

A photograph of a fencer in a teal overlay, wearing a mask and holding a foil. The image is partially obscured by a large teal triangle on the left side of the page.

# COMPETITION LAW ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

### Variation application dismissed: panel beaters request to vary settlement agreement denied by the competition tribunal

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Earlier this year, Eldan approached the Tribunal to remove its admission of liability from the confirmed agreement (now an order of the Tribunal). Eldan's variation application was based on an allegation that it was facing 'economic hardship' which arose after the Tribunal's order confirming the settlement agreement, which it alleged was due to its accreditation to repair certain vehicles being terminated because of the admission of liability contained in the agreement.

The Competition Act 89 of 1998 (as amended) affords the Tribunal with the express power to vary its orders in limited circumstances, for example, where its order is ambiguous or contains an obvious error or omission. The Tribunal has also previously interpreted a section granting necessary ancillary powers to the Tribunal as allowing it a general power to vary for changed circumstances or hardship. Although it found for itself a right to vary for changed circumstances, the Tribunal recognises the importance of the principle that matters decided by

courts and administrative bodies such as the Tribunal should be final (*res judicata*). In accordance with this principle the Tribunal noted that not every case brought before it on the grounds of changed circumstances or hardships should be granted; and "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". It was thus clear that Eldan would have to meet a high threshold to succeed with its variation application.

Eldan raised three grounds in support of its variation:

(1) Hardship/exceptional circumstances

Upon analysis, the Tribunal found that Eldan's alleged hardship, being the alleged loss of its contract with an OEM, did not constitute exceptional circumstances warranting variation of the consent agreement. The Tribunal held that "[t]he alleged

*exceptional circumstances pertain to consequences of the consent order on the private interests of Eldan rather than exogenous factors caused by changes to a market...*" – in other words, the alleged hardship did not outweigh the broader public policy interests at play. In any event, the Tribunal also appeared to place some weight on the fact that it was not evident that the contract would be reinstated if the admission of guilt was excised from the consent agreement, and that the relationship in question had in fact ended prior to the confirmation of the consent agreement.

(2) Legal representation

On Eldan's allegation of lack of legal representation, the Tribunal concluded that Eldan had in fact been represented throughout the matter up until settlement. It considered that Eldan was not indigent and that it had in effect made a decision to represent itself, as opposed to being forced to do so by circumstance.

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### (3) SMME/HDI-owned

With regard to Eldan being a small business owned by historically disadvantaged individuals (HDIs), the Tribunal found that “[c]artel 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 anti-competitive 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 Tribunal highlighted that the object and purpose of the Act is to protect consumers from anti-competitive conduct by all firms whether big or small.

Based on the above, the Tribunal dismissed Eldan’s variation application. The Tribunal’s decision reflects deference to the fundamental principle of *res judicata* (finality of legal decisions) in our law and recognises the importance of considering the impact on the public interest holistically, not narrowly focussing on individual firms.

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