

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA11/2015

Appeal from Appeal Tribunal Decision No. 7 of 2015

[2018] SCSC 538

FAIR TRADING COMMISSION

Appellant

Versus

FEROX ABATTOIR PROPRIETARY LIMITED

(Co. No. 8411595-2)

Respondent

Heard:

Counsel: Mr. Benjamin Vipin for Appellant

Mr. France Bonte for Respondent

Delivered: 6 June, 2018

JUDGMENT

ROBINSON J

Relevant factual background

1. Appellant, the Fair Trading Commission, on behalf of Jean Mellie (the "Complainant"), filed two cases against Respondent, Ferox Abattoir (Proprietary) Limited — one under the Fair Competition Act of 2009 against Respondent's hatchery for abuse of a dominant position (section 7 (3) (b)) and withholding supplies (section 20) (Case No. FCA39), and

another under the Consumer Protection Act of 2010 against Respondent's abattoir for alleged substandard performance of services (section 40) (Case No. CPA.13.367).

2. The record of a hearing, between the Fair Trading Commission and the Ferox Abattoir (Proprietary) Limited, on 6 August, 2014, at 1:30 p.m., (Case No. FAC39 at p1), before the Board of Commissioners, indicated that the Fair Trading Commission withdrew its claim under section 20 of the Fair Competition Act and proceeded only with section 7 of it. Moreover, the Board of Commissioners' ruling on 7 October, 2014, regarding the Fair Competition Act, only addressed the section 7 claim. This court is of the view that the Fair Trading Commission should not be allowed to litigate or introduce this claim at this stage.
3. On 7 October, 2014, the Board of Commissioners issued two rulings in favour of the Fair Trading Commission (Case No. 7/2015). On 10 February, 2015, Ferox Abattoir (Proprietary) Limited appealed both rulings by the Board of Commissioner's decision (Appeal No. 39 Re: FCA and Appeal No. 13 of 367 Re: CPA). On 7 May, 2015, the Appeal Tribunal, in its judgment, quashed the decisions of the Board of Commissioners and found that Ferox Abattoir (Proprietary) Limited was justified in refusing to provide services to the Complainant because the Complainant owed an outstanding debt of 9000.00/- rupees to Respondent. Hence this appeal.

The grounds of appeal

4. Appellant has raised several arguments on appeal against the judgment of the Appeal Tribunal and framed them as five different grounds, which are not well delineated and tended to overlap —

"1. The Appeal Tribunal failed to consider and give a ruling on the primary issue, namely that of abuse of a dominant market position as per the provisions set out in the Fair Competition Act. The subsidiary, although interlinked matter of a debt owed was the only focus of the decision.

2. The Appeal Tribunal has therefore ignored the extent and complexity of this matter by its exclusive ruling on one matter and has not analysed the legal arguments that were put forward by the Appellant.
3. In consideration of Paragraphs 1 and 2, there has thus been a wrongful amalgamation of cases by the Appeal Tribunal and no differentiation that has been made between the two cases.
4. The Appeal Tribunal bases the crux of its decision on assumptions rather than making reference to actual fact or evidence, by doing so the Appeal Tribunal did not demonstrate objectively in the matter that was brought before it.
5. Furthermore, Sections 8 and 9 of the Fair Competition Act demand that for a conduct under section 7 (1) (Abuse of a dominant position) of the same Act, to be considered, the enterprise engaging in the conduct needs to be considered by the Commission and further to that, apply to the Commission for guidance.”.

5. Having considered the five grounds of appeal with care, this court is satisfied that in its appeal Appellant essentially maintained that the Appeal Tribunal neglected to and/or improperly addressed legal claims arising out of the Fair Competition Act, namely abuse of a dominant market position as per the provisions set out in the Fair Competition Act.

Submissions and Discussion

6. This court has considered all the materials on file and the the submissions of learned Counsel.

7. Under the Fair Trading Commission Act, the Fair Trading Commission is responsible for the administration of the Fair Competition Act. The Fair Competition Act provides that if a party is dissatisfied with an order of the Fair Trading Commission it may appeal to the Appeal Tribunal (section 50) and eventually, if applicable, appeal the Appeal Tribunal's order before the Supreme Court (section 52).
8. Appellant maintained that the Appeal Tribunal failed to consider and give a ruling on the issue of abuse of a dominant market position. Appellant argues that the Appeal Tribunal's decision only focuses on the interlinked matter of debt owed to Respondent.
9. Section 7 of the Fair Competition Act, under Sub-Part I, dealing with abuse of a dominant position provides that —

"7(1) Subject to subsection (4), any conduct on the part of one or more enterprise or enterprises which amounts to an abuse of a dominant position in a market is prohibited, if it may adversely or unfairly affect trade within Seychelles.

(2) For the purposes of this Act, an enterprise or enterprises together hold a dominant position or a joint dominance in a market if that enterprise or enterprises together occupy such a position of economic strength as will enable them to operate in the market independently without effective competition from their clients, competitors or potential competitors.

(3) Conduct may, in particular, constitute such an abuse if it consists in —

(a) restricting the entry of any enterprise into that or any other market that supplies or is likely to supply a substitute for the goods or services supplied in that market;

- (b) preventing or deterring any enterprise from engaging in competitive conduct in that or any other market;
 - (c) eliminating or removing any enterprise from that or any other market;
 - (d) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions that are excessive, unreasonable, discriminatory or predatory;
 - (e) limiting production, markets or technical development to the prejudice of consumers;
 - (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (g) making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
 - (h) exclusive dealing, market restriction or tied selling.
- (4) An enterprise is not to be treated as abusing a dominant position —
- (a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or promoting technical or economic progress, and consumers were allowed a fair share of the resulting benefit;

- (b) if the effect or likely effect of its behaviour in a market is the result of its superior competitive performance; or
- (c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights —
 - (i) has the effect of lessening competition substantially in a market; and
 - (ii) impedes the transfer and dissemination of technology."

Underlining is mine

10. In short, if an enterprise holds a dominant position, the Fair Competition Act essentially provides that an enterprise's conduct may constitute abuse of a dominant position if its conduct prevents or deters any enterprise from engaging in competitive conduct in any market. It appears, therefore, that the focus of the inquiry is to determine whether the enterprise's conduct is preventing or deterring any enterprise from engaging in competitive conduct in that or any other market.
11. Appellant correctly pointed out that the Appeal Tribunal did not give a ruling as to whether Respondent was liable for abuse of a dominant position under the Fair Competition Act and it is not apparent from its decision that it considered this claim. Schedule 2 of the Fair Trading Commission Act provides that a decision of the Appeal Tribunal disposing of an appeal shall contain a statement of the reasons for the decision. Indeed, the Appeal Tribunal's decision did not include any explicit reference to the Fair Competition Act with respect to the claims of Appellant.

12. This court, pursuant to its powers under section 45 of the Fair Trading Commission Act, may address Appellant's claims and decide to affirm, reverse, amend, alter the determination of the Appeal Tribunal as well as remit the matter to be further determined by the Appeal Tribunal or make such orders as it thinks fit.
13. This court considers Appellant's claim under section 7 (b) of the Fair Competition Act. This court recognises that the term "*abuse of a dominant position*" and other terms used in this body of law have no context on their own unless this court has recourse to certain economic considerations. This court, therefore, needs to have access to economic expertise, which gives this body of law its muscle. This court's duty will still be to determine the questions of fact and law, but it will be better placed to do this equipped with the knowledge of an expert or experts in the field.
14. In relation to the present case, this court refers to the record of a hearing, (FCA39), before the Board of Commissioners. Appellant was represented by Mrs. Cosette Moustache - an analyst. Miss Burgita Albest, an analyst in the investigation and market surveillance department of Appellant, was a witness for Appellant, who gave evidence about its claims. During questioning of Miss Albest, Mrs. Moustache referred to "*the Commission's report*", Exhibit 16 (*Fair Trading Commission's Investigation Report Abuse of Dominance: Refusal to supply Jean Mellie v Ferox Hatchery Case Number: FCA39*). Exhibit 16 cited the following references —

- "EU Competition Law, 4th Edition by Alison Jones and Brenda Sufrin
- Coombs. J, 2011/2012. Kings College London
- Gangi, M., & Bienen, D. (2010). Competition policy in the SADC Region; A Reference Guide
- Piofsky. R, The essential facilities doctrine under United States Antitrust Law

- Unilateral Conduct Workbook Chapter 3: Assessment of Dominance, Unilateral Conduct working Group, Presented May 2011
- Van Sielen. S, 1996, OECD Secretariat: The Essential facilities concept
- Whish. R & Bailey. D, 2011, Competition Law, 7th edition".

15. This court has scrutinised Exhibit 16. Exhibit 16 stated at page 24 that "*[t]his report is submitted to the Board of Commissioners by the Chief Executive Officer as per section 36 of the Fair Competition Act 2009*". It is not clear to this court who has prepared Exhibit 16. Moreover, the record of a hearing, (FCA39), did not state whether Miss Albest was presented as an expert witness. There is no evidence in relation to Miss Albest's training, study or experience. In light of the above, this court concludes that no expert evidence was presented by Appellant. Expert evidence is presented so that the court can get the benefit of specialised knowledge based on training, study or experience in relation to an issue which the court is not used to and in respect of which the court will be helped by expert guidance. It is also to provide to the court the benefit of an objective and impartial assessment of an issue relevant to the proceeding.
16. In light of the above, this court attaches no weight to Exhibit 16 and the testimony of Miss Albest and is of the opinion that Appellant has not presented evidence demonstrating that Respondent's conduct amounted to abuse of a dominant position under section 7 of the Fair Competition Act. Accordingly, this court finds no merit in this appeal.

Decision

17. This court dismisses the appeal and makes no order as to costs.

Signed, dated and delivered at Ile du Port on 6 June 2018



F Robinson

Sitting as a Judge of the Supreme Court