

SOUTH AFRICA / JUDGMENT

Independent Newspapers Pty Ltd and Others v El page; In Re: El Page v East Cape Property Guide and Another (017913) [2014] ZACT 40; [2014] 1 CPLR 315 (CT) (31 March 2014)

[2014] ZACT 40

COURT

Competition Tribunal

BEFORE

Norman Manoim, Yasmin Carrim, Takalani Madima

CASE / FILE NUMBER

017913

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THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017913

(017764)

In the dismissal application of:

Independent Newspapers Proprietary Limited First

Applicant

Estates Agents Holding Company Gauteng (Proprietary) Second

Applicant

Limited

PA Group Third

Applicant

Home Finder Johannesburg Proprietary Limited Fourth

Applicant

and

EL Page

Respondent

In complaint referral of:

EL Page Complainant

East Cape Property Guide First

Respondent

Saturday Star Property Guide Second

Respondent

Panel:

Norman Manoim (Presiding Member)

Yasmin Carrim (Tribunal Member)

Takaiani Madima (Tribunal Member)

Heard on 29 January 2014

Order issued on 31 March 2014

Reasons

issued on 31 March 2014

Decision and Order

Executive Summary

- [1] On 29 January 2014 the Competition Tribunal (“Tribunal”) heard a dismissal application brought by the Applicants in relation to a complaint referred under section 51 of the Competition Act of 1998[1](“the Act”). The complaint referral was filed by the Respondent, Mr. E L Page. Mr Page, the Applicant in the main matter, was the sole member of a Close Corporation in the Eastern Cape trading as Charter Property Saies[2] (“Charter Properties”). He had, previously referred a complaint under s51(1) on behalf of Charter Properties during 2007. That complaint was eventually dismissed by this Tribunal on 8 March
2013. Thereafter Mr Page submitted a second complaint to the Commission in respect of which the Commission issued a certificate of non-referral. He then directly referred the matter to the Tribunal under s51(1) in October 2013, alleging that the East Cape Property Guide, Saturday Star Property Guide and ‘other respondents’ had contravened various sections of the Act. It is this referral that the Applicants ask us to dismiss, (“the 2013 referral”)
- [2] Mr Page is currently not active in the estate agent industry and has not been so for the past four years.

- [3] The Applicants are a group of estate agents, who were the constituent members of an unincorporated joint venture that owned and published the Saturday Star Property Guide (“SSPG”) until 01 July 2012. The SSPG was a publication that provided a platform for estate agents in the wider Gauteng area to market and advertise properties that they were mandated to sell by their clients. SSPG has since dissolved and has been replaced by a similar publication known as ‘Property’, which is published by Estate Agents Publishing Company (Pty) Ltd (“EAP”).
- [4] The Applicants seek a dismissal of the 2013 referral on a number of technical and substantive grounds. In a nutshell they argue that the conduct complained of in these proceedings has prescribed under section 67(1) because it is the same conduct that Charter had complained of in
2006. Mr Page and Charter Properties are the one and same legal entity and he had already obtained interim relief (which he to date, has not availed himself of) and which conduct was the subject of a dismissal application brought by the Eastern Cape Property Guide (“ECPG”) to the Tribunal on 14 October 2008 in case number: 014365. While the Applicants had not been cited as respondents in those previous proceedings by Charter they were entitled to allege prescription in terms of section 67(1) because the conduct complained of in the 2013 referral had already ceased more than three years ago. They could also rely on res judicata under section 67(2) because they were the constituent members of SSPG (who had been cited as a respondent). The Tribunal had already decided and dismissed the complaint that had been initiated by Charter in
- 2007.
- [5] They argue further that given the history of this case they ought not to be subjected to incurring further unnecessary costs in defending SSPG or the ECPG and the Applicants against unsubstantiated and vexatious allegations. Furthermore Mr Page’s papers contain fatal defects which cannot be remedied by amendment and the matter should accordingly be dismissed.
- [6] We have decided to dismiss the main matter and set out the main grounds as follows.
- [7] The founding affidavit in the complaint referral is in a large part incomprehensible. It comprises a main affidavit which purports to summarise a series of individually particularised complaints. Each individual complaint, at least as explained by Mr Page at the hearing, is then further particularised by a series of annexures to the main affidavit. Thus to attempt to understand each complaint one has to read the main affidavit together with the relevant annexure. This bizarre architecture to the complaint referral has only added to its confusing nature because it is unclear how to read the document properly to understand what is alleged.

- [8] The referral can thus be categorised as comprising allegations that can be understood and those that are incomprehensible. Of the latter no more need to be said of that no respondent can be required to guess the mind of the complainant in order to understand the case against it. Despite endeavouring to appreciate at the hearing what these complaints were based on it became no clearer. They are vague, embarrassing and fail to disclose a cause of action in law and fall to be dismissed.
- [9] Of the former i.e. those that are comprehensible, they remain problematic for the following reasons we summarise below as follows -

9.1 The conduct complained of in the 2013 referral was substantially the same conduct that Mr Page had complained of in 2006 on behalf of Charter Properties, a separate legal entity, and for which Charter had received interim relief by way of a settlement agreement in 2007("the 2007 referral"). This conduct has already ceased more than three years prior to the 2013 referral. Thus the complaint in this respect is not competent at all in terms of section 67(1) of the Act which states: "A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased".

9.2 Moreover SSPG and ECPG are still cited as respondents by Mr Page. Hence Mr Page has referred substantially the same conduct as in the 2007 referral against the same respondents, SSPG and ECPG, which referral has already been dismissed by us in November 2012. Thus the complaint in this respect is not competent against SSPG and ECPG in terms of section 67(2) of the Act which states that: "A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct."

9.3 The public interest requires us to not permit Mr Page from proceeding any further with this matter.

Background

- [10] This matter has a long and convoluted history. Since 2006, the Respondent (who we refer to as Mr Page or Charter interchangeably) has lodged various complaints and procedural matters to both the Competition Commission ("Commission") and before this Tribunal.
- [11] In January 2006, he lodged a complaint under his business Charter Properties to the Commission against ECPG, alleging that the refusal by ECPG to publish advertisements at reduced rates for estate agents such as Charter, contravened the Act. Charter wanted to place an advertisement in the ECPG to the effect that it would only charge 3% commission as opposed to the customary 7.5% commission charged by other estate agents.
- [12] Following the complaint lodged at the Commission, Charter Properties filed an interim relief application to the Tribunal in March 2006, under section 49C in order to obtain immediate access to ECPG. In this application Charter amended its papers to join SSPG as a respondent, even though it had not cited SSPG as a respondent in the complaint lodged at

the Commission. This application was heard on 19 January 2007 and on that day the parties arrived at an agreement in terms of which the ECPG agreed to accept Charter's adverts on condition these complied with the ASA rules. Thus Charter had obtained the relief it had sought in its complaint at that stage of the interim relief proceedings already.

[13] The Commission completed its investigation into the complaint and issued a notice of non-referral. Charter then referred the complaint to the Tribunal in terms of section 51 of the Act. After a drawn out process that complaint was eventually dismissed by this Tribunal on 8 March 2013.[3]

[14] Mr Page then submitted a second complaint to the Commission on 5 March 2013 in his own name. The Commission issued a certificate of non-referral on 8 August 2013. It is this complaint that constitutes the subject matter of the 2013 referral and which the Applicants seek to have dismissed.

Current Application

[15]The founding affidavit of the 2013 referral was arranged in a bizarre manner with different sections labelled as annexures. When we peruse these founding papers we find that the contents thereof incomprehensible. Mr Page alleges that the Applicants are in

contravention of Chapter 3, S5(1), S7(a), S(1)(viii), S4(1)(b)(i), S8(d)(i) and S(9)(c)(i) and (ii) of the Act. As was the case with all the papers filed by Mr Page in the last seven years, the founding papers contain nothing more than legal jargon strung together in paragraphs[4] In his papers Mr Page refers to "other respondents" frequently without identifying these. As it stands the founding affidavit discloses no cause of action.

[16] We see a similar pattern in his opposition to the dismissal application where words are strung together as follows: "...dismissal application is unfounded, un-procedural, has no basis in law and, as a consequence, does not provide compelling reason, or any reason at all, for a dismissal as sought; not as to pertain to the applicants therein, not as pertain to the further non-complying respondents and not as pertain to any part of the main matter"[5]

[17] At the hearing of the matter, the panel members attempted to obtain clarity from Mr Page about the nature of his complaint and whether

there was anything new that he had not previously complained of in the 2007 referral. Mr Page demonstrated an understanding of the legal processes and what the nature of the enquiry from the panel constituted. While his argument at the beginning was peppered with legal jargon and references to the provisions of the Act, in his responses to specific questions from the panel it became clear that the conduct he was complaining of in the 2013 referral was the same that he had complained of previously. It seems that all he wanted to do now was to extend liability of the conduct to the constituent members of the SSPG[6] When asked who the "other respondents" were Mr Page could not identify these. Thus the 2013 referral filed by Mr Page concerned the

same conduct and the same respondents as did the 2007 referral brought by Charter Properties. That conduct has already been the subject of a dismissal in our decision of 2012. It is also the same conduct that Charter had complained of in his interim relief application in 2006.

[18] In terms of section 67(1) it is not competent for any party to initiate a complaint in respect of a prohibited practice more than three years after the practice has ceased. Once the conduct has ceased as contemplated in section 67(1) the matter has prescribed and cannot be initiated against any party that may have been associated with that alleged conduct. Given that the conduct complained of by Mr Page ceased as early as 2006 or during 2007 when Mr Page was granted interim relief, it is not competent for Mr Page or any other person to initiate a complaint in relation to such conduct. On this basis Mr Page's 2013 referral must be dismissed.

[19] Not only is the conduct complained of by Mr Page the same as in the 2007 referral, so are the respondents against whom the complaint was lodged. As conceded by Mr Page he still persists in alleging the same conduct on the part of SSPG and ECPG, respondents in respect of whom this Tribunal has already dismissed the complaint in November 2012. In terms of section 67(2) it is not competent for Mr Page to refer a complaint to the Tribunal against firms who have been respondents in completed proceeding relating substantially to the same conduct. On this basis the complaint is also not competent and must be dismissed.

[20] As far as the incomprehensible founding affidavit filed by Mr Page goes, we agree with the Applicants that affording Mr Page an opportunity to cure the defect by an amendment will not take the matter any further simply because we have established that the conduct complained of by Mr Page is the same as that contained in the 2006 referral. That conduct has already prescribed and the merits of that complaint have already been decided by the Tribunal in its dismissal decision of 12 November 2012.

[21] What also emerged during the course of these proceedings is that Mr Page has still not made use of the relief he obtained in early

2007. He also confirmed that he was not trading in the property market and had no longer had knowledge of the recent practices in the industry. He once again conceded that his business model (as it was then)[7] was not understood by his clients who only sought to see their homes advertised in the property pages of the SSPG and ECPG.

[22] While it may be that the technical grounds alleged by the Applicants support a dismissal of the complaint referral, in our view the referral also falls to be dismissed on public interest grounds.

[23] Since 2006, Mr Page has repeatedly lodged complaints against the SSPG and ECPG and now the constituent members of the erstwhile SSPG. These complaints have been investigated by the Commission and have been found to have no merit. Despite this, Mr Page has persisted in his private capacity in pursuing these complaints at the Tribunal pursuant to a notice of non-referral as a complainant in terms of section 51(1).

- [24] At first the Tribunal, observing that he was unrepresented, attempted to assist Mr Page by referring him to legal representatives who might act for him pro bono. Mr Page has not been able to retain the services of any of them. While Mr Page may not have any consideration for the inconvenience caused by his actions to the respondents (Applicants in this case) or the great expense put to the agencies by his repeated filing of substantially the same complaint, he also lacks the ability to guard himself against the risks of his own unmediated persistence, namely running the risk of an adverse costs order.
- [25] Moreover the fact that he has still not utilised the relief he obtained in early 2007 and that he is no longer trading as an estate agent leads us to the inevitable conclusion that the public interest cannot be advanced by permitting Mr Page, an unrepresented private person, to continue utilising the provisions of the Competition Act in this manner. More so when the Commission after repeatedly investigating his allegations, found no merit therein.
- [26] While we hesitate in reaching this conclusion we are inclined to give credence to the possibility that the litigation by Charter is simply vexatious and levelled against the entire industry.
- [27] The application for dismissal is accordingly granted.

ORDER

1. The dismissal application in case number 017193 is granted and the complaint referral under case number 017764 is therefore dismissed.
2. The Respondent is liable to pay the costs of each of the Applicants on a party and party scale such costs to include the costs of one counsel.

31 March 2014

DATE

Ms. YASMIN CARRIM

Mr. Norman Manoim and Dr. Takalani Madima concurring

Tribunal Researcher: Caroline Sserufusa

For the Applicants: Adv Engelbrecht instructed by Cliffe Dekker Hofmeyer

For the Respondent; Mr. Eldrich Page on his behalf

- [1] Act No. 89 of 1998, as amended.
- [2] Amalgamated Real Estate Principals Group CC t/a Charter Property Sales
- [3] See Tribunal decision in Amalgamated Real Estate Principals Group CC t/a Charter Property Sales & The Home Trader (Eastern Cape) (Pty) Ltd t/a East Cape Property Guide, Case no: 015776

- [4] See pages 17-18 of the Mr Page's Founding Affidavit in the 2013 complaint referral.
- [5] See para 21 page 13 of Mr. Page's Heads of Argument.
- [6] See pages 28-29 of the Transcript.
- [7] Mr. Page's business model involved advertising by word of mouth, on notice boards and on the internet.
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