

Enforcing competition law through dawn raids

MUCH has been made in the press recently of the Competition Amendment Bill which is aimed, among other things, at shoring up the Competition Commission's means of enforcing the competition law regime.

While corporate SA awaits, with something less than enthusiasm, the introduction of criminal liability for contraventions of the Competition Act and complex monopoly provisions, an existing weapon in the commission's regulatory arsenal remains relatively unused – the so-called "dawn raid".

If the commission has reason to believe that a firm is in contravention of the Competition Act of 1998, or is in possession of information relating to a matter that is under investigation, its investigators have the authority to enter into such firm's premises; inspect and request copies of documents; ask for information about any documents; take notes and interrogate staff members; search and examine computer data; and remove evidence.

These powers emanate from sections 46 to 49A of the Competition Act and form the core of the commission's powers of search and summons.

It bears particular mention that the commission's personnel have made considerable progress in the forensic science of locating



**COMPETITIVE
EDGE**

Mark Garden and
Derushka Chetty

our competition law jurisprudence, with the commission falling foul of various procedural hurdles. This is not altogether unexpected given the relative age of our competition authorities in comparison to many of their foreign counterparts. As seen below, however, the greater precision with which recent raids have been carried out seems to indicate that such problems are being eradicated through experience and growing confidence.

By their very nature, dawn raids are invasive procedures that call for rigid adherence to due legal process and deference to the various rights enshrined in the constitution. In the Pretoria Portland Cement case, the first search and seizure operation embarked on by the commission, a warrant was obtained to conduct a dawn raid on the offices of Pretoria Portland Cement. During the raid, the commission arranged for an SABC television crew to film the proceedings. The Supreme Court of Appeal held that the dawn raid conducted by the commission was unlawfully executed as the presence of the television crew was contrary to the terms of the relevant warrant.

The court held that powers of search and seizure should not be abused and that the commission must be cognisant of its legal obli-

gations and the provisions of the constitution.

In 2004, the commission carried out a dawn raid on the offices of the Airlines Association of Southern Africa (AASA). While a warrant was not obtained in this instance, the commission's investigators were granted permission to conduct the search by the person controlling the premises. The raid followed a complaint relating to the activities of AASA and its members and, while the case against the company was not pursued, various of its constituent members were investigated for engaging in prohibited restrictive practices. The airlines involved entered into a settlement arrangement and paid administrative penalties.

In 2006, the commission initiated a complaint against various competitors in the scrap metal industry. The commission obtained a warrant and launched a dawn raid on the New Reclamation Group (Reclam). Raids were conducted simultaneously at the Johannesburg, Durban and Port Elizabeth offices of Reclam, making it the largest co-ordinated raid since the ill-fated affair at Pretoria Portland Cement.

Notwithstanding that the legal requirements necessary to conduct the raid were satisfied, Reclam brought an urgent application for the commission to

remove certain confidential information it had obtained during the raid from its website, and to refrain from disclosing further confidential information.

While the Competition Tribunal did not pronounce on the validity of the confidentiality claims under scrutiny, it ordered the commission to maintain the confidentiality integrity of all documents claimed as confidential by Reclam. This year Reclam entered into a settlement agreement with the commission and agreed to pay an administrative penalty equating to 6% of its annual turnover in the affected markets.

In April last year the commission unleashed a dawn raid upon the tyre industry, seizing documents from Dunlop Tyres International, Bridgestone SA and SA Tyre Manufacturers Conference. The raid was motivated by a complaint that alleged that prices adopted by the tyre makers were adjusted concurrently and within corresponding parameters. All the necessary legal requirements were complied with and a warrant authorising the raid was obtained. The parties co-operated with the commission and the consequent investigation is currently under way.

■ *Mark Garden is a director and Derushka Chetty a candidate attorney at Edward Nathan Sonnenbergs.*