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COMPETITION

Yet another dawn raid – but do you know all the facts?

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On 16 March 2017, the Competition Commission ("**Commission**") issued a press release welcoming the outcome of the proceedings in the High Courts of South Africa, KwaZulu Natal and Gauteng Divisions, which prevented edible cooking oils and baking fats manufacturers accused of cartel conduct, from stopping the Commission's investigation against them.[1]

INTRODUCTION

Both DH Brothers Industries (Pty) Ltd., trading as Willowton Oil and Cake Mills, as well as Wilmar Continental Edible Oils and Fats (Pty) Ltd., approached the High Court of South Africa, seeking an order interdicting the Commission from reviewing the evidence it seized during the raids conducted at their offices. The courts ruled in favour of the Commission dismissing these applications with costs and paving the way for the Commission to review the seized evidence as part of their investigation.

COURT RULING

However, what is not clearly stated in the press release is that Africa Sun Oil Refineries (Pty) Ltd. ("**Africa Sun**"), who approached the High Court in KwaZulu-Natal in a bid to interdict the Commission from reviewing the seized documents, was indeed granted interim urgent relief on 8 March 2017, in the Pietermaritzburg High Court. The court ruled that the Commission:

- will not open or unseal any of the evidence bags containing the hardcopy documents seized from Africa Sun or its employees during the search of Africa Sun's premises on 8 and 9 December 2016;
- will not in any manner access, copy or search any of the electronic data, devices or mirror copies of electronic data or any data storage and information electronically seized or removed pursuant to the search including electronic documents; and
- will not give any further effect to the warrant granted on 6 December 2017, as it relates to Africa Sun.

The above order will remain in place until such time as the court process has run its due course in terms of the Africa Sun application to interdict the Commission from studying any of the hardcopy documents or electronic data removed from its offices.

It is undoubtedly, absolutely essential to have a procedure in place for dealing with Dawn Raids.

DAWN RAID PREPAREDNESS

Dawn Raid procedures enable companies to manage the process, which is stressful at the best of times. You need to ask yourself whether you will be able to deal with a Dawn Raid in a measured and sensible way. Also, mock Dawn Raids enable one to test procedures and in doing so familiarise staff as to the do's and don'ts when it comes to a Dawn Raid. Companies need to understand what to do – step by step. Understanding what powers of search the Inspectors have? To what extent do you have to co-operate with the Inspectors? What documents can the Inspectors read? What questions can the Inspectors ask?

Commissioner, Tembinkosi Bonakele stated that:

"The search and seizure operation was conducted with due regard to the rights of all the affected persons. We will therefore not be swayed in our efforts to clamp down on the exploitation of consumers by cartels, particularly in the food and agro-processing sector."

CONCLUSION

The outcome of the *alleged cartel* in the refined edible cooking oils, baking fats and margarine sector in South Africa remains to be seen. To date, no company has been found guilty and all their rights remain reserved. A Dawn Raid does not serve as evidence of wrong-doing. It is only a finding by the Competition Tribunal that a company is engaged in cartel behaviour, based on evidence, which can result in a guilty finding. A Dawn Raid could however leave a company significantly exposed from a legal perspective.

Will you know whether due regard was given to your rights and those of your employees? Do you understand your rights, not only on the day but also during the days, weeks and months thereafter?

Werksmans has in place a Dawn Raid team structured to assist you in preparing for a Dawn Raid as well as providing you with guidance during a Dawn Raid and the process that follows. Knowing your rights is crucial. Be prepared!

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[1] The Commission conducted the search and seizure operation on 8 December 2016, as part of its investigation of the *alleged cartel* by the five manufacturers of refined edible cooking oils, baking fats and margarine in South Africa.

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