

## **Seminar shares insights into new competition regulations**

Early in 2020, the new regulations promulgated under the Competition Act came into operation to prohibit dominant players in a listed industry from discriminating towards SMMEs and HDI owned companies by imposing unfair prices or trading conditions. At a recent e-seminar hosted by the University of Johannesburg, industry experts and the regulator shared some insights into the new regulations and associated enforcement guidelines.

Of interest is that section 7 of the amended Act now sets out a test to determine whether an entity is regarded as 'dominant' in a certain industry. Firms that account for 45% or higher of a specific market is presumed to be dominant but this is not the only factor. The experts explained that the market structure, the dependency of the supplier on the buyer as well as the availability of alternative marketing channels can also be considered.

Broadly speaking there are two forms of conduct that is prohibited, namely the imposition of unfair prices or unfair trading conditions. Where a dominant firm offers lower prices to a SMME or HDI supplier, a number of factors are considered to determine whether this differentiation would be deemed unfair. For example, the guideline document acknowledges that a buyer does not necessarily have access to details regarding his suppliers' costs of production so firm benchmarks are not always a reliable indicator. Instead, the guideline seeks to determine whether there has been a change in behaviour from the buyer, whether the buyer imposes additional costs on the supplier and other factors to determine if there is a prima facie case. Once a case can be made at face value, the onus shifts onto the buying firm to showcase that the price differentiation is objectively justifiable. This will naturally depend on the facts of each case but a number of examples were cited by the experts where such a differentiation would be justifiable. For example, a buyer may give preferential treatment to one supplier over another if it forms part of an enterprise supplier development initiative.

A similar procedure is followed to establish whether a dominant buyer has imposed trading conditions which are unjust. According to the experts, indications that a trading condition could be unjust can include provisions that transfers risk from the buyer to the seller or where payment periods are so long that it will disproportionately affect the cashflow of smaller entities. One of the more contentious issues discussed was the possibility of quality standards being regarded as unfair trading conditions. Once again, the experts pointed to the fact a trading condition will only be deemed unfair if it cannot objectively be justified, so where private standards relate to quality controls or a public safety concern, it may be justifiable.

In conclusion, the expert noted that the regulations could make it more difficult for large firms to keep the final prices of consumer products down as the regulations could lead to entities having to reassess the weighting of price in their procurement strategies. The Regulations were, however, not enacted for consumer welfare but rather to advance SMMEs and HDI firms. In this regard it can be argued that the regulations sacrifice a degree of consumer welfare in favour of promoting SMMEs and HDIs.