

SOUTH AFRICA / JUDGMENT

Grant v Schoemansville Oewer Klub (IR202DEC15) [2016] ZACT 51; [2017] 1 CPLR 190 (CT) (11 July 2016) [2016] ZACT 51

COURT
Competition Tribunal

BEFORE
Y Carrim, A Ndoni, M Mazwai

CASE / FILE NUMBER
IR202Dec15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: IR202Dec15

In the matter between:

JG GRANT

Applicant

And

SCHOEMANSVILLE OEWER KLUB

Respondent

Panel

: Yasmin Carrim (Presiding Member)

Andiswa Ndoni (Tribunal Member)

Mondo Mazwai (Tribunal Member)

Heard on : 08 June 2016

Order issued on : 11 July 2016

Reasons

issued on : 11 July 2016

Decision and order

Introduction

[1] On 15 December 2015, an interim relief application was filed by Mr Jeremy Gordon Grant ("the applicant") with the Competition Tribunal of South Africa ("the Tribunal") against the respondent, the Schoemansville Dewer Klub ("the club").

[2] The applicant owns and operates a charter boat for hire on the Hartbeespoort Dam ("the Dam"), with a capacity of 14

passengers. The club consists of approximately 375 members who either own property at the Dam, or are tenants of a property at the Dam. The applicant is also a member of the club. He operates his business at the permission of the club, at a monthly fee, on the south-eastern bank of the Dam.

[3] On 11 November 2015, the applicant lodged a complaint with the Competition Commission ("the Commission"). In the complaint, the applicant alleged that Mr Jack Seale ("Mr Seale"), allegedly the owner of a commercial boat hiring business in competition with the applicant and other boat operators, was engaging in exclusionary conduct by using his unfounded claim to

rights in respect of the Oewer area of the Dam, as a ploy to eliminate competitors in the boat hiring business on the Dam. The

applicant alleged that Mr Seale was putting undue pressure on the Oewer Klub, through the threat of litigation, and that the club had, as a consequence, cancelled the agreements with the applicant and other boat operators.

[4] The applicant seeks an interdict preventing the club from terminating the oral agreement in terms of which he was allowed to operate his business, thereby restoring the status ante quo to use the south-eastern bank of the Dam and the facilities of the club for his customers.

Factual

Background

[5] It appears that at an Annual General Meeting ("AGM") held by members of the club, along with Mr Seale who, as mentioned, owns a portion of land at the Dam and also operates a boat hiring business in competition with other boat charter businesses, a resolution was adopted in terms of which the club members voted against permitting the applicant and others from operating a boat hiring/cruise business on the dam. At this meeting it was decided that the oral agreement entered into between the applicant and the club in September 2014 be terminated.

- [6] In terms of the oral agreement the applicant was permitted to dock his boat on the south-eastern bank of the Dam. His customers were permitted to access the bank by the payment of a gate fee of R20 to the club. If the customers wished to stay longer at the club and utilise the club's facilities they could do so on a further payment of R50.
- [7] The applicant together with another cruise company Harties Online were notified that subsequent to the decision of the AGM they were no longer permitted to operate a boat hiring/cruise business on the south-eastern bank of the dam. Another operator, Toro Ya Me, was however permitted to continue using the premises of the club. This, as we later discuss, became a subsequent basis for a change in the applicant's case.
- [8] It appears from the papers filed by the applicant that although the application is against the club, the person behind the termination of the oral agreement is Mr Seale, who owns a portion of land at the Dam and also runs a boat hiring business as well as an animal and snake park. Mr Seale seems to be a much larger business than the applicant. Mr Seale apparently addressed a letter to the club submitting that as per the instruction of the Department of Water and Sanitation, commercial boat hiring services (i.e. like that of the applicant), was no longer permitted at the foreshore of the Dam. The applicant submits that Mr Seale is under the impression that through his ownership of Ontspan and the Transvaal Yacht Club, he also has a right to dictate what takes place on the piece of land where the applicant operates its business.
- [9] It is not necessary, for purposes of this application, for us to explore in depth the basis of the dispute between Mr Seale and the applicant. Suffice to say that it appears that Mr Seale's claims are based on the fact that when the land around the Dam was acquired from the Schoeman family by the government of the Union of South Africa, in or about 1925, paragraph 4 of a resolution by the Cabinet of the Union of South Africa recorded in a minute, dated 11 September 1925 and published in the government gazette on 30 July 1926, made provision for owners of certain portions of land around the Dam to be utilised for commercial boat hire operations. In Mr Seale's view only he, by virtue of his acquisition and ownership of the relevant portion of the land around the Dam, enjoys the right to launch such boats. The applicant disagrees and has obtained legal advice in support of his contention.
- [10] The applicant submits that Mr Seale's actions are aimed at eliminating any form of competition against his boat hiring business

in the area. It seems the applicant is not the only one who has suffered loss of income as a result of the letter from Mr Seale, two other operators have also had to cease operations.

The Hearing

- [11] Prior to the hearing the Tribunal made various unsuccessful attempts (via emails and telephonically) to obtain an answering affidavit from the respondent so that the matter could be dealt with as expeditiously as possible, without success. The Tribunal therefore decided to issue a summons [1] in preparation for the matter to be heard. The notice of set down was served on the respondent via the sheriff to inform him that the matter would be heard on 08 June 2016.
- [12] At the hearing the Tribunal had to consider the preliminary issue of whether to permit the club a further opportunity to file answering papers. The club was represented by Mr Graeme Anthony Peplar ("Mr Peplar") who accepted that while the club had not filed an answer to the application they were willing to make

submissions

to the Tribunal on the merits of the application. The Tribunal decided that it was in the interest of justice that the matter proceeded given that this was an application for interim relief pending an investigation by the Commission and was of some urgency to the applicant.[2]

- [13] In his submission, the applicant informed us that as of 19 December 2015, with the assistance of the Department of Tourism

("DT") his business, Sunshine Cruises, was able to trade again on the Dam. However the trading conditions were different in the sense that the club was now discriminating against it by making it pay R60 more for the gate fee than Toro Ya Me, which is one of its competitors run by Ms Derna van Vuuren ("Ms van Vuuren"). The applicant now sought an order from the Tribunal that he should be given access to the premises of the club on the same terms and conditions as those offered to Toro Ya Me.

- [14] Mr Peplar, the Chairperson of the club, addressed the Tribunal on behalf of the club. Mr Peplar informed us that the reason he did not file an answering affidavit was due to the fact that he was still awaiting a pending application between the club and the Department of Water Affairs ("DWA"). Mr Peplar submitted that the application concerns Mr Seale's business rights over the water surface of the Dam, flowing from his purchase of the property years ago.

- [15] He explained that at a meeting held on 22 December 2015, called by the North West Provincial Tourism Association, which was held after the termination notices were issued on 5 December 2015 the club decided to allow commercial pleasure boat operators who had confirmed pre-bookings for visitors prior to 6 December 2015, to pay the fees as they had done in the past. The rate for new bookings, which the club would only permit with effect from 15 January 2016, would be R70 per day visitor.

- [16] Mr Peplar confirmed that boat operators, the applicant included, are currently being allowed to operate at the Dam pending the outcome of the engagement with the DWA. When asked whether this commitment had been given to the applicant in writing, Mr Peplar said that it was reflected in the minutes of the meeting of 22 December 2015. He indicated that he was willing to provide this undertaking to the Tribunal and would not oppose it being made an order of this Tribunal. [3]
- [17] On the issue of Toro Ya Me being charged a different gate fee to the applicant, Mr Peplar advised that a written agreement between the club and Toro Ya Me exists which provides for a different framework. He referred the Tribunal to a copy of the agreement which reflected that Ms van Vuuren was to build, at her own cost, a lapa and ablution facilities for her customers on the premises of the club. [4] For the duration of the contract of 5 years she would pay a monthly amount of R1500 and R10 for each customer. He also handed up a copy of the email in which the club had cancelled the contract following the resolution of the AGM. [5] The termination letter reflected that Toro Ya Me was given a 12 months' notice period. Mr Peplar confirmed that Toro Ya Me would be required to pay a R70 gate fee like the rest of the other boat operators once the existing contract terminated in December 2016.
- [18] At the hearing Mr Peplar provided the following undertakings:
- [18.1] Any member of the public can access the club at the present gate fee.
- [18.2] Any paid up member of the club can launch his boat at the club at his own risk. The management of the club will not be held responsible for any incidents that may arise from privately operated boats nor will it be regarded as having authorised the launch of such boats on the Dam.
- If it emerges that commercial rights on the Dam are not restricted to Mr Seale following the DWA's decision, and the club obtains this in writing from the DWA, then the club will enter into negotiations in good faith with the current boat operators.
- [19] In addition to this Mr Peplar submitted that he had no difficulty with his undertakings being made an Order of this Tribunal.

Our assessment

- [20] Both the applicant and the respondent confirmed that the applicant had been able to get his business up and running again. It was also common cause that while the club had terminated the oral agreement on 05 December 2015 it had reversed that decision on 22 December 2015. The applicant confirmed that he had been able to run his business since then.

- [21] It was clear that by the time that the matter was set down for hearing that the relief sought by the applicant on the papers, namely that the club be prevented from denying him access to the south-eastern bank of the Dam, was moot. The club had already granted him access on 19 December 2015. Had this application been heard in early December, there may have been a basis to grant interim relief of the type sought by the applicant on the papers.
- [22] In his papers the applicant also sought compensation from the club for loss of income. However we consider such a claim for damages to follow on from a final

determination

of a contravention of the Act by the respondent[6] and not appropriate or competent relief in an interim relief application.

- [23] In relation to the now alleged price discrimination conduct, the applicant sought to press a section 9(1) case against the club without any papers being filed with the Tribunal and served on the club. In fairness to the respondent this new alleged case of price discrimination cannot be entertained by the Tribunal. In addition to this, it is not clear whether the new allegation of price discrimination has been lodged with the Commission for investigation which raises a jurisdictional question of whether it is within our competence to hear it.

Conclusion

- [24] For all the above reasons, we conclude that the applicant's interim relief application should be dismissed on the grounds that the relief sought by him is moot. In relation to his new price discrimination allegation, we cannot decide it, as there is no formal application before us, nor is there enough evidence placed before us to support the allegations made by the applicant that the respondent has engaged in prohibited price discrimination in contravention of section 9(1) of the Act.

Costs

- [25] Normally in an interim relief application costs ordinarily follow the outcome of the case. However the facts of this case are different. Mr Peplar, on behalf of the Oewer Klub, could have simply filed an answering affidavit, alternatively provided the Tribunal with a letter containing his aforesaid undertakings which would have obviated the need for this hearing and the incurring of unnecessary costs by the applicant. Given the respondent's lack of co-operation and the consequential undue delays that were visited upon this matter we find that it appropriate that the respondent pay the applicant's costs on a party and party scale.

ORDER

1. The applicant's interim relief application under case number IR202Dec15 is hereby dismissed.

2. The respondent, the Oower Klub, will grant access to any member of the public on payment of the prevailing gate fee.
3. The Oower Klub will ensure that any paid up member of the club can launch his boat at the Oower Klub provided that the management of the club will not be held responsible for any harm caused to any person, whether a member of the club or a member of the public, that may arise from the operation of privately operated boats, nor will the club be regarded as having authorised the launch of such boats on the Dam.
4. If it is ascertained in future that commercial rights on the Dam are not restricted to Mr Seale, following the DWA's decision, and the club obtains this in writing from the DWA, then the club will enter into negotiations in good faith with the current boat operators at the Dam.
5. The Oower Klub is to pay the costs of the applicant on a party- party scale.

11 July 2016

Date

Ms Yasmin Carrim

Ms Andiswa Ndoni and Ms Mondo Mazwai concurring.

Tribunal Researcher: Caroline Sserufusa

For the applicant: Mr Jeremy Gordon Grant on his behalf

For the respondent: Mr Anthony Graeme Peplar on his behalf

[1] Tribunal Rule 47

[2] The Tribunal explained the procedure to the representatives of the club.

[3] See Transcript at page 45.

[4] See Annexure E6 of the applicant's founding papers.

[5] See Exhibit 1, as well as page 36 of the Transcript.

[6] See in this regard s65(6) and s49D(4) of the Act

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