

**COMPETITION TRIBUNAL**  
**REPUBLIC OF SOUTH AFRICA**

**Case Number: 25/CR/Apr02**

**In the matter between:**

**Independent Estate Agents Action Committee**

**Complainant**

**and**

**Kwazulu-Natal Property Services Ltd**

**1<sup>st</sup> Respondent**

**The Members of Kwazulu-Natal Property Services Ltd**

**2<sup>nd</sup> Respondent**

**The Competition Commission**

**3<sup>rd</sup> Respondent**

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**REASONS FOR DECISION**

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On the 18 November 2002 a panel of the Tribunal heard a number of *in limine* applications from both the complainant and the respondents in this matter. These concerned

- an application from the complainant for condonation of the late filing of its complaint referral;
- an application from the respondent asking us to dismiss the complaint referral for lack of *locus standi* on the part of the complainant;
- an application from the respondent asking us to strike out certain prayers in the complaint referral that the respondents alleged travelled beyond the boundaries of the initial complaint submitted to the Commission;
- an application from the respondent asking us to order the complainant to provide security for costs.

Having considered these applications we have ordered that

1. the complainant's application for condonation for the late filing of its complaint referral is granted;
2. the application by the respondents that the complainant does not have *locus standi* to launch the application before the Tribunal is dismissed;
3. the following prayers in Annexure "C" of the Complainants filing notice are struck out:

- a) Prayers 2.1 to 2.3
  - b) Prayers 4.1 and 4.2
  - c) Prayers 7.3 and 7.4
4. the application by the respondents that the complainant file security for costs is dismissed;
5. there is no order for costs.

Brief reasons for these decisions follow:

### **Condonation**

It is common cause that the Commission issued a notice of non-referral of the complaint on the 18<sup>th</sup> December 2001. The Act provides that should the complainant wish to refer the complaint directly to the Tribunal that it shall do so within 20 days of the notice of non-referral. However, the complaint was only referred on the 23<sup>rd</sup> April 2002. Section 58 (1) (c) expressly empowers the Tribunal to condone late filing.

While the Tribunal has become increasingly concerned at the cavalier approach adopted by many practitioners and their clients to the time frames provided for in the Act and the Rules and to the formulaic nature of many of the applications for condonation, we are persuaded that condonation is warranted in this case. In particular, we note that the complainant took the trouble to assure the respondent on two separate occasions within the time period stipulated for the filing of the complaint referral of its intention to proceed with the complaint referral and of its intention to apply for condonation for the late filing of the referral. We also agree that the matter is complex and that there is pertinent international jurisprudence to consider. We note too that the complainant was required to consult with its members and to secure funding to enable it to proceed with the complaint referral.

The application for condonation of the late filing of the complaint referral is accordingly granted.

### **Locus Standi**

The respondent argues that the complainant does not possess the requisite *locus standi* to initiate a complaint. Section 1(1)(iv) of the Act defines a '*complainant*' as a '*person who has submitted a complaint in terms of section 49B(2)(b)*'.

Section 1(1)(xi) defines a "*firm*" as including '*a person, partnership or trust.*'

The respondent relies on these differences in language, to come to the conclusion that a complainant cannot be a '*firm*' and hence the complainant in this case being a company, and hence a *firm*, has no locus standi. We assume that what the respondent is arguing,

although it was difficult to follow precisely what was meant, is that a complainant can only be a natural person as otherwise the legislature would have defined a complainant as a *firm*.

The Act does not define the word *person*. However the Interpretation Act<sup>1</sup> does and it defines a person as including “*any company incorporated or registered as such under any law*”.

The complainant is incorporated in terms of section 21 of the Companies Act and is therefore a company and hence meets the definition of person in the Act.

### **Complaint Referral**

The respondent argued that while certain elements of the complaint referred to the Tribunal derived from the initial complaint submitted to and investigated by the Commission, others travelled beyond these boundaries and, as such, fell outside of the jurisdiction of the Tribunal.

This was conceded by the complainant who identified those elements of its prayers that were not reflected in the initial complaint submitted to the Commission. These ‘excessive’ prayers are accordingly struck out of the notice of motion by our order. Should the complainant wish to persist with these prayers it will be obliged to submit them to the Commission for its consideration.

### **Security for Costs**

The respondent has asked us to order the complainant to provide security for costs. It argues that the complainant is a mere shell, expressly established for the purposes of mounting these proceedings.

The complainant, for its part, contends, by way of exception, that the Tribunal is not competent to issue the order sought.

We have not taken a view on the complainant’s exception. However, if we proceed on the assumption that we *are* entitled to entertain the order sought, we are nevertheless not inclined, as a matter of policy, to grant it. It is in the very nature of competition law that small players should confront much larger players, firms, or associations of firms that dominate the markets in which the small players participate or the markets of their suppliers or customers. Furthermore, in bringing a complaint to the competition authorities, the small player, while doubtlessly driven by its own perceived travails, performs a public function in identifying a practice that may, after investigation and adjudication, be found to be anti-competitive and, as such, inimical to the *public* interest. Accordingly we are extremely reluctant to impose a requirement that would effectively reduce the access of small complainants to this institution. This is not to say, that we would never order a complainant to provide security for costs. Were we persuaded that a complaint was vexatious and

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<sup>1</sup> Act no 33 of 1957. See section 2

submitted to meet some or other ulterior motive, we may well order the complainant to provide the security requested here. However, mere impecuniosity does, not in our view, constitute a valid ground for issuing the order sought and we decline to do so.

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**D. Lewis**

**22 November 2002**  
**Date**

**Concurring: M. Moerane and N. Manoim**