THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018655

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**Applicant**
and	
MARLEY PIPE SYSTEMS (PTY) LIMITED	**First Respondent**
COMPETITION COMMISSION	**Second Respondent**

Panel	:	Yasmin Carrim (Presiding Member) Andiswa Ndoni (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	:	23 April 2014
Order issued on	:	03 June 2014
Reasons issued on	:	03 June 2014

Decision and Order

Introduction

[1] This is an application for costs in terms of Section 57(1) of the Competition Act 89 of 1998 ("the Act") read with Rule 50(3)(b) of the Tribunal Rules.

[2] The Applicant is the National Union of Metalworkers of South Africa ("NUMSA"), a trade union recognised as such in terms of the Labour Relations Act 66 of 1995 ("the LRA") and in terms of section 1 of the Act. The Applicant approached the Tribunal to hear the cost application

without any written submissions as the first Respondent withdrew its review application at short notice, as discussed below. The Respondents did not object to the non-filing of written submissions.

[3] The First Respondent is Marley Pipes Systems (Pty) Limited ("Marley"), a manufacturer and distributor of plastic pipes and fittings for reticulation systems and subsidiary of the Aliaxis Group (a global plastic solutions company).

[4] The Second Respondent is the Competition Commission ("Commission"), which is simply cited as a Respondent for purposes of its interest in the matter. The Applicant did not seek wasted costs against the Commission.[1]

Background

[5] On 29 November 2011, this Tribunal approved an intermediate merger between Marley and Petzetakis Africa (Pty) Ltd subject to an employment condition that Marley should within a period of 6 (six) months after the acquisition date employ 311 (three hundred and eleven) employees who were in Petzetakis's employ at the date upon which Petzetakis ceased trading.

[6] The merger was approved subject to a further condition that the Commission may on good cause shown by the merging parties, lift, revise or amend these conditions.

[7] In accordance with the condition in paragraph 5 above, on 14 June 2013 Marley approached the Commission to reduce the number of former Petzetakis employees that Marley would be obliged to re-employ

[1] See Transcript of Hearing at page 2.

from 311 (three hundred and eleven) to 230 (two hundred and thirty) employees.

[8] After re-assessment of Marley's request, the Commission concluded that the revision or amendment of the relevant merger condition did not meet the threshold of good cause shown as prescribed in the conditions. As a result Marley's request was not granted.

[9] Following the Commission's refusal to amend the condition, Marley filed an urgent review application to the Tribunal, which is the subject matter of this cost application.

Marley's Review Application

[10] On 26 March 2014, Marley filed an application to the Tribunal for the review of the Commission's refusal to revise the employment condition referred to in paragraph 4 above. In this application, the Commission and NUMSA were cited as first and second respondent respectively.

[11] In its application, Marley requested the Tribunal to direct the Commission to pay its wasted costs, and for NUMSA to pay costs only in the event of it opposing the review application.

[12] The review application was set down for hearing on 23 April 2014, and was withdrawn one day before the hearing (due to public holidays), hence the cost application was heard without written submissions. The notice of withdrawal was filed on 17 April 2014.

[13] At the time of the withdrawal of the application NUMSA had filed an answering affidavit and a supplementary answering affidavit dealing extensively with the facts as well as issues of law raised by Marley in its application.

[14] The reason for the withdrawal of the application we were told was as a result of a decision by the Commission to review the employment condition.

Current Cost Application

[15] The Applicant in the cost application is seeking an order for its wasted costs against Marley. The Applicant submits that it is trite that a party that is responsible for aborted proceedings is responsible for the costs of the opposing parties.

[16] The Applicant further submitted that it went to great lengths to assist the Tribunal with its opposing papers and should be entitled to its costs for the withdrawal of the review application by Marley.[2]

[17] The argument put up by Marley was two-fold. In the first instance it was argued that section 57(2) limited the Tribunal's powers to award costs only in a hearing of a complaint between a complainant and a respondent that have been referred to it in terms of section 51(1).[3] Marley relied upon the recent judgement of the Constitutional Court in *Competition Commission v Pioneer Hi-Bred*[4] in support of this contention. Second, and if the Tribunal held that it was empowered to grant costs as a matter of law, it ought not to exercise its discretion in the circumstances of this case to award costs against Marley.

[18] Marley had not acted *mala fide* in withdrawing the application. Rather the review application was rendered moot by the settlement agreement that it had reached with the Commission. It had withdrawn the application in order to not waste the Tribunal's and the parties' time for relief that had been rendered unnecessary by the settlement agreement

[2] See page 10 of the Transcript of the hearing.
[3] Such a referral can be made by a complainant whose complaint has been non-referred by the Commission.
[4] Competition Commission and Pioneer Hi-Bred International Inc & Others, Case no: CCT 58/13 [2013] ZACC 50.

reached with the Commission. Marley submitted that in the exercise of its discretion, the Tribunal should order that each party pays its own costs.

[19] However given our decision to not award costs against Marley on the basis of the facts of this case, we find it unnecessary to deal with jurisdictional points raised by Mr Wilson on behalf of Marley.

[20] As a general rule the Act encourages participation in our proceedings.[5] Registered trade unions are afforded special rights of participation because they are legally entitled to receive notification of a merger under section 13(A)(2)(a) of the Act. The Tribunal welcomes such participation and would not seek to discourage unions from acting on behalf of their members' interests in our proceedings. At the same time this case does present unique facts.

[21] The reason for Marley's withdrawal stems from the fact that the Commission at the last minute agreed to review the conditions that had been imposed on the Marley/Petzetakis transaction. The application to review the condition launched by Marley with the Tribunal was rendered moot because it had obtained the relief it had sought through the Commission's offer. Correspondence between Marley's legal representatives and the Commission confirms that exploratory discussions about a settlement took place 10 (ten) days before the scheduled hearing.

[22] Unfortunately as between the legal representatives for Marley and the Commission the responsibility to include NUMSA in these discussions was left to the Commission. The Commission wrote to NUMSA's legal representatives advising of the possibility of a settlement on 11 April 2014(which was 10 (ten) days before the hearing). NUMSA's legal

[5] See section 53 of the Competition Act.

representatives were aware that the Commission and Marley were in settlement discussions, and that the review application could possibly be withdrawn. NUMSA persisted in filing its supplementary answering affidavit on17 April 2014 without first enquiring if a settlement had been reached.

[23] In our view it would have been preferable had Marley's legal representatives taken responsibility for contacting NUMSA's lawyers directly and had done so speedily and not relied on the Commission to do so. NUMSA had after all been joined as a respondent by Marley and not by the Commission. At the same time we give due regard to the fact that the withdrawal by Marley was *bona fide*.

[24] In *Serwada v Minister of Home Affairs* [6] the court held that:

24.1"*Ordinarily a party who withdraws his or her application is considered as having conceded the merits and thus is obliged to make tender of the costs. In this case what triggered a withdrawal of the application was a response by the respondent which satisfied the relief sought in a way that exonerated the court from making a determination whether or not the passport and temporally residence certificate should be returned to the applicant. Yet it was argued strenuously on behalf of the respondent that the applicant must not only bear its own costs but that he must pay the costs of the respondent as well. It seems to me that the Court is not confronted with an ordinary situation of a concession on the merits made through the withdrawal of the application. That the withdrawing party should bear the costs cannot be regarded as a hard and fast rule in the circumstances of this case.*"[7]

[6] Serwada v Minster of Home Affairs [2011] JOL 27643 (ECM)
[7] Ibid

[25] Furthermore, NUMSA's legal representatives had been notified of the settlement and made aware of the possibility of a withdrawal at least 10 (ten) days before the hearing. However, given that the settlement discussions themselves had commenced at a very late stage the timing of the notification does not seem unreasonable to us.

Conclusion

[26] We agree with Marley's submissions that the withdrawal of the review application is not a concession on the merits.

[27] The review application has been rendered moot by the settlement agreement reached with the Commission, and as such it would be neither fair nor logical for Marley to continue with an application which has become futile by reason of the settlement agreement.

[28] In exercising our discretion to award costs, we have to exercise our discretion judiciously with due regard to all relevant considerations.

[29] While we acknowledge and appreciate the role played by NUMSA in assisting the Tribunal with its submissions in the review application, for the reasons stated above, justice and fairness dictates that each party should pay its own costs. We therefore dismiss the cost application filed by NUMSA.

ORDER

1. The application for costs filed by the Applicant under case number 018655 is hereby dismissed.

PP

Ms ANDISWA NDONI

03 June 2014
DATE

Ms Yasmin Carrim and Ms Mondo Mazwai concurring

Tribunal Researcher:	Caroline Sserufusa
For the Applicant:	Adv Michelle Le Roux instructed by Hogan Lovells
For the First Respondent:	Adv Jerome Wilson instructed by Webber Wentzel
For the Second Respondent:	Bongani Ngcobo