COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR164Nov16/CON153Aug18

In the application for condonation between:

Competition Commission of South Africa	Applicant
And	
Much Asphalt (Pty) Ltd	First Respondent
Roadmac Surfacing (Pty) Ltd	Second Respondent

Case No: CR164Nov16/CON153Aug18

And in the application for costs order between:

Much Asphalt (Pty) Ltd	First Applicant
Roadmac Surfacing (Pty) Ltd	Second Applicant
And	
Competition Commission of South Africa	Respondent

Case No: CR164Nov16

In re the complaint referral between:

Competition Commission of South Africa	Applicant
And	
Much Asphalt (Pty) Ltd	First Respondent
Roadmac Surfacing (Pty) Ltd	Second Respondent

Panel	: Enver Daniels (Presiding Member)
	: Imraan Valodia (Tribunal Member)
	: Fiona Tregenna (Tribunal Member)
Heard on	: 17 October 2018
Order Issued on	: 4 April 2019
Reasons Issued on	: 4 April 2019

Reasons for Decision- Condonation Application and Costs Application

Introduction

[1] The matter before the Competition Tribunal ("Tribunal") concerns two interlocutory applications, a condonation application and a costs application. The applications arise from a complaint referral brought by the Competition Commission ("Commission") against Much Asphalt (Pty) Ltd ("Much Asphalt") and Roadmac Surfacing (Pty) Ltd ("Roadmac"), hereinafter collectively referred to as the Respondents.

[2] The Commission seeks condonation for the late filing of the revised trial bundle. This application is opposed by the respondents, Much Asphalt and Roadmac. In addition to opposing the application, Much Asphalt and Roadmac have brought a costs application against the Commission. The applicants, Much Asphalt and Roadmac seek two sets of costs namely costs in the event that the condonation application is dismissed; as well as wasted costs for the postponement of the hearing.

[3] At the hearing, the Commission made it known that it wasn't going to traverse the issue of costs because the law is clear on costs orders.

[4] The Tribunal, in terms of the order below, dismisses the Commission's condonation application and dismisses Much Asphalt and Roadmac's applications for costs. Our reasons for such order now follow:

Background

[5] On 16 November 2016, Mr Fhatuwani Mudimeli on behalf of the Commission, referred a complaint referral against Much Asphalt and Roadmac to the Tribunal. The complaint was referred in terms of section of 50(1) of the Competition Act[1] (the 'Act') read together with Rules 14(1)*(a)* and 15 of the Tribunal Rules.

[1] 89 of 1998 (as amended).

[6] Much Asphalt manufactures and supplies hot and cold mix asphalt products. Much Asphalt's target market is the high-end asphalt market for the use/application on urban streets, freeways, runways, race tracks, public sidewalks, bus lanes and certain harbour specific applications. Much Asphalt produces the asphalt at a number of static sites spread out across south Africa.[2]

[7] Roadmac is a paving contractor. This involves the laying and compaction of hot mix asphalt as road surfacing (also known as the tarring of roads). In addition to paving roads, Roadmac owns a mobile asphalt plant which it uses to self-supply in the Free State province. For the most part, other than in the Free State province, Roadmac procures asphalt from manufacturers such as Much Asphalt.

[8] The relationship between Much Asphalt and Roadmac dates back to 2005 when Much Asphalt started supplying asphalt to Roadmac. The Respondents, who were represented at the time by Mr Phillip Hecter of Much Asphalt and Mr Rudolph Fourie of Roadmac, would frequently have meetings to discuss their business relationship.

[9] The Commission alleged that from 2005 to 2007, Much Asphalt and Roadmac were competitors in the market for the supply of asphalt and agreed to divide markets by allocating territories in respect of the provision of asphalt products in contravention of section 4(1)*(b)(ii)* of the Act.

[10] In its complaint referral, the Commission claimed that from 2005, Much Asphalt and Roadmac agreed that Roadmac would not enter into the commercial asphalt market and compete with Much Asphalt. Roadmac would also continue to source asphalt from Much Asphalt in provinces where Roadmac had no presence. These allegations were denied by Much Asphalt and Roadmac.

[11] On 26 April 2017, a pre-hearing was held and timetable for the complaint referral proceedings was agreed upon by all parties. The timetable required the Commission to delivery its trial bundle to the Respondents by 27 October 2017. Thereafter, the

[2] Much Asphalts' static sites are situated in Polokwane, Witbank, Pomona, Roodeport, Benoni, Eikenhof, Empangeni, Pietermaritzburg, Coedmore, Bloemfontein, East London, Mthatha, Port Elizabeth, George, Contermanskloof, Eersterivier and Saldanha.

respondents had until 2 November 2017 to supplement the Commission's trial bundle.

[12] The Commission was not able to prepare its trial bundle on time. With the consent of the Respondents, it delivered the trial bundle on 1 November 2017. The trial bundle was supplemented by the Respondents on 22 November 2017. The combined trial bundle was filed with the Tribunal on 13 April 2018 and was to be relied on by all parties at the hearing on 6 to 8 August 2018.

[13] There is some dispute as to what transpired next. According to the Commission, it advised the Respondents on 3 August 2018 of its intention to revise the trial bundle and deliver it to the parties. The Respondents on the other hand state that they were only informed about this on 4 August 2018, a Saturday. At first the Respondents were told that the Commission wanted to re-order the trial bundle which was not completely correct. The Commission then included an additional 1221 pages of documents in the trial bundle. The Respondents only became aware of this when they received the index to the revised trial bundle on 4 August 2018.

[14] Whether the date was the 3rd or 4th of August is a trivial issue. The point is that the Commission wanted to change the referral proceedings at the 11th hour, believing, erroneously that no prejudice would accrue to Much Asphalt and Roadmac. Much Asphalt and Roadmac opposed the use of the revised trial bundle as there was insufficient time to review its contents and to prepare properly for the hearing.

[15] On the day of the hearing, 6 August 2018, the Commission, requested that the matter proceed on the basis of the revised trial bundle which the Respondents objected to. The Commission argued that its previous legal representative had compiled the original trial bundle and had, erroneously and negligently, omitted important legal documents, which the Commission intended to rely on for its case.[3] The Commission only became aware of this while preparing for the hearing, after terminating its attorneys' mandate and deciding to represent itself. The Respondents deny that the Commission's erstwhile attorneys were negligent as alleged by the Commission as the correspondence between Commission and those attorneys suggest not only that

[3] Transcript dated 6 August 2018, pages 16 and 23.

the Commission had been involved in the preparation of the bundle but also that it had provided those attorneys with instructions. The late filing of the revised trial bundle was, therefore, due to the Commission having to itself prepare, belatedly, for the case.

[16] As a result of the Commission's request, the Respondents sought a postponement of the hearing as they were simply not prepared to commence with the trial on the basis of the new documents. The Tribunal granted the postponement *sine die* and convened a pre-hearing immediately afterwards to give direction regarding the future conduct of the matter.

[17] In this pre-hearing, the Tribunal directed the Commission to make an application for the condonation of the late filing of the revised trial bundle. In a direction issued the following day (hereinafter referred to as the "Tribunal's directive"), which is attached hereto, the Tribunal expressly stated that the Commission's application must "*address the reasons for the late submission as well as the relevance of the additional documents to the present case*".[4]

[18] On 10 August 2018, the Commission filed its application. On 24 August 2018, Much Asphalt and Roadmac filed their Answering Affidavits to the Commission's application in opposition to the application and also sought costs against the Commission.

[19] In this judgement we will first deal with the condonation application followed by the application for costs.

Condonation Application

[20] The Commission sought to revise the trial bundle on the following grounds:

[20.1] it has re-ordered the revised trial bundle in such a way that the trial bundle is less burdensome for all parties to navigate and for the Tribunal to run through the matter expeditiously; and

[4] Tribunal Directive dated 6 August 2018.

[20.2] the revised trial bundle includes additional discovered documents which it seeks to use in support of its pleaded case.

[21] The documents that the Commission sought to include were Much Asphalt's minutes of meetings, management reports, market reports and strategic risk assessment documents and other related documents.

[22] In its explanation for the late filing of the revised trial bundle, the Commission stated:

"*when the Commission was preparing for the hearing it came to its attention that the existing trial bundle did not contain various relevant documents. To this end the Commission circulated a revised index of the trial bundle to the Respondents.*"[5]

[23] In its explanation as to why the additional documents were relevant to the present case, the Commission held that the documents:

"*are relevant to the issues sought to be determined in this referral.*"[6]

[24] According to the Commission, the Respondents would not be prejudiced by the inclusion of the 1221 pages of documents as those documents had already been discovered. The Commission also submitted that it would be fair to all parties to be able to prepare for the hearing using the revised trial bundle.

[25] The Respondents' opposed the application on the following grounds:

[25.1] the Commission has failed to comply with the Tribunal's directive;

[25.2] the Commission has failed provide a proper explanation for its late attempt to expand the trial bundle; and

[25.3] the application fails to establish the relevance of the additional documents that the Commission seeks to add to the original trial bundle.

[26] Roadmac argued that the Commission:

[5] Commission's Condonation Application, para 8.
[6] Ibid, para 13.

"fails to provide the required factual basis and justifies neither condonation nor a finding that the documents are relevant to this referral, contrary to what is required by the Tribunal's directions".[7]

[27] Roadmac also stated that the Commission:

"has failed to show good cause for its last-minute attempt to expand the trial bundle"[8]

[28] Much Asphalt asserted that the Commission:

"has not provided a satisfactory explanation for its extreme delay in seeking to expand the trial bundle in this matter, nor has the Commission even attempted to demonstrate. As it was expressly required to by the Tribunal, that all (or indeed any) of the further documents are relevant to, and will assist the Tribunal in its determination of, the complaint referral in this matter".[9]

Jurisprudence

[29] The Tribunal may condone the late filing of a document or approve a reduction or extension for the time of filing a document in terms of section 54 of the Act. This section states as follows:

"(1) A party to any matter may apply to the Tribunal to condone late filing of a document, or to request an extension or reduction of the time for filing a document, by filing a request in Form CT 6.

(2) Upon receiving a request in terms of sub-rule (1), the registrar, after consulting the parties to the matter, must set the matter down for hearing in terms of section 31(5) at the earliest convenient date."

[30] Noteworthy is that section 58(1)(c) provides that the Tribunal may, on good cause shown, condone the non-compliance with any of the time periods set out in the Act or its Rules.[10] Therefore, section 54 read with section 58(1)(c) confers on the Tribunal discretionary powers to either allow or decline a request for condonation. This approach is line with Supreme Court of Appeal (SCA) jurisprudence where the

[7] Roadmac's Answering Affidavit, pg 2.
[8] Roadmac's Heads of Argument, pg 3.
[9] Much Asphalt's Heads of Argument, pg 2.
[10] See *Mpho Makhathinini and Others v GlaxoSmithKline* (34/CR/Apr04) paras 10-11.

court on numerous occasions has held that this discretionary power is not fettered as the court will apply a holistic approach and consider each matter on a case by case basis in order to establish whether good cause has been shown.[11] In doing so, the courts have also refrained from developing an exhaustive list of circumstances where good cause can be shown because to do so would unnecessarily hamper the courts' discretion.[12]

[31] Each case must, therefore, be assessed on its own merits.

[32] In the *Mulaudzi*[13] case the SCA set a number of inexhaustive considerations that a court should take into account in determining whether condonation should be granted:

> *"A full, detailed and accurate account of causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, a respondents' interest in the finality of the judgement of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."* [14]

[33] Although the courts have refrained from attempting to formulate an exhaustive definition of 'good cause shown', the Appellate Division in *Melane v Santam Insurance Co Ltd*[15] held:

> *"In deciding whether sufficient cause has been shown, the basic principal is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with the true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any*

---

[11] Ibid para 16.
[12] Ibid paras 17 and 19.
[13] *Mulaudzi v Old Mutual life Assurance Company (South Africa) Ltd* 2017 (6) SA 90 (SCA).
[14] Ibid para 26. See also *Uitenhage Transitional Local Council v South African Revenue Services* 2004 (1) SA 292 (SCA).
[15] 1962 (4) SA 531 (AD).

attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay."[16]

[34] The Tribunal has not considered the prospects of success as such a consideration is better suited where an applicant seeks condonation in respect of the filing of an appeal.[17] We do, however, have difficulty in determining the relevance of the additional documents which the Commission wants to introduce into the trial bundle, as the Commission has not attempted to explain their relevance. Nonetheless, it is our duty to consider the other factors cumulatively when determining whether late filing should be granted.

Analysis

[35] The Commission's delay in the filing of the revised trial bundle was disproportionate to the time allowed for the remedial action. In this case, the trial bundle was filed with Registry on 13 April 2018 and the hearing was set to commence on 6 August 2018. The Commission alerted the Respondents to the changes to trial bundle on 4 August 2018 and delivered the revised trial bundle on 5 August 2018. The Commission took almost four months to file the revised trial bundle and delivered it to the Respondents on the day, before the hearing was due to commence, which was a Sunday. This has prejudiced the Respondents in their preparation for the hearing.

[36] The Respondents were unable to properly review the additional documents and to prepare their witnesses. The actions of the Commission were extremely prejudicial to the Respondents in preparation of their defence.

[37] When there is a delay of this magnitude the applicant needs to provide a full, detailed and accurate account of the events that led up to the late filing. In *Uitenhage Transitional Local Council v South African Revenue Services,*[18] the SCA held:

---

[16] Ibid at 532 B-E.
[17] *Mpho Makhathinini* supra note 10 para 25.
[18] 2004 (1) SA 292 (SCA).

"if non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelt out."

[38] The Commission sates that the original trial bundle was prepared poorly by an external legal team. The Commission also admits that their last-minute preparation is what led to the late filing but does not expand on that. We were not told when the preparations for the hearing were commenced by the Commission and when they first realised that the original trial bundle was inadequate. The Commission has not elaborated on their previous attorneys' alleged negligence. It has not explained why its legal representatives were not properly instructed on the preparation of the trial bundle and why it waited until the last minute to prepare for the hearing. The Commission has also not indicated whether their former legal representatives were aware of the relevance of the documents which the Commission seeks to introduce into the trial bundle. In conclusion, the Commission has provided neither a full explanation nor a reasonable one. It has not complied with our directive, either partially or at all.

[39] The other considerations that the SCA has mentioned are the avoidance of unnecessary delays in the administration of justice and the importance of the case. To administer justice is to work efficiently and in a timely manner.[19] Rejecting condonation would not avoid unnecessary delay as the delay has already occurred and has been occasioned by the preparation of a revised trial bundle. Since the hearing of this matter, the parties have had access to the revised trial bundle as well as an opportunity to peruse the documents.

[40] Whether this is an important case is dependent on the hearing of the merits, which will take place at a later stage. Generally, a section 4(1)*(b)* case is an important issue. This is a *per se* contravention—the most egregious offence which can only be remedied by consequences and punishment. This does not, however, mean that the Commission need not prepare properly for the case. As an organ of state, it has a duty to do so.

[19] *Member of the Executive Council: Health and Social Development, Gauteng Province v M obo M* (2014/22984) [2018] ZAGPJHC 408.

[41] The jurisprudence on condonation applications is clear and the Commission knew that it must show good cause to succeed in the relief sought. What distinguishes this case from an ordinary condonation application is that the Tribunal issued a directive on the issues which the Commission had to address in its application. The Tribunal's directive ordered that:

"*The Commission's application must address the reasons for the late submission as well as the relevance of the additional documents to the present case.*"[20]

[44] What is more is that during the pre-hearing, the Tribunal elaborated on what was expected of the Commission. The Tribunal stated:

"*We are not asking you to go through the motions of bringing an application. We want you to actually motivate why we should allow you to introduce the new trial bundle into these proceedings.*"[21]

[45] The Tribunal went on further to state that it does not require the Commission "*to go through every document and explain every document and their relevance.*"[22] What the Tribunal requires is the following:

"[A] full application explaining why it amended the trial bundle and why it wants to introduce the amended trial bundle and the relevance of the documents it seeks to introduce."[23]

[46] More importantly, the Tribunal expected "*a full explanation on the Commission's conduct in preparing the revised trial bundle at this late stage*".[24]

[47] In our view, the Commission's application is fatally defective as it failed to comply with the Tribunal's directive. Our directive was clear. The Commission was required to explain the entire period of the delay, as well as provide a full set of facts that will enable the Tribunal to understand the reasons for the delay. The Commission failed in this regard.

---

[20] Tribunal Directive dated 6 August 2018.
[21] Pre-hearing Transcript dated 6 August 2018, pg 2.
[22] Ibid, pg 9.
[23] Ibid, pg 27.
[24] Transcript dated 6 August 2018, pg 31.

[48] At the hearing of this matter, the Commission was given another opportunity to explain why it had failed to comply with the directive, but it was unable to do so.

[49] When determining whether good cause has been shown, the fundamental principles are that the Tribunal has a discretion which should be exercised judicially and there ought to be fairness to both sides.

[50] The Commission's actions have caused prejudice to the Respondents who have not be able to prepare adequately for the hearing. The Respondents could not reasonably have been expected to peruse, analyse and take instructions on 1221 pages of documents a day, before the hearing, which happened to be a Sunday.

[51] The Respondents remain unclear on the case they have to meet as the Commission has still not addressed the relevance of the additional documents. How they relate to the allegations and how they corroborate the facts? This information is important to prepare witnesses and a defence. We are therefore of the view that Much Asphalt and Roadmac would be prejudiced by the introduction of the revised trial bundle.

[52] The Commission was obliged to comply with the Tribunal's directive but failed to do so. At the hearing of this application, the Commission was asked a number of times to explain its failure to comply with the Tribunal's directive but was unable to provide an answer.

[53] Immediately thereafter, it was given another opportunity to address the reasons for delay and the relevance of the additional documents; and it was unable to provide satisfactory explanations.

[54] We therefore dismiss the condonation application.

Applications for Costs

[55] The Respondents brought two costs application. In the first application, the Respondents sought costs in this particular matter, including the costs occasioned by the employment of two counsel. The second application, which was brought in

terms of rule 42, 50, 55 and 58 of the Tribunal Rules, was for wasted costs occasioned in respect of the lost hearing dates of 6,7 and 8 August 2018.

[56] Before we can decide whether or not to award costs, we must look to see whether we enjoy such powers.[25]

[57] The Tribunal's powers to award costs was addressed by the Constitutional Court in the case of *Pioneer.*[26] The Constitutional Court held the following:

"The power of the Tribunal to award costs

"[30] Section 57 of the Act provides for the Tribunal's powers to award costs.

[31] The Act prescribes that, as a general rule, each party in proceedings before the Tribunal must pay its own costs. In my view the Commission is a "party" before the Tribunal when it appears before it and makes submissions. It would be an unduly narrow use of the term "party" to exclude the Commission when in many instances the Commission will be alone in opposition to merging parties or firms suspected of non-compliance with the Act. This is in harmony with the distinction drawn between a "party" in section 57(1) as compared to a "complainant" in section 57(2), where an exception to the general rule is made.

[32] The reference to section 51(1) in section 57(2) relates to an instance where the Commission elects not to refer a complaint to the Tribunal, in which case a private complainant may refer the complaint directly, without the Commission's participation. The exception in subsection (2) contemplates costs in proceedings in which the Commission is not involved.

[33] The proviso that the general "own costs" rule is "subject to subsection (2) and the Competition Tribunal's rules of procedure" is somewhat ambiguous. While subsection (2) clearly carves out an exception to the general rule, the import of the general rule being subject to the "Tribunal's rules of procedure" is less clear.

---

[25] *Omnia Fertilizer Ltd v The Competition Commission in re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd and others* [2009] ZACAC 5 para 20. In this case the Tribunal held that "*When the Tribunal is asked to grant a particular order, it must first look to see whether it enjoys such powers expressly or by necessary implication in the four corners of the Act. Hence before the Tribunal can make an award of costs, its powers to do so must be found in the Act.*"

[26] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* (CCT 58/13) [2013] ZACC 50; 2014 (3) BCLR 251 (CC); 2014 (2) SA 480 (CC)

[38] The Rules of Procedure provide the Tribunal with tools to regulate its proceedings other than through imposing adverse costs orders. As a creature of statute, the Tribunal's power to regulate its proceedings is circumscribed by the Act. It has no inherent powers to control its own process comparable to those of an ordinary High Court, the Supreme Court of Appeal or this Court as contained in section 173 of the Constitution.

[39] Indeed, rule 58 is capable of being read in a manner that does not extend the Tribunal's costs powers beyond section 57 of the Act. The reference to section 57 in rule 58(2) and the use of "an" order for costs, rather than "any" order for costs, can be understood as an attempt to frame the rules within the confines of section 57.

[40] The purpose of the Act is well served in this reasoning. Considering that the protection of public-interest concerns will seldom be advanced by an opposing party at the Tribunal stage in the majority of cases, a thorough defence of the public interest and the protection of the Commission's decision-making independence necessitates the preservation of the "own costs" rule at the Tribunal stage. The correct interpretation is therefore that the Tribunal has no powers to award costs against the Commission under the Act."

[58] In *Pioneer*, the Constitutional Court addressed various issues and established fundamental principles which are binding on this Tribunal.

[59] The Constitutional Court held that while the Tribunal's functions are adjudicative in nature, its powers are expressly provided for in the Competition Act. The Tribunal, unlike the High Court, is a creature of statute and does not enjoy inherent jurisdiction.[27] It is true that we have formulated our own practices and we have an inquisitorial system however, our ability to make orders and the type of orders we are permitted to grant are set out in the Competition Act. Any decision we make must be within our ambit otherwise we are abusing our powers.

[60] Secondly, the Tribunal's powers to grant costs are derived and confined to section 57 of the Act. The Constitutional Court broke down the said provision and made the following conclusions. The Tribunal has no authority to grant costs against the Commission. The general rule is that parties pay their own cost. The only time the

---

[27] Ibid para 38 and 39.

Tribunal may deviate from the norm is when the proceedings do not involve the Commission. If proceedings involve the Commission and their conduct is somewhat abusive towards the Respondents, a costs order is still not a remedy that the Tribunal may grant.

[61] The Respondents relied on Tribunal Rules as grounds for awarding costs. The Constitutional Court made it clear that cost orders made under Tribunal Rules are subject to section 57. If section 57 prohibits you from granting costs against a particular person or in particular proceedings that is the end of the matter. You cannot utilise the Tribunal Rules to bypass section 57 regardless of the severity of the conduct or the lack of alternative remedies.

[62] More importantly, the Respondents argue that *Pioneer* is not binding in this instance because it did not deal with the possibility of awarding costs under Tribunal Rule 50.[28] It is true that the Constitutional Court did not expressly deal with Rule 50 but that isn't a sufficient reason to disregard the binding precedent. In *Pioneer*, the Constitutional Court was not focused on the meaning of Rule 58 but whether the Tribunal Rules of Procedure were the exception to section 57. The only reason it interpreted a single Tribunal Rule and not all of them was because Rule 58 is the general rule under which costs would be granted. If this case was brought against the Tribunal, I am sure it would have gone through each and every Rule.

[63] It is important to note that section 57 does not mention Rule 58, it refers to all the rules of the Tribunal. The Constitutional Court was trying to determine whether any Tribunal Rule may be used to award costs against the Commission and it concluded that there aren't any. The Constitutional Court makes it very clear in paragraph 40 that it has *"established that the Tribunal has no power to grant costs outside of the exception to the "own costs" rule in section 57(2) of the Act."* Meaning that: (i) the Tribunal Rules of Procedure are not an exception to the rule that costs cannot be awarded against the Commission and (ii) our ability to grant costs is limited to proceedings involving private parties.

[64] In this case we simply do not have the ability to grant costs against the Commission and there is a principled reason for that. According to the Constitutional Court:

[28] Transcript dated 17 October 2018, pg 86.

"When the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the bona fide fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully."

[65] This would be an instance where we would award costs if we had the power to do so. The Commission caused prejudice to the Respondents, inconvenienced the Tribunal and ignored the Tribunal's Directive. Unfortunately, we are bound by the *Pioneer* decision.

[66] We therefore dismiss both applications for costs.

Conclusion

[67] We find that:

1. The Commission's condonation application is defective as it failed to comply with the Tribunal's directive;
2. The Commission has not made out an appropriate case for the granting of condonation;
3. The Respondents would suffer prejudice if the additional 1221 pages of documents were included in the trial bundle.
4. The Tribunal does not have the power to award costs against the Commission under any circumstances.

ORDER

The following orders are thus made:

1. The application to condone the late filing of the revised trial bundle is dismissed;
2. The application for wasted costs occasioned by the postponement is dismissed;
3. There is no order as to the costs.

Mr Enver Daniels

4 April 2019
Date

Prof. Imraan Valodia and Prof. Fiona Tregenna concurring.

Case Managers:	B Masina and H Vazi
For the Applicant:	K Modise and M Ngobese
For the Respondents:	Max Du Plessis *Instructed by: Bowman Gilfillan*
	Michelle Le Roux *Instructed by: Webber Wentzel*