

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case Number: 57/IR/Oct01

In the matter between:

HAYLEY ANN CASSIM

First Claimant

NOELEEN CATHERINE BARENDSE

Second Claimant

ARNOLD ZULMAN

Third Claimant

and

VIRGIN ACTIVE SOUTH AFRICA (PTY) LTD

Respondent

REASONS

Introduction

We have to decide the following issues-

1. Does an interim relief case lapse by operation of law if the Commission has issued a notice of non-referral and the claimant does not institute its own complaint referral in terms of section 51 of the Act; and
2. whether a respondent firm is entitled to recover the wasted costs of a lapsed interim relief application from the claimants.

Background

The first and second claimants are personal trainers who earn their living by training clients at health clubs. The third claimant is a businessman who is a client of the second claimant. The respondent is a nationwide operator of health clubs. The first and second claimants formerly conducted their business from the premises of Kings Park, one of the clubs operated by the respondent in Durban. The third claimant would train with the second claimant at the Kings Park Club where he is a member.

The first and second claimants had access to the facilities of Kings Park for the purpose of conducting their business, in terms of a written agreement known as a personal trainer agreement. A dispute arose between the first and second claimants and the respondent over the agreement. The crux of this dispute was around a requirement that personal trainers wear a uniform prescribed by the respondent and the amount of the access fee. The respondent then purported to cancel the agreements and denied the first and second claimants access to its premises.

This allegedly affected the third claimant, in that he could no longer train at Kings Park with the second claimant.

On the 21 September 2001 the claimants lodged a complaint with the Commission in terms of section 49 B of the Act, in which they alleged that the respondent had perpetrated various prohibited practices. On the 21 September 2001 they filed an application for interim relief in terms of section 49 C of the Act. The respondent then filed its answering papers on 31 October 2001. The respondent denied it had contravened the Act.

On the 14 November 2001 the Commission notified the claimants that it had investigated their complaint and that they had decided not to refer the matter to the Tribunal. The Commission furnished the claimants with a notice of non-referral on the same date.

In terms of section 51 of the Act, a complainant who has received a notice of non-referral in response to a complaint may refer the complaint directly to the Tribunal. In terms of the Tribunal rules this referral must take place within 20 business days after the notice of non –referral has been issued.

After receipt of the notice of non-referral the claimants never lodged a complaint referral and took no other procedural steps in the matter. Nor, it appears, did they withdraw the interim relief application or make a tender of costs to the respondent.¹

The respondent then approached our registrar to have the matter set down to determine the issue of costs. The registrar did this and informed both the claimants and respondents attorneys of the date of set down. On the 18 January 2002 the claimants' attorneys filed Heads of argument in which they requested us –

1. to have the matter struck off the roll on the grounds that only a claimant could enrol an interim relief matter; alternatively

¹ In correspondence with the claimants' attorneys before the matter was set down the respondent's attorneys had asked for them to withdraw and tender costs.

2. to find for the claimants on the merits. Argument was addressed on this issue to the effect that a case for relief in terms of section 49 C had been made out on the papers; further alternatively
3. to make no order as to costs.

In response to these Heads the respondent filed its own Heads of argument in which it dealt with all three issues raised in the claimants' Heads of argument. The respondent's main argument however was that the interim relief application had lapsed.

On the day of the hearing itself the first and second claimants appeared in person without legal representation. We were informed that the third complainant was overseas and had no knowledge of these proceedings. The respondent was represented by its attorney and counsel.

We adjourned the matter to allow the respondent's legal team to consult telephonically with the claimants' attorney who was in Durban. Since the matter revolved entirely around costs we asked if they could attempt to settle the matter. We were later advised that this had not been possible.

The actions of the complainants in this matter and their attorneys are difficult to fathom. It appears that initially after receipt of the notice of non-referral they had resigned themselves to the fact that they would not continue this matter. In a letter to the Tribunal dated 18 January 02 their attorneys advised us that:

" We refer to our Ms Hoffman's recent discussion with your Mr Tsitsi, and confirm that our clients did not wish to proceed with this matter in view of the ruling of the Competition Tribunal (sic) (We presume an erroneous reference to the Commission's decision to issue a notice of non-referral) particularly insofar as they were no able to afford the costs occasioned by arguing this matter before the Tribunal."

Despite this they then in the same letter go on to say :

" However it seems that the Respondent is adamant that it wishes to have this matter heard before the Tribunal and has apparently set this matter down for hearing.

In the circumstances our clients have no option but to proceed with this matter and their heads of argument are annexed hereto."

The heads of argument (prepared and submitted by their attorneys) referred to here persist in arguing the merits of the interim relief application. The claimants' attorney had thus prolonged the dispute at the very moment that they wished to appear to be abandoning it due to their clients' lack of funds. Given this stance on behalf of the claimants' attorneys, it was entirely reasonable for the

respondents to prepare for this hearing on the basis that the matter was to be argued on the merits.²

Has the interim relief application lapsed?

We agree with the respondent that the interim relief application has lapsed and that it is therefore not competent for us to grant an order in relation to that application.

An interim relief application is one contingent on the continued existence of a pending complaint process that has still to be decided. What is contemplated is some procedure pending before the Commission or Tribunal in respect of which a hearing has not yet been concluded. When the Commission issues a notice of non-referral it has two consequences ;

1. the Commission's investigation ceases ;
2. the Commission no longer has jurisdiction to refer that complaint.

Once the Commission has issued a notice of non-referral, an interim relief case is suspended until the occurrence of a subsequent jurisdictional fact. That subsequent jurisdictional fact is the filing of a complaint referral by the complainant within the prescribed time period.³ If that filing is not made within the prescribed time period the application lapses.⁴

In this case it is common cause that the claimants have not referred the complaint to us in terms of section 51 and they have stated that they do not intend to do so. Accordingly the application has lapsed and therefore the only issue properly before is whether the respondent is entitled to its wasted costs.

IS THE RESPONDENT ENTITLED TO COSTS?

The respondent argues that as in any other civil court matter we should observe the general principle that costs follow cause. They further argue that in the past where an application for interim relief has been dismissed the Tribunal has awarded the respondent costs.⁵ In this case although the application has not been dismissed the claimants have not kept their claim alive by filing a complaint referral and therefore the same principle should apply.

² It is regrettable that the claimants' attorneys, having chosen at the last minute to prepare heads of argument on all the issues, failed to appear to represent their clients at the hearing, without withdrawing as attorneys of record, on the basis that their clients did not have the funds.

³ Section 51 read with Rule 14(1)(b)

⁴ Presumably non-compliance with the time period may be condoned on good cause shown. (See section 58 (1)(c))

⁵ See *York Timbers Limited v South African Forestry company Limited* 15/IR/Feb01 and *Natal Wholesale Chemists (Pty) Ltd v Astra Pharmaceuticals (Pty) Ltd and Others* 98/IR/Dec00

The claimants' attorneys in their heads of argument ask us not to make an award of costs because this would have the effect of deterring persons from making complaints in terms of the Act. In this respect they appear to have confused two different processes. Where a member of the public lodges a complaint with the Commission in terms of section 49 B of the Act, that person is not liable for a respondent's costs even if the Commission does not proceed with a complaint referral. In this respect filing complaint with the Commission is no different to laying a charge with the police.

The position is quite different when it comes to an application in terms of section 49 C for interim relief. Here a complainant is no longer waiting for the Commission to decide whether it will institute action, but is using its own resources because it wants to get expedited interim relief. If it chooses this route it risks the possibility that if it is unsuccessful it will have to pay the respondents cost . Thus no one is obliged to proceed with interim relief if they want to bring a complaint in terms of the Act, but if they choose to avail themselves of this additional remedy they must be mindful of the consequences. It is therefore incorrect to state that awarding costs against claimants in interim relief applications will deter members of the public from lodging complaints with the Commission.

However it does not follow that we will always adopt a cost follows cause approach. There may be circumstances where a claimants who abandons or who loses an interim relief application will show that there are special circumstances why we should not award costs against them. In this case, however the claimants have not shown us that such circumstances exist. Moreover, since the Commission issued its notice of non-referral the claimants adopted a posture that led to the respondent incurring further unnecessary costs.

The claimants should be liable for the respondent's costs. There is no justification for any separate treatment of the third claimant. His attorneys of record, who have never withdrawn, were aware of the date of the hearing and never advised us that the date was not suitable for their client.

However we are not persuaded that the matter is of such complexity that it justified the respondent employing more than one legal representative.

We accordingly make the following order-

- 1) the claimants, jointly and severally, are ordered to pay the respondent's costs on a party and party scale;
- 2) the costs are to be limited to the fees of one legal representative.

N.M. Manoim

4 February 2002
Date

Concurring: D. H. Lewis, C. Qunta