REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CAC CASE NO: 197/CAC/Nov21

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED. NO

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SIGNATURE **DATE: 05 April 2022**

In the matter between:

Life Wise (Pty) Ltd t/a Eldan Auto Body Appellant

And

Competition Commission of South Africa Respondent

JUDGMENT

MANOIM JA (Victor Acting JP and Savage AJA concurring)

[1] The appellant before us in this matter appeals a decision made by the Tribunal to refuse to amend a provision in a consent order the appellant (Eldan) had entered into with the Competition Commission (Commission).

[2] Eldan is the trading name of a small business, owned by historically disadvantaged persons, that is engaged in the provision of auto body repairs.

[3] Although the Commission was a party to the order it does not oppose the appeal.

[4] Eldan had entered into a consent agreement with the Commission in terms of section 49D (1) of the Competition Act, 89 of 1998, (the Act), in which it admitted it had contravened three provisions of the Act, relating to price fixing, dividing markets by customer allocation and collusive tendering.[1]

[5] When the Tribunal approves a consent agreement between the Commission and a respondent firm, it becomes an order of the Tribunal. [2] This means that despite the agreement being one between the Commission and the respondent firm, once the Tribunal has approved it, even if both parties seek to amend it, they cannot do so without the Tribunal approving it. Nor are the Tribunal's powers to amend its own orders unconstrained. An express power is given to the Tribunal to do so but in limited circumstances, in terms of section 66 of the Act. This jurisdiction is limited to errors and ambiguities in orders.

[6] Nevertheless, the Tribunal has previously found that like a High Court it can amend one of its own orders if a respondent firm is suffering hardship due to changed circumstances *(Foskor)*[3] or where there are exceptional circumstances *(Ferro*)[4]. In its *Ferro* decision the Tribunal explained that:

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[1] The collusive tendering involved cover quoting, a practice where the competitors collude over the outcome of a tender. The firm that they agree will lose the tender, submits a higher quote than the other, giving the false impression that the lower price is a competitive price.

[2] Section 49D (1) read with section 58(1)(b).

[3] *Foskor (Pty) Ltd and Competition Commission, Omnia Group (Pty) Ltd And Others,* case number: CO037Aug10/VAR240Feb16 paragraph 69-71. Foskor was an excessive pricing case.

[4] *Ferro South Africa and Others v At/and Chemicals CC and Othe*rs. LM 179Jan14NAR 152 Nov 16.

"*exceptional circumstances means unusual or unexpected circumstances*"[5]. In the present case the Tribunal has used the test of exceptional circumstances.

[7] The exceptional circumstances test derives from a decision of the Constitutional Court in the case of *Molaudzi v S*. There the Court held that where a significant or manifest injustice would result if a court order would be allowed to stand, the *res judicata* doctrine could be relaxed in "*rare and exceptional circumstances where there is no alternative effective remedy".* [6]

[8] Of course as a creature of statute, the Tribunal, unlike a High Court, does not exercise an inherent power in terms of section 173 of the Constitution, the section relied on by the Court in *Molaudzi*. The Tribunal's solution has been to read this power into the discretion conferred upon it in terms of section 27(1)(d) of the Act.

[9] That section states:

27. Functions of Competition Tribunal. *— (1) The Competition Tribunal may—*

…..

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.

[10] Thus preventing an injustice where exceptional circumstances are made out, would, in the Tribunal's reasoning, as I understand it, constitute a basis for an order, necessary or incidental to the performance of its functions.

[11] This court has not been previously asked to consider whether the Tribunal can rely on this power to amend one of its orders in those

[5] See Ferro, ibid, at paragraph 37. *Ferro* was a merger case where the conditions required the merged firm to grant a third party a toll manufacturing agreement. The merging party sought later to vary this condition due to a dispute with the third party over its alleged misappropriation of confidential information. Unlike in *Foskor* the Tribunal here held the dispute was a private one and refused to vary the order.

[6] 2015 (8) BCLR 904 (CC) at paragraph 45, where the Court stated*: "Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy."*

circumstances. [7] Since this matter is before us on an unopposed basis, it would not be appropriate for us to decide the point without the benefit of full argument by the Commission. But it is not necessary for us to do so in the present case, because the Tribunal did not exercise this power to amend its order.

[12] What remains for us to decide is whether, the Tribunal correctly exercised its discretion in refusing the amendment, assuming it had this power.

[13] The Tribunal also had to decide a further jurisdictional point; whether it could grant a consent order if the respondent firm had not made an admission that it had contravened the Act? Here again the Tribunal found, based again on its past jurisprudence, that it could.

[14] This means that the success of this appeal does not turn on any jurisdictional error by the Tribunal, since both jurisdictional issues were decided in favour of Eldan. The question is whether the Tribunal correctly found that Eldan had not made out a case for an amendment to the consent order based on exceptional circumstances.

Background

[15] In 2014 the Commission initiated an investigation into collusion between Eldan and a competitor, Precision and Sons (Pty) Ltd. After some unsuccessful preliminary skirmishes against the Commission on procedural grounds, not germane to the present application, Eldan and the Commission entered into a consent agreement.

[16] In line with the manner in which the Commission structures its consent agreements the first paragraph contains definitions, followed by a second in which, inter alia, the conduct alleged to have been engaged in by the respondent firm is set out. In the third paragraph, headed "*Admissio*n*"*, Eldan

[7] There are other decisions both in this court and the Constitutional Court in respect of section 27(1)(d) which suggest the Tribunal enjoys a wide remit under this section to grant declaratory relief. See *Competition Commission v Hosken Consolidated Investments and another* (CCT296/17) 2019(3) SA 1 (CC) and *Hosken Consolidated Investments Limited and Tsogo Sun Holdings v CC* Case number 154/CAC Sep17.

made an admission that it had engaged in conduct that contravened section 4(1)(b)(ii) of the Act.

[17] The remainder of the order contains undertakings by the firm as to its future behaviour and then provision for it to pay an administrative penalty of R 750 000.

[18] When the agreement first served before the Tribunal, the panel queried why the admission by Eldan was confined to subsection 4(1)(b)(ii), when the factual background contained in the second part of the agreement, suggested that it had also contravened subsections 4(1)(b)(i) and (iii).

[19] The Commission and Eldan then concluded an addendum to the consent agreement, which now included an admission in paragraph 3, that Eldan had contravened subsections 4(1)(b)(i), (ii) and (iii).

[20] It was this amended version of the consent agreement that the Tribunal then confirmed on 12 August 2020.

[21] In September 2020, Eldan applied to the Tribunal to vary its order by the excision of paragraph 3, i.e. the paragraph containing the admission of the contraventions. It did not seek the excision of any other paragraph in the order.

[22] The primary reason for the application was that shortly after the confirmation of the order, Mercedes Benz, a firm that represented a sizeable portion of Eldan's panel beating business, announced that its accreditation as one of its repairers, had been terminated based on the contravention of section 4(1)(b) of the Act Eldan brought an urgent interdict in the High Court to prevent this cancellation but was unsuccessful. The parties then reached a settlement which was made an order of court in which Eldan acknowledged that Mercedes Benz was entitled to cancel the agreement between the firms, by 31 November 2020.

[23] Cancellation of other customers' business followed thereafter. Included amongst them were insurance companies from whom Eldan obtained business.

Eldan's contentions

[24] Eldan argued before the Tribunal that this cancellation by its major customers had caused unforeseen harm that was highly prejudicial to its business and occasioned great hardship.

[25] Eldan also relied on a public interest argument. It contended that it is a small business, owned by historically disadvantaged individuals (HDI's) and the cancellation of this business will likely lead to its exclusion from the market. Since the inclusion of businesses of this class in a market is a goal of competition policy, Eldan argued that this consequence constituted a separate ground justifying the excision of the admission. The Competition Commission filed an affidavit in support of the application for rescission echoing its contentions about the effect on public interest grounds. This was a surprising *volte face* given the history of the matter. According to Eldan it was the Commission that had originally insisted on the inclusion of the admission. [8]

[26] Finally, Eldan contended that at the time it entered into the consent agreement it was unrepresented. It was thus not advised that an admission was not a requirement for consent agreement to be valid.

Approach of the Tribunal

[27] The Tribunal rejected all three grounds. It had little sympathy with Eldan's argument that it had not been legally represented at the time that it had entered into the agreement. It noted that Eldan had already disclosed that it had incurred one million rand in legal costs in the proceedings before the Tribunal in certain interlocutory applications, and then in an aborted appeal to the CAC. Then following the conclusion of the consent order, Eldan, as I noted earlier, engaged legal representation to represent it in the High Court in litigation against Mercedes Benz. The Tribunal was correctly unconvinced that

[8] Eldan's deponent states in his founding affidavit that *"Notwithstanding that Eldan had never admitted to the commission of the prohibited conduct which it stood accused of, the Commission required Eldan to sign the consent agreement containing this term. Eldan understood that there would be no settlement unless I signed the consent agreement presented by Commission."*

Eldan could be regarded as an indigent litigant. Moreover, it is worth noting that the decision to sign a consent order with an admission has certain advantages to a firm. It may result in a lower administrative penalty and more favourable terms to the firm than if it refused to make the admission. It is thus by no means conclusive that lack of legal representation at the moment of signing led to a sub-optimal legal decision.

[28] The Tribunal also rejected the argument that the cancellation of customer contracts amounted to exceptional circumstances. Quoting from the *Molaudzi* case the Tribunal held that to justify a departure from the res judicata principle the circumstances have to be "…*truly exceptional" .*[9] the Tribunal reasoned that there was nothing exceptional about a customer cancelling a contract even if the extent might not have been foreseen.

[29] The Tribunal also rejected any inconsistency with its prior decisions to amend its orders which Eldan had relied upon. The Tribunal made the point that these cases involved behavioural remedies that had been imposed on the firms on the assumption that the market conditions which justified the conditions at the time the orders were made, would prevail in the future. But with time market conditions had changed. There was no longer a rationale for the conditions to prevail. Constraining the firms' market behaviour to comply with the conditions was pointless and might even be inimical to competition. In such cases the change in market conditions constituted exceptional circumstances unforeseen at the time of their imposition.

[30] Quite rightly the Tribunal held that this is not the case with the present consent order. That customers would decide to terminate the services of a firm involved in collusion is wholly predictable. Collusion leads to firms paying higher prices and getting degraded service. That a customer finds such conduct intolerable and a betrayal of fair dealing should come as no surprise.

[31] Nor is it an exceptional hardship on the contravening firm that they do so. That conduct contravening the Act, leads to private consequences in

[9] Tribunal reasons, paragraph 39. Record page 124.

addition to public enforcement remedies is not novel. Persons who face criminal convictions will frequently be faced with private opprobrium in the sense that people may no longer wish to employ them or use their services. The fact that this happens does not merit revisiting the criminal sanction as something leading to exceptional circumstances. The same applies to admissions concerning collusion. Collusive activity is the most reviled conduct in terms of the Act. Firms which engage in such activity need to appreciate that if they do so the consequences will be severe.

[32] In any event it is difficult to understand why the excision of the admission would make a difference to customer attitudes. The conduct that Eldan is accused of remains extant in paragraph 2 of the consent agreement. Customers concerned will be able to read what is stated and draw their own conclusions. Whether the admission is excised or not is unlikely to change their attitude. Eldan appears to concede this, but argues that without the admission of guilt, it will be easier for it to be able to persuade customers to resume using its services. That is highly speculative. Eldan is more likely to be successful in regaining the confidence of its customers if it can show that the firm has changed its ways and now offers competitive pricing, better service or both. It is change in behaviour of substance not a cosmetic alteration of an order that will matter.

[33] Finally, the Tribunal rejected Eldan's public interest argument. The Tribunal correctly pointed out that even if Eldan exits the market this does not mean it will not be replaced by another SMME or HDI firm.

[34] But it is important not to confuse two issues. The public policy in the Act to promote small and HDI businesses is aimed at preventing such firms from being excluded by anticompetitive behaviour. It is entirely a different matter to argue that this policy of inclusiveness justifies ameliorating the consequences of anticompetitive behaviour of firms that fall into this class. The Tribunal correctly rejected this argument as well.

Conclusion

[35] The Tribunal's decision to refuse the application for variation of its order to excise the admission contained in paragraph 3 has been properly reasoned. There is no basis made out for this court to come to any different conclusion. The appeal is dismissed. Since the matter was unopposed it is not necessary to decide on costs.

Order

1.The appeal is dismissed.

2. There is no order as to costs.

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N MANOIM JA

I concur

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M VICTOR JA

pp.

I concur

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K SAVAGE AJA

pp.

Counsel for the appellant: Advocate S. Cohen

Instructed by: Thompson Wilks

Heard on: 04 March 2022
Delivered on: 08 April 2022