

IN THE SUPREME COURT OF SEYCHELLES

Civil Appeal No. 66/2012

[Appeal from Fair Trading Commission decision CPA.11.187.99]

[2013] SCSC

GLOBAL INTERNET CAFE
Appellant

versus

FAIR TRADING COMMISSION

Respondent

Heard: 4 March 2013

Counsel: Frank Elizabeth for appellant
Rongmei Lansinglu for respondent

Delivered: 27 May 2013

JUDGMENT

Egonda-Ntende CJ

[1] This is an appeal by a business against conviction by the Board of Commissioners of the Fair Trading Commission on charges of misleading advertising and disregarding a compliance notice. Mr Elizabeth is the sole proprietor of the business and is therefore effectively representing himself.

[2] Although framed as an appeal, this is in substance an application for judicial review of procedural steps taken by the Commission. There is no challenge to the merits of the convictions.

[3] There is also no memorandum of appeal on file. This is unacceptable, particularly from an experienced attorney. Because there is no memorandum of appeal, there is no prayer for relief. As Mr Elizabeth's complaints are solely procedural, he is presumably seeking reconsideration of the charges by the Commission. But that is unclear.

- [4] Under rule 14 of the Appeal Rules this appeal is technically deemed to have been withdrawn for failure to file a memorandum of appeal. I have issued repeated warnings about the consequences of failure to comply with the Rules. On this occasion I have not found it necessary to have recourse to rule 14 because the appeal is, in any event, fundamentally misconceived. There is no prejudice to the respondent (who did not take the point), beyond having to attend the hearing.
- [5] The appeal is fundamentally misconceived because it has been filed in the wrong forum. The complaint in this case was initiated under s 5 of the Consumer Protection Act. Section 9(2) of that Act states that the hearing of complaints is governed by Part VI of the Fair Trading Commission Act (FTC Act), which cross-refers to the Fair Trading (Procedure for Conduct of Hearings) Rules (FTC Rules). Both s 45(1) of the FTC Act and s 77(1) of the Consumer Protection Act provide for appeals from Commission decisions to a specialist Appeals Tribunal, and then (if necessary) from the Tribunal to the Supreme Court. There is no direct right of appeal from the Commission to the Supreme Court. Mr Elizabeth's recourse lay in appeal to the Tribunal. This jurisdictional objection should have been raised by the Commission at the outset.
- [6] It was of course open to Mr Elizabeth at any time to file an application for leave to proceed with a judicial review petition in this Court. However, Mr Elizabeth would still have borne the burden of persuading the Court that he should not be first required to seek relief before the Tribunal. And the grounds of his complaint do not bear scrutiny in any event. I deal with them briefly here only in view of a possible appeal.
- [7] The first ground of appeal is that the Commission erred in basing a case on its own complaint, thereby acting as "Complainant, Prosecutor, Judge and Jury". Mr Elizabeth cited no authority for this submission. The Commission filed a helpful written reply submission, in which Mrs Lansinglu cited s 5(1) of the Consumer Protection Act and s 30(1) of the FTC Act. Support for the Commission's submission is also found in s 4(a) of the Consumer Protection Act and ss 32(1) and 38 of the FTC Act. It is clear beyond doubt from these provisions that the Commission is empowered to hear and determine complaints which it has initiated itself. While there had in fact been multiple consumer

complaints relevant to the charge of misleading advertising in this case, there was no illegality or procedural unfairness in proceeding on the Commission's own initiative. Mrs Lansinglu's submissions emphasised the separation of the Commission's investigation and enforcement functions. The Board of Commissioners plays no part in the initiation or investigation of the complaints which come before it for adjudication. That is how its constitutionally mandated impartiality and independence are protected.

- [8] The second ground of appeal is that Mr Elizabeth's "client" did not receive a fair hearing because of "the way and manner in which the hearing was conducted and the Ruling delivered". Mr Elizabeth clarified in oral argument that he objects to the hearing having proceeded in his absence. There does not seem to be a distinct issue with the delivery of ruling (although I note that delivery took 14 months, in clear breach of ss 42 and 43 of the FTC Act).
- [9] Mr Elizabeth's objection to the ex parte hearing procedure is unsustainable on the face of the legislation. As Mrs Lansinglu submitted, r 12(1) of the FTC Rules specifically empowers the Commission to conduct a hearing before the Board in the absence of a party who was served with notice of the hearing date. The objection is also unsustainable on the facts. Mr Elizabeth was not only served with notice but actually summoned personally under r 6(1) of the FTC Rules. This placed him on notice of possible criminal liability for non-attendance without lawful or reasonable excuse (s 33(6) of the FTC Act). The summons was dated 26 September 2011, for hearing on 12 October at 9:00 am. Mr Elizabeth wrote to the Commission advising that he would be in a hearing before the Supreme Court on that day and requesting an adjournment. He does not however appear to have drafted this letter until 10 October 2011 and, according to the Commission, it was not actually received until 9:10 am on the day of the hearing. That is the context in which the Commission decided to proceed under r 12(1).
- [10] During the hearing of the appeal I asked Mr Elizabeth why he had not asked the Commission to set aside or recall its ex parte decision so that he could have an opportunity to be heard. Mr Elizabeth stated that he was advised by the Commission on 12 December 2012 (in the letter accompanying its written ruling) that "under the

FTC Act 2009 our only recourse now is to appeal and not to file a motion to set aside. ... we do not have this right to set aside the ruling and our right is to appeal". The relevant letter, which is on the Court file, says nothing of the sort. There is no reference at all to challenging the decision. The ruling itself simply confirms Mr Elizabeth's freedom to appeal.

[11] In fact, as Mrs Lansinglu submitted, r 12(3) of the FTC Rules gives the Commission discretion to recall an order or direction made on an ex parte basis under r 12(1) wherever the party "shows that it was prevented from participating ... for reasons beyond its control". Mr Elizabeth could and should have made an application under this Rule as soon as he became aware that the hearing had proceeded in his absence.

[12] I observe that a 2011 letter from Mr Elizabeth on the Commission file, written near the end of the investigation and copied to the President and others, refers to a "personal vendetta" against his client and announces that he has commenced legal proceedings for "harassment and abuse of power". Court records indicate that such a proceeding was indeed filed in the Magistrate's Court, although not until a month after the letter in question. That proceeding, CS 311/2011, was withdrawn on the day that the Commission's ruling was delivered, a week before this appeal was filed. Mr Elizabeth has properly not sought to reinstate any allegation of bad faith or abuse of power before this Court.

[13] Be that as it may, this appeal should never have been filed. It is dismissed accordingly with costs to the respondent.

Signed, dated and delivered at Victoria this 27th day of May 2013



F M S Egonda-Ntende
Chief Justice