

# Issue of personal liability still not on the table

**FOR** a number of years, the trade and industry department has been considering amending the Competition Act, including increasing the powers of the competition authorities to investigate and eradicate anti-competitive behaviour.

It is unclear, however, whether the issue of personal liability is on the agenda.

In November last year, various submissions were made during the public hearings concerning the confirmation of the consent order entered into between Tiger Brands and the Competition Commission to the effect that penalties under the Competition Act were too low, and that personal liability was required. The chairperson of the Competition Tribunal said that it has been widely accepted that the only penalty sufficient to deter anti-competitive conduct is prison time. However, the chairperson also said that it is for good reason that, at this stage, contraventions of the South African Competition Act are not subject to criminal penalties.

Having regard to the proposed legislative amendments and the comments of the chairperson, it is relevant to consider the impact of any amendment to the Competition Act that will introduce personal liability for individuals involved in anti-competitive conduct.

The sanctions currently prescribed under the Competition Act for participation in anti-competitive



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conduct are reserved for "firms" and include behavioural remedies, such as interdicts, structural remedies, such as an order for divestment of assets, and administrative penalties. Criminal sanctions are reserved for a limited range of contraventions, including hindering the administration of the act, failure to protect confidentiality, perjury and failure to comply with an order of the competition authorities.

Importantly, however, participation in anti-competitive behaviour does not result in a criminal sanction for the company concerned, nor is there liability for the individuals involved.

Internationally, a number of jurisdictions already have laws in place providing for criminal sanctions for competition law contraventions, including Canada, Japan, Ireland, France, Germany and the US.

Last year in the US, for example, the Senate increased criminal penalties for anti-trust violations to a maximum fine of \$100m for a corporate and \$1m by an individual (as well as a maximum sentence of 10 years).

On January 11, the Australian government released a draft bill for public comment, proposing the introduction of criminal offences for involvement in cartel conduct. A cartel provision, in the draft bill, relates to price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers or territories or bid-rigging, by parties that are, or otherwise would be, in competition with one another.

In addition to the criminal offences referred to, the proposals in Australia include the imposition of civil penalties (which mirror the criminal offence, except that they do not require the establishment of dishonesty). The maximum penalties for individuals who commit a cartel offence or who aid or abet, induce or are knowingly concerned in the commission of such an offence by another, are imprisonment for a term of up to five years. These may be accompanied up a penalty of A\$220 000. The maximum penalty for breach of the civil provision by an individual is A\$500 000.

It is clear that international law is moving in the direction of the imposition of personal liability for competition law contraventions.

If SA were to consider following this trend, the most important question is whether the country is ready for criminal prosecution for competition law matters, or whether the current regime of penalties imposed on the firms concerned, and the reputational damage flowing from this, is sufficient at this stage. At the very least, some practical issues must first be considered, including:

- Whether personal liability will be limited to only "hard-core" cartel activity (namely the per se prohibitions contained in section 4(1)(b) of the Competition Act), such as in the Australian proposal, or whether all contraventions of the Competition Act will attract this liability;
- Whether personal liability will take the form of civil or criminal liability, or both;
- The determination of the relevant standard of proof (that is, whether the test will be a balance of probabilities or beyond a reasonable doubt). In this regard, it must also be decided whether the test in SA will require dishonesty prior to imposition of criminal sanctions and, if so, whether it will be necessary to establish that the individual intended dishonestly to obtain a benefit for himself, or whether a benefit for the company will suffice;
- Whether all individuals involved in cartel activity will be liable for personal penalties, or whether only the ring-leaders will be punished;
- Whether the Competition Tri-

bunal, with its competition law experience, is the appropriate authority to adjudicate upon personal liability issues, or whether these are better left to the high court. At the very least, an arrangement will need to be entered into between the National Prosecuting Authority and the competition authorities to properly regulate this issue;

■ Whether a company that qualifies for leniency from prosecution can escape criminal liability in the same application, and whether individuals can also make use of the leniency provisions to escape their own prosecutions (criminal or civil); or

■ Whether the individual penalty imposed will be financial (and the determination of the quantum thereof) and whether prison time is also considered.

While we in no way condone contraventions of the Competition Act, it may be too soon to incorporate personal liability into South African competition law. Our competition law regime is still very young, and it is therefore far too early to say with certainty that the current model is not effective. Given that the Competition Commission has enjoyed some success in its cartel-busting activities recently, it seems that the effect of these successes over time should be assessed first.

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# Status of estate agents scrutinised

**T**HE issue of estate agents and their status is a thorny one that comes under the spotlight again and again.

Most estate agents are treated as independent contractors and not as employees but this is not necessarily legally correct and there are significant risks to both parties if they get it wrong.

Recently the Labour Court was asked to decide whether or not an estate agent was an employee in the case of *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others*.

The case came to the Labour Court on review from the Commission for Conciliation, Mediation and Arbitration (CCMA). The employer had taken a preliminary point that the CCMA didn't have jurisdiction to hear the case because the agent was not an employee. The commissioner ruled in favour of the agent saying she was an employee and the employer took the ruling on review to the Labour Court.

The court applied the dominant impression test (in other words, it looked at all the facts and asked whether or not the dominant impression of the relationship was that of a contract of employment) and decided that the estate agent was an employee. It decided this even though in the contract it said that the agent was an independent contractor and not an employee of the company; the agent was paid commission only and no unemployment insurance fund (UIF) or pay-as-you-earn tax (PAYE) was deducted from her earnings.

Although the court acknowledged that the wording of the con-

tract carried some weight it was not prepared to read that clause on its own. Closer scrutiny of the rest of the contract and the facts left a different impression and indicated a relationship of employment. These are some of the aspects of the relationship that persuaded the court that it was dealing with employment:

- The agent was required to confirm the use of certain clauses and wording when preparing documents for conveyancing with her manager;
- The agent was prohibited from earning any form of commission or payment from any property transaction other than provided for in her contract with the company;
- The contract could be terminated if the agent referred a property transaction to another agency;
- The agent had to keep all correspondence received or written by her in the company's offices;
- The agent was restrained from working as an estate agent in the area she had been allocated for 180 days after termination of her contract with the company;
- The agent was required to subject herself to an exit interview in the event of termination;
- The agent was required to run errands for one of the managers and had to report any absence from work to the manager; and
- The agent was given a timetable or roster that regulated her activities.

The degree of control that the company and its managers had over the agent carried a lot of weight with the court in deciding that there was an employment relationship. The Labour Court referred the case back to the CCMA to decide the merits.

In the light of this judgment businesses that employ estate agents would be advised to look closely at the contracts they have in place and the relationships they have with their agents. The mere fact that there is a contract in place which says that it is an independent contract will not be enough. The relationship itself must be able to withstand scrutiny.

Too much control over the agent and regulation of what she can and can't do could create the impression of employment. You cannot have a genuinely independent contractor relationship and keep close tabs on what your agents do and how they are required to deliver. The risk is that you may be treating your agents as independent contractors when they are in fact employees. This in turn means there are likely to be a number of employment laws that apply but which you are not adhering to when dealing with the agents.

This is not to say that you can't have a genuine independent contractor relationship with an agent — you just can't have the best of both worlds. If you want independence you will have to relinquish matters such as control and supervision.

If you are an agent it would also be in your interests to know and understand the relationship you have with your agency and to be sure that you know whether you are an employee or an independent contractor. The legal consequences of the relationships are different — you will have more protection as an employee but less independence.

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