

CONFIDENTIAL

The ethics of anti-competitive behaviour

Companies have the right and a duty to make money, but they should do so legally and ethically. Price-fixing, collusion and anti-competitive behaviour are not only dishonest and illegal in terms of the Competition Act of 1998, but are also highly unethical. Conduct is unethical when it is not right, not good and not fair, and when it violates the known standards of ethical behaviour in an industry or a profession such as the financial sector. Furthermore, unlawful behaviour is irresponsible and selfish and those guilty are not considering the negative impact it has on the ordinary citizens of South Africa. It is unfair to harm others in the illegal pursuit of more profit.

Dishonest business practices violate the standards set by the 2016 King IV Report on Corporate Governance. Principle 1 of the King IV Report states: "The governing body (in other words the leaders of an organisation) should lead ethically and effectively. The board should individually and collectively cultivate the characteristics of integrity, competence, responsibility, accountability, fairness and transparency." When unlawful practices occur, it is indicative of a lack of leadership integrity. It would not be unfair to question the trustworthiness of such leaders. Besides, unethical leaders set a wrong example to others.

Directors and prescribed officers must be good stewards of their organisations. Engaging in illegal activities violates the legal obligation of a director to act with care, skill and diligence, and in good faith. Good faith means that the best interest of the organisation is served. That includes the best interest of all its stakeholders. When stakeholders, albeit ordinary citizens, are disadvantaged because they have to pay more for goods or services, the good name of the company is harmed



and stakeholder support might be withdrawn. This, in turn, threatens the long-term sustainability and success of the organisation.

As a juristic person, a company must be a responsible corporate citizen. People depend on big businesses for their livelihood - to provide services they need and deliver products they use. It is foreseeable that the cost of a fine imposed by the Competition Commissioner on a transgressing organisation will be filtered down to the end user, an innocent person. That could include employees who might not be receiving a salary increase the following year. The poorest of the poor is often impacted directly by having to pay more for services and products in an attempt by the offending company to recover the monies spent on a fine.

Dishonest business practices damage the country's economic growth and investment confidence. Business opportunities may be lost and unemployment is exacerbated.

How could cartel behaviour be prevented?

Despite the ability of the Competition Tribunal to fine a transgressing company 10 per cent of its annual turnover, it might not be enough of a deterrent. I am of the opinion that those responsible for the dishonest decision should be prosecuted individually and held personally liable for fraud.

The commercial crime courts have had successes in prosecuting high-level white-collar crimes. However, one could consider the establishment of another specialised criminal court to prosecute specific types of crimes related to fraud, anti-competitive behaviour and corruption. Once found criminally liable, directors should be given a substantial fine and/or a jail sentence. The Companies Act provides for delinquent directors to be blacklisted and prevented from serving as a director again.

A further option is to screen leaders and decision makers more carefully and assess their integrity. Psychometric testing, as approved by our courts, could be a valuable tool to determine the level of responsibility, accountability, honesty and integrity of a person.



One could also use Principle 1 of the King IV Report, which states that the arrangements by which the members of the governing body are being held to account for ethical and effective leadership should be disclosed. These arrangements would include, but are not limited to, codes of conduct and performance evaluations of the governing body and its members. It is thus incumbent upon big businesses to ensure that those who lead their organisations are carefully selected, their integrity is assured and they are held accountable annually through codes of ethical conduct to which they must commit.

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