

There is an implication to switching sides

THE Competition Commission has, since its inception, faced a large exodus of its employees to the private sector, both to commercial enterprises and to legal firms.

Given the small pool of competition lawyers in SA, and the potentially lengthy duration of competition matters, there is clearly a possibility that the erstwhile employees of the commission may work on two sides of a matter, with the consequent risk of conflicts of interest.

This issue came before the Competition Tribunal in the long-standing and acrimonious dispute between American Natural Soda Ash (Ansac) and Botswana Ash (Botash). Although the issue is now the subject of an appeal before the Competition Appeal Court, it is relevant to briefly discuss the tribunal's findings.

In 1999, Botash launched a complaint against Ansac alleging that it was a cartel and had abused its dominance. Ansac mounted many challenges to Botash's complaint, with the result that the merits of the case have not yet been heard (notwithstanding almost seven years since the filing of the complaint). A further delay arose when it came to Ansac's attention that one of the lawyers working for Botash had previously



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been employed by the commission and had worked, while at the commission, on the Botash complaint.

Ansac alleged that this lawyer's presence compromised the legal firm concerned. Ansac said if the matter were to proceed its right to a fair hearing would be violated. The lawyer concerned was removed from the case, without conceding that this was necessitated by legal or ethical considerations. Notwithstanding the withdrawal, Ansac brought an application seeking the disqualification of the legal firm, counsel and experts as well as Botash as an intervener.

It was held that courts are concerned with discouraging lawyers' conflicts of interest, but equally with respecting the client's right to choice of legal counsel. The reason why courts adopt a strict view of conflicts is the policy interest in preserving the sanctity of attorney-client privilege. If the rule interpreting these conflicts is too lenient, the danger is that the public will no longer trust attorneys to respect their confidences, with a resultant threat to the proper administration of justice.

The tribunal held that there was a "possibility", not a "probability", of a breach of confidentiality having taken place. However, since the case did not concern "side switching" (which would have been the case if the lawyer had represented Ansac and then moved to represent Botash), there was no reason to utilise the test of possible harm (as opposed to the more lenient test of probable harm).

In this regard, the tribunal said the commission was not Ansac's attorney, nor is it the type of public body that otherwise has access to a company's secrets because of its statutory function. The commission had decided to prosecute Ansac. Ansac ought to have known that the commission was its adversary and

that the prosecution would continue if settlement negotiations failed. It should have approached the settlement meetings (at which the confidential information was disclosed) accordingly.

The tribunal held that, if Botash and its representatives were disqualified, the implications would be substantial. Taken to its logical conclusion, Botash would be deprived of its constitutional right to pursue a civil claim against Ansac, and the right to have its application for an interdict adjudicated. Further, if the tribunal disqualified only Botash's legal advisers and experts, the prejudice to it in a case of this complexity over this length of time would be enormous.

The tribunal found that, although the allegedly conflicted lawyer had briefly been part of the Botash legal team and may have been exposed to without-prejudice information in this matter due to his prior employment with the commission, Ansac had not established more than a possibility of harm.

Even if there had been breach of an alleged duty arising from a confidential occasion, without proof that this led to substantial unfairness, this claim must fail. Even if the legal test for disqualification is less

stringent (namely requiring only the possibility of harm), the tribunal found that a balancing of interests would still be required. Disqualification of Botash in the circumstances would be a fundamental breach of its rights of access to justice. Further, if the remedy sought required only the disqualification of Botash's lawyers, this would also cause Botash, at this late stage, to find new legal advisers which would, in turn, compromise its rights to fairness.

Although it is clear that former employees of the commission cannot be barred from utilising their expertise in working for law firms or other private commercial endeavours, notwithstanding the lenient test adopted by the tribunal, care must be taken in ensuring that confidential information is not utilised for any nonapproved purpose.

Any commercial enterprise or law firm employing former commission employees should take steps to ring-fence those workers from any cases in which they may have been involved while at the commission.

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