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COMPETITION **ALERT**

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Competition Act implications for workplace collusion

Earlier this year, the United States Department of Justice Antitrust Division and the Federal Trade Commission (Agencies) issued a joint statement reaffirming their commitment to protecting workers on the frontlines of the COVID-19 pandemic by using various antitrust laws against those who seek to exploit the prevailing circumstances and engage in anticompetitive conduct in the labour market. This article explores how similar employment-related anticompetitive practices may contravene the South African Competition Act 89 of 1998, as amended (Act).

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Competition Act implications for workplace collusion

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Earlier this year, the United States Department of Justice Antitrust Division and the Federal Trade Commission (Agencies) issued a joint statement reaffirming their commitment to protecting workers on the frontlines of the COVID-19 pandemic by using various antitrust laws against those who seek to exploit the prevailing circumstances and engage in anticompetitive conduct in the labour market.

To this end, the Agencies highlighted that they are "*on alert for employers, staffing companies, and recruiters, among other, who might engage in collusion or other anticompetitive conduct in labour markets, such as agreements to lower wages or to reduce salaries or hours worked*" in an attempt to leverage the COVID-19 pandemic as an opportunity to collude against workers in labour markets. The Agencies warned that those entering into unlawful wage-fixing and no-poach agreements may be visited with criminal prosecution.

The statement is not a first of its kind, with the Agencies having also previously issued a non-exhaustive list of "*red flags*" for employment practices that may give rise to competition concerns. These include, for example,

(i) agreements between companies relating to employee salaries or other terms of compensation (either at a specific level or within a specific range), employee benefits, other terms of employment and undertakings not to solicit or hire the other company's employees;

(ii) expressing to competitors that you should not compete too aggressively for employees;

(iii) exchanging sensitive information about employee compensation or terms of employment with another company;

(iv) participation in a meeting where these topics are discussed;

(v) discussing these topics with colleagues at other companies (including during social events or in other non-professional settings); and

(vi) receiving documents that contain another company's internal data about employee compensation.

This concern has become particularly relevant in light of the enhanced vulnerability in relation to job security experienced during the COVID-19 pandemic. Firms are being forced to shed human capital to survive and affected employees will face the obstacle of having to secure new employment within a severely depressed economy, with anticompetitive labour practices merely enhancing this hurdle.

From a South African perspective, while the COVID-19 pandemic has elicited various forewarnings from our competition authorities, no express caveat was levelled with regard to similar employment-related anticompetitive practices. Despite this, there is scope for the application of the Act in such cases, some of which we briefly highlight below.

Competition Act implications for workplace collusion...*continued*

As a general principle, competition between firms is viewed as desirable and as such is encouraged.

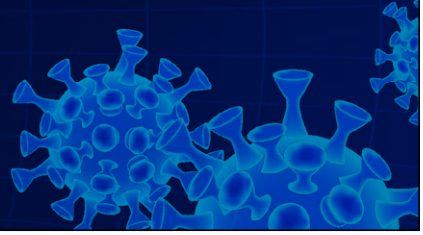
As a general principle, competition between firms is viewed as desirable and as such is encouraged. Competition in respect of the sale of goods and/or services is often beneficial to consumers as it results in lower prices and increased quality, option, and innovation. Similarly, competition amongst employers is beneficial to employees as it results in pro-competitive benefits accruing in the form of higher salaries or other beneficial terms of employment. Guarding against anticompetitive employment-related practices is not foreign to the Act. To this end, the preamble to the Act recognises that a prerequisite to an efficient and competitive economic environment that benefits all South Africans requires "*balancing the interests of workers, owners and consumers*". This is reinforced by the purpose of the Act being to "*promote and maintain competition in the Republic*" in order to, amongst others, "*promote employment and advance the social and economic welfare of South Africans*".

The scope of the Act, in so far as it relates to employment-related anticompetitive practices, is however, tempered by section 3 which excludes from the ambit of the Act:

(i) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act 66 of 1995 (LRA); and

(ii) collective agreements, as defined in section 213 of the LRA.

Notably, however, other than through legitimate collective bargaining and collective agreements, any agreement to fix salaries or other terms of employment between employers will likely be viewed as the fixing of price or trading conditions, a practice that is *per se* prohibited under the Act unless it forms part of a larger legitimate business collaboration or transaction between the employers or is otherwise subject to an exemption. '*Per se*' prohibitions being outright violations of the Act requiring no further inquiry into the actual competitive effects or justifications thereof.



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Competition Act implications for workplace collusion*...continued*

In light of the severe pecuniary fines and other serious penalties for engaging in anticompetitive conduct, firms, and in particular, the human resources department will be best placed to implement safeguards to prevent inappropriate labour-related restrictions that may contravene competition laws.

Legitimate labour-related restrictions include (amongst other things), for a limited duration: parties agreeing not to hire or recruit employees with whom they may possibly transact while negotiating or conducting the necessary due diligence; joint venture partners who agree not to hire or recruit employees involved in the joint venture; or a seller agreeing with a purchaser not to recruit key management staff from the business being sold.

While South Africa has not had cases dealing directly with these issues, the Competition Appeal Court (in *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC)) recently set the parameters within which restraints of trade agreements are to be assessed, more specifically, by interrogating: *"(a) Is the main agreement (i.e. disregarding the impugned restraint) unobjectionable from a competition law perspective? (b) If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement? (c) If so, is the particular restraint reasonably proportionate to the requirement served?"*. A similar test may arguably be applied in the case of the labour-related restrictions referred to above.

Based on the above, there is clearly potential for employment-related arrangements that neither constitute

(i) collective bargaining and/or collective agreements; nor

(ii) a legitimate business collaboration,

to fall foul of the Act insofar as they may restrict competition.

Bearing in mind that our competition authorities may consider appropriate foreign and international law, the scrutiny that these arrangements could face may gain momentum in line with the approach by the Agencies. This would also be consistent with our authorities' increased focus on public interest (including employment) considerations and the principle of competition over collusion, even in times of crisis.

In light of the severe pecuniary fines (up to 10% of a firm's turnover for first-time offences, and 25% for repeat offences) and other serious penalties for engaging in anticompetitive conduct, firms, and in particular, the human resources department will be best placed to implement safeguards to prevent inappropriate labour-related restrictions that may contravene competition laws.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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