

## **PROPOSED CHANGES TO THE COMPETITION ACT - (Sipho Ziga, Partner)**

On the 12th of July 2017, a bill proposing to repeal the current Competition Act (Cap 46:09) ("the Act") was published in the Government Gazette. The object of the bill is to re-enact, with amendments, the Act.

The Competition Act Bill, No. 22 of 2017 ("the Bill"), which is still to be debated in Parliament and passed as law, proposes significant amendments to the regulatory framework for dealing with competition issues.

The most significant amendment, is the structure of the Competition Authority ("the Authority"). Under the current regime, the Authority deals with all operational matters, whilst the Competition Commission, is both the governing body of the Authority, and has an adjudicative role to settle disputes arising out of decisions from the Authority. This naturally raised issues of conflict of interest.

Under the Bill, the Authority which is established under the Act shall, continue under the new name of the 'Competition and Consumer Authority'. The proposed new governing body shall be the Competition and Consumer Board, which will be responsible for the governance of affairs of the Competition and Consumer Authority. A new body known as the 'Competition and Consumer Tribunal', ("the Tribunal"), will be established to play an adjudicative role in disputes arising from the decision of the Competition and Consumer Authority.

The Competition and Consumer Authority will have a widened scope as it will not only deal with competition issues, but also with consumer issues which will arise out of a proposed new Consumer Protection Bill No. 23 of 2017.

Some of the proposed amendments to the Act which are of interest are as follows:

- A new provision has been introduced for criminal sanctions for officers or directors of enterprises who contravene the provisions of the Act by committing an offence of entering into anti-competitive practices, such as price-fixing and bid rigging. The Bill would introduce sanctions for these anti-competitive practices, as any officer or director is therefore liable for a fine not exceeding BWP 100 000.00 or a term of imprisonment not exceeding five years or both. Under the Act, there is no such sanction.
- Under the merger control provisions of the Bill, a new section will be introduced, which allows participants to, within 14 days after a decision to reject a merger is made, make an application to request the Competition and Consumer Authority to re-consider its decision by providing a presentation of new facts or evidence that were not submitted with the original notification. This is subject to payment of a further fee of 20% of the original notification fee paid. This allows parties to have a second bite of the cherry.
- The establishment of the Competition and Consumer Tribunal, which is empowered to inter alia, adjudicate over all matters brought before the Tribunal by the Authority or by complainants regarding a breach of any provisions of the Bill or any appeal brought in accordance with the Bill.
- The Bill also introduces comprehensive provisions regarding the manner in which the Tribunal, inter alia, conducts hearings, takes evidence and makes decisions. The Bill will give the Tribunal power to make decisions and any person who fails to comply with decisions of the

Tribunal commits an offence and is liable, upon conviction, to fines not exceeding BWP 50,000.00 or a term of imprisonment not exceeding three years or both.

A person who is aggrieved by the decision of the Tribunal has the right to either appeal the decision of the Tribunal or to take them on review to the High Court. This is different from the Act, which provides for an appeal from decisions of the Competition Commission which are to be determined by using the principles of review. This can be confusing, as it blurs the distinction between reviews and appeals. This is a welcome development because it allows any of the parties to either choose to appeal, which involves the re-opening of the merits of the matter, or review which is concerned with the manner in which a decision was taken.

It is sincerely hoped that the Bill will clarify and improve the competition regime in Botswana and will go through Parliament as soon as possible.