

**EMPLOYMENT AS A PUBLIC INTEREST CONSIDERATION IN MERGER
EVALUATION**

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1. Background

The dawn of independence in South Africa came with the need for legislative reform particularly in the field of competition law. South Africa’s political history had much to do with the creation of the Competition Act 89 of 1998 (Competition Act).¹ One of the most controversial features of the Competition Act is the incorporation of public interest considerations into merger regulation. The purpose of this dissertation therefore is to evaluate the role of employment as a public interest consideration in merger evaluation. There are four public interest grounds listed in the Competition Act but the focus of this dissertation will be on employment.²

In South Africa there was a need for competition legislation that would promote the growth of the developing economy and assist in wealth redistribution whilst also reducing the levels of unemployment.

¹ Staples and Masamba “Fourteen years later: An assessment of the realisation of the objectives of the Competition Act 89 of 1998, paper presented at the 6th Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, Johannesburg, South Africa” (2012) p. 4 (hereafter “Staples and Masamba”).

² Section 12A(3) of the Competition Act 89 of 1998 states that Competition Authorities must consider the effect that a merger will have on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.

2. Competition Legislation in South Africa

Here we will look at the development of competition legislation in South Africa and the present-day competition legislation that is in force.

2.1 Pre-Democracy

The Regulation of Monopolistic Conditions Act of 1955 did not confer any merger jurisdiction on the Board of Trade which was responsible for administration of the Act.³ 1979 saw the Maintenance and Promotion of Competition Act 96 of 1979 (MPCA) come into operation. The MPCA lacked provisions dealing specifically with merger regulation and did not purport to stop or regulate mergers. This was a problem that was highlighted by the Department of Trade and Industry.⁴ This might be due to the fact that during this period South Africa had an inward-looking economy in which private businesses were protected.⁵ However, policy makers realised the potential of competition policy as a vehicle to make markets work more effectively and efficiently through the promotion of effective competition. This is done by controlling mergers and prohibiting anti-competitive practices.⁶

At this stage there was a need for better legislation dealing with competition law because one of the results of apartheid was the cultivation of a culture of anticompetitive business practices as is highlighted in the Preamble of the Competition Act.

2.2 Post Democracy

After a long drafting process the Competition Act finally came into being. The Competition Act created the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the CAC). The Commission was bestowed with strong powers of investigation into any anti-competitive behaviour.⁷

It was important for the Competition Act to be created in a manner that would enable it to perform the traditional functions of any competition legislation. These traditional

³ Lewis, D. *Thieves at the Dinner Table: Enforcing the Competition Act* (2012) 18 (hereafter "Lewis").

⁴ Department of Trade and Industry, "Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development" (1997).

⁵ Moodaliyar, K. and Roberts, S. *The Development of Competition Law and Economics in South Africa* (2012) p. ix (hereafter "Moodaliyar and Roberts").

⁶ Ibid.

⁷ Ibid.

functions are promoting and maintaining competition, while at the same time making provision for the special needs of a developing state such as South Africa.⁸ At the time of drafting the competition legislation, the government was looking to create a comprehensive framework that would achieve both a competitive and fast growing economy.⁹ The Preamble of the Competition Act states that a competitive economic environment which balances the interests of workers, owners and consumers and is focussed on development will benefit South Africans in order to amongst other things, provide South Africans with an equal opportunity to participate fairly in the national economy.¹⁰

A key feature of the Competition Act is that it includes public interest grounds as a means to evaluate the merits of a proposed merger. Section 2 of the Competition Act lists the main purposes of the Act. One of these main purposes is to promote employment and one of the ways it does this is by making employment part of the public interest grounds in merger evaluation. Competition Authorities must therefore evaluate the effects any proposed merger will have on employment.¹¹

At the negotiation stage of the Competition Act the business community was against the inclusion of public interest grounds in the legislation, but it was the general consensus amongst all involved in the negotiation process that no major socio-economic legislation would pass muster without incorporating job creation.¹²

3. Research Questions

One of the main challenges facing Competition Authorities is balancing public interest considerations and pro-competition considerations. In this dissertation I will seek to answer the following questions:

- a. How often is employment as a public interest taken into consideration when evaluating potential mergers?

⁸ Buthelezi and Njisane, "The incorporation of public interest considerations during the assessment of prohibited conduct: a juggling act" p. 4 (hereafter "Buthelezi and Njisane").

⁹ Moodaliyar and Roberts (2012) p. 3.

¹⁰ Competition Act 89 of 1998.

¹¹ Section 12A(3)(c) of Competition Act 89 of 1998.

¹² Lewis (2012) p. 117.

- b. Are there any improvements that can be or should be made to employment as a public interest ground based on international and foreign law?

4. Research Methodology

The research for this dissertation will be conducted by means of a literature review. Information will be gathered from articles, case law, legislation, journals and textbooks. A comparative study will also be conducted between South African, Kenyan and Zimbabwean competition law.

5. Structure of Dissertation

This dissertation will consist of 5 chapters. Chapter one is the introduction which gives a brief background on competition law in South Africa leading up to the creation of the Competition Act and the controversial public interest provisions namely employment. The second chapter will look specifically at mergers and merger regulation in South Africa. Chapter 3 will be an analysis of case law which dealt with employment as a public interest consideration in evaluating prospective mergers. Chapter 4 will be a comparative study on South African, Kenyan and Zimbabwean competition laws. Finally, chapter 5 will serve as a conclusion for the findings from the research conducted in a bid to answer the research questions posed in chapter 1.

Chapter 2

Legislative Framework

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1. Introduction

In this chapter the focus will be on merger evaluation in terms of the Competition Act. To begin with the word “merger”, as it appears in the Competition Act will be defined. This is necessary in determining whether the transaction in question constitutes a merger that falls under the jurisdiction of the Competition Authorities as provided for by the Competition Act.¹³ Thereafter, the different types and classifications of mergers will be discussed. To contextualize the discussion, the authorities charged with evaluating and regulating mergers will also be identified. Lastly this chapter will analyse the test for merger evaluation as laid out in the Competition Act.

¹³ Mergers are regulated by Chapter 3 of the Competition Act 89 of 1998.

1.1 Definition of a merger

A “merger” is defined in section 12 of the Companies Act as the direct or indirect acquisition or establishment of control, by one or more persons over the whole or part of another business. According to Neuhoff the legal definition of a merger contains two important elements, which are;

- the acquisition or establishment of control; and
- the interest, right or entity acquired must constitute a business or part of a business.¹⁴

This definition does not confine itself to only one specific type or classification of merger. Therefore, it is then necessary to highlight the different types and classifications of mergers that companies conclude.

1.2 The Types of Mergers

There are three types of mergers, namely, conglomerate mergers, horizontal mergers and vertical mergers.¹⁵ A “conglomerate merger” is defined as a transaction that results in the coming together of two companies that are active in unrelated industries.¹⁶ An example of a conglomerate merger would be the merging together of Microsoft and BMW. A “horizontal merger” is defined as the coming together of companies which are in the same industry or operate on the same market level.¹⁷ An example of a horizontal merger would be the merging of Samsung and Huawei. This results in there being fewer competitors in that particular industry. Lastly, a “vertical merger” is defined as the coming together of companies that operate at different levels in the chain of production.¹⁸ An example of a vertical merger is the merging of Disney and Toys R Us. This means that the merging companies usually operate along the same supply chain within an industry.

1.3 Classification of Mergers

According to the Competition Act there are three different classifications under which mergers can fall insofar as the size of the merger is concerned. This classification is done to restrict the application of Chapter 3 of the Competition Act. These

¹⁴ Neuhoff, M. (ed) *A Practical Guide to the South African Competition Act* (2017) p. 310 (hereafter Neuhoff).

¹⁵ Brassey, M. et al *Competition Law* (2002) p. 225.

¹⁶ Ezrachi, A. *EU Competition Law: An Analytical Guide to the Leading Cases* (2012) p. 344.

¹⁷ Ibid p. 343.

¹⁸ Ibid.

classifications are based either on the assets or total turnover of the parties involved in the merger.¹⁹ The thresholds of the different categories are to be determined by the Minister of Trade and Industry who must also consult with the Commission.²⁰

Mergers are thus classified into small, intermediate and large mergers. A “small merger” is one where the turnover or asset value of the target firm on one hand and the combined turnover or asset value of the acquiring firm and the target firm on the other hand are below the lower thresholds established in terms of section 11(1)(a) of the Competition Act.²¹ Currently the lower threshold is R100 million for the target firm and R600 million for both the acquiring firm and the target firm.²² A “large merger” is one where the turnover or asset value of the target firm on one hand and the combined turnover or asset value of the acquiring firm and the target firm on the other hand exceeds the higher thresholds established in terms of section 11(1)(a) of the Competition Act.²³ The current higher threshold is R190 million for the target firm and R6.6 billion for both the acquiring firm and the target firm.²⁴ Lastly, an “intermediate merger” is one where the target firm’s turnover or asset value on one hand and the combined turnover or asset value of the acquiring firm and the target firm on the other hand fall anywhere between these lower and higher thresholds mentioned above.²⁵ If a merger falls within the intermediate and large merger thresholds then the Commission must be notified of such a merger.²⁶

1.4 Merger Evaluation Authorities

There are in total three authorities that have been given the task of evaluating mergers, these are the Commission, the Tribunal and the CAC.²⁷

1.4.1 Competition Commission

The Commission is responsible for a number of things. Section 13 of the Competition Act states that all intermediate and large mergers must be brought to the notice of the

¹⁹ Neuhoff (2017) p. 11.

²⁰ Section 11(1) of the Competition Act 89 of 1998.

²¹ Section 11(5)(a) of the Competition Act 89 of 1998.

²² <http://www.compcom.co.za/merger-thresholds/> : [accessed 28 October 2017].

²³ Section 11(5)(c) of the Competition Act 89 of 1998.

²⁴ <http://www.compcom.co.za/merger-thresholds/> : [accessed 28 October 2017].

²⁵ Section 11(5)(b) of the Competition Act 89 of 1998.

²⁶ <http://www.compcom.co.za/merger-thresholds/> : [accessed 27 July 2017].

²⁷ Section 13(3) of the Competition Act 89 of 1998.

Commission, therefore amongst the responsibilities of the Commission is the responsibility of considering mergers that it received notice of.²⁸

The Commission is comprised of a Commissioner and a minimum of one Deputy Commissioner.²⁹ The Commissioner is then charged with appointing investigators and staff to support the Commission in carrying out the responsibilities assigned to it under the Competition Act.³⁰ The Commission upon receiving notification of any small or intermediate merger must make one of three decisions that are to approve the merger conditionally or unconditionally or to prohibit the merger.³¹ With regards to large mergers, if the Commission is notified about such mergers it must refer such notice to the Tribunal accompanied with a recommendation on whether the merger should be approved either conditionally or unconditionally or if it should be prohibited.³²

1.4.2 The Competition Tribunal

The Tribunal like the Commission has a lot of responsibilities. The Tribunal consists of a Chairperson and between three to ten other people so nominated.³³ The members of the Tribunal may be requested to consider any conditions imposed on a merger by the Commission or the prohibition of a merger by the Commission as requested by a party to the merger.³⁴ The Tribunal is also charged with evaluating large mergers.³⁵ Such mergers may be approved unconditionally or with conditions, or they may be prohibited.

1.4.3 The Competition Appeal Court

The CAC is made up of at least three High Court judges, one of whom will serve as the Judge President of the CAC, and two other members. The CAC hears appeals from the Tribunal and also reviews decisions of the Tribunal.³⁶ It must be noted that the CAC has a status that is similar to that of a High Court.³⁷

²⁸ Section 21(1)(e) of the Competition Act 89 of 1998.

²⁹ Section 19(2) of the Competition Act 89 of 1998.

³⁰ Sections 24-25 of the Competition Act 89 of 1998.

³¹ Sections 14(1)(b)(i)–(iii) of the Competition Act 89 of 1998.

³² Section 14(3) of the Competition Act 89 of 1998.

³³ Section 26(2) of the Competition Act 89 of 1998.

³⁴ Section 15(1) of the Competition Act 89 of 1998.

³⁵ Section 14(3) of the Competition Act 89 of 1998.

³⁶ Section 37(1) of the Competition Act 89 of 1998.

³⁷ Section 36(1)(a) of the Competition Act 89 of 1998.

1.5 The Analysis of Mergers

The Competition Act has a number of purposes and one of those purposes is to promote employment and advance the social and economic welfare of South Africans.³⁸ Therefore when determining whether or not a merger under review should be approved, the Competition Authorities will analyse the merger on the classic competition issues and in addition also on public interest issues.

Merger analysis under the Competition Act requires the Competition Authorities to assess:

- a. whether the merger is likely to lead to a substantial prevention or lessening of competition. If this is so, whether there are any technological, efficiency or pro-competitive benefits that will result directly from the implementation of the proposed merger that would outweigh the anticompetitive effects presented by the proposed merger; and
- b. irrespective of the above-mentioned analysis, whether the proposed merger can be justified on public interest grounds, which requires Competition Authorities to consider the impact of a proposed merger on:
 - i. a particular industrial sector or region;
 - ii. employment;
 - iii. the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive; and
 - iv. the ability of national industries to compete in international markets.³⁹

Therefore, merger analysis consists of two tests as can be seen from the above paragraph. The test to determine the economic impact of the merger is known as the “SLC test” (Substantial Lessening of Competition test) and it goes beyond just determining if competition will be prevented or lessened.⁴⁰ In addition, the public considerations test is known as “PICs test”. These merger analysis tests are found in Section 12A of the Competition Act.

³⁸ Section 2(c) of the Competition Act 89 of 1998.

³⁹ Mendelsohn & Phaladi, “The Merger Control Review: South Africa” (2014) p. 390 (hereafter Mendelsohn).

⁴⁰ Raslan, “Public Policy Considerations in Competition Enforcement: Merger Control in South Africa” (2016) p. 4 (hereafter “Raslan”).

1.5.1 Test for Prevention or Lessening of Competition (SLC Test)

In order to determine whether or not a merger will substantially prevent or lessen competition in a particular market the strength of competition in the market must be assessed as well as the probability of the firms in the market acting competitively or cooperating after the merger has taken place.⁴¹ The Competition Act under section 12A(2) lists some factors that are relevant to competition that must also be taken into account and these include but are not limited to:

- a. the actual and potential level of import competition in the market;⁴²
- b. the ease of entry into the market, including tariff and regulatory barriers;⁴³
- c. the level and trends of concentration, and history of collusion, in the market;⁴⁴
- d. the degree of countervailing power in the market;⁴⁵
- e. the dynamic characteristics of the market, including growth, innovation, and product differentiation;⁴⁶
- f. the nature and extent of vertical integration in the market;⁴⁷
- 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;⁴⁸ and

⁴¹ Section 12A(2) of the Competition Act 89 of 1998.

⁴² According to Neuhoff (2017) p. 246, if it can be shown that it is easy to import, and that imports are a significant and permanent part of the domestic market, a merger can be approved even if the parties to the merger are the only local producers or suppliers of a product.

⁴³ According to Neuhoff (2017) p. 249, low barriers to entry constrain the ability of occupants in the market to exercise market power, therefore if it can be shown that it would be possible for a new entrant to establish itself within a reasonable period, which is usually one to two years, barriers to entry are not regarded as significant.

⁴⁴ According to Neuhoff (2017) p. 254 some markets are concentrated by nature, others become concentrated due to regulation. These markets are closely scrutinised by the Competition Authorities. Also some markets become concentrated due to market consolidation, where firms choose to grow by acquiring other firms rather than growing organically. Growth through acquisition might not be most efficient or beneficial to consumers. Also if an industry has a history of collusion this will play a role in future analysis of merger cases in these industries.

⁴⁵ According to Neuhoff (2017) p. 255, a firm's customers or suppliers will have countervailing power if they themselves are large and have alternatives available to them. Therefore if merging parties can show that their customers or suppliers have countervailing power it may support an approval of the merger.

⁴⁶ According to Neuhoff (2017) p. 257, it is very difficult to abuse market power in the long run in a market where there is growth, high levels of innovation and where products are constantly differentiated and re-invented. If market conditions are constantly changing, barriers to entry are low, firms must adapt or die, therefore it is unlikely that a merger would raise competition concerns.

⁴⁷ According to Neuhoff (2017) p. 258, in cases where few firms are vertically integrated, and where the post-merger vertically integrated firm will have a significant upstream and downstream presence, the transaction may raise concerns regarding the impact on potential entry at both levels of the market.

⁴⁸ According to Neuhoff (2017) p. 262, Competition Authorities will assess whether the firm in question has no reasonable prospect of survival on its own in the foreseeable future and that if the merger is prohibited, its assets will exit the market.

h. whether the merger will result in the removal of an effective competitor.⁴⁹

If a merger passes the SLC test the Competition Authorities then move to the next stage which is the PICs test. However, if the merger fails the SLC test then the Competition Authorities must determine whether or not there are any efficiencies or public interest considerations that will offset the anticompetitive effects of the merger.⁵⁰ If the anticompetitive effects of the merger are set off then the merger would have succeeded in passing the SLC test, being the first leg of merger analysis, but if they are not set off then the merger will be found to be anti-competitive.

However, whether or not a merger passes the SLC test it will still have to pass the PICs test.

1.5.2 Public Interest Considerations Test (PICs Test)

The second phase of merger analysis is to determine if a merger can be justified on substantial public interest grounds. Raslan remarks that the PICs test is not an open-ended one as the Competition Act limits the Competition Authorities' ability to remedy public interest concerns in two ways.⁵¹ Firstly, it only recognises a specified set of public interest concerns contained in an exhaustive list.⁵² Secondly, the public interest considerations must be merger-specific and substantial so therefore, the analysis here moves to whether the detrimental effects on public interest considerations are justifiable.⁵³ Although there are a number of public interest considerations which must all be weighed against each other when determining the effect of a merger on public interests the focus of this dissertation is on employment.

1.6 Conclusion

In the next chapter there will be an in-depth discussion on the PICs test relating to employment as a public interest consideration and how it was utilised in case law. This will help determine how often employment has been taken into consideration when Competition Authorities analyse proposed mergers. It will also help determine which guidelines, if any, can be extracted from case law as to the approach that the

⁴⁹ According to Neuhoff (2017) p. 266, an effective competitor is one that is particularly dynamic and innovative.

⁵⁰ Raslan (2016) p. 4.

⁵¹ Raslan (2016) p. 7.

⁵² Raslan (2016) p. 7.

⁵³ Raslan (2016) p. 7.

Competition Authorities follow when dealing with employment as a public interest consideration.

Chapter 3

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1. Introduction

The Competition Act states that the Commission may prepare guidelines to indicate its policy approach to any matter that is within its jurisdiction in terms of the Competition Act.⁵⁴ Therefore, in January 2015, the Commission released draft “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended)” (hereafter “the draft guidelines”).

⁵⁴ Section 79(1) of the Competition Act 89 of 1998.

After taking into consideration public comments from various stakeholders, a second version of the guidelines was released on the 22nd of December 2015 in the Government Gazette and was open for public comments for the last time.⁵⁵ The final guidelines were released in the Government Gazette on the 2nd of June 2016 and the document was titled “Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998” (hereafter “the guidelines”).⁵⁶

In this chapter, the guidelines will be discussed and relevant case law will be analysed. The purpose of the case law analysis is to compare how the Competition Authorities dealt with employment as a public interest consideration before and after the guidelines were released. This will help ascertain whether or not the guidelines have in fact been applied by the Competition Authorities.

2. Enforcement of Public Interest Considerations before the Guidelines

The Competition Act came into force on the 1st of September 1999. Between 1999 and 2010 the Competition Authorities only dealt cautiously with public interest considerations.⁵⁷ The tide began to turn in 2010 when the Competition Authorities and third-party interveners began to bring public interest considerations in merger control into the spot light.⁵⁸

The key issues that arise with employment considerations are, firstly, identifying the extent to which Competition Authorities should take the effect of a merger on employment into consideration and secondly, what factors pertaining to employment must be analysed. The Tribunal is of the view that Competition Authorities need to keep in mind that there are numerous other pieces of legislation that directly deal with the protection of employees’ rights and therefore the Competition Authorities will not be willing to involve themselves in matters relating to collective bargaining, wages and working conditions.⁵⁹

⁵⁵ Government Gazette of the Republic of South Africa, Vol. 606, 22 December 2015, No.39560.

⁵⁶ The guidelines are available on the Competition Commission website at: <http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidelines.pdf>

⁵⁷ Oxenham, Stargard and Currie, “Developments in South African Merger Control – Ministerial Interventionism and the impact on timing and certainty” (2016) p. 4 (hereafter “Oxenham”).

⁵⁸ Ibid.

⁵⁹ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 par 233-243.

The effect that a merger has on employment has been treated with greater regard than the other public interest considerations.⁶⁰ In protecting employment, Competition Authorities will not merely consider the number of jobs lost as a result of the merger, but they will rather look at the substantial effect that the merger has on employment.⁶¹ In this regard, the enquiry into whether retrenchment packages are sufficient, and whether retrenchments are properly negotiated, will be of greater importance than just the number of jobs lost.⁶² It is often the case that levels of employment cannot be maintained at the level they were at pre-merger if efficiency gains are to be realised.⁶³ It will therefore not be sufficient to only point out that jobs will be lost as a result of the merger, it is necessary to also prove that the job losses will be a result of the merger.⁶⁴

Competition Authorities are generally unwilling to strike down mergers on the basis that jobs will be lost.⁶⁵ In many cases where a merger is disputed because of job losses, the problem can be addressed by imposing conditions on the merger.⁶⁶ Where the merging firms reach an agreement with employees or their representatives on conditions to better reductions in employment, Competition Authorities will be reluctant to challenge these conditions.⁶⁷ However, where employees oppose conditions proposed by the merged firm, a more robust analysis of those conditions will be undertaken by the Competition Authorities.⁶⁸

The consideration of employment by the Tribunal between 1999 and 2010 seems to follow a particular pattern. It rises when there are major challenges in the economy and decreases thereafter. The highest peak was in 2001 where 16% of evaluated mergers took employment into account, this coincided with the downturn in non-oil commodity prices and the International Monetary Fund noted that a rebound in oil prices during 1999 and 2000 had a negative impact on other non-oil commodity exports and this would have had serious employment implications for South Africa

⁶⁰ Sutherland, P. and Kemp, K. *Competition Law in South Africa* (2016) p. 10–133 (hereafter “Sutherland and Kemp”).

⁶¹ Ibid.

⁶² *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 par 242-243.

⁶³ *Daun et Cie G/Kolosus Holdings Ltd* 10/LM/Mar03 par 127-128.

⁶⁴ Sutherland and Kemp (2016) p. 10–135.

⁶⁵ *Unilever plc v Competition Commission* 55/LM/Sep01 par 43.

⁶⁶ Sutherland and Kemp (2016) p. 10–136.

⁶⁷ Ibid.

⁶⁸ *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) par 104ff.

given that it is largely a mineral resources based economy.⁶⁹ Whereas by 2007 at the height of the commodity price boom employment issues failed to be mentioned.⁷⁰ Thereafter, the next highest peak was in 2009 after the global financial crisis.⁷¹

Below some case law will be analysed to give a clearer picture of how exactly the Competition Authorities dealt with employment as a public interest consideration in merger evaluation.

2.1 Unilever PLC/Competition Commission and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union [2001-2002] CPLR 336 (CT) (hereafter “CEPPWAWU”)

In this case, the issue raised by CEPPWAWU was also the number of jobs that could potentially be lost as a result of the proposed merger. The Tribunal however approved the merger but with conditions. In handing down its decision the Tribunal pointed out that the Commission did show concern for the number of potential job losses as a result of the merger but, it did not think that this warranted for the merger to be prohibited as long as there were remedies available for the anti-competitive implications of the proposed transaction.⁷²

The Tribunal stated that the parties to the merger should discuss with the trade unions the issue regarding job losses.⁷³ This was stated in line with section 13A of the Competition Act which provides that in the case of a large or intermediary merger, the primary parties to the merger must give notice of the said merger to certain trade unions or the employees themselves.⁷⁴ The Tribunal stated that in its view the most important right that the Competition Act extends to employees and their unions is the right to timeous information with respect to the potential impact that the merger will have on employment.⁷⁵

⁶⁹ https://www.africanlii.org/sites/default/files/the_rise_of_public_interest.docx : [accessed 6 September 2017].

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² *Unilever PLC/Competition Commission and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union [2001-2002] CPLR 336* par 36.

⁷³ Ibid par 1.

⁷⁴ Section 13A(2)(a) of the Competition Act 89 of 1998.

⁷⁵ *Unilever PLC/Competition Commission and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union [2001-2002] CPLR 336* par 43.

Furthermore, it was stated that the most powerful channel available to the trade unions to address employment related issues arising from a merger is the Labour Relations Act (LRA)⁷⁶ or private collective bargaining agreements where they exist, because the decisions of the Tribunal have to balance impacts on competition with impacts on employment whereas on the other hand the concerns of the LRA and other collective bargaining arrangements have no such balancing requirement.⁷⁷

From this case it seems the Tribunal was in favour of the parties to the merger and the trade unions sitting down together to discuss the impact of the merger on employment before approaching the Competition Authorities, and in so doing the two sides would have been able to come up with a mutually satisfactory solution to the labour related issues arising from the merger.⁷⁸

2.2 Tiger Brands Limited and Ashton Canning Company Limited and others 46/LM/May05

This proposed merger would result in a loss of approximately 45 permanent jobs and 1000 seasonal jobs.⁷⁹ These job losses were a public interest concern because such a large number of workers would have their employment possibilities seriously reduced and these employees were furthermore unlikely to gain employment elsewhere.⁸⁰ The reason for this is that seasonal workers are unskilled workers and if 1000 seasonal workers would lose their jobs after the merger, their prospects for other employment were limited because the Ashton area was heavily dependent on the canning firms since it was an economically distressed area that offered minute hope for unskilled labour.⁸¹

The Commission approved the merger but imposed a condition on it. The merging parties were ordered to set up a training fund to the value of R2 million, that would benefit retrenched workers.⁸² Also, as a first measure, the Tribunal placed a

⁷⁶ Labour Relations Act 66 of 1995.

⁷⁷ *Unilever PLC/Competition Commission and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2001-2002] CPLR 336 par 43.

⁷⁸ *Ibid.*

⁷⁹ *Tiger Brands Limited and Ashton Canning Company Limited and others* 46/LM/May05 par 140.

⁸⁰ *Ibid* par 143.

⁸¹ *Ibid* par 142.

⁸² *Ibid* par 151.

moratorium on retrenchments for a period of three years from the date of approval of the merger.⁸³

2.3 Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10

This is the seminal case on protection of employment as a public interest consideration. In this matter Metropolitan Holdings sought to acquire all the shares in Momentum. The proposed merger was found to be unlikely to prevent or lessen competition.⁸⁴ The merger however raised one public interest consideration as the parties to the merger stated that the merger was likely to result in an estimated 1000 retrenchments made up of senior management, middle management, junior management, semiskilled employees and unskilled employees, in order to avoid duplication of roles and the need to improve efficiencies in the merged firm.⁸⁵

The parties to the merger claimed that initially there were meant to be 1500 job losses but through their plan to redeploy, retrain and offer early retirement packages to some of the employees, that number was brought down to 1000 job losses.⁸⁶ The Tribunal stated that when providing information pertaining to job losses, merging parties are now required to show that:

- a. a rational process has been followed to arrive at the determination of the number of jobs to be lost - this means that basically the reason for the job reduction and the number of proposed job losses are rationally linked; and
- b. the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job losses, and which is clearly identifiable under the Competition Act.⁸⁷

The Tribunal held that the parties to the merger had failed to show a rational connection between job losses and the efficiencies sought.⁸⁸ The Tribunal then imposed a moratorium on retrenchments in South Africa for two years from the effective date of the proposed merger.⁸⁹ Katz et al remark that this decision is said to appear to bestow on merging parties facing duplicated employment positions the duty

⁸³ Ibid.

⁸⁴ Katz, Chetty, Graaff, "Legal Implications of job losses and mergers" p. 1 (hereafter "Katz").

⁸⁵ *Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10* par 61.

⁸⁶ Ibid par 79.

⁸⁷ Katz p. 1.

⁸⁸ Ibid.

⁸⁹ *Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10* par 64.

to retain certain semiskilled and unskilled employees regardless of the effect of this on the efficiency and financial health of the company post-merger, which seems to run counter to the principles of the Competition Act.⁹⁰ Mutizwa however opines that this decision emphasised the Competition Authorities' mandate to safeguard employment given the high level of unemployment in South Africa.⁹¹

2.4 Wal-Mart Stores Inc and Massmart Holdings Ltd 73/LM/Nov10

Wal-Mart, the largest retailer in the world sought to acquire Massmart holdings, a local wholesaler of general merchandise, groceries and liquor.⁹² Following the two-step test for merger analysis as explained in the preceding chapter, two main questions had to be asked. Firstly, whether the proposed merger was likely to substantially prevent or lessen competition and secondly, whether the proposed merger could be justified on public interest grounds. In this case there was no competition issue raised as the merger did not threaten to either substantially prevent or lessen competition.⁹³ The main concern in this case was based on public interest considerations, specifically its impact on employment.⁹⁴

The issue with regards to employment was the potential number of job cuts that would arise through retrenchments after the merger. Those opposing the merger were of the opinion that it would result in a move of procurement away from local producers to Asia where there are producers who supply at a lower cost.⁹⁵ The envisioned result was that such a shift in procurement would lead to a loss of jobs, closure of Small to Medium Micro Enterprises (SMMEs) and the frustration of local industries' growth.⁹⁶ The case was brought before the CAC as the concerned third parties were of the opinion that the merger's effect on employment was not properly addressed by the Commission and the Tribunal. The CAC approved the merger just as the tribunal had

⁹⁰ Katz p. 1.

⁹¹ Mutizwa "Metropolitan Momentum merger summary" p. 2.

⁹² *Wal-Mart Stores Inc and Massmart Holdings Ltd 73/LM/Nov10* par 2.

⁹³ Tavuyanago, S. *Public Interest Considerations and their Impact on Merger Regulation in South Africa* (LLM-Thesis 2014) p. 21 (hereafter "Tavuyanago").

⁹⁴ Amongst these third parties were various trade unions, namely, the Congress of South African Trade Unions (COSATU), Food and Allied Workers Union (FAWU), National Union of Metal Workers in South Africa (NUMSA), South African Commercial Catering and Allied Workers Union (SACCAWU) and South African Clothing and Textile Workers Union (SACTWU).

⁹⁵ *The Minister of Economic Development and Others v The Competition Tribunal and Others* 110/CAC/Jul11 par 48.

⁹⁶ Boshoff, Dingley and Dingley, "The Economics of Public Interest Provisions in South African Competition Policy" (2012) p. 4 (hereafter "Boshoff").

done but it held that the merger gave rise to significant public interest concerns that the Tribunal ought to have addressed.⁹⁷ It was stated that because Wal-Mart is the largest retailer in the world, South African producers might face significant challenges in trying to participate in the retail sector's global value chains which are dominated by Wal-Mart.⁹⁸ Furthermore, it was stated that failure to engage meaningfully with the implications of this challenge which is created by globalisation can potentially have detrimental economic and social effects for the South African economy in general.⁹⁹ Consequently the CAC upheld the decision of the Tribunal but made changes to some of the conditions it had imposed on the merger. By so doing, the CAC sent a clear message that the Competition Authorities take their section 12A duty to weigh the effects of a merger on public interest very seriously.¹⁰⁰

Oxenham remarks that the actual value of the public interest benefit derived from this case is not apparent, besides the possibility of retaining jobs in the short term.¹⁰¹ The CAC ordered that the 503 employees that had been retrenched be reinstated, as the retrenchments were found to be sufficiently related to the merger.¹⁰² Also, the CAC included in the conditions a stay on retrenchments based on the merged company's operational requirements for a period of two years from the date of approval of the transaction.¹⁰³ However, the approach taken by the CAC shows that it is required of the Competition Authorities to balance the competition and public interest concerns that arise in a proposed merger through a test of proportionality.¹⁰⁴ What this means is that, the public interest leg of the test should not be subordinate to the competition leg of the test as its relative status is determined by the facts of each case.¹⁰⁵

2.5 BB Investment Company (Pty) Ltd and Adcock Ingram 018713

BB Investment Company (BB) sought to acquire sole control of Adcock Ingram (Adcock). There were no competition concerns arising from the proposed

⁹⁷ Oxenham (2016) p. 8.

⁹⁸ Ibid.

⁹⁹ *The Minister of Economic Development and Others v The Competition Tribunal and Others* 110/CAC/Jul11 par 32(hereafter "Wal-Mart/Massmart, 110/CAC/Jul11").

¹⁰⁰ Oxenham (2016) p. 8.

¹⁰¹ Ibid.

¹⁰² Boshoff (2012) p. 6.

¹⁰³ Ibid.

¹⁰⁴ Ramburuth, S. *Recent Activities and Policy Priorities in South Africa* contained in Emch, A. Regazzini, J. and Rudomino, V. *Competition Law in the BRICS Countries* p. 215 (hereafter "Ramburuth").

¹⁰⁵ Tshweza, I. *Public interest considerations under the Competition Act No. 89 of 1998 and the effect on Foreign Direct Investments (FDIs) in South Africa* (LLM Thesis 2014) p. 24 (hereafter "Tshweza").

transaction.¹⁰⁶ However, the Tribunal noted that there were employment concerns arising from the proposed transaction. Adcock was embarking on a restructuring exercise, which would result in the loss of 51 jobs.¹⁰⁷ The Commission stated that it was satisfied that Adcock had followed a rational and fair process in identifying the redundant positions and as such that a moratorium on the retrenchment of the 51 employees was not warranted.¹⁰⁸ However, the controller of BB informed the Commission that post-merger it intended on instituting further retrenchments over and above the 51 employees.¹⁰⁹ The Commission saw it necessary to safeguard against further negative effects of the merger on employment and as such it recommended that the Tribunal approve the proposed transaction subject to a condition.¹¹⁰ The condition was that the number of retrenchments at Adcock be limited to only the 51 employees originally meant to be retrenched, with a moratorium on all other retrenchments for a period of three years.¹¹¹ However, the parties to the merger opposed this condition, stating that the proposed retrenchments were not merger-specific.¹¹² The Tribunal upon careful consideration came to the conclusion that the merger will be approved subject to the condition that Adcock will not retrench any employees for one year from the date of the approval of the transaction.¹¹³

2.6 Conclusion

It is apparent from the cases as discussed above that the Competition Authorities in evaluating the impact of a merger on employment had a somewhat uniform way of doing things. First of all, the starting point is that the loss of jobs must be merger specific. Merger specific retrenchment is theoretically a result that can be shown, as a matter of probability, to have some link to the incentives of the new merged entity.¹¹⁴

Secondly, the Competition Authorities want to know the number of potential job losses and what number of these job losses affects unskilled workers. If workers are unskilled it will be more difficult for them than their skilled and semi-skilled colleagues to secure

¹⁰⁶ *BB Investment Company (Pty) Ltd and Adcock Ingram* 018713 par 2.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* par 3.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid* par 4.

¹¹⁴ *Skyscanner Limited v Competition and Markets Authority* 1226/2/12/14 par 90.

new jobs if they are laid off so the Competition Authorities seem to seek to preserve their jobs as much as possible. Thirdly, the Competition Authorities sought ways to remedy the potential negative impact the job losses would have on employment. And finally, the Competition Authorities seem to only approve job losses where such losses can be justified by the parties to the merger.

3. Enforcement of Public Interest Considerations after the Guidelines

The final guidelines were published in the Government Gazette on the 2nd of June 2016. The guidelines seek to provide guidance on how the Commission will evaluate public interest considerations when evaluating mergers.¹¹⁵ According to the guidelines the Commission in general will adopt the following steps when analysing each of the public interest provisions:

- a. determine the likely effect on the public interest;¹¹⁶
- b. determine whether the alleged effect on a specific public interest is a result of that merger or is merger specific. In other words, is there a sufficient causal nexus between the merger and the alleged effect?;¹¹⁷
- c. determine whether these effects are substantial;¹¹⁸
- d. consider whether the merging parties can justify the likely effect on the particular public interest;¹¹⁹ and

¹¹⁵ Bosiu, “Key Aspects of South Africa’s New Public Interest Guidelines” Centre for Competition Regulation and Economic Development (CCRED) Quarterly Review (2016) (hereafter “Bosiu”) p. 8.

¹¹⁶ According to Neuhoff (2017) p. 278-279, the Commission may consider, inter alia, the intention of the parties relating to employment and plans to create further employment opportunities within the merged entity. The merging parties must declare all potential retrenchments irrespective of whether they contend that they are merger specific or due to operational reasons.

¹¹⁷ According to Neuhoff (2017) p. 282, the Commission will consider whether the proposed employment effects are in any way linked to the intentions, incentives, policies, rationale and decisions of the acquiring group.

¹¹⁸ According to Neuhoff (2017) p. 283-284, the Commission must take into account; the number of employees likely to be affected relative to the affected work force; the affected employees skill levels; the likelihood of the affected employees being able to obtain alternative employment in the short term.

¹¹⁹ According to Neuhoff (2017) p. 287-288, if there is a negative effect on employment the Commission will consider, whether a rational process was followed to arrive at the determination of the number of jobs to be lost; whether the merger specific substantial job losses are justified by an equally weighty and countervailing public interest; and whether the merging parties have provided the Commission with complete information and provided employees with sufficient information to be able them to consult fully on all issues. All three of these requirements must be met before the Commission can accept that the merging parties have justified the negative effects arising from the merger.

- e. consider possible remedies to address any likely negative effect on the public interest.¹²⁰

When dealing with employment, the Competition Authorities require that parties to mergers declare all potential retrenchments or job creations that they are considering regardless of whether these are due to the merger or to operational reasons.¹²¹ The Competition Authorities will then take it upon themselves to analyse whether such impacts on employment are due to duplications, cost-cutting measures, cancellation of supply or distribution arrangements, and/or relocation of offices, plants and facilities.¹²²

Also, another important factor that needs to be clarified is the meaning of “substantial” when determining the effects of a merger on employment. In terms of the guidelines, the following factors have to be considered when making that assessment:

- the number of employees that are likely to be affected relative to the affected workforce;
- the affected employees’ skill levels, qualification, experience, job grade, job description and position;
- the likelihood of the employees being able to obtain alternative employment in the short term considering various factors;
- whether the sector employs largely unskilled employees, the unemployment rate in the sector;
- whether the sector is experiencing a trend of retrenchments;
- whether the sector is a mature or declining sector; and
- whether the sector is an emerging sector which would suggest future employment opportunities.¹²³

Since the guidelines came into effect there has not been a major merger evaluation case such as the Wal-Mart and Momentum cases, dealing with employment as a

¹²⁰ According to Neuhoff (2017) p. 291-292, possible remedies that can be considered include, capping the number of job losses; staggering the number of job losses over a period of time; placing moratorium on job losses for a period of time; providing funding to reskill affected workers in order to improve their prospects of obtaining alternative employment; obliging companies to re-employ or give preference to affected employees should positions become available; and creating jobs as proposed by the merging parties.

¹²¹ Bosiu p. 9.

¹²² Ibid.

¹²³ Ibid.

public interest consideration. However, there have been some cases brought before the Competition Authorities and these will be discussed below.

3.1 *Hollard Holdings and Regent Insurance Company LM253Mar16*

Here Hollard sought to purchase a 100% stake in Regent. The Commission was concerned that as a result of the merger 140 jobs were likely to be cut, this figure however dropped to 64 job cuts.¹²⁴ Furthermore, the Commission found that the need to retrench workers arising from a duplication of staff positions and the substantial loss of jobs outweighed the potential efficiency gains resulting from the merger.¹²⁵

In order to address the concerns of the Commission the parties to the merger proposed some remedies. Firstly, they proposed to not retrench any employees for a period of three years from the date of approval of the merger.¹²⁶ The only employees to be retrenched would be “affected employees” who had to be retrenched to avoid duplication of staff positions as stated above, however only a maximum of 76 workers could be let go.¹²⁷

From this case we see that again some of the guidelines were applied. The Commission identified the effect of the merger on employment as a public interest consideration. The effect being initially the anticipated 140 job loses stated above. Then secondly, the Commission allowed the parties to the merger to provide remedies for this negative effect on employment.

3.2 *Dimension Data and MWEB Connect LM188Jan17*

Dimension Data sought to acquire MWEB ISP. The Commission found that the proposed merger would have a negative impact on employment.¹²⁸ There were found to be merger specific and non-merger specific retrenchments.¹²⁹ The parties to the merger planned to retrench 29 employees due to duplication of staff as a result of the merger. Of these 29 employees four were found to only hold matric qualifications.¹³⁰ In order to mitigate the negative effect of the merger on employment the Commission imposed the condition that only a maximum of 25 employees be retrenched while the

¹²⁴ *Hollard Holdings and Regent Insurance Company LM253Mar16* par 25(ii).

¹²⁵ *Ibid.*

¹²⁶ *Ibid* par 26.

¹²⁷ *Ibid.*

¹²⁸ *Dimension Data and MWEB Connect LM188Jan17* par 15.

¹²⁹ *Ibid.*

¹³⁰ *Ibid* par 16.

four employees identified above not be retrenched for a period of one year from the date that the merger is approved.¹³¹

In this case we see that the Commission identified the impact of the merger on employment. The Commission through its investigations identified 29 potential job losses. Furthermore, we are shown that the 29 job losses were merger specific. The Commission also analysed whether the effect on employment was substantial. We see through the preservation of the jobs of the four employees that their retrenchment would have a substantial effect on public interest. Due to their lack of qualifications it would be naturally difficult for them to find work elsewhere. Lastly, the Commission applied a remedy in order to lessen the negative impact of the merger on public interest.

3.3 Denel SOC and Turbomeca LM/214/Feb17

These two companies were involved in a joint venture and they sought to divide the joint venture business amongst themselves and each company would solely control the portion of the business that it would acquire.¹³² This proposed merger was going to result in some employees being transferred to Denel or Safran HE and some being retrenched immediately.¹³³

The Commission found that 42 of the workers being transferred to Denel would be retrenched after a year and based on this finding it proposed a two year moratorium on these retrenchments.¹³⁴ The Tribunal moved for the 14 employees who were to be transferred to Safran HE to also be covered by the moratorium.¹³⁵ There were 18 other workers that were to be retrenched as a result of the merger for efficiency reasons. The Commission agreed to these retrenchments provided that the parties to the merger give these 18 people the same retrenchment packages given to the employees retrenched by the joint venture firm prior to the merger.¹³⁶

From this case it is clear that some of the guidelines were followed. Firstly, the effect on employment was identified. The effect was that 18 employees would be

¹³¹ Ibid.

¹³² *Denel Soc Limited and Turbomeca Africa Proprietary Limited* LM214Feb17 par 5.

¹³³ Ibid par 9.

¹³⁴ Ibid par 11.

¹³⁵ Ibid par 12.

¹³⁶ Ibid par 13.

immediately retrenched whilst 56 other employees would be transferred but later retrenched. Secondly, although the case does not explicitly state that there was an investigation into whether the effect on employment was a result of the merger, we see in the case that the Tribunal came to the conclusion that the dissolution of the joint venture would result in employees either being retrenched or transferred.¹³⁷ Thirdly, we see from the decision handed down by the Tribunal that both the Commission and the Tribunal did in fact consider other remedies to address the negative effect on employment and the Tribunal implemented these remedies.¹³⁸

4. Conclusion

Based on the above analysis and as stated by Oxenham, that the guidelines are simply a codification of the process already followed by the Competition Authorities in merger evaluation. The guidelines, which are non-binding, were created to promote certainty as to the evaluation of public interest considerations by the Competition Commission.¹³⁹

Before the inception of the guidelines there were numerous cases that the Competition Authorities dealt with which raised debates regarding the assessment standard for public interest issues.¹⁴⁰ The Commission stated that the parties to mergers during proceedings often failed to provide the Commission with enough information, particularly regarding the anticipated effect that the merger will have on employment.¹⁴¹ It is thus the intention of the guidelines to offer support regarding the Commission's merger analysis process by specifying the approach that the Commission is likely to take and by also signifying the information that the Commission will likely need in order to assess the effect of the merger on public interest considerations.¹⁴²

Conclusively, based on the cases above it is clear that the Competition Authorities have been following the guidelines.

¹³⁷ Ibid par 9.

¹³⁸ Ibid par 14.

¹³⁹ Oxenham (2016) p. 20.

¹⁴⁰ The guidelines (2016) p. 3.

¹⁴¹ Ibid.

¹⁴² Ibid p. 4.

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Comparative Study

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1. Introduction

The effects that apartheid had on competition in South Africa have been discussed in the Chapter One of this dissertation. It was stated that in order to offset these effects of apartheid it is necessary to create an economic environment that is efficient and competitive, that will balance the interests of workers, owners and consumers and

focus on development.¹⁴³ This resulted in the enactment of the South African Competition Act. However, not all countries have the same political history as South Africa and therefore it is the aim of this chapter to determine whether South Africa stands alone in trying where possible to protect employment through merger regulation. Having looked at employment as a public interest consideration in South African competition law, it is also necessary that an enquiry is done to establish whether other countries have similar provisions in their competition law. And if so, also to point out what lessons South Africa can take from these countries.

David Lewis, the previous chairman of the Competition Tribunal in South Africa, who was instrumental in drafting South Africa's competition law stated that, public interest considerations weigh more heavily in the competition laws of developing countries than in those of developed countries.¹⁴⁴ Therefore, in this chapter the position in South Africa will be compared with two other developing countries, namely Kenya and Zimbabwe. This is because these two countries are likely to be facing the same socio-economic challenges as those faced by South Africa.

2. Kenya

Just as South Africa is the financial hub of southern Africa, Kenya is the financial hub of east Africa.¹⁴⁵ In 2003 the Kenyan government implemented the *Economic Recovery Strategy for Wealth and Employment Creation*¹⁴⁶ with the aim of creating employment through sound macroeconomic policies, improved governance, efficient public service delivery and fostering an environment for the private sector to conduct business and through public investments and policies that reduce costs of doing business.¹⁴⁷ In the two decades before this strategy was implemented, Kenya had slipped into a void of unemployment.¹⁴⁸ In 2003 the unemployment rate in Kenya was

¹⁴³ Preamble of the Competition Act 89 of 1998.

¹⁴⁴ Teague, I.G. *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing countries* (LLM Thesis 2009) p. 51.

¹⁴⁵ <https://www.nbad.com/en-ns/insight-and-features/mena-and-global-markets/big-stories/2017/kenya.html> : [accessed 1 October 2017].

¹⁴⁶ Available at: <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj65t uxazXAhVHD8AKHaVSBDMQFggkMAA&url=http%3A%2F%2Fsitesources.worldbank.org%2FKENYAEXTN%2FResources%2FERS.pdf&usg=AOvVaw3K6vZL P v-qxpmrGyS6VDh>

¹⁴⁷ "Ministry of Planning and National Development, Preamble of the Economic Recovery Strategy for Wealth and Employment Creation, Ministry of Planning and National Development, June 2003" (2003).

¹⁴⁸ Ibid p. v.

at 40%.¹⁴⁹ Whereas at the time of drafting of the Competition Act, the unemployment rate in South Africa was at 25%.¹⁵⁰ So it is clear that in both countries the necessary measures had to be implemented to address the respective levels of unemployment.

2.1 Background to Kenya's Competition Law

The first competition legislation to be enacted in Kenya was the Price Control Ordinance of 1956 which was later renamed the Price Control Act of 1956.¹⁵¹ Prior to Kenya's attainment of full independence on the 12th of December 1963, the degree of industrialisation and liberalization of the economy was very low.¹⁵² However, after gaining its independence Kenya embarked on a process of rapid industrialisation and indigenisation of its economy.¹⁵³

Subsequently, the Restrictive Trade Practices, Monopolies and Price Control Act¹⁵⁴ (RTP Act) came into being. This was as a result of a shift in the 1980s of the Kenyan economy from a price control regime, which saw significant state intervention, towards a market economy, which is self-regulatory.¹⁵⁵ The RTP Act was intended to only be a transitional piece of legislation and as such has now become outdated.¹⁵⁶ In dealing with mergers the RTP Act only considered the effect of the merger on competition.¹⁵⁷

The RTP Act covered three areas, namely restrictive trade practices; monopolies, mergers and takeovers; and control and display of prices.¹⁵⁸ The Monopolies and Prices Commission was placed with the responsibility of investigating any possible contraventions of the RTP Act.¹⁵⁹ The Monopolies and Prices Commission fell under the Ministry of Finance and the Minister of Finance was able to take decisions on

¹⁴⁹ <https://www.indexmundi.com/g/g.aspx?c=ke&v=74> : [accessed 1 October 2017].

¹⁵⁰ <https://businesstech.co.za/news/general/77737/south-africa-unemployment-1994-2015/> : [accessed 1 October 2017]

¹⁵¹ CUTS International "Competition Law in Kenya – A Snapshot" (2010) p. 2.

¹⁵² Njoroge, "Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing"(2003) p. 2 (hereafter Njoroge).

¹⁵³ Ibid p. 3.

¹⁵⁴ 1989, Cap 504 of the Laws of Kenya.

¹⁵⁵ CUTS International "Competition Law in Kenya – A Snapshot" (2010) p. 1.

¹⁵⁶ Ibid.

¹⁵⁷ Njoroge (2003) p. 9.

¹⁵⁸ Sections 4-39 of the Restrictive Trade Practices, Monopolies and Price Control Act, 1989, Chapter 504 Laws of Kenya.

¹⁵⁹ CUTS International "Competition Law in Kenya – A Snapshot" (2010) p. 1.

particular cases.¹⁶⁰ Decisions of the Minister could be appealed to the Restrictive Trade Practices Tribunal and the High Court.¹⁶¹

2.2 Legal Framework for Mergers

There are various pieces of legislation that currently regulate mergers in Kenya. These are, the Capital Markets Act;¹⁶² the Capital Markets (Takeovers & Mergers) Regulations, 2002; the Competition Act (Kenyan Competition Act);¹⁶³ and the Companies Act.¹⁶⁴

The primary institutions that are in charge of overseeing the application of the above legislation are the Capital Markets Authority and the Competition Authority.¹⁶⁵ There are secondary institutions as well, which include the Nairobi Stock Exchange, the Competition Tribunal and the Capital Markets Tribunal.¹⁶⁶ It must also be noted that Kenya is a member of the Common Market for Eastern and Central Africa (COMESA), and as such the rules of the COMESA Competition Commission are applicable to cross-border transactions.¹⁶⁷

2.3 Competition Authorities Established under the Kenyan Competition Act

The Kenyan Competition Act, which came into effect in August of 2011, established the Competition Authority of Kenya.¹⁶⁸ The functions of the Competition Authority of Kenya, amongst other things, are to:

- a. “promote and enforce compliance with the Kenyan Competition Act;¹⁶⁹
- b. receive and investigate complaints from legal or natural persons and consumer bodies;¹⁷⁰

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Chapter 485A Laws of Kenya.

¹⁶³ No. 12 of 2012 Laws of Kenya.

¹⁶⁴ Chapter 486 Laws of Kenya.

¹⁶⁵ Mugo, A.W. *The Legal Framework for Take-overs and Mergers in Kenya: How Efficient is it in Light of the Proliferation of Take-overs and Mergers in the Market?* (LLM Thesis 2015) p. 6.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Section 7 of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁶⁹ Section 9 (1) (a) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷⁰ Section 9 (1) (b) of the Competition Act No. 12 of 2012 Laws of Kenya.

- c. carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers.”¹⁷¹

The Kenyan Competition Act also established the Kenyan Competition Tribunal, which is the authority that reviews the decisions of the Competition Authority of Kenya.¹⁷²

2.4 Regulation of Mergers under the Kenyan Competition Act

When a merger is proposed, the parties to the merger are each required to notify the Competition Authority of Kenya of their intention to merge in writing.¹⁷³ Unlike in South Africa, the Kenyan Competition Act does not have merger thresholds which lay out when the Competition Authorities must be notified of a proposed merger. The Competition Authority of Kenya must be notified of all proposed mergers. After receiving the notification of the proposed merger and assessing it, the Competition Authority of Kenya can approve the merger with conditions, or without conditions or it may prohibit the merger.¹⁷⁴

When assessing mergers the Competition Authority of Kenya is allowed to base its decision on the proposed merger on any criteria that is relevant to the circumstances of the proposed merger, including but not limited to:

- a. “the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- b. the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- c. the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

¹⁷¹ Section 9 (1) (g) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷² Section 71 of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷³ Section 43 (1) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷⁴ Section 46 (1) of the Competition Act No. 12 of 2012 Laws of Kenya.

- d. the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- e. the extent to which the proposed merger would be likely to affect employment;
- f. the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
- g. the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
- h. any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.”¹⁷⁵

This list is very similar to the tests that the Competition Commission in South Africa has to undertake in its analysis of mergers. The South African Competition Act provides for the SLC test and the PICs test. The SLC test deals with the effects of the proposed merger on competition, while the PICs test deals with the effect of the merger on public interest considerations. It is clear from the above list that Kenyan competition law also provides for the analysis of the effect of a proposed merger on competition.¹⁷⁶ Also, public interest considerations should be taken into account during the evaluation of a proposed merger.¹⁷⁷ It should be noted that among these public interest considerations is the effect of the merger on employment which is also present under South African competition law, more specifically, in the Competition Act.

The Competition Authority of Kenya published a document titled “Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act”¹⁷⁸ (the consolidated guidelines). The consolidated guidelines document is not a legal document and thus is not legally binding, but it is just a guide on how to apply the provisions that are under Part IV of the Kenyan Competition Act which deals with mergers.¹⁷⁹ As pointed out, such a document also exists in South African competition law and as stated above it is titled “Guidelines on the assessment of public interest

¹⁷⁵ Section 2(a)-(h) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷⁶ This is implicit in Section 46(2)(a)-(c) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷⁷ Section 46(2)(d)-(h) of the Competition Act No. 12 of 2012 Laws of Kenya.

¹⁷⁸ Available at: <https://www.cak.go.ke/images/docs/Merger%20Guidelines.pdf>

¹⁷⁹ Competition Authority of Kenya “Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act” p. 1 (hereafter “consolidated guidelines”).

provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended)”.

2.4.1 The Effect on Competition Assessment

When assessing the potential effect that a merger will have on competition in Kenya, the “Substantial Lessening of Competition” (SLC) test is applied. This is the same test applied under competition law in South Africa.¹⁸⁰ The purpose of the SLC test is to establish whether the proposed merger is likely to prevent or lessen competition or whether it is likely to create or strengthen a dominant position.¹⁸¹ The SLC test is not meant to protect competitors from the merger but rather it is meant to ensure that effective competition in the post-merger market will be maintained or alternatively to restore effective competition in the post-merger market by applying conditions to a merger, which are meant to remedy any anticompetitive effects arising from the merger.¹⁸² The Competition Authority considers this to be its main priority in ensuring that there will be strong rivalry between firms post-merger and that there is a prospect of consumers having a choice between substitute goods or services which will prompt businesses to effectively compete for customers.¹⁸³

2.4.2 The Effect on Public Interest Assessment

The Competition Authority of Kenya also published a document titled, “Public Interests Test in Merger Determination”¹⁸⁴ (public interest guidelines). One of the objectives of the public interest guidelines is to provide clear criteria regarding the “Public Interest Test” (PIT) in the determination of mergers under the Kenyan Competition Act.¹⁸⁵ This test is the same as the PICs test that is applied under competition law in South Africa.¹⁸⁶

The Kenyan government has an economic agenda titled “Vision 2030”.¹⁸⁷ Vision 2030 is the national long-term development policy with the goal of transforming Kenya into a newly industrializing, middle-income country that is able to provide a high quality of

¹⁸⁰ The SLC test is found under Section 12A of the Competition Act 89 of 1998.

¹⁸¹ Ibid par 42.

¹⁸² Ibid par 43.

¹⁸³ Ibid.

¹⁸⁴ Available at: http://admin.theiguides.org/Media/Documents/balancing_public_interest_guidelines.pdf

¹⁸⁵ Competition Authority of Kenya, “Public Interests Test in Merger Determination” par 1 (hereafter “public interest guidelines”).

¹⁸⁶ The PICs test is found under Section 12A of the Competition Act 89 of 1998.

¹⁸⁷ Available at: www.vision2030.go.ke/about-vision-2030/

life to all its citizens by the year 2030, in a clean and secure environment.¹⁸⁸ To help in achieving Vision 2030, the public interest guidelines take cognisance of the fact that there is a need to enhance and sustain employment, through supporting the following:

- a. “measures to ensure no substantial job losses occur as a result of mergers;
- b. salvaging of failing and dormant firms, and;
- c. encouraging mergers of media firms that will enhance production of local content/programmes and thereby support youth employment.”¹⁸⁹

Now the focus will be on employment as a public interest consideration as this is the subject of this dissertation. It is noted that the public interest guidelines state that the parties to a proposed merger are expected to provide the Competition Authority of Kenya with a complete analysis of the likely impact of the proposed merger on employment.¹⁹⁰ In order to satisfy the Competition Authority of Kenya, the parties to the proposed merger must show that:

- a. “a rational process has been followed to arrive at the determination of the number of jobs that are likely to be lost as a result of the proposed merger. That is, the reason for the job losses and the number of jobs proposed to be lost must be rationally connected, and;
- b. the public interest in preventing the loss of jobs is balanced by an equally weighty but countervailing public interest which justifies the job losses and which is also cognizable under the Kenyan Competition Act.”¹⁹¹

This is similar to the position under South African competition law, as pointed out by Sutherland and Kemp.¹⁹² The Competition Authority will consider an efficiency argument for substantial job losses only if these job losses are justified on a ground that is public in nature to counter the need to preserve jobs which is also a public interest.¹⁹³ It is clear that the Kenyan Competition Authorities regard public interest

¹⁸⁸ <http://www.vision2030.go.ke/about-vision-2030/> : [accessed on 4 October 2017].

¹⁸⁹ Public interest guidelines par 5.

¹⁹⁰ Ibid par 13.

¹⁹¹ Ibid.

¹⁹² Sutherland and Kemp state that it will not be sufficient for parties to a merger to only point out that jobs will be lost as a result of the merger, it is necessary for them to also prove that the job losses will be a result of the merger.

¹⁹³ Public interest guidelines par 14.

considerations as quite important. The consolidated guidelines clearly indicate that the PIT should be applied regardless of the outcome of the SLC test.¹⁹⁴ Also, in recent years employment has been a specific area of focus for the Competition Authority of Kenya and in its assessment of proposed mergers it has evaluated the track record of the merging firms in relation to labour-related issues.¹⁹⁵

3. Zimbabwe

Very little data exists on the exact unemployment rate in Zimbabwe. According to a survey done by Zimbabwe's agency for national statistics published in June 2011 the unemployment rate stood at 10.7%.¹⁹⁶ The survey classified anyone who had worked for at least an hour, whether it is for cash or kind, in the week preceding the survey as employed.¹⁹⁷ Resultantly, around 5.4-million people were classified as employed.¹⁹⁸ According to the survey, 84% of the 5.4million employed Zimbabweans work in the informal sector, while only a mere 11% work in formal employment.¹⁹⁹ Looking at these statistics gives the impression that unemployment levels are worse in South Africa than they are in Zimbabwe but it must be noted that in Zimbabwe people who are involved in subsistence farming are classified as employed whereas in South Africa this is not the case. In Zimbabwe, agriculture, both formal and subsistence, contributes to 66% of total employment.²⁰⁰

3.1 Background to Zimbabwe's Competition Law

Competition law became necessary in Zimbabwe when the country adopted an IMF-sponsored *Economic Structural Adjustment Programme* (ESAP)²⁰¹ in 1992.²⁰² However after the introduction of these economic reforms there was still a lack of competition in Zimbabwe and it was felt that the full benefit of the reforms would be

¹⁹⁴ <https://gettingthedealthrough.com/area/20/jurisdiction/44/merger-control-kenya/> : [accessed on 6 of October 2017].

¹⁹⁵ <https://gettingthedealthrough.com/area/20/jurisdiction/44/merger-control-kenya/> : [accessed on 6 of October 2017].

¹⁹⁶ <https://africacheck.org/reports/is-zimbabwes-unemployment-rate-4-60-or-95-why-the-data-is-unreliable/> : [accessed 10 October 2017].

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid. It must be noted that these figures are from the period before the 1st of October 2014, the time when this article was published.

²⁰¹ Available at: <https://www.afdb.org/en/documents/document/zimbabwe-economic-structural-adjustment-programme-9900/>

²⁰² Mlulla. "Voluntary Peer Review of Competition Policy: Zimbabwe" (2012) UNCTAD/DITC/CLP/2012/1 p. 1 (hereafter Mlulla).

better realised under conditions of fair competition.²⁰³ The Zimbabwean government realised that market forces alone would not be enough to address all the problems arising in the market place, in particular cases of market failure which results from the abuse of market power.²⁰⁴

3.2 Legal Framework for Mergers

In 1996 the Parliament of Zimbabwe passed into law the Competition Act²⁰⁵ (old Zimbabwean Competition Act). This made Zimbabwe the fifth country in southern and eastern Africa, after South Africa, Kenya, Tanzania, Kenya and Zambia, to adopt competition policies.²⁰⁶ However, in 2002 a new Competition Act²⁰⁷ (Zimbabwean Competition Act) was adopted to remedy some deficiencies identified in the old Zimbabwean Competition Act.

Some of the objectives of the Zimbabwean Competition Act are:

- a. “to promote and maintain competition in the economy of Zimbabwe, and;
- b. to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.”²⁰⁸

3.3 Competition Authorities Established under the Zimbabwean Competition Act

The Zimbabwean Competition Act established the Competition and Tariff Commission.²⁰⁹ The Competition and Tariff Commission was a combination of the Competition Commission and the Tariffs Commission which were established by the old Zimbabwean Competition Act. The rationale for the combination was to cut costs for the government by running one instead of two interconnected Commissions.²¹⁰

²⁰³ CUTS International, “Competition Regimes in the World – A Civil Society Report: Zimbabwe” (2006) p. 306 (hereafter Competition Regimes in the World).

²⁰⁴ Ibid p. 307.

²⁰⁵ No. 7 of 1996.

²⁰⁶ Competition Regimes in the World (2006) p. 307.

²⁰⁷ No. 29 of 2001.

²⁰⁸ Competition Act No. 29 of 2001.

²⁰⁹ Section 4 of the Competition Act No. 29 of 2001.

²¹⁰ Mulla (2012) p. 3.

The Competition and Tariff Commission has a number of functions, but the ones that are relevant to this dissertation are:

- a. “to encourage and promote competition in all sectors of the economy;
- b. to reduce barriers to entry into any sector of the economy or to any form of economic activity;
- c. to investigate, discourage and prevent restrictive practices; and
- d. to study trends towards increased economic concentration, with a view to the investigation of monopoly situations and the prevention of such situations, where they are contrary to the public interest.”²¹¹

The Zimbabwean competition law covers three main competition concerns. These are anti-competitive agreements, which comprise of both horizontal and vertical agreements; abuse of dominant position; and anti-competitive mergers and acquisitions.

3.4 Regulation of Mergers under the Zimbabwean Competition Act

The term “merger” as defined in the Zimbabwean Competition Act covers both horizontal and vertical mergers but it does not include pure conglomerate mergers and joint ventures.²¹² Whereas under South African competition law the Competition Act regulates vertical, horizontal and conglomerate mergers. Mergers are regulated under Part IV of the Zimbabwean Competition Act. The provisions dealing with regulation of mergers are scattered between sections 29, 30, 32 and 34 of the Zimbabwean Competition Act therefore making the interpretation of the provisions difficult.

As is the case under South African competition law, the Zimbabwean Competition Act prohibits mergers which are contrary to public interest.²¹³ The public interest test in Zimbabwe is essentially an efficiency defence and is clearly aligned with best practice

²¹¹ Section 5(1)(a)-(d) of the Competition Act No. 29 of 2001.

²¹² Section 2 of the Competition Act No. 29 of 2001. A conglomerate merger is the coming together of two firms in unrelated industries, therefore these types of mergers very rarely have any effect on competition or on the public interests as envisaged in the Zimbabwean Competition Act.

²¹³ Section 32(1) of the Competition Act No. 29 of 2001.

in merger control.²¹⁴ A merger is considered to be contrary to the public interest if the Competition and Tariff Commission is satisfied that the merger:

- a. “has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- b. has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.”²¹⁵

3.4.1 The Effect on Competition Assessment

In considering a merger, the Competition and Tariff Commission initially determines whether or not the merger is likely to substantially prevent or lessen competition in Zimbabwe or any part of Zimbabwe by assessing any of the following factors which may be relevant:

- a. “the actual and potential level of import competition in the relevant market;
- b. the ease of entry into the market, including tariff and regulatory barriers;
- c. the level, trends of concentration and history of collusion in the market;
- d. the degree of countervailing power in the market;
- e. the likelihood that the merger would result in the merged party having market power;
- f. the dynamic characteristics of the market, including growth, innovation and product differentiation;
- g. the nature and extent of vertical integration in the market;
- h. whether the business or part of the business of a party to the merger or proposed merger has failed or likely to fail;
- i. whether the merger will result in the removal of efficient competition.”²¹⁶

In Zimbabwe, once the authority concludes that a merger substantially lessens competition, it determines whether there is any technological efficiency or other pro-

²¹⁴ UNCTAD, “Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe, Comparative Assessment” UNCTAD/DITC/CLP/2012/1 (2012) par 40.

²¹⁵ Section 32(4)(a)-(b) of the Competition Act No. 29 of 2001.

²¹⁶ Section 32(4A)(a)-(i) of the Competition Act No. 29 of 2001.

competitive gains which would offset the lessening of competition.²¹⁷ This is also similar to the position under South African competition law.²¹⁸

3.4.2 The Effect on Public Interest Assessment

In determining whether a merger is or will be contrary to the public interest, the Competition and Tariff Commission takes into account everything that it considers relevant in the circumstances and has regard to the desirability of:

- a. “maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe;
- b. promoting the interests of consumers, purchasers and other users in Zimbabwe in regard to the prices, quality and variety of commodities and services; and
- c. promoting through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.”²¹⁹

Unlike the South African Competition Act, the Zimbabwean Competition Act does not provide for employment as a public interest consideration. In Zimbabwe public interest considerations seek to control prices of goods and services.²²⁰

4. Conclusion

Competition law in Kenya and South Africa are much alike when it comes to having employment as a public interest consideration in merger evaluation in their competition law. South African competition law is young, only dating back to 1998 whereas Kenyan competition law dates back to 1989. However, Kenya only incorporated its public interest provisions into the Kenyan Competition Act in 2012. Kenya borrowed the public interest inquiry in mergers from South Africa. This was done in order to reconcile economic growth and social and political goals in merger review.²²¹ So it is evident that whilst competition law in South Africa is fairly new, it has developed rapidly as seen from its ability to handle high level merger cases as analysed in the preceding

²¹⁷ Kukuba, “Issues in Market Dominance: Merger Control in Zimbabwe” (2004) 3.

²¹⁸ Section 12(A)(1)(a)(i) of the Competition Act 89 of 1998.

²¹⁹ Section 32(1)(a) of the Competition Act No. 29 of 2001.

²²⁰ Ibid.

²²¹ Gitonga, R.K. *Social and Political Goals of Mergers in Competition Law: Comparative Analysis of the Efficiency and Public Interest Provision in Kenya and South Africa* (LLM-Thesis 2015) p. 71 (hereafter “Gitonga”).

chapter and it has influenced competition law in Kenya insofar as public interest is concerned.

South Africa, in my opinion, can be seen as one of the countries with leading competition law provisions in Africa. This is seen from the fact that while developing countries like Zimbabwe have adopted competition law they have not yet incorporated employment as a public interest consideration into their competition laws. It is no secret that employment levels need to be protected in all developing countries.

Chapter 5

Conclusion

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1. Introduction

The Competition Act is written in a manner that explicitly acknowledges the importance of public interest and therefore provides a role for the consideration of factors that go beyond the boundaries of competition.²²² The inclusion of public interest considerations in the Competition Act came as a direct response to the socio-economic needs of South Africans as there was and still is a need to advance employment, black economic empowerment and small businesses in order to set off the effects of the Apartheid competition regime that left power and ownership in the hands of a minority of people.²²³

Hodge et al, opine that in the drafting of the new Competition Act, it was crucial to align competition policy to public interest objectives in order for the Competition Act and the envisioned Competition Authorities to be successful.²²⁴ Disregarding major public interest issues would have led to a loss in credibility by the public of the Competition Act and the Competition Authorities enforcing it.²²⁵ This resulted in a Competition Act which explicitly requires that public interest objectives be considered in merger evaluations.²²⁶

²²² Hodge, Goga and Moahloli, "Public Interest Provisions in the South African Competition Act – A Critical Review" (2009) p. 3 (hereafter "Hodge et al").

²²³ Tavuyanago, "Public Interest Considerations and their Impact on Merger Regulation in South Africa" (2015) p. 21 (hereafter "Tavuyanago").

²²⁴ Hodge et al (2009) p. 5.

²²⁵ Ibid.

²²⁶ Myeni, W. *Public Interest and merger controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations* (LLM Thesis 2008) p. 56.

2. Arguments against the Inclusion of Public Interest Considerations

The inclusion of the PICs test in merger analysis has however for a long time been the subject of much controversy. Balkin and Mbikiwa are of the opinion that the Competition Authorities in recent years have given undue prominence to public interest considerations in their analysis of mergers, particularly where the public interest concern is employment.²²⁷ They go on further to state that public interest considerations are often divorced from and at times are directly at odds with the primary objectives of competition law.²²⁸ Furthermore, they stated that they are of the view that too much weight has been placed on public interest in merger evaluation, as Competition Authorities have shown that they are willing to launch an investigation into a proposed merger transaction even at the prospect of one retrenchment.²²⁹ Lastly, they stated that for every merger to be constrained by the possibility of only a few retrenchments is irreconcilable with the broader competition objectives and cannot be said to meet the requirements of “substantiality” as provided in the guidelines on the assessment of public interest provisions in merger regulation.²³⁰

Reekie, in his criticism stated that looking at section 12A(3) of the Competition Act, where the public interest considerations are contained, the scope for error, flexible interpretation and subjectivity of judgement is very great.²³¹ He also goes on to observe that this could possibly deter prospective investors from engaging in takeover activity as the reactions of the Competition Authorities, is both unknown and unpredictable.²³² It must be noted that Reekie’s article was published in 1999, just after the Competition Act came into being, and as such many were not sure how exactly these public interest considerations would be applied. However, since then the Competition Commission has released guidelines on the assessment of public interest provisions in merger regulation and the Competition Authorities have also dealt with numerous cases pertaining to public interest considerations thereby providing some form of legal certainty. Reekie also opined that relying on competition policy to achieve

²²⁷ Balkin and Mbikiwa, “Public interest test in Competition Act: Have the Competition Authorities applied the test correctly?” (2014) p.1 (hereafter “Balkin and Mbikiwa”).

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Reekie, “The Competition Act, 1998: An economic perspective” (1999) p. 284.

²³² Ibid.

socio-economic objectives is inappropriate as there are more effective policies that can be used.²³³

Reekie further opines that public interest considerations have no place in competition law as they are political in nature and are not competition objectives.²³⁴ He argues that competition policy does not aim to be a redistributive tool, but rather that the aim of competition policy should be to help allocate resources in the economy such that as far as technological and physical constraints allow, customers will be able to satisfy their needs.²³⁵

Lastly, another criticism of the inclusion of public interest considerations is that it results in the creation of a lot of unnecessary litigation which ultimately results in unnecessary delays in merger decisions.²³⁶

3. The Importance of Public Interest Considerations

In support of the inclusion of public interest considerations in merger evaluation, Sibanda opines that the socio-economic situation in South Africa is rather unique and merits the further development and consideration of public interest.²³⁷ South Africa, he states, is not only a developing country but it has also suffered one of the most socio-economic injustices in the past and as such, considering public interest in competition law remains an issue of national importance.²³⁸

The Competition Act specifically sets out the order which should be followed in the merger evaluation process, with competition considerations being assessed first and then the public interest factors being assessed second.²³⁹ The Competition Act requires the deliberate balancing of public interest considerations and competition considerations.²⁴⁰

As indicated, section 12A(3) of the Competition Act states that Competition Authorities must implement the PICs test in every merger evaluation regardless of the outcome

²³³ Ibid.

²³⁴ Ibid p. 283.

²³⁵ Ibid p. 284.

²³⁶ Tavuyanago (2015) p. 46.

²³⁷ Sibanda, "Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy, and Practice" (2015) p. 742 (hereafter Sibanda).

²³⁸ Ibid.

²³⁹ Tavuyanago (2015) p. 20.

²⁴⁰ Hodge et al (2009) p. 12.

of the SLC test. Public interest considerations have played a major role in a number of cases that have been brought before the Competition Authorities.²⁴¹ Sibanda states that the Competition Authorities have never shied away from considering public interest considerations in merger evaluation, especially in cases of mergers which will potentially result in huge losses of jobs.²⁴²

South Africa has a very high unemployment rate therefore the Commission considers it important to measure the impact of mergers on employment and to measure the Commission's outcomes in matters that raise employment concerns.²⁴³ The Commission has the authority to approve or prohibit a merger solely on the basis of its effect on public interest.²⁴⁴ In the 2016-2017 financial year the Commission's intervention in mergers resulted in a net saving of 48 403 jobs and 15 mergers in total were approved with public interest conditions, with eight of these relating to employment.²⁴⁵ Where public interest concerns have been raised, the Competition Authorities have imposed conditions on the merger, and the aim of these conditions is to mitigate or eliminate the public interest concern, thus allowing the merger to proceed, while at the same time minimising its negative effect on public interest.²⁴⁶

4. Conclusion and Recommendations

The purpose of this dissertation was two-fold. Firstly, it was to identify how often employment as a public interest is taken into consideration when evaluating potential mergers. And secondly, it was to identify whether there are any improvements that can be or should be made to employment as a public interest consideration based on international and foreign law.

It is clear from the preceding paragraph²⁴⁷ that whenever a case of a potential merger is brought before the Competition Authorities that both the effect of the proposed merger on competition and public interest must be analysed.²⁴⁸ In chapter 3 of this dissertation case law involving employment as a public interest consideration was

²⁴¹ Sibanda (2015) p. 741.

²⁴² Ibid.

²⁴³ Competition Commission "Annual Report 2016-17" p. 27.

²⁴⁴ Ibid p. 28.

²⁴⁵ Ibid p. 27-28.

²⁴⁶ Ibid p. 28.

²⁴⁷ See paragraph 3 above.

²⁴⁸ Section 12A(3) of the Competition Act 89 of 1998.

analysed. Oxenham opined that since 2010 public interest considerations have been brought into the spotlight.²⁴⁹ Analysis of case law showed that Competition Authorities are not willing to strike down a merger only on the basis that it will have an adverse effect on employment, rather they aim to mitigate these adverse effects through imposing conditions on the merger.²⁵⁰ I am therefore of the opinion that during merger evaluation, employment considerations are always taken into account, and that the Competition Authorities have placed more consideration on the effects of a proposed merger on employment than on the other public interest considerations and I agree with this approach.

In chapter four of this dissertation a comparative analysis was conducted between South Africa, Kenya and Zimbabwe. The reason for the comparison with other developing countries was that they have similar socio-economic needs as South Africa and as such if there are any lessons to be learnt, they are best learnt from observing jurisdictions facing the same or similar challenges as South Africa. Kenya only introduced public interest considerations into its competition law in 2012 having in fact borrowed this inquiry from South Africa.²⁵¹ While Zimbabwe does have public interest considerations in its merger analysis, employment is not one of their public interest considerations. In the preceding chapter I was of the opinion that South Africa is one of the countries with leading competition law provisions in Africa and this is substantiated by the ability of the Competition Authorities to deal with high level merger cases such as the *Walmart/Massmart* case.

I therefore recommend that the Competition Authorities continue to place emphasis on employment as a public interest consideration as I agree with Balkin and Mbikiwa who opined that the inclusion of public interest considerations in merger evaluation is necessary in South Africa where unemployment is common and the distribution of wealth and ownership is so unequal.²⁵²

²⁴⁹ Oxenham (2016) p. 4.

²⁵⁰ Sutherland and Kemp (2016) p. 10 – 136.

²⁵¹ Gitonga (2015) p. 71.

²⁵² Balkin and Mbikiwa (2014) p.1.

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