

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR024May15/DSM093Aug19

In the dismissal application matter between:

PRECISION & SONS (PTY) LTD

Applicant

v

THE COMPETITION COMMISSION

First Respondent

And

ELDAN AUTO BODY CC

Second Respondent

In re the complaint referral between:

THE COMPETITION COMMISSION

Applicant

v

ELDAN AUTO BODY CC

First Respondent

And

PRECISION & SONS (PTY) LTD

Second Respondent

Panel	: Enver Daniels (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Andreas Wessels (Tribunal Member)
Heard on	: 14 November 2019
Order issued on	: 18 November 2019
Reasons issued on	: 13 December 2019

REASONS FOR DECISION

Introduction

- [1] We have been called to determine whether the Competition Commission's complaint referral ought to be dismissed on the basis that it failed to secure the attendance of its key factual witness, Mr Gibson Homan to give oral testimony in complaint proceedings at the Tribunal which were originally to commence on 27 March 2017.
- [2] Mr Homan is a Zimbabwean citizen who, at the time, had sought asylum and refugee status in the United States ("US") and would not return to South Africa as he would risk being denied entry back into the US.
- [3] The dismissal application has been brought by the applicant, Precision & Sons (Pty) Ltd ("Precision"), the second respondent in the main matter. The second respondent, Eldan Auto Body CC ("Eldan"), is the first respondent in the main matter and filed its answering affidavit in support of the relief sought by the applicant.
- [4] On 22 October 2019, Eldan filed a notice to abide by the Tribunal's decision.
- [5] The Commission opposed the relief sought.
- [6] On 14 November 2019, we heard the parties' arguments on this issue. In the interests of time, given the extensive delays that have occurred in the attempted prosecution of the merits of this case, we issued an order on 18 November 2019 dismissing Precision's application in favour of the Commission. Our order is attached to these reasons hereto marked Annexure "A".

Factual background

- [7] Precision and Eldan are certified Mercedes Benz autobody repairers and provide their services to insured and uninsured customers in Pretoria.
- [8] On 25 May 2015, the Commission referred a complaint to this Tribunal against Eldan and Precision wherein it alleged that they engaged in collusive tendering, alternatively price fixing and market division in the market for the provision of

autobody repairs, panel beating and spray painting in contravention of section 4(1)(b) of the Competition Act 89 of 1998, as amended ("the Act").¹

- [9] The hearing was set to commence on 27 March 2017.
- [10] The hearing was originally set down for five days. The Commission, however, notified the parties the day before the hearing that Mr Homan, the Commission's key witness, could not travel to South Africa to give his testimony, as his travel documents did not comply with the entry requirements of South Africa. Eldan and Precision were of the view that the Commission knew that Mr Homan would not be able to attend the hearing and, therefore, misrepresented itself when it stated that this issue only came to its knowledge the day before the hearing.
- [11] Having heard the parties on the issue, the Tribunal postponed the matter to an undetermined future date.
- [12] In the following year, on 14 May 2018, the Commission indicated that Mr Homan had obtained his US travel documents to attend a hearing on a date to be agreed upon by the parties. It was brought to our attention and to the attention of the parties that Mr Homan's travel documents would be valid for a period of one year and would expire on 1 March 2019.
- [13] On 10 September 2018, a pre-hearing was convened as the parties could not agree on an earlier hearing date due to some or other difficulty expressed by Eldan. In view of the expiry date of Mr Homan's travel documents, it was agreed that a hearing would take place on 21 and 22 February 2019 and that only Mr Homan would testify on those dates. In order to ensure that Mr Homan was able and willing to attend the hearing, the Commission was directed to confirm by 31 October 2018 that Mr Homan would indeed attend the hearing. In addition, the Commission was warned by the Tribunal that no further extensions would be granted. As per the directive, the Commission confirmed Mr Homan's attendance.
- [14] On 21 February 2019, the Commission informed the parties and the Tribunal that Mr Homan failed to board his flight from the US to South Africa to give his oral testimony as directed. The Commission, as a result, made an application to the

¹ Case number CR024May15.

Tribunal for another postponement of the matter. The Commission called Mr Fhatuwani Mudimeli, the Commission's investigator in the matter, to give evidence on why Mr Homan was prevented from traveling to South Africa and the various steps the Commission took when it learned of the travel difficulty confronted by Mr Homan.

- [15] The Commission submitted that in its understanding Mr Homan was unable to travel due to new travel regulations which meant he could only travel to South Africa six months prior to the expiration of his travel documents. As previously mentioned, Mr Homan's travel documents were due to expire on 1 March 2019. There was some debate around these "new" travel regulations between the parties. However, the Tribunal was left in doubt about which regulations actually applied at the time.
- [16] At the hearing, however, it emerged that Mr Homan had travelled to South Africa in December of 2018 for his own personal engagements which cast doubt on the so called "new" travel regulations relied on by the Commission. The Commission also explained to us that it did everything in its power to ensure that Mr Homan boarded the flight to South Africa, including driving to the airport to speak to immigration officials to explain that Mr Homan was a crucial witness in the hearing and that his attendance was of utmost importance. The Commission also indicated that it would take another 90 days for Mr Homan to obtain new travel documents.
- [17] After hearing the parties' submissions on 12 April 2019, the Tribunal granted the postponement application in the Commission's favour given that (i) Eldan and Precision did not provide us with evidence that the financial prejudice outweighed any other facts when a postponement is sought; (ii) Eldan and Precision were accused by the Commission of collusion in contravention of the Act and therefore these allegations had to be fully ventilated in the public interest and to give Eldan and Precision an opportunity to fully defend themselves and; (iii) the delay could not be attributed solely to the Commission in light of the unavailability of Eldan in order to have the matter heard earlier.²

² See reasons for decision: *Competition Commission v Eldan Autobody CC and Another* (CR024May15/PPA259Feb19) paras 34-36.

- [18] In the order issued by the Tribunal, the Commission was required to confirm by no later than 31 July 2019 that Mr Homan had obtained his travel documents and would be able to travel to South Africa. Should the Commission fail to do so, Precision and Eldan would be entitled to seek a dismissal of the Commission's referral.
- [19] On 30 July 2019, pursuant to our order, the Commission notified us that Mr Homman had *not yet* received his travel documents but that he was going to obtain them shortly.
- [20] On 15 August 2019, Precision filed its dismissal application. Eldan filed its answering affidavit in support of the dismissal. The Commission did not file an answering affidavit in the prescribed time, which prompted Precision to request the Tribunal to set the matter down for hearing.
- [21] On 1 October 2019, at a pre-hearing Precision asked the Tribunal to set the matter down for hearing as soon as possible. It was then that we were notified that Mr Homan had finally received his travel documents and could therefore travel to South Africa and the Commission undertook to ensure that he would do so. Precision cautioned that this undertaking by the Commission should be "*taken with a large amount of salt*", because the Commission had on prior occasions made similar promises. Be that as it may, the Tribunal issued a directive allowing the Commission to file an answering affidavit by 15 October 2019 and Precision to file a reply by 21 October 2019 if it chose to do so. The dismissal application was set down for 14 November 2019.³

The dismissal application

- [22] The applicant sought the following relief pursuant to its notice of motion:⁴

" ...

2. *The proceedings brought by the Competition Commission on 25 May 2015 against the applicant and Eldan Auto Body CC... are permanently stayed.*
In the alternative to prayer 2 above:
3. *The Competition Commission's case against the applicant and second respondent is declared closed, and the complaint against them is dismissed.*

³ See Trial record (R), page (pg.) 222.

⁴ R, pg. 3.

4. Any further appropriate relief.”

- [23] What Precision effectively seeks is equivalent to a permanent stay of prosecution.
- [24] The primary basis for this application is that the Commission had not complied with the Tribunal's order to secure Mr Homan's attendance on or before 31 July 2019.
- [25] Secondly, Precision argued that the delay in the hearing of the complaint is unreasonable and inexcusable and that the proceedings of the Tribunal have been abused by the Commission. In addition, the Commission's undertaking to secure Mr Homan's attendance should not be given much weight because on previous occasions the Commission had failed to do so.
- [26] Thirdly, the Commission made itself guilty of a range of abusive steps during the Tribunal proceedings.
- [27] Fourthly, the delay in the finalisation of this matter has caused significant financial and trial prejudice to the applicant and Mr De Sousa (the sole shareholder of the applicant) and his wife. The Commission's referral has also caused Precision reputational harm.
- [28] Precision also averred that the public interest would be served if the Commission's referral was dismissed. The Tribunal, in accordance with the principles espoused in the Constitution of the Republic of South Africa, 1996 ("the Constitution"), is obliged to conduct the hearing as expeditiously as possible and the Commission has a constitutional obligation to conduct its cases expeditiously. The same obligation is imposed on the Tribunal by section 52 of the Act to conduct the hearings as expeditiously as possible. It is not, however, in the public interest for justice to be delayed or for a legal entity to wait that long to have its day in court. The mere litigation then becomes a tyranny of sorts that should not be countenanced.
- [29] Eldan, in its answering affidavit and in support of Precision's averments submitted that there has been an unreasonable and inexcusable delay on the part of the Commission by virtue of the fact that it has the obligation to manage its cases and to ensure that its witnesses are present to attend the hearing. By acting in the manner that it has, the Commission has violated Precision and Eldan's legitimate

rights and interests. As a result of protracted proceedings, it has suffered enormous prejudice which includes, financial, reputational and evidential prejudice.

- [30] In its defence, the Commission contended that Precision and Eldan have not shown exceptional circumstances to justify the dismissal of its complaint. On 1 October 2019, during the pre-hearing, Eldan and Precision were alerted to the approval of Mr Homan's travel documents. The Commission made a proposal to the parties that a hearing date be set in order to hear the merits instead of hearing this dismissal application. However, Precision wanted to pursue this application.
- [31] In order to secure Mr Homan's attendance, the Commission did everything in its power to ensure that Mr Homan obtained his travel documents, including following up on Mr Homan's application; sending further requests to expedite his application and making funds available to Mr Homan to apply for his travel documents and visa. Even though Mr Homan failed to obtain his travel documents in time, as envisaged in the Tribunal's decision, this was not the Commission's fault but was due to the internal processes of the US Government. This delay was unforeseen.
- [32] In addition, the cause of the delay ought not to be laid solely at the door of the Commission, because the Commission has endeavoured to secure the attendance of the witness. The public interest would therefore not be served by dismissing the Commission's referral of allegedly a serious contravention of the Act. Precision and Eldan have been accused of contravening section 4(1)(b) of the Act and, therefore, the public interest requires the main matter to be adjudicated to either confirm the Commission's complaint or to exonerate Precision and Eldan.
- [33] The Commission also argued that Precision and Eldan have failed to establish prejudice. In other words, they have not shown how the issue of delay has tainted the overall substantive fairness of the hearing in a manner that cannot be remedied.
- [34] Mr Homan has now obtained his travel documents and can attend the hearing. The matter, therefore, should be heard on the merits and that would serve the public interest.

- [35] We now turn to consider the two issues, namely, whether Precision and Eldan would suffer any prejudice if the dismissal application was dismissed and whether such prejudice would outweigh the public interest in having the trial commence.

Analysis

- [36] Section 52(2) of the Act enjoins the Tribunal to conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice. In contrast to ordinary civil proceedings, the proceedings of this Tribunal involve the public interest and under the Act, the Tribunal is given an active role in protecting that interest.⁵
- [37] Where a court in ordinary civil court proceedings is called to determine whether a *permanent stay* of proceedings (which are akin to a permanent dismissal) ought to be granted in favour of the applicant, it must show the following: (i) there is delay in prosecution of the action; (ii) the delay is inexcusable; and (iii) that the applicant is seriously prejudiced thereby.⁶
- [38] It is common cause and accepted that there has been a delay in the prosecution of this matter. It seems clear from the unfortunate circumstances of the matter, that the delay in the commencement of the merits cannot be solely attributed to the Commission. Mr Homan resides in the US which has to issue the travel documents. Mr Homan is not automatically entitled to those by virtue of his refugee status in the US but must make a formal application to the relevant authorities for such documents. That application has to be considered in accordance with the applicable US laws and regulations. The approval of Mr Homan's travel documents has to be made by the US immigration authorities and neither the Commission nor Mr Homan has any control over that process.
- [39] It would appear from the documentation presented by the Commission and made available to the parties, that Mr Homan was willing to testify on behalf of the Commission, and for that purpose to do all things necessary to obtain the required travel documents. A pertinent fact which we cannot ignore is that Mr Homan has now obtained his travel documents. We must accept that securing the attendance of a witness who has refugee status in another country does have various

⁵ *Competition Commission v Senwes Ltd* [2012] ZACC 6.

⁶ *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) para 11.

difficulties. We are also mindful of the fact that the Commission was not entirely at fault and had not been cavalier in its conduct and attempts to secure Mr Homan's attendance.

- [40] Regarding the issue of prejudice, Precision submitted as a result of the Commission's referral that it has suffered reputational harm and if this referral were to proceed, it would suffer trial prejudice because one of its key witnesses has retired from the automotive repair business and is of an advanced age. Memories also fade after a period of time.
- [41] In our view, the trial prejudice in this matter would not be so material as to adversely affect Precision and Eldan. Mr Homan is in possession of his travel documents and the parties may now proceed to a hearing of the merits. In this instance, the prosecution of this case has taken approximately 3 years. This period of time is not unusual in matters of this nature and cannot be said to justify the dismissal of a complaint under section 4(1)(b), especially as the Commission was not solely responsible for the delay. If the hearing were to proceed, Eldan and Precision would be given an opportunity to defend and exonerate themselves from the charges brought against them by the Commission and to restore the reputational damage they claim to have suffered.
- [42] During the hearing this was canvassed with Precision. The Tribunal postulated that it may be appropriate for the Tribunal to set down the matter as soon as possible and to conduct the hearing on the merits without any further delays, rather than not hearing the matter at all. Precision submitted that the doors should be closed to the Commission permanently because in its view Mr Homan would not attend the hearing.
- [43] In *Kuiper and others v Benson*,⁷ the court had to determine whether the respondent had been solely responsible for the delay in prosecuting his defamation claim (the main trial) and whether in the circumstances, his claim ought to be permanently dismissed. The court found that the conduct of the respondent as well as his inaction in the circumstances were not tainted as to amount to an abuse of process or warrant a dismissal of his claim. The court ordered, *inter alia*, that the main trial

⁷ 1984 (1) SA 474 (W).

proceed. In other words, the preferred remedy was a *mandamus* on the merits to proceed.⁸

- [44] In our view, the circumstances of this matter do not warrant a dismissal of the Commission's case and that the main matter must proceed. It would serve both the public interest and the interests of the respondents for the matter to be heard on the merits, especially as serious allegations have been made against the respondents. As acknowledged in the competition law jurisprudence, the types of conduct captured under the provisions of section 4(1)(b) are arguably some of the most egregious offences under competition law.⁹

Conclusion

- [45] Having regard to the all the facts in this matter, we are of the view that the public interest would be better served if the Commission were required to proceed with its case on an expedited basis. In doing so, our order sets out the steps the parties must take to achieve this objective.
- [46] No further postponement of the matter will be allowed in the event that Mr Homan is not able to give evidence on the date of the hearing.



Presiding Member
Mr Enver Daniels

13 December 2019
Date

Concurring: Ms Yasmin Carrim and Mr Andreas Wessels

Tribunal Case Manager : Ndumiso Ndlovu

For the Applicant : R Mastenbroek instructed by Mpoyana Ledwaba Inc.

For the First Respondent : M Nxumalo instructed by Ndzabandzaba Attorneys

⁸ Ibid page 477.

⁹ *Patensie Sitrus Beherend Bpk v Competition Commission and others* (37/CR/Jun01). See also *Reinforcing Mesh Solutions (Pty) Ltd and others v Competition Commission and others* (119/120/CAC/May 2013).



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Case No.: CR024May15/DSM093Aug19

In the dismissal application between:

Precision & Sons (Pty) Ltd

Applicant

and

Competition Commission

First Respondent

Eldan Auto Body CC

Second Respondent

Case No.: CR024May15

In re complaint referral between:

Competition Commission

Applicant

and

Eldan Auto Body CC

First Respondent

Precision & Sons (Pty) Ltd

Second Respondent

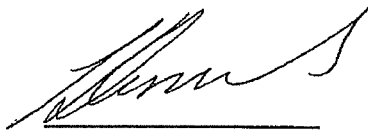
Panel	: E Daniels (Presiding Member)
	: Y Carrim (Tribunal Member)
	: AW Wessels (Tribunal Member)
Heard on	: 14 November 2019
Decided on	: 18 November 2019

ORDER

KINDLY TAKE NOTICE THAT after hearing the parties in the matter above, the Competition Tribunal orders as follows:

1. The applicant's dismissal application under case number CR024May15/DSM093Aug19 is hereby dismissed.
2. There is no order as to costs.

3. Reasons for decision will follow.
4. The parties must make necessary arrangements in obtaining a date for a pre-hearing at which the following issues must be resolved:
 - 4.1 The Competition Commission ("Commission") must state whether it will be relying on the evidence of Mr Gibson Homan ("Mr Homan") and / or will lead Mr Fhatuwani Mudimeli as a factual witness; and
 - 4.2 Hearing dates for the main matter (case number CR024May15) to be decided on an urgent basis, which will be at the convenience of the Tribunal and not dependent on the availability of Mr Homan or counsel of the Commission or the respondents.



**Presiding Member
Mr Enver Daniels**

18 November 2019
Date

Ms Yasmin Carrim and Mr Andreas Wessels concurring.