

Aspects of the interface between the promotion of small and medium enterprises (SMEs) and statutory competition law*

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OPSOMMING

Aspekte van die koppelvlak tussen die bevordering van klein en medium ondernemings en statutêre mededingingsreg

Die onderhawige artikel ondersoek aspekte van die koppelvlak tussen die bevordering van klein sake-ondernemings en die Wet op Mededinging 89 van 1998, en toon onder andere aan dat die beskerming van die belange van sodanige ondernemings ingesluit is in die openbare belange-oorwegings vervat in die Wet. Daar word op hul belange gelet veral in die assessering van samesmeltings en deur die verlening van vrystellings. Die beskerming van hul belange is sinvol in die lig van die geskiedenis van Suid-Afrika en omdat hulle belangrik is vir die Suid-Afrikaanse ekonomie.

1 INTRODUCTION

South Africa, as it is today, has emerged from a system of apartheid, which is the antithesis of democracy and a system that is in conflict with the basic tenets of a market-oriented economy. While the landslide victory for the African National Congress (ANC) in the general election on 27 April 1994 heralded a new era of democracy, the country's apartheid legacy had caused hardship to many and had resulted in specific market structure characteristics. The country had (and still does have) a dual economy.¹ Together with a complex web of laws, which prevented black South Africans from participating meaningfully in specific geographical areas as well as in certain economic activities, the dual economic structure had the effect that participation in the formal economy as well as opportunities to develop formal and growing businesses were limited for black South Africans. In stark contrast, the formal economy consisted of developed markets and industries.

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¹ This entails a dichotomous economic structure within the economy, in other words, on the one hand, a modern, almost-exclusively white formal economy existed, and on the other hand, a less-developed, almost exclusively black, mainly informal economy existed.

However, the latter was characterised by concentrated markets, many of which had high barriers to entry.²

These challenges as well as poverty, unemployment and inequality, needed to be addressed urgently, and the Government of National Unity needed to ensure that all South Africans had equal opportunities to participate in the formal economy. The proposed solutions to the challenge of redressing the dual legacies of an uncompetitive, concentrated economy and a society sated with socio-economic inequalities were many.³ Of these solutions were embodied in economic policy which was informed by a “reconstruction and development” imperative and which provided the impetus for both the promotion of the small enterprise sector⁴ and reform in the area of competition policy and law.

This article aims to examine aspects of the interface between competition law and policy and the small enterprise sector development. There is a link between the development of the small enterprise sector and competition policy as both aspects are central to broader discussions of South Africa’s industrial policy⁵ and their historical development occurred *in continuum*. Moreover, the importance of the small enterprise sector is recognised as it has the potential to play a significant role in the economic and social development of South Africa.⁶ Similarly, competition law in South Africa which embodies a “pro-poor and pro-development leaning”⁷ has been identified as being necessary for an efficient functioning economy.⁸ As with SMEs, it may also be seen as serving “to empower the less

2 These barriers included economic barriers to entry and barriers created on racial grounds. Hartzenberg “Competition policy and enterprise development: The role of public interest objectives in South Africa’s competition policy” (2004) 6, available at <http://bit.ly/2p9WkBH> (accessed on 6 December 2017).

3 Lewis *Enforcing competition rules in South Africa: Thieves at the dinner table* (2013) 7.

4 This sector consists of what has been termed small and medium enterprises (SMEs) or small, medium and micro enterprises (SMMEs). Where the term SME is used, micro enterprises would fall under the umbrella of small enterprises. The terms SMEs and SMMEs are used interchangeably throughout the article. As unity of government was achieved in 1994, and in what follows the focus is on the period following upon 1994. Support for small enterprises did exist before this, with the involvement of the national government: Department of Trade and Industry (DTI) as well as the Small Business Development Corporation (SBDC), established in the early 1980s; the Development Bank of Southern Africa (DBSA); the Industrial Development Corporation (IDC) and a whole range of regional development corporations. However, it was only the late 1980s that saw a racially unbiased political interest in the development of small business. See generally DTI “Review of ten years of small business support in South Africa 1994–2004” (2004), available at <http://bit.ly/2BVbCQ1> (accessed on 1 December 2017).

5 As will be shown, the government’s industrial objectives have been incorporated into the Act. However, as cautioned by the Competition Appeal Court, by incorporating public interest considerations (such as those relating to small enterprises) into competition law, it does not mean that competition law should be seen as a substitute for a “coherent industrial policy which by its very nature involves a series of polycentric decisions ill-suited to judicial interventions”: *Minister of Economic Development v Competition Tribunal (Walmart/Massmart merger)* 110/CAC/Jul11 09/10/2012 paras 12–15.

6 Ministry of Trade and Industry “Strategies for the development of an integrated policy and support programme for SMMEs” (1994) 9.

7 Gal and Fox “Drafting competition law for developing jurisdictions: Learning from experience” (2014), New York University Law and Economics Working Papers, Paper 374 available at <http://bit.ly/2BkTV8G> (accessed on 6 December 2017) 10.

8 Preamble Competition Act 89 of 1998, hereafter “the Act”.

and least well off”.⁹ Policies which encourage the promotion of SMEs contribute towards the facilitation of competition in markets and amongst institutions. Furthermore, as the existence and promotion of SMEs are seen as a necessary developmental tool in South Africa, it is not surprising that they feature in the Competition Act,¹⁰ which as stressed in the Preamble, has a developmental slant, namely, “an efficient, competitive economic environment, balancing the interest of workers, owners and consumers and focussed on development, will benefit all South Africans”.

In line with the intention of the government that the Act should reflect policy alignment between the goals of competitiveness and development,¹¹ the goals of the Act are multifarious¹² and encapsulate both economic goals¹³ as well as the so-called public-interest goals.¹⁴ This is so in consequence of the specific history of South Africa and the fact that the government has recognised the importance of an economy that focuses on development. Hartzenberg¹⁵ points out that in order to ensure that the country has “long-term, balanced, and sustainable development”¹⁶ both a more even spread of ownership as well as small and medium enterprise (SME) promotion are important. While the objectives of the Act have been criticised by some,¹⁷ others find them laudable, since among other things they provide credibility to the statute. Here, the quotation of Lewis, who is a well respected member of the drafting team of the Act and a former Chairperson of the South African Competition Tribunal, is to the point: “A competition statute that simply ignored the impact of its decisions on employment or on securing a greater spread of black ownership, would consign the act and the authorities to the scrap heap.”¹⁸

9 Fox “Competition and poverty reduction” (2013), available at <http://bit.ly/2BymljY> (accessed on 6 December 2017) 2.

10 89 of 1998.

11 Ie, as posited in the DTI’s *Proposed guidelines for competition policy: A framework for competition, competitiveness and development* (1997) para 2, see too discussion *infra*.

12 The goals of competition law in South Africa are located in the preamble to the Act and in s 2 of the Act. The preamble acknowledges a dual efficiency and equity approach.

13 Ie, the promotion and maintenance of competition in South Africa in order to promote the efficiency, adaptability and development of the economy; provide consumers with competitive prices and product choices and expand opportunities for the country to participate in world markets while at the same time to recognize the role of foreign competition in the Republic; s 2(a) (b) (d).

14 Ie, the promotion and maintenance of competition in South Africa in order to ensure the promotion of employment and the advancement of social and economic welfare of all South Africans; ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy and finally, to promote a greater spread of ownership and, more particularly, to increase the ownership stakes of historically disadvantaged persons; s 2(c) (e) (f).

15 “Competition policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries” 2005–2006 *North-western J of Int L & Business* 667–685.

16 *Idem* 670.

17 See, eg, Reekie “The Competition Act, 1998: An economic perspective” 1999 *SAJE* 257.

18 See Lewis “The role of public interest in merger evaluation”, a paper delivered at the Merger Working Group International Competition Network Naples (28–29 September 2002), available at <http://bit.ly/2l0k31E> (accessed on 6 February 2017).

Two of the public-interest goals pertain to small business¹⁹ and more specifically their ability to become competitive. Section 2 of the Act determines that the purpose of the Act is to promote and maintain competition in South Africa, in order, *inter alia*, to “ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy”²⁰ and to “promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons”.²¹ While there will be overlap²² between these two goals, the protection of SMEs is in many ways different from the promotion of black economic empowerment, and the focus in the rest of the paper will be on the former goal.

2 DEFINITION OF “SMALL ENTERPRISE” AND ITS IMPORTANCE

Small enterprises, previously called small businesses, are also known as small firms and are commonly referred to in South Africa either as SMMEs, an acronym used to denote small, medium and micro enterprises or SMEs, an acronym used to denote small and medium enterprises. As defined in the National Small Enterprise Act,²³ SMMEs are separate and distinct business entities, together with their branches or subsidiaries, if any, and include co-operative enterprises. The concept of a “small enterprise” is wide-ranging as it includes any form of economic activity – registered or not – that provides its owner with an income

19 A small business is defined in s 1 of the Act as a business that is defined as such in terms of the National Small Business Act 102 of 1996. This latter Act has been renamed the National Small Enterprise Act 102 of 1996. The terms small business and small and medium enterprises (SMEs) are generic terms used interchangeably to refer to privately owned enterprises that are of a small class-size.

20 S 2(e) of the Act.

21 S 2(f). S 12A(3)(c), the public interest provision in mergers, contains a unitary reference to SMEs and historically disadvantaged persons (HDP) considerations. S 3(2) defines a HDP as a person who “(a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race; (b) is an association, a majority of whose members are individuals referred to in paragraph (a); (c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes; or (d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes.” Although the Act does not specify whom this “category of individuals” would specifically include, the regulations published pertaining to the Preferential Procurement Policy Framework Act 5 of 2000 do set this out in the definition of a Historically Disadvantaged Individual (HDI), viz “a South African citizen – (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No. 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) (“the Interim Constitution”); and/or (2) who is a female; and/or (3) who has a disability: Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI”. Reg 1(h) of the Preferential Procurement Regulations Pertaining to the Preferential Procurement Policy Framework Act 5 of 2000, reg 725 in GG 22549 of 10 August 2001.

22 Small business interests are often associated with promoting Black Economic Empowerment (BEE) as BEE business operations are frequently (though not always) small. Moreover, the public interest provision in mergers, s 12A(3)(c), contains a unitary reference to SME and HDI considerations.

23 102 of 1996.

but remains below the thresholds for a large enterprise. In terms of the statutory definition, they are managed by one or more owner, and are predominantly carried on in any specified sector or sub-sector of the economy in accordance with the Standard Industrial Classification.²⁴

Enterprises are classified as micro, small, and medium enterprises²⁵ in accordance with the following criteria, namely, total full-time equivalent of paid employees, total annual turnover and total gross asset value (excluding fixed property).²⁶ These criteria are set for a range of economic sectors and differ from one sector to another and thus the definition a small enterprise varies, depending on the sector within which the enterprise is situated. Broadly speaking, these are businesses with between one²⁷ and 200 full-time paid employees. The annual turnover varies between R200 000 and R64 million and the value of gross assets (excluding fixed property) varies between R100 000 and R23 million, depending on the economic sector in which the small enterprise operates. Thus, for example a wine estate would be classified in the agricultural sector as a medium enterprise, if it has between 50 and 100 full-time paid employees and a total turnover and asset value of between 3 and 5 million, while a business that has to do with the building of houses, would be classified in the construction sector as such if it has between 50 and 200 full-time paid employees, a total turnover of between 6 and 26 million and an asset value between 1 million and 5 million.

All over the world, it has been recognised that the small business has the potential to stimulate economic growth, both in advanced industrial economies and in economies in transition in developing countries.²⁸

24 According to the Standard Industrial Classification of all Economic Activities, industries (ie establishments engaged in the same, or similar, kinds of production activity), are classified into various sectors. There are nine major divisions, viz agriculture, hunting, forestry and fishing; mining and quarrying; manufacturing; electricity, gas and water supply; construction; wholesale and retail trade; repair of motor vehicles, motorcycles, and personal and household goods, catering and accommodation; transport, storage and communication; financial intermediation, insurance, real-estate and business services and lastly community, social and personal services.

25 A further category of enterprises termed “survivalist enterprises” is distinguished in the White Paper *National strategy for the development and promotion of small business in South Africa* (1995) para 2.2.3 (hereafter White Paper *National strategy* (1995)). As described in the White Paper these enterprises are “activities by people unable to find a paid job or get into an economic sector of their choice. Income generated from these activities usually falls far short of even a minimum income standard, with little capital invested, virtually no skills training in the particular field and only limited opportunities for growth into a viable business. Poverty and the attempt to survive are the main characteristics of this category of enterprises”. Although not specifically referred to the National Small Enterprise Act 102 of 1996, these survivalist enterprises would be included in the category referred to as “micro enterprises” in this Act. See DTI *The Integrated small business development strategy in South Africa: 2004–2014* (2003) 7.

26 S 1 of the National Small Enterprise Act read together with the schedule in Annexure 1.

27 The maximum number of employees for qualification as a micro-enterprise is 5.

28 Tengeh “Advancing the case for the support and promotion of african immigrant-owned businesses in South Africa” 2013 *Mediterranean J of Social Sciences* 348; Finmark Trust “FinScope South Africa Small Business Survey” (2010) available at <http://bit.ly/2zfnmHy> (accessed on 6 December 2017) 1; Church “Sustainable development revisited: The protection of small business enterprises and the environment as national assets with reference to global trends and recent government policy” 2006 *Obiter* 631; Frijns and Van Vliet “Small-scale industry and cleaner production strategies” 1999 *World Development* 968.

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Small enterprises may be seen as “building blocks of an economy”²⁹ and are important to any country’s growth.³⁰ Increasingly, they are being recognised as “the life blood of modern economies”³¹ and the economic boom in many countries may be ascribed to such country’s small enterprise market.³² Moreover, they are also important for their contribution to social development.³³

In South Africa, their potential influence on economic growth is already clear from their presence in nearly all sectors of industry and commerce.³⁴ For example, these enterprises are prominent in the construction sector³⁵ where they function either as general building contractors or specialist contractors.³⁶ They may also be found in the mining and quarrying sector. Although the mining sector is predominantly controlled by conglomerates,³⁷ small-scale mining does occur on a sizeable scale in South Africa. Large manufacturing concerns are prominent in the manufacturing sector, but they often depend on small enterprises to serve as suppliers. Opportunities for small manufacturers are also provided by local consumer markets. There are a variety of small enterprises in the retail sector, for example petrol service stations, stores selling appliances and motor vehicle accessories and clothing stores. Businesses that operate in the service sector are mainly small and include legal and accounting firms, dry cleaners and motor vehicle repair services. The agricultural sector favours large commercial farms but small-scale farming has increased³⁸ although only a small share of the rural population is engaged in agriculture.³⁹ Small enterprises are already prominent in the wholesale sector where they act as intermediaries between manufacturers and retailers or users and they sell a wide range of products ranging from fruit and vegetables to petroleum products such as fuel oil and liquefied petroleum gas.

Eurofound “ERM annual report 2015: Job creation in SMEs” (2016), available at <http://bit.ly/2BXmKvz> (accessed on 1 December 2017) recognises the importance of SMEs, ie companies with fewer than 250 employees, as a job engine for Europe.

29 Khan “Government funds available to SMEs in South Africa” 2014 *Accountancy SA* 1.

30 *Ibid.* The definition of small enterprises varies from country to country depending on the purpose for which the definition is used and the overall level of economic development of a country.

31 Yan and Makinde “Impact of continuous improvement on new product development within SMEs in the Western Cape, South Africa” 2011 *African J of Bus Man* 2221.

32 Khan (fn 29) 1.

33 Thwala and Phaladi “An exploratory study of problems facing small contractors in the North West province of South Africa” 2009 *African J of Bus Man* 533.

34 Church (fn 28) 631.

35 Berry *et al* *The economics of SMMES in South Africa* (2002), available at <http://bit.ly/2BZsN2L> (accessed on 1 December 2017) 17. Small enterprises are being encouraged to participate in the construction sector as businesses in this sector have been targeted as potential vehicles for social change and economic empowerment. Large corporations have already sold assets and downsized in order to survive and it is to be expected that the numbers of small enterprises in the construction sector will continue to increase: Thwala and Phaladi (fn 33) 534.

36 Examples of specialist contractors are those who specialise in painting, plumbing or electrical work.

37 Lynas and Dorrian *Managing the smaller firm: “The South African context”* (1987) 2.

38 Berry *et al* (fn 35) 17.

39 National Planning Commission “National development plan: Vision for 2030” (2011), available at <http://bit.ly/2pcf1om> (accessed on 1 December 2017) 123.

Not only are SMEs important because they operate in virtually all sectors but as is recognised worldwide, small enterprises have the potential to make a significant contribution to an economy's strong overall performance. This is so whether they are situated in a developed country or in one of the developing countries of Africa.⁴⁰ Research in respect of SMEs in the European Union⁴¹ for example reflects that they do create more jobs than the larger enterprises and that the support of SME development is therefore warranted. In 2010, the overall majority of all enterprises in the European Union were SMEs and of these 92 percent of all enterprises were micro enterprises.⁴² Between 2002 and 2010, SMEs had a much higher employment growth rate than large enterprises and 85 percent of total employment growth was attributable to SMEs.⁴³ SMEs also play an important role in the economies of the BRICS⁴⁴ countries.⁴⁵ Arroio and Scerri point out that SMEs are the "backbone" of the national economies in the BRICS countries⁴⁶ where they represent over 90% of total enterprises.⁴⁷ In China 99% of all enterprises are SMEs.⁴⁸ India's economy has shown dynamic growth which is attributed to a healthy SME sector.⁴⁹ In South Africa, these enterprises have been identified as having the potential to play a crucial role in the social,⁵⁰ economic⁵¹

40 Berry "The role of the small and medium enterprise sector in Latin America and similar developing economies" 2002 *Seton Hall J of Diplomacy and Int Relations* 110; see generally Leidholm and Mead *Small enterprises and economic development: The dynamics of micro and small enterprises* (1999).

41 Here micro enterprises are enterprises that employ less than 10 persons but they are included in the category of small enterprises.

42 De Kok *et al* "Do SMEs create more and better jobs?" (2011), available at <http://bit.ly/2kEj5sA> (accessed on 1 November 2017) 5.

43 *Idem* 6.

44 Ie Brazil, Russia, India, China and South Africa. BRICS is a unique grouping of countries with shared opportunities and common challenges. The BRICS countries have a number of aspects in common that in turn could influence the way policies for SMEs are developed and implemented. These include high degrees of inequality in respect of the distribution of income, challenges in the provision of essential services, high unemployment (although the unemployment rate in South Africa is far above the rate in the other BRIC countries) and huge regional differences in human and economic development. These countries use different criteria for categorising SMEs and although direct comparisons cannot be made, broad comparative insights may be drawn. Commonly used criteria include the number of employees and Brazil, China and South Africa link these to specific industrial sectors; total net assets; level of investment and turnover. Interestingly, India initially used employment and usage of power as a criterion to determine the size of an enterprise and later they were defined in terms of investment in machinery and here micro small and medium enterprises are referred to as MSMEs or simply small scale industry. See Arroio and Scerri BRICS Project "Comparative report on the role of small and medium enterprise in the national innovation system of BRICS" (2010), available at <http://bit.ly/2CUIW6m> (accessed on 1 November 2017) 9–11.

45 *Idem* 8.

46 *Idem* 11.

47 *Idem* 8.

48 *Idem* 11.

49 *Ibid*.

50 Eg, through the provision of employment opportunities and income generation which eventually leads to poverty alleviation and an increase in the welfare of the society; see Kongo "Job creation versus job shedding and the role of SMEs in economic development" 2010 *African J of Bus Man* 2289 2291.

51 Eg, employment creation and economic growth: *idem* 2290.

and political transformation⁵² of the country. Not only are they drivers of economic growth but they are able to generate much needed employment opportunities and wealth⁵³ and bring about income redistribution as a result of this growth.⁵⁴ One of the reasons that they are able to create employment opportunities is that the capital cost of creating jobs by a small enterprise is generally much lower than that of the large corporation.⁵⁵ Statistics reveal that during 1998 to 2005, SMMEs in South Africa created 90% of all jobs⁵⁶ and the small enterprise sector has been described as one which is labour-absorbing⁵⁷ and which can buffer high unemployment rates.⁵⁸

Moreover, small enterprises are also important for the contribution that they can make in the technical and innovation sphere,⁵⁹ which is vital in order to overcome many of the challenges that the South African economy faces.⁶⁰ Innovation is important in any economy as it is a driver of both the growth of the enterprise itself and economic growth generally.⁶¹ The ability to meet challenges such as climate change and poverty would depend on stronger innovation.⁶² While large businesses tend to focus on the improvement of existing products, small businesses are able to try new ideas. Significant scientific advances have often been made by independent inventors.⁶³ For example, major inventions by small

52 Eg, in terms of the White Paper *National strategy* (1995) para 3.1.2, one of the objectives underlying the SMME support framework is to redress discrimination with regard to employment opportunities by facilitating the sharing in prosperity by the formally disadvantaged, particularly women and Black people and enterprises in the rural areas in South Africa.

53 See De Clercq and Venter "A three-sector comparative study of the impact of taxation on small and medium enterprises" 2007 *Meditari Accountancy Research* 133; Chimucheka "Usefulness of business plans to small, micro and medium enterprises in East London, South Africa" 2012 *African J of Bus Man* 4957.

54 See generally Broom *et al Small-business management* (1983).

55 *Idem* 3.

56 National Planning Commission (fn 39) 117.

57 Ie, there is a high capacity to absorb the working-age population, those persons aged between 15 and 65 years. The labour absorption rate is the proportion of the working-age population that is employed.

58 That is as opposed to a large enterprise whose demand for labour does not increase in proportion to its growth. Although small enterprises are not as important in terms of salary generation, as wages are significantly higher in the large corporations, SMEs act as a cushion to absorb the body of the labour force. This has happened to a large extent in China and India for example: Arroio and Scerri (fn 44) 8.

59 Broom *et al* (fn 54) 34. Innovation has been defined as "the implementation of a new or significantly improved product (goods or service), or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations": OECD "Fostering innovation: The policy challenge" *OECD innovation strategy: Getting a head start on tomorrow* (2010) 20.

60 White Paper *National strategy* (1995) para 2.2.2.

61 See Callan and Guinet "Enhancing the competitiveness of SMEs in the global economy: Strategies and policies" Report prepared for the OECD Conference for Ministers responsible for SMEs and Industry Ministers in Bologna, Italy (14–15 June 2000), available at <http://bit.ly/2zfMj5H> (accessed on 1 December 2017).

62 *Idem* 17.

63 Broom *et al* (fn 54) 34. Eg, both in the USA and in Germany the propensity to patent, a measure for the production of new technological knowledge, tends to increase as enterprise size decreases: Callan and Guinet (fn 61) 7. Moreover, according to these authors, SMEs make "impressive contributions to innovation" and the advantages that they have in this

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enterprises in the United States of America include the Polaroid camera, soft contact lenses, hydraulic brakes, heart valve and a safety razor.⁶⁴ Small enterprises have also been seen to be a breeding ground for entrepreneurs and they are a source of the entrepreneurial spirit.⁶⁵ Because of their flexibility they are able to develop specialised product and market niches in response to market demands, which in turn activates domestic competition.⁶⁶ Small enterprises are also seen as a tool to achieve global competitiveness.⁶⁷

Small enterprises contribute to the economy of a country in general as they are also consumers, and their “buying power” could stimulate the business activities of their suppliers. By manufacturing goods and providing services they also contribute towards the country’s national product⁶⁸ and by supplying these to foreign markets they contribute towards export.⁶⁹

As the creation of jobs is one of the ways to reduce inequality in South Africa, albeit in the long-term, SMEs indirectly contribute to achieving this goal and in South Africa the small enterprise sector has been identified as being “a highly significant vehicle for black economic empowerment”.⁷⁰ Besides generating wealth in their local communities, SMEs also contribute to social stability generally.⁷¹ Moreover, by contributing towards economic growth, SMEs also serve to alleviate poverty.⁷² Even when there is a downturn in the economy, employment

regard compared to large-sized corporations are summarised as follows: “One important strength is that they are less bureaucratic than more highly structured organization. Second, and something that is often overlooked, many advances in technology accumulate on a myriad of detailed inventions involving individual components, materials, and fabrication techniques. The sales possibilities for making such narrow, detailed advances are often too modest to interest giant corporations. An individual entrepreneur’s juices will flow over a new product or process with sales prospects in the millions of dollars per year, whereas few large corporations can work up much excitement over such small fish, nor can they accommodate small ventures easily into their organizational structures. Third, it is easier to sustain a fever pitch of excitement in small organization, where the links between challenges, staff, and potential rewards are tight. ‘All-nighters’ through which tough technical problems are solved expeditiously are common” (*ibid*).

64 Timmons *New venture creation – Entrepreneurship for the 21st century* (1999) 10.

65 Thankappan *et al Dichotomy between attitudes and environmental performance: A case of European SMEs* (2004) 15. Research has shown that a good way to increase economic growth is to increase the number of active entrepreneurs in a society: Timmons (fn 64) 4.

66 White Paper *National strategy* (1995) para 2.2.2.

67 *Strategic Business Plan April 2010 – March 2013* (2010) 6.

68 In geographical areas in South Africa where the population is too small to warrant large enterprises, all economic activity is provided by small enterprises: Chimucheka (fn 53) 4959.

69 Berry *et al* (fn 35) 4. Unlike in China and India, however, SMEs in South Africa and Brazil make a very small contribution to exports. Arroio and Scerri (fn 44) 9–11.

70 White Paper *National strategy* (1995) para 2.2.5.

71 See Watson and Van Vuuren “Entrepreneurship training for emerging SME’s in South Africa” 2002 *J of Small Business Management* 154.

72 As Dollar and Kraay “Growth is good for the poor” 2002 *J of Economic Growth* 239 emphasise, where there is economic growth in a country, the poorest in the society will benefit as much as anyone else in the society. Thus growth-oriented policies will always benefit the poor. Moreover, research shows that where poor countries have created a positive investment climate for small firms, while also opening their markets to foreign investment and trade, a rapid reduction in poverty has occurred. Eg, in China, where the number of

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through small enterprises continues to expand. As one writer puts it, such entities serve as “a ‘shock absorber’ in a languishing economy”.⁷³ This would happen for example where a person who has been retrenched uses whatever resources he or she has to start a small business. Similarly, as economic historians have shown, where large entities have shed unskilled labour because of industrialisation or technological advances for example, the smaller entities have been able to absorb such unskilled labour⁷⁴ and to expose such persons to business skills within the enterprise which would contribute toward their personal development and lead to an enhancement of human capital.⁷⁵ Furthermore, as Berry⁷⁶ points out, although these enterprises might not have the capacity to generate high incomes for a large number of people, they still play a very important ‘insurance role’ in that they ensure a minimum income to many.

Given the importance of SMEs, it is understandable that the development of the small enterprise sector has been identified by the government as a key policy focus⁷⁷ and features in a range of development and planning frameworks designed by the government to lead and manage the country’s development.

3 DEVELOPMENT AND PLANNING FRAMEWORKS THAT RECOGNISE THE SIGNIFICANT ROLE OF BOTH THE SMALL ENTERPRISE SECTOR POLICY AND COMPETITION LAW

The initial policy framework embodying specific key economic objectives, the *Reconstruction and development programme (RDP)*, was released by the Tripartite Alliance⁷⁸ prior to 1994. However, it was adopted post 1994 by the government, as South Africa’s socio-economic policy framework and development strategy. The White Paper addressing reconstruction and development⁷⁹ set out the Reconstruction and Development Programme (RDP), which embodied a framework for integrated and coherent socio-economic progress. The ideology that informed the RDP was that the economy had to be restructured.⁸⁰ This was

people who were desperately poor fell from 250 million in 1978 to about 34 million in 1999; Stern “Businesses are helping to overcome global poverty” 2001 *Ivey Business J* 9.

73 Liedholm “Small firm dynamics: Evidence from Africa and Latin America” (2001), available at <http://bit.ly/2pbvZTX> (accessed on 1 November 2017) 15.

74 In India, eg, these enterprises are often the only opportunity to earn an income for workers who are either unskilled or lack resources: Dasgupta “Environmental enforcement and small industries in India: Reworking the problem in the poverty context” 2000 *World Development* 946.

75 Berry *et al* (fn 35) 5. Liedholm (fn 73) 16 maintains that assistance to micro enterprises that are not growing would be good as this could contribute to alleviating poverty in that such assistance could secure the survival of the enterprise or at least help the entrepreneurs to earn a higher income.

76 Berry (fn 40) 108.

77 White Paper *National strategy* (1995) para 2.2.5. The importance of the small enterprise sector is appreciated by Government and in 2014 a new Ministry of Small Business Development was established.

78 The Tripartite Alliance is an alliance between the African National Congress (ANC), the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP).

79 White Paper *Reconstruction and development* (1994).

80 While nationalisation was initially proposed as a solution to the concentration of private wealth, this never materialised. Nationalisation basically means the taking of control by the

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due to the conviction that the economic system of capitalism in place in South Africa at the time that post-apartheid government took office was not a “social democratic” kind of capitalism, but rather a vestige of the system of colonial capitalism steeped in racism.⁸¹ In line with the ideology underpinning the RDP, the prescribed strategy was to play an active role in the restructuring of the economy.⁸² The government’s proposed solutions included adopting a Black Economic Empowerment policy (BEE),⁸³ a robust competition policy and a greater involvement by the small enterprise sector in economic activity.⁸⁴

As postulated in the White Paper, the policy framework sought to mobilise resources towards the total eradication of the legacy of apartheid with the goal of building a democratic, non-racial and non-sexist future society.⁸⁵ The White Paper pays particular attention to the promotion of an economy that would create employment, that would be labour-absorbing and which would finally lead to full employment. Furthermore, it asserts that redistribution was necessary in order to alleviate poverty, yet it emphasises that neither economic growth by itself nor redistribution on its own would resolve the severe crisis in which South Africa found itself. Notably, as posited in the White Paper, it was imperative that the reconstruction of the economy was not to be seen in isolation, and that an integrated approach to reconstruction and development should be followed. This would encompass the promotion of a more equitable pattern of growth, as well as an equitable distribution of assets, services and access to markets, and the maintenance of macro-economic stability. In order to address structural deficiencies in the market, the framework proposed key economic initiatives. These initiatives, it was emphasised, could and should be, applied concomitantly and in a mutually reinforcing manner. These included initiatives relating to investment, trade, industrial strategy, competition, small business and labour markets.⁸⁶

government over assets and over a corporation, usually by acquiring the majority or the entire stake in the corporation.

81 White Paper *Reconstruction and development* (1994) para 1.2.

82 *Ibid.*

83 The concept of Black economic empowerment (BEE) can be traced as far back as the Freedom Charter of 1955. Chabane *et al* “10 year review: Industrial structure and competition policy” (2003), available at <https://www.researchgate.net> (accessed on 2 December 2017) 22. The Black Economic Empowerment Commission *BEECom Report* (2001) 1 defines black economic empowerment as “an integrated and coherent socio-economic process . . . within the context of the national transformation programme, namely the RDP . . . [which] is aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens. It seeks to ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity”.

84 White Paper *Reconstruction and development* (1994) paras 3.1.4 3.4.6.

85 *Idem* paras 1.1.1 3.4.6.

86 *Idem* paras 3.4.5–3.4.6. The goals of the RDP, in terms of reg 17(3) of the Preferential Procurement Regulations, include the following: the promotion of South African owned enterprises; the promotion of export orientated production to create jobs; the promotion of SMMEs; the creation of new jobs or the intensification of labour absorption; the promotion of enterprises located in a specific province, region, municipality or rural areas and the upliftment of communities Preferential Procurement Regulations, GN R725 in *GG* 22549 of 10 August 2001.

The White Paper affirmed the government's commitment to economic growth and the stimulation of sustainable employment and in this regard recognised the important role that the small enterprise sector could play. This sector, it was asserted in the framework, could contribute, through its economic activity, to the achievement of a less concentrated economy as well as to one in which there would be ownership patterns that were racially and gender inclusive. Moreover, the framework recognised the value of the small enterprise sector in the generation of new employment and competitiveness. Accordingly, impetus was given to the development of this sector with the assistance from government.⁸⁷

Similarly, the value of competition law was recognised. Strict competition legislation was "to create a more competitive and dynamic business environment" to address some of the economic and social ills that could be traced back to economic concentration.⁸⁸ The competition legislation was seen as an instrument to discipline and fragment the ownership of corporate South Africa and to level the corporate and economic landscape.⁸⁹ It was to address "overconcentration of economic power and interlocking directorships, to abolish numerous anti-competitive practices such as market domination and abuse, and to prevent the exploitation of consumers."⁹⁰ Thus, besides serving the traditional economic goals, competition law had to serve a broader social and political purpose.⁹¹ In respect of small and medium enterprises, it was resolved that competition policy would ensure that participation of efficient small and medium-sized enterprises would not be jeopardised by anti-competitive structures and conduct.⁹²

However, the RDP was short-lived and it was the official policy for only two years. During this period, the South African economy performed poorly and a high level of unemployment continued. Consequently, in June 1996, the government accepted the growth, employment and redistribution (GEAR)⁹³ strategy as a macro-economic strategy for South Africa. The point of departure of GEAR was that "sustained growth on a higher plane would require a transformation towards a competitive outward oriented economy".⁹⁴ The vision of the strategy entailed the pursuit of

"a competitive fast-growing economy which creates sufficient jobs for all work seekers; a redistribution of income and opportunities in favour of the poor; a

87 White Paper *Reconstruction and development* (1994) Preface.

88 *Idem* paras 4.1.5–4.1.6.

89 See Lewis (fn 3) 7.

90 White Paper *Reconstruction and development* (1994) para 3.8.1.

91 See Sutherland and Kemp *Competition law of South Africa* (2014) ch 3 para 3.2.3.

92 White Paper *Reconstruction and development* (1994) para 3.8.2.

93 GEAR (1996). While the GEAR strategy was sufficient for the achievement of macroeconomic objectives, it did not meet the social challenges of the country, most notably poverty reduction and employment creation. It was thus replaced in 2005, after the promulgation of the Competition Act 89 of 1998, by the *Accelerated and shared growth initiative for South Africa (ASGISA)* which was replaced in 2010 by the *New growth path (NGP)*. In 2013 the NGP was replaced by the *National development plan (NDP)-2030* as South Africa's long-term socio-economic development roadmap. This policy was adopted as the blueprint for a future economic and socio-economic development strategy for South Africa in December 2012.

94 GEAR (1996) para 1.3.

society in which sound health, education and other services are available to all; and an environment in which homes are secure and places of work are productive".⁹⁵

The paradigm shift from the idea of a democratic social welfare state to the idea that economic growth was a prerequisite to meeting social imperatives was thus apparent.

GEAR⁹⁶ provided a medium term strategy aimed at bridging the gap between a "constrained economic environment and an improved growth and employment performance", while concomitantly strengthening the competitive capacity of the economy.⁹⁷ It gave impetus to a new competition law in its call for "a strengthening of competition policy"⁹⁸ to be reflected in new legislation.⁹⁹ Moreover, GEAR acknowledged that the promotion of small enterprises was identified as being a key element in the government's strategy for employment creation and income generation and reiterated the important contribution that small enterprises could make to improve economic growth and performance.¹⁰⁰ GEAR furthermore recognised that for historical reasons the small enterprise sector was severely under-developed and the need to boost the small and medium business development was emphasised.¹⁰¹ One of the initiatives aimed at assisting the poor to meet their basic needs was the budgetary reform which included finances to be allocated in respect of small business support policies.¹⁰² A further undertaking was made in the White Paper *National strategy for the development and promotion of small business in South Africa*¹⁰³ namely to make a major effort "to operationalise and implement the policies outlined".¹⁰⁴

While the GEAR strategy was sufficient for the achievement of macro-economic objectives, it did not meet the social challenges of the country, most notably poverty reduction and employment creation. In terms of the GEAR strategy an over optimistic¹⁰⁵ growth rate of 6 per cent per annum and job creation of 400 000 jobs per annum by the year 2000 was aimed at.¹⁰⁶ The targets set by GEAR were not met for various reasons, *inter alia* the crisis in global markets and the failure to attract the necessary foreign investment. The latter may be attributed to the fact that the economic approach of GEAR was too narrow in

95 GEAR (1996) 1. Terreblanche explains that the main difference between the RDP and GEAR was that "while the former expected the state to conduct a people orientated developmental policy, the latter saw South Africa's economic 'salvation' in a high economy growth rate that would result from a sharp increase in private capital accumulation in an unbridled capitalistic system": "The ideological journey of South Africa: From the RDP to the GEAR macro-economic plan" (1999), available at <http://bit.ly/2BVmayx> (accessed on 1 December 2017) 4.

96 GEAR (1996).

97 *Idem* para 2.2.

98 *Ibid.*

99 *Idem* para 5.3.

100 *Idem* para 5.4.

101 *Idem* 4.

102 *Idem* 10.

103 White Paper *National strategy* (1995).

104 *Idem* 14.

105 According to the DTI "growth remained well below the projections of GEAR": see *Annual review of small business in South Africa 2005–2007* (2008), available at <http://bit.ly/2CXrA9c> (accessed on 1 December 2017) 25.

106 GEAR (1996) 6.

that the government failed to address the need for socio-economic stability, government efficiency and a greater state capacity.¹⁰⁷

As the growth performance was much lower than had been predicted and insufficient to impact significantly on poverty alleviation and unemployment, it gradually became apparent that it was necessary to adopt successful supply-side policies for the South African economy to succeed in becoming globally competitive. Moreover, the supply-side policies needed to address the economy's structural weaknesses which included the shortage of high-level skills as well as the mismatch between the supply of skills and the skills needs of the economy.¹⁰⁸ Building on GEAR, the accelerated and shared growth initiative for South Africa (ASGISA) was launched in 2006,¹⁰⁹ with the main aim of accelerating the creation of employment. ASGISA identified a number of "binding constraints", which mitigated against the desired economic growth rates. These included shortages of suitably skilled labour, barriers to entry in markets, limits to competition, limited new investment opportunities and the burden on small and medium enterprises.

ASGISA was replaced by the new growth path (NGP) in 2010. This framework was drafted in response to the economic downturn from late 2008, accelerating technological change as well as the need to accelerate employment creation, income growth and to reduce poverty and inequality.¹¹⁰ As posited in the framework, the aforementioned could only be achieved through "a new growth path founded on a restructuring of the South African economy to improve its performance in terms of labour absorption as well as the composition and rate of growth".¹¹¹

A developmental package was thus proposed. It consisted of macro-economic strategies,¹¹² stakeholder commitments and micro-economic measures. The latter embodied targeted measures to control inflation and support competitiveness and increased equity. It includes among others reforms in policies relating to both competition¹¹³ and small enterprises.¹¹⁴

In 2013, the NGP¹¹⁵ was replaced by the national development plan (NDP)-2030 as South Africa's long-term socio-economic development roadmap. This

107 Terreblanche (fn 95) 87.

108 DTI (fn 105) 25.

109 ASGISA was approved by cabinet in July 2005 and unveiled on 6 February 2006.

110 Minister of Economic Development *The new growth path: The framework* (2010), available at <http://bit.ly/2DqF12d> (accessed on 1 December 2017) para 2.2.

111 *Idem* para 1.

112 The macro-economic strategies related to *inter alia* the balancing of monetary policy interventions which would achieve a more competitive exchange rate.

113 Eg, it was emphasised that "[m]ore consideration should be given to mandating public interest conditions on proposed mergers, particularly in respect of employment and prices" and that "[c]ompetition authorities should involve trade unions more, as provided for in the Competition Act. Unions should develop their capacity to share information and insights on employment issues in mergers and acquisitions": Minister of Economic Development (fn 110) para 2.2.19.6.

114 Eg, the need for financial and other support was emphasised and the need to integrate small and micro enterprise support systematically into all sector strategies was stressed. *Idem* para 2.2.20.

115 As Qobo points out these policies (ie GEAR, ASGISA, NGP) as well as the DTI's Industrial Policy Action Plan (IPAP) "have been increasingly interventionist, indicative of a

policy was adopted as the blueprint for a future economic and socio-economic development strategy for South Africa.¹¹⁶ The NDP envisions what a 2030 South African society should be and it was emphasised that in order “to address the twin challenges of poverty and inequality, the state needs to play a transformative and developmental role”.¹¹⁷ As posited in the NDP, a commitment was reflected to boost entrepreneurship through regulatory reform and support and it was envisioned that by 2030 small- and medium-sized enterprises would be the main employment creators.¹¹⁸ Accordingly, SMMEs are envisioned as being at the centre of economic development in South Africa.

The theme of an integrated approach to reconstruction and development and economic growth runs through all the above mentioned policy frameworks, and as will be shown, this approach is also encapsulated in competition policy. In this regard, on 27 November 1997, the DTI published its policy document *Proposed guidelines for competition policy: A framework for competition, competitiveness and development*¹¹⁹ which would serve as a broad framework for competition policy, the ensuing Competition Bill¹²⁰ and the subsequently promulgated Competition Act.¹²¹

4 COMPETITION POLICY AND LAW

4.1 Proposed guidelines for competition policy

As the title of the guidelines for competition policy suggests,¹²² the guidelines attempt to reconcile the application of competition policy with the national objectives of ‘competitiveness’ and ‘development’.¹²³ Moreover, it attempts to align

gear-change in South Africa’s approach to economic development, allowing for a greater role of the state in correcting perceived market failures”: “Competition policy response to state intervention: A competition practitioner’s perspective on IPAP5” (2013), available at <http://bit.ly/2kEFWo6> (accessed on 1 December 2017) 4.

116 This new national planning framework incorporated the DTI’s industrial policy action plan (IPAP), as well as IPAP 2, released in February 2010 by the DTI, and the Economic Development Ministry’s new growth path (NGP); Zarenda “South Africa’s National Development Plan and its implications for regional development” Stellenbosch: Tralac (2013), available at <http://bit.ly/2kWybJo> (accessed on 1 December 2017). The DTI has released the IPAP annually since 2007. The IPAP 2014/15–2016/17 identifies competition policy as one of the transversal programmes through which government’s industrial policy goals can be achieved; DTI *IPAP 2014/15–2016/17* (2014), available at <http://bit.ly/2kEbev5> (accessed on 1 December 2017).

117 National Planning Commission (fn 39) 409.

118 *Idem* 40 93. However, according to Fatoki and Van Aardt Smit, in order for the contribution of SMEs to be sustained, new SMEs would need to be formed and without this happening, South Africa’s economy would be likely to stagnate or even decline: “Constraints to credit access by new SMEs in South Africa: A supply-side analysis” 2011 *African J of Bus Man* 1413.

119 DTI *Proposed guidelines* (fn 11). The guidelines were framed within a specific mandate arising from political and economic policy as contained in both the RDP and GEAR policies.

120 Competition Bill and Explanatory Memorandum (1998).

121 Competition Act 89 of 1998.

122 *Proposed guidelines for competition policy: A framework for competition, competitiveness and development*, DTI *Proposed guidelines* (fn 11).

123 Lewis (fn 3) 18. The guidelines were framed within a specific mandate arising from political and economic policy as contained in both the RDP and GEAR policies.

competition law with trade and industrial policy and with the treatment of small and medium enterprises.

Lewis¹²⁴ expertly recounts the path to the enactment of the Competition Act¹²⁵ and points out that this statute, as well as the foregoing competition policy, was a form of public policy intervention, “it was a central feature of the democratic project” rather than “part of a market liberalisation agenda”.¹²⁶ Moreover, it was required because of the ills of “economic and corporate life”¹²⁷ prevalent in 1994.¹²⁸ These included the fact that ownership of wealth was largely concentrated in the hands of a small number of large corporations that were controlled by a select group of white families,¹²⁹ while in contrast the majority of the black population was characterised by dispossession, poverty and unequal and unfair treatment.¹³⁰ A unique approach was thus required.

The guidelines were drafted after extensive consultation.¹³¹ Business and organised labour, however, had different views on competition policy. Organised business, although of the view that preferably there should be no competition legislation at all, eventually succumbed to the view that there would be competition legislation but argued to constrain the consequences of such competition legislation. Organised labour argued that an appropriate competition law should *inter alia* meet the economic imperatives of sustainable industrial expansion, which would include widened ownership patterns and the promotion of employment opportunities.¹³² Consequently, the guidelines reflected a fused mandate and suggested that a *sui generis* approach should be followed. The public was assured that, “on the one hand competitiveness and efficiency are pursued, and on the other that this process will ensure access to many more people previously denied an equal opportunity to participate in the economy”.¹³³

Thus, in line with the RDP and GEAR policies, competition law was to have multifarious goals, which would include the traditional economic goals of

124 Lewis (fn 3).

125 89 of 1998.

126 Lewis (fn 3) 8. As put by Hartzenberg (fn 2) 7 “competition policy became the policy option for the regulation and development of enterprise to enhance the economic opportunities and participation in the formal economy of black South Africans”.

127 See Lewis (fn 3) 6.

128 *Ibid.*

129 These included the Oppenheimer, Rupert and Hertzog families. Historically, four main conglomerate groupings viz Anglo American Corporation, Sanlam, Liberty Life and Rembrandt (now Remgro), have controlled the majority of economic activity: see Roberts “The role for competition policy in economic development: The South African experience” TIPS Working Paper Series (WP8-2004), available at <http://bit.ly/2Bkui88> (accessed on 6 December 2017) 2.

130 Lewis (fn 3) 6.

131 The National Economic and Labour Council (Nedlac) was the forum in which the guidelines were negotiated. Government, organised labour, organised business and the ‘community’ were the constituent parties and were afforded the opportunity to put forward their views on the competition policy.

132 Lewis (fn 3) 21–23.

133 DTI *Proposed guidelines* (fn 11) Executive summary para 4. Lewis (fn 3) 25 states that “while business represented the competitiveness elements of the public interest as defined in the guidelines, labour effectively became the representative of the social elements of the public interest, ultimately expressed as the promotion of employment, black economic empowerment, small business and an equitable regional spread of development”.

competition law as well as developmental goals.¹³⁴ In respect of the latter, the concept of “public interest” was to play a key role, as it would become the linchpin for achieving developmental goals. The meaning of “public interest” was given content to in the guidelines and it is described as being broader than the “sectional interests of firms and their workers within a particular industry. It also stretches beyond the interests of consumers, of emerging black entrepreneurs or of labour and community constituencies”.¹³⁵

A key to understanding public interest in competition policy is seeing the combination of competitiveness¹³⁶ and development.¹³⁷ Both are embraced as central aims of competition policy.¹³⁸ Thus, while the overriding goal of the competition policy is to achieve a more effective economy in South Africa,¹³⁹ it also has to be developmental.¹⁴⁰ Accordingly, it was posited in the guidelines that there would need to be a synthesis between competition policy and other areas of economic policy within the industrial strategy.

The guidelines exposed the weaknesses of the former legislation¹⁴¹ and recommendations were proposed. These included new competition bodies and enforcement methods that were to be created.¹⁴² Moreover, anti-competitive conduct, abuses of dominance and mergers which do not serve the public interest needed to be addressed¹⁴³ and in the light of the constitutional dispensation¹⁴⁴ a framework of openness and transparency was required.

4 2 Competition Bill¹⁴⁵

After negotiation, the Competition Bill,¹⁴⁶ drafted roughly as agreed upon by the relevant interest groups and encapsulated in the guidelines, was sent to Cabinet and thereafter went through the parliamentary process.¹⁴⁷

134 As stated by Qobo (fn 115) 5 “an effective competition regime can lead to overall fairness and efficiency of markets, leading to economic growth and development”.

135 See DTI *Proposed guidelines* (fn 11) para 1.1.3.

136 “Competitiveness” is understood in both domestic and international terms. It is identified as part of the public interest, and is defined as “help[ing] to make South Africa more competitive by lowering costs along the entire value chain”: *idem* para 2.4.3.

137 Development is also identified as part of the public interest and is defined as the willingness to “address socio-economic backlogs and capacity to correct, over time, existing racial and gender biases in ownership and control throughout the private sector”: *idem* para 2.4.3.

138 *Idem* para 1.3.4.

139 *Idem* para 1.1.3.

140 *Idem* para 1.3.3.

141 Ie the Maintenance and Promotion of Competition Act 96 of 1979. With reference to mergers in particular, the guidelines criticised the Act in that no procedure was provided for the compulsory pre-notification of mergers and acquisitions of substantial proportions. DTI *Proposed guidelines* (fn 11) para 3.3.4.

142 *Idem* paras 1.2.4 10.2.1.2.

143 *Idem* paras 2.4.5 8.2.1–8.2.3.

144 *Idem* para 1.3.2. Lewis (fn 3) 13 recounts that under the previous competition law dispensation, merger reviews were undertaken with the “the utmost secrecy” and that he “soon came to appreciate that this secretive and informal mode of decision-making was ineluctably skewed in favour of those seeking a favourable merger decision from the Board”.

145 Competition Bill and Explanatory Memorandum (1998).

146 *Ibid.*

While certain aspects in the provisions of the guidelines were criticised, in the most part, they were uncontroversial.¹⁴⁸ In this process the public as well as organised labour and organised business were once again able to air their criticism and there were many revisions of the Bill. Additional changes to the Bill mostly concerned language, systemisation of the provisions and the creation of more efficient and workable procedures.¹⁴⁹

The explanatory memorandum stressed that the South African economy was then characterised by highly concentrated market structures. Furthermore, ownership and control of the economy was unusually centralised which *inter alia* would be particularly threatening to the interests of the small enterprise and new market entrants.¹⁵⁰

As posited in the memorandum¹⁵¹ the overriding objective of competition policy and its associated instruments is the promotion and maintenance of competition in South Africa. Notably, however, this objective should be met in order to achieve further objectives, which relate to both competition (economic objectives) and developmental or public interest objectives.¹⁵² Economic objectives included the promotion of the efficiency, adaptability, and development of the economy; the provision of competitive prices and product choices to consumers and lastly the expansion of opportunities for South African participation in world markets while concomitantly recognising the role of foreign competition in South Africa. Public interest objectives included the promotion of employment and the advancement of the social and economic welfare of South Africans; ensuring that SMEs have an equitable opportunity to participate in the economy and the promotion of a greater spread of ownership, specifically to increase the ownership stakes of members of historically disadvantaged communities. Thus, as was the case in the Guidelines, clearly the goals of competition law were to be multifarious.

147 Lewis (fn 3) 17. This process was managed by the DTI and represented by Alistair Ruiters, the then chief director of the section of the DTI dealing with small business and cooperatives; *Ibid.*

148 *Idem* 26.

149 However, some amendments did result from important policy shifts. With regard to mergers, the Bill only provided for one type of threshold (annual turnover), cl 11 of the Competition Bill and Explanatory Memorandum (1998), while different types of merger thresholds were established in the subsequent Competition Act 89 of 1998. Furthermore, the power granted to the relevant Minister to review mergers on certain narrow grounds did not find its way into the Act; Cl 18 of the Competition Bill and Explanatory Memorandum (1998).

150 Introduction, background and motivation for policy review, Competition Bill and Explanatory Memorandum (1998).

151 *Ibid.*

152 Cl 1 of the Competition Bill and Explanatory Memorandum (1998). These are to “(a) promote the efficiency, adaptability, and development of the economy; (b) provide consumers with competitive prices and product choices; (c) promote employment and advance the social and economic welfare of South Africans; (d) expand opportunities for South African participation in world markets while at the same time recognising the role of foreign competition in South Africa; (e) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; (f) promote a greater spread of ownership, in particular to increase the ownership stakes of members of historically disadvantaged communities”.

The Bill formed the basis of the ensuing Competition Act¹⁵³ which was enacted on 1 September 1999.

4.3 Competition Act¹⁵⁴

As already alluded to, the radical transformation process that followed the dismantling of apartheid and the establishment of a constitutional democracy underpins this statute. Moreover, it is the product of a legislative process unique to South Africa and was one which involved inputs from various stakeholders, all with differing interests.¹⁵⁵

Thus, the preamble recognises that South Africa's discriminatory past has resulted in excessive concentrations of ownership and control, inadequate restraint on anticompetitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans. Furthermore, it recognises that the economy should be open to greater ownership by a greater number of South Africans, and that credible competition laws and effective structures to administer those laws are necessary for an efficient functioning economy. Moreover, it acknowledges that "an efficient, competitive economic environment, balancing the interest of workers, owners and consumers and focussed on development, will benefit all South Africans".¹⁵⁶

Section 2¹⁵⁷ outlines the purpose of the Act and it is clear that the purpose of statutory competition law in South Africa is intended to meet a plurality of goals.

153 89 of 1998.

154 *Ibid.*

155 See Lewis (fn 3) 28–29. As stated by Sutherland and Kemp (fn 91) ch 1 para 1.3, "the Competition Act is not merely an updated version of the Maintenance and Promotion of Competition Act 96 of 1979. On the contrary, it is the result of a determined policy initiative to bring South African competition law into line with international best practice, adapted for an African and developing country environment".

156 Furthermore, the preamble states that the Act is enacted in order to provide all South Africans with equal opportunities to participate fairly in the national economy; achieve a more effective and efficient economy; create markets to which consumers have access and in which they can freely select the quality and variety of goods and services; create greater capability and an environment for South African firms to compete effectively in international markets; restrain specific trade practices that undermine a competitive economy; regulate the transfer of economic ownership in a manner consistent with the public interest and to establish independent institutions to monitor economic competition and to give effect to international law obligations.

157 S 2 has to a large extent part been copied from the Canadian Competition Act RSC 1985 c C-34. The purpose of the Canadian statute as set out in s 1.1 is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices". The South African Act contains the additional goal of creating a greater spread of ownership and, more particularly, to increase the ownership stakes of historically disadvantaged persons. However, despite this section, Canadian competition law now generally regards efficiency and consumer welfare as the main goals of competition law. See Sutherland and Kemp (fn 91) para 1.10. As far as ensuring that SMEs have an equal opportunity to participate in the Canadian economy, the Canadian Competition Bureau assists them for example by way of written opinions. They can receive advice for instance on whether or not their proposed business plans would raise

continued on next page

While the primary goal is the promotion and maintenance of competition, this must be realised in order to achieve the further aims. As already mentioned, in line with the government's objectives of redress and development, the latter include transformative objectives relating to macro-economic or wider public interest goals namely, the development of the economy, employment and the advancement of the social welfare of citizens, the expansion of ownership stakes of historically disadvantaged persons in the economy and lastly the ensuring of the participation of SMEs in the economy.¹⁵⁸ While the protection of competitors is not one of the purposes of the Act, access to markets by South Africans, SMEs and previously disadvantaged persons, is included.¹⁵⁹

Besides the preamble and purpose, cognisance is taken of the needs of SMEs in two broad areas: exemptions and mergers. In what follows, these areas are discussed briefly, with the focus primarily being on the way in which the interests of SMEs have been incorporated in the Act.

4.3.1 Exemptions

The Competition Commission may grant a firm an exemption from the application of the Act¹⁶⁰ in respect of certain agreements or practices that would otherwise contravene the Act.¹⁶¹ It is clear that the exemptions posited in the Act lie at the intersection of competition law policy and broader economic and social policy objectives. As far as SMEs are concerned, a firm may apply to the Competition Commission for such exemption¹⁶² where the granting of the exemption is required to obtain,¹⁶³ or such exemption contributes to,¹⁶⁴ the objective of the "promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive".¹⁶⁵

issues under the Competition Act. They can also receive relevant information and plain-language explanations of various topics that would apply to them *inter alia* on mergers, marketing practices prohibitions and requirements and abuse of dominance. Canadian Competition Bureau available at <http://bit.ly/2zFzS3i>.

158 As stressed in the Competition Amendment Bill, the objectives encapsulated in s 2 cannot be achieved through the Act alone. The Act is but one of the many complementary policy instruments that serve to achieve these objectives. See Competition Amendment Bill published in GN 1345 GG 41294 of 1 December 2017.

159 Sutherland and Kemp (fn 91) para 3.1.1.

160 S 10 of the Act.

161 Ie, that would be anticompetitive in terms of ss 4–9, such as restrictive horizontal or vertical practices or an abuse of dominance.

162 S 10(1) read together with s 10(3).

163 S 10(3)(a).

164 S 10(3)(b).

165 S 10(3)(b)(ii). It may, however, be very difficult for eligible firms to prove that a restrictive agreement that they seek to exempt is necessary to promote their ability to become competitive. The Competition Amendment Bill (fn 158) emphasises the importance of small businesses and firms owned or controlled by historically disadvantaged persons, and suggests that their interests be protected to a greater extent. It thus proposes that s 10(3)(b)(ii) be framed more broadly, to include in the process of determining exemptions, the consideration of the entry, participation in and expansion of small businesses and firms owned or controlled by historically disadvantaged persons. This the Bill asserts would be a further tool to address the concern that these firms frequently exit the market.

4.3.2 Mergers

The Competition Act determines that a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control¹⁶⁶ over the whole or part of the business of another firm.¹⁶⁷ Such a merger may be attained through the purchase or lease of the shares, an interest or assets of the other relevant firm, or an amalgamation or other combination with the firm.¹⁶⁸

Where a transaction does fall within the definition of a merger, the Competition Commission must be notified of the proposed merger,¹⁶⁹ where after a substantive analysis must be undertaken by the Competition Commission, or the Competition Tribunal as the case may be,¹⁷⁰ to determine whether a proposed merger should be prohibited, or approved with or without conditions.¹⁷¹ As provided for in section 12A of the Competition Act,¹⁷² a two-legged assessment needs to be undertaken by the relevant competition authority. During the first leg of the assessment, the competition authority must determine to what extent, if any, the proposed merger would be likely to substantially prevent or lessen competition.¹⁷³ Here, considerations of a purely economic nature would be taken into account.¹⁷⁴ Should it appear to the competition authority that the proposed merger would be likely to substantially prevent or lessen competition, the proposed merger may still be justified. This would be where such merger is likely to result in any technological, efficiency or other pro-competitive gains which would probably not be obtained should the merger be prevented, and which would be greater than, and offset, the anti-competitive effects that may result from the merger.¹⁷⁵ Whatever the outcome of the first leg of the substantive merger

166 S 12(2) lists forms of control.

167 S 12(1)(a). Determining whether or not a transaction does fall within the legal definition of a merger may be very complex. However, a discussion of the definition falls outside of the scope of this article. For a detailed analysis of the definition see Sutherland and Kemp (fn 91) para 8.2.

168 S 12(1)(b)(i)–(ii).

169 A small merger is not notifiable except at the behest of the Competition Commission.

170 In the case of a small and intermediate merger, the assessment will be undertaken by the Competition Commission and in the case of a large merger, the proposed merger will be considered by the Competition Tribunal, generally after the Competition Commission has also undertaken the assessment and forwarded a recommendation to the Competition Tribunal.

171 Ss 13(5)(b), 14(1)(b) and 16(2). The conditions may extend beyond those aimed strictly at promoting competition into the realm of the public interest.

172 89 of 1998.

173 S 12 (1).

174 In terms of s 12A(2) the competition authority must assess the strength of competition in the relevant market as well as the probability that the firms in the market, after the merger, will behave competitively or cooperatively. For this evaluation, any factor that is relevant to competition in the relevant market must be taken into account. These factors would include the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, which would include growth, innovation, and product differentiation; the nature and extent of vertical integration in such market; whether the business or part thereof, of a party to the merger or proposed merger has already failed or is likely to fail and lastly whether the merger will result in the removal of an effective competitor. S 12A(2)(a)–(h).

175 S 12A(1)(a)(i).

analysis, it must be supplemented by the second leg of the assessment that involves an evaluation of public interest considerations.¹⁷⁶ It is in the second leg of the merger assessment that SMEs are particularly relevant. The Competition Act¹⁷⁷ provides that when the competition authorities determine whether a proposed merger can or cannot be justified on public interest grounds, the effect that such merger would have on a closed list of specified public interest grounds, namely: 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 lastly the ability of national industries to compete in international markets, must be considered.¹⁷⁸ Theoretically, the second leg of the merger assessment means that a merger, on the one hand, which poses no threat to competition, can be prohibited if there are substantial public interest grounds that are negatively affected. However, as pointed out by Sutherland and Kemp¹⁷⁹ it is unlikely that competition authorities would in fact prohibit such a merger. On the other hand, an anti-competitive merger can be rescued if there appears to be a positive effect on public interest as a result of the merger.¹⁸⁰ Once again, it is unlikely that competition authorities would in fact allow such a merger.¹⁸¹

Where a merger is proposed, which poses no threat to competition but public interest concerns need protection, it mostly leads to the imposition of conditions on the particular transaction.¹⁸² As highlighted by the Competition Appeal Court (CAC) in *Minister of Economic Development v Competition Tribunal (Walmart/Massmart merger)*,¹⁸³ the inclusion of the public interest factors found in section 12A is intended as a way to reduce the potential harm that may be caused by the

176 S 12A(1)(a)(ii) read together with s 12A(1)(b). This would be so even if the proposed merger is pro-competitive or competitively neutral.

177 S 12A(3).

178 Each relevant public interest ground must be viewed in isolation to determine whether it will be substantially affected by the merger, see Sutherland and Kemp (fn 91) para 10.11 and *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003. This article only focuses on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.

179 Sutherland and Kemp (fn 91) para 10.11.

180 Thus, as put by Sutherland and Kemp *ibid*, “the public interest test, unlike the efficiency defence, possesses a ‘Janusfaced’ quality. It may lead to the rejection of a merger which is not anticompetitive. It can save a merger that would have been rejected on the basis of pure competition criteria”. The Competition Commission’s *Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998* 31 May 2016 as published in GG 40039, 2 June 2016, para 5.5 states that “the Commission could approve an anti-competitive merger if there are substantial merger specific positive public interest grounds that justify the approval of the merger. This requires a balancing of competition and public interest issues and is dealt with on a case by case basis.”

181 *Ibid*.

182 As stated by the Competition Tribunal in *Walmart Stores Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 para 34: “A survey of the merger decisions since the Act came into being shows that in no case has an adverse public interest condemned an otherwise unproblematic merger, nor has a problematic merger from a competition perspective been rescued on public interest grounds. This does not mean that no public interest grounds have been found to exist in a merger context. Rather these have been thought adequately addressed by the imposition of conditions on a particular transaction.”

183 *Minister of Economic Development v Competition Tribunal, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

merger in respect of these factors.¹⁸⁴ The risk may thus be reduced by the inclusion of merger conditions.

In the past, the competition authorities have imposed innovative conditions that give effect to the twin needs of promoting competition and the public interest goals. With regard to the latter goal, and in particular the protection of the interests of SMMEs, the Walmart/Massmart merger¹⁸⁵ serves as an example of where imposed conditions had this effect.¹⁸⁶ Here the Competition Appeal Court¹⁸⁷ had to deal with the direct and particular risks posed by the proposed merger to employment as well as the potential compromise of the ability of SMEs or firms controlled or owned by historically disadvantaged persons to access markets, as a result of the introduction of WalMart's global supply chain into the South African economy. Although the CAC cleared the merger, conditions were imposed to counteract the risks of the merger, particularly those relating to the impact on local producer SMEs and their ability to interact with the global value chain of the merged entity. The CAC thus ordered that the merged entity set up a local supplier development fund, capitalised with R200m over 5 years by Massmart. The court determined that the core objectives of the fund were that national SME's would benefit from integration into the merged entity's supply chain, and by being so integrated, it would be ensured that this sector remains competitive and hence viable, which, in turn, may enhance employment.¹⁸⁸

184 *Idem* paras 12–14, ie where there is no basis on competition grounds to prohibit the merger.

185 See fn 183.

186 Other examples include *Anheuser-Busch InBev SA/NV v SABMiller plc* (LM211Jan16) [2016] ZACT 72 South Africa Competition Tribunal South Africa 4 August 2016 and *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* (LM243Mar15) [2016] ZACT 68 (10 May 2016). The AB InBev/SAB Miller merger was approved by the Tribunal subject to extensive public interest conditions. These related *inter alia* to employment, support for small businesses and emerging farmers through a R1 billion supplier development fund, support for the local procurement of inputs and a requirement to divest of certain operations owned by the target firm (SABMiller) in South Africa.

187 The Competition Commission concluded its investigation of the proposed merger on 2 February 2011 and recommended that the proposed transaction be approved without conditions. See Competition Commission *WalMart/Massmart merger* 73/LM/2010. In 2012, the Competition Tribunal conditionally approved the proposed merger. It found that the merger did not raise any competition concerns, but that there were public interest concerns relating to the potential displacement of small businesses in markets underserved by large retailers as well as employment. The undertakings offered by the merging parties during the hearing were incorporated into the order made by the Tribunal as conditions. For a discussion on these cases, see Mandiriza *et al* "An ex-post evaluation of the Wal-mart/Massmart merger" Working Paper CC2016/03 (2016) available at <http://bit.ly/1L44cqY> (accessed on 1 November 2017). Organised labour (South African Commercial, Catering and Allied Workers Union (SACCAWU) and various government departments intervened and the case was taken to the CAC for adjudication on the grounds that the effect of the proposed merger on employment and local procurement had not been adequately addressed by the Tribunal.

188 As to the scope of the fund CAC stressed that the fund should be targeted and limited as "the success of supply chain development cannot equate to persuading the merged entity to be charitable to local suppliers nor to compel it to purchase from local suppliers, even where the latter transactions make no commercial or financial sense. The purpose of the fund is to ensure that targeted suppliers can be joined successfully to Walmart's global value chain": (fn 183) 24 25.

A recent analysis of the performance of the subsequently established Massmart Supplier Development Fund has found that it has indeed contributed to the achievement of both competition and industrial policy objectives, and as a result, the interests of SMMEs have been protected. As stated in the report, the fund has “facilitated the entry and expansion of SMEs in the agriculture and manufacturing sectors. It has also positively contributed to job creation and local procurement.”

5 CONCLUSION

It is clear that the South African government is committed to the promotion of the small enterprise sector. The stance taken is that the interests of SMEs (which would include the interests of HDIs) need to be protected, and that an enabling environment must be created for them to flourish. This makes sense generally, in the light of their importance for the country as a whole and their contribution to economic development and alleviation of poverty. It also makes sense against the backdrop of the political history of South Africa, where economic development was racially skewed and markets concentrated as result of various apartheid policies enforced by the previous government.

Protection of SMEs extends to the realm of statutory competition law. Their protection is embodied in the public interest considerations of the Competition Act, and more specifically in the provisions relating to exemptions and the regulation of mergers. With regard to mergers, while a delicate balancing of considerations relating to the potential lessening of competition and public interest is required, which no doubt has its own complexities, innovative conditions has had the result that both competition and interests of SMEs have been protected.