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ADVANCING A CONSTITUTIONAL APPROACH IN EVALUATING MERGERS AND ACQUISITIONS IN SOUTH AFRICA: LESSONS FROM COMPETITION COMMISSION OF SOUTH AFRICA v MEDICLINIC SOUTHERN AFRICA (PTY) LTD

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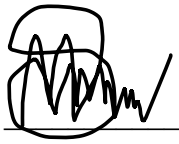

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ABSTRACT

Competition law is a vital tool that can be used to regulate and promote a competitive market economy. It is often argued that in a free market economy, market operation/performance should be left to be determined and regulated by market forces, and therefore state intervention should be minimal. Even though this view may have merit, it may be unsuitable or undesirable in developing countries like South Africa that are grappling with historical political ties that have engraved deep racial inequalities and uneven opportunities or access to participate in the economy. In the latter scenario, it is fundamentally important for the government to introduce measures to ensure that free market operations do not widen the inequalities and exclude other members of the society from meaningful participation in the economy. This is the story of the current South African competition law regime.

The South African Competition Act has traditional competition objectives and equity objectives, both of which are explicitly set out in the preamble, section 2, and the substantive provisions of the Act. Section 12A of the Act, the merger control provision, is one of those provisions in the Act that incorporates both the competition and equity policy objectives. The legislature intended that both policy objectives be approached with and given equal weight in interpreting and applying section 12A. Section 12A is therefore a regulatory tool deployed by the South African government to regulate the implementation of mergers and acquisitions to promote competition and further advance access to and equal participation in the economy. These objectives are in line with some of the fundamental objectives underpinning our constitutional democracy including the right to equality and the advancement of human rights.

The Constitution is the supreme source of law that sets the benchmark against which all laws must be interpreted. The Competition Act should therefore be applied within the framework of the Constitution. Section 39(2) enjoins courts, tribunals, and forums to promote the spirit, purport, and objectives of the Bill of Rights when performing judicial duties. It therefore follows that; competition authorities should give regard to the constitution and the Bill of Rights when evaluating mergers and acquisitions. In *Competition Commission v Mediclinic*, the Constitutional Court stated that when evaluating mergers, competition authorities are bound to give regard to all the policy objectives of the Competition Act, and further comply with all their constitutional duties including the injunction in section 39(2) to promote the spirit, purport and objects of the Bill of Rights.

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1 CHAPTER 1

1.1 Introduction and Background.

The year, 1994, will forever be cherished as a remarkable and future-defining moment in the history of South Africa. This is primarily because 1994 signifies the moment long awaited by many South Africans, particularly the historically disadvantaged people,[1] a moment when the controversial, racist, and brutally oppressive regime of apartheid was officially dismantled.[2] A new system of government grounded on democratic principles was ushered in.[3] In line with international practice, the democratic government opted to enact the constitution as the supreme source of law that will govern all public and private affairs in every spectrum of society in South Africa.[4]

The South African constitutional democracy is founded amongst others on the commitment toward the reversal of the deep inequalities and wealth gap occasioned by apartheid.[5] It is proposed in this study that these commitments or objectives be referred to as the pursuit of the national agenda, upon which the foundation of our constitutional democracy rests. Mncube and Ratshisusu state that all statutes enacted post-apartheid are expected to contribute towards the realization of the national agenda.[6] To achieve this objective, the democratic government enacted various legislations,[7] including the Broad Black-Based Economic Empowerment Act,[8] the National Small Businesses Act,[9] the Consumer Protection Act,[10] Labour Relations Act,[11] and the Competition Act.[12] It is the latter Act that will be the primary focus of this study. The Competition Act seeks to provide all South Africans with equal opportunity to participate in

[1] Hereafter ''HDPs''.
[2] *Certification of the Constitution of the Republic of South Africa*, 1996 (1996) (4) SA 744 (CC) par 10. (Hereafter ''*Certification Judgement*'').
[3] Currie and De Waal *The Bill of Rights handbook* (2013) 2.
[4] Currie and De Waal (2013) 5.
[5] Constitution of the Republic of South Africa, Act 200 of 1993, preamble; C*ertification Judgement* par 10.
[6] Mncube and Ratshisusu. ''Competition policy and black empowerment: South Africa's path to inclusion'' 2013 *J Antitrust Enforc* 78; Fox ''Equality, discrimination, and competition law: Lessons from and for South Africa and Indonesia'' 2000 *Harv Int'l LJ* 583.
[7] Woker ''Consumer protection: an overview since 1994'' 2019 *Stell LR* 97; Buthelezi and Njisane ''The Incorporation of the Public Interest in the Assessment of Prohibited Conduct: A Juggling Act?'' in Jenny and Katsoulacos (ed) *Competition Law Enforcement in the BRICS and in Developing Countries* (2016) 295.
[8] 53 of 2003.
[9] 105 of 1996.
[10] 66 of 1995.
[11] 68 of 2008.
[12] 89 of 1998. (Hereafter "the Competition Act", or "the Act", and the relevant section no).

the national economy, to achieve a more effective and efficient economy, and to ensure that consumers have access to affordable and quality goods and services.[13]

Section 12A of the Act, the merger regulation provision, is one of the central instruments intended to facilitate and achieve the objectives of the Competition Act.[14] Section 12A obliges competition authorities when analysing mergers and acquisitions to consider both the economic and public interests considerations listed in the Act. This balanced approach is intended to regulate traditional competition concerns, while also safeguarding and promoting public interests.[15] This was a conscious decision by the legislature that was ignited by the fragility of the South African democracy, which is still in its infancy stages.[16] Adopting a competition instrument that is totally oblivious to the plight of historically disadvantaged people would not have been a progressive and pro-transformative move and would surely not contribute towards the national agenda.[17]

The objectives of the Competition Act should however not be considered in isolation, rather they should be placed within the broader national agenda, along with the other statutes that are also geared towards achieving the national agenda, which as already been stated has as its aim the reversal of racial inequalities, poverty, exclusion of HDPs, and wealth disparities in the South African society.[18] The Competition Act and all the other statutes are however subject to, and regulated by the Constitution, which is the supreme source of law.[19] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Other*, the Constitutional Court authoritatively advised that there is one system of law in South Africa, and it is designed and informed by the Constitution.[20] The Competition Act can therefore not be applied outside the purview of the Constitution. The Competition Act must be placed within the constitutional framework and infused with constitutional principles. After all, the aims and objectives of the Competition Act are

[13] Preamble of the Competition Act.
[14] Katerina and Grimbeek ''The effectiveness of merger control in South Africa: selected case studies'' Working Paper cc2016/01: Competition Commission South Africa (2016) 2. (Hereafter ''Katerina and Grimbeek (2016) Working Paper'').
[15] Katerina and Grimbeek (2016) Working Paper 2.
[16] Katerina and Grimbeek (2016) Working Paper 2; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76.
[17] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76.
[18] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76; Katerina and Grimbeek 2016 Working Paper 5. Hartzenberg ''Competition policy and practice in South Africa: Promoting competition for development'' 2005 *Nw J Int'l L & Bus* 667.
[19] S 2 of the Constitution of the Republic of South Africa, 1996. (Hereafter ''the Constitution'', and the relevant section no).
[20] 2000 (2) SA 674 (CC). (Hereafter ''*Pharmaceutical Manufacturers''*).

constitutionally mandated.[21] As the supreme source of law, the Constitution sets the benchmark for all law and conduct in South Africa. It invalidates any law that is misaligned with its provisions and objectives.[22]

From the above discussion, it is therefore clear that competition authorities must in applying competition law give regard to applicable constitutional principles. The evaluation of mergers and acquisitions must be made in light of constitutional supervision to ensure that the approval or prohibition of any proposed merger or acquisition promotes the spirit, purport, and objects of the Bill of Rights.[23] The Supreme Court of Appeal in *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* noted that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2 of the Constitution.[24] Most recently, in *Competition Commission v Mediclinic*, the Constitutional Court held that competition authorities must give regard to the Constitution and the Bill of Rights when evaluating mergers.[25] The Constitutional Court confirmed that competition authorities are bound by section 39(2) of the Constitution which obliges all adjudicative institutions to promote the spirit, purport, and object of the Bill of Rights in all adjudicative processes undertaken.[26] This study will argue that adopting a constitutionally grounded approach in merger analysis (or in applying competition law generally) will enhance and solidify the transformative objectives of the Competition Act and contribute immensely towards the attainment of the national agenda.

This study will in chapter 2 provide a social, political, and legal history of South Africa that pre-dated the enactment of the Competition Act. It will be argued that the objectives behind the South African constitutional democracy informed the nature, scope, and character of the South African Competition Act. An overview of the Competition Act will thereafter be provided. Chapter 2 will discuss the merger control provisions of the Competition Act, with the aim to decipher their role in the attainment of the objectives of the Competition Act. It will be argued that the legislature intended that the competition and public interest considerations in section 12A of the Act be given equal weight in the interpretation and application of the merger control provisions. Chapter 3 will discuss the role of the Constitution in the

[21] *Competition Commission v Mediclinic* 2022 (4) SA 323 (CC). (Hereafter ''*Competition Commission v Mediclinic*'' or ''*Mediclinic*'') paras 4 and 8.
[22] S 2 of the Constitution.
[23] *Mediclinic* paras 8 – 10.
[24] 2010 (6) SA 108 (SCA) para 10.
[25] *Mediclinic* paras 8 – 10.
[26] *Mediclinic* paras 8 – 10.

interpretation and application of merger control provisions. It will be argued that competition authorities should explicitly invoke applicable constitutional principles in evaluating mergers to advance or develop the constitutional role in the application of merger control provisions. The interface between competition law and the Constitution will be drawn and thoroughly discussed, with reference to applicable legislation, case law, and other scholarly work.

1.3 Problem Statement.

Section 12A of the Competition Act outlines a dual inquiry that competition authorities must follow in evaluating proposed mergers. Firstly, competition authorities are required to test the likely impact that a proposed merger will have on the state of competition in the relevant market.[27] Secondly, competition authorities should test the impact of the merger on public interest grounds.[28] The application of section 12A has caused divergent views amongst scholars. One class of scholars argues that burdening the Competition Act with public interest is ''inappropriate'' because it constitutes an undesirable state interference with the market, and this dissuades investment and frustrates economic growth.[29] This class prefers a competition policy that pursues solely economic efficiency. The other class of scholars, however, endorses the dual character of the Competition Act. The latter class of scholars argues that competition law should be balanced between pursuing economic efficiency and achieving economic equity.[30] This will produce a competitive environment that is focused on economic growth, development and benefit all South Africans.[31] This study endorses the views of the latter class of scholars.

From the body of case law that has been decided since the inception of the Competition Act, it seems that the competition authorities have taken an approach that leans towards the argument advanced by the former class of scholars. Competition authorities have shown a disinclination to prohibit mergers solely on public interests, despite being empowered by the Act to do so, in appropriate cases.[32] This is evinced by the smaller number of prohibited mergers. Section 12A

[27] S 12A (1) of the Competition Act.
[28] S 12A (1A) of the Competition Act.
[29] See Brooks ''Redefining the objectives of South African competition law'' 2001 *CILSA* 296; Fox 2000 *Harv Int'l LJ* 580; Changole and Boshoff ''Non-competition Goals and Their Impact on South African Merger Control: An Empirical Analysis'' 2022 *Rev Ind Organ* 363.
[30] See Uwadi ''A case for public interest considerations in merger control analysis with reference to competition law enforcement in developing countries: The example of South Africa'' 2020 *TMD* 10 – 12; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79 – 80; Brooks 2001 *CILSA* 296; Fox 2000 *Harv Int'l LJ* 593.
[31] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79; Uwadi 2020 *TMD* 14.
[32] Dini ''South African Merger Litigations'' 2013 *Antitrust Bull* 365; Sutherland and Kemp *Competition Law of South Africa* (2013) par 1.10.

(3) amongst others, aims to facilitate the participation and expansion of small and medium size enterprises[33] within the market and promote the increase of ownership levels by HDPs and workers in the market. The attainment of these objectives can be partly derived from a consistent implementation of section 12A. There has been a negligible achievement of the empowerment objectives of the Act since its inception. This is partly attributable to the conservative or liberal approach adopted by competition authorities in applying the public interests' considerations.

This study endorses the approach to section 12A that seeks to balance the application of competition and public interest considerations, and thus the equal pursuit of economic efficiency and economic equity. However, this study advocates for a much broader approach to competition law, that is consonant with the values and objectives of our Constitutional democracy. In line with this approach, it, therefore, becomes necessary to outline in detail the place, interpretation, and application of competition law within the purview or framework of the constitution. This is what this study aims to do. In so doing, regard will be had to recent legislative amendments to the Competition Act and case law that have effectively bolstered the measures available to competition authorities to discharge the duty imposed on them, particularly in achieving the transformative objectives of both the Competition Act and the Constitution.

1.4 Motivation.

The inclusion of section 12A (3) in the Competition Act characterises the South African competition instrument as substantially different from the traditional competition instruments from other jurisdictions which are primarily and arguably only concerned with the regulation of competition and market efficiency.[34] This is attributed to the unique history of South Africa.[35] Apartheid produced a racially bifurcated society in which the minority white population owns and controls the bulk share of wealth in the South African economy while the majority of the black population remains excluded from participating in the mainstream economy.[36] The Competition Act is one of the measures deployed by the government to address

[33] SMEs.
[34] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76; Uwadi 2020 *TMD* 11; Fox 2000 *Harv Int'l LJ* 586.
[35] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78.
[36] *Mediclinic* par 4; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; Hartzenberg 2005 *Nw J Int'l L & Bus* 669; Fox 2000 *Harv Int'l LJ* 583. Also see the Peer Review Report compiled by the Organisation for Economic Co-operation and Development (''OECD'') titled ''Competition Law and Policy in South Africa'' (2003) 10. (Hereafter ''OECD (2003) Report'', and the relevant page no).

the economic disparities created by the apartheid system.[37] The Act is set to do this by harnessing the inclusivity and access for HDPs to participate in the economy through the measures listed in section 12A (3) of the Competition Act. The stumble between the measures in section 12A (3) and the realization thereof rests squarely on the shoulders of the competition authorities that are vested with the duty and power to implement the provisions of the Act. The views advanced in this study seek to compel competition authorities to apply the provisions of the Competition Act (particularly section 12A) in light of the objectives of the Act and the transformative objectives of the Constitution. This will render the Competition Act more potent and draw it closer to achieving the purposes for which it is intended.

1.5 Research Questions.

The overarching question sought to be addressed by the current study is, whether section 12A of the Competition Act can be interpreted and applied in light of the Constitution, and in particularly section 39(2) which enjoins all courts and legal forums to consider the Bill of Rights when interpreting statutes? In addressing the main question posed above, the study will respond to the following questions –

- What political, social, and legal history pre-dated the adoption of the Competition Act in South Africa?
- How did the adoption of the Constitution influence the adoption, substantive content, interpretative tools, and application of the Competition Act?
- Are the provisions of the Competition Act, particularly section 12A able to achieve the transformative goals that were intended by the legislature?
- Can competition law be interpreted and applied within the constitutional framework?
- What is the impact of recent legislative amendments and case law on the advancement of a constitutional approach to the interpretation and application of competition law?

1.6 Outline of Chapters.

Chapter 2:

The journey towards the adoption of the Competition Act; Political, social, and legal history that shaped/defined the character of the Competition Act.

Chapter 3:

[37] Preamble of the Competition Act; *Mediclinic* par 4; Katerina and Grimbeek (2016) Working Paper 2.

Overview of Merger control in South Africa; Policy goals, interpretation and application of section 12A of the Competition Act.

Chapter 4:

The Influence of the Constitution in merger evaluation and the Advancement of the transformative aims of the Competition Act.

Chapter 5

Conclusion.

1.7 Research Methodology.

The study will be entirely conducted through desktop research in which various journal articles, legislation, case law, and selected chapters from academic textbooks will be consulted. The departure point will be a critical evaluation of the Competition Act, in an attempt to place it within the transformative vision of the Constitution. The relevant provisions of the Competition Act and the Constitution will therefore be thoroughly discussed. The body of case law and academic journals to which the Competition Act was subject will thereafter be critically analyzed. Finally, the study will reflect on all the authority that would have been discussed in the body of the study and then concluding remarks and recommendations will be made.

1.8 Limitations.

Given the unique nature of the South African Competition Act, there is no similar or comparable competition instrument in any of the developed jurisdictions from which the Act drew inspiration.[38] Therefore, the study will not benefit or be enriched with a comparative analysis of the position or approach from other jurisdictions.

[38] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79; Uwadi 2020 *TMD* 11; Fox 2000 *Harv Int'l LJ* 579; Raslan ''Public Policy Considerations in Competition Enforcement: Merger Control in South Africa'' (2016) *CLES Research Paper series 3/2016* 2. (Hereafter ''Raslan (2016)'', and the relevant page no).

2 CHAPTER 2

2.1 The journey towards the adoption of the Competition Act; Political, social, and legal history that shaped/defined the character of the Competition Act.

2.1.1 General.

Competition law is influenced and shaped by economic and political considerations.[39] Laws are political in nature because there are passed by the government in response to societal needs or demands.[40] Competition law is a dynamic phenomenon that is influenced by relevant political dispensations and socio-economic preferences and imperatives. At its core, competition law is concerned with the regulation of market behaviour, in an attempt to preserve and promote competition, with the ultimate goal of enhancing consumer welfare**.**[41] Competition laws may however directly or indirectly impact the design of the economy, access to, participation, and the distribution of wealth. This may thus warrant political intervention to guard against the implementation of competition law in a manner that causes wealth disparities, especially in a jurisdiction like South Africa that is already battling with racial inequalities that were caused by past racial laws.

The apartheid policies shaped every aspect of South African society, unleashing the most violent human rights violation regime in recent history and bringing deeply rooted racial divides between whites and non-whites. Apartheid also influenced the direction of all political and economic affairs in South Africa.[42] This had dire consequences for the broader economy, especially for the excluded HDPs. The scope of this study will focus on those aspects that gave rise to some of the anti-competitive practices that the Competition Act seeks to address.[43] The current chapter will briefly set out the political history of South Africa with the aim of drawing a link between the apartheid policies and the character or focus of earlier competition instruments. This will demonstrate the fidelity between competition law and politics. Thereafter, will follow a broad discussion of the competition law statutes that were adopted before the Competition Act. The last segment of the chapter will discuss the substantive and procedural provisions of the Competition Act, which is currently the primary authority of competition law in South Africa.

[39] Brooks 2001 *CILSA* 295; Buthelezi and Njisane (2016) 295.
[40] Brooks 2001 *CILSA* 296.
[41] Brooks 2001 *CILSA* 296.
[42] Fox 2000 *Harv Int'l LJ* 583.
[43] Hartzenberg 2005 *Nw J Int'l L & Bus* 667.

2.2 Pre-1994 political history and how it shaped competition law.

The adoption of apartheid in the late 1940s saw a rollout of racially oppressive laws that were intended to unduly advance the interest of the white segment of the population at the expense of the rest of the South African population.[44] Human rights, access to public services, and economic resources were assigned and allocated on the basis of race.[45] Racial prejudices were legalized through various statutes that were passed by the whites-only parliament.[46] Parliament was the supreme source of law, so not even the judiciary could curb or veto the wrath of apartheid policies on its subjects. Apartheid policies effectively ensured that black people were precluded from participating in the mainstream economy, whilst the minority white population owned (and still owns) and control the majority of the South African economy.[47] This also constituted a direct interference with the fundamental tenets of the market-orientated economy.[48] These political and economic abnormalities distorted the competition statutes that were adopted during this era and thus had little or no impact on the collective well-being of citizens.[49] These laws were actually complicit in the perpetuation of apartheid. The apartheid government, as will be evident from the proceeding paragraphs, intentionally weakened and politically compromised the competition laws to establish and advance state monopolies and certain exclusionary practices that are against the fundamental objectives of competition law. Below, the study will look at the previous competition legislations that were adopted by the pre-democratic governments.

2.3 History/ journey to the adoption of the Competition Act.

Competition legislation in South Africa can be traced back to the early 19th century. In 1923, the then parliament enacted the Board of Trade and Industries Act.[5051] The BTIA established the Board of Trade and Industries[52] which was tasked with the responsibility to carry out the mandate of the BTIA. The role of the Board was to advise the government on competition

[44] *Certification Judgement* par 6.
[45] *Certification Judgement* par 7.
[46] Currie and De Waal (2013) 2.
[47] *Mediclinic* par 4; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; OECD report 10; Hartzenberg 2005 *Nw J Int'l L & Bus* 669; Fox 2000 *Harv Int'l LJ* 583. Also see the 2022 World Bank Report titled ''Inequality in Southern Africa: An assessment of the Southern African Customs Union''. According to this report, South Africa is the most unequal country in the world. There is an income and wealth wedge that causes and sustains racial inequalities. Much of the wealth in South Africa circulates within the white segment of the population.
[48] Brooks 2001 *CILSA* 296.
[49] Deon and Koornhof ''Assessing the nature of competition law enforcement in South Africa'' (2014) *Law democr Dev*; Kelly *et al* (2017) 8; OECD (2003) Report 12.
[50] 28 of 1923. (Hereafter ''BTIA'').
[51] Kelly *et al Principles of Competition Law in South Africa* (2017) 8.
[52] Hereafter ''the Board''.

policy.[53] The most noticeable contribution of the Board was the report that they produced in 1951, which ultimately led to the enactment of the Regulation of Monopolistic Conditions Act.[5455] The RMCA is the first South African general competition law statute.[56] In terms of the RMCA, the Board was tasked with the responsibility to investigate anti-competitive conduct(s), recommend remedies, and supervise compliance.[57] The RMCA did not define or list what was to be regarded as anti-competitive conduct, rather, the Minister of the Trade and Industry[58] was empowered to decide what was to be investigated and what relief would be implemented.[59] Unlike the Competition Commission, the current administrative body established by the Competition Act, the Board did not enjoy independence nor was it empowered by law to regulate its own investigative procedures.[60] The heavy involvement of the Minster in the functioning of the Board made the Board susceptible to political control or interference.[61]

The RMCA generally was a permissive statute, it sought to regulate and control a number of monopolistic conditions that were potentially anti-competitive.[62] However, the RMCA did not prescribe any practices that were per se prohibited. The standard of analysis was simply ''Public Interest''.[63] However, the formulation of this standard was never intended to reflect broader social concerns. In so far as promoting and enforcing competition goals, the RMCA was a potent instrument, which was manipulated by the executive arm of the state to exempt state monopolies from its ambit, and thus the concentration in the key sectors of the economy prevailed.[64] The RMCA did not have any merger control provisions.[65] The RMCA remedies were only prospective. It is important to also contextualize the era in which the RMCA was adopted, which could perhaps explain the eagerness of the executive to control the direction of the Board. The RMCA was enacted shortly after the National Party assumed power and enforced the apartheid system. The OECD report notes that the RMCA and other statutes that

[53] Kelly *et al* (2017) 8; Hartzenberg 2005 *Nw J Int'l L & Bus* 671.
[54] 24 of 1955. (Hereafter ''RMCA'').
[55] OECD (2003) Report 12.
[56] Brooks 2001 *CILSA* 297.
[57] OECD (2003) Report 12.
[58] Hereafter ''the Minister''.
[59] OECD (2003) Report 12; Hartzenberg 2005 *Nw J Int'l L & Bus* 671; Brooks 2001 *CILSA* 297.
[60] Brooks 2001 *CILSA* 298.
[61] Kelly (2017) 8; Hartzenberg 2005 *Nw J Int'l L & Bus* 671; Brooks 2001 *CILSA* 298.
[62] OECD (2003) Report 12.
[63] OECD (2003) Report 12.
[64] Changole and Boshoff 2022 *Rev Ind Organ* 367.
[65] Hartzenberg *Nw J Int'l L & Bus* 671.

were enacted during the apartheid era contributed towards advancing the broader apartheid agenda.[66]

The apartheid government combined racial discrimination and the protection of whites' interest in policy measures to shield white businesses, particularly farmers, from black competitors.[67] These policy measures further ensured that most land and state subsidies were reserved for white people. One would have expected of a traditional competition statute to address these clearly anti-competitive practices. However, it was not the case with the RMCA, which could explain the apartheid government's eagerness to control the direction of the RMCA.[68] In sum, the RMCA was ineffective.[69] It produced very few reports.[70] The most noticeable work of the Board under the RMCA was the declaration of some restraints as against public interests.[71] These include price fixing, trade discounts, resale price maintenance, exclusive dealing, and boycotts.[72]

In 1975, the apartheid government appointed the Mouton Commission to investigate and report on competition policy in South Africa.[73] The Mouton Commission recommended that a revised competition statute be enacted.[74] Following this recommendation, the Maintenance and Promotion of Competition Act[75] was enacted.[76] The MPCA created a new board, appointed by the Minster, which could investigate matters on its own initiative.[77] The Board was empowered to review mergers, restrictive practices, and monopoly situations.[78] These are some of the noteworthy provisions of the MPCA. However, the manner in which the MPCA regulated these practices is fundamentally different from how the current Competition Act provides.[79] The standard of analysis under the MPCA remained public interests. In all other respects, the MPCA resembled the RMCA. It also did not contain any explicit prohibitions.[80] The most noticeable substantive action under the RMCA was a regulation issued by the Minister

[66] OECD (2003) Report 9; Changole and Boshoff 2022 *Rev Ind Organ* 367.
[67] OECD (2003) Report 9; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; *Mediclinic* par 4.
[68] Brooks 2001 *CILSA* 298.
[69] Brooks 2001 *CILSA* 297.
[70] OECD (2003) Report 13.
[71] OECD (2003) Report 12.
[72] Kelly *et al* (2017) 8; Brooks 2001 *CILSA* 298
[73] Kelly *et al* (2017) 8.
[74] Kelly *et al* (2017) 8.
[75] 96 of 1979. (Hereafter ''MPCA'').
[76] Kelly *et al* (2017) 8.
[77] OECD (2003) Report 13.
[78] OECD (2003) Report 13.
[79] Kelly *et al* (2017) 9.
[80] Kelly *et al* (2017) 9.

following an investigation conducted by the Board in 1984 which proposed that certain practices be declared per se unlawful.[81] These included resale price maintenance, horizontal collusion on price, terms and market shares, and bid rigging.[82] A criminal sanction was to be imposed on those who will be found to have committed any of these acts.[83] However, not an individual person or entity was prosecuted by this provision.[84]

2.4 Transition to democracy; the path towards the adoption of the Competition Act.

Internal and external political events stretching back to the 1980s compelled the apartheid government to engage the political formations that drove the defiance campaigns against apartheid, led by the African National Congress. These engagements culminated in the form of Convention for a Democratic South Africa talks which took place between 1990 and 1993. The negotiating parties agreed to adopt the Interim Constitution in 1993, which was instrumental in the preparation and facilitation of the first democratic elections in 1994. One of the early commitments of the first democratic government was economic reform, inclusivity, and equal distribution of resources.[85] The Competition Act was one of the instruments that the government deployed to advance these objectives.[86] Given the impact of apartheid on the design of the South African economy, the adoption of competition legislation in South Africa required a unique approach.[87]

The Competition Act was drawn through a legislative process that was facilitated by the National Economic Development and Labour Council which included the business sector, labour organizations, economists, lawyers, academics, and politicians.[88] The result of this multi-stakeholder panel was a Competition Bill, containing substantive provisions dealing with traditional competition objectives as well a variety of public interests considerations including consumer protection, protection of workers, and the inclusivity of those who were historically disadvantaged by the system of apartheid.[89] The Competition Bill ultimately became the

[81] OECD (2003) Report 13.
[82] OECD (2003) Report 13.
[83] OECD (2003) Report 13; Brooks 2001 *CILSA* 298.
[84] OECD (2003) Report 13; Brooks 2001 *CILSA* 298.
[85] Kelly *et al* (2017) 9 – 11; OECD (2003) Report 14; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; *Certification Judgement* par 7; Brooks 2001 *CILSA* 302; Fox 2000 *Harv Int'l LJ* 583.
[86] Fox 2000 *Harv Int'l LJ* 583; Buthelezi and Njisane (2016) 295.
[87] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79; Uwadi 2020 *TMD* 11; Hartzenberg 2005 *Nw J Int'l L & Bus* 685; Changole and Boshoff *Rev Ind Organ* 367; Buthelezi and Njisane (2016) 295.
[88] Kelly *et al* (2017) 10; OECD (2003) Report 16; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; Brooks 2001 *CILSA* 302; Fox 2000 *Harv Int'l LJ* 583.
[89] Kelly *et al* (2017) 10; Hartzenberg 2005 *Nw J Int'l L & Bus* 668.

Competition Act 89 of 1988, the currently applicable statute. The Competition Act established a comprehensive framework for competition regulation in South Africa and has since been amended on several occasions to address emerging issues and promote greater economic transformation and empowerment of previously disadvantaged groups. The enactment of the Competition Act was a significant milestone in the development of competition policy in South Africa, and has since been instrumental in promoting competition, economic growth, and social welfare in the country.

2.5 The Competition Act 89 of 1998.

The Competition Act came into effect on 1 September 1999.[90] The Act contains innovative provisions that significantly break away from its predecessors. These provisions relate to the establishment of competition institutions that bear the primary duty to enforce the Act; substantive provisions that outline the scope of the work of the competition institutions; exemptions from the substantive provisions of the Act that may be granted upon application; corporate leniency policy; jurisdiction of the competition institutions to execute their duties conferred by the Act; and other provisions related to the administrative issues. These provisions will be briefly discussed below.

The aims and objectives of the Act.

The theme and direction of the Act are set by the preamble. The preamble recognizes apartheid and past injustices as the basis that caused the abnormalities that the Act seeks to address. The preamble notes the need to open the economy for the participation of the greater population and for a balance to be struck in protecting all relevant stakeholder interests. It also recognizes the need for independent and effective institutions that will be responsible for enforcing competition law. The ultimate purpose is to create a competitive and efficient economy where all South Africans have an equal opportunity and the means to meaningfully participate. Fox characterizes this aspect of the Act as a form of affirmative action.[91] This is appropriate given the fact that the Act goes to lengths to introduce measures that aim to favour HDPs, to give them a leeway or competitive advantage to be able to compete in the market overly dominated by those who were favoured by the apartheid regime.[92] The Act is also meant to provide consumers with product choices and goods of sound quality. These commitments or goals are a direct response to the anti-competitive, exclusionary, and unjust socio-economic conditions

[90] Kelly *et al* (2017) 10; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 80.
[91] Fox 2000 *Harv Int'l LJ* 2000.
[92] Sutherland and Kemp *Competition Law of South Africa* (2013) par 1.10.

occasioned by the system of apartheid and the equally complicit past competition instruments discussed in 2.3 above.[93]

The objectives of the Act are captured in section 2, which is basically a reiteration of the commitments outlined in the preamble. Section 2 provides that the Act aims ‘‘to promote and maintain competition in the Republic in order -

‘‘(a) to promote the efficiency, adaptability, and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in South Africa;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons’’[94]

What can be gleaned from the preamble and section 2 is that the Act aims to strike a balance between promoting a competitive economy and protecting public interests. This approach will be discussed further in chapter 3, with a particular focus on mergers and acquisitions.

Competition Authorities.

Chapter 4 of the Competition Act provides for the establishment of an independent administrative body (the Competition Commission),[95] an adjudicative body (the Competition Tribunal),[96] and an appellant body (the Competition Appeal Court)[97] (collectively, referred to as ‘‘the Competition Authorities’’). The Act outlines the operational procedure, scope of mandate, and functions that may be competently executed by competition authorities. The Act confers on the competition authorities the jurisdiction over the execution of all disputes and complaints emanating from issues covered in the Act. The Competition Commission has the primary responsibility over all matters arising from the Competition Act. However, the Competition Commission is only competent to perform the functions outlined in section 21 of the Act. Whereas section 27 sets out the functions of the Competition Tribunal, while section 37 outlines the functions of the Competition Appeal Court.

[93] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76.
[94] S 2 of the Competition Act.
[95] S 19 of the Competition Act
[96] S 26 of the Competition Act
[97] S 36 of the Competition Act

Substantive provisions.

Unlike its predecessors, the Competition Act in chapters 2 and 2A contains provisions that explicitly prohibit certain practices including restrictive horizontal practices, restrictive vertical practices, abuse of dominance, price discrimination, cartel conducts, complex monopolies, and other anti-competitive practices. Chapter 3 of the Act contains provisions dealing with merger control. The Competition Act outlines investigation and enforcement procedures to guide the competition authorities in applying chapters 2, 2A, and 3, as well as the remedies and penalties that should be imposed on those who will be found guilty of contravening these provisions.

Exemptions.

Section 10, 78, and Part A of Schedule 1 of the Act make provision for exemption from compliance with Chapters 2, 2A, and 3 of the Act to be granted to a firm or professional body upon application to the Competition Commission. Section 10 entitles any party to apply to be exempted from the provisions of Chapter 2 dealing with restrictive horizontal and vertical practices. Part A of Schedule 1 provides that a professional body or an association may apply to the Commission for an exemption from complying with certain provisions of the Act for a specified period. An example of the provision in terms of this chapter is the exemption granted to National Health Network,[98] a non-profit company that serves as an umbrella body for relatively small independent hospitals.[99] The exemption to NHN permitted the organization to negotiate tariffs and other benefits with medical schemes on behalf of affiliated hospitals. In terms of section 78, the Minister, in consultation with the Competition Commission, may also grant block exemptions in favor of an association or group in any industry to give effect to the provisions of the Act.

Other provisions.

The remaining provisions of the Act deal with administrative and enforcement issues. Chapter 4A empowers the Competition Commission to conduct market inquiries into any sector of the economy to determine the state of competition and concentration, Chapter 5 details the investigation and adjudication procedures of the competition authorities, Chapter 7 lists the offenses that the competition authorities may competitively impose against entities that violate the provisions of the Act, whereas Chapter 8 deals with general provisions, the important one

[98] Hereafter ''NHN''.
[99] *Mediclinic* par 16; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 83.

for the purposes of this study is section 82 which empowers the Commission to negotiate an arrangement to practice concurrent jurisdiction or by way of cooperation with any other regulatory authority in instances where the mandate of the Competition Commission and such other regulatory authority overlap.

2.6 Conclusion.

This chapter has outlined the history of competition law in South Africa. It was discussed that the pre-1994 competition statutes were highly influenced by the political dictates of the government of the day. As a result, these statutes turned out to be impotent and thus failed to serve any competition law purpose.[100] This paved the way for the apartheid government and private large corporations to enforce anticompetitive practices.[101] Owing to this hideous history, the democratic government was faced with the enormous task of reshaping the South African economy into an equitable one. This included having to adopt measures that are geared towards the inclusion of the black majority into the formal economy after centuries of marginalization due to repressive racial laws. Alive to this reality, many policy instruments, including the Competition Act were drafted with the aim to restore the deep racial inequalities and economic disparities in South African society. The legislature incorporated in the Competition Act traditional competition objectives, as well as public interest considerations.[102] Changole and Boshoff are of the view that the decision to include public interest concerns served to avoid conflicts that might occur between socio-economic policies and market competition.[103] One provision in the Competition Act that is set to achieve this goal is section 12A, the merger control provision. The next chapter discusses section 12A in detail.

[100] Hartzenberg 2005 *Nw J Int'l L & Bus* 668; Brooks 2001 *CILSA* 297.
[101] Hartzenberg 2005 *Nw J Int'l L & Bus* 683.
[102] Preamble of the Competition Act.
[103] Changole and Boshoff *Rev Ind Organ* 367.

3 CHAPTER 3

3.1 Overview of Merger control in South Africa; Policy goals, interpretation and application of section 12A of the Competition Act.

3.1.1 General.

The current chapter will contextualize the thesis advanced in this study. It suffices to repeat here that the study aims to test the role of the Constitution in the interpretation and application of competition law, particularly the merger control provisions. This chapter will provide an overview of merger control in South Africa, as set out in section 12A. Firstly, the study will discuss how the Act categorizes mergers. Thereafter, the policy objectives underpinning merger control will be discussed, with the aim of marrying the substantive provisions of section 12A with the objectives of the Act. This will provide a broad and holistic understanding of how the legislature intended Section 12A to be understood and applied.

This chapter will also discuss the merger considerations test outlined in section 12A. The view will be advanced that section 12A sets out a conjunctive test that incorporates both competition and public interest considerations on an equal footing. This then guides the approach that competition authorities should accord to both sets of considerations in interpreting and applying section 12A. It is not the aim of this chapter to discuss the technical application of each of the competition and public interest considerations listed in section 12A. Rather, the study will discuss the interpretational approach that should be accorded to the application of both the competition test and public interest test, broadly, and at the policy level. It will be argued that the approach proposed in this study accords with how the legislature had intended section 12A to be applied. The understanding advanced in this chapter will further set the basis for the thesis advanced in chapter 4, which is the heart of this study.

3.2 Categorization and notification of mergers.

A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.[104] Chapter 3 of the Competition Act sets out the provisions applicable to merger control. Since the inception of the Competition Act, merging parties are obliged to notify the Competition Commission in

[104] S 12(1) of the competition Act.

accordance with the applicable rules,[105] of all proposed mergers that meet the threshold for notification. The Act categorizes mergers as either small, intermediate, or large.[106]

3.3 Policy objectives underpinning section 12A: Efficiency v Equity.

Section 12A is one of the substantive provisions where the policy objectives of the Act are explicitly outlined. Section 12A seeks to regulate and monitor the implementation of mergers and acquisitions to protect the markets and consumers against uncompetitive transactions, and thus promote competition.[107] The legislature however also incorporated in section 12A the other transformative objectives that the Act seeks to pursue through the mandatory public interest considerations that competition authorities ought to consider in merger analysis.[108] The inclusion of public interests in Section 12A has however been heavily criticized.[109] The thrust of the criticism is that competition law should not be cloaked with political considerations, rather it should serve its traditional objective, which is to increase consumer welfare through the pursuit of efficiency.[110] This thesis can be traced to Artur Akun, who in his 1975 book: Equality and Efficiency: The Big Trade-off, argued that equity undermines efficiency.[111] According to Akun, government attempts to equalize the distribution of income decrease the efficiency of the economy.[112] Changole and Boshoff state that public interest considerations make the merger analysis process lengthy and thus increase costs.[113] Boshoff argues that the costs of implementing public interest considerations undercut and offset efficiency gains.[114]

It is further argued that the lack of clear public interest guidelines is detrimental to merging parties as they will not be able to structure their application and thus predict whether a merger will satisfy the public interest test.[115] This disrupts legal certainty.[116] It has also been argued

[105] S 13A (1) of the Competition Act; Dini 2013 *Antitrust Bull* 358.
[106] S 13A of the Competition Act; Dini 2013 *Antitrust Bull* 362.
[107] Buthelezi and Njisane (2016) 295.
[108] S 2 of the Competition Act; Uwadi 2020 *TMD* 8.
[109] Brooks 2001 *CILSA* 295; Fox 2000 *Harv Int'l LJ* 580; Changole and Boshoff *Rev Ind Organ* 362.
[110] Boshoff, Dingley and Dingley ''The economics of public interest provision in South Africa competition policy'' *6th Annual Conference on Competition Law, Economics and Policy. Pretoria: Competition Commission South Africa* (2012) 3. (Hereafter ''Boshoff, Dingley, and Dingley (2012)'', and the relevant page no).
[111] Andersen and Maibom ''The big trade-off between efficiency and equity—is it there?'' (2020) *Oxf Econ Pap* 391; Also see Mncube and Ratshisusu 2013 *J Antitrust Enforc* 379.
[112] Andersen and Maibom (2020) *Oxf Econ Pap* 391; Boshoff, Dingley, and Dingley (2012) 16.
[113] Changole and Boshoff *Rev Ind Organ* 362; Also see Boshoff, Dingley, and Dingley (2012) 29.
[114] Changole and Boshoff *Rev Ind Organ* 363.
[115] Changole and Boshoff *Rev Ind Organ* 362.
[116] Oxenham ''Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty'' (2012) *US-China L Rev* 212; Also see Changole and Boshoff *Rev Ind Organ* 363; Raslan (2016) 50.

that public interest considerations are political and policy laden,[117] as such cannot be appropriately dealt with under competition law. The Tribunal also in *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* cautioned that the public interest provisions should not be used as a socio-economic redistribution tool.[118] Smith and Oxenham posit that a competition instrument that pursues traditional competition goals better advances economic growth and employment. A departure from this focus will dissuade investment and thus lead to reduced growth in the economy, which will ultimately lead to the loss of jobs.[119] This argument aligns with the position adopted by most developed jurisdictions like the United State of America, where the view is advanced that public interests are actually better served if competition law focuses solely on competition concerns, as this will deliver efficiency, economic growth and create job opportunities.[120]

There is however a rival perspective advanced by those who believe competition law can be competently used to pursue both economic efficiency and equity objectives.[121] Proponents of the dual-purpose competition law believe that in a developing country like South Africa, which is characterized by high levels of income inequality, poverty, and racial domination, the inclusion of public interest is not only desirable but necessary.[122] Mncube and Ratsisusu argue that the Competition Act of South Africa was enacted as part of collective legislative instruments by the first democratic government to pursue and implement the socio-economic reforms desired by many South Africans, especially HDPs.[123] This argument aligns with Njisane's view, who argues that the public interest considerations in the Competition Act are an effort by the government to effect redistributive justice.[124]

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[117] Lewis (2012) *Thieves at the Dinner Table: Enforcing the Competition Act: A Personal Account*, Jacaranda Media, Johannesburg, South Africa, 37; Boshoff, Dingley, and Dingley (2012) 3. Buthelezi and Njisane (2016) 295.

[118] (66/LM/Oct10) par 58. Also see *Minister of Economic Development and Others/Competition Tribunal and Others, South African Commercial, Catering, and Allied Workers Union /WalMart Stores Inc and Another* [2012] 1 CPLR 6 (CAC) par 154.

[119] Smith P & Oxenham J "What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives", available at http://www.compcom.co.za/wpcontent/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pd (accessed on 27/07/2023)

[120] Sutherland and Kemp (2013) par 1.10; Uwadi 2020 *TMD* 12; Fox 2000 *Harv Int'l LJ* 579. Raslan (2016) 2.

[121] Buthelezi and Njisane (2016) 295; Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness, and Development (Department of Trade and Industry 1997) (proposed Nov. 27, 1997) (S. Afr.) (Hereafter referred to as ''DTI Competition Guidelines'').

[122] Fox 2000 *Harv Int'l LJ* 579. Changole and Boshoff *Rev Ind Organ* 363. Raslan (2016) 2. Katerina and Grimbeek (2016) Working Paper 1.

[123] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 375.

[124] Njisane "The Rise of Public Interest: Recent High-Profile Mergers" 2011 www.publicinterestlawgathering.com/wp-content/.../the_rise_of_public_interest.docx at 3.

Uwadi argues that it would not make sense if developing countries like SA which are struggling with rife issues of poverty, unemployment, and income disparities would adopt a merger policy that ignores these public interests, particularly if the outcome of merger transactions could exacerbate these issues.[125] Uwadi is for a holistic approach to merger analysis, that takes into consideration both competition and public interests.[126] This requires an approach that looks beyond the immediate impact a case under evaluation will have on competition in the market, and take into consideration the possible prejudicial effect it might have on public interest.[127] Uwadi argues that this approach would ensure that competition authorities lead the enforcement of competition law that aligns with other national economic, social, and developmental strategies deployed by the government to meet the developmental needs of the citizens.[128] Lewis opine that competition authorities in developing countries should play their role and not isolate themselves from those issues that most engage popular sentiment.[129] This will make competition authorities gain credibility and legitimacy.

Some scholars went as far as arguing that there is no trade-off between equity and efficiency, that both can parallelly be pursued through competition law.[130] It has been argued that equality is an important factor influencing the long-term pursuit and achievement of economic growth and development.[131] Increasing inequalities within a society frustrates the effort to grow the economy. Thus, it is argued that improving equality may also improve efficiency, which will ensure the attainment of long-term economic growth.[132] Fox argues that until the excluded and disempowered fully participate in the economy, the efficiency potential of a nation is unlikely to be achieved.[133] According to the United Nations Conference on Trade and Development,[134] prohibited practices may negatively impact economic growth and development because these practices may stifle competition and reduce customer welfare, and this may lead to efficiency

[125] Uwadi 2020 *TMD* 11
[126] Uwadi 2020 *TMD* 14; also see Brooks 2001 *CILSA* 306.
[127] Uwadi 2020 *TMD* 14.
[128] Uwadi 2020 *TMD* 14; Also see Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76; Hartzenberg 2005 *Nw J Int'l L & Bus* 670; Brooks 2001 *CILSA* 305.
[129] Lewis "The Role of Public Interest in Merger Evaluation – Speech" Speech given at the International Competition Network, Merger Working Group, Naples, Italy 28-29 September 2002. www.comptrib.co.za; Also see Raslan (2016) 55.
[130] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 78; Fox 2000 *Harv Int'l LJ* 593; Katerina and Grimbeek (2016) Working Paper 1.
[131] Fox 2000 *Harv Int'l LJ* 593; Uwadi 2020 *TMD* 14.
[132] Uwadi 2020 *TMD* 14; Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79.
[133] Fox 2000 *Harv Int'l LJ* 593.
[134] Hereafter ''UNCTAD''.

and innovation concerns.[135] Competition in developing countries may thus directly affect other developmental objectives that are in public interest.[136]

Arguing in favour of a dual-purpose competition law, Fox asks the question ‘‘why not competition law that favours the oppressed and excluded?’’[137] Fox argues that some goals (equity) are more important than efficiency.[138] The overall point here is that competition law (mergers control) must be sensitive, take cognizance of and respond to the socio-economic state of the jurisdiction where it will be applied.[139] This approach aims to marry the ultimate conventional competition law goal of efficiency and the pursuit of equity. This is the approach followed in the South African Competition Act.[140]

3.4 Merger consideration in terms of Section 12A of the Competition Act (test).

Section 12A of the Competition Act sets out the merger control test. Section 12A outlines the procedure that the competition authorities should follow in considering a proposed merger. In summary, section 12A requires the competition authorities when considering mergers to follow a three-stage inquiry, and determine[141] –

a) Whether the impugned merger is likely to substantially prevent or lessen competition?

b) If so, whether the merger is likely to result in any technological, efficiency, or another pro-competitive gain that will offset the anti-competitive effects of the merger and would not likely be obtained if the merger is prevented, and can the merger be justified on substantial public interest grounds.

c) Irrespective of the answer to the first question, can the merger be justified on substantial public interest grounds, or do such grounds weigh against its approval?

The merger consideration test set out in section 12A of the Act is conjunctive in nature. It requires the competition authorities to consider all three legs of the inquiry outlined in Section 12A (1) in deciding whether to approve or prohibit a proposed merger. In every given matter, the starting point would always be to determine whether or not the merger is likely to lessen or

[135] Buthelezi and Njisane (2016) 292.
[136] Uwadi 2020 *TMD* 14.
[137] Fox 2000 *Harv Int'l LJ* 593.
[138] Fox 2000 *Harv Int'l LJ* 593.
[139] Buthelezi and Njisane (2016) 290.
[140] Fox 2000 *Harv Int'l LJ* 579. Changole and Boshoff *Rev Ind Organ* 3. Raslan (2016) 2. Katerina and Grimbeek (2016) Working Paper 1.
[141] S 12A of the Competition Act.

prevent competition (the competition test). This is done with reference to the competition factors outlined in section 12A (2).[142] A merger that satisfies this leg of the inquiry is likely to be approved without any conditions, provided that it does not have any negative impact on public interests. Where, however, a merger does not satisfy the competition test, the second leg of the inquiry will be triggered.[143]

The Competition Tribunal in *Tongaat Hullet Group Ltd/ Tranasvaal Suiker Bpk*[144] held that the merging parties bear the onus of proving the efficiency (or technological/pro-competitive gain) since they are in possession of the information and therefore are better positioned to do so. The efficiency claimed must be merger specific. This means that there must be a link between the efficiency claimed and the merger. The merging parties cannot, therefore, seek to rely on efficiencies that would have otherwise occurred absent the merger. It must also be determined whether the efficiencies (or the technological/pro-competitive gain) are realistic and whether there are less restrictive or alternative ways in which the same efficiencies (or the technological/pro-competitive gain) may be achieved.[145] Practically, the merging parties whose proposed merger does not satisfy the first leg of the inquiry in terms of Section 12A (1) and (2) will in terms of Section 12A(1)(a) allege in their application documents seek to convince that the competition authorities that the proposed merger will result in efficiencies (or the technological/pro-competitive gain) that may not ensue if the merger is prohibited.

The third leg of the inquiry is self-standing, and not dependent on the outcome of either the first or second leg of the inquiry. Section 1A states that ‘‘despite’’ the determination in the first two legs of inquiry, the competition authorities ‘‘must’’ proceed to determine whether or not the merger can be justified on the public interests’ grounds set out in section 12A (3) (the public

[142] These include:
(a) the actual and potential level of import competition in the market;
(b) the ease of entry into the market, including tariff and regulatory barriers;
(c) the level and trends of concentration, and the history of collusion, in the market;
(d) the degree of countervailing power in the market;
(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
(f) the nature and extent of vertical integration in the market;
(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
(h) whether the merger will result in the removal of an effective competitor.
[143] Dini 2013 *Antitrust Bull* 362.
[144] 83/LM/JUL00 par 100.
[145] *Pioneer Hi-Bred International v Competition Commission* 113/CA/DEC10 25/05/2012 par 48.

interest test).[146] The section 12A (3) is a closed list.[147] In *Anglo American Holdings Ltd and Kumba Resources Ltd*, the Competition Tribunal correctly noted that section 12A obliges competition authorities to evaluate a proposed merger on public interest grounds even where the merger is unlikely to offend the competition test.[148] This approach was subsequently followed in other cases.[149] Following the enactment of the 2018 Competition Amendment Act,[150] it is now settled law that all proposed mergers must be evaluated against the public interest considerations in section 12A (3). A proposed merger is evaluated in light of those public interest concerns that will follow the approval of the merger. In other words, the public interest concerns must be merger-specific. It will be argued in the next segment of this chapter that section 12A sets out a conjunctive test that compels the decision maker to apply both the competition and public interests' factors with equal regard.

3.5 Section 12A: balancing the efficiency and equity objectives - the vehicle to deliver the transformative aims of the Act.

The Competition Act in its quest to protect public interest does not forsake the pursuit of traditional Competition law goals.[151] This is as much evident from the preamble, objectives, and substantive provisions of the Act, including section 12A which recognizes that the Competition Act aims amongst others to achieve a more effective and efficient economy, to provide consumers with product choice, restrict trade practices that undermine a competitive economy. Whereas section 12A (3) of the Act obliges competition authorities when analyzing mergers to determine whether a proposed transaction will impact public interests. This is a mandatory test that is applicable in the determination of all notifiable mergers. The design of section 12A does not make provision for the decision maker to abandon or opt not to conduct the public interest test, even on merger transactions that prima facie would not offend public interest, the test must nevertheless be conducted.

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[146] These include:
(a) a particular industrial sector or region;
(b) employment;
(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) the ability of national industries to compete in international markets.
(e) the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in the market."

[147] Kelly *et al* (2017) 212.

[148] (46/LM/Jun02) [2003] 45 paras 137–139.

[149] *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* (66/LM/Oct01).; *Telkom SA Ltd and Business Connexion Group Ltd* (51/LM/Jun06).

[150] 18 of 2018. (Hereafter '' 2018 Competition Amendment Act''.

[151] Fox 2000 *Harv Int'l LJ* 586; Brooks 2001 *CILSA* 306.

It is therefore argued that section 12A is a conjunctive test. It obliges the decision maker to chronologically apply both the competition test in section 12A (1) and the public interest considerations set out in section 12A (1A) in all proposed mergers. Contrary to the arguments advanced by Magana, it is argued here that the legislature intended to give equal weight to the competition test and the public interest test. The evidence in this regard lies in the conjunctive language used in section 12A. This contention further finds support in the preamble and objectives provisions, which lists the aims of the Act with no particular hierarchal emphasis.[152] The DTI Competition Guidelines behind noted the legacy of economic distortion in South Africa and suggested that a unique approach be followed in crafting the new competition policy. This policy had to promote competitiveness and efficiency and ensure access to the economy for HDPs.[153] These are the drivers which led to the adoption of the Competition Act. The timing in which the Act was adopted[154] and the importance of its policy objectives in harnessing South African democracy do not support a contention that relegates public interest secondary to competition interest in merger analysis.

This understanding debunks Magana's supposition that in a hypothetical scenario where the competition test and the public interest test conflict, the competition test will have to prevail.[155] Magana bases this view on the fact that section 12A stipulates that merger analysis must be undertaken initially by conducting the competition test, thereafter the public interest test. When one considers the conjunctive design of section 12A and the holistic understanding of the provision and the Act, one realizes that the application of the competition test before the public interest test is only a matter of chronology and structure. As correctly noted by Raslan, the Act does not set out an explicit hierarchy between the competition and the public interest tests, but rather a certain analytical progression.[156] In concurring with this view, Brooks state that the multiples objectives pursued by the Act have not been given a hierarchal structure.[157] Mergers and Acquisition remains an exercise falling under the purview of competition law, and as such should primarily be tested on competition considerations before the newly added public interest considerations can be undertaken, but this does not in any way imply that the public interest considerations are of secondary importance.

[152] Raslan (2016) 6; Katerina and Grimbeek (2016) Working Paper 1; Buthelezi and Njisane (2016) 289.
[153] Brooks 2001 *CILSA* 302; Fox 2000 *Harv Int'l LJ* 583.
[154] Hartzenberg 2005 *Nw J Int'l L & Bus* 667.
[155] Magana *Public interest versus competition considerations: a review of merger review guidelines in terms of Section 12 A of the Competition Act, 1998* (LLM thesis 2020 UNISA) 67.
[156] Raslan (2016) 6.
[157] Brooks 2001 *CILSA* 306.

Magana also cites *Harmony Gold Mining Co Limited/Gold Fields Limited*,[158] where the Tribunal intimated that in merger analysis, competition considerations take priority given the fact that the public interest test is undertaken to justify the approval or disapproval of the merger.[159] This argument is also not persuasive. Section 12A (1A) states that despite the outcome of the competition test, the decision maker must proceed to conduct the public interest test to determine whether the merger can be justified on public interest grounds. This implies that the approval of a merger will always depend on whether it complies with the public interest test. As confirmed in *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd*, even a merger that poses no threat to competition at all may be prohibited if it does not meet the public interest test.[160] The reverse is not true.

The Competition Commission in *ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC and Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd*[161] was determined to prohibit the proposed merger, which did not pose any competition concerns but would reduce the greater spread of ownership by HDPs. On the original terms of the transaction, the shareholding of HDPs in the target firm would post-merger be reduced from 68.56% to 0%. This directly offended section 12A (3)(e) of the Act, which seeks to promote the greater spread of ownership by HDPs. On the other hand, a merger that substantially offends any of the public interests' considerations covered in the Act cannot be justified on the basis that it is pro-competitive. If anything, this demonstrates the importance and weight that the legislature accorded the public interest test.

Magana further refers to *Anglo American Holdings Ltd & Kumba Resources Ltd* where the Competition Tribunal stated that public interest can operate to sanitize an anti-competitive merger or to impugn a merger found not to be anti-competitive. This statement too does not take Magana's argument any further. It merely reiterates the effect or impact of public interest considerations in merger evaluation, as discussed immediately above. Although the role of public interests is secondary in the analytical process in section 12A, it does not imply that the public interest considerations are of secondary importance in merger analysis.

[158] (93/LM/Nov04) [2005] ZACT 29.
[159] Magana 68.
[160] Also see Mncube and Ratshisusu 2013 *J Antitrust Enforc* 79; Dini 2013 *Antitrust Bull* 366. Changole and Boshoff *Rev Ind Organ* 367; *Distillers Corporation SA Limited/Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) par 214.
[161] Hereafter ''*ECP Africa/ Burger King*''.

Section 12A is one of the few provisions in the Act where the policy objectives of the Act are explicitly and practically given effect. The incorporation of public interest considerations in the substantive provisions of section 12A is a further demonstration that the legislature intended public interest to be evaluated on equal footing with the competition considerations. The inclusion of the public interest test in section 12A is a deliberate attempt by the legislature to deliver the transformative aims of the Act which include equity and inclusivity.[162] The public interests' should therefore be given effect in the evaluation of every proposed merger to advance the crucial objectives of the Act.

3.6 Conclusion.

In conclusion, it suffices to emphasize that the competition test and public interest test in section 12A have equal weight. Competition authorities are required to apply both tests conjunctively. The legislature designed section 12A such that in regulating or monitoring the state of competition in the markets where the merger is undertaken, the fundamental aims behind the Act are safeguarded or promoted through the application section 12A (3).[163] It is therefore important that competition authorities be able to balance the two tests to fully realize the objectives of the Act.[164] The hypothetical scenario pictured by Magana is therefore inconceivable because the section 12A test is conjunctive in nature, it does not allow a decision-maker to contrast or apply one test against the other. It rather outlines the tests chronologically in a manner that obliges the decision maker to conduct one test after the other to reach a decision.

It has become apparent from this chapter that a correct reading and application of section 12A is one that gives equal weight and due regard to both competition considerations and public interest considerations. This approach is not only compliant with the substantive provisions of section 12A but also with the objectives and fundamental aims of the Act that are set to be advanced through section 12A (3).[165] In the next chapter, it will be argued that the Constitutional Court in *Competition Commission v Mediclinic* has introduced or confirmed another consideration that competition authorities are also obliged to consider in deciding

[162] Katerina and Grimbeek (2016) Working Paper 2.
[163] Buthelezi and Njisane (2016) 293; Also see Changole and Boshoff *Rev Ind Organ* 367.
[164] Uwadi 2020 *TMD* 14; Hartzenberg *Nw J Int'l L & Bus* 669; Buthelezi and Njisane (2016) 290; Boshoff, Dingley and Dingley (2012) 3; *Wal-Mart Inc/Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 42 par 100. (Hereafter ''*Wal-Mart/Massmart*'').
[165] Brooks 2001 *CILSA* 305; *Wal-Mart/Massmart* par 98.

mergers, that is they must test the impact of a proposed merger on the Constitution and the Bill of Rights. This will influence the interpretation and application of section 12A.

4 CHAPTER 4

4.1 The Influence of the Constitution in merger evaluation and the Advancement of the transformative aims of the Competition Act.

4.1.1 General.

The Constitution is the supreme source of the law of the Republic of South Africa, any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.[166] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Other*, the court held that there is one system of law in South Africa, and it is shaped by the Constitution. All recognized sources of law derive force from and are subject to the Constitution.[167] Legislation is one of the recognized sources of law, and as such, it is subject to the dictates and standards of the Constitution. Former Chief Justice Pius Langa, in his inaugural seminar presented in 2006, at Stellenbosch University postulated that the Constitution is transformative in character and it requires judges to divorce the formal approach to law that was standard under the apartheid era, in favor of a culture of justification which is sensitive to our history, the forever changing norms and values of the society and the circumstances presented by each case.[168]

This is the legal framework according to which the Competition Act must be interpreted and applied. This position is affirmed in Section 1(2)(a) of the Competition Act, which state that the Act ‘‘must be interpreted in a manner that is consistent with the constitution and gives effect to its purposes set out in section 2 of the Act. The current chapter will in depth discuss the relationship between the Constitution and the Competition Act. More specifically, the discussion will centre around the role of section 39(2) of the Constitution[169] in the application of section 12A of the Competition Act.[170] The aim is to determine where and how constitutional provisions feature in the merger evaluation.

4.2 Relationship between the objectives of the Constitution and the Competition Act.

The Competition Act is one of a couple of legislations that were adopted by the democratic government and mandated to directly advance the fundamental objectives of the

[166] S2 of Constitution.
[167] *Pharmaceutical Manufacturers* par 44.
[168] Langa “Transformative Constitutionalism” 2006 *Stell LR*.
[169] For all intents and purposes, this provision will be referred to in full as ‘‘section 39(2) of the Constitution’’ or just ‘‘section 39(2)’’.
[170] For all intents and purposes, this provision will be referred to in full as ‘‘section 12A of the Competition Act’’ or just ‘‘section 12A’’.

Constitution.[171] The preamble of the Constitution commits to healing the divisions and injustices that were occasioned by the apartheid regime. This includes amongst others addressing the wealth disparities and inequality of opportunities between whites and HDPs. The preamble further commits to laying the foundation to create a democratic society where all citizens are equally protected by the law. The commitment to equality further appears in Section 1(a) of the Constitution, which state that the Republic of South Africa is founded amongst others on the achievement of equality and advancement of human rights and freedom. Section 9 of the Constitution extends to all rights bearers the right to equality and equal benefit of the law. Section 9 further enjoins the government to take legislative measures to promote the achievement of practical equality. These measures are often referred to as substantive equality or affirmative measures because they seek to promote equality of outcome, as opposed to formal equality, which has the tendency to treat unequally situated people ''equally''.[172] The latter approach perpetuates inequalities.

The Competition Act is one of the statutes that were adopted to promote and advance the aims of section 9 of the Constitution.[173] The preamble of the Competition Act also notes the role that apartheid had in entrenching racial inequalities in South Africa, and therefore, commits to providing measures directed toward redressing these inequalities.[174] It was discussed in 2.5 above that the drafters of the Competition Act were conscious of the dictates of our constitutional democracy when they negotiated the Competition Act. Alive to the reality that some of the practices that are regulated by the Competition Act may exacerbate inequalities, the legislature opted to incorporate measures in the Act to curb or counter this effect.[175] Amongst other measures to attain this goal, the legislature incorporated public interest considerations that ought to be taken into account when interpreting and applying section 12A of the Competition Act. These public interest considerations are *inter alia* intended to level the playing field by enabling preferential treatment to small and medium-sized businesses and HDPs.[176] These are direct substantive equality measures that not only advance the objectives of the Competition Act but also the broader constitutional objectives to achieve equality and

[171] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76.
[172] Smith ''Equality constitutional adjudication in South Africa: focus: twenty years of the South African Constitution'' 2014 *AHRLJ* 613.
[173] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76.
[174] See full discussion above in 2.5 above.
[175] Mncube and Ratshisusu 2013 *J Antitrust Enforc* 76; Hartzenberg 2005 *Nw J Int'l L & Bus* 670; Brooks 2001 *CILSA* 305.
[176] S 12A (3).

improve the lives of all of South Africa. This is the broader constitutional understanding that competition authorities ought to keep in interpreting section 12A of the Competition Act. Section 39(2) of the Constitution, however, provides a more specific obligation. Section 39(2) provides that

> ''When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.''

Section 39(2) enjoins competition authorities to have regard to the Constitution and the Bill of Rights when evaluating mergers. The Bill of Rights extends a variety of fundamental rights to citizens, all of which should not be impermissibly limited by the implementation of any merger transaction. The next segment of the study will look at the impact of section 39(2) in the interpretation and application of section 12A. The discussion will be led in reference to *Competition Commission v Mediclinic*, in which the Constitutional Court tested the relationship between section 12A and section 39(2) and the Constitution in general. A brief summary of *Competition Commission v Mediclinic* is provided immediately below. Followed by a discussion on the jurisdiction or competency of competition authorities to determine constitutional matters that are related to the application of merger control and the broader competition law. Thereafter, the discussion will be segmented into addressing the following questions: when or in what kind of merger cases are competition authorities required to invoke Section 39(2); what are the constitutional considerations that should be factored in when interpreting statutes (the Competition Act); what possible actions are at the disposal of the competition authorities in instances where a proposed merger does not live up the standards required by section 39(2) and the Constitution in general; lastly, what is the overall objective of this constitutional scrutiny or exercise and why the Competition law should be subjected to it, given the fact that the Competition Act has its own internal standards aimed at promoting public interests which are arguably akin to the exercise demanded by Section 39(2). These questions are addressed below.

4.3 *Competition Commission v Mediclinic.*

The Constitutional Court in October 2021 delivered judgment in an appeal case brought by the Competition Commission against a decision of the Competition Appeal Court where the Competition Appeal Court overturned a decision of the Competition Tribunal wherein the Competition Tribunal prohibited a merger between two private hospitals: Mediclinic and

Motloasana, citing amongst others as reasons for the decision that the merger would have raised prices for private health care services at the target hospital and remove a viable alternative, thus reducing customer choice and increase market concentration.[177] The Competition Tribunal further held that the merger would have had detrimental effects on public interests as the large masses in the geographical area of the target firm who relied on the affordable medical services of the target firm would lose access to medical healthcare because the acquiring firm was going to adjusted the prices of the medical services at the target firm to reflect the prices of the other medical institutions owned by the acquiring firm.[178] The Competition Tribunal further held that this outcome would also impact the constitutionally guaranteed right of the relevant masses to access medical healthcare.

The Competition Appeal Court overturned the decision of the Competition Tribunal, holding that the Competition Tribunal incorrectly applied the substantial lessening of competition test prescribed in section 12A of the Competition Act.[179] Aggrieved by the decision, the Competition Commission appealed to the Constitutional Court arguing that (i) the Competition Appeal Court had no legal basis to interfere with and set aside the Competition Tribunal's findings in the manner in which it did; (ii) the Competition Appeal Court failed to have due regard to section 27 of the Constitution in making its decision; (iii) the Competition Appeal Court did not have due regard to the purposes of the Competition Act, including the aspiration for a more equitable and inclusive economy and society and the high costs of private healthcare.[180] The Constitutional Court upheld the appeal in respect of all three grounds and emphasized that the competition authorities ought to interpret the Competition Act in light of the Constitution and the Bill of Rights as enjoined to do so by section 39(2) of the Constitution.[181] The apex court stated that when competition authorities are considering mergers or any other provisions of the Competition Act, they should remember or give regard to the foundational aims of the Competition Act outlined in the preamble and section 2 of the Act.[182]

[177] *Mediclinic* par 19.
[178] *Mediclinic* par 19.
[179] *Mediclinic* par 19
[180] *Mediclinic* par 21.
[181] *Mediclinic* par 53.
[182] *Mediclinic* par 53.

4.4 Competency of competition authorities to exercise constitutional jurisdiction.

The Act confers on the competition authorities the jurisdiction over the execution of all disputes and complaints emanating from issues covered in the Act.[183] The Competition Commission has the primary responsibility over all matters arising from the Competition Act. However, the Competition Commission is only competent to perform the functions outlined in section 21 of the Act. Whereas section 27 sets out the functions of the Competition Tribunal, while section 37 outlines the functions of the Competition Appeal Court. Section 62(1)(a) of the Act cloth the Competition Tribunal and the Competition Appeal Court with exclusive jurisdiction with regard to matters concerning the interpretation and application of chapters 2 (prohibited practices), 3 (merger control), and 5 (investigation and adjudicative procedures) of the Act. The Competition Appeal Court in *Schuman Sasol v Price's Dailite*;[184] and *Imerys South Africa v Competition Commission*[185] has fortified the meaning of section 62(1)(a), holding that competition matters are of a specialist nature which requires the hybrid technical expertise of both legal and economic nature, and as such competition authorities are best equipped to deal with those. This position has subsequently been endorsed lately by the apex court in *Competition Commission v Media 24*,[186] and *Competition Commission v Mediclinic*.[187] Section 62(2)(a) states that the jurisdiction of the Competition Appeal Court is final over matters arising from section 62(1)(a).

Section 62(2) confers additional jurisdiction to the Competition Appeal Court over matters where the jurisdiction of the Competition Commission and Competition Tribunal in taking any action is challenged; where a party disputes that a matter falls within the exclusive jurisdiction of the Competition Tribunal and Competition Appeal Court as stipulated in section 62(1)(a); and where a party raises any constitutional issues in terms of the Act. With regard to the instances mentioned above, section 62(3)(b) states that the jurisdiction of the Competition Appeal Court is neither final nor exclusive. In the instances envisioned in section 62(3)(b), the Competition Appeal Court will share jurisdiction with the High Court. The High Court is in terms of section 169 of the Constitution granted original jurisdiction to resolve any dispute that is capable of being resolved by resort to law, unless that jurisdiction has been assigned to another forum by national legislation. The Constitutional Court has recently confirmed in

[183] *Mediclinic* paras 9 and 77.
[184] [2002] ZACAC 2.
[185] [2017] ZACAC 1.
[186] 2019 (5) SA 598 (CC) par 136.
[187] *Mediclinic* par 51.

Competition Commission v Group Five[188] that the Competition Appeal Court shares jurisdiction with the High Court with regard to matters arising from section 62(2) of the Act.[189]

What is clear from the above discussion is that the Competition Tribunal and the Competition Appeal Court will enjoy exclusive jurisdiction to determine substantive questions in any disputed merger or related matter. However, where a dispute or cause of action is couched in terms that do not relate to the substantive content of evaluating the merger, but rather a challenge in terms of legality or the Promotion of Administration of Justice Act[190] of the process or procedure followed by the decision maker in reaching the decision, the Competition Appeal Court and the High Court will share jurisdiction, to the exclusion of the competition Tribunal. The Competition Tribunal is a creature of statute and as such can only exercise the powers explicitly granted to it by the Competition Act. The question that then arises is whether competition authorities are bound to adhere to section 39(2) of the constitution when evaluating mergers. This question was answered in the affirmative by the Constitutional Court in *Competition Commission v Mediclinic*. Be that as it may, the *Mediclinic* decision has left some questions unanswered, and these will be discussed in the proceeding paragraphs.

Section 39(2) binds every court, tribunal, or forum. The recognized courts in South Africa are listed in section 166 of the Constitution.[191] Of the competition authorities, only the Competition Appeal Court qualifies as a court. In *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit*,[192] the Constitutional Court was called amongst others to determine whether the Special Tribunal is equivalent to a court, such that it may exercise powers that are not explicitly conferred by its mother statute.[193] The apex court held that the Special Tribunal is not a court recognized in Section 166 of the Constitution.[194] The Competition Tribunal is therefore not a court for the same reasons advanced in *Ledla*. The Competition Tribunal is only empowered to deal with competition issues covered in the Act. In *Group Five*, the Constitutional Court advised that the Competition Tribunal is neither the kind of Tribunal

[188] 2022 SA 36 (CC). (Hereafter ''*Competition Commission v Group Five*'' or ''*Group Five*'').
[189] *Group Five* par 115.
[190] 3 of 2000. (Hereafter ''PAJA'' and the relevant section no).
[191] This includes - the Constitutional Court; the Supreme Court of Appeal; the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa; the Magistrates' Courts; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.
[192] 2023 (2) SACR 1 (CC). (Hereafter ''*Ledla*'').
[193] *Ledla* paras 48 – 52.
[194] *Ledla* par 52.

envisioned in section 1 of PAJA, those are the Tribunals or institutions that akin to the Special Tribunal that are empowered to conduct legality reviews in terms of PAJA.[195] The Competition Tribunal, however, still exercises judicial authority, and its decisions are binding unless reviewed successfully in a higher court.

Both the Competition Appeal Court and the Competition Tribunal are therefore obliged to adhere to section 39(2) in their adjudication processes (constitutional jurisdiction). However, the extent in terms of which the Competition Tribunal and the Competition Appeal Court are bound and may act in terms of section 39(2) is not similar. The Competition Tribunal may only exercise an indirect application of the Constitution. This means that the Competition Tribunal has to observe, promote, and demonstrably protected the Bill of Rights in evaluating the impact that a merger may have if approved. This is precisely what the Competition Tribunal did in *Mediclinic* by assessing the impact that approving the proposed merger would have had on the access to healthcare of the residents in the area or location of the target firm who would no longer be able to afford to access the services of the target firm post-merger because the tariffs were bound to be adjusted higher to reflect those of the acquiring group. This is as far as the competence of the Competition Tribunal can go in exercising (indirectly) constitutional jurisdiction.

Section 62(2) of the Act explicitly grants constitutional jurisdiction only to the Competition Appeal Court and not the Competition Tribunal. The Competition Appeal Court on the other hand is equivalent to the High Court in status, and as such, enjoys similar powers as the High Court. The Competition Appeal Court is therefore competent to entertain direct constitutional challenges. Competition Appeal Court may determine challenges emanating from the conduct or decisions of the lower competition authorities and constitutional challenges to the validity of the Competition Act. The constitutional scope of the Competition Appeal Court is, therefore, wider than that of the Competition Tribunal, and can be directly exercised. It may also be added that the Competition Appeal Court is in terms of section 172 of the constitution also empowered to declare as invalid any law or conduct that is inconsistent with the Constitution. Only the judicial institutions that qualifies the description of a court in section 166 of the Constitution can act in terms of section 172 of the Constitution. The Competition Appeal Court may in terms of section 172(1)(b) Constitution, when exercising its functions also make any order that is just and equitable. The discussion above sets out the competency and extent that the Competition

[195] *Group Five* paras 131 – 132.

Tribunal and Competition Appeal Court may reach in exercising the section 39(2) obligation when evaluating mergers. The discussion below will look at the practical application of section 39(2) in evaluating mergers.

4.5 The practical application section 39(2) in merger evaluation; an analysis.

4.5.1 When are competition authorities required to invoke Section 39(2).

The departure point in the interpretation of statutes is Section 39(2) of the Constitution, which enjoins all courts, tribunals, or forums when interpreting any legislation to promote the spirit, purport, and objects of the Bill of Rights. The Competition Tribunal and Competition Appeal Court are undoubtedly bound by section 39(2), however, the position relating to the Competition Commission is slightly different and will be discussed separately later. In *Vodacom v Makate*,[196] the Constitutional Court held that section 39(2) of the Constitution means that courts are bound to read a legislative provision through the prism of the Constitution.[197] This obligation is activated whenever the provision under scrutiny implicates or affects rights in the Bill of Rights.[198] The Competition Act must therefore be interpreted in light of the Constitution, Bill of Rights, and the well-established canons of interpretation. Section 39(3) is also noteworthy, it states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by the common law, customary law, or legislation, to the extent that they are consistent with the Bill.

From the reading of Section 39(2) above, the provision does not seem to confer specific instances whereupon the legal institutions that are bound by the provision are expected to conduct the legal inquiry demanded by the provision. The logical conclusion would be that Section 39(2) demands these legal institutions to comply with the provision in all cases before them. This position is endorsed by the Constitutional Court in *Mediclinic*, wherein Chief Justice Mogoeng (as he then was) stated that the Section 39(2) injunction is a compulsory duty that judicial institutions have to discharge in all cases before them, whether or not the parties have specifically called upon the court to do so.[199] This means that in all notified mergers, competition authorities are enjoined by Section 39(2) to assess whether the proposed merger violates or threatens a right protected in the Bill of Rights.

[196] 2016 (4) SA 121 (CC). (Hereafter ''*Makate*'').
[197] *Makate* par 87.
[198] *Mediclinic* par 9.
[199] *Mediclinic* par 9.

4.5.2 Constitutional approach: Test for statutory interpretation.

The second question inquires as to what considerations should competition authorities have regard to when analyzing mergers in terms of Section 12A. This is a very important inquiry to set legal boundaries and curtail Section 39(2) from casting the net too wide. This is also necessary to guide merging parties to assess the merger and self-rectify if there are issues, before notifying the merger. This also plays an important role in ensuring which is legal certainty, which in turn advances the rule of law. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* the court cautioned that section 39(2) is not a license to ignore the text of the legislation.[200] A fundamental tenant of statutory interpretation is that the words must be given their ordinary grammatical meaning unless doing so would result in an absurdity. The legislation must be reasonably capable of bearing the assigned interpretation. The Test for statutory interpretation was eloquently summarised by the court in *Cool Ideas 1186 CC v Anne Christine Hubbard*.[201] The court held that:

‘‘There are three important interrelated riders to this general principle, namely:[202]

a) that statutory provisions should always be interpreted purposively;

b) the relevant statutory provision must be properly contextualised; and

c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’’

The statutory test requires competition authorities when evaluating mergers to test Section 12A of the Competition Act against the three standards outlined above.

Firstly, it demands competition authorities to interpret and apply Section 12A in the consideration of a merger, purposively. There are legal precedents that elucidate the precise meaning of a purposive interpretation. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[203] the court held that the ‘’emerging trend in statutory construction is to have regard to the context in which the words occur, even where

[200] 2001 (1) SA 545 (CC) par 24. (Hereafter ‘’*Hyundai Motor Distributors*’’).
[201] 2014 (4) SA 474 (CC). (Hereafter ‘’*Cool Ideas*’’).
[202] *Cool Ideas* par 28.
[203] 2004 (4) SA 490 (CC) (Hereafter ‘’*Bator Star*’’).

the words to be construed are clear and unambiguous.''[204] The exercise of interpretation must instead focus on the purpose of the provision and the context in which it appears. In *Daniels v Scribante*, this Court emphasized that courts must adopt "a purposive interpretation that is compatible with the mischief being addressed by the statute concerned."[205] This means that a court must determine the goal of a statute as a whole, and of a particular provision and seek, as far as possible, to interpret the legislation to further that goal.

Drawing from the cumulative wisdom of the courts in the above-discussed cases, when considering a merger, competition authorities should apply the merits or facts presented by a proposed merger to the three-pronged test set out in Section 12A. At the end of the inquiry, competition authorities should be satisfied that approving or prohibiting the merger advances the legislative intention behind Section 12A, the Act as a whole. According to *Scribante*, the purpose of Section 12A cannot be determined in isolation, rather it should be placed within the broader purpose of the Competition Act because Section 12A is only one provision that in part is deployed to advance the broader policy goals behind the Act, as outlined in the Preamble and Section 2 of the Act.[206] The approach followed by the Tribunal, and further fortified by the Constitutional Court in *Mediclinic* is exemplary in this regard. CJ Mogoeng made the orbiter comments that ''Sight must therefore never be lost of the central purpose for the enactment of that Act and for the investigative and adjudicatory structures that it gave birth to''.[207]

The second inquiry is interlinked with the first one, it requires competition authorities to put Section 12A into proper context. To be able to extract the meaning or purpose of the provision in the manner demanded by the first inquiry, competition authorities would have to contextualize Section 12A. Wallis JA has explained that: "Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise."[208] This means that section 12A must be understood in its context. This would demand one to study the policy objectives underpinning the Act broadly, and section 12A in particular. This approach enables the decision maker to understand the context in which the words or phrases that appears in section 12A are used. This would ensure that merger evaluations do not produce hollow

[204] *Bator Star* par 90.
[205] 2017 (4) SA 341 (CC). (Hereafter ''*Scribante*'').
[206] *Scribante* par 24.
[207] *Mediclinic* par 5.
[208] *Scribante* par 24.

technical or legalistic outcomes, but outcomes that are grounded in policy and that advances the objectives of the Act.

The third inquiry requires competition authorities to attempt as far as possible to interpret Section 12A consistently with the Constitution, to preserve the constitutional validity of the provision. However, as noted in *Hyundai Motor Distributors*, this does not mean that the competition authorities can stretch the meaning of the provision however they wish. The interpretation must be within acceptable legal bounds, cloth with constitutional values, and indeed be capable of withstanding scrutiny. In short, the interpretation must be justifiable.

It would appear from this discussion that competition authorities are in terms of Section 39(2) obliged to promote the spirit, purport, and objects of the Bill of Rights in interpreting and applying Section 12A. This means that the competition authorities when considering a merger, its adjudication process, analysis, and outcome must not only demonstrably conform with Section 12A of the Competition Act, but with the Bill of Rights too. A proposed merger that exhibits traits or has the likelihood to negatively impact public interest, particularly in a way that would violate rights protected in the Bill of Rights, ought to be prohibited. From a close reading of Section 12A, it seems that the provision gives leeway to the competition authorities to consider and possibly approve a merger that has negative competition consequences provided that the merger parties can prove that the merger would result in any technological, efficiency, and pro-competitive gains that are greater than the negative impact on competition and, the merger would further positively impact on public interests. However, the provision does not appear to endorse a position where competition authorities can justify the approval of a merger that has severe impacts on public interests on the basis that the merger does not pose any competition issues. This was the issue in *ECP Africa/ Burger King*.[209]

It should, however, be pointed out that *ECP Africa/ Burger King* is distinguishable from *Mediclinic* on the basis that the merger did not pose a direct threat to the rights protected in the Bill of Rights, rather, the objection of the Competition Commission emanated from the fact that approving the merger would have adverse effects to, rather than advance the purpose of Section 12A(3)(e) of the Act, which seeks to increase the greater spread of ownership to HDPs. Section 39(2) of the constitution is thus not triggered in *ECP Africa/ Burger King*. Whereas in *Mediclinic*, as evident in the Competition Tribunal and Constitutional Court judgements, the merger had the potential to negatively impact both the competition and public interest

[209] See full discussion of the case in 3.5 above.

considerations, and additional violate the right to access health care which is protected in section 27 of the Constitution. The latter effect is what triggered CJ Mogoeng's resort to section 39(2). The public interests' considerations in section 12A were not designed to remedy violations against the rights covered in the Bill of Rights, rather they are deployed to deal with merger-specific effects that trigger one of the grounds in Section 12A(3)(a)-(e).

In cases where parties to a merger that violates the public interests' provisions of the Competition Act and Bill of Rights are unable to make compelling concessions that can satisfactorily offset the offending aspects of the transaction, the merger will suffer the fate of *Mediclinic*. It would appear that *Mediclinic* has made the merger consideration test more onerous in cases akin to *Mediclinic*, where the merger impacts rights in the Bill of Rights. Regrettably, the Constitutional Court in *Mediclinic* does not provide clear guidance for merger parties and the competition authorities as to what extent should the Bill of Rights jurisprudence be incorporated or juxtaposed in evaluating mergers. The Bill of Rights test is well known, it forbids interference with all the rights in Chapter 2 of the Constitution unless the interference is justifiable in terms of the law of general application or in terms of Section 36 of the Constitution.[210] What is not clear from Mediclinic is whether the merging parties whose conduct is under scrutiny for possible non-compliance with section 12A and for possibly interfering impermissibly with the enjoyment of the rights protected in the Bill of Rights are required to separately make satisfying concessions to remedy any negative effects on the competition and public interests listed in Section 12A and separately make concessions or undertakings that would satisfy the limitation of the rights in the Bill of Rights or if the merging parties can make satisfactory concessions enough to remedy the effect on public interest, it would simultaneously meet or rectify the violation of Bill of Rights. This is not clear from the judgment.

Where merging parties fail to satisfy the competition authorities that the concessions that they are presenting are advantageous enough to meet the pro-competitive gain standard in Section 12A(1)(a), the merger will be prohibited. But, it would seem that even if they do make concessions or commitments that are just enough to satisfy the decision maker of the potential of the transaction to result in any technological, efficiency, or another pro-competitive gain that will offset the anti-competitive effects of the merger, and the merger cannot be justified in terms of section 12A(1)(b) and 12A(3) or if the concessions do not elevate proposed merger to

[210] S 36 of the Constitution.

a state where despite the test in Section 12A, it cannot be justified in terms of the Bill of Rights, it has to be prohibited. This is the genesis of the *Mediclinic* decision. This discussion above shows the extent that competition authorities ought to go, to comply with leg (c) of the statutory test that was outlined by the court in *Cool Ideas*.

4.5.3 Recourse for non-compliance, in terms of Section 39(2).

The third inquiry relates to the possible actions available at the disposal of the competition authorities in instances where a proposed merger does not live up to the standards of section 39(2). This aspect is covered in the discussion of the second inquiry above. It was discussed that competition authorities are first required to interpret and apply Section 12A to the facts of the merger before them, as reasonably, as possible in conformity with the Constitution, in a manner that promotes the spirit, purport, and objects of the Bill of Rights. This means that after analyzing the merger, if competition authorities find that the merger has potential effects that would frustrate the aims of the Act and further violate rights in the Bill of Rights, an interpretation of section 12A that is in compliance with Section 39(2) obliges the decision maker to prohibit the merger. This is what transformative constitutionalism requires of the decision maker because acting contrary would amount to a perpetuation of the very ills that the Competition Act seeks to undo or prevent, and further it would amount to an unjustified violation of the Bill of Rights.

4.5.4 Is Section 39(2) necessary in the context of section 12A.

The last aspect to be determined is whether constitutional scrutiny is necessary and desirable in the context of competition law given the fact that the Competition Act has its own internal standards aimed at promoting public interests which are arguably akin to the exercise demanded by Section 39(2).

The public interest considerations in Section 12A (3) are legislative means aimed at advancing the statutory aims of the Competition Act. The public interest considerations are specifically and narrowly tailored to respond to merger-specific effects. Therefore, Section 12A (3) has a specific mandate that has a limited reach. Section 12A (3) is also subject to Section 39(2) of the Constitution which is a general standard to test the constitutional validity of all laws. Should the public interest provisions fall short of the required constitutional rigor, Section 39(2) of the Constitution compels decision-maker/ competition authorities to adjust, align or develop the public interest provisions to be inline with the spirit, purport, and object of the Bill of Rights.

4.6 Position with regard to the Competition Commission.

In 4.4 above, the study discussed the competency or jurisdiction of the Competition Tribunal and the Competition Appeal Court to engage the Constitution. The extent and way these institutions are required to observe section 39(2) was discussed.[211] The position regarding the Competition Commission is slightly different. As already discussed, section 39(2) binds courts, tribunals, and forums. The Competition Commission cannot be categorized as either of these, even on a broader interpretation. Therefore, it is reasonable to conclude that the Commission is not bound by Section 39(2). However, this does not mean that the decisions of the Competition Commission in evaluating mergers are not subject to legal scrutiny and procedural fairness. Section 27(1)(c) of the Act empowers merging parties to appeal or challenge decisions of the Commission in the competition authorities above the Competition Commission in the hierarchy set out in the Act. The Competition Commission is also an administrative body falling within the executive arm of government.[212] The decisions of the Commission are administrative and public in nature and thus may be challenged in terms of Section 33 of the Constitution and section 6 of PAJA.[213]

The Constitutional Court has recently confirmed in *Competition Commission v Group Five* that the Competition Tribunal does not have jurisdiction to decide review challenges of the decisions of the Competition Commission that are brought in terms of PAJA or the legality principle, but the Competition Appeal Court does.[214] Section 62(3) of the Act confers to the Competition Appeal Court jurisdiction to hear matters brought in terms of legality and PAJA. However, its jurisdiction in this regard is neither exclusive nor final.[215] This means that a party challenging a decision of the Commission may either do so in the Competition Appeal Court or in the High Court, and further appeals to the Supreme Court of Appeal and the Constitutional Court are permissible, where appropriate. CJ Mogoeng in *Mediclinic* also noted that the competition authorities, including the Competition Commission, are further burdened with the duty to uphold and promote the Bill of Rights by section 7 of the Constitution.[216] CJ Mogoeng noted that as state organs, competition authorities are bound by Section 7(2) to protect, promote and fulfill the rights in the Bill of Rights.[217] It is therefore evident from this discussion that the

[211] See discussion in 4.4 above.
[212] OECD (2003) Report page 37.
[213] *Group Five* par 113.
[214] *Group Five* par 132.
[215] Section 62(3)(b) of the Competition Act.
[216] *Mediclinic* par 10.
[217] *Mediclinic* par 10.

non-applicability of section 39(2) in the proceedings of the competition Commission does not absolve the Commission from advancing or promoting adherence to and fulfilment of the Bill of Rights.

4.7 Legal certainty.

Although the *Mediclinic* judgment is to be cherished for the pro-transformative input that it has introduced in merger regulation, it is not without difficulties. The main issue with the *Mediclinic* judgment is that it does not provide enough details as to how competition authorities should incorporate the constitutional jurisprudence in applying section 12A of the Competition Act. The Constitutional Court advises competition authorities to have regard to the Bill of Rights in evaluating mergers without a detailed or standard procedure on how they should practically do so. As noted in 4.5.2 there might indeed be cases where the line may become blurred as to whether a challenged merger violates the public interest considerations envisioned in section 12A (3) or the Bill of Rights. It is possible for a merger to contain aspects that offend both section 12A (3) and the Bill of Rights. How the provisions in section 12A and the constitutional provisions are to be balanced and applied in a given matter, is not clear from the judgment. This does not help in enhancing legal certainty.

The binding force of a precedent lies in its consistent application.[218] Mediclinic is the binding authority for matters that pose similar legal questions as those posed in the *Mediclinic/Motloasana* prohibited merger. In other words, competition authorities are required to decide matters that pose a threat to the Bill of Rights, in line with the *Mediclinic* precedent. It would have assisted had the Constitutional Court expanded or provided a scope or guide on how such an inquiry should be undertaken. This would have guaranteed the development of a constitutional-merger control jurisprudence that is consistent, stable, predictable, and effectively protect the Bill of Rights.[219] The application of *Mediclinic*, however, in an incoherent and inconsistent manner would ironically frustrate the development of constitutional law in merger regulation.

4.8 Other relevant considerations.

Out of interest, the question may be teased here as to whether constitutional values such as public policy, good faith, and ubuntu have any role to play in merger regulation. These values have never been incorporated or used in merger analysis before, at least not direct. As the

[218] *Daniels v Campbell* 2004 (5) SA 331 (CC) par 94.
[219] *Gcaba v Minister of Safety and Others* 2010 (1) SA 238 (CC) par 2.

constitution-competition law jurisprudence develops, it remains to be seen if these values will play any role in merger analysis in the future. The value of ubuntu can play a significant role, even extra-judicial, to appeal to merger parties' consciousnesses to consider and limit as far as possible the impact of their transaction on the community interests. This would call for an approach that elevates the overall community well-being and interest over the commercial interest of the merging parties, particularly in those scenarios where the competition authorities would not find anything in the statute that would bar that merger from proceeding to implement their transaction.[220] This is possible if the protest of the community would arise from a matter that cannot be categorized as one of the recognized grounds section 12A (3) nor can it be categorized as constitutional, such that it engages the jurisdiction of the superior courts. It would be interesting to see if competition authorities and the courts would make use of these values when the appropriate case presents itself.

4.9 Conclusion.

This chapter has drawn the relationship between the Competition Act and the Constitution. It was discussed that the broader policy objectives of the Competition Act aligns with some of the fundamental aims of the Constitution, particularly the pursuit of the right to equality, inclusivity and access for HDPs to effectively participate in the South African economy. One of the ways in which the Act is set to achieve this objective is through section 12A, the merger control provision.

Section 12A requires competition authorities when evaluating mergers to consider competition and public interest considerations. It was discussed that competition authorities when interpreting section 12 are further expected to uphold applicable constitutional provisions. The study was particularly grounded on testing the role of section 39(2) of the Constitution in the interpretation of section 12A of the Competition Act. Section 39(2) requires competition authorities to promote the spirit, purport and object of the Bill of Rights when evaluating mergers. Put differently, section 39(2) obliges competition authorities to examine or check the impact of proposed mergers on the rights protected in the Bill of Rights. This discussion was triggered in *Competition Commission v Mediclinic*, where the Constitutional Court held that a merger can be prohibited on the basis that it violates the rights protected by the Bill of Rights.

[220] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) par 207.

In relevant cases, section 12A should therefore be subjected to or interpreted in light of the established constitutional-statutory interpretation principles.

It was also discussed that competition authorities, particularly the Competition Tribunal and the Competition Appeal Court are obliged to adhere to section 39(2). The Competition Tribunal as a creature of statute has a limited scope to engage with the constitution, whereas the Competition Appeal Court has an equivalent status to the High Court and therefore a wider or broader constitutional jurisdiction, including the power to determine the validity of the provisions of the Competition Act. It was also discussed that section 39(2) does not find application in the processes of the Competition Commission. This does not, however, mean that the Competition Commission is not required to adhere to the Constitution when evaluating mergers. Section 7 of the Constitution obliges the Competition Commission, as an organ of state to always promote the Bill of Rights.

Lastly, the chapter highlighted the concerns pertaining to legal uncertainty that may possibly be caused by the in-elaborative approach adopted by the Constitutional Court in *Mediclinic*. It was argued that the Apex Court should have expanded on how competition authorities should in the future approach merger cases that implicate the Bill of Rights.

5 CHAPTER 5

5.1 Conclusion and Recommendations

This study endorses an approach to the South African competition law that places public interest considerations at the centre. It is submitted that competition law is a vital instrument that the government can use to respond to the economic disparities that were incurred by democratic South Africa from the apartheid regime whilst also serving traditional competition goals. Socio-economic reform was amongst the top priorities of the government post-1994, hence the Competition Act was enacted and mandated to ensure amongst others that SMEs have an equitable opportunity to participate in the economy and the promotion of a greater spread of ownership stakes of HDPs.

Section 12A is one of the specific provisions in the Act that have a dual purpose, regulating competition interests and also guarding and promoting public interests. This study argues that the latter purpose of section 12A should rather be fortified and enforced more in merger evaluation to fully realize the transformative goals that the legislature intended to achieve through the Competition Act. The enactment of the 2018 Competition Amendment Act further reinforced the measures available to competition authorities to advance public interests when evaluating mergers. Most notably, the 2018 Competition Amendment Act introduced a new public interest ground, which requires all proposed mergers to promote the greater spread of ownership by HDPs. The *ECP Africa/ Burger King* merger is so far the leading authority in

where the competition authorities have practically applied the 2018 Competition Amendment Act.

The study submits that *Mediclinic* has introduced or confirmed another leg of inquiry that should be considered by competition authorities in evaluating mergers. The Constitutional Court in *Mediclinic* has held that competition authorities ought to have regard to section 39(2) of the Constitution when evaluating mergers, particularly, they should determine whether approving or prohibiting a proposed merger is likely to affect rights protected in the Bill of Rights. Section 39(2) is a compulsory duty that should be discharged by competition authorities in deciding any merger.

The implication of *Mediclinic* is that not only are competition authorities required to test a proposed merger against the competition and public interest considerations set out in section 12A of the Competition Act, but they are also expected to test whether or not the proposed merger limits or threatens the enjoyment of rights protected by the Bill of Rights. It is unfortunate that the Constitutional Court did not expand on how competition authorities should balance between discharging their duty in terms of section 12A and complying with the duty to vindicate and prevent the violation of the Bill of Rights. However, it would seem that a merger that exhibits traits that are likely to thwart competition or offend against the public interest considerations in section 12A (3) and also violate rights in the Bill of Rights, would have to be prohibited. What is uncertain is whether the merging parties to such a proposed merger would through making concessions or accepting conditions imposed by the competition authorities, simultaneously remedy the violation of Section 12A of the Competition Act and also the violation of the Bill of Rights.

The view advanced in this study is that *Mediclinic* is a progressive step in the development of the constitutional-competition law jurisprudence. However, the Constitutional Court shied away from providing a concrete and detailed step by step guidance on how competition authorities are to interpret and apply section 12A and still observe their constitutional duty to promote the spirit, purport and object of the Bill of Rights. It is submitted that such a detailed guide would have avoided any legal uncertainties and provided a concrete precedent to guide competition authorities and the merging parties. Regardless, the development introduced by *Mediclinic* should still be lauded.

The current South African Competition law regime is still relatively young compared to leading jurisdictions like the United States of America and the European Union. It remains to be seen

how competition authorities will in the future approach cases akin to *Mediclinic*. It will be interesting to see how the constitutional-competition law jurisprudence will develop in this regard. It may be a while before the Constitutional Court has another opportunity to deal with the legal questions posed in *Mediclinic*. Until such a time, it is submitted that competition authorities must adhere to and further develop the *Medclinic* principles to enrich the jurisprudence in that regard.

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