KEBD
KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC.
Attorneys | Notaries | Conveyancers

220 Lange Street,
Nieuw Muckleneuk,
Pretoria, 0181
PO Box 178, Groenkloof,
South Africa, 0027
Docex 42, Brooklyn
Tel: +27 (0) 12 452 8900
Fax: +27 (0) 12 452 8901
www.kebd.co.za

Unlawful Competition

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Introduction:

In South Africa we live in a free-market economy. Vigorous and robust competition amongst competitors is appropriate. The difficulty that often arises is to draw the line between lawful and unlawful competition.

What is unlawful competition?

It has been held that a rival trader who in some manner obtains confidential information from its competition, well aware of its confidential nature, and uses it in his competing business, commits a wrongful act.

In a reported case, it was held that:

> *"A trader who makes fraudulent misrepresentations about his own business to the detriment of his rival's business is guilty of unlawful interference. So also a trader who passes off his goods as being of a competitor, or makes injurious false statements concerning his competitors business. In each case the interference is unlawful and actionable and in each case the conduct is unfair or dishonest."*

Further, examples of what has been held by the courts to be unlawful competition include, inter alia, theft of trade secrets, theft of confidential information, industrial sabotage, misappropriation of corporate opportunities and passing off.

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The main objectives of the Competition Act are to promote and maintain competition in the marketplace in order to:

- promote the efficiency, adaptability and development of the economy;
- provide consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa;
- ensure that SMME's have an equitable opportunity to participate in the economy;
- promote a greater spread of ownership, in particular to increase ownership of historically disadvantage.

The Competition Act 89 of 1998, (the "Act") was one of the policy instruments adopted as a mechanism to strengthen the South African competition regime so as to transform the economy, and enable small and medium-sized enterprises to have an equitable opportunity to participate in the economy.

*The Act prohibits **Abuse of Dominance,** which refers to anti-competitive practices by dominant firms and may include the following:*

- Excessive pricing of goods or services to the detriment of consumers;
- Denying competitors access to an essential facility;
- Price discrimination (such as unjustifiably charging customers different prices for the same goods or services); and
- Exclusionary acts such as refusing to supply scarce goods to a competitor, inducing suppliers or customers not to deal with a competitor, charging prices that are below cost to exclude rivals from the market and buying up a scarce input required by a competitor.

Another category of unlawful competition is ***Collusive Tendering***, also known as bid rigging, which forms part of what is also known as "cartel activity", in which competitors agree not to compete on bids to be submitted following receipt of an invitation to tender in respect of specified goods and/or services.

Collusive tendering may take many forms, for example:

- complementary bidding: firms may agree on their bids in advance by deciding that one of them will submit the lowest bid or will submit the only bid containing acceptable terms;
- bid suppression: in this form, some firms may agree to refrain from bidding;
- bid rotation: firms may decide to bid high so that an agreed bidder will win.

The Act prohibits all forms of *collusive tendering* and encourages anyone that has fallen victim of such practice to bring their claim for damages against firms guilty of such prohibited practice in our civil courts.

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Competition law is designed to create a level playing field where both big and small businesses can compete fairly and effectively. Therefore, the Act regulates mergers having an effect within South Africa. No party may implement a notifiable ***Merger, amalgamations and acquisitions of control*** without the prior approval of the competition authorities. The authorities must assess whether the merger is likely to substantially lessen or prevent competition in the relevant market and the probability that the firms in the market will behave competitively or co-operatively after the merger. Irrespective of the impact on competition, the competition authorities must determine whether the merger can or cannot be justified on public-interest grounds.

Non-Solicitation or ***Non-Poaching*** in the context of Competition Law and the Labour Laws may land you in big trouble if it does not comply with the Competition Laws therefore, it is imperative that Human Resource professionals ensure that their companies' hiring practices comply with the Competition laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms. Traditionally, however, HR Professionals are not always included in competition compliance training and programmes. It is important that HR Professionals are fully apprised of Competition Law risks and how to mitigate them.

Which brings us to this question?

Is stealing the employees of a competitor unlawful competition?

The question is often asked whether or not it is lawful for an employee to entice or solicit the employees of another competitor. It has been held in a leading case that:

"In our competitive economy it is normal for employers to bid for their labour, the price of which is subject to the law of supply and demand. As long as the employee is free to leave others are entitled to offer him better terms of employment. The fact that the loss of the employee might cause damage to the employer is incidental and irrelevant."

This does not mean that should a businessman systematically induce his competitor's employees to leave, his conduct would necessarily be lawful. Public policy subscribes to the opinion that where the aim in inducing a competitor's employees to terminate their employment is not to benefit from their services, but to prejudice or restrict, competitor's business, this action constitutes unlawful competition.

It is therefore lawful, in the course of competition, for an employer to offer employment to the employees of a competitor, even if the other competing business suffers loss as a result of the former employee taking up employment with a competitor, unless it is the objective to cripple or eliminate the competition.

Conclusion:

It is evident that in order to judge whether or not conduct amounts to unlawful competition, such conduct must be weighed on the facts and the respective interests of the competing parties, and on the context of the applicable principles and laws, including case laws. This is an elastic concept and the boundary between lawful, as opposed to unlawful competition is sometimes difficult to judge.

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By Malandi Pieterse (Director) and Olivia Ndebele (Candidate Legal Practitioner) | Litigation Department