Patel Makes Monopoly Capital Criminal

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Patel makes monopoly capital criminal

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As of this month, it is a criminal offence to engage in cartel conduct, leaving corporate executives and managers open to personal fines and even prison sentences for fixing prices, dividing markets or colluding on tenders.

This is a massive departure from the old situation, where it was only the company that got fined or slapped with an administrative penalty.

The maximum penalty that bosses could now face is, however, unclear.

It could be a relatively paltry fine of up to R2 000 or six months in jail.

Or it could be completely up to the National Prosecuting Authority to take on these prosecutions.

President Jacob Zuma signed a proclamation last month that brings into effect parts of the 2009 Competition Amendment Act that have been lying dormant.

The 2009 amendment allowed for individual penalties to shoot up to 10 years in jail or a fine up to R500 000, but that part is still being kept inactive, causing the uncertainty.

Before now, the Competition Act did provide for imprisonment, but mostly for offences related to undermining the competition authorities, not for actual competition offences.

The extreme 10-year sentence and/or R500 000 fine was already in place, but only for people who ignored the orders of the commission or tribunal – a mechanism to ensure enforcement of penalties against companies.

According to the statistics provided by the Competition Tribunal, there have been just more than 200 consent orders and settlements for cartel conduct at the competition authorities since 2004.

Minister of Economic Development Ebrahim Patel announced the criminalisation during his departmental budget vote in Parliament last month.

According to him, the time is right because the competition authorities have prosecuted enough cartels to make it certain what is, and what isn't, illegal.

Some major law firms disagree.

Tamara Dini, a partner at Bowman Gilfillan Africa Group, said that the move "seems to be premature".

According to her, there were still aspects of the competition law that have not been fully interpreted by the competition authorities.

This left companies at risk of accidentally committing an offence, said Dini.

Webber Wentzel put out a notice saying other parts of the amendment that were still dormant would cause constitutional issues.

Zuma's proclamation also left out a controversial rule that finding a company guilty of cartel conduct automatically provides prima facie evidence that managers are guilty.

This creates a "reverse onus" when that manager ends up in a criminal court – undermining the presumption that people are innocent until proven guilty.

The new criminalisation could also potentially cause a headache for the Competition Commission by neutering one of its best weapons.

Jennifer Finnigan, partner at Shepstone & Wylie Attorneys, warned it could have a chilling effect on companies coming forward and confessing to get leniency.

That leniency wouldn't necessarily help bosses in criminal court.

"The bottom line in any firm which applies for leniency exposes its directors and managers to criminal charges for cartel conduct," she wrote in a note for law website Lexology.

The higher stakes are, however, having an effect on corporate conduct.

Media24, owner of City Press, responded this week by canning its "early settlement discount or agency commission" – a long-standing practice that in essence amounted to a 16.5% payment to media agencies that bring clients' ads to Media24 titles.

According to the company, this is standard industry practice.

"Having assessed its exposure, and without acknowledging any wrongdoing, Media24 has decided to take these precautionary measures to create certainty, and avoid any regulatory and legal risk," the company said in a notice to clients.

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