

March 2016

Without Prejudice

2015 saw a marked increase in dawn raids by the South African Competition.

There were four dawn raids conducted by the Commission across the following industries:

- fire control and protection systems companies (20 March 2015)
- recruitment advertising agencies (23 September 2015)
- furniture removal companies (30 September 2015)
- liquefied petroleum gas suppliers (14 October 2015).

In the wake of the increased reliance on dawn raids by the Commission, it has become more imperative than ever that firms are aware of their rights and duties, as well as the best practices that should apply in anticipation/response to a dawn raid.

What is a dawn raid?

"Dawn raid" is a colloquial term used to refer to the investigatory procedure in terms of the search and seizure provisions contained in Part B of Chapter 5 of the Competition Act 89 of 1998 (the Act).

The Act permits the Commission to, *inter alia*, enter a firm's premises and seize or make copies of documents and collect electronic data, which have a bearing on an investigation. The term "premises" is couched in broad terms and includes land, any building, structure, vehicle, ship, boat, vessel, aircraft or container.

Section 46 permits the Commission to conduct a dawn raid pursuant to being issued a warrant by a judge or magistrate. A warrant will be granted if reasonable grounds exist to believe that:

- a prohibited practice (as contemplated in chapter 2 of the Act) has occurred, will occur or is likely to occur on those premises; or
- anything connected with an investigation is in possession or under the control of a person located at the premises.

Section 47 of the Act permits the Commission to conduct a dawn raid without a warrant. Such a dawn raid may be conducted if:

- permission to do so is granted by the owner or person in control of the premises; or
- on reasonable grounds it is believed that a warrant would be issued in terms of section 46 of the Act if applied for and the delay in applying would defeat the purpose of the dawn raid.

Requirements for a lawful dawn raid

With a warrant (section 46)

- The warrant must be validly issued.
- The warrant must identify the premises on which the dawn raid may be conducted and authorise an inspector or police officer to enter the premises and conduct the dawn raid.
- Only a person authorised in terms of the warrant may enter the premises.
- Immediately before the warrant is exercised, the person executing the warrant must identify himself/herself and explain the authority to conduct the dawn raid in terms of the warrant to the owner of or person in control of the premise and provide a copy of the warrant to such person. If there is no such person present at the premises, the authorised person must affix a copy of the warrant to the premises in a prominent and visible place.
- For a dawn raid to be conducted at night, a judge or magistrate must be satisfied that it is reasonable in the circumstances to do so. The warrant must expressly authorise the night raid.

Without a warrant (section 47)

A dawn raid may not be conducted without a warrant on a private dwelling. The term "private dwelling" refers broadly to the part of a structure or any area connected thereto that is used for the purpose of a residence.

A dawn raid may only be conducted during night if justifiable and necessary in the circumstances.

Duties placed on the Commission during a dawn raid

A dawn raid must be conducted with the utmost regard to decency and order, taking into account every person's constitutional right to dignity, freedom, security and privacy.

Persons may only be searched by a Commission inspector of the same gender.

Any person subject to questioning by the Commission must, prior to such questioning, be informed of his/her right to be assisted by an attorney or advocate and be given an opportunity to exercise such right.

If the Commission removes anything from the premises it must issue a receipt in respect thereof to the owner or person in control of the premises and must return such item as soon as possible after the purpose for which it was removed is achieved.

Pursuant to an audible demand and explanation of the purpose of the required entry to the premises, a police officer may use reasonable force to overcome any obstacle, such as a locked

door or closed window, which impedes the entry and search of the premises.

Rights and duties of a firm during a dawn raid

Rights

A person may refuse to permit the Commission to inspect or remove any document that is legally privileged. If a document is claimed to be legally privileged, the Commission may request that the registrar or sheriff remove such document for safe keeping until a court determines whether the information contained in the document is in fact legally privileged.

A firm is entitled to be compensated by the Commission for any damage suffered as a result of forced entry when a responsible person was present at the premise at the time of the entry.

Duties

The firm is obliged to co-operate with the Commission during a dawn raid. Section 70 of the Act makes it an offence to hinder, oppose, obstruct or unduly influence any person exercising a power or carrying out a duty in terms of the Act.

Best practices

Adopting best practices will mitigate against the potential negative legal and reputational effects concomitant with being subjected to a dawn raid. Some of the practices that should be adopted would include the following:

- **"Prevention is better than cure"**
Regular competition law training should be conducted for all employees of a firm to ensure that they are aware of the situations that may arise in the course of carrying out their duties that may give rise to contraventions of the Act, and how to avoid them. This would include practices to be adopted in interactions with competitors and participation in trade associations and contracts containing non-compete or exclusivity or preferential pricing provisions. Firms should also regularly review the practices and procedures followed in their organisations to identify and eliminate any potential prohibited practices
- **Retention of records**
Firms must ensure that their records are well ordered and easily accessible, which will help to minimise the intrusiveness of a dawn raid. A transparent, systematic and lawful document retention policy will also reduce the likelihood of suspicion that incriminating records have been selectively destroyed.
- **Dawn raid procedures**
Firms should develop and implement policies and procedures to be followed in the event of dawn raids. This should involve extensive training for "front-of-house" staff who will be the first employees of a firm to interact with the Commission during a dawn raid.

Points that should be emphasised include:

- o Remain calm, professional and courteous at all times.
- o Confirm the investigator's identity and the authority to conduct the dawn raid.
- o Contact the firm's attorneys and inform them of the scope and purpose of the dawn raid. (All staff who are likely to have to interact with the investigators should be in possession of a list of contact numbers).
- o Request the investigator and accompanying personnel to wait in a meeting room until the attorneys arrive at the premises, but do not object should they not wish to wait.
- o Do not contact any competitors or destroy any documents.
- o Ensure that the inspectors are escorted by your attorneys at all times.
- o Inform the inspectors of any documents which may be legally privileged.
- o Permit the inspectors access to confidential firm documents that contain business secrets, subject to the firm's right to require, by way of the prescribed CC7 form, that the Commission observe the confidentiality of the documents.
- o Keep a detailed record of all documents seized or copied and all statements made or questions answered.
- o Do not sign any documents or statements without first seeking advice from your attorneys.

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