact that the Commission had issued a notice of non-referral in respect of Autobid's complaint to it, that no self-referred complaint by Autobid had been lodged with the Tribunal following the issuance of the Commission's notice of non-referral, and that Michaelides had lied to his client's

counsel during the course of the court proceedings by saying that a replying affidavit by Autobid was on the point of being filed in the interim relief application brought by Autobid. In fact no such affidavit had been prepared and it seems that Michaelides had not even told his client that there was a need to prepare and file this affidavit.

In view of the emergence of these facts in the additional evidence the judge found, relying on the decision in the case of *Platinum Holdings (Pty) Ltd and others v Victoria and Alfred Waterfront (Pty) Ltd*, SCA case no. 428/2003 (judgment dated 28 May 2004), that Autobid was conducting a hopeless case in its defence of the High Court proceedings as it no longer had a complaint pending against Transunion before the Commission, and was consequently acting frivolously in those proceedings. The requirements of section

65(2)(b)(i) were therefore not met and the court considered it was at liberty to grant Transunion the interdictory relief it had sought without referring Autobid's allegations of restrictive practices to the Tribunal.

The reservation regarding a licence obtained by a ruling of the Tribunal as expressed in the order made by the judge is therefore of a precautionary nature since the possibility of the late filing of a self-referred complaint and condonation of its lateness by the Tribunal was in existence at the time of his decision and is referred to in it.

Factors relevant to condonation

Autobid's tribulations in having its complaint aired in the Tribunal did not end with the omissions and deceptions of its absconded attorney. From Ms Martin's affidavit of 23 May 2012, filed in support both of the condonation application and of the self-referred complaint, it emerges that after the fact of attorney Michaelides' disappearance came to light in the last weekend of October 2011, Autobid in the ensuing week appointed a fresh legal representative in the form of John Isabelle Attorneys. It was only when attorney Isabelle began to delve into the matter that various deceptions and suppressions of information by Michaelides emerged and their implications were unravelled. Ms Martin states that Autobid was unaware that the Commission had decided not to refer Autobid's complaint to the Tribunal, and was unaware that a replying affidavit in the interim

application had been needed. Autobid had relied on Michaelides to keep track of the proceedings and notify it of requirements as they arose, so that Autobid had been heavily reliant on Michaelides' diligence and honesty. As it turned out, it was attorney Isabelle who first informed Autobid, on or about 3 November 2011, of the Commission's non-referral decision of 19

September 2011.

A consultation was held on 11 November 2011 by one of Autobid's directors, Mr Peter Azzie, and Mr Isabelle with a senior advocate to take advice on the steps needed to prepare and lodge Autobid's self-referred complaint to the Tribunal. Autobid was advised at this consultation that it should expand upon the documents which had been sent to the Commission with the originally lodged complaint, and should further supplement the expanded documents with a report by an economist having specialist knowledge of the motor trade. Steps were promptly taken to put this advice into effect.

Witnesses were approached for further evidence and Mr Tony Twine, a consultant economist with extensive experience of the motor industry, practising in the firm Econometrix, was briefed during November 2011 on the report that was required from him. He was only able to provide a complete draft of his report in the week ending 8 February

2012. The draft was sent to Autobid for its comments. Mr Twine was informed that the draft was in order except for some very minor matters and he was asked to finalise and sign it. Before he could do so he died. His death occurred on 12 March 2012.

Autobid took further advice from an advocate with extensive competition law experience and as a result obtained a report from another economist, and this, together with an unsigned copy of Mr Twine's report, has been attached to the self-referred complaint lodged with the Tribunal. Ms Martin's affidavit contains a detailed account of steps taken by Autobid to protect its interests and those of its customers and to advance its complaints regarding Transunion's alleged contraventions of the Act in the period following Michaelides' disappearance, which occurred after the initial hearings in the High Court litigation.

The action taken by Autobid included consultations with various lawyers, communications with Transunion's attorneys, and implementation of the legal advice received by Autobid to bolster its complaint with customers' reports and an expert economics report. It is clear that the year-end holiday period intervened, when legal advisers are generally away from their offices.

Has 'good cause' been shown?

The Tribunal, in dealing with condonation applications, is required by section 58(1)(c) of the Act to determine whether the applicant has shown 'good cause' for the condonation. This means that the circumstances of each case are considered individually and that there is no universal formula or closed list of factors to apply. In assessing the merits of a case the Tribunal may be guided by the principles which prevail in the High Court regarding condonation for non-compliance with time limits and rules of court. 1

In *United Plant Hire (Pty) Ltd v Hills and others*, 1976(1) SA 717(A) at p 720 it was stressed that a court in dealing with a condonation application should be fair to both sides. Relevant considerations might be the degree of non-compliance with the rules for which condonation was sought, the explanation given for non-compliance, the prospects of success of the applicant in the contemplated litigation, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of delay in the administration of justice. This list of factors was said to be non-exhaustive.`

Condonation would be pointless if there were no prospect at all of success in the contemplated litigation, but the Tribunal took the view in the *Makhathini* case (cited above) that this was an issue which it should not attempt to assess in circumstances where there has not been a hearing on the merits of the matter in respect of which condonation is sought. Accordingly, we express no opinion on Autobid's chances of success in its self-referred complaint apart from expressing our view that it cannot be said that the complaint has no prospect whatsoever of success. It is conceivable – and it need be stated no higher -- that a full ventilation of the

merits of the matter in a hearing before the Tribunal will reveal that the view taken of Autobid's case by the Commission in its letter of 19 September 2011 setting out its reasons for the non-referral decision was incorrect. That question will be

considered in the hearing to follow.

If the unusual circumstances related in Ms Martin's affidavit are taken into account, essentially the double blow of the defection and deceptions of attorney Michaelides and the death of Mr Twine, it seems to us that Autobid was the victim of considerable misfortune which was not of its making. Transunion's counsel, Mr Wilson, was quick to refer us to cases in which it was held that bad luck on its own is not a basis for condonation, and that condonation should be withheld if the applicant, on becoming aware of the relevant lapse, has failed to act in good faith, diligently and promptly, in remedying the failings which have led to non-compliance with a time limit or other formal requirement.

Where an attorney has failed in his duty and the result has been the non-compliance in question, the attorney's client is expected to act promptly, vigorously, and effectively in righting the wrong done by the attorney. Not everything can be blamed on the defaulting attorney. This is clear from the cases cited by Mr Wilson, exemplified by *Saloojee NNO v Minister of Community Development*, 1965(2) SA 135 (A), *Blumenthal v Thompson NO*, [1993] ZASCA 190; 1994 (2) SA 118 (A), and the Tribunal's own findings in *Independent Estate Agents Committee v KwaZulu-Natal Property Services Ltd* (case no 25/CR/Apr02).

We accept all these precepts but consider that on the papers before us there is nothing to controvert Ms Martin's assertions that once she became aware of Michaelides' disappearance Autobid acted speedily and effectively in getting the self-referred

complaint properly drafted and supported by useful guidance to the Tribunal from an economist with specialist knowledge of the motor trade, utilising the services of lawyers familiar with the competition law system. Ms Martin and Mr Azzie are clearly not

experienced in competition law and Ms Martin, who has been responsible within Autobid for advancing the complaint, had to be

guided by specialists in determining what was required of Autobid and ensuring that the complaint was comprehensively documented.

Several consultations with lawyers took place, all of which appear to have contributed usefully to her goal.

Although the delay of upwards of seven months in the filing of a document will in most circumstances represent an exceptionally lengthy period, we are satisfied that because of the specialised and complex nature of the complaint and its supporting documents, and the inevitable difficulties of a lay client in obtaining expert advice on the important step for it to take in the competition arena which the filing of the complaint represents, it would be unfair to Autobid to withhold condonation because of this delay.

We consider that no prejudice has been suffered by Transunion by the delay. Transunion has enjoyed the benefit of the interdict granted by the High Court so that its commercial activities are undisturbed and for the present Autobid has been excluded from using data subject to its copyright. This exclusion could conceivably be terminated if the complaint is heard and decided in Autobid's favour, but the delay in the lodging of the complaint has if anything operated to favour, not disfavour, Transunion in this respect.

There is no unfairness to Transunion in granting the condonation sought by Autobid.

On the basis of this reasoning we accordingly find that good cause as required for the condonation has been shown by Autobid.

There was initially a possibility that the Tribunal would be called upon to deal with a striking-out application which Transunion

contemplated bringing, relating to certain passages in Ms Martin's affidavit, but at the hearing we were informed that this was not being pursued.

The order we have made establishes a notional date from which, if Transunion chooses to supplement the answer to Autobid's

complaint which it has already placed on record, the period prescribed by the Tribunal's rule 16(2) for the filing of the

answer will be deemed to commence. The existing answer is contained in Mr Michael von Hoene's answering affidavit of 25 June 2012, and is already extensive, but the order allows Transunion as a matter of procedural fairness an opportunity to add further answering material if it wishes to do so.

The Tribunal's order as issued on 05 November 2012 is as follows:

The late filing on 25 May 2012 by Autobid (Pty) Ltd of its complaint against Transunion Auto Information Solutions (Pty) in terms of Section 51(1) of the Competition Act, 1998, is condoned.

For the purposes of establishing filing dates and the taking of other action pursuant to that complaint referral, the date of filing of the complaint referral with the Tribunal will be deemed to be the date of this order.

An order as to costs in the condonation application is reserved pending the outcome of the complaint referral.

____ 11 February 2013

Lawrence Reyburn Date

Medi Mokuena and Takalani Madima concurring.

Tribunal Researcher : Ipeleng Selaledi

For Autobid : Adv. A. Annandale SC instructed by John Isabelle

Attorneys

For Transunion : Adv. J. Wilson instructed by Bowman Gilfillan

¹See M. Makhathini and others v GlaxoSmithKline SA (Pty) Ltd and another, 34/CR/Apr04, at pars 16 et seq, and cases cited in that decision.

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