HOW THE SOUTH AFRICAN COMPETITION ACT 89 OF 1998 PROTECTS SMALL AND MEDIUM ENTERPRISES.

Dissertation submitted to the faculty of law at the University of Pretoria in partial fulfilment of the degree of Masters of Law (Mercantile Law).

by

MAFUNGWASHE NTAMO

STUDENT NUMBER: **17343543**

SUPERVISOR: **PROF. CORLIA VAN HEERDEN**

31 October 2018

DECLARATION

I, Mafungwashe Ntamo, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution before. Where other people's work has been used, references have been provided and in some cases, quotations are made. In this regards, I declare work as originally mine. It is hereby represented in partial fulfilment of the requirements for the award of the degree of Masters in Law in the Mercantile Law department at the University of Pretoria.

Signature: _____

Date: **31 October 2018**

Supervisor: **Professor Corlia van Heerden**

DEDICATION

To my late father, Mongameli Stoto Ntamo, whom I have no doubt is proud of me where ever he is. To my mom, whose prayers are the reason I am the woman I am today and for reminding that as a Black African widowed mother, the only inheritance she can ever leave me is education. To my brothers, for letting me know that they look up to me, which is what keeps me wanting to reach for new heights. To my kids, Ivile and Msawenkosi, for being my angels and the reason life makes sense to me.

Acknowledgements

I would like to express my gratitude to my supervisor, Professor Corlia van Heerden, for pushing me, for the support and encouragement. Without her constant support, this dissertation and degree would not have been possible. She kept on showing me that I was seeing mountains where there were mole hills. Once I changed the way I looked at things, the things I was looking at, changed, in Dr. Wayne Dyer's words. Prof. you are my hero and inspiration, thank you.

Table of Contents

ACRONYMS AND DEFINITIONS

Act	Competition Act 89 of 1998
ASIG-SA	The Accelerated and shared Growth Initiative
BBBEE	Broad-Based Black Economic Empowerment
CAC	Competition Appeal Court
ISBDS	Integrated Small Business Development Strategy
NIPF	National Industrial Policy Framework
NGP	New Growth Path
OECD	Organisation for Economic Cooperation and Development
SME	Small Medium Enterprises
SMME	Small, Macro and Micro Enterprises
SA	South Africa
The Republic	Republic of South Africa
The dti	the Department of Trade and Industry
UK	United Kingdom
USA	United States of America

1. CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

The South African Competition Act[1] (the Act) is perhaps one of the most liberal and inclusive pieces of legislations in its category. As a result of the apartheid history of South Africa, the legislature always has to be mindful of and safeguard the balancing of interests that may not necessarily always co-exist in harmony. South Africa's exclusion from global markets for many years resulted in the development of an extremely protected economy during the earlier part of the 20th century.[2] The apartheid government's considerable support, including subsidised inputs in industries such as manufacturing and agriculture, together with strict market controls, high tariffs, low levels of foreign direct investment and high levels of government ownership have, over the years, contributed to the creation of a highly concentrated economy.[3] In ordinary terms, this means that in many market sectors, a few large firms held huge market power, measured in terms of their share of the relevant market. The aftermath of this is still evident today, particularly in manufacturing, agriculture and mining where large dominant firms are most active.[4]

The South African Competition Act is unique compared to most of the other Competition Acts globally in that, in addition to the normal goals of competition, i.e, 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[5], it also pursues certain public interest goals. These public interest goals are: the promotion of employment and the advancement of social and economic welfare of all South Africans to 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[6]. This is also the result of South Africa's specific apartheid history and the fact that the government has recognised the significance of an economy that prioritises development.

---

[1] Act 98 of 1998.
[2] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[3] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[4] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[5] S 2(a) (b) (d).
[6] S 2(c) (e) (f).

1.2 THE OBJECTIVE OF THE STUDY

The main objective of this research is to investigate how the Competition Act is achieving or not achieving one its objectives, namely that of protecting small and medium enterprises (SMEs) in the arena of competition, as provided for in its section 2(e) and (f).[7] This is important as the achievement of this objective would be a good indicator of whether SMEs stand a chance to ever participate meaningfully in the South African economy which in turn would contribute toward economic transformation of the Republic. An examination of cases in order to determine what matters have been brought before the Competition Commission by SMEs, how the competition authorities deal with them and the measurement of success in achieving the growth of SMEs thus far, would be a credible indicator of the achievability of this objective of the Act.

1.3 RESEARCH PROBLEM

The research problem that this dissertation will address is the question of how the Competition Act of South Africa protects SMEs as this is one of its objectives.

In this regard, the study will also be investigating the cause of the low and progressively diminishing number of SMEs that have successfully brought or are successfully bringing complaints to the Competition Commission. This number remains low despite indications that SMEs are in fact negatively impacted by anti-competitive conduct of dominant firms and despite the Act specifically providing for support for such enterprises to ensure that they get access to the competition authorities and that they are supported to grow. One of the key questions to be addressed by the research is whether the Competition Act is sufficient as an effective instrument to ease the barriers to growth and expansion of small businesses.

In addressing this question, reference will be made to the recently proposed changes[8] to the Act and whether such changes will assist more SMEs in bringing cases i.e. whether it will provide an “easier” path to address anti-competitive conduct by dominant firms. Some of the merger provisions of the Act will also be examined as one of the areas where the legislature has attempted to protect public interest considerations in order to, inter alia, protect small businesses.

[7] Competition Act 89 of 1998.
[8] Government Gazette notice No. 1345 of 1 December 2017, the Competition Amendment Bill 2017.

1.4 METHODOLOGY

This will be a qualitative desk-top based research project. It will make use of policy documents, legislation, books, journal articles and cases to enable proper research and to motivate eventual findings.

1.5 CHAPTER LAY-OUT

Chapter One is the introduction to the study. Its sets out the background, motivation for the study, the objective of the study, the research problem, research methodology and chapter lay-out.

Chapter Two deals with the objectives of the Competition Act with specific emphasis on public interest. Chapter two gives the background and rationale for the public interest objective and considers whether or not these objectives can be achieved by means of the Act.

Chapter Three entails an in-depth discussion on balancing the substantive competition goal of efficiency and the application of public interest.

Chapter Four examines whether the South African competition policy framework is an appropriate and effective tool to regulate completion in SA with regards to helping SMEs.

Chapter Five has regard to selected comparative jurisdictions and the measures they have implemented for protecting SMEs, if at all, and what lessons they yield for South Africa. This chapter will also contain the conclusions and recommendations pursuant to the study undertaken in this dissertation.

2. CHAPTER TWO: THE COMPETITION ACT AND ITS OBJECTIVES TO PROTECT SMEs.

2.1 INTRODUCTION

Competition legislation in South Africa is to be interpreted primarily in accordance with its Preamble, whose principles are to expand on the rationale of the provisions that follow it. Notably, the Preamble makes particular reference to economic discriminatory practice that was perpetrated by the past regime on racial policy that characterised the political core of apartheid South Africa.[9]

Effectively, there were two separate economies in existence during Apartheid.[10] The economic players, able to navigate and exploit the totality of the national economy, were the small White minority who had at their disposal the most opportunities and capital to grow and to benefit as its exclusive participants.[11] The majority of the nation's citizens were not afforded access to such interaction and the effects of this legally sustained discrimination are still evident today. This segregation of a distinct and substantial section of the population reduced them to the inferior classes of society where they were forced to a lower standard of living with no prospects of escaping and substantially arresting their economic development and growth albeit their desire to participate existed.[12]

The Competition Act 89 of 1998 came into effect on 1 September 1999. Competition law was regarded as the preferred tool to enforce the social welfare imperatives that are the reason behind the creation of public interest policy. Ordinarily, competition law is the mechanism employed so that the government can direct the market to function in a certain fashion, which involves the attainment of normal goals of competition whilst simultaneously encouraging the market to function as uniquely, freely and as openly as possible, according to a more beneficial and socially responsible standard. This mechanism was opted for in designing the South African competition Act as it is viewed as the model with the thinnest barrier between the government and the actual market, and as it further provides for specialised forums where these two force can interact. In

---

[9] Preamble, Competition Act.

[10] Hartzenberg T, *Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa's Competition Policy*, (August 2004), at 6.

[11] Ibid.

[12] Ibid.

these forums, the government has the ability to regulate the markets structure and its activities, to a certain degree.[13]

2.2 THE PREAMBLE TO THE ACT:

The preamble to the Competition Acts states as follows:

The *people of South Africa recognise:*

a) *"That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.*
b) *That the economy must be open to greater ownership by a greater number of South Africans.*
c) *That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.*
d) *That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans".*

In order to –

a) *provide all South Africans equal opportunity to participate fairly in the national economy.*
b) *achieve a more effective and efficient economy in South Africa;*
c) *provide for markets in which consumers have access to, and can freely select the quality and variety of goods and services they desire;*
d) *create greater capability and an environment for South Africans to compete effectively in international markets;*
e) *restrain particular trade practices which undermine a competitive economy;*
f) *regulate the transfer of economic ownership in keeping with the public interest;*
g) *establish independent institutions to monitor economic competition; and*
h) *give effect to the international law obligations of the Republic."*

The wording of the Preamble was carefully selected to include descriptive and emotionally provocative words such as "***unjust"***, to convey the severely immoral foundation on which the Apartheid economic policy was enacted and implemented. These words demonstrate to the reader the seriousness of the degree of change that is now required in order to redress these past 'injustices'.[14]

[13] Ibid.
[14] Kampel (2004a). "The role of South African competition law in supporting SMEs."

Within the preamble, there is a call for effective administrative bodies to ensure the continued existence of this 'new' competition policy, which in its mandate includes the promotion of enhanced mobility and access to all markets by *all* South Africans without political reservations. The call is for consideration to be had to the rights and needs of all participants in the market at all levels, with the ultimate goal of securing positive economic growth and consumer welfare increases by strategically encouraging greater product choice and international commercial interaction.[15] It is from this template of interpretation that the Act will be read therefore to enable an understanding of the magnitude of importance that the public interest provisions are to be afforded.[16]

2.3 THE GOALS OF THE COMPETITION ACT

The goals of the Act, are listed in Section 2, stating that the purpose of the Act *"...is to promote and maintain competition in the Republic in order –*

(a) *To promote the efficiency, adaptability and development of the economy;*

(b) *To provide consumers with competitive process and product choices;*

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

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

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

(f) *To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons...."*[17]

Sub-sections (a) and (b) include the main goals of competition law in most jurisdictions in the world[18], whilst sub-sections (c) to (f) list the additional equity and collective objectives, which are a continuation of the spirit of the Preamble reflecting the social welfare sense. More specifically, these objectives were incorporated into the Act as defined goals in an attempt to prevent the effects of the past injustices from surviving into new South Africa's democratic dispensation and thereafter hampering the progress that was and always will be desperately needed.[19]

---

[15] Kampel (2004a). "The role of South African competition law in supporting SMEs."

[16] Kampel (2004a). "The role of South African competition law in supporting SMEs."

[17] The following sub-provisions of section 2 of the Act have not been included as they are not related to the argument being made in this paper.

[18] These goals form the primary evaluation in any competition matter. Should the conduct that is being investigated be a merger, an abuse of dominance, cartel behaviour etc, be contrary to the promotion of efficiency and who offend against the competitive process through any disruption at all.

[19] This is therefore an indication that the Act has some politically charged rationale behind its creation, in that equity and justice as driving forces have been incorporated into the interpretation and therefore intended application of this legislation.

Subsections 2(e) and (f) arguably seek to maximise consumer welfare by efficiently allocating resources, whilst also incorporating amongst its goals the furthering of certain socio-economic imperatives. This, again echoes government's resolve to include particular public interest policies that reflect the changing socio-economic and political context within which the Act was promulgated.

2.4 SMEs AND MERGER PROVISIONS OF THE ACT

One way that competition legislation helps and protects SMEs is through its provisions on merger control.[20] For the purpose of the Act, a merger occurs when one or more firms establish direct or indirect control over the whole or part of the business of another firm.[21] Those mergers which fall within a predetermined threshold[22], as determined by the Competition Act,[23] need to be notified to the Competition Commission. For the purposes of notification, mergers are classified as either small, intermediate or large, depending on thresholds determined by the Competition Commission.[24] In the event of intermediate[25] merger, notification must be lodged with the Competition Commission[26] and notification fee of R150 000.00 will be applicable. A large[27] merger is notifiable to the Competition Commission[28] and a notification fee of R 500 000.00 becomes payable.

South Africa is often hailed as a success story when it comes to balancing the normal goals of competition law such as efficiency and the public interest considerations which are of greater importance for developing countries.[29] Many competition lawyers believe that the primary objective of competition law regime is to promote "economic efficiency".[30] Fox agrees with this view when she remarks that competition law (antitrust law) is typically a tool

---

[20] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[21] Section 12 of the Competition Act.
[22] The Act provides 3 types of mergers, small intermediary and large. A merger is large – where the greater of the annual turnover or asset value of the target firm is valued at or above R190 million, and where the greater of the combined annual turnover and/or asset value of both the consolidated acquiring group and the target firm is valued at or above R6,6 billion. A merger is intermediate where the greater of the annual turnover or asset value of the target firm is valued at or above R190 million (but does not meet the large merger thresholds); and the greater of the combined annual turnover and/or asset value of both the consolidated acquiring group and the target firm is valued at or above R600 million. A merger is small - where financial values fall below the thresholds pertaining to an intermediate merger.
[23] S11(1)(a) and (b).
[24] Ibid
[25] S11(3)(a)
[26] S13(1)
[27] S11(3)(b)
[28] S15(1)
[29] http//www.npconline.co.za/competition policy review Trudi Hartzenberg, TRALAC 2003 18 September 2013.
[30] Kampel (2004a). "The role of South African competition law in supporting SMEs."

to preserve market competition in order to provide an environment that will encourage the efficiency and responsiveness of business and serve the interests of consumers.[31] In South Africa, however, developmental goals play a pivotal role together with the promotion and maintenance of competition and the right to consider public interest imperatives vest in the competition authorities.

Section 12A (3) of the Competition Act addresses the socio-economic challenges of the past through the public interest assessment in merger proceedings. In summary, section 12A calls for three separate but interrelated inquiries and these are:

(1) Whether or not the merger is likely to substantially lessen or prevent competition;

(2) If the merger is likely to lesson or prevent competition, whether technological, efficiency or other pro-competitive gains will override the negative effect;

(3) Whether the merger can be justified on substantial public interest grounds. This is regardless of whether or not (1) and (2) above are in the affirmative.

The Act specifies that merger assessment should involve consideration of the following substantial public interest grounds in section 12A (3):

"when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on:

(a) A particular sector or region;
(b) Employment;
(c) The ability of small business or firms controlled or owned by historically disadvantaged persons to become competitive; and
(d) *The ability of national industries to compete in international markets".*[32]

The above considerations are prescribed in order to encourage developmental objectives of competition law.

Section 12A(3) is both practical and inclusive of all stakeholders such as trade unions, employees, communities etc. Such a provision is both necessary and must be commended

[31] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[32] Section 12A(3).

because it is in line with the purport and spirit of the South African Constitution whose main objective is to create an environment that is based on equality, dignity and freedom.[33]

Kampel remarks that an opportunity sometimes presents itself where a small business can merge with a large firm allowing it to diversify into other ventures. In recognition of this, the merger process under South African competition law has been made more flexible when it comes to those smaller firms who are acquired by larger firms and enable cash-strapped SMEs relying on the investment of larger companies to grow and therefore compete equitably in the market.[34] This flexibility is important in a context where the government seeks to encourage SME growth and transition up the ranks of the formal sector.

When larger companies merge, structural changes may occur in a market, which consolidates market power in a particular sector in the hands of the merged entity, often to the exclusion of other, smaller competitors. Under the merger provisions, the Act sets out an array of factors to consider determining whether competition in the market will be "prevented or substantially lessened" and therefore whether the merger should be prohibited, approved or approved with conditions.[35]. Under the Act's public interest provisions, the authorities must also consider whether the merger can or cannot be justified on substantial public interest grounds[36]. Thus, in analysing a merger and determining whether it should be approved, prohibited or approved with conditions, the competition authorities are required to balance the competition factors that are commonly accepted by competition authorities globally, against the less commonly considered public interest factors in section 12A(1).[37] In this balancing process, it is conceivable that a proposed merger that has been found to substantially lessen or prevent competition may be approved because the anti-competitive effect is outweighed by the positive impact of the merger on public interest considerations. This then begs the question of whether a merger can actually be approved on public interests grounds alone after having been found to be anti-competitive as evidenced by its failure to clear the competition leg of the test[38]. As much as this is possible in principle, Nzero however argues that there are several factors that make

[33] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[34] Kampel (2004a). "The role of South African competition law in supporting SMEs."
[35] Section 12A(1)
[36] Section 12A(3) provides that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on: a particular sector or region; employment; the ability of small business or firms controlled or owned by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets.
[37] Morphet L. 2007. South African Competition Law and Public interest.
[38] Nzero I, 2017. The implications of public interest considerations in the interpretation and application of the failing-firm doctrine in South African merger analysis, *THRHR*.

it practically impossible for an anti-competitive merger to be approved on purely public interest grounds.[39]

Firstly, he points out that there is no such precedent in South African merger regulation.[40] This shows that the authorities have never approved an anti-competitive merger and will probably not do so. Secondly, the competition authorities have reiterated that although they are statutorily obliged to consider the likely impact of any given merger on substantial public interests, Nzero states that such a mandate must not be construed as placing the latter at the heart of merger assessment.[41] The primary mandate of the competition authorities is to ensure the protection of the competition process.[42] The authorities have shown a commitment to jealously guard the competition process. Alternatively, an otherwise acceptable merger on substantive competition grounds, could be prohibited on its negative public interest effects.[43]

The *Nationwide Poles v Sasol*[44] case that was non-referred by the Commission and subsequently brought to the Tribunal by the complainant himself,[45] dealt with public interest considerations of a merger. Although the Tribunal decision[46] was overturned by the Competition Appeal Court ("CAC"), this is an important case insofar as it concerns the manner in which competition authorities understand and reconcile their dual objectives of promoting economic efficiency and promoting equitable distribution of wealth within the South African economy.[47] Even the CAC in its ruling on the *Nationwide Poles v Sasol* appeal[48] noted the relevance of the remarks of the chairman of the then Korean Competition Advisory Board, Kyu-Uck Lee. Lee stated that in a developing economy where economic power is not fairly distributed, "competition policy must play the dual role of raising power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the

[39] Nzero I, 2017. The implications of public interest considerations in the interpretation and application of the failing-firm doctrine in South African merger analysis, *THRHR*.
[40] Ibid
[41] Ibid
[42] Ibid
[43] Morphet L. 2007. South African Competition Law and Public interest.
[44] Decision of the Competition Tribunal n, case no. 72/CR/Dec03 and CAC decision, case no. 49/CAC/Apr05
[45] According to section 51(1) of the Act, "If the Competition Commission issues a notice of non-referral in response to a complainant, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure."
[46] 72/CR/Dec03 ("Nationwide Poles")
[47] Ncube P and Paremoer T., 2010. Competition policy in SA and small business: A review of enforcement cases.
[48] Ibid.

other".[49] In *Nationwide Poles v Sasol,*[50] the complainant, Nationwide Poles CC ('Nationwide'), was a small producer of treated wooden poles based in the Eastern Cape Province. It procured supplies of untreated pine poles from the sawmills and then impregnates the poles with a wood preservative. The preservative employed was creosote, or, to be more specific, SAK K, the brand name of a wax-additive creosote produced by Sasol. Creosote, produced by Sasol was utilised by its customers for a range of different uses including the treatment of poles. Nationwide Poles brought a complaint that Sasol was charging *Nationwide Poles* a higher price for their purchases of creosote than that charged to their competitors. *Nationwide Poles* approached Sasol for a price list which, after some apparent reluctance on Sasol's part, was furnished. The price list confirmed that the price charged by Sasol for creosote supplied to Nationwide was notably higher than that levied on Woodline, a very large pole manufacturer in the Eastern and Western Cape and Nationwide's most important competitor. It is, indeed, common cause that Sasol's price schedule for the sale of creosote allows for discounts based on purchase volumes, with its largest customers receiving the most preferred prices while its smallest customers, of whom the complainant is one, charged the highest price on Sasol's price schedule.[51]
This case also highlighted many of the elements that are considered as key constraints to the deepening of competitive market structures and, as a result, the limitation of the entry and growth of small businesses in the South African economy.[52]

In its ruling, the Tribunal prefaced its appraisal of the price discrimination complaint on a review of the role of price discrimination in competition law generally and its particular place within the South African economic context.[53] It placed significant emphasis on the policy context within which the South African Competition Act was drafted and the context within which price discrimination should thus be evaluated. In its judgement, the Tribunal took quite bold strides towards developing jurisprudence that puts competition analysis within broader social objectives and emphasised the importance of the role of competition practitioners in interpreting competition law within the context of a broader social, economic and political agenda.[54] The Tribunal went as far as saying that the price discrimination provision was

[49] Judgment of the Competition Appeal Court, 2005. Page 27.
[50] 72/CR/Dec03.
[51] 72/CR/Dec03.
[5252] Ncube P and Paremoer T., 2010. Competition policy in SA and small business: A review of enforcement cases.
[53] Ncube P and Paremoer T., 2010. Competition policy in SA and small business: A review of enforcement cases.
[54] Ncube P and Paremoer T., 2010. "Competition policy in SA and small business: A review of enforcement cases".

borne from recognition that this kind of abuse of dominance would likely be perpetrated against small business[55].

Since the *Nationwide Poles*-case, the Commission has referred and successfully prosecuted various cases lodged by small businesses.[56] Although these cases fall within the ambit of Section 8 of the Act, they still confirmed that small business are likely to be the victims of abuse of dominance by large firms. The successful cases prosecuted by the Commission[57] include the margin squeeze[58] case against Senwes Ltd[59] and the inducement[60] case against South African Airways.[61] In the *Senwes Ltd* case, Senwes Ltd, a company trading grain, referred a complaint to the Competition Commission. The complaint was that, Senwes Ltd, a vertically integrated firm dominant in the market for the storage of grain, abused its dominance in this market. The alleged effect of this abuse was to exclude rivals downstream in the market for the trading of grain, a market in which *Senwes Ltd* operates, but is not dominant. The margin squeeze allegation was that *Senwes Ltd's* inflated grain storage tariffs rendered its downstream trading competitors unable to compete effectively in the market for trading grain.

Although Nationwide, in the *South African Airways* (SAA) case may not be regarded as an SME in the usual sense, Ncube and Paremoer argue that its size and turnover relative to SAA and the other major player in the domestic market at the time, British Airways, qualified it as a smaller player at 6.6% of the relevant market.[62] The *SAA* case decided that anticompetitive effects would be shown in an exclusionary act if *actual harm* to consumer

[55] 72/CR/Dec03 at para 89.
[56] Ncube P and Paremoer T., 2010. "Competition policy in SA and small business: A review of enforcement cases".
[57] Ncube P and Paremoer T., 2010. "Competition policy in SA and small business: A review of enforcement cases".
[58] *Senwes Ltd/Competition Commission of South Africa (87/CAC/Feb09*. Margin squeeze was dealt with by the CAC under the "catch all" exclusionary conduct in S8(c).
[59] The CAC in the *Senwes Ltd* case said a vertical margin squeeze can occur where a firm is dominant in an upstream market and supplies a key input to undertakings that compete with it in the downstream market. In such a situation, the dominant firm has a discretion as to the price it charges for the input and this could have an effect on the ability of the forms to compete with it in the downstream market.
[60] S8(d)(1) it is prohibited for a dominant firm to engage in any of the acts requiring or inducing a supplier or customer to not deal with a competitor, unless the firm concerned can show technological, efficiency or other pro-competitive gains of that act which outweighs the anti-competitive effect. Therefore, inducement is where a dominant firm uses its market power to commit this anti-competitive act.
[61] Tribunal Case Number 18/CR/Mar01.
[62] Ncube P and Paremoer T., 2010. "Competition policy in SA and small business: A review of enforcement cases".

welfare can be shown or if it can be shown that the act forecloses a significant proportion of the market to rivals.[63]

2.5 CONCLUSION

To date, the inclusion of section 2 (e) and (f) in the Competition Act specifically is something that is understood to be uniquely South African and should invoke pride and a spirit of patriotism in any citizen that believes that Apartheid was inhumane, unjust and degrading to the majority of the South African population.

The legislature's intention with the inclusion of the protection of SMEs is indeed noble but the ultimate test is whether it is actually realistic and can protect SMEs and positively promote their growth and sustainability in South Africa. After all these years since the Competition Act came into effect, can SMEs attest to this protection?

As indicated, the Act specifically calls for attention to be directed to SME interests. Therefore, South African competition law is, in theory, SME-friendly insofar as it proclaims to protect SME interests by promoting access to markets as well as acknowledging their rights to participate in the economy.

It appears that the Competition Amendment Bill (the Bill) will further illuminate the protection of SMEs. The Bill provides, under the list of priorities, that special attention must be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons. Positive re-enforcement of the protection of SMEs as part of historically disadvantaged persons is contemplated in clause 7(a) of the Amendment Bill, which will allow all mergers, as opposed to only anti-competitive mergers, to be considered and justified on public interest grounds. This bolsters the legislative intention that all mergers must now be justified on both competitive and public interest grounds to obtain approval.

The amendment to section 12A (clause 7) also seeks to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.

In addition, the proposed amendment to section 15 (clause 9) provides that the Commission may make an appropriate order regarding any condition relating to the merger, including those relating to employment, small businesses and firms owned or controlled by historically

[63] The SAA case set out that anticompetitive effects would be shown in an exclusionary act if actual harm to consumer welfare can be shown or if it can be shown that the act forecloses a significant proportion of the market to rivals.

disadvantaged persons. The amendment to section 16 (clause 10) provides the Tribunal with a similar power. These amendments aim to reflect and consolidate the jurisprudence developed by the Competition Appeal Court and Tribunal recognising the breadth and scope of conditions that can be imposed to creatively address the public interest impact of mergers. The Amendment Bill also increases the powers of the Minister of Economic Development will be empowered to participate in merger proceedings and applications for exemptions, specifically in relation to public interest grounds. In terms of clause 11(1) of the Amendment Bill, the Minister has the right to appeal against any merger decision of competition authorities if it has substantial public interest implications for a particular industrial sector. If signed into law, these amendments may have positive effects for SMEs and consumers.

3. CHAPTER THREE: EFFICIENCY VERSUS PUBLIC INTEREST

3.1 INTRODUCTION

An argument can be made that sound competition policy and effective law enforcement are good for the business community as they help level the playing fields in all markets and sectors as well as increase innovation and efficiency. The argument continues that competition provides firms with strong incentives to be more efficient than their rivals, reduce their costs, and bring new ideas and ways of doing things. Industries characterized by vigorous competition, under most conditions, utilize resources more efficiently, are more innovative and produce more output at lower cost than industries where competitive pressure is weak[64]. This is generally the argument that is used to criticise competition policies and laws, like the South African competition law framework, that focus on public interest considerations. The belief here is that public interest provisions like those contained in section 2 of the Competition Act stifle completion and thwart innovation and that those firms that are closing down, do so because they are not efficient, innovative and cost-effective enough.[65]

3.2 SUBSTANTIVE TEST

The substantive criteria applied in considering mergers include both competition and public interest considerations. The primary concern is whether the merger is likely to substantially prevent or lessen competition. The criteria to be applied by the competition authorities in determining the answer to this question is set out in the Competition Act and include the following[66]:

(a) The level of competition from imports;

(b) The nature of barriers to entry in the particular market;

(c) The level and history of collusion in the relevant market;

(d) The degree of countervailing power enjoyed by other parties in the relevant market;

(e) Whether the merged firm would have market power in the relevant market;

(f) The extent of vertical integration in the relevant market;

---

[64] Lipczynski J and Wilson Jos and Goddard J 2009. “Industrial organization: Competition, strategy and policy.” 3rd ed. Essex: Pearson Education.

[65] Ngobese M. & Chung I. ‘The role of efficiencies in the South African merger control regime’ (2009) 126 *SALJ* 141.

[66] S12 A (2) of the Competition Act.

(g) Whether either of the parties to the merger can be said to be failing;

(h) Whether the merger would lead to the removal of an effective competitor.

If the enquiry finds that the merger will substantially prevent or lessen competition, the authorities must determine whether the merger will result in technological, efficiency or other pro-competitive gains that will be greater than and offset the loss of competition.[67]

Merging parties can raise efficiency, technological or other pro-competitive advantages as a defence against any lessening or prevention of competition. If the anti-competitive effects are offset by other efficiency or pro-competitive gains, an otherwise problematic merger can be rescued, or conversely an otherwise acceptable merger can conceivably be sunk, by the positive effect of the merger on the public interest.[68]

3.3 THE EFFICIENCY DEFENCE

Economic efficiency refers to "*a decision or event that increases the total value of all economically measurable assets in a society or total social wealth*".[69] The 'efficiency defence' recognises the important role of merger control in facilitating the attainment of efficiencies.[70] However, jurisdictions differ in their approaches to efficiencies in mergers. This difference is based on two views. First, there is a general view that efficiency gains are more likely to be achieved in competitive markets.[71] Here the purpose of competition law is to ensure that competitive markets allocate production and consumers purchase products in an efficient manner.[72] Secondly, some jurisdictions recognise the possibility of alternative ways of attaining efficiencies besides preserving competitive markets.[73]

In practice, competition authorities analyse mergers in a 'two-step' approach where the likelihood of substantially lessening or preventing competition by a merger precedes

---

[67] S12A(1)(a)(i) of the Act.
[68] S12A(1)(a)(ii) of the Act.
[69] Joseph F Brodley 'The Economic Goals Of Antitrust: Efficiency, Consumer Welfare, And Technological Progress' [1987] 62 *New York University Law Review* at 1025.
[70] Ngobese M. & Chung I. 'The Role of Efficiencies in the South African Merger Control Regime' (2009) 126 *SALJ* 141.
[71] Ngobese M. & Chung I. *"*The role of efficiencies in the South African merger control regime*"* (2009) 126 *SALJ* 141.
[72] Philip Sutherland 'Steel and Propane: The Efficiency Defence And Horizontal Mergers' (2008) 128 *SALJ* 331 at 342.
[73] Ngobese M. & Chung I. 'The role of efficiencies in the South African merger control regime' (2009) 126 *SALJ* 141.

analysing the efficiencies from the merger.[74] Efficiencies in merger analysis are relevant where a merger is found anti-competitive.[75] Where the effects of the merger are found pro-competitive, generally no further inquiry is made and the merger is approved.[76] The rationale for this two-step approach is first, that competition authorities will only undertake analysing efficiencies when necessary since it is difficult to identify and quantify efficiencies.[77] Second, it is based on the supposition that only the parties to the merger have better access to information pertinent to an efficiency claim.[78]

3.4 TYPES OF EFFICIENCIES

There are four categories of efficiencies, namely dynamic efficiency, production efficiency, pecuniary efficiency and allocative efficiency.

Dynamic efficiencies are efficiencies in innovation that develop efficient production processes, introduce new products, use resources, product and service quality.[242] Dynamic efficiencies are difficult to analyse because they are difficult to calculate, verify and generalise because the presence of market power can either promote innovation or hinder it.[79] Innovation through dynamic efficiency is described as being the 'most important determinant for long-term economic growth' and it is argued that 'innovation and diffusion of new products and technologies' is one of the significant results that effective competition should realise.[80]

Production efficiencies are economic cost saving efficiencies in production processes that allow firms to produce more or better quality output from the same amount of input.[81] Savings in cost of production through economies of scale and specialisation are first: efficiencies in purchasing, distribution, advertising, capital raising, complementary

---

[74] Organisation for Economic Co-Operation and Development "Competition Policy and Efficiency Claims in Horizontal Agreements". Available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018.

[75] Ibid.

[76] Organisation for Economic Co-Operation and Development "Competition Policy and Efficiency Claims in Horizontal Agreements". Available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018, at 6.

[77] Ibid.

[78] Ibid.

[79] Organisation for Economic Co-Operation and Development "Competition policy and efficiency claims in horizontal agreements". Available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018.

[80] Wolfgang "Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law". Available at *http://poseidon01.ssrn.com/delivery.php?*

[81] Ibid.

resources and research and development.[82] In addition, savings derived from transaction costs through integrating previously external functions.[83] Lastly, savings derived from the transfer of superior production techniques and knowledge.[84]

Pecuniary efficiencies result from merged entities gaining greater bargaining power and having lower input costs.[85] Although they are easier to measure compared to other efficiencies, Sutherland and Kemp state that they are not considered real savings in resources and are less favoure' and should not form the basis of an efficiency defence' because they only lead to a redistribution of resources. [86]

Collectively, allocative efficiencies are realised through allocating existing stock of goods and productive output through the price system to purchasers who are willing to pay or to forego other consumption.[87]

3.5 WELFARE STANDARDS

Economic welfare is the measure that aggregates the welfare of different groups of market participants in an economy.[88] These different groups of market participants are measured in two main categories, consumers and producers, through analysing consumer, producer and total surplus.[89] Crampton explains that consumer surplus is the difference between what consumers collectively pay for a product in a market and the value that each consumer is willing to pay over the actual price.[90] Producer surplus is the difference between the price that producers collectively receive for their products in a market and the sum of the producers' respective cost in the increase or decrease in making one extra unit of a product at each level of output.[91] Total surplus is 'the sum of

---

[82] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 339-40.

[83] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 342.

[84] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 342.

[85] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 342.

[86] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 342.

[87] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers". (2008) 128 *SALJ* 331 at 340.

[88] An Renckens "Welfare standards, substantive tests, and efficiency considerations in merger policy: Defining the efficiency defense" (2007) 3 *Journal of Competition Law and Economics* 149 at 152.

[89] Paul S Crampton 'Alternative Approaches to Competition Law Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals' (1993) 17 *World Competition.*

[90] Paul S Crampton 'Alternative Approaches to Competition Law Consumers' Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals' (1993) 17 *World Competition*.

[91] Ibid.

producer surplus and consumer surplus'.[92] Welfare standard is the welfare that a competition authority seeks to maximise when balancing the aggregate welfare of consumer and producer surplus.[93] This part will assess the different types of welfare standards and how these standards relate to efficiencies.[94]

3.5.1. Total Surplus Standard

The total surplus standard "*does not consider consumer or producer interests"* it merely measures the "*total gain by society"* against the "*total loss by society"* and if positive the merger will be approved.[95] Ngobese and Chung remark that under the total surplus standard, the weight to consumers and producers is considered equal; therefore shifting a rand from consumers to producers has "*neutral effects*" on a merger.[96] They comment that a merger can be approved where consumers were worse off post-merger than premerger and the merger results in gains to the producers that outweigh losses to consumers or the merger resulting in price increase or harmful effects to consumers.[97]

Under the total surplus standard, the purpose of competition law is not to promote efficiency but it is argued that *"the promotion of competition does not take place at the expense of efficiency, especially as efficiency also forms the rationale for the promotion of competition""*.[98] The rationale behind the total surplus standard is that 'money is circulated in the economy, it is irrelevant who holds it, as money is of the same value in anyone's hands producers could be consumers on the next level'.[99] Further, Ngobese and Chung point out that under the total surplus standard the efficiencies generated may

---

[92] Ibid.

[93] 93 An Renckens 'Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense' (2007) 3 *Journal of Competition Law and Economics* at 153.

[94] The price standard is also considered as a type of welfare standard where a merger is prohibited if it results in post-merger price increases. However, as highlighted by Reckens op cit note 252 at 155, it is uncertain whether efficiency gains are considered in mitigating the effect on prices. Therefore, this paper will not analyse this standard since its core focus is on benefits from efficiency gains.

[95] Ngobese M. & Chung I. "The role of efficiencies in the South African merger control regime" (2009) 126 *SALJ* 141.at 142.

[96] Ibid.

[97] Organisation for Economic Co-Operation and Development 'Competition Policy and Efficiency Claims in Horizontal Agreements' available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July at 6.

[98] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" Mergers' (2008) 128 *SALJ* 331at 349.

[99] Ngobese M. & Chung I. 'The role of efficiencies in the South African merger control regime' (2009) 126 *SALJ* 141.at 142.

be beneficial to consumers in a different market to the relevant market where the anti-competitive effects of the merger are felt.[100]

The total surplus standard requires calculating a range of possibilities in relation to the elasticity of demand for the relevant product and the anticipated price increase.[101] This standard is therefore difficult to apply since it involves calculation of a range of probabilities whose values are unknown.[102]

In *Commissioner of Competition v Superior Propane Inc.,* the Competition Tribunal of Canada applied the total surplus standard in merger review. According to the aforesaid Tribunal, when market power results in price increase of a product, allocative efficiency is reduced since consumers acquire less of the product and switch to lower valued substitutes.[103] Productive efficiency is also reduced because output falls and economic resources are diverted to the producing substitutes due to less consumption of the product.[104] An increase in the product price means loss in consumer surplus as compared to paying under competitive prices.[105] Loss in consumer surplus is first realised by the firm and its shareholders in the form of increase in profits.[106] The Canadian Competition Tribunal interpreted such loss as 'not a social loss, but rather a redistribution of gains from the merger; real resource use is not affected by this transfer of income'.[107] Loss in consumer surplus may result in 'deadweight loss' which is a social loss consisting of 'the remaining loss of consumer surplus, beyond that realised by the shareholders in the form of increased profits'.[108] This deadweight loss measures "*the allocative and technical inefficiency*" caused by the exercise of market power and accordingly it represents the economic effect of the merger[109].

---

[100] Ngobese M. & Chung l. "The role of efficiencies in the South African merger control regime" (2009) 126 *SALJ* 141.at 143.

[101] Organisation for Economic Co-Operation and Development "Competition Policy and Efficiency Claims in Horizontal Agreements" available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018 at 6.

[102] Organisation for Economic Co-Operation and Development "Competition Policy and Efficiency Claims in Horizontal Agreements" available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018 at 6.

[103] Ibid.

[104] Ibid.

[105] Ibid para 424.

[106] Ibid.

[107] Ibid.

[108] Ibid para 425.

[109] Ibid

Sutherland remarks that under the total surplus standard 'efficiencies need only exceed the deadweight loss to save an anti-competitive merger'.[110] According to the Canadian Competition Tribunal, the total surplus standard 'addresses solely the effects of a merger on economic resources' and not "*whether shareholders will be better off at the expense of consumers, but rather whether the economy gains more resources than it loses through the transaction"*.[111] The aforesaid Tribunal preferred the total surplus standard because the Canadian Competition Act not concerned with distributional concerns in mergers and using this standard allowed predictability in merger review.[112] Notably, the Tribunal interpreted the underlying purpose of the Canadian Competition Act as maintaining and encouraging competition in order to promote efficiency.[113] It accordingly indicated that the statutory means of achieving this purpose was through encouraging competition while the desired end was efficiency.[114] In case of a conflict between competition and efficiency, the Tribunal held that the latter will prevail allowing an anti-competitive merger to be approved.[115]

3.5.2 Consumer Surplus Standard

Crampton states that under the consumer surplus standard, competition is viewed as "*an end itself rather than a means to attainment of the paramount goal of wealth maximisation*".[116] The consumer surplus standard requires efficiency gains to be substantial and it aims to ensure that mergers will not result in wealth transfer from consumers to producers leaving consumers worse off post-merger than premerger.[117] Efficiencies must be substantial to enable profit maximisation not resulting in price increase post-merger.[118] However, the consumer surplus standard not only focuses on

---

[110] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331 para 427.

[111] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331 para 430.

[112] *Commissioner of Competition v Superior Propane Inc (2002) 18 CPR.* supra note 268 para 432-33.

[113] Ibid para 412. S 1.1 of the Competition Act of Canada provides 'the purpose of this Act 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.'

[114] Ibid para 412.

[115] Ibid.

[116] *Commissioner of Competition v Superior Propane Inc (2002) 18 CPR* at 62.

[117] Ngobese M. & Chung L. 'The Role of Efficiencies in the South African Merger Control Regime' (2009) 126 *SALJ* 141at 145.

[118] Ngobese M. & Chung L. 'The Role of Efficiencies in the South African Merger Control Regime' (2009) 126 *SALJ* 141.

price reduction post-merger, but it also accounts for non-price benefits.[119] Under this standard a merger is prohibited once it is found anti-competitive and it cannot proceed by merging parties showing that efficiencies outweigh the resultant anti-competitive effects.[120] Actually, efficiencies under the consumer surplus standard must be shown to "*reverse*" the anti-competitive effects that are likely to arise without them.[121]

Under the consumer surplus standard, the competition authority is concerned with the likelihood of achieving the claimed efficiencies, failure of which the economy will be burdened with an anti-competitive merger.[122] The higher the level of concentration of the relevant market, the greater the concern of not achieving efficiencies or, if achieved, not being passed on to consumers. In analysing efficiencies, the recommended approach is the 'sequential approach' where a low concentration level is assumed for mergers that do not pose competitive concerns and there is no need for taking efficiencies into account. [123] With a high concentration level, the assumption is that efficiencies will not be taken into account and mergers will not be approved if they are anti-competitive.[124] Where a merger falls between these concentration levels, efficiencies are determined on a factual basis where they can only impact if the anti-competitive effects of a merger are limited but significant enough to require that the merger be prohibited if no efficiencies were to result.[125] In the consumer surplus standard there is need for exercise of discretion by competition authorities to determine the threshold at which efficiency gains will not be considered since it may be difficult to agree on such.[126] A consumer surplus standard is thus driven by 'the protection of competition, and not the achievement of distributional goals'.[127]

The consumer surplus standard is used by the European Commission Merger Guidelines.[128] Under the European Union guidelines on horizontal mergers, the European

---

[119] Ngobese M. & Chung I. "The role of efficiencies in the South African merger control regime" (2009) 126 *SALJ* 141.at 147.

[120] Ibid.

[121] Ibid.

[122] Ibid at 148.

[123] Ibid at 148. The other approaches are a 'cases-by-case' approach which although being the most accurate method, it is the most costly and time-consuming. The other approach is general presumption approach, which uses indicators such as HHIs or market shares.

[124] Ibid.

[125] Ibid.

[126] Ibid at 150-51.

[127] Ibid.

[128] European Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)' available at

Commission recognises the benefits of effective competition as including innovation. The Commission prevents mergers from depriving consumers of the benefits of effective competition through a firm's significantly increasing market power.[129] The Commission interprets increase in market power as referring to producer's market power and including "*increase prices, reduce output, choice or quality of goods and services [and] diminish innovation"*.[130]

3.5.3 Balancing Weight Standard

The balancing weight standard considers the distributive effects of mergers where the benefit to producers is compared to the loss suffered by consumers.[131] As explained by Sutherland, this benefit to producers is attributed to greater efficiency and redistribution from consumers.[132] In contrast, the loss suffered by consumers is attributed to both the redistribution of surplus to producers and the inability of consumers to purchase a product due to price increase and reduction in output produced resulting from market power increased by the merger.[133] A "*balancing weight*" is attached to the loss suffered by consumers that balances it with the benefits of the merger to producers[134]. The competition authority will thereafter determine whether the weight attached to the interests of consumers is equal to or greater than the balancing weight., If it is indeed the case then the merger should not be allowed on efficiency grounds.[135]

The balancing weight standard is therefore premised on the distribution effects of a merger that gives greater weight to consumers.[136] This standard has been criticised as presuming that consumers are a homogenous group and does not consider other related markets in the merger.[137]

---

http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN accessed on 28 August 2018.

[129] Ibid.

[130] Ngobese M. & Chung I. 'The role of efficiencies in the South African merger control regime' (2009) 126 SALJ 141.at 146. European Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)' available at *http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN* accessed on 28 August 2018.

[131] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331at 349.

[132] Ibid.

[133] Ibid.

[134] Ibid

[135] Ibid.

[136] Ibid.

[137] Ibid.

The Appeal Court in Canada applied the balancing weight approach in reversing the appeal from the Canadian Tribunal judgement in *Canada (Commissioner of Competition) v. Superior Propane Inc.*[138] In *this case* the Appeal Court interpreted the effects of preventing or lessening competition under subsection 96(1) of the Canadian Competition Act as not exclusively focusing on the objective of promoting competition where loss is restricted to deadweight loss.[139] The Appeal Court interpreted the effects of preventing or lessening competition as including the *"other statutory objectives to be served by the encouragement of competition that an anti-competitive merger may frustrate, such as the ability of medium and small businesses to participate in the economy, and the availability to consumers of a choice of goods at competitive prices"*.[140] The Appeal Court was further reluctant to accept that parliament would allow an anti-competitive merger to proceed regardless of raising prices provided that its efficiencies exceeded the resulting loss of resources to the economy.[141] It held that the balancing weight approach was "*more reflective*" than the total surplus standard of the different objectives of the Competition Act'[142]

3.6 THE TRADE-OFF

However, South Africa has a well-established interpretation and implementation addressing the trade-off between public interest provisions and efficiency. Interpretation of the merger laws in South Africa illustrate engaging an exercise of proportionality required to determine how to balance the competing arguments between efficiency and public interest.[143]

---

[138] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331at 349. *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A*.) 2001 FCA 104, [2001] 3 F.C. 185.

[139] Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute". Canada (Commissioner of Competition) v. Superior Propane Inc., [2003] 3 FCR 529, 2003 FCA 53 (CanLII) at para. 13.

[140] *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A*.) para 105.

[141] Ibid para 122.

[142] Ibid para160-61.

[143] To quote the South African Competition Commission, Official Newsletter – Competition News (September 2015): "*[…] while competition promotes consumer welfare by enhancing efficiency, promoting innovation and leading to wider product choice and better quality, it also facilitates a more even spread of ownership and development of small businesses by promoting access and reducing barriers to entry to markets. Strengthening competitive pressures in the economy acts to lower entry barriers, which enables the creation and expansion of small businesses and in turn facilitates the introduction of new technologies. As such, South Africa's competition policy and law are important policy tools to complement government's policies to promote small businesses*."

Section 12A (1) (i) of the Competition Act of South Africa provides that where a merger is likely to substantially prevent or lessen competition, the Competition Commission or Tribunal must then determine:

> *"whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented".*

The South African approach to efficiencies was analysed by the Competition Tribunal in *Trident Steel Limited/ Dorbyl Limited*.[144] The Tribunal first noted that the efficiency provision at the time was adopted from section 96*(1)* of the Canadian Act.[145] Section 96*(1)* of the Canadian Act was further interpreted to mean that a merger can 'both lessen competition and create efficiencies and that a proper enforcement policy should seek to maximise overall efficiency in the economy'. The Tribunal further noted that section 96 *(1)* of the Canadian Act was influenced by US economist Oliver Williamson's hypothesis known as the *Williamson trade-off*.[146]

The Williamson trade-off argues that *"cost efficiencies would be far greater than the social losses resulting from increased economic power, a relatively small cost reduction would offset a relatively large price increase thereby making society indifferent to the merger*".[147] The Williamson trade-off has accordingly been linked to the total surplus standard.[148] In determining whether a merger can be justified based on dynamic or production efficiency, a major concern is the conflict between production or dynamic efficiency and allocative efficiency, as alluded to above. The Williamson trade-off seeks to balance increase in production efficiency and allocative inefficiencies in a merger.[149] According to the Williamson trade-off, a merger may lead to welfare loss by increasing market power and allocative inefficiency in the form of a dead weight

---

[144] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00.

[145] The Tribunal quoted section 96 (1) as 'The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

[146] Ibid.

[147] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00 at 42-3.

[148] Organisation for Economic Co-Operation and Development 'Competition Policy and Efficiency Claims in Horizontal Agreements' available at *http://www.oecd.org/competition/mergers/2379526.pdf* accessed on 14 July 2018 at 5.

[149] Wolfgang Kerber "Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law".

loss.[150] On the other hand, the merger may achieve a welfare gain by increasing production efficiency.[151] According to the Williamson trade -off, economic calculation often shows that welfare gain through production efficiency will exceed the loss by allocative inefficiency.[152]

In *Trident Steel Limited/ Dorbyl Limited* the Tribunal addressed analysed competition efficiencies under five issues, namely: [153]

- 'The onus of establishing the efficiency gain?
- The types of acceptable gains?
- How the offset or trade-off between the competitive loss and the efficiency gain is calibrated?
- Whether the gain needs to be passed on to the consumer?
- Whether the efficiency is merger specific?'

3.6.1 Onus

According to the Competition Tribunal, the onus of establishing the efficiency defence rests on the merging parties.[154] This is because identifying and quantifying post-merger efficiencies at the pre-merger stage is difficult.[155] Further, the parties to the merger, in contrast to the competition authorities, are best placed to provide information on efficiencies.[156]

3.6.2 Whether the efficiency is merger specific?

The tribunal interpreted the words 'would not likely be obtained if the merger is prevented' to mean the efficiencies must arise *as a result of* the merger.[157] The efficiency defence fails "*if the efficiencies could come about through some other legal arrangement or organisational form that is not a merger, or if one of the firms could*

---

[150] Deadweight loss "results from the fall in demand for the merged entities' products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute". *Canada* (*Commissioner of Competition*) *v. Superior Propane Inc.,* [2003] 3 FCR 529, 2003 FCA 53 (CanLII) at para. 13

[151] Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331at 344.

[152] Ibid.

[153] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00 para 49.

[154] *Trident Steel (Proprietary) Limited/Dorbyl Limited Case No.: 89/LM/Oct00* para 51. According to the Competition Tribunal, Canada and US also follow rest the onus on the merging parties.

[155] Ibid.

[156] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00

[157] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00*,* para 76.

achieve a claimed efficiency on its own, could arise from a legal arrangement or organisation that is not a merger".[158]

3.6.3 Whether the gain needs to be passed on to the consumer?

The Tribunal recognised that a merger will be anti-competitive where there is wealth transfer from consumers to producers.[159] According to the Tribunal, the issue of the credibility of the claims that efficiency gains will be passed on, is pertinent.[341] It criticised the requirement of passing on efficiency gains as a prerequisite to an efficiency defence as "*a price control remedy"* and indicated that 'it is not appropriate for the regulator to become a price setter'.[160] However the Tribunal stated that:

"We propose the following test – where efficiencies constitute "real" efficiencies and there is evidence to verify them of a quantitative or qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship. The more compelling the former the less compelling need be the latter".[161]

The Tribunal thus adopted an inverse relationship between real economies and benefit to consumers in determining whether the benefit of the efficiency should pass through to the consumer. According to the Tribunal, where efficiencies are "real", evidence that it benefits consumers is less compelling.[162] However, evidence of a passing on to consumers is required where the efficiency 'demonstrates less compelling economies'.[163] The issue is however, the type of efficiencies that fall within the concept 'real' and demonstrates less compelling economies.[164]

The Tribunal referred to real efficiencies as being dynamic efficiencies and production efficiencies ranging from plant economies of scope and scale to research and development efficiencies that might not be achieved without a merger.[165] The Tribunal

---

[158] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00, para 76.
[159] Ibid para 68.
[160] Ibid para 75.
[161] Ibid para 81.
[162] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00
[163] Ibid.
[164] Ibid.
[165] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00, para 81.

interpreted the efficiency provision under the South African Competition Act as differing from the Canadian Act due to the inclusion of the words "*technological or other pro-competitive gain*".[166] It further applied the *eiusdem generis*[167] interpretation of the words "*technological gain*" to mean dynamic efficiencies while "*other pro-competitive gain*" was interpreted to constitute real economies, which does not include "*mere pecuniary gains*".[168]

The Tribunal thereupon justified the dynamic nature of competition law in South Africa with reference to the purpose of the Competition Act of South Africa under section 2 (a) which is "*to promote the efficiency, adaptability and development of the economy*".[169] It stated that efficiencies that "*demonstrates less compelling economies*" can be interpreted to include pecuniary efficiencies or efficiencies that would "*result in a mere redistribution of income from the customers, suppliers or employees to the merged entity*".[170]

3.6.4 Measuring the trade-off

The Tribunal interpreted the Competition Act as requiring efficiency gains to be 'greater than' and 'offset' the anticompetitive effects as 'presupposing a weighing process which suggests that efficiencies must be capable of measurement as opposed to broad speculative assertions'.[171] The Tribunal thus adopted a two-step approach to analysing efficiencies in mergers namely: first, to verify efficiency gains quantitatively and thereafter establish how the efficiencies trade-off against loss to competition.[172] The second step is analysing the likelihood of efficiencies.[354]

In verifying efficiencies, Sutherland indicates that the Tribunal has been criticised as simplifying the process from the more established total and consumer surplus standards to a formulaic and flexible approach.[173] The Tribunal however referred to the

---

166 *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00, para 81.

167 Eiusdem generis is the modification of meaning which happens when the initial meaning of the text does not correspond fully to the purpose of the legislation.

168 *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00 para 78.

169 Ibid para 78.

170 Ibid para 81.

171 Ibid para 63.

172 *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00.

173 Philip Sutherland "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *SALJ* 331and 173 Mfundo Ngobese & Linda Chung 'The Role of Efficiencies In the South African Merger Control Regime' (2009) 126 *SALJ* 141 at 146. European Commission 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C

total surplus standard as 'formulaic' where 'one has to approach the problem as an economist would do in a classroom demonstrating Williamson's trade-off'.[174] According to the Tribunal, the main advantage of using the total surplus approach is that efficiencies and losses to competition are quantified and calculated therefore upon substantiating the numbers the outcome is definitive.[175] However, the Tribunal remarked that problem with this approach is that losses and gains are difficult to calculate since they are not always quantified and measured by the same units. Further, market power effects may result in price increase by other firms understating the loss to consumers.[176]

The flexible approach on the other hand entails that 'the competition adjudicator relies on its discretion rather than an equation'.[177] The competition authority can however only exercise its discretion under the flexible approach once a formulated policy approach has been established to guide it in its evaluation.[178] The Tribunal noted that this approach created some uncertainty since parties may not know in advance whether their claims of efficiency will be accepted. [179] The Tribunal nevertheless settled for the flexible approach which it conceded 'may be criticized for giving the competition authority too much discretion at the expense of business certainty'. However it did not favour the formulaic approach as it found that the formulaic approach 'permits an approach so clinical and rigid that it would reduce the proper exercise of a discretion to a matter of *calculus'*.[180]

3.7 CONCLUSION

In a country like South Africa, with its dark and painful history of Apartheid, laws and policies are not just needed to ensure that there is a rule of law. All government institutions and efforts need to point towards reconciliation and redressing the injustices of the past, and this applies to its competition policies as well.

31/03)' available at *http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN* accessed on 28 August 2015.

[174] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00, para 63.

[175] *Trident Steel (Proprietary) Limited/Dorbyl Limited* Case No.: 89/LM/Oct00, para 65.

[176] Ibid para 65.

[177] Ibid para 66.

[178] Ibid.

[179] Ibid.

[180] Ibid para 82.

It would not have been enough for the competition legal framework to only regulate the normal competition concerns, because it specifically needed to protect the historically disadvantaged individuals that were the victims of Apartheid and help them gain easy entry into the economic landscape that they had been deliberately kept out of. That is why public interest provisions are a very important part of our competition legal framework.

However, not everybody would agree with this view, especially those that stand to benefit from the *status quo*. They would use defences like the efficiency defence to argue that competition must be left to self-regulate in a free market environment where those that conduct their businesses efficiently will survive competition pressures and those who do not efficiently conduct their businesses will not. The advocates of this latter view conveniently forget that those businesses that are efficient most probably received unfair advantage under Apartheid. This is why it is pivotal for the public interest considerations to only be strengthened in our law and not done away with.

4 CHAPTER FOUR: THE ROLE OF COMPETITION POLICY AS THE MORE SUITABLE MECHANISM TO ACHIEVE THE OBJECTIVE OF THE ACT.

4.1 INTRODUCTION

The South African Competition Act does not seek to protect competition for its own sake but, as reflected in the objectives of the Act, does so in order to promote the development of the economy, more equitable participation, and wider ownership especially by historically disadvantaged persons[181]. It does this by restraining certain trade practices, assessing and prohibiting mergers which substantially prevent or lessen competition, and prosecuting firms that seek to abuse positions of market power to the detriment of competition, economic efficiency and consumers. Furthermore, the explicit provisions regarding the evaluation of public interest concerns that may arise from merger transactions are, by design, a means towards linking competition law with the greater socio-economic development agenda of the country. Specifically, these provisions seek to protect employment, strategic industrial sectors or regions in the context of industrial policy, and small or medium-size businesses and particularly those owned by previously disadvantaged groups.

Competition policy can be defined as a set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society.[182] Competition is "detrimental to society" if it does not achieve the policy objective of economic welfare to society.[183] Therefore, competition policy may sometimes concern itself with public interest considerations more than economic efficiency. Competition policy should not be about defending competitors but more about promoting public interest and fair competition.

A literature review conducted by the World Bank Group shows that competition policy reforms allow markets to work more efficiently for the benefit of consumers and drive sustainable economic growth.[184] Three main insights emerge: Greater market competition matters for achieving greater innovation, productivity, and economic growth.[185] Policies that help open up markets and remove anti-competitive regulations can promote competition,

---

[181] Preamble to the Act and Section 2 of the Competition Act 89 of 1998
[182] Motta M, Competition Policy: Theory and practice. Cambridge University Press, 2004
[183] Ibid
184 Markus Kitzmuller & Martha Marinez Licetti: "Competition Policy: Encouraging Thriving Markets for Development", View Point Public Policy for the Private Sector Series, No 331, Finance and Private Sector Development Vice Presidency, The World Bank Group, 2013.
[185] Ibid

resulting in lower prices and better deals for consumers and firms. This creates a clear connection with helping SMEs as they will benefit from fair competition practises and growth in the economy. Therefore, effective enforcement of competition rules across sectors, rather than the pure existence of competition laws, makes a difference in the impact of competition policies[186].

The practical problems encountered by SMEs before the competition authorities are symptomatic of SMEs position in the economy at large. It is recognized that competition policy can only assist SMEs within the framework of a broader, workable government policy vis-à-vis small business. Fundamental issues need to be addressed such as access to resources and facilitating and incentivising SMEs' to mobilize and consolidate themselves.

4.2 THE POLICY FRAMEWORKS - NATIONAL LEVEL

The thrust of transformative legislation in South Africa has its roots in the Bill of Rights in the Constitution. Section 9(2) stipulates that the right to equality includes the full and equal enjoyment of all rights and freedoms by people irrespective of their race, gender and related profiles .[187] The Bill of Rights provides that to achieve this objective, legislation that provides preferential rights to previously disadvantaged individuals may be promulgated to justify and ensure the same.[188] The effect of the provision was a number of Acts passed to provide substantive and procedural regulations that various stakeholders can invoke to achieve the aforesaid objective regarding equality. Thus, the constitutional imperative of an inclusive society ushered in the crafting of the *White pape*r of 1995 facilitating the development of t small businesses[189]. Notably Mushangai comments that, the transition to democracy in South Africa happened at the time when the neo-liberal thinking was dominating following the collapse of the USSR and the Berlin Wall with scholars such as Fukuyama at the global level celebrating the victory of neo-liberalism in his *End of History and the Last Man.* Such an environment casted a long shadow over South Africa's emerging developmental policies.[190]

---

[186] Markus Kitzmuller & Martha Marinez Licetti: "Competition Policy: Encouraging Thriving Markets for Development", View Point Public Policy for the Private Sector Series, No 331, Finance and Private Sector Development Vice Presidency, The World Bank Group, 2013.

[187] Dandira Mushangai. 2015. "Does the state disable small businesses? AcCritique of Hernando de Soto. University of the Witwatersrand".

[188] Dandira Mushangai. 2015. "Does the state disable small businesses? AcCritique of Hernando de Soto. University of the Witwatersrand".

[189] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.

[190] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.

The SME policies in South Africa have thus been largely informed by the 1995 *White Paper on national strategy on the development and promotion of small business*[191]. The *White Paper* evoked the need for the creation of an enabling legal framework by the government to facilitate access to information, access to finance, affordable infrastructure and to boost procurement (White paper 1995).[192] All of this was anchored on the RDP philosophy and principles as a national framework to remedy the legacy of Apartheid and its attendant effects of marginalisation based on race.[193]

In order to put into effect the provisions of the RDP (1994) and the 1995 White Paper strategy, the *National Small Business (NSB) Act*[194] was passed in 1996 in which stipulations pertaining to the sector were built into the *Broad Based Black Economic Codes of Good Practice.*[195] The objectives of the *National Small Business* Act were specified as follows: " *to provide for the establishment of the Advisory Body and the Small Enterprise Development Agency; to provide guidelines for organs of state in order to promote small enterprises in the Republic; and to provide for matters incidental thereto*"[196] This resulted in the setting up of agencies for the purpose of facilitating the development of SMEs which were then distributed across five government departments namely: the Presidency, the Department of Agriculture, the Department of Science and Technology (DSE), the Department of Trade and Industry (DTI) and the Department of Economic Development (DED).[197]

4.2.1 The Institutional Agencies

A number of institutional agencies had been set up since then to facilitate the realisation of capital formation in South Africa through the propping up of small scale enterprises.[198] Amongst these, was the National Youth Development Agency (NYDA) of 2009, the Small Business Development Agency (SEDA) of 1996, the National Empowerment Fund (NEF) of 1996, the National Small Business Advisory Council (NSBAC) of 2006, Khula Finance Ltd

---

[191] White Paper on National Strategy for the Development and Promotion of Small Business in South Africa. WPA/1995.
[192] Ibid.
[193] Ibid
[194] National Small Business Act, No. 102 of 1996.
[195] *Broad Based Black Economic Codes of Good Practice*. Available at https://www.thedti.gov.za/economic_empowerment/docs/Inside.pdf. Accessed on 21-11-2018 at 12h00. It was first published by the Department of Trade and Industry in 2007.
[196] National Small Business Act, No. 102 of 1996.
[197] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[198] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.

(1996) and the Micro Agricultural Financial Institute of South Africa (Mafisa).[199] The role of the Industrial Development Corporation (IDC) was also reaffirmed. Despite other things, the central focus of the government policies, programmes and schemes have been to stimulate and "prop up" small business development in South Africa by ensuring access to financing, technology, affordable infrastructure and the acquisition of the requisite skills. These agencies established after the demise of the Apartheid system were informed by the White Paper of 1996 which found effect through the National Small Business Act of 1996,as alluded to above.[200]

4.2.2 The Integrated Small Business Development Strategy (ISBDS).

The White Paper of 1996 manifests itself well in the *Integrated Small Business Development Strategy for 2005-2014*[201]. The ISBDS aims at increasing the financial and non-financial support to SMEs, creating demand for SMEs products and services and at reducing the regulatory constraints[202]. The *Integrated Small Business Development Strategy* is a summary and correction of the errors and limits which came out of the evolution of small business support frameworks and institutional arrangements based on the *Review of Ten Years of Small Business Support*.[203] The strategy noted that, the great diversity of small enterprises and their needs have to be given greater recognition, that there has to be more knowledge and understanding across the full range of support suppliers as to what support each one is providing, as well as to whom and under what conditions.[204] The strategy raised concern that, many support programmes at offer only tackle the symptoms of deeper-lying problems thereby preventing a more systematic approach to those structural issues (e.g. access to finance for black entrepreneurs)[205]. As a strategy, it also seeks to clarify the roles and responsibilities of different levels of the public sector and to impact on their coordination and effectiveness.[206]

---

[199] Ibid
[200] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[201] DTI. *The Integrated Small Business Strategy 2004-2014*. DTI. Pretoria. South Africa.2005.
[202] DTI. *The Integrated Small Business Strategy 2004-2014*. DTI. Pretoria. South Africa.2005.
[203] DTI, Review of 10 Years of Small Business Support in South Africa: 1994-2004, 2004. It summarises the weaknesses and strategy gaps that became apparent over the years after the White Paper.
[204] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[205] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[206] Ibid

In addition, the ISBDS seeks to improve representation of small-enterprise-interest groups in existing or evolving business associations so as to improve feedback on specific needs[207]. It noted with concern that, there are still substantive differences in the capacity to absorb small-enterprise-support programmes in the different provinces and regions of the country and in different sectors and expressed dissatisfaction about the insufficient interaction between small-enterprise-support programmes and other thrusts of the government's socio-economic development support[208]. The ISBDS review (2010) ended by concluding that the decade (1994 to 2004) has revealed an inability on the part of the Centre for the Promotion of Small Business (the DTI chief directorate) to coordinate all the support programmes developed by different national government departments for small enterprises, thorough regular monitoring and evaluation of the evolving support processes have been lacking.[209] As pointed out by Mushangai, it was this diagnosis that determined the nature and composition of the *Integrated Small Enterprise Development Strategy* presenting a framework for action from 2004 to 2014.[210]

4.2.3 The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014

This Framework revolves around three pillars aimed at unlocking the potential of South African entrepreneurs.[211] Pillar 1, targets the promotion of entrepreneurship under which it is intended to strengthen national awareness about the critical role of entrepreneurship, promote alternative focus on ownership, expand franchise opportunities, strengthen business associations and networks, information, research, monitoring and evaluation[212]. Pillar 2, puts emphasis on the creation of enabling environments around which the following will be observed: to maintain small business sensitive regulations, improve access to finance, strengthen access to markets via procurement, exports and business linkages, facilitate the availability of business infrastructure and premises, and increase the effectiveness of enterprise support[213]. Pillar 3, is aimed at enhancing competitiveness and capabilities at the enterprise level by strengthening of managerial, business and technical

[207] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[208] Dandira Mushangai 2015, Does the State Disable Small Businesses? A critique of Hernando de Soto". University of the Witwatersrand
[209] DTI. *The Integrated Small Business Strategy 2004-2014*. DTI. Pretoria. South Africa.2005.
[210] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[211] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[212] The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014.
[213] The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014.

skills, facilitating improved quality, productivity and competitiveness[214]. It also supports technology transfers, incubation and the commercialisation of business services. The strategy is further centred on the expansion of SME-focused support strategies, information, research, monitoring and evaluation[215].

The Integrated Strategy has been designed to address the needs and development potential of the whole small-enterprise sector, which includes micro, small and medium-sized enterprises but with special focus on the previously disadvantaged groupswhich remain hindered by the burden of South Africa's dual economy.[216] It noted that, 'South Africa is still burdened by a dual economy in which established --- white-owned businesses have greater access to resources and opportunities than black-owned businesses'.[217] Further, the ISEDS noted that small businesses often find it more difficult to penetrate new markets.[218] To dismantle this dualism in the economy, the framework seeks to address market failures that exist in particular segments of small enterprises and the degree to which these segments create opportunities to support the government's special development goals and the viability of suitable instruments to government in order to impact on these segments.

4.2.4 The National Industrial Policy Framework (NIPF of 2007)

The National Industrial Policy Framework was constituted in order to contribute towards the South African government's goals for year 2014 and beyond. It envisions the promotion of a broad-based industrialisation path characterised by greater levels of participation of historically disadvantaged people and marginalised regions in the mainstream of the industrial economy.[219] Notably, the NIPF is not isolated from other policies and frameworks but rather complements these other constitutions. It stated clearly that it has adopted and extended the same methodology as ASGI-SA (discussed below) and that it is not a new policy direction but a logical evolution of government economic policy, all of which is inspired

[214] Ibid.
[215] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto'. University of the Witwatersrand.
[216] The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014
[217] The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014
[218] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Sot'o. University of the Witwatersrand.
[219] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.

by the principles of the Reconstruction and Development Programme. Of importance is the solution proposed for the challenges of integrating the second economy.[220]

In its section entitled *The NIPF and the Second Economy*, the framework points as one of its solutions, the promotion of SMEs by assisting people to become entrepreneurs[221]. This includes both the creation of new enterprises that in turn generate formal jobs, and the 'graduation' of certain viable informal enterprises to formal businesses[222]. Further, the NIPF just like ASGI-SA, takes the Broad-Based Black Economic Empowerment as an integral part of policies to integrate the Second Economy into the industrialisation processes[223].

4.2.5 The Accelerated and Shared Growth Initiative (ASGI-SA 2006)

ASGI-SA is another crucial strategy in the promotion of the SMEs in South Africa. As a strategy, it hinges on the need to reduce unemployment and poverty by 'eliminating' constraints identified in the regulatory environment for small and medium-sized businesses. It prioritises the small, macro and micro enterprises in its interventions. It noted that the 'two economies' remains a "searing human issue" and a cause for concern about our economic sustainability, emphasising that:

"South Africa has a highly unequal economy in which people with access to wealth experience the country as a developed modern economy, while the poorest still struggle to access even the most basic services. The differences in conditions between the two are so stark that they appear to be worlds apart – giving the notion of, 'two economies' resonance. --- Certain key legacies of apartheid make this inequality deeply structural".[224]

Some of the key legacies of the Apartheid system to be addressed are identified namely, the centralised monopoly structure of South Africa's core economy, the "spatial legacy of Bantustans" and Apartheid cities and the highly skewed distribution of assets (including land, capital and human capital). It concluded that "the concept of the 'Second Economy' is used to describe this economic marginalisation, and the poverty and social alienation that characterise it".[225]

---

[220] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[221] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[222] National Industry Policy Framework 2007
[223] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.
[224] The Accelerated and shared Growth Initiative (ASIG-SA 2006)
[225] *The Accelerated and shared Growth Initiative (ASIG-SA 2006)*

As part of the interventions to address the challenges of the second economy, the ASGI-SA proposes the need for providing greater recognition and legitimacy to the informal sector, to improve conditions and returns in the marginal economic activities. It envisages that this would include "*clear rules*" of the game to reduce their risks and vulnerability to abuse; to facilitate access to storage and ablution facilities, as well as services such as electricity supply.[226] It also proposes support to forms of co-operation and organisation to reduce their costs and increase their 'voice.'[227] It further identified the need to support technological advancement to fast-track increased access to financial services through savings products, cash transfers, and access to micro-credit and to incremental housing finance to enable home-based enterprise activity; enable greater SME participation and employment creation; transformation and achieving stronger advocacy capacity and giving a "voice" to small producers and new entrants within informal sectors.[228]

4.2.6 The New Growth Path (NGP) 2011

Like the former policies and frameworks, the New Growth Path realised the importance of the enforcement of the Competition Act 89 of 1998, enterprise development - promoting small business and entrepreneurship and eliminating unnecessary red tape and the importance of the BBBEE (discussed below) in integrating the economy.[229] It noted with concern that government has adopted the position that black economic empowerment should seek to empower *all* historically disadvantaged people rather than only a small group of black investors'.[230]

4.2.7 The Broad Based Black Economic Empowerment (BBBEE)

In pursuit of equality as enshrined in the South African Constitution, the government of South Africa developed a number of documents to stimulate the empowerment project.[231] Amongst these is The Strategy for Black Based Economic Empowerment (March 2003), The *Broad Based Black Economic Empowerment Act (Act 53 of 2003)* and the *Codes of Good Practice* which provides an explanation of the approach to be adopted by the government in the

---

[226] Ibid
[227] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[228] The Accelerated and shared Growth Initiative (ASIG-SA 2006)
[229] Competition Act 89 of 1998.
[230] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[231]Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

measurement of the BBBEE compliance by all business entities in South Africa.[232]As adopted by the South African government, the BBBEE implies the promotion of black people in the ownership and control of the means of production. Among other things, it seeks to promote empowerment through procurement sourced from the qualifying Broad Based Black empowered enterprises and enterprise development through the provision of financial and operational assistance to such enterprises. [233]

4.2.7.1. The objectives of the BBBEE[234]

The BBBEE has a number of set objectives which include the promotion of economic transformation in order to enable black people to participate meaningfully in the economy, the achievement of substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.[235] It aims at increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manages existing and new enterprises.[236] It also aims at increasing access to economic activities, infrastructure and skills training.[237] Further, the BBBEE targets the promotion of access to finance for BEE, the application of preferential procurement and investing in the enterprises that are owned or managed by black people. It also calls for the promotion of rural communities in development policies and programmes. All of these are deemed necessary to promote black people which means African, Indian, and Coloured persons[238]

The most important components of the BBBEE touch on direct empowerment (centred on management and ownership) human resource development (skills development and employment equity) and indirect support (involving enterprise support, preferential procurement and residual support). With regards to the SMEs, the last one is of greater importance.[239] Preferential procurement would promote BBBEE through the allocation of preferential scores to enterprises with higher BBBEE contributions.[240] This is, deemed to be an effective way of creating market access for small businesses belonging to black people in an environment characterised by extreme monopolies. Code 500 of the BBBEE codes

[232] Dandira Mushangai. 2015. “Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand”.
[233] Ibid
[234] Dandira Mushangai. 2015. “Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand”.
[235] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)
[236] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)
[237] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)
[238] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)
[239] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)
[240] The Broad Based Black Economic Empowerment Act (Act 53 of 2003)

outlines principles to be observed in the determination and measurement of the level of affirmative procurement.[241] The BBBEE entrepreneurs will further be supported through assistance in the creation, and enhancement of the entrepreneurs' operational and financial skills.[242] It also aims at synergising financial and non-financial services in boosting entrepreneurship by black persons.[243]The BBBEE Code 600 outlines the principles applied when determining the level of enterprise development.[244] The residual element recognises other factors that may also boost Black people entrepreneurialism and this is dealt with under Code 700.[245] The pronounced interventions have, the small, micro, and medium enterprises owned and controlled by black people as their beneficiaries.[246]

4.3 GAUTENG SME POLICIES

Gauteng's policies on small enterprise development have largely been determined by the national priorities namely: to facilitate black empowerment, to be achieved through the extension of financial and non-financial support in a way that would have the effect of altering the structural defects in the South African economy thereby facilitating greater inclusion and equality.[247] The *Gauteng Enterprise Propeller Act No. 5 of 2005* was enacted to facilitate the provision of financial and non-financial support to the SMEs and co-operatives in Gauteng province.[248] It ha, long term socio-economic goals, the most crucial being the creation of employment, development of sustainable businesses and poverty alleviation.[249]

The Act was also meant to enhance the participation of SMEs in the mainstream economy and aimed at reinforcing synergistic partnerships with business, the academia and government. The Gauteng Enterprise Propeller Act has led to the initiation of a number of projects with the aim of boosting the growth of the small scale enterprises.[250] Amongst these, is the 20 Prioritised Township Programme (20 PTP Programme) which seeks to empower the small scale enterprises by improving their premises, fittings, fixtures, equipment among

---

[241] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[242] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[243] Ibid
[244] Ibid
[245] Ibid
[246] Ibid
[247] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[248] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[249] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".
[250] Ibid

other things.[251].Those selected receive business mentorship and training support under their Gauteng Plato Mentorship Programme.[252] As envisaged, this mentorship programme would provide the small scale businesses with the platform to learn business expertise on how to handle business challenges and the establishment of support networks for the purpose of facilitating the sharing of ideas by the owners of these businesses.[253] The *Gauteng Enterprise Propeller Act of 2005* has also pioneered the *Township Business Renewal Programme,* an investment programme with the focus on developing township businesses to effectively compete on the market[254].

Gauteng as a province is not entirely independent of the national frameworks, but works within the ambits of the national frameworks such as the New Growth Path of 2011. It seeks to reinforce the targets of employment creation as commandeered by the NGP.[255] Whilst the New Growth Path of 2011 had set itself a target of achieving a growth rate of creating 5 million jobs (7% per annum) by 2020, the Gauteng Enterprise Propeller had set itself a target of 1,5 million jobs by 2020 and 150 000 per year. To meet this target, the small scale businesses are seen as the cornerstone of the whole project.[256]

Further, the *Gauteng Employment and Development Strategy* is also in line with the dictates of the NGP and defines its strategic focus as the provision of integrated support services to SMEs to ensure their sustainability. It emphasised that, 'we expect to assist more SMMEs through partnerships which should bring more resources and technical industries and sector skills for the benefit of SMMEs'[257]

Recently the Gauteng premier, David Makhura in his 2014 *State of the Province Address* launched the *Gauteng Ten Pillars of Radical Transformation* (2014) in which small businesses were articulated as the motor power of growth and development in the achievement of the long term goals of equity and social economic justice. The premier poignantly stated that, 'We start this term of the 5th administration with a tremendous sense of historic obligation --- to effect radical socio-economic transformation in the country' and that the

---

[251] Dandira Mushangai. 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

[252] Dandira Mushangai 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

[253] Ibid

[254] Ibid

255 The New Growth Path has also committed itself to building a social economy. However, as noted by Satgar and Williams (2011), this happened at a time when these social formations had been hijacked by elitism, corruption and patronage.

[256] Gauteng Enterprise Propeller Act No. 5 of 2005

[257] Dandira Mushangai 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

province will take steps to make Gauteng an 'integrated city-region characterised by cohesion and economic inclusion'.[258] To achieve this, Gauteng province will have to revitalise and mainstream the economy by supporting the development of township enterprises, co-operatives and SMEs that will produce goods and services that meet the demands of the township residents[259]. The *Ten Pillars of Radical transformation* is in line with the BBBEE programme and noted the need for the provincial and municipal governments to boost employment and economic inclusion by ensuring that 75% of their goods and services are procured from South African producers especially the SMEs and township enterprises.[260]

4.4 CONCLUSION

A policy which affords some protection to SME complainants wanting to approach the competition authorities and/or participate in merger or enforcement proceedings free of intimidation should be invoked. A good case can be made for lobbying for a victimization provision to be included in the Competition Act. This should allow for equivocal, decisive and swift follow up recourse and would go a long way towards encouraging SMEs to participate in the competition enforcement.

Fundamentally, the competition authorities need to encourage SME trade or sector associations, as in other countries, to not only bring complaints on behalf of SMEs, but also to ensure a presence in merger and restrictive practice hearings, thereby consolidating their might behind and raising the profile of individual SME complainants. The bringing of complaints by networks of SME organizations, would lend credence to and fortify allegations of harm to the competitive process. SMEs desperately require the ability to access and galvanize the requisite legal skills and financial resources, which assistance should be comprehensive and sustained. The presence of this support would undoubtedly address many of the practical problems, obviate threats of intimidation, remove unreasonable time delays and relieve interpretation and evidentiary difficulties, ultimately making the Act more "user friendly" for SMEs.

No doubt all these policy issues will play themselves in coming years and it will be telling to see how the competition tribunal addresses them. Sometimes however, it is useful to go back to those goals that were espoused in the beginning.

---

[258] Dandira Mushangai, 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

[259] Dandira Mushangai, 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

[260] Dandira Mushangai, 2015. "Does the state disable small businesses? A critique of Hernando de Soto. University of the Witwatersrand".

5 CHAPTER FIVE: APPROACH BY OTHER JURISDICTIONS: UNITED KINGDOM AND UNITED STATES OF AMERICA.

5.1 THE UNITED STATES OF AMERICA (USA)

In the, it seems like competition law or antitrust law, is primarily used as a measure to preserve market competition in order to provide an environment that will promote the efficiency and responsiveness of business and serve the interests of consumers. The USA designed its antitrust or competition law to procure efficiency and squeeze out older concerns of inequity[261]. In the United States, public interest considerations in mergers has mainly focused on the media and banking sectors respectively[262]. With the exception of these two sectors, there does not seem to exist any public interest considerations in the USA. Public interest in media merger cases in the US is based on the notion of freedom of speech and the press and its importance for democratic rule[263].

5.2 UNITED KINGDOM (UK)

The most prominent aspect of the UK merger provisions is the independence of the Office of Fair Trading and the Competition Commission from the Secretary of State in its decision-making process[264]. In the UK, competition analysis in merger applications are carried out by specialist competition authorities, primarily by the Secretary of State for Trade and Industry and this is limited to: National Security, which includes public security; Plurality of media and Stability of the UK financial system[265]. The reason why the merger analysis is targeted at the above industries is that these are regarded as being of paramount to the state economy and well-being of UK[266].

Media's independence is important for maintenance of free and fair dissemination of information and for that reason, it should be preserved save for the limited intervention

---

[261] Eleanor M. Fox, Equality, Discrimination and competition Law: Lessons from and for South Africa and Indonesia, 41 *Harvard International Law Journal* 579 (2000).

[262] TN Njisane, Y. 2011 The rise of Public Interest: Recent high profile mergers. Public Interest Law Gathering. 1-24.1

[263] Martin Mgiba, The role of section 12 A (3) of the Competition Act to bring into effect the objectives of the Act of addressing social and economic problems and past inequalities through public interest assessment in merger proceedings, 2015

[264] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

[265] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

[266] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

by the secretary of state for Trade and Industry. The analysis focuses on the competition effects of the relevant merger. The Competition authorities' powers are limited to assessing competition issues in all mergers unless 'relevant or special merger situations'[267] arise[268].

In addition to the above right to intervene by the Secretary of State in relevant or special merger situations, in terms of chapter 2 of the Enterprise Act 2000, the Secretary of State has the power to add new public interest considerations when the need arises and this is how the 'stability of the UK financial system' came into being in 2008[269]. Considering how important the financial services sector is and how negatively the instability in this sector can be to the economy, the Enterprise Act 2000 was amended to include the finance sector in public interest considerations.[270]

In September 2008, Lloyds TSB and Halifax Bank of Scotland were allowed to merge into the Lloyds Banking Group where public interest considerations superseded objections by the UK Office of Fair Trading based on competition grounds, in that the merger could substantially lessen competition when it comes to personal current accounts, banking services for SMEs and mortgages. The Secretary of State used his powers under section 42 of the Enterprise Act to create new public interest ground, which was 'maintaining the stability of the UK financial system' and used this ground to circumvent the Competition Commission from blocking it on competition grounds. This demonstrated that the benefit of the merger resulting in the stability of the UK financial system outweighed any anti-competitive effect of such merger[271].

5.3 CONCLUSIONS

Presence of proper infrastructure to protect competition is significant for the survival and growth of SMEs in a free market. This is because SMEs could be vulnerable to competition law abuses particularly by large dominant enterprises that may resort to strategies to

---

[267] Ibid. Special mergers situation arises when a merger may lead to two or more enterprises ceasing to exist or the creation and/or enhancement of at least a 25% share of the supply of any good or service or is in a substantial part of the UL Post-merger. In such cases, the Secretary of State issues a notice of intention to intervene, specifying the public interest considerations to be investigated.

[268] Section 43 of the Enterprise Act 2000

[269] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

[270] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

[271] TN Njisane, Y. 2011. "The rise of Public Interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

eliminate smaller competitors from the market in order to further strengthen their position. SMEs could be harmed by anti-competitive conduct in various ways be it in their capacity as competitors, buyers, or even as suppliers. For instance, consorting between large producers of raw materials could affect the prices and/or supplies of inputs required by SMEs. Large incumbent firms with enough resources at their disposal may charge prices below cost (predatory pricing) with an intention to restrict the ability of small competitors to compete.

SMEs can approach the CCI to request an inquiry against firms indulging in potentially anti-competitive practices, which the CCI is obligated to investigate (and penalize if the violation of the law is found). In fact, SMEs (any aggrieved party) can also claim compensation for losses incurred as a result of practices that are found to be in contravention of competition law. An effective competition law, therefore, is critical to prevent large businesses from creating artificial barriers to entry or limiting market access thereby enabling SMEs to enter and participate freely in the market.

As a result of the apartheid history of South Africa, there are a number of key areas with which government should focus their attention. It is crucial that government sees promotion of market related outcomes as vital to ensuring employment and poverty alleviation. This can be done through concentrating their efforts on promoting small businesses, encouraging foreign direct investment and allowing market forces to provide for employment opportunities. Linking with this is that the South African government must continue its approach to preserving the credibility of competition policy, through advocating the independence of the Competition Authorities.

So far, evidence seems to indicate that not nearly enough SMEs are taking advantage of the protection afforded to them by the Act. Bolder interpretation and application of the Act's objectives in this regard by the Competition Commission in a way that results in the process of investigation and dispensing with these cases not being too costly or lengthy might be a way to give them courage and means to more SMEs to approach the Commission and even going further to the Tribunal of the Competition Appeal Court (CAC).

Government should therefore re-evaluate the funding model of the Competition Commission to find one that allows it to be funded from the administrative fines and in that way self-funding and/or that and maybe restructure the Commission so that there is a division in the Competition Commission that focuses on prioritising small and medium enterprise complaints.

5.4 REFERENCES

1. Acts

Competition Act 89 of 1998

Competition Act of Canada of 1985.

Constitution of the Republic of South Africa Act 108 of 1998.

2. Articles

Crampton, Paul S "Alternative approaches to competition law consumers" Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals' (1993) 17 *World Competition* 55.

Dabbah, Maher M "Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime" (2010) 33*World Competition* 457.

Dandira Mushangai 2015, "Does the state disable small businesses? A critique of Hernando de Soto". University of the Witwatersrand.

Lipczynski J and Wilson Jos and Goddard J 2009. "Industrial organization: Competition, strategy and policy." 3rd ed. Essex: Pearson Education.

3. Books

Brassey, Martin (ed) *Competition Law* (2002).

Buttigieg, Eugene, *Competition Law: Safeguarding the Consumer Interest, A Comparative Analysis of US Antitrust Law and EC Competition Law* (2009).

Dabbah, Maher *International and Comparative Competition Law* (2010).

Minette Neuhoff et al, *A Practical Guide to the South African Competition Act*, (2017).

Motta, Massimo, *Competition Policy Theory and Practice* 12th Edition (2009).

Sutherland, Philip and Kemp, Katharine, *Competition Law of South Africa Service Issue 18* (2014).

4. Cases

Commissioner of Competition v. Superior Propane Inc., 2000 Comp. Trib. 15

Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.), 2001 FCA 104, [2001] 3 F.C. 185.

The Minister of Economic Development vs Wal-Mart Stores Inc, Massmart Holdings Limited in SACCAWU and Massmart Holdings Limited Case No: 110/CAC/Jul11, 111/CAC/Jun1.

Trident Steel (Proprietary) Limited and Dorbyl Limited Case No: 89/LM/Oct00.

5. Journals

Nzero I, 2017. The implications of public interest considerations in the interpretation and application of the failing-firm doctrine in South African merger analysis, *THRHR*

Brodley, Joseph F. "The economic goals of antitrust: Efficiency, consumer welfare, and technological progress" [1987] 62 *New York University Law Review* 1020.

Elzinga, Kenneth G "The goals of antitrust: Other than competition and efficiency, what else counts?" (1977) 125 *University of Pennsylvania Law Review* 1191.

Fox, Eleanor M "Economic development, poverty, and antitrust: The other path" (2007) 13 *Southwestern Journal of Law and Trade in the Americas* 101.

Fox, Eleanor M "Equality discrimination, and competition law: Lessons from and for South Africa and Indonesia" (2000) 41 *Harvard International Law Journal* 579.

Ngobese, Mfundo & Chung, Linda "The role of efficiencies in the South African merger control regime" (2009) 126 *South Africa Law Journal* 141.

Renckens, An "Welfare standards, substantive tests, and efficiency considerations in merger policy: Defining the efficiency defense" (2007) 3 *Journal of Competition Law and Economics* 149.

Sutherland, Philip "Steel and Propane: The efficiency defence and horizontal mergers" (2008) 128 *South Africa Law Journal* 331.

3. Websites

TN Njisane, Y. 2011 "The rise of public interest: Recent high profile mergers. Public interest law gathering". *1-24, www.africamlii.org on 17 October 2018*.

Trudi Hartzenberg, 2003 http//www.npconline.co.*za/competition policy review*, TRALAC. Accessed on 18 September 2018.

Organisation for Economic Co-operation and Development “Competition Law and Policy in South Africa: An OECD Peer Review OECD Global Forum on Competition Peer Review: Paris”, 11 February 2003. Available at *http://www.oecd.org/competition/globalforum/GlobalForumFebruary2003.pdf*

Organisation for Economic Co-Operation and Development “Competition Policy and Efficiency Claims in Horizontal Agreements”. Available at *http://www.oecd.org/competition/mergers/2379526.pdf*. Accessed on 1 September 2018.

Organisation for Economic Co-Operation and Development “Remedies in merger cases 2011”. Available at *http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf*.