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CONSTRUCTION LAW BULLETIN

THE CORPORATE LENIENCY POLICY: IS IT LEGAL?

What is it?

In 2004 the Competition Commission ("the Commission") introduced a corporate leniency policy ("CLP") relating to cartel activity.

In terms of this policy leniency can be sought in respect of activities described in section 4(1)(b) of the Competition Act ("the Act"), namely:

- price fixing
- market allocation
- collusive tendering¹

An applicant for leniency can be granted conditional immunity and then total immunity if it meets the requirements of the CLP.

Immunity shields an applicant from adjudication before the Competition Tribunal ("the Tribunal") and the imposition of any fine.

In order to meet the requirements of the CLP, an applicant must:

- come forward before the Commission initiates an investigation;
- come forward before any other cartel participant;
- honestly and truthfully disclose all information and evidence;
- co-operate with the Commission;
- cease its cartel activity;
- not have been the instigator of the cartel activity;

¹ Which includes the giving of cover prices in relation to tenders.

- not alert former members to the fact that it has applied for leniency;
- not destroy or falsify information;
- not act dishonestly or make misrepresentations.

Construction Industry

In February 2011 the Commission invited persons guilty of cartel activity in the construction industry to engage in settlement discussions.

In terms of this proposal persons who come forward and make a truthful disclosure of their collusive tendering activities can benefit from a reduced penalty as per a table set out in the policy document.

This policy was issued pursuant to the initiation by the Commission on 1 September 2009 of an investigation into bid rigging and collusion in the construction industry.

A person engaged in the construction industry who may have participated in bid rigging is in the following position:

- If the practices occurred more than three years prior to 1 September 2009, they will be prescribed and no sanction will be competent.
- If the person submits a marker application, i.e. complies with the CLP which would require being the first person to disclose the bid rigging activity, then that person will qualify for immunity.
- If the person concerned makes the necessary disclosure and submits the required information but is not the first to do so, then all that person can hope for is to conclude a settlement with the Commission on the basis of the reduced penalty provisions set out in the construction industry invitation to construction firms.

Is it legal?

The Supreme Court of Appeal ("SCA") recently had occasion to consider the legality of the CLP.²

Background Facts

Following a decision of its parent company, Consolidated Wire Industries (Pty) Ltd ("CWI"), a member of a large group of companies operating generally in the steel industry, undertook an audit to identify anti-competitive conduct in the company.

Pursuant to this audit, CWI reported that it had been involved in cartel activity relating to the setting of prices, dividing markets and fixing of tenders.

CWI reported the existence of the cartel activity to the Commission and named Agri Wire (Pty) Ltd and eleven other companies as having been involved in the unlawful cartel activity.

The Commission granted CWI leniency on a conditional basis and after conducting an investigation referred the matter to the Tribunal.

² Agri Wire (Pty) Ltd and Another v The Commissioner of the Competition Commission and Others [2012] ZASCA 134, Case No 660/2011, Date of judgment 27 September 2012.

In its referral the Commission requested the Tribunal to direct Agri Wire and the other companies involved to refrain from engaging in the prohibited conduct and also to impose an administrative penalty on them of 10% of their annual turnover in the 2008 financial year.

Although CWI was also cited as a party in the referral to the Tribunal, the Commission did not ask for any relief or penalty against it on the basis that it had granted CWI conditional leniency in terms of its CLP.

Agri Wire's Challenge

Agri Wire attacked the referral to the Tribunal on the grounds that the CLP was not authorised by any law and that the evidence obtained against it had been obtained unlawfully.

Its argument was that the Commission is a creature of statute and only has those powers conferred on it in terms of the Competition Act which does not in terms grant authority to the Commission to implement a policy such as the CLP.

Agri Wire complained that if the Commission identifies cartel activity, then it is obliged to report and pursue all members of the cartel and may not selectively decide which ones to penalise.

In considering these criticisms, the court observed that, as stated in the CLP itself, it is extremely difficult to detect or prove the existence of a cartel, and the rationale of the CLP is to encourage participants to break ranks and disclose information to enable the Commission to tackle cartel activity. Absent some incentive, cartel participants would have no reason to blow the whistle.

Strangely, the Commission tried to answer Agri Wire's complaint by contending that it was only the Tribunal not it that had the power to decide on the grant of immunity and that the Tribunal would have to decide whether CWI should be given immunity. Both the Commission and CWI argued that what the Commission was doing was referring everyone involved in the cartel activity to the Tribunal but merely not asking for relief against CWI which would be left to the decision of the Tribunal.

Agri Wire on the other hand said that what the Commission had in fact done was unlawfully grant CWI immunity itself.

After analysing the wording of the CLP, the court concluded that it clearly provided for the Commission to grant immunity as opposed to the Tribunal and that is what the Commission had done in the case of CWI.

The Issue

The court expressed the central issue in the case as:

"... whether the CLP is lawful and whether the Act permits the Commission to refer a complaint to the Tribunal in respect of cartel behaviour, without citing and seeking relief against all the members of the cartel."

Jurisdiction

The court had to digress into a consideration of whether the High Court and by extension the SCA has jurisdiction to deal with such competition law matters.

The Commission and CWI had challenged the High Court's jurisdiction to rule on the matter and the High Court had upheld that contention. Agri Wire had appealed that finding, hence the case arriving at the SCA for determination.

The argument of the Commission and CWI was that it is the Tribunal and the Competition Appeal Court which have exclusive jurisdiction to decide on the legality of the Commission's conduct.

In this regard they relied on section 62(3)(b) of the Act which confers jurisdiction on the Competition Appeal Court over:

"(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act"

The SCA rejected these arguments and pointed out that the jurisdiction conferred on the Competition Appeal Court in the section is neither exclusive nor final. As such the inherent jurisdiction of the High Court is not ousted in such matters.

The court recognised that there are certain competition law matters which the Tribunal and Competition Appeal Court have exclusive jurisdiction over in terms of the Act but found that the issue in the present case was not one of those.³

The Court's Decision

The SCA found that properly interpreted the Act does empower the Commission to adopt a policy such as the CLP.

The court reasoned that the purpose of the Act as set out in section 2 is to promote competition in South Africa. To that end the Commission is empowered to promote market transparency and to investigate and evaluate alleged contraventions of the Act including prohibited cartel activity.

The court stated that breaking up cartels serves to promote market transparency as cartel behaviour is the antithesis of transparency in the market place.

As part of its function of investigating contraventions it must be so that the Commission is entitled to put in place measures that will enable it to perform this function effectively. The court held that this is the whole purpose of the CLP and as such it follows that the Commission must be taken to be empowered under the Act to adopt and implement a policy such as the CLP.

The court went on to clarify that it is the Commission which has the power and ability to grant immunity and not the Tribunal.

Conclusion

The High Court has inherent jurisdiction to decide on an issue such as the legality of the CLP.

The CLP is a lawful policy which the Commission is entitled to implement.

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³ Even in such matters the SCA retains appellate jurisdiction.