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COMPETITION

Tools of the trade – do you understand how to navigate through a dawn raid?

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The Competition Commission ("**Commission**") has conducted a significant number of dawn raids during this year alone. From the beginning of 2017, the Commission has raided 47 companies and 53 premises in total. These raids involved the fresh produce market, meat suppliers and fire sprinkler installers.

Minister of Economic Development, Ebrahim Patel, stated earlier this year that collusion[1]:

> *"...it stunts our economic growth, prevents the entry of new players, reduces consumer choice and feeds the growing resentment of black South Africans of the failure to recognise promises made by the Competition Act and the vision of the Constitution."*

Minister Patel also stated that neither corruption in the public sector (with its private sector counterparties) nor collusion between large firms are "*victimless crimes*".

> *"Corruption takes resources away from housing, jobs, social grants, education, health facilities. Collusion increases the costs of doing business, stunts the dynamism and competitiveness that is needed and has a negative impact on growth and jobs."*

Furthermore, the Competition Commissioner Tembinkosi Bonakele has on numerous occasions highlighted the importance of rooting out collusion through vigorous enforcement.

The above signals afresh the focus of the Commission to rid the South African economy of any cartel arrangements. It is further suggested that if we expect a renewed focus by the Commission in this regard, that we should also expect the Commission to utilise all the powers at its disposal in the attempt to root out collusion.

During the course of an investigation, the Commission has wide powers to collect information, even from third parties. The full extent of these powers can be witnessed when a "dawn raid" is carried out simultaneously on multiple businesses in relation to alleged infringements of the Competition Act.[2] During a dawn raid, the Commission has a wide range of powers including:

- entering premises;
- examining the books and other records related to the business, irrespective of the medium on which they are stored;
- taking or obtaining in any form, copies of, or extracts from, such books or records;
- sealing books or records for the period and to the extent necessary for the inspection where privileged information is involved;
- asking any representative or member of staff of the organisation for explanations or facts or for documents relating to the subject matter and purpose of the inspection and thereafter recording the responses.

The start of a dawn raid is often the first time an organisation or individual learns that it is the subject of an investigation by the Commission. Knowing what to do during the first minutes of a dawn raid is vital. Ensuring that an organisation's receptionist, employees and senior management are all aware of the role they have to play in effectively managing the arrival of investigators at the organisation's front door

and the subsequent search is essential. Attempting to formulate such a plan of action once the raid has begun has proven to be difficult and therefore the key to handling a dawn raid is preparation and detailed planning.

The surprise nature of a dawn raid means that it is important that companies are prepared and provide information to relevant members of staff on how dawn raids are carried out, as well as assisting employees who may be directly involved in the raid to understand their individual roles. In addition, lawyers play an important role in helping to manage the process by acting as liaison between the investigators and the organisation and ensuring that the investigators are acting within their powers, while ensuring that the organisation abides by the legislation.

Having a prepared dawn raid response plan in place that is individually tailored for staff members will assist greatly in ensuring that everyone in the organisation is aware of what they have to do during a raid. This in turn helps to minimise the confusion and uncertainty as to what can and cannot be done that initially follows a dawn raid. A step-by-step guide detailing how employees should behave during a dawn raid, the rights and responsibilities of the investigators and the roles of each individual is a useful tool in the event that an organisation receives an unexpected early morning knock on the door by investigators.

Over the past few years, the Commission has dealt with close to 200 cases involving cartels in various sectors of the economy. Numerous cartel investigations result in consent orders and irrespective of this, 84 individual cartel cases are currently before the Competition Tribunal for adjudication. Dawn raids assist the Commission in collecting necessary evidence in support of prosecutions of control contraventions.

Preparation is crucial.

Find out about our **Competition e-Learning tool**.
Click **here** to find out more about our Dawn Raid team.

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[1] Commission's Eleventh Annual Competition Law, Economics & Policy Conference

[2] Act 89 of 1998



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