



Persuading colluders to break ranks

MUCH has been said and written about infringements of competition law by construction companies recently.

The high-profile publicity is the culmination of a lengthy process that commenced in 2004 when the competition authorities introduced a corporate leniency policy relating to cartel activity.

Included within the ambit of cartel activity is collusive tendering. The most common form taken by such collusion was the practice of giving cover prices. It involves a contractor, at the request of a competitor, submitting an inflated tender price in return for a fee.

The competition authorities rightly considered that to make any headway in unearthing collusive tendering, which by its very nature is secretive, they would have to offer some form of incentive to encourage contractors to come forward and provide relevant information.

It is safe to say that, had it not been for the introduction of the leniency policy, it is highly unlikely that the competition authorities would have been as successful as they have been in opening the collusive tendering can of worms in the construction sector.

The success of the strategy is



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linked to the domino effect.

In this process the competition authorities have been able to extract large sums of money, albeit by way of reduced administrative penalties, from many construction companies in relation to collusive tendering that occurred both in the public and private sector. The policy that made all of this possible was nearly still-born a few years back when its legality was challenged in court. Consolidated Wire Industries, a member of a large group of companies operating in the steel industry, after undertaking an audit, identified various instances of anti-competitive conduct perpetrated by the company including the fixing of tenders.

To avail itself of the leniency policy, it reported the details to the Competition Commission and named one of its competitors, Agri Wire, with 11 other companies. The commission granted Consolidated Wire Industries leniency and applied to the Competition Tribunal

for an order imposing the maximum administrative penalty of 10 percent of annual turnover on Agri Wire and the other collaborators.

Agri Wire responded by launching a court challenge as to the legality of the leniency policy. The case was first heard in the North Gauteng High Court in Pretoria, which dismissed Agri Wire's challenge. Agri Wire appealed to the Supreme Court of Appeal in Bloemfontein where it presented its case to a full Bench of five appeal judges, one of whom was Malcolm Wallis, a well-respected scion of the KwaZulu-Natal legal fraternity.

Judge Wallis was the judge tasked with delivering the court's judgment. Agri Wire's attack on the leniency policy was multipronged. It contended that the Competition Act made no express provision for it and, being a creature of statute, it could only exercise those powers conferred on it in terms of the Act.

It complained also that the evidence against it had been obtained unlawfully, that the Competition Commission should treat all guilty parties in the same manner and that Consolidated Wire Industries should have the same penalty imposed on it.

The question that the court was called on to answer is whether the

leniency policy is lawful and whether the Competition 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.

Fortunately or unfortunately, depending on your point of view, the Supreme Court of Appeal found that, properly interpreted, the Competition Act did empower the commission to adopt a policy such as the leniency policy.

The court reasoned that the purpose of the Act was 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 served to promote market transparency as cartel behaviour was the antithesis of transparency in the marketplace. 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 that was the whole purpose of the leniency policy and as such it followed that the commission must be taken to be

empowered under the Act to adopt and implement a policy such as the leniency one.

In considering Agri Wire's criticisms of the policy, the court observed that, as explained in the policy itself, it was extremely difficult to detect or prove the existence of a cartel, and the rationale of the policy was to encourage participants to break ranks and disclose information to enable the commission to tackle cartel activity.

Absent of some incentive, cartel participants would have no reason to blow the whistle. Whatever one's views are of the competition authorities, their success in putting the spotlight on what appears to have been an endemic practice of collusive tendering in the industry will strengthen the industry and certainly have positive benefits for those who employ contractors.

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