



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case Number: CR024May15/PPA259Feb19

In the postponement application between:

**Competition Commission**

**Applicant**

and

**Eldan Auto Body CC**

**First Respondent**

**Precision and Sons (Pty) Ltd**

**Second Respondent**

Case Number: CR024May15

In re the complaint referral between:

**Competition Commission**

**Applicant**

and

**Eldan Auto Body CC**

**First Respondent**

**Precision and Sons (Pty) Ltd**

**Second Respondent**

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Panel	: AW Wessels (Presiding Member)
	: E Daniels (Tribunal Member)
	: M Mokuena (Tribunal Member)
Heard on	: 21 – 22 February 2019
Last submission made on	: 11 March 2019
Decided on	: 12 April 2019

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**DECISION: POSTPONEMENT APPLICATION**

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## **INTRODUCTION**

- [1] This matter was set down for hearing on 21 and 22 February 2019.
- [2] On 21 February 2019, the Applicant applied for a postponement of the matter on the basis that Mr Gibson Homan (Mr Homan), a key and possibly the only factual witness for the Applicant was unable to travel to South Africa in order to testify in this matter, as his United States of America refugee travel documents did not comply with South African legislation and regulations.
- [3] The application for a postponement of the matter was opposed by the respondents. They argued that the matter has been carrying on for a very long time and the respondents have incurred a great deal of costs. In addition, the First Respondent is also engaged in litigation against Mr Homan on issues arising out of his employment with the First Respondent and which are unrelated to this matter.

## **BACKGROUND**

- [4] Mr Homan is a citizen of Zimbabwe and had apparently applied for asylum in South Africa. It was during the time that he sought asylum in South Africa that he worked for the First Respondent. It was evidently he who had alerted the Competition Commission (the Commission) to the possible contravention of the Competition Act 89 of 1998 (the Act) by the respondents. He is, therefore, a crucial factual witness as he is the only person who may be able to explain how the alleged cartel arrangement between the respondents actually worked.
- [5] However, it would appear that Mr Homan left South Africa to seek asylum in the United States of America. Although he had a valid travel document which was issued by that country, it did not satisfy the South African entry requirements and he was denied permission to board a flight to South Africa a few days before the hearing of 21 February 2019 where he was required to testify.
- [6] That then is a short summary of why the Applicant applied for a postponement.

## THE POSTPONEMENT APPLICATION

- [7] The application, as mentioned earlier, was opposed. The Applicant had mentioned that it could commence the matter with another witness, Mr Fhatuwani Mudimeli (Mr Mudimeli), a senior investigator at the Commission who has been involved in the investigation of the complaint against the respondents. Mr Mudimeli however does not have any personal knowledge of the alleged cartel conduct.
- [8] Mr Mudimeli was called to testify in support of the postponement application.
- [9] He mentioned that when they were alerted to Mr Homan's difficulties in boarding the flight, Mr Mfundo Ngobese (Mr Ngobese) who is also employed by the Commission immediately travelled to OR Tambo International Airport to discuss the matter with the South African immigration authorities. They were unable to assist him and referred him, it seems, to a Mr Jackie McKay, a Deputy Director General in the Department of Home Affairs. Evidently, that person advised the Applicant that he was unable to grant a waiver or to assist in any way as the entry regulations had changed. The result was that Mr Homan was unable to travel to South Africa for the hearing and the Applicant's efforts to try to assist him to gain entry for the purposes of testifying were in vain. Mr Mudimeli also stated after questioning from the Tribunal that they were always of the view that Mr Homan would be able to travel to South Africa.
- [10] Mr Mudimeli stated that he was in a position to testify on behalf of the Applicant and could do so immediately if necessary. However, he also stated that he was unable to testify directly on matters pertinent to the Applicant's case, especially in relation to the documentation which was to be presented in evidence.
- [11] Mr Mudimeli was cross-examined at length by the representatives of the respondents. It is not necessary to deal in detail with the cross-examination, except to say that Mr Mudimeli maintained that Mr Homan was a necessary witness and that the Commission was doing everything in its power to ensure that Mr Homan was able to return to South Africa to testify.

- [12] After the hearing, the Tribunal asked the Applicant, in writing, to indicate whether Mr Homan would receive the necessary travel documents from the relevant authorities in the United States of America and received correspondence from the Commission regarding the matter. In essence, it would appear that Mr Homan's application will take approximately 90 days to be approved by the American authorities. The respondents were provided with copies of the correspondence.
- [13] The general principles applying to postponements have been settled in our law.
- [14] A party seeking a postponement actually applies for an indulgence and must therefore show good cause for the interference with the other party's procedural right to proceed with the hearing (in this instance the respondents) and the general interests of justice in having matters finalized.
- [15] In *CeCentirugo AG v Firestone (SA) Ltd*<sup>1</sup> the court had to consider an application for a postponement of a matter on the basis that the senior counsel briefed to deal with the matter was not available. The court noted that in *Cosmetic Distributing Company v Industrial Products*<sup>2</sup> Millin J had stated that "good and strong reason" had to exist before a postponement would be granted. The court also referred to the case of *Ecker v Dean*<sup>3</sup> in which Van Den Heever J stated that an applicant for a postponement would have to show good cause.
- [16] In *Phutuma Networks (Pty) Ltd v Telkom SA Ltd*<sup>4</sup> it was stated that a trial judge has a discretion as to whether a postponement should or should not be granted, but that that discretion must be judicially exercised. The same was stated in *Madzivhandila v Law Society, Northern Provinces*,<sup>5</sup> where the court stated that it had, in *Madnitsky v Rosenberg*<sup>6</sup> warned that a court "should be slow to refuse to grant a postponement where the reason for a party's unpreparedness has been fully explained, where his unreadiness to proceed is not due to delaying

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<sup>1</sup> [1969] 3 All SA 330 (T).

<sup>2</sup> 1944 W.L.D. 201.

<sup>3</sup> 1939 S.W.A. 22.

<sup>4</sup> [2017] 1 All SA 265 (GP).

<sup>5</sup> [2009] 1 All SA 124 (SCA) para 20.

<sup>6</sup> 1949 (2) SA 392 at 399.

tactics, and where justice demands that he should have further time for the purpose of presenting his case”.<sup>7</sup>

- [17] The Applicant did not make the application for a postponement on notice of motion given to all the parties before the application was actually made. Instead, it alerted the parties to the possibility of it applying for a postponement due to Mr Homan’s problems in travelling to South Africa. On the scheduled date of the hearing, it made an oral application for a postponement and led oral evidence on the matter, as explained above.
- [18] During both the Applicant’s opening address and during the leading of evidence (which evidence was tested by vigorous cross-examination), the Applicant explained as fully as it was able to, that it required a postponement and that its inability to proceed with the matter was not due to any fault of its own. According to the Commission, it was prepared and ready to proceed and had even interviewed Mr Homan, when he was in South Africa towards the end of 2018, in preparation for the hearing and that during that interview Mr Homan had indicated his willingness and readiness to travel to South Africa to testify.
- [19] This evidence was not seriously challenged and must be accepted, especially as it transpired that Mr Homan had come to South Africa at the time in connection with other litigation which he was involved in against the First Respondent.
- [20] The Tribunal must also accept, for the same reason, that the inability to proceed with the hearing was not due to an unpreparedness on the part of the Commission to proceed. In fact, the only real issue to be considered is whether justice demands that the Commission should be given extra time to present its case.
- [21] It is true that the Commission was alerted to potential difficulties which a person in the position of Mr Homan may have in traveling to South Africa from the United States of America where he is currently seeking asylum. But it is equally true that the respondents were also aware of that difficulty. In fact, the First

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<sup>7</sup> *Madzivhandila* para 22.

Respondent's legal representatives had at a pre-hearing convened in September 2018 to obtain the Tribunal's directive regarding the conduct of the hearing, suggested that the Applicant should approach Parliament for guidance on the entry requirements.

- [22] An application for a postponement cannot be claimed as a right and the issue of prejudice forms the basis upon which such an application is considered and prejudice to either party must be taken into account. However, prejudice must be contextualised taking into account the conduct of the party that claims prejudice. In the instant case, both the First Respondent and the Commission were culpable.
- [23] A postponement applied for during the course of the trial because the applicant wishes to lead further evidence requires proof that, the evidence is relevant and material; the evidence is available; it is through no fault of his own that the evidence is not immediately available. In the case before us, the Commission endeavoured to bring a material witness but, unforeseen circumstances resulted in the witness being prohibited from boarding the flight to South Africa.
- [24] We are satisfied that the Applicant in applying for a postponement satisfied the various tests laid out in the principles enunciated above.
- [25] However, we still need to consider whether the broad public interest requires a postponement in this matter.
- [26] In *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*,<sup>8</sup> in which the respondents, less than 24 hours before the hearing, sought a postponement. The court stated that "a proper case for a postponement must be brought before the court so that it can justify the granting of the application on the basis of clear principle".<sup>9</sup> In that case the postponement was refused.
- [27] Upon consideration of the facts in this case, a postponement is justified. The Applicant believed that Mr Homan would be able to travel, unhindered, to South

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<sup>8</sup> [1999] 1 All SA 643 (C).

<sup>9</sup> At page 650.

Africa to testify. Upon being apprised of Mr Homan's difficulties, Mr Ngobese of the Commission travelled to OR Tambo International Airport immediately to try to ascertain what could be done to assist Mr Homan to enter the country. It would appear that Mr Ngobese was referred to the Deputy Director General at the Department of Home Affairs, Mr Jackie MacKay who was also not able to assist.

- [28] Although it could be argued that the Applicant could have and should have done more to secure Mr Homan's attendance, the fact of the matter is that the Applicant believed, reasonably, that Mr Homan would be able to travel to South Africa and upon being informed of a problem, immediately took steps to try to resolve that problem but without success.
- [29] On the face of the evidence led and the papers before us, it does seem that the Applicant has fulfilled the requirements for a postponement.
- [30] In the first place, the Applicant did not simply make the application for a postponement based on a statement of facts unsupported by any evidence. The Applicant called a witness, Mr Mudimeli to explain why a postponement was necessary and what steps had been taken by the Applicant to secure Mr Homan's attendance at court. Mr Mudimeli was subjected to vigorous cross-examination by the Respondents and to questioning by the Tribunal but gave a good account of himself.
- [31] We conclude under the circumstances, that the application was made in good faith and justified.
- [32] We are also mindful of the fact that the Respondents were also acutely aware of the fact that Mr Homan may have difficulties in entering South Africa. The Tribunal, too, was alert to that and offered the parties a date in October 2018, for the hearing of Mr Homan's evidence only, to ensure that his evidence could be dealt with and that the hearing could be finalised without further delays. The First Respondent refused that offer by the Tribunal and must, in a sense, also bear some responsibility for the unfortunate delay. We also point out that the Second Respondent aligned itself with the First Respondent and agreed to the

later dates in February, although the Second Respondent was, it transpired, capable of proceeding with a hearing in October 2018. Had the offer of a hearing date in October 2018 been accepted by the parties, then Mr Homan would, *ex facie* the documentation presented in support of the postponement and other documents put up by the Respondents, in all probability have travelled to South Africa for the hearing and would have been permitted to enter the country.

- [33] The application for the postponement was heard over two days. In effect that two day hearing rendered the application moot, because had the Tribunal, at the end of the two day period refused the application, the Applicant would have had to commence its case, but would not have been able to do so because the two day period set aside for Mr Homan's testimony had already been used for the application. In other words, the two days set aside for the hearing was taken up completely with the application for a postponement. The parties would, therefore, have had to arrange new dates for the hearing. We are mindful, too, of the fact that the Applicant could have commenced with Mr Mudimeli's evidence but would still have had to arrange new dates for the reasons mentioned.
- [34] The respondents seem to suggest that they would suffer financial prejudice and some reputational damage if the postponement is granted. The respondents have not referred us to any case law which suggests that financial prejudice outweighs any other factors when a postponement is sought. The respondents have also not provided evidence of the alleged reputational damage suffered by the respondents which would be accentuated by a postponement.
- [35] The public interest demands that the application for a postponement must be considered holistically. It must look at actual prejudice to the respondent(s) and the prejudice to the public. The prejudice to the public is great. The respondents are alleged to have colluded in contravention of the Act. If those allegations were to be true, then the customers of the respondents would have been prejudiced, through possibly not having received the most competitive quotations for panel beating repairs to their vehicles. For that reason, the



hearing must go ahead so that the allegations can be fully ventilated in the public interest and to give the respondents an opportunity of responding fully to and defending themselves against the Applicant's cartel allegations against them.

[36] We are mindful of the fact that the matter has been postponed before and that the matter was first investigated five years ago. This Tribunal has often expressed its concern at the length of time it takes to finalise matters before it. This matter is not an exception. Justice delayed is justice denied. The delay can however not be visited on the Competition Commission alone, in the light of the unavailability of the First Respondent's Counsel in October 2018. Secondly, the First Respondent also took its time to respond to the Commission's attorneys' letters regarding possible hearing dates in 2018. This was after being informed by the Commission that Mr Homan was in possession of the United States Travel Document, thus, able to travel to South Africa to give evidence. The tardiness of the First Respondent culminated in the Commission requesting from the Tribunal Registrar a pre-hearing date for direction, forcing the First Respondent's hand. Under the circumstances both the Commission and the First Respondent are both to blame for the delay. In addition, we are satisfied that public interest dictates that the Competition Commission be given the opportunity to lead the evidence of its only factual evidence witness Mr Homan. We are, however, cognizant that this matter must be heard without any further delays and this will be apparent from our order.

[37] We are led to believe that Mr Homan's travel documents will take about 90 days to be processed in the United States of America. Usually postponements are granted "*sine die*" (without a day) so that the parties can themselves set the matter down for hearing. We do not believe that that would be appropriate in the circumstances of this case. The respondents are entitled as a matter of right to have the matter finalised and adjudicated upon without any further delays.

[38] The usual rule is that the party who is responsible for the postponement must pay the wasted costs. This however does not apply in Tribunal cases where as a general rule no costs orders are granted against the Commission. In any

event, the Commission and the First Respondent must bear responsibility for the unfortunate state of affairs.

## **ORDER**

Therefore, we order as follows:

1. The application for a postponement is granted;
2. The Applicant must notify the respondents and the Tribunal in writing on or before 31 July 2019, what steps it has taken to secure Mr Homan's attendance and to confirm that Mr Homan has obtained the necessary travel documents from the relevant authorities in the United States of America.
3. In the event of Mr Homan not having received the necessary travel documents from the relevant authorities in the United States of America, the respondents may make an application for a permanent stay of the proceedings against them.
4. In the event of Mr Homan having received the necessary travel documents from the relevant authorities in the United States of America by 31 July 2019, the parties must arrange hearing dates for this matter with the Tribunal Registrar.
5. Once dates have been arranged the parties may arrange a pre-hearing to obtain directions from the Tribunal regarding the further conduct of the hearing.
6. There is no order as to costs.



**Mr Enver Daniels**

**12 April 2019**

**Date**

**Mr Andreas Wessels and Mrs Medi Mokuena concurring.**

Tribunal Case Manager	: Ndumiso Ndlovu
For the Commission	: K Modise
For Eldan Autobody CC	: A Kruger instructed by De Klerk Mandelstam
For Precision and Sons	: R Mastenbroek instructed by Mpoyana Ledwaba