



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2012/1249

In the matter between:

KETLER INVESTMENTS CC

t/a KETLER PRESENTATIONS

Applicant

And

INTERNET SERVICE PROVIDERS' ASSOCIATION

Respondent

JUDGMENT - SUMMARY

SPILG, J:

DEFAMATION:

- *"SPAM" and its derivatives not per se defamatory*
- *Listing a sender of unsolicited bulk commercial email ("spammer") on a webpage titled "Hall of Shame" by a recognised representative body in the internet service industry ("IRB") in the circumstances of the case is defamatory in its secondary meaning ("ie; innuendo")*
- *The Electronic Communications and Transactions Act 25 of 2002 ("ECTA") provides not only a legislative framework, including certain statutory offences, but also establishes a self-regulatory framework for information system service providers through the respondent association*
- *The defence of truth and public interest/benefit successful;*
 - o *Respondent able to demonstrate truth of content both under ECTA and the broader industry definition of spamming as applied in its code of conduct. Its code is part of the self-regulatory framework sanctioned under the Gazetted Guidelines for IRBs which itself provides that the*

industry rather than the State, should regulate and control both illegal and unacceptable conduct and content by internet service providers (“ISPs”).

For this reason the United States case of Omega World Travel Inc v Mummagraphics Inc 469 F.3d 348 (2006), which declined to uphold this defence because of the wording of the CAN-SPAM Act is not analogous.

- *Public benefit demonstrated by reference both to respondent’s status as a self-regulator under ECTA and the public interest it serves in dealing with spam as well as by reference to other legislation and regulatory instruments*
- *Defence of consent also upheld. Post-publication withdrawal of consent irrelevant. Consent not negated in circumstances of case, which includes the extremely limited nature of prejudicial consequences if spammer not afforded opportunity to make representations before relisting.*
- *Defence of qualified privilege raised but not considered*

CONSTITUTIONAL LAW

- *Applicant failed to set out facts demonstrating transgression of constitutional right to freedom of expression under section 16(1) (b) and, possibly on a purposive interpretation of section 22, a transgression of the freedom of trade in an extended sense; the applicant could not show that the listing inhibited it from disseminating commercial information via promotional material through the internet or that it would be incurring any extra cost.*
- *Accordingly unnecessary to consider competing constitutional rights of consumer (and ISPs) in respect of privacy and property under sections 14 and 25. Furthermore no constitutional challenge raised to s45 of ECTA or the provisions conferring self-regulatory powers to the respondent.*

INTERNET- Unsolicited emails

- *Role and function of industry representative body (“IRB”) and internet service providers (“ISPs”) and powers of self-regulation in context of internet messaging and SPAM*
- *Whether IRBs entitled to rely on defence of truth and public interest and defence of consent to defamation claim by sender of unsolicited bulk commercial email (“spammer”)- see **Defamation** above*