COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR024May15/VAR133Sep20

In the variation application:

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

And

Competition Commission of South Africa Respondent

In re: the consent agreement between:

Case No: CR024May15/SA073Jul20

Competition Commission of South Africa Applicant

And

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

Panel:	Ms M Mazwai (Presiding Member) Mr E Daniels (Tribunal Member) Mr AW Wessels (Tribunal Member)
Heard on:	05 July 2021
Order Issued on:	08 November 2021
Reasons Issued on:	08 November 2021

REASONS FOR DECISION

Introduction

[1] This matter concerns an application by Life Wise (Pty) Ltd t/a Eldan Auto Body ("Eldan") to vary an order of the Competition Tribunal ("Tribunal") confirming a consent agreement between itself and the Competition Commission ("Commission"). The consent agreement relates to an alleged contravention of sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Competition Act, 89 of 1998, as amended ("the Act"). It was brought to the Tribunal by the Commission in terms of sections 58(1)(a)(iii) and 58(1)(b). We confirmed the consent agreement as agreed to between both parties as an order of this Tribunal on 12 August 2020.

[2] In this application, Eldan seeks to vary the Tribunal's order by means of the excision of clause 3 of the consent order, which contains an admission by Eldan to contravening sections 4(1)(b)(i),(ii) and (iii). In effect, Eldan seeks to withdraw its admission of cartel conduct in contravention of sections 4(1)(b)(i)-(iii).

[3] The Commission did not oppose the application. It made submissions in support of Eldan's application.

Background

[4] On 25 May 2015, the Commission referred a complaint to the Tribunal against Precision & Sons (Pty) Ltd ("Precision") and Eldan (collectively referred to as the "respondents") for alleged price fixing, market division and collusive tendering in the provision of auto body repair services, in contravention of sections 4(1)(b)(i), (ii) and (iii) of the Act.

[5] The complaint referral was based on the Commission's findings that from 2011, Eldan and Precision, being firms in a horizontal relationship – agreed, or alternatively engaged in a concerted practice, to directly or indirectly fix prices, divide markets by allocating customers to each other, and to tender collusively in

respect of the provision of auto repair services. This agreement was implemented through the exchange of cover quotes.[1]

[6] Eldan and Precision, at the time of the Commission's referral, were both certified original equipment manufacturer auto repairers for Mercedes-Benz South Africa Limited ("Mercedes Benz"); and provided their services to insured and uninsured customers in Pretoria.

[7] The hearing was due to commence on 27 March 2017. However, it suffered several setbacks pertaining to difficulties in securing a Commission factual witness living in the USA due to restrictions placed on the witness' travel documents as a refugee. The witness was a former employee of Eldan. The hearing was postponed on two occasions on account of the witness' inability to attend the hearing. Precision then applied to the Tribunal for the dismissal of the case, which was dismissed.

[8] Ultimately, the Commission's complaint referral culminated in the consent agreement between the Commission and Eldan, which was confirmed as an order of the Tribunal on 12 August 2020, and is the subject of this variation application.

[9] The salient terms of the consent order are set out below.

Consent Agreement

[10] The consent agreement bears the heading "*CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND LIFE WISE (PTY) LTD trading as ELDAN AUTO BODY IN RESPECT OF THE ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i), (ii) and (iii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED*" (emphasis added).

[1] A "cover quote" is defined in the consent agreement as: "a cover quote is exchanged by firms that agreed among themselves about which firm should win a tender and which firm(s) should lose a tender. A cover quote is a distinguished quotation ("a façade"), which is usually a higher price that is submitted by a firm that does not wish to win a tender. It is meant to give a false impression that the firm that eventually wins a tender is cheaper."

[11] Clause 2.3.1 provides that Eldan and Precision were party to an agreement, alternatively a concerted practice to directly or indirectly fix prices, divide markets by allocating customers to each other, and tender collusively in respect of the provision of auto repair services.

[12] Clause 2.3.2 records that the Commission's investigation revealed that Eldan and Precision:

i. coordinated their collusive arrangement through Vehicle Accident Assessment Centre ("VAAC") which renders vehicle assessment services to customers;[2]
ii. discussed how to collaborate when providing cover quotes to clients;[3] and
iii. discussed prices for auto body repair services including panel beating and spray painting.[4]
iv. Further, it records that there was regular contact between the employees of Eldan and Precision so that they could request cover quotes from each other.

[13] Clause 3 provides that "*Eldan admits that it engaged in the conduct set out in clause 2.3.1 to 2.3.4 above in contravention of section 4(1)(b)(ii)*" (emphasis added). Eldan also agreed to pay an administrative penalty in the amount of R750 000.00.

[14] In order to address this conduct in future, Eldan undertook to (i) fully cooperate with the Commission in the prosecution of this complaint; (ii) desist from the conduct described above; (iii) develop, implement, monitor and submit proof of a competition law compliance programme to prevent future contraventions; and (iv) circulate the summarised consent agreement to Eldan's management and operational staff within 60 days of the Tribunal's confirmation of the subject order.

[2] Consent Agreement clause 2.3.2.
[3] Consent Agreement clause 2.3.3.
[4] Ibid.

The Hearing

[15] The consent order was set down for 05 August 2020. It was heard in accordance with the Tribunal's Procedural Directive issued on 26 March 2020 for the hearing of matters during the national lockdown. According to the Directive, consent orders at the discretion of the Tribunal, may be decided by the panel on the papers.[5]

[16] Prior to the hearing, on 03 August 2020, the Tribunal informed the Commission and Eldan of the hearing date, and requested them to clarify the following:

> *"The Tribunal panel has considered the consent agreement entered into between the parties and requests that the parties motivate the following ... Why the respondent's admission is limited to section 4(1)(b)(ii) of the Competition Act (Act No 89 of 1998, as amended) when the Commission's findings [as recorded in clause 2.3.1] also relate to sections 4(1)(b)(i) and (iii) of the Act."*[6]

[17] In response to this enquiry the Commission provided that the "*omission was an oversight.*"[7] Thereafter, on 07 August 2020, the parties filed an addendum, indicating that Eldan admits to the conduct in "*contravention of section 4(1)(b)(i), (ii) and (iii) of the Act*" (emphasis added).[8] The addendum was signed by the Competition Commissioner and Mr Vinay Singh, Eldan's General Manger.

[18] Following this clarification, on 12 August 2020, the Tribunal approved the consent agreement with its addendum.

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[5] This directive applied inter alia to consent orders due to them being uncontested proceedings, and in terms of section 49D, not requiring the hearing of oral evidence.

[6] See email from Tribunal case manager to the Commission and Eldan dated 05 August 2020 of 09:17 "RE: Settlement Agreement: CC And Life Wise t/a Eldan Auto Body (CR024May15/SA073Jul20)".

[7] Letter sent by the Commission to the Tribunal on 6 August 2020.

[8] Consent Agreement Addendum signed on 7 August 2020.

The Basis for the Variation Application

[19] On 21 September 2020, Eldan made an application to the Tribunal, seeking the excision of all admissions of guilt contained in clause 3 of the consent agreement (read with the addendum). Eldan advanced three grounds for this.

[20] Firstly, Eldan alleged that following the Tribunal's order confirming the consent agreement, it was advised by Mercedes Benz that its accreditation to repair Mercedes Benz vehicles, which constituted the bulk of Eldan's business, would be terminated. This necessitated that Eldan seek out other means of earning revenue. However, Eldan found itself constrained in its efforts to stay afloat as other commercial partners and business associates had "*expressed reservation about conducting business with Eldan, ostensibly because of the conduct which was the subject of the consent agreement with the Commission".*[9] Consequently, Eldan has suffered hardship as a result of the admission contained in the consent order.

[21] Secondly, Eldan submits that throughout the settlement discussions with the Commission, it was not legally represented. Eldan states in its founding affidavit that it "*was not properly appraised nor did it have the foresight of the range of consequences that would flow upon the granting of the Tribunal order and, in particular, the admission of guilt*".[10]

[22] Eldan explains that that prior to settling the matter with the Commission, it had been involved in long protracted legal proceedings with the Commission which began with a search and seizure by the Commission at Eldan's premises, and included two interlocutory applications by Eldan before the Tribunal (which were dismissed), and appealed by Eldan to the Competition Appeal Court ("CAC").

[23] Eldan submits that upon reflection and advise, it appeared that the matter would take a considerable length of time before it could be concluded before the CAC and the Tribunal. By this time, Eldan had already spent almost R1 million in legal fees. Eldan took a decision to withdraw its appeal before the CAC and commenced

[9] Founding Affidavit at paragraph 23 p6.
[10] Founding Affidavit paragraph 51.

settlement discussions with the Commission, with the intention of expeditiously resolving the matter.[11]

[24] Finally, Eldan argues that the excision of the admission of guilt from the Tribunal's order confirming the consent agreement is warranted by the effects that shall otherwise result if the admission were to remain in the consent order, namely the exit of a small, medium and micro enterprise ("SMME") controlled by a historically disadvantaged person ("HDP") from the auto body repair market.[12] Eldan submits that in addition to being an SMME wholly owned by HDPs, it holds a level 1 B-BBEE certificate and employs 63 people. Eldan argued that varying the Tribunal's order would be in line with the objectives of the Act and in the public interest as it would maintain the existence of a black owned small business in the auto repair market in Pretoria, and would save jobs.[13]

The Commission's submissions

[25] As indicated, the Commission did not oppose Eldan's variation application. It filed an affidavit in support of Eldan's application in which it highlighted Eldan's dire financial position and the fact that Eldan was not legally represented when the consent agreement was concluded. The Commission further submitted that the exit of Eldan from the auto repair market would not advance the objectives in the Act and would be contrary to the "*Guidelines for Competition in the South African Automotive Aftermarke*t" ("Automotive Aftermarket Guidelines") issued by the Commission, which are aimed at promoting and advancing SMMEs and HDI owned firms in the sector.

[26] The Commission also submitted that it was notified by Eldan that Mercedes Benz sought to remove Eldan from its panel of firms accredited for the repair of Mercedes Benz vehicles.[14] As a consequence of the impeding termination of the

[11] Heads of Argument paragraph 2.
[12] Founding Affidavit at paragraph 28-9, 58.
[13] Founding Affidavit paragraph 56.
[14] Supporting Affidavit at paragraph 14-16 p6.

contract, the Commission had attempted to mediate with Mercedes Benz.[15] However this was unsuccessful.

[27] At the time of filing its affidavit in support of Eldan's application, the Commission submitted that Eldan's approval to repair Mercedes Benz vehicles "*would be terminated, with effect on 30 November 2020"*.[16] Further, it was submitted that Eldan was of the view that the excision of the admission from the order would "*save its relationship with Mercedes Benz, as the cause of the termination of the relationship will have been removed*".[17]

[28] A pre-hearing was scheduled for 30 November 2020. Prior to the pre-hearing, the Tribunal received a letter from Mercedes Benz in which Mercedes Benz alleged that Eldan had misrepresented the position with Mercedes Benz by stating that the commercial relationship between them had not yet been terminated.[18] The correct position was that the relationship had already been terminated by an order of the High Court of 25 September 2020. Mercedes Benz requested and was permitted to attend the pre-hearing, where it confirmed that the relationship had been terminated by a High Court order.[19]

[29] In its second supplementary affidavit, Eldan clarified that when it indicated the termination of its agreement with Mercedes Benz was still pending, it had laboured under a misapprehension of the effect of the High Court order.

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[15] Ibid at paragraph 17 p6.

[16] First Supplementary Affidavit p7 paragraph 25.

[17] At paragraph 30.

[18] The letter, dated 30 November 2020, and copied to the Tribunal was addressed to a law firm that had legally represented Eldan in the urgent interdict application to the High Court, which was initiated on O8 September 2020, where Eldan attempted to interdict the termination of its contract with Mercedes Benz.

[19] Mercedes Benz asked to be kept abreast of the matter and the Tribunal was copied on two further letters from Mercedes Benz to the Commission's representatives. Mercedes Benz also attended the further pre-hearing of 10 February 2021. Mercedes Benz finally confirmed on 19 February 2021 that it would not be formally intervening in the variation application.

Legal Framework for the variation of Tribunal Orders

[30] The Tribunal is a creature of statute established as an administrative body in terms of section 26 of the Act. It derives its mandate for varying its orders in section 66 of the Act which provides that:

> *"(i) The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order-*
>
> (a) *erroneously sought or granted in the absence of a party affected by it;*
>
> (b) *in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or*
>
> (c) *made or granted as a result of a mistake common to all of the parties to the proceedings"*.

[31] Furthermore, the Tribunal has extended powers in terms of section 27(1)(d) which provides that *"[t]he Tribunal may - … make any ruling or order necessary or incidental to the performance of its functions in terms of this Act"*.

[32] In the Constitutional Court judgement *in the matter between Molaudzi v S*[20] (*Molaudzi*), the Court considered its powers (and that of lower courts) to revisit final orders. The Court said:

> *"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has an inherent power to protect and regulate their own powers, and to develop the common law, taking into account the interests of justice.*
>
> *… Since res judicata is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does however stipulate that the*

[20] Molaudzi v S 2015 (8) BCLR 904 (CC).

power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of the section. Rigidity has no place in the operation of court procedures.

This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties…This power …must be used sparingly otherwise there would be legal uncertainty and potential chaos.

This Court is empowered to vary orders in limited circumstances, essentially if the order was made in error…The Court has recognised various exceptions to the functus officio and res judicata doctrines by effecting minor alterations to final orders in order to clarify their true intention or vary consequential matters" (own emphasis).

[33] Being an administrative body, the Tribunal does not have inherent powers to vary its orders. Its powers are limited to sections 66 and 27(1)(d). In giving effect to its power to vary its orders, and having regard to the Constitution, the Tribunal said the following in *Foskor:*[21]

"*Furthermore, our functions under the Act must also be exercised in accordance with the Constitution. A respondent firm who is suffering hardship due to changed circumstances cannot be denied access to courts, and justice, through a contextual interpretation of our legislation.*

Therefore, when read in the context of the Act, and the Constitution, the Tribunal under section 27(1)(d), must necessarily include the power to vary for changed circumstances or hardship.

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

It may be that the above interpretation of our powers under section 27(1)(d) may have the effect of extending the grounds listed in section 66(b). But such an extension must be viewed as necessary to the exercise of our functions in accordance with Constitutional precepts. A respondent firm cannot be denied access to courts, and justice, through an acontextual and unconstitutional interpretation of our legislation."

[34] The Tribunal clarified the basis of the exercise of this power:

"*This does not mean that every case that is brought to the Tribunal on the grounds of changed circumstances or hardship should be granted. Our discretion under section 27(1)(d) should only be exercised when warranted and in cases where we do intervene such intervention must be in accordance with the principle of legality, transparency and fairness as required by the Act (own emphasis).*

[35] In *Ferro*,[22] the Tribunal stated, in the context of an application to vary conditions placed on the approval of a merger, that exceptional circumstances could warrant the variation of a Tribunal order; where "*exceptional circumstances' means unusual or unexpected circumstances [which] must be determined on the facts of each case, and must be incidental to or arise out of a particular case" (own emphasis)*.[23]

[36] Thus, the power of the Tribunal in terms of the Act to vary its orders was common cause in the hearing. The key question was whether Eldan had made out a case for variation on the basis of "hardship" or "exceptional circumstances" as interpreted in accordance with the Act and the Constitution. We note that these terms are used as the legal standard (seemingly interchangeably) in the *Molaudzi* decision and consequently in the Foskor and Ferro decisions discussed above.[24] The same terminology was applied by the parties here.

[22] *Ferro South Africa and Others v Atland Chemicals CC and Others* LM179Jan14/VAR152Nov16.
[23] Ferro at paragraph 37.
[24] See e.g. paragraphs 37 and 38 of Molaudzi.

[37] Relying on the Constitutional Court decision in *Molaudzi v S* (*Molaudzi*), Eldan and the Commission argued that the grounds set out above constituted exceptional circumstances and it was in the interests of justice to vary the Tribunal's order.

[38] Recall that the basis of Eldan's case can summed up as follows:

33.1. Eldan faces economic hardship as a result of the admission contained in the consent order and this constitutes "exceptional circumstances",
33.2. Eldan entered into settlement negotiations and concluded the consent agreement with the Commission, without legal representation; and
33.3. Eldan being a SMME that is owned by HDIs would be removed from the auto repair services market and this would not advance the objectives of the Act or the Commission's Automotive Aftermarket Guidelines seeking to promote SMMEs and HDI's.

Our Analysis

[39] We state at the onset that the issue before us is not whether a consent order must contain an admission. This issue has been traversed by the Tribunal for example in the *SAA* decision which the Commission and Eldan relied on. Indeed the Commission in its heads of argument, submits that it would not have been novel for the Commission to conclude a consent agreement with a respondent without an admission of guilt.[25] The issue is whether the admission by Eldan once made and confirmed by an order of the Tribunal can be excised from the consent agreement. The application invokes the legal doctrine of *res judicata* which in principle bars litigation on the same issues between the same parties in the same forum in which the issue has been decided. Its underlying rationale is to give effect to the finality of judgements.

[40] We note as held in Molaudzi and subsequently in Foskor and Ferro that the issue of variation of a Tribunal order must be assessed on a case-by-case basis based on the facts of each particular case. We turn to consider whether the parties have

[25] Paragraph 23.

made a case for variation in the interests of justice, based on economic hardship or exceptional circumstances. We also have regard to the principle of equality of arms since Eldan was not legally represented when it concluded the consent order.

Economic hardship / exceptional circumstances

[41] Both Eldan and the Commission place emphasis on the termination by Mercedes Benz of its commercial relationship with Eldan. Recall that at the time of hearing the matter Mercedes Benz had already terminated its commercial relationship with Eldan through the High Court order of 25 September 2020.

[42] Eldan accepts that its past commercial relationship with Mercedes Benz may not be re-instated as of right by the variation. It submitted that it was, nevertheless, hopeful that it would be placed in a position where it could negotiate towards such a re-instatement or approval / accreditation by other motor vehicle brands.

[43] In this regard the Commission indicated in its supporting affidavit that it had attempted, unsuccessfully, to mediate between Eldan and Mercedes Benz. The Tribunal held two pre-hearings at which Mercedes Benz was present. At both pre-hearings, Mercedes Benz indicated its decision to terminate its commercial relationship with Eldan.

[44] In our view, Mercedes Benz' unilateral decision to terminate Eldan's status as an approved Mercedes Benz auto repair provider is a commercial decision. While it has had an economic impact on Eldan, the decision does not constitute exceptional circumstances that warrant departing from the long-established principle of res judicata.

[45] Both the Commission and Eldan, relying on *Foskor* and *Ferro* argued that exceptional circumstances were satisfied by the existence of the hardship emanating from the termination of the commercial relationship by Mercedes Benz.[26]

[46] In our view, these cases do not assist Eldan, as explained below.

[26] Transcript p15.

[47] In *Foskor* the application to vary the order related to *ongoing* (and open-ended) behavioural (pricing) commitments imposed on Foskor which it claimed it could no longer sustain due to exceptional and/or changed market circumstances. In other words, there was an inability to comply with the behavioural remedy as a result of *exogenous* factors. The variation sought here (namely the removal of the admission to a contravention) does not relate to (future) behavioural remedies imposed but relates to *past* (admitted) conduct that is *endogenous* to Eldan.

[48] In *Foskor*, which dealt with excessive pricing by Foskor as a dominant firm and a behavioural remedy for that pricing into the future, the changed market conditions were occasioned by price movements affecting the phosphoric acid market as a whole. The Commission conducted two reviews prior to concluding the new consent agreement with Foskor and found that Foskor's pricing for phosphoric acid during the investigated periods was below cost, indicating that the excessive pricing concern had fallen away. A new pricing remedy was agreed between the parties and confirmed by the Tribunal.[27]

[49] In *Ferro*, the trigger for the application related to ongoing obligations on Ferro that aimed to address a competition concern in the broader public interest. Ferro had been ordered to enter into a toll manufacture agreement with an (at the time) unidentified third party in order to maintain the competition that would otherwise be lost as a result of the merger.[28] The Tribunal refused to vary the order (in the context of a merger), as we concluded that the alleged exceptional circumstances pertained to a private dispute between the parties. Ferro alleged that Atlin (the identified third party by then) was misappropriating its confidential information and sought to cancel the toll manufacturing agreement on this basis.[29]

[50] While sympathetic to Ferro's position, we concluded that the commercial dispute between them did not constitute exceptional circumstances warranting the cancellation of the toll manufacturing agreement. This was because *"…the*

[27] Foskor undertook not to revert to its pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India.

[28] Ferro paragraph 2.

[29] Ferro paragraph 4.

Tribunal (and Commission) is concerned with the enforcement of the Act in the interests of the public, not private parties.[30]

[51] Public policy would be undermined by allowing the variation of a confirmed consent agreement for the reasons that the respondent was merely suffering economic hardship occasioned as a result of counterparties choosing to disassociate with firms implicated in anti-competitive conduct, in this case cartel conduct. The consequence of this could be opening up a floodgate of respondents seeking variation of past Tribunal orders, because they too, now face economic hardship as a consequence of their impugned conduct.

[52] The Commission submitted that such variation would not open the floodgates since each case would be dealt with on its merits and given its powers to investigate the exceptional circumstances. We agree that each case must be assessed on its own merits. However, the principle of *res judicata* as espoused in the Molaudzi decision requires, in the public interest, that there be certainty and predictability regarding the Tribunal's orders and decisions. This should be departed from in the interests of justice only where there are *truly* exceptional circumstances. The following passage from Molaudzi is instructive:

> *"The incremental and conservative ways that exceptions have been developed to the res judicata doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if finality of a court order is in doubt and can be revised in a substantive way. The administration of justice will also be adversely affected if parties are free to continually approach court on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry for one. There can be no legitimacy in a legal system where final judgements, which would result in substantial or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata."*

[53] Furthermore, while the Tribunal may have the power to *"fashion a remedy to enable it to do justice to the parties"* in this case the remedy sought is unlikely to

[30] Ferro paragraph 47.

restore the commercial relationship between Eldan and Mercedes Benz which has already been terminated the commercial relationship. The Commission's attempts to mediate including the two prehearings held by the Tribunal have not changed this. Thus, departing from the res judicata principle on speculation that Eldan's commercial relationship with Mercedes Benz may be restored would unduly compromise the rule of law and legal certainty.

[54] It is noteworthy that the remedies contained in the consent agreement provide inter alia, that Eldan shall desist from the anti-competitive conduct, and shall develop, implement and monitor a competition law compliance programme and provide training on competition law to certain employees. These remedies that Eldan has agreed to (and confirmed as an order of the Tribunal) should give comfort to third parties when considering a commercial relationship with Eldan, without compromising the rule of law and legal certainty.

[55] On the facts of this case and taking Eldan and the Commission's submissions as a whole (we discuss the other two arguments below) we have found that the alleged hardship does not outweigh the broader interests of justice and public policy.

[56] Removing the admission after the Tribunal's order has been given would alter the Tribunal's decision in a substantive way that may potentially affect third parties. Section 49(D)(4)(a) provides that: "*A consent order does not preclude a complainant from applying for –*

> *(a) a declaration in terms of section 58(1)(a)(v) or (vi); or*
> *(b) an award for civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant."*

[57] A declaratory order is an order by the Tribunal declaring that certain conduct contravenes the Act.[31] Furthermore, in terms of section 65(6) any person who has suffered loss or damage as a result of the prohibited practice may request a certificate from the Tribunal in order to pursue a damages claim in a civil court. A

[31] In this case the need for a declarator is obviated by the admission, which is already contained in the consent order, and on which civil damages by third parties depend.

certificate issued in terms of section 65(6) is conclusive proof of its contents and is binding on a civil court.

[58] Third parties who may have suffered loss or damage may be unfairly prejudiced in their pursuit of damages claims if substantive terms (in this case an admission of guilt) of a confirmed consent agreement can be altered on the grounds advanced by Eldan.

[59] In our view, the certainty of completed proceedings as confirmed by the order of the Tribunal, taken together with the consequences on potential third parties whose entitlement to pursue damages may be affected, constitute good reason to not depart from the principle of *res judicata*.

[60] The only remaining issue is whether Eldan's lack of legal representation is contrary to the interests of justice, which we deal with below.

Lack of legal representation

[61] It is common cause that, when the consent agreement was concluded, Eldan directly engaged with the Commission without legal representation. Eldan submitted in its letter of 14 February 2021 to the Commission when engaging with the Commission on settlement "*We are now at a point where we cannot afford our legal team anymore. We simply cannot afford for this to go on any further*".[32]

[62] It bears mention that generally the Tribunal is not privy to settlement discussions between the Commission and a respondent as these discussions are often without prejudice. Thus, when an agreement has been reached by the parties the consent agreement is filed with the Tribunal. The Tribunal then, in terms of section 49D hears the matter without oral evidence and may ask for clarity or more information, as we have done in this case.

[63] Upon receiving the consent agreement, the Tribunal noted that Eldan's admission was limited to section 4(1)(b)(ii). Eldan was then specifically questioned by the Tribunal regarding the scope of its admission (since other sections of the Act

[32] Commission's Supporting Affidavit MN2.

implicated were not mentioned in the admission clause). Eldan responded and indicated that its admission also includes sections 4(1)(b)(i) and 4(1)(b)(iii). The Commission indicated that the "*omission was an oversight".* Both parties then signed an addendum to correct the oversight.

[64] The Commission and Eldan sought to present the admissions by Eldan as an error common to the parties. In the hearing, Mr Nxumalo argued that a mistake had occurred "*firstly on the insistence… of the Commission that there must be an admission of guilt which is not accurate and further to that Chair, the consistent denial of Eldan that it did not contravene the Act, brings us into the realm of mistake Chair, and where a common error makes itself apparent, this enables the tribunal to intervene on that basis…"*[33]

[65] However, in our view, this does not appear to be the case. Eldan indicated in its heads of argument that while it did not admit liability, the Commission informed Eldan that an admission was a condition of the settlement. With this understood between them, the consent agreement was concluded with an admission.

[66] As indicated, when considering the consent order, the Tribunal questioned the scope of Eldan's admission which only pertained to section 4(1)(b)(ii) and requested the Commission and Eldan to clarify this. Eldan responded with an addendum in which it was clarified that its admission included admissions to contravening sections 4(1)(b)(i) and (iii). Nowhere did Eldan indicate in the consent order proceedings that it did not admit liability. Eldan understood the Commission's basis for settlement and agreed to it. That it did so without legal representation is a relevant consideration, since equality of arms between negotiating parties is a recognised principle of fairness.

[67] The Commission relied on the principle of "equality of arms" espoused by the Constitutional Court in Magidiwana[34] and later in S v S[35] where the Constitutional Court held as follows:

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[33] Transcript p32.

[34] Magidiwana and Others v President of the Republic of South Africa and Others 2013 ZACC 27 paragraph 16.

[35] S v S and Another [2019] ZACC 22.

> *"…Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensure they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality."*[36]

[68] The Commission submitted that:

> *"…during the consent negotiations, Eldan did not have an opportunity to present its case under conditions of equality. The Commission insisted, as it should have, that Eldan admits liability. Had the Commission been aware that its insistence on clause 3 would result in Mercedes SA terminating its relationship with Eldan, it would have settled with Eldan without admission of liability. This is not to say, the Commission was not confident of its prospects of success in the main case. The Commission is also not saying that Eldan was coerced into settling and signing the consent agreement. We submit that the consent agreement does not reflect the true intention of the parties (for the consent order to eliminate an SMME competitor whose constituent shareholders are previously disadvantaged individuals").*[37]

[69] While it may not be possible to conceive of every consequence of an admission, a consequence such as the termination of Eldan's commercial relationship with Mercedes Benz does not, in our view, constitute *truly exceptional circumstances* as contemplated in Molaudzi where the Court in departing from the principle of res judicata said the following: *"… the circumstances must be wholly exceptional to justify a departure from the res judicata principle. The interest of justice is the general standard, but the vital question is whether there are truly exceptional circumstances."* Significantly, as indicated, the alleged exceptional circumstances pertain to consequences of the consent order on the private interests of Eldan rather than exogenous factors causing changes to a market where a behavioural remedy may be affected.

[36] S v S para 40.
[37] Commission's Heads of Argument at paragraph 22.

[70] In the context of this case, it is not as if Eldan did not have legal representation at all. Throughout the proceedings it was legally represented up until the settlement stage. Eldan had already expended approximately R1 million in legal fees in these proceedings, including the costs of bringing applications of its own in both the Tribunal and the CAC. Eldan was also legally represented in the High Court in relation to the termination of its commercial relationship with Mercedes Benz. In these proceedings, Eldan was also legally represented.

[71] Eldan, after having spent a significant sum, made a decision not to use its legal representatives who had assisted it throughout the proceedings in order to save costs. Although we are sympathetic to Eldan's position considering how much it had spent on legal fees, it is not an indigent litigant who could not afford legal fees as it had otherwise up to this point, afforded legal representation. In our view, the fact that Eldan was not legally represented does not result in an injustice as Molaudzi contemplates.

[72] The Commission further submitted that the remedies contained in the consent order would still be effective without the admission. This however does not outweigh nor warrant tempering with the principle of *res judicata*. While the Constitutional Court recognises the power of a court to revisit its orders "[this] *must be used sparingly otherwise there would be legal uncertainty and potential chaos*".[38] We have found on the facts before us, that no case for exceptional circumstances has been made out by Eldan (or the Commission) that calls for a departure from this principle. In our view, on the facts before us, "*the rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way*"[39] which potentially affects third parties' entitlement to pursue damages.

[73] We turn now to consider the public interest issues raised by the Commission and Eldan.

[38] Molaudzi paragraph 34 p17.
[39] Molaudzi at paragraph 37 p19.

Public Interest Issues - Eldan as a SMME

[74] Both Eldan and the Commission highlighted that Eldan is a small to medium sized enterprise as defined by section 1(xxxii) of the Act, read with section 1(xv) of the National Small Business Act, with 63 employees at the time of launching this application. Further that Eldan is wholly owned by historically disadvantaged persons and holds a level 1 B-BBEE certification in terms of the Broad-Based Black Economic Empowerment Act.

[75] The Commission, in support of Eldan's argument, submitted that in December 2020, it published its Automotive Aftermarket Guidelines, which are intended to promote inclusion and to encourage competition through greater participation of SMMEs as well as HDPs in the automotive after-market. Eldan was one of only three certified Mercedes Benz auto body repairers located in Pretoria at the time of the Commission's referral of the main matter.[40] The Commission submitted that the admission contained in the consent order may lead to the exit of Eldan from this sector. This loss of competition (through the exit of Eldan from the market) and the public interests involved (in the form of retrenchments that will ensue) as a result of the admission in the consent order would crush and destroy Eldan's business and would not promote employment and advance the social economic welfare of South Africans, especially in the uncertain times of a global pandemic that has wreaked havoc in lives and livelihoods of many South Africans.

[76] In support of this argument, the Commission quoted the CAC's reasoning in *Babelegi*, where it was said that SMMEs "*should be promoted as is clear from the broad objectives of the Act"*[41] and the "*purpose of section 59(2) is not to crush the business of the affected firms".*[42]

[77] Indeed, the automotive sector is one with opportunities for growth and entry, expansion, and participation by small and HDP-owned businesses. As indicated in the Automotive Aftermarket Guidelines, the guidelines are "*intended to promote*

[40] Commission's Founding Affidavit, par 110.

[41] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] ZACAC (Babelegi) paragraph 77.

[42] Ibid.

inclusion and to encourage competition through greater participation of small businesses as well as historically disadvantaged groups".[43]

[78] We are cognisant that Eldan belongs to a designated group that the Act seeks to promote. We are sympathetic to Eldan's position as a result of the consent order. However, there is no evidence before us that Eldan will exit the market as alleged. On the papers before us Eldan has been in existence for 38 years. Its most recent unaudited financial statements for the year ending 30 June 2020 indicate that Eldan is profitable. Eldan submitted that Mercedes Benz constituted approximately 80% of its business. However, since the contract has already been terminated there is no guarantee that it would be renewed if this consent order is varied. The principle of *res judicata* far outweighs varying the order when there is no certainty that Mercedes Benz will renew the contract.

[79] Moreover, the Commission's guidelines are intended to promote competition by HDIs and SMMEs in the sector overall, not only that of one player. Cartel conduct, as the relevant section of the Act in this case, is one of the most egregious forms of anti-competitive conduct. Consumers are harmed when they are deprived of competitive prices and product choice by a firm engaging in anticompetitive conduct, whether the firm is big or small. In our view, competition could equally be served by another HDI or SMME in line with the objectives of the Automotive Aftermarket Guidelines in the sector. The Commission furthermore was not able to tell the Tribunal where Mercedes Benz's accreditation business had gone to after its commercial relationship with Eldan ended.[44] Conceivably this may have gone to one or more HDIs or SMMEs. Without any clear evidence that Eldan will exit or that no other SMME or HDI firm could fulfil the objectives of the Commission's Guidelines, we find this argument to be unsubstantiated.

[43] Guidelines for Competition in the South African Automotive Aftermarket, paragraph 1.4.
[44] Transcript p112.

Conclusion

[80] In light of the above, we conclude that Eldan's application for variation of the Tribunal's order by removing its admission should be dismissed. Eldan has not shown that the interests of justice warrant a departure from the long-established doctrine of *res judicata*. Eldan has not satisfied exceptional circumstances in the interests of justice, as contemplated in section 27(1)(d) read with the Constitution, nor has it satisfied the grounds for variation under section 66.

Order

[81] We accordingly make the following order:

1. The application for variation is dismissed; and
2. There is no order as to costs.

Ms Mondo Mazwai

08 November 2021

Date

Mr Enver Daniels and Mr Andreas Wessels concurring

Tribunal Case Managers:	Camilla Mathonsi and Busisiwe Masina
For the Applicant:	Adv Mhluli Nxumalo *instructed by* Bopape Attorneys
For the Commission:	Anthony Ndzabandzaba of Ndzabandzaba Attorneys