



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 22310/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
.....	2022-01-26
SIGNATURE	DATE

In the matter between:

**STEINHOOF INTERNATIONAL HOLDINGS
(PROPRIETARY) LIMITED**

APPLICANT

And

**THE COMPETITION COMMISSION OF
SOUTH AFRICA**

RESPONDENT

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case-lines. The date for handing down is deemed to be 26 January 2022.

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

- [1] This is an application for the review setting aside of the respondent's decision on 13 November 2019 to refer a complaint against the applicant (previously known as Steinhoff International Holdings Limited) to the Competition Tribunal of South Africa ("the Tribunal") in terms of section 50 of the Competition Act 89 of 1998 ("the Act") for alleged conduct in contravention of the said Act. The respondent seeks to oppose this relief.
- [2] There is also an application for the condonation by the Respondent of the late filing of the respondents answering affidavit. The applicant opposes this relief.

BACKGROUND FACTS

- [3] During November 2019, the Competition Commission of South Africa ("the Respondent (the commission)") referred a complaint of collusive price fixing in terms of the Competition Act 89 of 1998 ("the Act") against Steinhoff International Holdings (Pty) Ltd to the Competition Tribunal.
- [4] The Applicant is now seeking to review the Respondent's decision to refer the complaint to the Tribunal.
- [5] The application was enrolled on the unopposed motion court roll for 01 March 2021. On the morning of the hearing, the Respondent filed an answering affidavit opposing the review application and seeking condonation for the late filing of its answering affidavit.
- [6] Two applications therefore serve before this court. I shall first deal with the application for condonation.

CONDONATION APPLICATION

[7] It is trite law that the court has discretion to condone noncompliance with its own rules on good cause shown

[8] It is a well-established principle that in an application for condonation the court is required to exercise a discretion having regard to the extent of the delay, the explanation of that delay, the prospects of success and the prejudice to the parties that may be suffered by either party should the application be granted or refused. Condonation therefore is not a right enjoyed by the party who failed to comply with the court rules.

[9] In **Uitenhage Transvaal Local Council v SA Revenue Services [2004] (1) SA 292 SCA** Hefer JA said the following at 297 I-J; *“Condonation is not to be had merely for the asking; a full detailed and accurate account of the cause 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. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”*

[10] The following is the brief chronology of events which necessitated this application for condonation by the Commission:

10.1 During November 2019, the Competition Commission referred a complaint of collusive price-fixing in contravention of the Competition Act 89 of 1998 (the Act) against the Steinhoff to the Competition Tribunal.

10.2 During June 2020, the Applicant applied to have the decision to so refer reviewed and set aside.

10.3 The review application was enrolled on the unopposed motion court roll for 01 March 2021.

[11] Despite the fact that letters were sent by Steinhoff's attorneys of record advising them about the date of set down the Commission only produced an answering affidavit on the day the application was to proceed unopposed.

[12] In the answering affidavit the Respondent says;¹ “In any event, there have been delays in relation to the Commission obtaining some of the information that it needed to oppose the application. When consultations were held with Counsel in January 2021, it

¹ Caselines 002-77 PARAG 40 Answering affidavit

was pointed out that the application could not merely be opposed for lack of jurisdiction alone, but it had to be opposed on the merits. Further information was thereafter sought from the commission”.

[13] This cannot be a cogent reason for the delay. The Respondent does not even say what information they sought which prevented them from filing an answering affidavit on time. In the absence of any explanation regarding the information sought from the Commission one can safely come to the conclusion that the Commission does not take the Court into its confidence with the full disclosure.

[14] The information was, however, made available on 17 February 2021. A draft answering affidavit was produced and circulated. The Respondent avers it was not possible for this to be finalised timeously, as senior counsel who had to settle the papers was also engaged by the Commission at the Constitutional Court.

[15] According to the Commission the answering affidavit became due of 10 Sep 2020 whilst according to the Applicant (Steinhoff) the affidavit became due on 27 August 2020. It is common cause that the answering affidavit was filed on 01 March 2021. The delay is therefore at least 6 months or more than 24 weeks.

[16] The attorneys representing Steinhoff (DDPA) dispatched letters to the attorneys representing the Commission (NA) advising them to file an answering affidavit but most of these were ignored. The following are some of the extracts from the Applicant’s replying affidavit:²

“On 06 October 2020 DDPA sent a letter to NA. DDPA recorded inter alia that: DDPA had not received a response to its letter of 2 September 2020 (NLJ12); the due date for the delivery of the answering affidavit had passed: the commission had failed to deliver an answering affidavit in terms of Rule 53(5) (b); and should the commission wish to deliver an answering affidavit, same would have to be accompanied by an application for condonation. The commission never responded to this letter.

On 4 February 2021 NA sent a letter to DDPA recording that the commission has not filed an answering affidavit ‘due to a number of difficulties encountered with erstwhile Counsel. The Commission has since secured the services of a new Counsel who has been briefed with a draft answer to settle. NA also advised that the commission would be filing an answering affidavit ‘in due course’ and requested that the matter be removed from the unopposed roll. On 17 February 2021 DDPA sent a letter to NA. DDPA recorded that the Commission had not filed answering affidavit and that the matter accordingly remained unopposed. It advised that the matter would be finally enrolled on the unopposed roll of 1 March 2021. DDPA also advised that the Commission’s request to have the matter removed from the unopposed roll had been rejected by Steinhoff.”

² Caselines 002 103

[17] In **Ferris and Another v First Rand Bank Limited and Another**³ Moseneke ACJ said the following;

“The test for condonation is whether it is in the interest of justice to grant it, As the Interest of Justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiry. For both inquiries, the prospects of success and the importance of the issue to be determined are relevant factors.”

[18] I am of the view that the Commission has not given convincing reasons for the delay. In fact the amount of time that has lapsed before the Commission could come with a decision to file answering affidavit is so excessive that it is understandable that it could not be explained.

[19] The Commission is a creature of statute and it deals with time frames in its daily workings. It is unacceptable that the Commission would fail to file answering affidavit for almost six months and come up with an explanation that they could not find Senior Counsel and the fact that covid-19 played a role in the delay.

[20] I have considered the reasonableness of the delay and I find that the explanation is not compelling and convincing.

[21] Having found that the explanation tendered for the delay in the filing of the answering affidavit is not convincing, one has to look at the prospects of success and whether it will be in the interest of justice to grant or to refuse the application.

[21] In **Grootboom v National Prosecuting Authority**⁴ the following was said;

“The interest of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.”

[22] Counsel for the commission argued that even if this Court is not satisfied that the commission has given a full and satisfactory explanation for the delay, the Commission's conduct should not be the decisive factor when broader public interest is involved. In this regard was referred to the judgment of the **Constitutional court in the matter of Secretary of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekiza Zuma**⁵ where it was held that while a public litigant's conduct is a factor

³ 2014 (3) SA 39

⁴ (2014) 35 ILJ 121 (CC) at paragraph 50

⁵ [2021] ZACC 2

to consider, it should be weighed against the public interest that the public body serves and the frustration to the public interest that will arise if the court refuses to hear the matter.

[23] It was further submitted on behalf of the Commission that if this Court refuses to accept the Commission's answering papers this will be to the detriment of the public interest. When one weighs the conduct of the Commission against the public interest I come to the view that the interests of justice do not dictate that I grant the Commission's application.

[24] I have had the liberty of hearing the parties on the review application and therefore am able to consider the merits in order to determine whether the Commission has reasonable prospects of success. I am of the view that there are no reasonable prospects of success and therefore it would not be in the interest of justice to grant condonation.

[25] The Commission's application for condonation should therefore fail. Now that the application for condonation has been unsuccessful the court should deal with the review application on an unopposed basis. After having heard the parties and considered the merits of this application I am of the view that the application for review should succeed.

[26] In the result I make the following order:

26.1 The Commission's application for condonation is dismissed with costs including costs of two Counsel.

26.2 The Commission's decision to refer a complaint against Steinhoff to the Tribunal is hereby revised and set aside.

26.3 The Commission is ordered to pay costs of the review application, including costs of two Counsel.

**K F PHAHLAMOHLEKA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

JUDGMENT RESERVED ON: 10 AUGUST 2021

DELIVERED ON: 25 JANUARY 2022

COUNSEL FOR THE APPLICANT: EDUARD FAGAN SC

SCHALK WILLEM BURGER

INSTRUCTED BY: WERKMANS ATTORNEYS

COUNSEL FOR THE RESPONDENT: TEMBEKA NQCUKAITOBI SC

ISABELLA KENDRIDGE
KATLEGO MONARENG

INSTRUCTED BY: NDZABANDZABA ATTORNEYS INC.