

REPUBLIC OF SOUTH AFRICA

COMPETITION AMENDMENT BILL

*(As amended by the Portfolio Committee on Trade and Industry (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

[B 10D—2000]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP MEDEDINGING

*(Soos gewysig deur die Portefeuljekomitee oor Handel en Nywerheid (Nasionale
Vergadering)) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VAN HANDEL EN NYWERHEID)

[W 10D—2000]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Competition Act, 1998, so as to alter the manner in which the Competition Appeal Court is constituted; to make fresh provision as to the Competition Appeal Court’s powers of appeal and review and for the terms of office of the members of the Competition Appeal Court; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 36 of Act 89 of 1998

1. Section 36 of the Competition Act, 1998 (Act No. 89 of 1998) (hereinafter referred to as the principal Act), is amended— 5

- (a) by the substitution for subsection (2) of the following subsection: 5
- “(2) The Competition Appeal Court consists of at least three judges, appointed by the President on the advice of the Judicial Services Commission, each of whom must be a judge of the High Court.”; and
- (b) by the addition after subsection (2) of the following subsections: 10

“(3) The President must designate one of the judges of the Competition Appeal Court to be Judge President of the Court.

(4) The Minister of Justice, after consulting the Judge President of the Competition Appeal Court, may second any number of judges of the High Court to serve as acting judges of the Competition Appeal Court. 15

(5) When the office of Judge President of the Competition Appeal Court is vacant, or when the Judge President is temporarily unable to perform the functions of that office for any reason, the senior judge of the Court must perform the functions of Judge President.”.

Substitution of section 37 of Act 89 of 1998 20

2. The following section is substituted for section 37 of the principal Act:

“Functions of Competition Appeal Court

37. (1) The Competition Appeal Court may—

- (a) review any decision of the Competition Tribunal; or
 - (b) consider an appeal arising from the Competition Tribunal in respect of—
 - (i) any of its final decisions other than a consent order made in terms of section 63; or
 - (ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.
- (2) The Competition Appeal Court may give any judgment or make any order, including an order to—
- (a) confirm, amend or set aside a decision or order of the Competition Tribunal; or
 - (b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.

Amendment of section 38 of Act 89 of 1998

3. (1) Section 38 of the principal Act is amended—
- (a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:
 - “(b) must preside at proceedings of the Court **[and]** or designate another judge of the Competition Appeal Court to preside at particular proceedings of the Court; and”;
 - (b) by the substitution for subsection (2) of the following subsection:
 - “(2) Subject to subsection (2A), the Judge President must assign each matter before the Court to a bench composed of three judges of the Court.”;
 - (c) by the insertion of the following subsection after subsection (2):
 - “(2A) The Judge President, or any other judge of the Competition Appeal Court designated by the Judge President, may sit alone to consider an—
 - (a) appeal against a decision of an interlocutory nature, as prescribed by the rules of the Competition Appeal Court;
 - (b) application concerning the determination or use of confidential information;
 - (c) application for leave to appeal, as prescribed by the rules of the Competition Appeal Court;
 - (d) application to suspend the operation and execution of an order that is the subject of a review or appeal; or
 - (e) application for procedural directions.”;
 - (d) by the substitution for subsection (3) of the following subsection:
 - “(3) The decision of a judge sitting alone in terms of subsection (2A), or of a majority of the bench hearing a particular matter, is the decision of the Competition Appeal Court.” and
 - (e) by the substitution for subsection (4) of the following subsection:
 - “(4) If a judge or any of the judges hearing a matter assigned in terms of subsection (2) is unable to complete the proceedings in that matter, the Judge President must—
 - (a) direct that the hearing of that matter proceed before the remaining judge or judges to whom the matter was assigned; or
 - (b) terminate the proceedings before that bench and constitute another bench, which may include a judge to whom the matter was originally assigned, and direct that bench to hear the matter afresh.”.

Substitution of section 39 of Act 89 of 1998

4. The following section is substituted for section 39 of the principal Act:

“Term of office

39. (1) The Judge President and any other judge of the Competition Appeal Court is appointed for a fixed term determined by the President at the time of the appointment and holds office until—

- (a) the expiry of the term;
- (b) the date the judge ceases to be a judge of the High Court; or
- (c) the judge resigns from the Court by giving written notice to the President.

(2) Section 33, read with the changes required by the context, applies to the Judge President and other judges of the Competition Appeal Court.

(3) The tenure of office, the remuneration, and the terms and conditions of service applicable to a judge of the High Court in terms of the Judges’ Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), are not affected by the appointment and concurrent tenure of office of that judge who is appointed as a judge of the Competition Appeal Court.”

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Transitional provision

5. Anyone serving as Judge President or as a judge of the Competition Appeal Court immediately before this Act comes into operation continues to serve in that office after this Act comes into operation, subject to section 39 of the principal Act.

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Short title and commencement

6. This Act is called the Competition Amendment Act, 2000, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPETITION AMENDMENT BILL, 2000

1. Scope of the Bill

a. Background

The Competition Act, 1998 (Act No. 89 of 1998) (“the Act”), makes provision for the establishment of a Competition Appeal Court, which may consider any appeal from, or review of, a decision of the Competition Tribunal. Although the Act came into operation on 1 September 1999, the members of the Competition Appeal Court have not yet been appointed. Experience of working with the Act, as well as comments from members of the Judicial Services Commission, has brought to light various problems that will arise from attempting to constitute the court under the existing provisions of the Competition Act. As such, this Bill is proposed in order to bring about certain changes in the structure, functions and powers of the Competition Appeal Court, in order to facilitate the establishment of this court. It should be noted also that the Court needs to be established as soon as possible in order that parties may exercise their constitutional right to take matters on review or appeal.

b. Discussion

Section 36 of the Act provides that the court will be composed of five members, at least three of whom must be judges of the High Court, while the remaining two members must be “lay members”. These latter members are analogous to assessors who participate in selected proceedings of the High Court.

There is considerable uncertainty regarding the appropriate procedure to be followed in appointing the two lay members of this Court. While the Act provides that they will be appointed by the President, legal opinion is divided as to whether or not the correct procedure is appointment by the Judicial Services Commission or appointment by the President on the recommendation of the Minister. Furthermore, one legal opinion suggests that the procedure set out in the Act may well violate the Constitution in so far as it does not make provision for a commensurate degree of protection of judicial independence for lay members, as is accorded to those members of the Court who are High Court judges.

In order to allay any uncertainty that may thus arise, specifically any constitutional uncertainty, it is proposed that this category of members be removed from the Act entirely. In this regard it should be noted that the services of assessors in High Court proceedings are generally only required at trial stage where evidence on the facts of the case is evaluated. As opposed to this, appeal hearings tend to focus on matters of legal interpretation, an area in which lay members would not necessarily be qualified to assist the Competition Appeal Court. This therefore explains the need for introducing an amendment that will effectively change the structure of the Competition Appeal Court.

In addition, the present Act requires that a full Court or bench hear every matter that is referred to the Competition Appeal Court. However, it is clear that in many instances matters of a purely technical or procedural nature will have to be heard and decided upon by the Court. In such instances, the nature of the subject matter does not necessitate the sitting of a full bench to decide upon the issue that has been referred to it. Indeed, such matters can easily be handled by a single member of the Court and this Bill proposes to amend the Act to cater for precisely this situation. This amendment will allow the Court to function more efficiently and will help to prevent the creation of backlogs in the system.

Finally, the Bill clarifies the review and appeal powers of the Court. These serve to confirm the review and appeal powers of the Court as well as limit the power of the Court to consider appeals in interim or interlocutory matters, in common with High Court practice.

2. Consultative process

The Department of Justice and the Chief Justice have been consulted with respect to the proposed amendments.

3. Organisational and personnel implications

The proposed amendments do not have any personnel implications in that the Court has not yet been established. The reduction in the size of the Court will neither have any effect on existing personnel nor create any need for additional personnel.

4. Financial implications

There are no financial implications that arise from the proposed amendments in terms of additional spending. Rather, the amendments will reduce the running costs of the Court by removing the category of lay members from the Court.

5. Parliamentary procedure

The State Law Advisers and the Department of Trade and Industry hold the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.