

The Trajectory of Citizen Economic Empowerment in Botswana After Fifty Years: An Endless Road of Hapless Policies¹

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ABSTRACT

Citizen economic empowerment is one of the most aged policies of the Government of Botswana, as was implied in Botswana's first national economic plan - the Transitional Plan for Social and Economic Development of 1966-1971. Overtime, the policy developed into an intrinsic and integral economic policy of Botswana. In 2012, the government promulgated the Citizen Economic Empowerment Policy. Notwithstanding its old age, the policy suffers from a long-standing failure to deliver. This paper traces the trajectory of citizen economic empowerment in Botswana, and further identifies challenges and opportunities for reform and improvement. It is argued that the main problems reside in the system of implementation, and therefore the solution to a sound implementation of citizen economic empowerment policy can only be found in the promulgation of a law on citizen economic empowerment with institutions focused on delivering the policy.

1. INTRODUCTION

Due to a history of colonialism and lack of skills by citizens, the economic activities of most developing countries are dominated by non-citizens. In Botswana, the tourism industry provides a good example. Citizen economic empowerment is one of the concepts through which citizens are given the opportunity to access and derive advantage from their country's economy. The aim of this paper is to trace the trajectory of citizen economic empowerment in Botswana, and to identify the weaknesses, challenges and opportunities for reform and improvement. In tracing the history of citizen economic

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1 This article consists of a revised section of the author's dissertation titled: *The Interplay of Citizen Economic Empowerment and WTO Law in Botswana*, submitted in partial fulfilment of the requirements of the Master of Laws (LLM) Degree at the University of Botswana in August 2013.

empowerment, this paper begins with the birthplace of citizen economic plan, that is, the Transitional Plan for Social and Economic Development (1966-1971) and moves to the several national development plans and relevant pieces of legislation up to the Citizen Economic Empowerment Policy (2012). The implementation of citizen economic empowerment has faced a lot of challenges over the years. On the issue of reform, the question posed is – after 50 years of policies and fragmented legislation, has the time not come to consolidate citizen economic empowerment into one comprehensive law? To answer this question, guidance is drawn from existing models in Southern Africa.

2. THE BIRTH OF CITIZEN ECONOMIC EMPOWERMENT IN BOTSWANA

2.1 The Transitional Plan for Social and Economic Development

The Transitional Plan for Social and Economic Development (TPSED),² was the first development plan in Botswana, and was designed to guide the economic and social development of Botswana during the two year period following independence. However, rather ironically, the TPSED was also silent on the notion of citizen economic empowerment to a great degree. Nevertheless, the TPSED addressed, in a small measure, the development of local entrepreneurship through small scale industries particularly in the field of agriculture. In 1966 and for many years to follow, agriculture was to become the mainstay of the economy. Government economists forecasted that “for many years to come agriculture will remain the most important industry in Botswana and therefore significant improvement in the standard of living of the majority of the people will largely depend upon improvement and development of the agriculture industry.”³ Programs put in place to drive the development of local entrepreneurship included the Bull Subsidy Scheme,⁴ the Karakul Sheep

2 Republic of Botswana, *Transitional Plan for Social and Economic Development (1966-1971)*, Ministry of Finance and Development Planning, Gaborone, Government Printer, (1966).

3 Republic of Botswana, *National Development Plan 1 (1968-1973)*, Ministry of Finance and Development Planning, Gaborone, Government Printer (1968), at p. 18.

4 Republic of Botswana, *Transition Plan for Social and Economic Development (1966-1971)*, at p. 6.

Subsidy Scheme⁵ and the Dorper Ram Subsidy Scheme.⁶ With these schemes the government bought bulls, Karakul Sheep and the Dorper Ram, and sold them to farmers at very subsidized prices. Thus, the TPSED represents the pre-natal phase of citizen economic empowerment in Botswana. At the time, empowering citizens was not, *per se*, the preoccupation of the economic policy; rather, more focus appears to have been on building and establishing a functional cash economy.

The first National Development Plan (1968-1973), hereafter referred to as NDP1, rekindled the idea of citizen economic empowerment. It had almost been a decade since Botswana gained independence. Under the subject of private enterprise, NDP1 set out one of its objectives as to “foster local participation in commerce.” To achieve this, the government would assist local participation by formation and growth of co-operatives and through the provision of credit on generous terms to co-operatives and to local entrepreneurs, generally through the National Development Bank (NDB). Even institutionally, to promote indigenous industrial and commercial entrepreneurship, the government intended to establish the Botswana Development Corporation (BDC). Thus, under the first NDP, the idea of citizen empowerment became more pronounced; it was seen as participation of local people in the economy.

Between the second NDP (1973-1978) and the sixth NDP (1985-1991), Botswana’s economy went through a remarkable transformation. Agriculture was no longer the largest sector of Botswana’s economy in terms of contributing to the GDP.⁷ The economy was now dominated by the mining sector. However, there was an acknowledgement that “too many Batswana still lived in poverty.”⁸ The government believed that an enterprising and dynamic private sector was essential to rapid and balanced development.⁹ The government continued to establish programs aimed at assisting local participation of citizens in the economy.

The government established Arable Land Development Programme

5 *Ibid*, p.62.

6 *Ibid*.

7 Republic of Botswana, *National Development Plan 6 (1985-1991)*, Gaborone, Government Printer, (1985), at p. 168.

8 *Ibid* at p. 19.

9 *Ibid* at p. 54.

(ALDEP) in the fifth NDP, and Services to Livestock Owners and Communal Areas (SLOCA). The principal objective of ALDEP and SLOCA was to assist small subsistence farmers in expanding the production of basic food grains (sorghum and maize), legumes and sunflower in order to achieve self-sufficiency at household and national levels, and to raise rural revenues and improve income distribution. The 1973 National Policy on Rural Development,¹⁰ which followed the publication of the first NDP, also contained measures aimed at helping the local people. The basic philosophy governing the economic policies was expressed as “social justice” and “equality of opportunity.”¹¹ In this policy, Government accepted the need for a subsidy and credit program for the local people, but with the qualification that the subsidies will be for the purpose of increasing productivity and not in the form of social welfare handouts.¹² Furthermore, the policy provided that local farmers would be supported by favouring them in the tenders for supplies to local institutions such as schools and hospitals.¹³

2.2 The 1981 Presidential Commission

In 1981, owing to the permeating dissatisfaction of the people with failing government policies, the President established a Commission to examine the effectiveness of government’s policies for growth, employment and to consider in particular whether citizens of Botswana were participating sufficiently in the country’s economic development.¹⁴ The general conclusions of the Commission were accepted by Government.¹⁵ The Commission recommended that special weight must be given to factors which increase opportunities for Botswana’s poorest citizens.¹⁶ Furthermore, the Commission recommended that

10 Republic of Botswana, *National Policy on Rural Development, Government Paper No. 2 of 1973*, Ministry of Finance and Development Planning, Government Printer, Gaborone, (1973), pp. 1-53.

11 *Ibid*, at p.1.

12 *Ibid*, at p. 5.

13 *Ibid*, at p.6.

14 Republic of Botswana, *Report of the Presidential Commission on Economic Opportunities*, Government Printer, Gaborone, (1982).

15 Republic of Botswana, *National Policy on Economic Opportunities, Government Paper No. 2 of 1982*, Government Printer, Gaborone, (1982).

16 Republic of Botswana, *Report of the Presidential Commission on Economic Opportunities*, (1982), at p. 16.

Government should promote increased citizen participation in all aspects of the country's economic development, and that was to be achieved through positive assistance and incentives.¹⁷ The Commission believed that, in general, the best way to stimulate the creation of opportunities was to provide incentives and support to the private sector. This ignited a more targeted and focused attitude on citizen economic empowerment.

In 1982, Government launched the Financial Assistance Policy (FAP)¹⁸ under the management of the NDB. Through FAP, the government allocated finance for direct encouragement of productive activities. Productive activities were defined as those activities that produce or process goods, which could either substitute for imports or be exported from Botswana, other than cattle, large scale mining and dry-land farming. Following the 1981 Commission, in 1985 Government introduced the Accelerated Rain-fed Agricultural Programme (ARAP). ARAP was essentially a cash subsidy to farmers to assist them with drought recovery.¹⁹ From 1985, several policies made by the Government contained provisions which emphasized local participation of the citizens in the economy. For instance, Clause 8 of the Tourism Policy (1990), entitled 'Localization' states that "it is the firm intention of the government to bring about as quickly as possible, an orderly increase in the participation by Batswana in the tourism industry as employees, investors and operators."²⁰ According to the policy, this followed from "a failure to employ Batswana in managerial jobs or even in those with a potential for promotion"²¹ and "limited opportunities for citizens to acquire shares in the industry,"²² which has engendered a perception of the industry as "an industry dominated by expatriates that makes little if any contribution to the nation and provides few attractive career or investments prospects."²³

The periods from the seventh (1991-1997) and eighth (2002-2003)

17 *Ibid* at p. 15.

18 Republic of Botswana, *Financial Assistance Policy (FAP)*, Ministry of Finance and Development Planning, Gaborone, Government Printers (1982).

19 H.K Siphambe, N. Narayana, et al, *Economic Development of Botswana: Facets, Policies and Prospects*, Gaborone, Bay Publishing (2008), pp. 1-287, at p. 128.

20 Republic of Botswana, *Tourism Policy, Government Paper No. 2 of 1990*, Government Printer, Gaborone, (1990).

21 *Ibid*, at p. 10.

22 *Ibid*.

23 *Ibid*.

National Development Plans saw a heightened attention on citizen economic empowerment by Government. First, there was the review of the then-existing ALDEP, FAP and other existing policies and programs. Second, in 1999 the National Conference on Citizen Economic Empowerment was held in Francistown. Finally, the formulation of Vision 2016 for Botswana included commentary on citizen economic empowerment. The Botswana Institute for Development Policy Analysis (BIDPA) conducted a study entitled the ‘Study of Poverty and Poverty Alleviation in Botswana’²⁴, in which several weaknesses were pointed out in both FAP and ALDEP. Regarding FAP, these findings were corroborated by a comprehensive study, the Fourth Evaluation of the Financial Assistance Policy²⁵ in 1995. The evaluation found that FAP was no longer effective in achieving its objectives of sustainable employment creation, and that in any case FAP was inconsequential to Botswana’s needs at the present time and does not address the main constraints to investment and development of sustainable productive enterprise.²⁶ Moreover, the evaluation identified a lack of citizen entrepreneurial capacity as an economic constraint.²⁷ Owing to the identification of these inefficiencies, the program was ultimately terminated in June 2001.

In 1996-1997, the Presidential Task Group completed its task and produced ‘A Long-Term Vision for Botswana - Vision 2016’, which encompassed the defined and formulated aspirations and dreams of citizens of Botswana. Vision 2016 was formulated after extensive and broad consultations with various sectors of the population of Botswana. Aside from outlining the vision for Botswana, Vision 2016 also identified the major challenges that would need to be met in order to realize the vision, and proposed a set of strategies that would meet them.²⁸ On the matter of citizen economic empowerment, Vision 2016 made a finding that “It is vital that citizens meet the challenge of developing more of a stake in the economy of Botswana. A significant proportion of the

24 Botswana Institute of Development Policy Analysis (BIDPA), *Study of Poverty and Poverty Alleviation in Botswana*, Gaborone, Gaborone, (1997).

25 BIDPA, *Financial Assistance Policy (FAP) Fourth Evaluation: Final Report for Ministry of Finance and Development Planning (MFDP)*, Gaborone, (2000).

26 *Ibid*, at para. 10.4.

27 *Ibid*, at p. 145.

28 Republic of Botswana, *Vision 2016: Long Term Vision for Botswana- Towards Prosperity for All*, Gaborone, Government Printers (1997).

private sector is in foreign hands. There is a challenge to find concrete strategies to ensure citizen empowerment, and to maximise the participation of citizen owned companies in the economy.”

2.3 The 1999 National Conference on Citizen Economic Empowerment

In July 1999 - two years after the formulation of Vision 2016, Government, the private sector and other interested policy makers held the National Conference on Citizen Economic Empowerment (NCCEE). The purpose of the NCCEE was to agree on a working definition of citizen economic empowerment, consider practical options to achieve citizen economic empowerment, assess the status of citizen economic empowerment in Botswana and consider appropriate recommendations for a national policy on the matter. Officially opening the conference, the then-President of Botswana, Festus Mogae, remarked that “the demand for citizen economic empowerment was legitimate and should be pursued vigorously without fear and apology,”²⁹ and that “Botswana should be in the driving seat of the country’s socio-economic transformation and not be passive and bemused spectators.”³⁰

The outcome of the conference was the report on the NCCEE, which contained a working definition of citizen economic empowerment and recommendations for Government. One of the recommendations was the establishment of an empowerment fund.³¹ The issue of citizen economic empowerment went before parliament in 2001 when parliament carried a motion by Mmadinare Member of Parliament, Ponatshego Kedikilwe, which proposed the establishment of a statutory body to coordinate and monitor citizen economic empowerment schemes. This was followed by a motion in 2007 by the then member of parliament, Duke Lefhoko, to introduce a citizen economic empowerment policy. However, the motions did not bear any fruit at the time.³²

With the end of ALDEP, FAP and SLOCA, surely having an effect on the atmosphere of the conference, began an era of more concrete, yet not

29 Republic of Botswana, *The National Conference on Citizen Economic Empowerment*, Government Printer, Gaborone, (2000).

30 *Ibid.*

31 *Ibid.*, at p. 187..

32 *Ibid.*

institutionalized or synchronized citizen economic empowerment strategies by the Government, some of which even having support by legislation. In response to the recommendations from both the NCCEE Report and the Fourth Evaluation of FAP, Government established the Citizen Entrepreneurial Development Agency (CEDA) in 2001. Both the FAP and the Micro Credit Scheme, previously managed by the NDB, were transferred to the agency. CEDA was established to foster citizen entrepreneurship and citizen empowerment, and to encourage the development of competitive and sustainable citizen enterprises.³³ CEDA focuses specifically on the development of viable and sustainable citizen-owned business enterprises, through training, skills-sharing and provision of finance in the form of loans at subsidized interest rates.

The establishment of CEDA was followed by the establishment of the Local Enterprise Authority (LEA) established under the Small Business Act.³⁴ Under Section 4 of the Act, the functions of LEA include, *inter alia*: the provision of assistance to small, micro or medium business enterprises in the preparation of business plans, feasibility studies and market surveys³⁵ and the provision of training and advisory services in the entrepreneurship market.³⁶ A close study of the two entities may reveal an overlapping of functions. For instance, both entities are involved in training.

Even after the creation of CEDA and LEA, citizen economic empowerment continued to take the attention of policy makers in Botswana. The Privatization Policy,³⁷ which seeks to divest government interest from state-owned enterprises and out-source certain non-core services to the private sector, promises to pay special attention to measures in the privatization process that will assist the economic empowerment of citizens of Botswana.³⁸ The Medium to Long Term Strategy (2011-2016),³⁹ promulgated in 2010 by the Economic Diversification Drive (EDD), which also seeks to diversify the economy and

33 CEDA, *CEDA Guidelines*, Gaborone, (2008), pp.1-12.

34 Section 3.

35 Section 4 (a).

36 Section 4 (b).

37 Republic of Botswana, *Privatization Master Plan*, Ministry of Finance and Development Planning, Government Printer, Gaborone, (2005).

38 *Ibid*, at p.10, paras. 34-43.

39 The Republic of Botswana, *Botswana Excellence: A Strategy for Economic Diversification and Sustainable Growth*, Office of the President, Government Printer, Gaborone, (2008).

reduce the high import bill of P20 billion, has a short term strategy that is based on the use of government interventions such as local procurement, the use of preference margins and citizen economic empowerment strategies to promote local production and consumption.

2.4 The 2012 Citizen Economic Empowerment Policy

After various calls for concrete implementation of citizen economic empowerment, on 26 July 2012, the Citizen Economic Empowerment Policy (CEEP), presented by the Minister of Finance and Development Planning, was approved by the National Assembly. With the CEEP in place, there is now a definition of what citizen economic empowerment is and its rationale. In his address to the National Assembly, presenting the CEEP, the Minister of Finance and Development Planning stated that:

“The rationale for the CEEP comes from the notion that rapid economic growth and diversification without citizen empowerment could ultimately lead to a more fragile and vulnerable economy, subject to the vagaries of international markets over which the country has little or no control. In addition, if the economy continues to be dominated by non-citizen interests, it could ultimately lead to instability and even greater calls for protectionism. The rationale for a policy on Citizen Economic Empowerment in Botswana, which goes hand-in-hand with economic growth and development, therefore, is to promote social cohesion and harmony, promote a notion of nationhood and pride, maximise potential human capital residing in Botswana, and eradicate absolute poverty.”⁴⁰

This rationale is also reflected by the policy.⁴¹ The CEEP establishes the philosophy of citizen economic empowerment as stemming from “... the need to build capacity of the nation to respond to the changing economic and political environment and participate effectively in the decisions that affect their lives...”⁴² and “...the need for economic development to lead to equitable distribution of income and wealth in order to improve the quality of

40 O.K. Mathambo, Minister of Finance and Development Planning, “Presentation on the Citizen Economic Empowerment to Parliament” National Assembly, 26 July 2012, pp. 1-5, para. 4.

41 *Ibid*, at p. 2.

42 *Ibid*, at p. 1.

life of citizens.”⁴³ Furthermore, its aim should be to “... equip citizens with the necessary competencies, which would enable them to take better advantage of economic opportunities and thereby have a stake in the process of economic growth and development.”⁴⁴ There is fear that the feeling of economic alienation by citizens could threaten the sustainability of all investments as citizens might adopt a negative attitude. The CEEP defines citizen economic empowerment as “... a set of inter-related interventions aimed at strengthening the ability of citizens to own, manage and control resources, and the flexibility to exercise options, which will enable Botswana to generate income and wealth through a sustainable, resilient and diversified economy.”⁴⁵

At a conceptual level, the CEEP helps clarify the idea of citizen economic empowerment. It lays down a clear definition of citizen economic empowerment in the context of Botswana’s local economic conditions. In addition, it sets out the rationale and objectives of the citizen economic empowerment in Botswana. Most fundamentally, there is an express acknowledgment by the Government of Botswana that previous instruments of citizen economic empowerment have not satisfactorily fulfilled their objectives. Thus, as a normative source on the ideology of citizen economic empowerment in Botswana, the CEEP can be applauded.

Even though the CEEP provides a good normative source of ideology on economic empowerment in Botswana, it leaves out very fundamental policies that are relevant if the CEEP is to be a success. The CEEP does not take concrete cognizance of other strategies of the government such as the EDD⁴⁶ which provides a framework for diversifying Botswana’s economy. While the policy mentions the concept of citizen economic empowerment, there is no attempt to merge and explore the synergies between the two. The other policy that is ignored is Botswana’s policy on foreign direct investment. Government strategy on foreign direct investment functions to attract non-citizens to invest in Botswana while the CEEP acts to prevent entry or participation of non-citizens into certain sectors of the economy. The fact of the existence of a

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*, at p.3.

46 Republic of Botswana, *Economic Diversification Drive: Medium to Long-Term Strategy 2011-2016*, Ministry of Trade and Industry, Gaborone, Government Printer, Gaborone, (2011).

conflict between these two policies ought to have become a relevant factor in the CEEP. Foreign investment is vital to Botswana's economy. It is important that both prospective and existing foreign investors are assured of the protection of their investment and investment opportunity in Botswana.

The success of any policy rests on its implementation. To examine the CEEP's implementation model, the issue of implementation is approached from two angles: targets/deliverables and institutions responsible for implementation. The CEEP does not set out any clear and achievable targets to be fulfilled. In this respect, the CEEP looks like a rushed reaction to public outcry. Although it is a positive factor that the policy marks out what it calls "indicators of empowerment", without any clear, specific and achievable targets, it impossible to talk about any implementation. It is not clear what purpose the five year review will accomplish. The policy ought to have indicated in very clear language the sectors of the economy, the measures of citizen economic empowerment at the time of the policy in those sectors, what measures of citizen economic empowerment the policy seeks to achieve and how it will achieve that in the five year period. Such an approach would have had the advantage of giving the public the opportunity to weigh the success of the CEEP at the end of the five year term.

The institutional set up for the implementation of the policy is also not clear. All the policy states on this note is that the CEEP will be coordinated from the Ministry of Trade and Industry where implementing sectors will report progress. The policy does not state what these implementing sectors are and who they consist of or who in the ministry will be responsible for the implementation of the policy. The machinery of the implementation of Vision 2016 is even clearer and more promising than that of the CEEP.

A policy such as this requires a clear implementation institution or structure to oversee its overall management and administration. Such a structure would help ensure a more coordinated approach to the implementation of the policy. Furthermore, had attention been given on the implementation structures, it would have become necessary to constitute a multi-sectoral body with officers from various government departments, parastatals and private sector organizations as citizen economic empowerment must be approached from all

sectors.

The other issue is whether the CEEP is the right tool to guide the process of citizen economic empowerment. The need for citizen economic empowerment initiatives was highlighted as far back as 1982 by the Presidential Commission on Economic Opportunities. From then, it took eight years for the government to conduct the 1999 NCCEE. The CEEP came after 23 years. The time for such a policy had probably lapsed by that time. What Botswana required was to move towards legislation on citizen economic empowerment. Botswana could have learnt from Zambia which in 2006 passed a Citizens Economic Empowerment Act.⁴⁷ The Act notably establishes the Citizen Economic Empowerment Commission⁴⁸ and sets up the Citizen Economic Empowerment Fund.⁴⁹ Some of the commission's specific functions include advising the government on the necessary changes to various types of legislation for the effective delivery of economic empowerment initiatives⁵⁰ and promoting gender-equality in accessing, owning, controlling, managing and exploiting economic resources.⁵¹

3. ASSESSMENT OF THE LEGAL FRAMEWORK

In terms of legislation, the primary pieces of legislation that make provision for citizen economic empowerment are: The Trade Act;⁵² the Industrial Development Act;⁵³ the Tourism Act⁵⁴ and the Public Procurement and Asset Disposal (PPAD) Act.⁵⁵ As argued below, these laws suffer from a plethora of difficulties and face hurdles so serious that they compromise the delivery of citizen economic empowerment.

47 Act No. 9 of 2006., 33.

48 Section 4.

49 Section 29.

50 Section 6 (2) (a).

51 Section 6 (2) (b).

52 Act No. 5 of 2004.

53 Act No. 3 of 2007, Chapter 43:01, Laws of Botswana.

54 Chapter 42:09, Laws of Botswana.

55 Act No. 10 of 2001, Chapter 42:08, Laws of Botswana.

3.1 Trade Act

The Trade Act is a regulatory law. It mandates traders to apply for and obtain licences before they can carry out certain stipulated trades,⁵⁶ and prohibits them from carrying out such trades without licences.⁵⁷

The Act regulates about 25 trades. The regulated trades are: auctioneer, bookshop, boutique, car wash, cleaning services, curio shop, department store, distributor, dry clean, fresh produce, funeral parlour, furniture shop, general clothing, general dealer, hair dresser, hardware, hire service, laundromat, motor dealer, petrol filling station, restaurant, supermarket/ chain store, take away, wholesale, workshop, or miscellaneous trade or business. It is not clear how the legislature arrived at this list. So many other trades, such as driving schools, internet café/ shops, and courier services, for example, are not on this list. The question that arises is whether or not a licence is not required for those trades that are not mentioned.

To administer and issue out licences the Act establishes a body, the licensing committee for each Council in Botswana, and sets out terms of membership such as qualification and disqualification for appointment and vacation and removal from office. An application for a licence is submitted to the licensing committee in the Council area where the trader wishes to trade.⁵⁸ Where the application is for a miscellaneous trade, it is then forwarded to the minister.⁵⁹ Where the application meets the requirements for the issue of a licence, the committee is required to issue the applicant a licence containing such conditions it may consider necessary.⁶⁰ It is presumed that this grants the committee too wide a discretion. The Act ought to clearly stipulate the conditions to be met. In the present form, the committee may stipulate conditions that do not fall under their jurisdiction or that are far from the intention of parliament.

Once issued, a licence expires after a period of 12 months from the date of issue,⁶¹ but may be renewed upon payment of a prescribed fee.⁶² Furthermore,

56 Section 10 (1).

57 Section 3 (1).

58 Section 10 (1).

59 Section 10 (2).

60 Section 13 (1).

61 Section 13 (2).

62 Section 14 (1).

a trader may, upon a written application, apply to transfer his/ her licence to another person.⁶³ The licence may be revoked under certain conditions.⁶⁴ However, the Act does not give the affected traders the opportunity to be heard prior to revocation of a licence. The trend in Botswana law is for Courts to read fairness provisions where a public body is empowered to make a decision that is detrimental to an individual. It is however advised that the legislature must incorporate these fairness provisions into the Act so that those who administer the Act, and oftentimes do keep abreast with case law, can have such principles readily available to them.

The minister is empowered to make regulations declaring any trade to be a reserved trade, and a licence for such reserved trade shall be issued only to citizens of Botswana or companies wholly owned by citizens of Botswana.⁶⁵ The regulations may further provide that only citizens of Botswana shall be entitled to carry on trade in such areas in the country as may be prescribed, or from such premises as may be prescribed, or engage in any specific type of businesses.⁶⁶ The regulations reserve the following trades for citizens or for companies wholly owned by citizens: auctioneer's licence; car wash licence; cleaning services licence; curio shop licence; fresh produce licence; funeral parlour licence; general clothing licence; general dealer's licence; hairdresser's licence; hire services; laundromat licence; petrol filling station licence; and take away licence.⁶⁷

A joint venture of a medium business enterprise between a citizen and a non-citizen may be granted a licence in a reserved trade where the citizen has a minimum beneficial ownership of 51 percent of the joint venture.⁶⁸ This provision ensures that citizens own a controlling stake in qualifying enterprises. The provision can be circumvented through fronting which is a criminal offence under the Act.⁶⁹ According to the Act, fronting means obtaining a licence to enable another person, who would otherwise not qualify to obtain such a licence,

63 Section 17 (1).

64 Section 20(1).

65 Section 15(1).

66 Section 15(2).

67 Regulation 28.

68 Section 18(2).

69 Section 30(g).

to run a business.⁷⁰ It usually manifests itself in citizens obtaining licences under reserved trades so that the enterprise can be run by a non-citizen. This definition is narrow. It may fail to address circumvention methods through conclusion of legal relationships with citizen companies, the effect of which is to deny citizens the economic benefits from the reserved trades. For instance, a citizen company may undertake complex agreements with a non-citizen, the effect of which is to have the non-citizen benefit from the company without actually managing it. The provision has a further weakness. Upon application by the citizen partner, the Minister may approve the granting of a licence to a joint venture where a citizen partner holds less than 51 percent. This means that in certain unstated cases, an enterprise where a non-citizen owns a controlling stake may qualify to reap the benefits of citizen economic empowerment. The Act does not prescribe any conditions to be met to ensure that citizens also benefit.

Further, according to section 27, the Minister is by regulation entitled to exempt any person from any provision of the Act if in the Minister's opinion it is desirable to do so in the interest of the public. This is a problematic. The Minister is not obliged to consult any committee. It is not stipulated what persons wishing to benefit from this provision should do. Furthermore, the provision does not give any affected persons the opportunity to oppose such exemption. Without such safeguards, this provision is prone to abuse.

A person aggrieved by the decision of the licensing committee has a right of appeal to a Regional Appeals Board.⁷¹ A further right of appeal is available from the Regional Appeals Board to the Minister.⁷² The main criticism against this provision is that both the Act and the regulations do not provide a time frame within which the appeal must be dealt with. This may result in inordinate delay, an obvious inconvenience to traders and in some cases, a cause of prejudice.

70 Section 2.

71 Section 21 (1).

72 Section 21 (7).

3.2 The Industrial Development Act

The main regulatory legislation on “industrial development” in Botswana is the Industrial Development Act (IDA),⁷³ which repeals the Industrial Development Act No. 17 of 1988 (the old Act). The aim of the IDA is to regulate the manufacturing sector in Botswana. The IDA establishes a two-tier licensing structure - a licensing committee for each District Council and the Industrial Licensing Authority. A licensing committee consists of a senior officer of the Council; a member of the private sector, a Councillor; a police officer of the rank of Sergeant or above and a Commercial Officer from the Council. The function of a licensing committee is to issue manufacturing licences to small and medium enterprises.⁷⁴ The Industrial Licensing Authority consists of a Chairperson and members who are appointed by the Minister. Its function is to issue manufacturing licences to large enterprises.⁷⁵ The size of an enterprise is determined by the Minister based on its annual turnover and staff complement.⁷⁶

The Act prohibits and criminalises any person from manufacturing for sale any product at any place in Botswana unless he/she is in possession of a licence to manufacture such product at such place.⁷⁷ The licence granted by the committee is valid for an indefinite period subject to compliance with its conditions and payment of annual license fees.⁷⁸

The Act establishes a Regional Appeals Board for each region.⁷⁹ Its members are appointed by the Minister and consist of the following: a person from the private sector; two representatives from the private sector; an attorney; a representative of the Ministry of Lands and Housing; a representative of the Ministry of Trade and Industry and such two Councillors as the Minister may determine.⁸⁰ Any person aggrieved by a decision of the licensing committee refusing to issue, transfer, suspend or revoke a licence, may, within 30 days of

73 Act 3 of 2007.

74 Section 9.

75 Section 26(2).

76 Section 2.

77 Section 16.

78 Section 17(3).

79 Section 25(1) and (2).

80 Section 25(3).

notification of the decision, appeal to the Regional Appeals Board.⁸¹ In the old Act, the power to adjudicate was vested on the Minister, a political office.⁸² This is commendable. However, there is no time frame within which the Board must deliver its decision, a regression from the position in the old Act, which gave the Minister 90 days to hand down a decision.⁸³

The minister is empowered to make regulations providing that licences to carry on such enterprises as may be prescribed shall be issued only to citizens of Botswana, or to companies wholly owned by citizens of Botswana.⁸⁴ The regulations may provide that only citizens of Botswana shall be entitled to carry on a particular enterprise in such areas in the country as may be prescribed.⁸⁵ This is identical to Section 15(1) of the Trade Act. The provisions on citizen economic empowerment are contained under Regulation 13 of the Industrial Development Regulations⁸⁶ which reserves for Botswana citizens or companies wholly owned by Botswana citizens the following types of manufacturing enterprises: the manufacture of school uniforms; the manufacture of school furniture; the manufacture of burglar bars; the manufacture of protective clothing; the milling of sorghum; the manufacture of cement bricks and baked earth (mud) bricks; the baking of bread and confectionery; manufacture of peanut butter; bottling of water; the production of traditional sour milk; packaging; the manufacture of floor polish; the manufacture of traditional leather products; the manufacture of traditional crafts; signage, including electronic signage; fencing materials excluding gum poles; the manufacture of candles; ice making and meat processing. With the manufacturing industry just at its nascent stage in Botswana, a case for including foreign traders in all trades can be made. This is because foreign traders bring skills development and foreign investment, which may assist in expanding Botswana's manufacturing sector. Rather than reservation of trades, a different form of citizen economic empowerment that focuses on capacity building and skills transfer is required.

81 Section 25(5).

82 Section 17(1).

83 Section 17(2).

84 Section 27 (1).

85 Section 27 (2).

86 Statutory Instrument No. 30 of 2008.

3.3 The Tourism Act

The Tourism Act is the main regulatory law for the tourism industry in Botswana. The Act establishes the Director of Tourism, who is responsible for administering the Act under the directions of the Minister of Environment, Wildlife, and Tourism.⁸⁷ It also establishes the licensing regime for the tourism industry in Botswana. No person is allowed to carry on, or assist in carrying on, any tourist enterprise except under and in accordance with the terms and conditions of a licence issued under the Act.⁸⁸ The carrying on of a tourist enterprise includes negotiating, soliciting, canvassing or accepting business for that enterprise and engaging in correspondence with a person who may become a customer of that enterprise, or with an agent of such person, concerning the business of that enterprise. Contravention of this provision constitutes a criminal offence punishable by a fine of P20 000 and imprisonment for two years.

The Act classifies tourist enterprises into categories ranging from A to D. Category A are operations that offer facilities only on site, such as hotels, motels, guest houses and apartments. Category B consists of operations that offer facilities on and off site, such as tourist camps, lodges, caravans, hunting camps and tented tourist camps, which also operate tours which require the services of professional guides or professional hunters licensed under the Wildlife Conservation and National Parks Act, 1992. Category C is made up of operations that offer facilities off site only, such as safari or tour operators, and any enterprise that receives and transports travellers and guests, providing them with sleeping accommodation and food and beverages in equipment that is not geographically fixed. And finally, category D entails operations that act as agents only, such as travel agents. A licence to carry on one of the categories of tourist enterprise does not entitle the holder to carry on any other category of tourist enterprise.

The Act establishes the Tourism Industry Licensing Board as a regulatory body.⁸⁹ The composition of the board, the terms of service for its members, its functions and powers and any other matters relating to the board are provided

87 Section 3 (1).

88 Section 4 (1).

89 Section 6.

for in the Second Schedule. Any person wishing to carry on a tourist enterprise is required to apply to the director in Form A in the Third Schedule to the Act, and to supply such additional information as the director may reasonably require.⁹⁰ Bearing in mind the interests of the tourism industry as a whole, and after satisfying himself/herself as to the quality of accommodation or service offered by the applicant, and the applicant's ability to provide and maintain such quality of accommodation and service, the director shall forward the application to the board together with his/her recommendations as to the issue of a licence and as to the grading of the enterprise.⁹¹ If the board, after hearing such evidence or making such further enquiries as it considers necessary, decides that the licence should be issued, subject to such conditions, and such grading as the board considers necessary or appropriate, it shall so direct, and on payment of such fee as may be prescribed, the director shall forthwith issue the licence accordingly. The licence in question shall be in Form B in the Third Schedule.⁹²

Licences shall be issued for such period as may be prescribed, and shall be renewed automatically by the director on the same terms and with the same grading, on payment of the prescribed fee, without reference to the board. Automatic renewal of licensing, as opposed to renewal on application, is a positive feature of this Act. However, where the director considers that there are special circumstances that make such action necessary, the director may refer the application to the board, together with his/her report on such special circumstances, and his/her own recommendations, and the application for renewal shall be processed in the same manner as an original application for a licence; and where the application for renewal is made in good time, the enterprise may continue to operate until the licence is issued.⁹³ The licence may be suspended where the licensee contravenes the Act or the licence conditions.⁹⁴

Any person aggrieved by any decision of the board refusing to issue a licence, or to renew or amend a licence, or as to any condition attached to a licence, or as to any grading subject to which a licence is issued, or as to the cancellation or suspension of a licence, may appeal to the Minister within 30

90 Section 7 (1).

91 Section 7 (2).

92 Section 7 (3).

93 Section 7 (4).

94 Section 7 (7).

days of the decision appealed against.⁹⁵ Upon receipt of an appeal under subsection (1), the Minister may cause such investigation into the matter as he/ she considers necessary or advisable, and may, during such investigation, permit the enterprise to operate or continue to operate, subject to such conditions as he/ she thinks advisable.⁹⁶ After such investigation as he/ she considers necessary or advisable, the Minister may uphold the decision of the board, may reverse it, amend it or make such other decision as he/ she considers proper in all the circumstances, and his/ her decision shall be final and shall not be subject to any further appeal.⁹⁷ Where the Minister upholds a decision of the board or himself/ herself makes a decision refusing or cancelling the issue of a licence, he/ she may, nevertheless, permit the enterprise a period of up to but not more than six months to wind up the enterprise.⁹⁸ Like the Trade Act, no time frames are given within which a decision must be given.

Under Section 12 (1), the Minister may make regulations prescribing anything which, under the Act, is to be or which may be prescribed, and generally for the better carrying out of the provisions and purposes of this Act, which purposes shall include the imposition of a levy on all tourist enterprises to assist the training of staff for such enterprises. Further, Section 12 (2) empowers the Minister, through regulations, to establish and provide for a National Advisory Council consisting of not more than 15 persons drawn from representatives of the government, the tourism industry and other sectors of the economy and local interests, whose function shall be to advise the Minister on all matters relating to the formulation, planning, development and administration of a policy relating to tourism. The National Advisory Council has been established under Regulation 2(1) of the Tourism Regulations.⁹⁹ The purpose of the council is to advise the Minister on all matters concerning or related to the formulation, planning, development and administration of a national policy on tourism. In the regulations, the council has been given a specific citizen economic function, which is to advise the Minister with a view to ensuring that the greatest possible social and economic benefits are obtained on a sustainable basis for the people

95 Section 9 (1).

96 Section 9 (2).

97 Section 9 (3).

98 Section 9 (4).

99 See Statutory Instrument 58 of 1996.

of Botswana from the tourism resources, scenic beauty, wildlife and unique ecological, geological and cultural characteristics of Botswana.¹⁰⁰ The creation of a body that focuses on citizen economic empowerment and advises the Minister on the issue is commendable. It is submitted that for citizen economic empowerment to receive the attention it deserves, departmental organs that focus specifically on it must be set up.

3.4 The PPAD Act

The *lex specialis* in the regulation of public procurement in Botswana is the PPAD Act.¹⁰¹ The Act establishes the Public Procurement and Public Asset Disposal Board (PPADB), which is a body corporate, capable of suing and being sued in its own name.¹⁰² The main function of the board is the adjudication and award of tenders. Other functions include to ensure that all public procurement and asset disposal entities, in making their decisions, take into account the principles of¹⁰³ an open, competitive economy, standardisation of procurement items in the interest of cost reduction, competition among contractors by using the most efficient and competitive methods of procurement or disposal to achieve the best value for money; fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field; accountability and transparency in the management of public procurement and in the disposal of public assets in order to promote ownership of the system and minimise challenges thereto; and integrity, fairness of and public confidence in, the procurement and disposal process. Moreover, the board has a statutory obligation to ensure that all procuring and disposing entities comply fully with all the provisions of the Act¹⁰⁴ and advises procuring and disposing entities on all aspects of procurement and disposal management.¹⁰⁵ It is empowered to establish Ministerial Procurement and Asset Disposal Committees and delegate authority in writing to them, for the management of aspects of public

100 Regulation 2 (1).

101 Chapter 42:08.

102 Section 10.

103 Section 26.

104 Section 27.

105 Section 28.

procurement and assets disposal processes of the departments encompassed by each ministry.¹⁰⁶ There is currently no regulatory and oversight body in public procurement. Rather than adjudicating and awarding tenders, the role of PPADB must be to regulate and oversee public procurement. The role of awarding and adjudicating tenders should be left to Ministerial Tender Committees.

The Act also sets out a dispute resolution mechanism. The board is empowered to act as a dispute resolution body.¹⁰⁷ However, another system of dispute resolution, more elaborate, is set out under Section 95. Section 95 establishes the Independent Complaints Review Committee which is independent from the PPADB. Since the Act provides for the Independent Complaints Review Committee as the dispute resolution body, it is submitted that the role of the board as a dispute resolution body is repetitive and unnecessary and may create a conflict roles. The Independent Complaints Review Committee is governed by the Public Procurement and Asset Disposal (Independent Complaints Review Committee) Regulations¹⁰⁸ In most complaints; the complainant seeks to stop the execution of the contract or its implementation pending the resolution of its complaint. The regulations have no procedure for handling urgent matters, which compels bidders to rush to the High Court in respect of urgent matters. A procedure for dealing with urgent matters needs to be included in the regulations.

Under Section 66(1) of the Act, the government may, pursuant to its economic and social objectives, introduce reserved and preferential procurement and asset disposal schemes, which shall be consistent with its external obligations and its stable, market-oriented, macro-economic framework. According to the Act, reservation schemes apply to procurement and disposal activities of the following nature: (a) low complexity; (b) limited scale; (c) repetitive in nature; (d) having a financial ceiling; (e) open only to citizen contractors; and (f) based only on competition among the eligible contractors in the classification in question.¹⁰⁹

The reservation and preferential scheme is required to be targeted and time bound; be phased in and out; be non-discriminatory in respect of the

106 Section 61.

107 Section 53.

108 Statutory Instrument No. 20 of 2006.

109 Section 71.

targeted group or grade of contractors; be based on competition among eligible contractors; entail contractor's calculation of cost versus the cost of unrestricted procurement or disposal; have clear quantifiable objectives to be achieved; and contain benchmarks to assess progress.¹¹⁰ Further, the schemes must apply to contractors of works, service and supplies or any combination thereof however classified; and specific, disadvantaged women's communities and regions, and areas subject to occasional calamities. This latter requirement seeks to promote gender sensitivity in public procurement. However, any expectation of its implementation appears to be unrealistic. Section 67 provides that in order to promote the empowerment of citizen contractors:

- a) all citizen contractors shall, in relation to their respective classification be treated fairly and equitably in respect of all procurement and disposal activities;
- b) there shall be an equitable balance in the distribution of such activities within and across grades and codes of such contractors where applicable;
- c) the extent of reservation or preference extended to them shall be proportional to their assessed capacities to fully comply with the applicable specifications, specific instructions and conditions in the relevant bidding packages; and
- d) bids shall be awarded strictly on a competitive basis among firms of a given grade, code and classification in relation to the reservation and preference schemes.

To be eligible for a specific reservation or preference, a contractor must attach to its bidding package a certificate of entitlement from the competent issuing authority,¹¹¹ and must qualify in terms of the classification as provided for by section 121. The level of preference is to be applied as follows: the first preference is given to joint ventures between citizen contractors; followed by sole citizen contractors; then joint ventures between citizen and non-citizen contractors; and, lastly, association arrangements between citizen subcontractors and foreign contractors.¹¹²

110 Section 66 (2) (a) - (g).

111 Section 69.

112 Section 73 (a) - (d) of the Act.

Pursuant to these provisions, the government has devised various citizen economic empowerment schemes under the PPAD Act. Following adoption of the CEEP on 26 June 2013, Government considered and approved various citizen economic empowerment schemes. There is a mandatory requirement for subcontracting of citizen owned consultancy and construction companies by foreign-owned companies awarded government contracts. Foreign-owned companies awarded contracts on mega projects are expected to subcontract citizen-owned companies and be given price preference of up to 6%, depending on the percentage of work subcontracted. A maximum of 30% of the total cost of the project may be subcontracted to citizen-owned companies. It is a requirement that a foreign company should transfer skills to the subcontracted citizen-owned company with a view towards developing capacity of citizen owned companies. How a foreign company intends to do this must be made clear in the bidding documents. Also, companies awarded projects are expected to absorb interns and the number of interns placed will be determined by the procuring entities taking into account the length, nature, scope, complexity, and national interest of the project.

Joint ventures between a foreign-owned and citizen-owned company are encouraged and promoted through price preference incentives. A price preference incentive of up to 4% is given to a joint venture partnership between a foreign-owned and citizen-owned company. Joint ventures may range from a majority to a minority citizen owned joint venture, including consortia and associations between citizen and foreign owned companies. As an additional incentive for joint ventures and subcontracting, price preference caps for the Reservation and Price Preference Schemes have been removed to give a full advantage of the price preference percentages provided under each category.

However, some government departments do not include these schemes in invitation to tender documents, and nothing is done about this. Since these schemes do not create rights in favour of the contractors, there is no recourse to a court of law in cases where such schemes are left out of tender documents. The schemes remain policy instruments with no force in a court of law. In addition, there are no mechanisms in place to ensure that there is transfer of skills from non-citizen companies who are awarded tenders to subcontracted

citizen-owned companies. Even where tender documents require that non-citizen companies should subcontract citizen companies and the non-citizen company is awarded the tender on that basis, there is no monitoring to ensure that there is actual skill transfer. It is therefore difficult or almost impossible to gauge the success of these schemes.

4. THE PROBLEM OF LICENSING

The Trade Act, Industrial Development Act and the Tourism Act are licensing laws. According to the World Bank Group (WB Group), a trade licence is a permission that firms must obtain before they can engage in their core business activities.¹¹³ All these acts require traders to obtain permissions before engaging in their core business activities. According to the WB Group, a good business licensing regime must firstly be a means to fulfil a regulatory legitimate purpose.¹¹⁴ Only two appropriate rationales are recognised, that is to safeguard the public interest and to manage limited natural resources.¹¹⁵ According to the WB Group, licensing that limits competition or is used to generate revenues is impermissible. Secondly, licences should be granted on the condition of *ex-ante* fulfilment of qualifications. This means that the focus of licensing must be the establishment of qualifications for traders in order to safeguard public welfare. The licensing regime must be contained in some clear legal instrument. The laws must satisfy several requirements.¹¹⁶ Most licensing laws impose licensing fees; these fees must only cover administrative costs. The WB Group considers it inappropriate for licensing to be used as a revenue generation method; taxes are the appropriate means to generate government revenue. Moreover, the law must clearly articulate the criteria for qualifications to obtain a licence. The law should also specify clear reasons why applications may be rejected or revoked as well as procedures for appeals. Finally, licences should be valid for unlimited periods, except when periodic review of qualifications is necessary to fulfil regulatory objectives.

113 The World Bank Group, *Business Licensing Reform: A Toolkit for Development Practitioners*, Small and Medium Enterprise Department, The World Bank, (2006).

114 *Ibid*, at p.3.

115 *Ibid*, at p. 4.

116 *Ibid*, at p.7.

There is no clear rationale or policy for licensing of trades in Botswana. However, it is observed that the government has put trade licences to various uses from which a general rationale can be garnered. At least four uses can be identified. Due to the licensing fees that come with licences, licensing has become a method that generate income to fund the local government. Under the Trade Regulations, a trader is required to pay a non-refundable fee of P100.00 for an application¹¹⁷ and a further P100.00¹¹⁸ for a duplicate licence if the application is approved. It is not clear what administrative costs are contemplated under the Trade Act, it could be argued that this renders the imposition of the fee arbitrary. It makes it impossible for citizens to assess the legitimacy of such a fee. A licensing regime of this nature is improper because it allows the law makers to impose any figure that comes to their mind.

Licences are also used to carry the conditions upon which licences are granted. In addition, since most laws require them to be exhibited, licences provide evidence of qualifications of the traders to members of the public. It is probable that licences are good sources of information for government statistics. Notwithstanding these good uses, without demonstration of legitimate regulatory purposes, the licensing requirement remains inappropriate considering that there are other alternative tools that can be used instead of licensing. For instance, instead of requiring licensing, the government could simply require registration.

Licensing is also used as a tool of citizen economic empowerment. The licensing regime allows for licences in specific trades to be reserved for citizens only. This cannot be a legitimate use of licensing. Licensing is not the only method of implementing the citizen economic empowerment laws. The laws could, without making any requirements for licensing, simply stipulate that certain trades are reserved for citizens.

The first instinct of the government seems to be that all trades require licensing. There is no clear and articulated regulatory purpose for this licensing requirement. There are specific laws meant to fulfil regulatory aims to protect the public interest. The inadequacy of such laws should not be compensated by imposing licensing burdens on traders, the laws must be amended. The

117 Regulation 29 (1) and 34 (1).

118 Regulation 35 (2).

licensing requirement is an unnecessary burden on traders. Furthermore, with Botswana's little manufacturing base and seeking to pursue diversification of the economy it can be argued that a less regulated manufacturing sector is the best policy.

Another problematic feature of these laws is the requirement for annual licence renewal. Again, there is no recognizable regulatory purpose for this requirement apart from being a possible attempt to generate fees through renewal fees. This is not acceptable according to the WB Group. This annual renewal of licences is another unnecessary burden on traders. It is proposed that in the event that the licensing requirement is not abolished, at the least, the licences must be made indefinite. The IDA has moved to this method of licensing.¹¹⁹ It is submitted that other licensing laws must adopt the same method. In certain cases, the grounds upon which a request for a licence may be refused are vague and creates a doubt as to whether the institution entrusted with deciding applications for licences has the necessary competence. For instance, the Tourism Act requires the Director of the Tourist Industry Licensing Board to bear in mind the interests of the tourist industry as a whole and after satisfying himself/herself as to the quality of accommodation or service offered by the applicant, and the applicant's ability to provide and maintain such quality of accommodation, to forward the application to the board together with his/her recommendations as to the issue of a licence. Although the board may make further inquiries and hear evidence, there is no doubt that the director's view is very influential. To allow these bodies to make such economic and commercial judgments is inappropriate particularly having regard to the competence of individuals who sit on those bodies. Furthermore, it gives the licensing authorities a wide discretion which can be abused by considering political or other inappropriate factors. The decision whether entry of a trader into the market is in the interests of a certain market must be left to the market.

The scope of trades and enterprises that require licensing raise certain issues, especially in the Trade Act. The Trade Act requires licensing for 25 services. The Act excludes from its scope several other services. Some of

119 Under the old Act, the licence expired after 12 months and traders had to apply for renewal on a monthly basis which was a source of inconvenience and inefficiencies to traders.

the excluded services are domestic services, cab or taxi services, car rentals, parking lot services, travel agency, sale of land business, photography services and others. It is difficult to conceive the reasons why the Trade Act confines its licensing regime to the 25 trades and excludes some. While it is positive that the Trade Act does not require a licence for all trades, the phrase ‘miscellaneous trade or business’ may cause a lot of confusion as it is not clear what business activities it includes. The phrase has given rise to other problems. According to Jefferies:

“The implementation of the ‘miscellaneous’ licensing category has also given rise to a number of practical problems. The Act states that a miscellaneous licence can only be issued with the approval of the minister (as opposed to the local authority licensing committees, in the case of all other licences under the Trade Act). Given the potentially large number of miscellaneous licences, this constitutes a bureaucratic bottleneck as well as an unnecessary escalation of work for the minister. Furthermore, the licensing authorities who carry out the initial assessment of miscellaneous licence applications are struggling to find criteria against which to assess applications, which is problematic given the very wide range of activities covered. However, the applicability of licensing requirements to all service businesses does not appear to be enforced, except for businesses wishing to tender for government procurement contracts, for which a valid licence is required. One result of the introduction of the miscellaneous category is that many businesses are precluded from tendering for government business, thus reducing competition in government procurement, to the disadvantage of both government and the business sector.”¹²⁰

The exclusion of various services from the scope of the Trade Act renders the scope of citizen economic empowerment in the Trade Act Regulations very narrow. The regulations reserve the following trades for citizens: auctioneer’s licence; car wash licence; cleaning services licence; curio shop licence; fresh produce licence; funeral parlour licence; general clothing licence; general dealer’s licence; hairdresser’s licence; hire services; licence laundromat licence; petrol filling station licence; and takeaway,

120 K. Jefferis, *Technical Report: Trade Licensing and Reform of the Trade Act*, AECOM International Development (April 2011), pp.1-14, at p. 10.

wholesale, workshop, or miscellaneous trade or business.¹²¹

5. CLASH OF POLICIES: CITIZEN ECONOMIC EMPOWERMENT AND FOREIGN DIRECT INVESTMENT

Citizen economic empowerment is a citizen affair. Owing to its insistence on exclusively providing economic opportunities to citizens, the citizen economic empowerment policy may be seen to discourage foreign direct investment. This perception is even made worse by the fact the policy was developed in response to the concern from citizens of Botswana that the economy was dominated by expatriates. Even at the 1999 NCCEE, these concerns were expressed. According to Harvey, Shiphambe and Segosebe,¹²²

“A National Conference on Citizen and Economic Empowerment was held in July 1999. It was clear from the conference that much has been achieved in the provision of education and training to empower individual citizens of Botswana. There remains a strong feeling that Botswana relies too heavily on expatriate personnel, and that not enough is being done to enable locally-owned businesses to compete successfully with, or to be protected against, 60 foreign-owned businesses, so that foreign-owned businesses are excessively dominant.”

In its report of a review on Botswana’s investment policy,¹²³ the United Nations Conference on Trade and Development recognises the danger that citizen economic empowerment policy poses to foreign direct investment when it cautions:

“[T]he current focus of the government on national business development – through citizen empowerment – should not hold Botswana back from seizing opportunities to attract additional FDI and to benefit from it.”

121 Under Section 2, miscellaneous trade or business means a trade or business dealing in goods that cannot be categorised under any other licence in this Act, being a licence which is issued subject to the approval of the Minister.

122 C. Harvey, H. Shiphambe and E. Segosebe, “Globalization and Sustainable Human Development: Progress and Challenges for Botswana”, United Nations Conference on Trade and Development (UNCTAD), Undated Occasional Paper, available at <https://www.oecd.org/countries/botswana/2498169.pdf>, accessed on 15 October 2016.

123 UNCTAD, *Investment Policy Review for Botswana*, UN, New York and Geneva (2003), available at http://unctad.org/en/Docs/iteipcmisc10_en.pdf, accessed on 17 October 2016.

Citizen economic empowerment must not disempower foreign direct investment. It is vital that these two policies are harmonized to avoid a perception that by calling for citizen economic empowerment, the government is by necessary implication chasing away non-citizens who bring foreign direct investment into Botswana.

The establishment of the Botswana Investment and Trade Centre through the Botswana Investment and Trade Act¹²⁴ is a clear indication of the government's policy towards attracting foreign direct investment. The governing organs of the centre include the board¹²⁵ and the Chief Executive Officer.¹²⁶ The main function of the centre is to promote, encourage and facilitate export development and promote, attract, encourage and facilitate local and foreign investment promotion in Botswana.¹²⁷ This is to be achieved by, *inter alia*, undertaking investment and export promotion missions within and outside the Southern African region; publishing information relating to investment in, and exports from Botswana; encouraging expansions and new investments by existing investors in Botswana; identifying partners in or outside Botswana for joint business ventures in Botswana and providing monitory, advisory and courtesy services, including after-care services, to prospective investors and purchasers of Botswana goods and services. From its name and objectives, the centre is clearly not designed to or suitable for delivering citizen economic empowerment.

6. THE CASE FOR A CITIZEN ECONOMIC EMPOWERMENT ACT

Citizen economic empowerment faces an array of challenges. When the CEE Policy was introduced, it was acknowledged that although a number of initiatives had contributed towards business development in Botswana, citizen participation in major economic activities and opportunities was not significant.¹²⁸ It would appear that this remains a challenge.

124 Act No. 12 of 2011.

125 Section 4(1).

126 Section 14 (1).

127 Section 16 (1).

128 See Republic of Botswana, *The Citizen Economic Empowerment (CEE) Policy*. Government Paper No. 1 of 2012, Government Printer, Gaborone, (2012), p.2, para. 5.

The persistent challenges of citizen economic empowerment in Botswana can be attributed to a number of factors. First, there are scattered pieces of legislation, policies and directives which contain citizen economic empowerment provisions but with little coordination. To resolve this there is a need for consolidation. Second, the institutions responsible for spearheading this policy are fragmented and disjointed. This fragmentation not only makes it difficult to manage and monitor the success of the citizen economic empowerment schemes, it also results in duplication and overlapping of functions. This results in poor implementation and delivery of the benefits of the schemes to targeted recipients. The solution to this is creation of one institution that focuses on developing, implementing and monitoring delivery of citizen economic empowerment by various government departments. The third challenge relates to the content of citizen economic empowerment measures. A pattern that emerges from the reserved trades in both the Trade Regulations and the Industrial Development Regulations is that the trades are mostly low capital trades which only require low technology and are also tend to be low profit generating. The scope of reservations does not extend to high-profit and high-tech trades, which have the potential to significantly empower citizens of Botswana. Lastly, there are no mechanisms to ensure that the benefits of citizen economic empowerment flow to the intended beneficiaries. When non-citizen contractors are required to subcontract citizen contractors, there is no mechanism to monitor and determine whether there is a transfer of skills. There are also no mechanisms to determine the extent of fronting under the Trade Act. Due to fragmentation and overlapping of functions the mechanisms for delivering citizen economic empowerment should be very costly to the government. In their analysis of CEDA, Themba and Josiah conclude as follows:

“... an elaborate entrepreneurial framework, such as the one set up by Botswana Government, has budgetary implications in terms of maintenance and running costs. A more streamlined system with clear performance indicators could be advocated. One of the key issues that emerged from this study is the near absence of performance indicators developed specifically for the institutions charged with entrepreneurship.

We found in the case of CEDA that there were no clear key performance indicators upon which to ascertain organisational performance.”¹²⁹

Citizen economic empowerment has become an intrinsic and integral part of Botswana’s economy. According to the CEE Policy, its goal is equitable distribution of income and wealth in order to improve the quality of life of citizens and to equip citizens with the necessary competencies, which would enable them to take better advantage of economic opportunities and thereby have a stake in the process of economic growth and development.¹³⁰ Without legislation and institutions dedicated to it, citizen economic empowerment policy will not fully achieve its goals as is already the case. As acknowledged in the CEE Policy there is a need for a more strategic and holistic approach to citizen economic empowerment. This requires both institutional and legislative reform.

Government must promulgate a law on citizen economic empowerment. The fact that Government saw it fit to promulgate a law on foreign direct investment exposes it to the attack that either there is confusion in terms of priorities or that the government is paying insincere support to citizen economic empowerment as a political gimmick. By promulgating legislation that is focused on citizen economic empowerment, the Government of Botswana stands to reap many benefits. Such a law must create an independent regulatory body corporate that is aimed at designing citizen economic empowerment measures, assessing their effectiveness, monitoring and evaluation of and the implementation of citizen economic empowerment, dispute resolution, educating the public on such measures and advising the government on citizen economic empowerment policy. To avoid costly multiple statutory bodies, this will necessitate restructuring CEDA and LEA by absorbing them in the new institution. The implementation and monitoring of citizen economic empowerment schemes will be the exclusive function of the new body. The law will also create comprehensive offences in order to deter practices that defeat the goals of the law. The beneficiaries of citizen economic empowerment stand to benefit from certainty, having an institution

¹²⁹ G. Themba and J. Josiah, “Entrepreneurship Development in Botswana Lessons for Other Developing Countries,” *Botswana Journal of Business*, Volume 8, No. 1 (2015), pp. 10-35, at p. 26.

¹³⁰ Republic of Botswana, *CEE Policy*, *op. cit.*, para. 1.

that protects their interest and creation of rights that are enforceable in courts of law.

There are models which Botswana can use in developing such a law. Botswana can derive guidance from the *Zambian Citizen Economic Empowerment Act*,¹³¹ the *South African Broad Based Economic Empowerment Act*¹³² and the *Tanzanian National Economic Empowerment Act*.¹³³ These laws share the following features: they establish an institution that is designed to regulate economic empowerment with powers necessary to meet that goal, criminalize conduct that defeats the goal of economic empowerment and provide for funding of the entity. For example, the *South African Broad Based Economic Empowerment Act* creates the *Black Economic Empowerment Advisory Council* which has the following functions:¹³⁴ advising government on black economic empowerment; review progress in achieving black economic empowerment; advise on draft codes of good practice and facilitate partnerships between organs of state and the private sector that will advance the objectives of this Act. The *Zambian Citizen Economic Empowerment Act* contains provisions on skills development,¹³⁵ mechanisms for measuring progress¹³⁶ and establishes the *Citizen Economic Empowerment Fund*.¹³⁷

7. CONCLUDING REMARKS

The field of citizen economic empowerment in Botswana is flooded with policy instruments. Whilst there are laws that contain provisions on citizen economic empowerment, such laws do not create rights in favour of beneficiaries and are limited in operation by fragmentation, overlapping policies and lack of an institution with a focused mandate on citizen economic empowerment. The policies on citizen economic empowerment are enough. Enough testing of schemes has been done. It is now time to create Botswana's *Citizen Economic Empowerment Act*. With such a law in place, it will be easy to untangle the

131 Act No. 9 of 2006.

132 Act No. 46 of 2006.

133 Act No. 16 of 2004.

134 Section 5.

135 Section 17.

136 Section 26.

137 Section 27.

problems of licensing, the quality of the citizen economic empowerment measures and conduct by some players that defeat the ends of the policy. The success of the policy of citizen economic empowerment in the next decade will depend on the creation of such a law.