

COMPETITION

Breaking set stone – exceptional circumstances and the variation of Competition orders

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The Competition Tribunal

According to the ancient Japanese philosophy of wabi-sabi, *nothing in life is interminable; instead, all is but transient, for even set stone can be broken*. In this article, we explore the finality of legal decisions in the context of consent orders approved by the Competition Tribunal ([Tribunal](#)).

The case of *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa*^[1] (*Life Wise v Competition Commission*) is instructive insofar as the scope of the Tribunal's power to amend its own orders is concerned – a proverbial 'breaking of set stone' if you will.

In *Life Wise v Competition Commission*, Eldan Auto Body (Eldan) appealed a decision of the Tribunal that refused to amend a provision in a consent order (application for variation) entered into between Eldan and the Competition Commission (Commission). The application for variation was rejected by both the Tribunal and Competition Appeal Court (CAC).

II Background

The Commission initiated an investigation into collusion between Eldan, a small auto repair business (SMME) owned by historically disadvantaged persons (HDPs),^[2] and a competitor (Precision and Sons (Pty) Ltd). Pursuant to this investigation, Eldan and the Commission entered into a consent agreement^[3] in terms of which Eldan admitted to contravening three provisions of the Competition Act:^[4] namely, price fixing, dividing markets^[5] by customer allocation and collusive tendering^[6] (admissions); and agreed to pay an administrative penalty of R750 000.^[7]

The agreement was confirmed by the Tribunal in August 2020.^[8]

Following Eldan's admission of its contravention of the Competition Act,^[9] Mercedes Benz – Eldan's biggest client – terminated the firm's accreditation as a repairer.^[10] In its application for variation, Eldan sought to amend a paragraph in the consent order that contained Eldan's admission of the contraventions.^[11]

The issue to be decided by the CAC is whether the Tribunal correctly exercised its discretion in refusing the amendment of the order, assuming the Tribunal had such a power?^[12]

III Legal Principles

The *res judicata* principle provides that once a matter has been adjudicated by a competent court, the same matter may not be pursued further by the same parties.^[13] In general, the Tribunal has found that similarly to the High Courts, it can amend its own orders. However, section 66 of the Competition Act provides a closed list of the circumstances under which the Tribunal may vary its own orders; thus indicating that the Tribunal's powers of variation are not unrestrained.^[14]

Nevertheless, the Tribunal has historically found that it can amend its orders on the basis of (i) a hardship due to change of circumstance;^[15] and (ii) exceptional circumstances.^[16]

The 'exceptional circumstances' test derives from the Constitutional Court decision of *Molaudzi v S*,^[17] wherein it was held that the *res judicata* doctrine should only be relaxed in "*rare and exceptional circumstances where there is no alternative remedy*", and where a refusal to relax an order of the court would result in significant injustice.^[18] Unlike the High Courts however, the Tribunal does not exercise inherent jurisdiction.^[19]

Accordingly, the Tribunal has exercised its discretion to make any ruling or order necessary to the performance of the Tribunal's functions^[20] by 'reading-in' the power to amend its own orders. Ultimately, the 'reading-in' of such power is the basis on which the Tribunal has transposed the *res judicata* principle into the competition law environment.^[21]

IV Analysis

Prior decisions of the Tribunal

Eldan cited the Tribunal's decisions in the *Foskor*^[22] and *Ferro*^[23] cases as the basis upon which Eldan's application for variation should be granted.^[24] In considering the applicability of *Foskor* and *Ferro*, the Tribunal highlighted that in those cases, the applications for variation were brought on the basis of a change in circumstance insofar as the relevant market conditions were concerned.^[25] For example, in *Foskor*, the Tribunal agreed to the proposed variation on the basis that unpredictable changes had occurred in the relevant market.^[26]

Thus, the market conditions used as a rationale for imposing behavioural conditions, as contained in the initial Tribunal order, were no longer justified.^[27]

Conversely, in this case, the Tribunal found that a client's decision to terminate a firm's services on the basis of an admission to participation in collusive practices is a wholly predictable consequence of such admission.^[28] In other words, Mercedes Benz's decision to terminate Eldan's services does not constitute an unpredictable change in market conditions and therefore, does not warrant the variation sought.^[29]

Economic hardship/exceptional circumstances

Eldan argued that the cancellation of service agreements caused unforeseen harm to its business; and that such harm constitutes exceptional circumstances that warrant a variation of the Tribunal's order.^[30]

The Tribunal has defined a "*truly exceptional circumstance*" as one borne out of an external factor(s) that affects a firm's ability to comply with conditions.^[31] The CAC, in agreeing with the findings of the Tribunal, held that disdain from clients on the basis of a firm's participation in (and admission of) collusive activity is a private consequence that is part-and-parcel of that firm's contravention of the Competition Act.^[32]

Accordingly, the CAC found that such private consequence(s) does not meet the threshold of a truly exceptional circumstance^[33] that warrants a variation of the Tribunal's order.^[34]

Public interest

In 2020, the Commission published its Automotive Aftermarket Guidelines with the intention, *inter alia*, of facilitating and promoting greater participation of SMMs and HDP-owned firms in the automotive industry.^[35] Eldan argued that the prejudice experienced by its business, as a result of the cancellation of service agreements, will likely lead to Eldan's exclusion from the automotive market; and that such exclusion would not align with the promotion of HDP participation in the automotive industry.^[36]

Indeed, competition authorities are obliged to promote public policies that guard against anticompetitive practices – including exclusion from markets.^[37] However, it does not then follow that the consequences occasioned on a firm that engaged in anticompetitive conduct should be mitigated simply because the contravening firm happens to be HDP-owned.^[38]

Nevertheless, Eldan's exit from the market would not mean the firm will not be replaced by another HDP-owned firm in the market.^[39]

V CONCLUSION

The CAC found that the Tribunal's decision to refuse the application for variation is properly reasoned.^[40] Accordingly, the application for variation was rejected, and the appeal was dismissed.^[41]

[1] (197/CACNov21) [2022] ZACAC 3 (8 April 2022).

[2] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 2.

[3] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 4; Competition Act 89 of 1998, section 49D(1).

[4] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 19.

[5] Competition Act 89 of 1998, section 4(1)(b)(iii).

[6] Competition Act 89 of 1998, section(1)(b)(iii).

[7] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 15 and 17.

[8] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 20.

[9] Competition Act 89 of 1998, section 4(1)(b).

[10] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 22. Mercedes Benz constituted 80% of Eldan's panel beating business.

[11] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 16 and 21.

[12] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 12.

[13] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 32.

[14] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 5 – 6; Competition Act section 66 – the Tribunal has the power to amend consent order limited to (a) orders erroneously sought or granted in the absence of party affected by it, (b) ambiguity and/or errors; (c) or granted as a result of a mistake common to all of the parties to the procedures a certain category of errors.

[15] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 6.

[16] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 6.

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

[18] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 7; *Molaudzi v S* 2015 (8) BCLR 904 (CC) para 45.

[19] Constitution of the Republic of South Africa, 1996, section 173.

[20] Competition Act 89 of 1998, section 27(1)(d); *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 9.

[21] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 8.

[22] *Foskor (Pty) Ltd v Competition Commission and Others* (CO037Aug10NAR240Feb16) [2019] ZANCT 181 (18 December 2019).

[23] *Ferro South Africa and Others v Competition Commission and Others* (LM179Jan14VAR152Nov2016) [2017] (9 June 2017).

[24] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 29.

[25] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 29.

[26] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 30; *Life Wise (Pty) Ltd t/a Eldan Auto Body and Competition Commission of South Africa* (CR024May15/VAR133Sep20) (8 November 2021) para 48.

[27] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 30; *Life Wise (Pty) Ltd t/a Eldan Auto Body and Competition Commission of South Africa* (CR024May15/VAR133Sep20) (8 November 2021) para 48.

[28] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 30.

[29] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 30.

[30] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 24.

[31] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 28; *Life Wise (Pty) Ltd t/a Eldan Auto Body and Competition Commission of South Africa* (CR024May15/VAR133Sep20) (8 November 2021) para 47.

[32] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 31.

[33] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 28; *Life Wise (Pty) Ltd t/a Eldan Auto Body and Competition Commission of South Africa* (CR024May15/VAR133Sep20) (8 November 2021) para 47.

[34] *Life Wise* para 31 and 32 (CAC).

[35] *Life Wise (Pty) Ltd t/a Eldan Auto Body and Competition Commission of South Africa* (CR024May15/VAR133Sep20) (8 November 2021) para 75.

[36] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 25.

[37] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 34.

[38] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 34.

[39] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 33.

[40] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 35.

[41] *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CACNov21) [2022] ZACAC 3 (8 April 2022) para 35.



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