

**THE IMPACT OF OVERLY CONCENTRATED AND
UNTRANSFORMED MARKETS ON SMALL AND MEDIUM SIZED
ENTERPRISES: SURVIVAL OF THE FITTEST**

by

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Glory be to God.

SUMMARY

Today, South Africa still has one of the most concentrated economies worldwide and this is as a result of its dire past. South Africa is a new society built on a foundation of freedom and democracy; a developing country with first-hand stumbling blocks. The economy still demonstrates the repercussions of the Apartheid regime. Consequently, various measures have been implemented such as the Competition Act 89 of 1998 and its supporting policies for the purpose of fundamentally transforming the economy; calculatedly attempting to correct the structural imbalances and past economic injustices.

In understanding the implications of South Africa's existing economic structures, this dissertation will contain a brief history of the economic dimensions of the past as well as how the legacy of the historical economy of concentration and ownership is still evident today. Furthermore, it will critically discuss the relevant provisions governing competition in support of Small and Medium Sized Enterprises (SMEs) in South Africa. The main aim is to evaluate whether the already existing competition legislation and competition authorities are sufficiently performing their roles in relation to SMEs and the challenges encountered. Moreover, it will focus on the impact imposed by the persisting high levels of concentration and untransformed ownership in the market economy. In final deliberation, the dissertation will incorporate recommendations that may possibly assist SMEs to prolong their participation in the economy as well as how legislation and competition authorities can facilitate that.

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Chapter 1: Background

1.1 Introduction

SMEs are also referred to as 'small businesses' and are defined as a separate and distinct business entity that is managed by one owner or more, which is predominantly carried on in any sector or subsector of the economy and are categorized as either micro-, very small, a small or medium sized enterprise.¹ SMEs play an extremely significant role in the South African economy. They can be regarded as a catalyst for economic growth, innovation and job creation.² These enterprises contribute significantly to the Gross Domestic Product (hereinafter referred to as 'GDP') of a country and have proved to be major contributors to job creation.³ Hence, most governments throughout the world focus on the development of the SMEs sector to promote economic growth.⁴ South Africa has an extremely high SMEs failure rate and this is caused by various internal and external factors.⁵ To a large extent the level of competition and potential competition also influences the market potential and growth opportunities of SMEs.⁶ Developing countries have motioned the necessity to implement and make use of competition law not only to traditionally promote efficiency and consumer welfare, but to also promote and encourage the development of SMEs.⁷

In South Africa, the development of SMEs is important due to the structure of the economy, entailing high levels of concentration and the existence of conglomerates

¹ Section 1(xv) of the National Small Business Act of 102 of 1996.

² T Tulus "Development of SME in ASEAN with reference to Indonesia and Thailand" (2008) 20(1) *Chulalongkorn Journal of Economics* at 54.

³ Department of Trade and Industry (DTI) Small, Medium and Micro Enterprises (SMME) report (2008).

⁴ For instance Vietnam, Thailand and Indonesia. Also see T Tulus "Development of SME in ASEAN with reference to Indonesia and Thailand" (2008) 20(1) *Chulalongkorn Journal of Economics* at 62.

⁵ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4(5) *African Journal of Business Management* at 729.

⁶ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4(5) *African Journal of Business Management* at 732.

⁷ EM Fox "Equality discrimination and competition law: lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 579.

in several sectors, such as mining and manufacturing sectors.⁸ Although these are vital challenges for small business development, they are far beyond the standard challenges that SMEs face.⁹ The political transition that was made by the new South African government in 1994 inherited an economy that presented not only racial inequality but also several uncompetitive sectors and high levels of concentration.¹⁰ The government was tasked to implement laws capable of economic development favourable for the 'new South Africa'¹¹, to allow those that were discriminated-against to participate in the economic activities.¹² The current South African law and policy encourages extensive actions to redress economic imbalances throughout society.¹³ Hence this imposed a great challenge on the government to ensure the implementation of adequate competition law and policy according to the South African economic context.¹⁴

The South African economy is predominantly occupied by monopolies and oligopolies¹⁵, implying that there are a relatively small number of firms that dominate in markets, which lowers the level of competition.¹⁶ A simplified understanding of competition entails that there is rivalry among competitors who have a market share,

⁸ T Hartzenberg "Competition policy & promoting competition for development on competition law and policy in developing countries" (2006) 26 *North Western Journal of International Law and Business* at 669.

⁹ T Hartzenberg "Competition policy & promoting competition for development on competition law and policy in developing countries" (2006) 26 *North Western Journal of International Law and Business* at 669.

¹⁰ C Smit "The rationale for competition policy: a South African perspective" Biennial Economic Society of South Africa Conference, 7-9 September 2005 available at: https://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf (accessed 3 February 2017) (hereinafter referred to as 'C Smit "The rationale for competition policy: a South African perspective" (2005)') at 1.

¹¹ Organization for Economic Cooperation and Development "Competition law and policy in South Africa competition policy foundations", Peer Review, 2003 at 14.

¹² EM Fox "Equality discrimination and competition law: lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 580.

¹³ EM Fox "Equality discrimination and competition law: lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 580.

¹⁴ C Smit "The rationale for competition policy: a South African perspective" (2005) at 4.

¹⁵ RP Viljoen states in his textbook that the main characteristics of a monopoly are when 'there is only one manufacturer or seller of a product, there are no close substitutes for the product, and there are obstacles that impede other participants' entry to the market'. Furthermore, he stipulates that a characteristic of an oligopoly is that 'the market is dominated by a few big firms and that there is usually a great deal of interdependence between the firms'. The interdependence of firms refers to the extent to which the actions of one firm are influenced by the actions of other firms. See *Macroeconomics* (1998) at 157 & 200.

¹⁶ C Smit "The rationale for competition policy: a South African perspective" (2005) at 4.

sales volumes and most importantly, profits.¹⁷ Competition is important because, it amongst other things, promotes allocative and productive efficiency and recently, dynamic efficiency. Allocative efficiency pertains to the allocation of resources whereas productive efficiency refers to the ability of the firm or market to produce maximum output with the least possible resources.¹⁸ Furthermore, dynamic efficiency pertains to innovation, research and development, the creation of technology and higher inputs.¹⁹ Bork argues that this understanding enjoins the courts to exercise balance gains in the productive use of resources and possible losses in the efficiency in the allocation of resources.²⁰ According to Sutherland and Kemp, competition law remains ideological; it is buffeted by the forces of politics and this often creates inconsistencies.²¹

1.2 The history and development of Competition Law

The first form of legislation governing competition law in South Africa was the Regulation of Monopolistic Conditions Act 24 of 1955.²² However, its enforcement was seen to be ineffective.²³ Consequently, a commission of inquiry, called the Mouton Commission was appointed to draft a report on the possibility of new legislation.²⁴ The Mouton Commission acknowledged the importance of competition issues and encouraged the enactment of the Maintenance and Protection of Competition Act in 1979 as well as the establishment of the Competition Board.²⁵ Nevertheless, the mechanism that was entrenched in the Maintenance and Protection of Competition Act failed to address the high rate of anti-competitive and

¹⁷ M Neuhoff *et al A Practical Guide to the South African Competition Act* (2nd ed 2006) (hereinafter referred to as 'Neuhoff') at 45.

¹⁸ GT Gundlach & D Moss "The role of efficiencies in antitrust law: Introduction and overview" (2015) 60(2) *The Antitrust Bulletin* at 93.

¹⁹ GT Gundlach & D Moss "The role of efficiencies in antitrust law: Introduction and overview" (2015) 60(2) *The Antitrust Bulletin* at 93-94.

²⁰ DA Crane "The Tempting of Antitrust: Robert Bork and the goals of antitrust policy" (2014) 79 *Antitrust Law Journal* at 851.

²¹ P Sutherland & S Kemp, "Competition law of South Africa", Lexis Nexis Butterworths (loose-leaf service issue 15), (hereinafter referred to as Sutherland & Kemp) at 1-3.

²² D Prins & P Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law Democracy and Development* at 138.

²³ D Prins & P Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law Democracy and Development* at 138.

²⁴ D Prins & P Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law Democracy and Development* at 139.

²⁵ Sutherland and Kemp at 3-32.

there was a lack of adequately competent officers to deal with such competition matters.²⁶

Thereafter, the Department of Trade and Industry (hereinafter referred to as 'DTI'), with the purpose of creating new legislation, conducted a three-year-long project, consulting with the relevant experts and parties to create a new competition policy framework in 1995.²⁷ The African National Congress (hereinafter referred to as 'the ANC') created a general policy framework namely, the Reconstruction and Development Programme (hereinafter referred to as 'RDP') and its macro-economic strategy for Growth, Employment and Redistribution (hereinafter referred to as 'GEAR').²⁸ During apartheid, the South African minority owned and ran all business enterprises of any significant size; and the majority were, according to the law, prohibited from participating in the economy, with the result that markets became highly concentrated.²⁹

The objectives of the RDP were to reduce or completely eliminate the prejudicial effects of excessive economic concentration and conglomerates, collusive practices, and the abuse of dominance by firms.³⁰ The ANC introduced policies dealing with antimonopoly, antitrust and mergers, that were on an equal standing with international norms and practices.³¹ These policies were introduced to govern monopolies and the continued domination of firms, as well as to promote greater efficiency in the private sector.³² In addition to competition law promoting economic goals, it had to fulfil, on a broader scale, a social and political purpose.³³ Hence, the

²⁶ D Prins & P Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law Democracy and Development* at 139.

²⁷ Department of Trade and Industry, Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development (1997). Also see Organisation for Economic Co-operation and Development (OECD) Competition Law and Policy in South Africa OECD Global Forum on Competition Peer Review: Paris, 11 February 2003 available at: <https://www.comptrib.co.za/assets/Uploads/Reports/South-Africa-Peer-Review.PDF> (accessed on 30 May 2018) (hereinafter referred to as "OECD Competition Law and Policy in South Africa") at 6-7.

²⁸ N Natrass "Politics and economics in ANC economic policy" (1994) 93 *African Affairs* at 358.

²⁹ EM Fox "Equality discrimination and competition law: Lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 583.

³⁰ Organization for Economic Cooperation and Development "Competition law and policy in South Africa competition policy foundations", Peer Review, 2003 at 14.

³¹ EM Fox "Equality discrimination and competition law: Lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 584.

³² EM Fox "Equality discrimination and competition law: Lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 584.

³³ Sutherland and Kemp at 3-46.

policy was to also ensure that the participation of efficient SMEs in the economy is not prejudiced by anti-competitive structures and conduct.³⁴

The agenda for economic reform included a revised competition law.³⁵ It is clear that the 1998 Competition Act and the institutions established under it had significant roles to play as part of the first democratic government's agenda of economic reform. The RDP had evidently identified a more effective competition policy, which was necessary to deal with the high levels of concentration in the South African economy and its negative impact on development.³⁶ The current Act was passed by Parliament in September 1998 and came into operation in September 1999.³⁷ The Act indicates the government's intention to integrate the relevant public interest policies that contribute to the changing socio-economic and political context within which the Act was implemented.³⁸

The preamble of the Competition Act recognises that the South African discriminatory past resulted in a skewed distribution of ownership and control, inadequate restraint on anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.³⁹ It acknowledges that the economy should be open to greater ownership by a greater number of South Africans and that credible competition laws and effective structures to administer those laws are necessary for an efficient functioning economy.⁴⁰ The purpose of the Act's emphasis in addition to the promotion of 'efficiency, adaptability and development of the economy', is the promotion of small business development, greater participation in the economy and greater spread of ownership.⁴¹ Accordingly, the objectives of competition law are correlated to the achievement of holistic

³⁴ White Paper on Reconstruction and Development no1954 of 1994, 23 November 1994 available at: <https://www.gov.za/sites/default/files/16085.pdf> (accessed 07 February 2018).

³⁵ Department of Trade and Industry, Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development (1997). Also see OECD Competition Law and Policy in South Africa at 7-8.

³⁶ A Adelzadeh & V Padayachee "The RDP white paper: Reconstruction of a development vision?" (1994) 25 *African Journals* at 4.

³⁷ The Competition Act 89 of 1998 (hereinafter referred to as 'the Act').

³⁸ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

³⁹ Sutherland & Kemp page at 1-52.

⁴⁰ Sutherland & Kemp page at 1-52.

⁴¹ Section 2 of the Act.

economic development through transformation and the promotion of consumer welfare in a manner which ensures that markets remain open and free.⁴² This does, however, not take away from the fact that competition law has other subordinate goals such as regulating competition in such a way that it produces social consequences.⁴³

Section 2 stipulates that the purpose of the Competition Act is to promote and maintain competition in South Africa in order to:

- a) to promote the efficiency, adaptability and development of the economy;
- b) to provide consumers with competitive prices and product choices;
- c) to promote employment and advance the social and economic welfare of South Africans;
- d) to expand opportunities for South African participation in world markets and 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.

Sections 4, 5, 8 and 9 of the Act deal with prohibited practices. Section 4 governs the direct and indirect coordinated horizontal behaviour among competitors. Section 5 deals with the restrictive vertical practices, such as minimum resale price maintenance. Section 8 prohibits the abuse of a dominant position by firms in a market. The abuse of a dominant position by a firm may include excessive pricing of goods or services, denying competitors access to an essential facility, price discrimination and other exclusionary acts.⁴⁴

⁴² F Banda, G Robb & S Roberts "The links between competition policy, regulatory policy and trade and industrial policies" (2015) Centre for Competition, Regulation and Economic Development Review Paper 2 available at: https://www.competition.org.za/s/Reviewpaper2draft_28042015.pdf (accessed at 05 February 2018) at 3.

⁴³ EM Fox "Equality discrimination and competition law: Lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 584.

⁴⁴ Section 8(a)-(d) of the Act.

1.3 Particular provisions in the Act relating to SMEs

Competition law and policy is about putting in place regulations that govern the market economy and such rules can be amended in such a way that they favour certain outcomes such as constructively opening up markets.⁴⁵ One of the objectives that form part of the purpose of the Act that is of particular interest is the objective to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.⁴⁶ As indicated above, section 8 of the Act prohibits the abuse of dominance by firms.⁴⁷ Section 8(d) of the Act sets out specific prohibited exclusionary acts. In *Competition Commission and SAA Pty (LTD)*, the Competition Tribunal set out the approach to be taken to the analysis of exclusionary acts.⁴⁸ Firstly, one has to determine whether the conduct at hand is exclusionary in nature and section 8(c) provides the definition of a conduct that would constitute as an exclusionary act. Secondly, if the conduct satisfies the definition provided in section 8(c), the exclusionary act will thereupon be examined whether it has an anti-competitive effect according to section 8(d).⁴⁹

Section 9 of the Act precludes firms from engaging in price discrimination if it has the effect of substantially preventing or lessening competition. Only a few cases of price discrimination have been referred to by the Commission to the Tribunal.⁵⁰ In *Sasol Oil (Pty) Ltd v Nationwide Poles* the Tribunal and Competition Appeal Court

⁴⁵ S Roberts "Barriers to entry and implications for Competition Policy" (2017) Working Paper 13/2017 Centre for Competition Regulation and Economic Development at 2.

⁴⁶ Section 2(e) of the Act.

⁴⁷ It provides that it is prohibited for a dominant firm to –

- a) charge an excessive price to the detriment of consumers;
- b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- c) engage in an exclusionary act, other than that listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain; or
- d) engaging in any of the listed exclusionary acts unless the firm concerned can show technological, efficiency or other pro-competitive gains, which outweigh the anti-competitive effect of its act.

⁴⁸ *Competition Commission and South African Airways (Pty) Ltd* (18/CR/Mar01) at 23-24. Also see Neuhoff at 61-62.

⁴⁹ The following will be looked at in order to determine the effect: whether there is actual harm of consumer welfare and whether the act is substantial or significant in terms of its effect foreclosing the market to rivals.

⁵⁰ Competition Commission South Africa & Competition Tribunal South Africa "Ten years of enforcement by the South African competition authorities: Unleashing rivalry" (2009) at 65.

assessed price discrimination in detail.⁵¹ In this case, Nationwide Poles was a small business and supplier of treated wooden poles and alleged that they had been a victim of abuse of dominance in the form of price discrimination.⁵² In order for price discrimination to constitute as a prohibited practice, all the elements listed in section 9 must be proven.⁵³ Once a firm has been established to be dominant in terms of market share and market power, and there is sufficient evidence proving the firm's abuse of its position, the price discrimination will be prohibited in terms of the Act. However, if the dominant firm at hand can prove one of the justifications provided in section 9(2), the conduct of the firm will not be prohibited.⁵⁴

Firms may apply for their conduct to be exempted from the general application the Act which prohibits anti-competitive practices.⁵⁵ Due to the strict provisions and application of the Act, there are various instances in which individuals or firms may be exempted for acting in contravention of the Act. However, it must be noted that the Act does not allow for the exemption of agreements on a general basis of public interest.⁵⁶ These exemptions are listed in section 10 and are granted to promote specific public interest objectives.⁵⁷ The second objective that is provided for in this section consists of two overlapping parts namely the promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to

⁵¹ Competition Commission South Africa & Competition Tribunal South Africa "Ten years of enforcement by the South African competition authorities: Unleashing rivalry" (2009) at 65 and *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5.

⁵² *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 2.

⁵³ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 10.

⁵⁴ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 10. Section 9(2) of the Act provides that conduct involving differential treatment of purchasers is not prohibited price discrimination if the dominant firm is able to establish that the differential treatment-

- a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;
- b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or
- c) is in response to changing conditions affecting the market for the goods or services concerned, including-
 - (i) any action in response to the actual or imminent deterioration of perishable goods;
 - (ii) any action in response to the obsolescence of goods;
 - (iii) a sale pursuant to a liquidation or sequestration procedure; or
 - (iv) a sale in good faith in discontinuance of business in the goods or services concerned.

⁵⁵ Section 10 of the Act.

⁵⁶ Sutherland and Kemp at 5-114.

⁵⁷ Sutherland and Kemp at 5-114. Also see section 10 of the Act.

become competitive.⁵⁸ Nonetheless, the stipulated provision does not allow for the general protection of small businesses, or historically disadvantaged persons per se, but to only allow them to become competitive in their respective fields.⁵⁹

Section 12(1)(a) of the Act provides that a merger occurs when one or more firms directly or indirectly acquire or establish control over the whole or part of the business of another firm. The main test that the Act requires is for the competition authorities to determine whether a merger will mean that competition is substantially prevented or reduced.⁶⁰ During the evaluation process the competition authorities are also required to consider the impact of the merger on specified public interest considerations. These public grounds are namely: the effect on a particular sector or region; employment; international competitiveness of South African industries, or the ability of small business or firms controlled by historically disadvantaged persons to become competitive.⁶¹

In respect of the ability of small businesses to compete, these guidelines have been successfully applied by the competition authorities. In the *Minister of Economic Development v Competition Tribunal* (the Walmart case) the parties opposing the merger between Walmart and Massmart suggested that the competition authorities consider how much more difficult it would be for small firms to supply to retailers as a result of the merger.⁶² In this case, the Tribunal ordered that an establishment of a local supplier development fund, for the purpose to promote smaller businesses to become part of its supply chain.⁶³ This is a form of innovative conditions that are imposed by competition authorities on the merging parties in order to promote the explicit public interest goals provided for in the Act.⁶⁴

Recently there have been mergers approved with conditions attached that include the empowerment and promotion of small businesses.⁶⁵ For instance, the conditions

⁵⁸ Sutherland and Kemp at 5-115. Also see section 10(3)(b)(ii) & (iii) of the Act.

⁵⁹ Sutherland and Kemp at 5-115.

⁶⁰ Section 12A of the Act.

⁶¹ Section 12A(1)(a)(ii) of the Act.

⁶² Sutherland and Kemp at 1-55.

⁶³ Competition Amendment Bill 2017 GG No. 41294 at 11.

⁶⁴ Competition Amendment Bill 2017 GG No. 41294 at 11.

⁶⁵ *Anheuser-Busch InBev SA/NV and SABMiller plc* 2015Dec0690; *Reutech (Pty) Ltd and Nanoteq (Pty) Ltd* 2016Jun0280 & *BASF SE Germany and The Divestment Business of Bayer AG* LM044May18.

imposed in the *Anheuser-Busch InBev SA/NV and SABMiller* merger, which according to the competition authorities was one of the largest mergers to be considered, included the condition of the support and promotion of small beer producers.⁶⁶ In the merger between *Reutech (Pty) Ltd and Nanoteq (Pty) Ltd*, the conditions imposed on the parties included an obligation to subcontract at least 40 per cent of certain orders to SMEs.⁶⁷ The acquiring firm in the *BASF SE Germany and The Divestment Business of Bayer AG* merger had an obligation imposed on them to offer small emerging farmers purchasing their chemical product a 25 per cent discount.⁶⁸

The Draft Competition Amendment Bill (hereinafter referred to as ‘the Draft Bill’) was published in the Government Gazette by the Minister of Economic Development, Mr Ebrahim Patel, for the purpose of public comment.⁶⁹ There have been deliberations taking place with various parties participating in the engagements since the publishing of the Draft Bill. The Draft Bill acknowledges the fact that the objectives of the Act cannot be achieved through the Act alone.⁷⁰ Furthermore, it states that the explicit reference to these structural and transformative objectives in the Act clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as these explicit transformative public interest goals.⁷¹ The Draft Bill aims to fulfil the objectives of the Act in two ways. Firstly, by creating and enhancing the substantive provisions of the Act aimed at addressing two key structural challenges in the South African economy, namely, concentration and the racially-skewed spread of ownership of firms in the economy.⁷²

Secondly, by proposing amendments in the Act that are intended to enhance the policy and institutional framework, and the procedural mechanisms for the

⁶⁶ The Competition Commission Annual Report 2016-17 available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Annual-Report-2016-17.pdf> (accessed 06 August 2018) at 16 & 31. Also see *Anheuser-Busch InBev SA/NV and SABMiller plc* 2015Dec0690 at 18.

⁶⁷ *Reutech (Pty) Ltd and Nanoteq (Pty) Ltd* 2016Jun0280. Also see The Competition Commission Annual Report 2016-17 available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Annual-Report-2016-17.pdf> (accessed 06 August 2018) at 31.

⁶⁸ *BASF SE Germany and The Divestment Business of Bayer AG* LM044May18 at 6.

⁶⁹ Competition Amendment Bill 2017 GG No. 41294.

⁷⁰ Competition Amendment Bill 2017 GG No. 41294 at 6.

⁷¹ Competition Amendment Bill 2017 GG No. 41294 at 6.

⁷² Competition Amendment Bill 2017 GG No. 41294 at 6.

administration of the Act.⁷³ Primarily, the Draft Bill seeks to address the high level of economic concentration and the spread of ownership.⁷⁴ Five priorities are identified in the Draft Bill and one of which states that special attention must be given to the impact of the anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons.⁷⁵ The revised version of the Draft Competition Amendment Bill (hereinafter referred to as ‘the Bill’) was passed by the National Assembly on the 23rd of October 2018.⁷⁶

1.4 Nature and scope of dissertation

In the wake of economic transformation, it suffices to emphasise the two listed aims that form part of the purpose of the Act, in order to achieve desirable economic endeavours.⁷⁷ There are a number of practices and conditions which make it difficult for smaller businesses to establish a presence in a market or even compete with larger firms.⁷⁸ For instance, a market may consist of a relatively large number of small firms but it may also be dominated by a few large firms with great market power.⁷⁹

Overall, the survival rate of SMEs in South Africa is relatively low and this is based on various obstacles such as market structures. High market concentration hampers the competitiveness and growth of SMEs. This dissertation aims to evaluate how the competition legislation and authorities govern and enhance SMEs participation and growth in the highly concentrated and untransformed South African economy. The author will examine the sustainability of SMEs in South Africa with specific reference to the impact of the existing conditions of the economy. In interpreting the relevant

⁷³ Competition Amendment Bill 2017 GG No. 41294 at 7.

⁷⁴ Competition Amendment Bill 2017 GG No. 41294 at 6.

⁷⁵ Competition Amendment Bill 2017 GG No. 41294 at 8.

⁷⁶ The Competition Amendment Bill 23 of 2018 available at: <http://www.sabinetlaw.co.za/economic-affairs/legislation/competition-amendment-2018> (accessed 27 October 2018).

⁷⁷ To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy and to promote a greater spread of ownership, in particular to increase the ownership of historically disadvantaged persons.

⁷⁸ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

⁷⁹ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

provisions, the author will apply both a purposive⁸⁰ and contextual⁸¹ approach in order to determine the aims of the Act.

Although the Act has dismantled cartels and achieved lower prices for consumers, it has not largely opened markets to smaller firms to such that they have the possibility to become effective rivals.⁸² The author will discuss applicable cases and policies that involve SMEs either directly or indirectly. With all things considered, the author will make recommendations as to how competition legislation, policy and authorities can encourage and protect SMEs participation in the South African turbulent economy.

1.5 Chapter layout

The first chapter of this dissertation, by way of a general introduction, will discuss the pivotal role of SMEs in South Africa. Moreover, it explores the origin of competition law and the various stages in its history as well as the nature and purpose of the Competition Act. It also sets out provisions of the Act with specific relevance to SMEs, which will be expanded in later chapters. The discussion in this introductory chapter attempts to lay a foundation for a further and more specialized discussion in the other parts of the dissertation.

The second chapter explains the concept of a highly concentrated market and untransformed ownership. It also contains a brief history of the economic dimensions of the past as well as how the legacy of the historical economy of concentration and ownership is still evident today. Furthermore, this chapter also reveals the

⁸⁰ *Minister of Land Affairs of the Republic of South Africa and Another v Slamdien and Others* (LCC107/98) [1999] ZALCC 6 at 9, the Constitutional Court clearly describes the purposive approach and requires that one must:

- i) ascertain the meaning of the provision to be interpreted by analysis of its proposed in doing so;
- ii) having regard to the context of the provision in the sense of its historical origins;
- iii) have regard to its objects of statute as a whole, the subjective matter and broad objects of the statute and the values that underlie it.

Also see L du Plessis *Re-Interpretation of Statutes* (2007) at 115.

⁸¹ *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A): 'Context does not only include the language of the rest of the statute, but also its matter, its apparent purpose and scope and, within limits, its background'. Also see L du Plessis *Re-Interpretation of Statutes* (2007) at 114.

⁸² S Roberts "Barriers to entry and implications for competition policy" (2017) Working Paper 13/2017 Centre for Competition Regulation and Economic Development at 2.

dominance of State-Owned Entities as well as other dominant firms in various South African sectors which have continued into the post-democratic market structures. Given the high levels of market concentration, the several challenges that SMEs face will also be discussed.

The third chapter will evaluate the significant role of competition law in relation to SMEs through the Act and supporting policies. In addition, it will ascertain the meaning of public interest in terms of competition law considering the social, political and economic basis of the Act. Moreover, this chapter will discuss the interpretation and application of the Competition Act by competition authorities. It will also comment on the amendments proposed by the Bill and its underpinning objectives with reference to small businesses.

The fourth chapter will put forward for consideration other possible ways of economic regulation and policy implication in order to improve SMEs development as well as make a sound conclusion.

Chapter 2:

Overly concentrated and untransformed markets

2.1 Concept of a highly concentrated market and untransformed ownership

A market is considered to be concentrated when a few large firms dominate a significant amount of sectors in the economy.⁸³ Consequently, these dominant firms are protected by high entry barriers and acquire so much market power that it could potentially exclude other players participating in the same sectors, particularly the smaller competitors.⁸⁴ The South African apartheid history serves as an explanation of the current high levels of concentration in markets.⁸⁵

On the other hand, untransformed ownership, with specific reference to South Africa, is the concentration of ownership that is retained by previous conglomerates that were formed during apartheid, regardless of their unbundling post-apartheid.⁸⁶ During apartheid the competition legislation did not adequately address the conglomerate combinations and there were no regulations in place to deal with mergers.⁸⁷ The political and economic conditions at the time also exacerbated the lack of competition laws governing the markets.⁸⁸ Hence the historical prevalence within the market structures today.

At the time of democratisation in South Africa, 83 of the top 100 companies on the Johannesburg Stock Exchange were controlled by six large conglomerate groupings.⁸⁹ The proposed guidelines for competition policy by the DTI in 1997 sought to encourage an increased number of black persons ownership participation

⁸³ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

⁸⁴ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

⁸⁵ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 549.

⁸⁶ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 555.

⁸⁷ OECD Competition Law and Policy in South Africa at 7.

⁸⁸ OECD Competition Law and Policy in South Africa at 7.

⁸⁹ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 555.

in the economy.⁹⁰ The implementation of the Broad-Based Economic Empowerment Act 53 of 2003 (hereinafter referred to as the 'BEE Act') also placed emphasis on the promotion of economic transformation in such a way that it includes meaningful participation of black people in the South African economy.⁹¹ However, thus far, the BEE Act has only managed to increase the number of black managers of these large companies but not necessarily an increase of black ownership.⁹²

2.2 Economic dimensions of the past and its impact

The South African economy has a unique history, which was highly characterized by the political conditions at the time.⁹³ Policies which were implemented by the government during apartheid restricted the integration of the South African economy and significantly contributed to the high degree of the concentration of markets and ownership.⁹⁴ The policies that were implemented, together with the injustices enforced by the apartheid regime resulted in many countries and bodies imposing economic sanctions against South Africa, such as the mandatory arms embargo adopted by the United Nations in 1977.⁹⁵ The sanctions that were imposed against South Africa led to the economy being severely influenced by the government through import substitution industrialization and an implementation of policies of economic independence.⁹⁶

⁹⁰ OECD Competition Law and Policy in South Africa at 9.

⁹¹ Section 2(a) of the BEE Act.

⁹² National Treasury Research Report Ownership of JSE-listed companies September 2017 available at: http://www.treasury.gov.za/comm_media/press/2017/2017100301%20Ownership%20monitor%20-%20Sept%202017.pdf (accessed 08 June 2018) at 26.

⁹³ K Kappel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 242.

⁹⁴ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 549.

⁹⁵ B Senekal, J Stemmet & K Stemmet "South Africa in the international arms trade network (ATN) during national party rule (1948-1994): A network analysis" (2015) 40 *Journal for Contemporary History* at 55. Also see N Bhana "The effects of trade sanctions and disinvestment by foreign countries and its impact on the South African economy" (1987) 18 *South African Journal of Business Management* at 130.

⁹⁶ T Hartzenberg "Competition policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries" (2006) 26 *Northwestern Journal of International Law & Business* at 683.

Government subsidised the inputs of the manufacturing and agricultural industries and had put in place very strict market controls.⁹⁷ Hence, the government controlled a significant amount of the country's agricultural and manufacturing activities.⁹⁸ Furthermore, the high level of government ownership coupled with the low levels of foreign investments contributed to the excessive economic concentrations and conglomerates.⁹⁹ Due to the lack of import activities, there were relatively low levels of competition hence Hartzenberg remarks that businesses could get off scot-free with uncompetitive behaviour such as imposing excessive prices.¹⁰⁰ As the government played a significant role in both producing and regulating the market, anti-competitive practices to a certain extent were condoned in order to restrict competition.¹⁰¹

There was thus a powerful influence of conglomerates in the South African markets as firms extended their operations within the domestic borders.¹⁰² The strict exchange control regulations that were implemented by the government at the time, prohibited South African firms from investing in other foreign companies.¹⁰³ Additional to these regulations, sanctions were also imposed on South Africa by other countries therefore curtailing foreign investments.¹⁰⁴ Hence conglomerates dominated sectors of production and distribution.¹⁰⁵ Most of these conglomerates

⁹⁷ K Kempel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 240.

⁹⁸ OECD Competition Law and Policy in South Africa at 3.

⁹⁹ K Kempel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 240.

¹⁰⁰ T Hartzenberg "Competition policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries" (2006) 26 *Northwestern Journal of International Law & Business* at 683.

¹⁰¹ T Hartzenberg "Competition policy and enterprise development: the role of public interest objectives in South Africa's competition policy" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 137.

¹⁰² J Affleck-Graves, G Burt & J Cleasby "An empirical study of the performance of South African conglomerates" (1989) 20 *South African Journal of Business Management* at 1.

¹⁰³ G Rossouw "Unbundling the Moral Dispute About Unbundling in South Africa" (1999) 16 *Journal of Business Ethics* at 1019-1020. Also see D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management Sciences* at 340.

¹⁰⁴ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management Sciences* at 340.

¹⁰⁵ R Davies "Nationalisation, socialisation and the freedom charter" (1987) 12(2) *South African Labour Bulletin* at 91.

were created through mining-based investments.¹⁰⁶ Anglo American controlled approximately 54% of the Johannesburg Stock Exchange (hereinafter referred to as the 'JSE') markets in 1987.¹⁰⁷ Over the years Anglo American diversified into sectors such as banking, industrial commodities, engineering, and consumer goods (including beer and furniture).¹⁰⁸ During the 1970s and 1980s, the JSE market was controlled by the six large conglomerates representing 80% of the market capitalisation.¹⁰⁹ These large conglomerates dominated the production, distribution and financial sectors through subsidiary companies that were established.¹¹⁰

Accordingly, due to the intensified economic sanctions against South Africa, the economy presented autarky, uncompetitive sectors with high concentration and untransformed ownership in markets.¹¹¹ As a result, when the new government inherited this economy that was shaped by apartheid ills, it implemented extensive policies to successfully bring about a new political and economic dispensation.¹¹² The political transformation in the country commenced with the adoption of the Interim Constitution¹¹³ and other laws in 1993.¹¹⁴ Subsequently, the final Constitution¹¹⁵ came into effect in 1997 and was the catalyst for the democratization of South Africa.¹¹⁶ Many of the laws pursuant to the Constitution have been enacted to give effect to the new constitutional order.¹¹⁷

¹⁰⁶ G Verhoef "Global since gold the globalisation of conglomerates: Explaining the experience from South Africa, 1990 - 2009" (2011) Working Paper 238/2011 Economic Research Southern Africa at 6.

¹⁰⁷ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 554.

¹⁰⁸ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 551.

¹⁰⁹ G Rossouw "Unbundling the Moral Dispute About Unbundling in South Africa" (1999) 16 *Journal of Business Ethics* at 1019.

¹¹⁰ S Malherbe & N Genesis "Corporate Governance in South Africa" 2001 Annual Forum at Misty Hills, Muldersdrift (10-12 September, 2001) Trade and Industry policy strategies available at: file:///C:/Users/u13060393/Downloads/Corporate_Governance_in_South_Africa.pdf (accessed 28 May 2018) (hereinafter referred to as "S Malherbe & N Genesis "Corporate Governance in South Africa (2001)") at 13.

¹¹¹ S Malherbe & N Genesis "Corporate Governance in South Africa" (2001) at 21.

¹¹² OECD Competition Law and Policy in South Africa at 2-3.

¹¹³ Act 200 of 1993.

¹¹⁴ IM Rautenbach *Rautenbach-Malherbe Constitutional Law* (6th ed 2012) at 18.

¹¹⁵ The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

¹¹⁶ IM Rautenbach *Rautenbach-Malherbe Constitutional Law* (6th ed 2012) at 18.

¹¹⁷ IM Rautenbach *Rautenbach-Malherbe Constitutional Law* (6th ed 2012) at 18.

The South African democratic government together with the DTI implemented various strategies and policies that would promote the development of effective economic transformation including the strengthening of competition.¹¹⁸ The DTI has focused on promoting structural transformation and a dynamic industrial and globally competitive economy as well as broadening economic transformation in order to strengthen economic development.¹¹⁹ In addition to the objectives of the RDP mentioned in Chapter One, the RDP sought not only to transform South Africa's economic, social and political systems but to also integrate the country back into the global economy.¹²⁰ The notion of the macro-economic strategy that was set out in the Growth, Employment and Redistribution policy and other laws originated from the need to incorporate South Africa back into the global economy.¹²¹ In seeking economic and political redress, there was a need for the implementation of robust legislation and policies bringing into existence a more competitive and dynamic business sector.¹²²

Fundamental changes such as the unbundling of conglomerates was introduced by the government in order to be able to facilitate the restructuring of the economy.¹²³ The term 'unbundling' refers to the splitting of the diversified conglomerates into smaller companies with an increased focus on its core business.¹²⁴ Unbundling was not only introduced to increase competition in markets but it was also regarded as a socio-economic measure to enable black economic participation and empowerment.¹²⁵ The BEE Act has been a catalyst to further promote the

¹¹⁸ D Prins & P Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law Democracy and Development* at 13.

¹¹⁹ J Machaka & S Roberts "The DTI's new 'integrated manufacturing strategy'? Comparative industrial performance, linkages and technology" (2003) 71 *South African Journal of Economics* at 679.

¹²⁰ T Hartzenberg "Competition policy and practice in South Africa: Promoting competition for development symposium on competition law and policy in developing countries" (2006) 26 *Northwestern Journal of International Law & Business* at 667.

¹²¹ G Verhoef "Global since gold the globalisation of conglomerates: Explaining the experience from South Africa, 1990 - 2009" (2011) Working Paper 238/2011 Economic Research Southern Africa at 8.

¹²² A Adelzadeh & V Padayachee "The RDP white paper: Reconstruction of a development vision?" (1994) 25 *African Journals* at 11.

¹²³ G Rossouw "Unbundling the moral dispute about unbundling in South Africa" (1997) 16 *Journal of Business Ethics* at 1019.

¹²⁴ G Rossouw "Unbundling the moral dispute about unbundling in South Africa" (1997) 16 *Journal of Business Ethics* at 1019.

¹²⁵ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management Sciences* at 342.

unbundling of conglomerates in order to increase the number of black individuals owning businesses and business assets.¹²⁶

The unbundling of these conglomerates also enabled them to obtain a dual listing on an international stock exchange.¹²⁷ For instance, AngloGold in cooperation with the ANC government assigned those that were discriminated against by the apartheid system to occupy positions of leadership within the company.¹²⁸ Hence, in 1998 AngloGold obtained a listing on the New York Stock Exchange, thereupon, unbundling of conglomerates became prudent to other corporations in South Africa.¹²⁹ By 2004 there was already an increase in black economic participation and a slight increase in ownership with only five of the top 100 companies controlled by black individuals.¹³⁰

2.3 Dominant firms and State-Owned Entities

Despite the enactment of legislation such as the 1998 Competition Act and the BEE Act as well as the renewed policies and strategies, as part of local and international commitments aimed at the economic transformation, the legacy of highly concentrated markets and untransformed ownership still persists today.¹³¹ Fedderke and Simkins remark that the gravity of these conditions is linked directly to the considerable challenges in providing reform in the economy.¹³² Although conglomerates were unbundled, the companies stemming from these conglomerates

¹²⁶ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management* at 342.

¹²⁷ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management* at 341.

¹²⁸ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management* at 341.

¹²⁹ D King, D Coldwell, T Joosub & D McClelland "Institutional forces and divestment performance of South African conglomerates: case study evidence" (2015) 18 *South African Journal of Economic and Management* at 341.

¹³⁰ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 557.

¹³¹ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 555-557.

¹³² J Fedderke & C Simkins "Economic growth in South Africa" (2012) 27 *Economic History Society of Southern Africa* at 188,191 & 204.

are still in possession of large market share and are able to dominate various sectors due to their inherent power which emanates from their previously existing access to resources and establishments.¹³³

The Competition Commission recently conducted a study looking into dominant firms in different product market sectors between the years 2009 and 2016.¹³⁴ Consequently, it was found that 70% of these product market sectors have dominant firms in their respective markets.¹³⁵ Generally, firms are not prohibited from occupying dominant positions in respective markets. Nonetheless, the abuse of a dominant position by a firm is prohibited as stipulated in section 8 of the Competition Act.¹³⁶ Various acts are considered to be an abuse of dominance, including price discrimination.¹³⁷ In South Africa, there has been an identifiable trend amongst large and dominating firms in order to retain their dominant market power.¹³⁸ Creating barriers to entry affords large firms with market power akin to a monopoly and is evidently in contravention with provisions prohibiting abuse of dominance.¹³⁹ Notwithstanding the decline of the concentration of ownership in South Africa, Chabane et al indicate that there has been a continuation of high concentration in markets and a significant number of mergers that consist of vertical integration which has resulted in an increased control of dominant firms in supply and production chains.¹⁴⁰

¹³³ N Chabane, A Goldstein & S Roberts "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 573.

¹³⁴ The Competition Commission's study consisted of the following product market sectors: communication technologies; energy; financial services; food and agro-processing; infrastructure and construction; intermediate industrial products; mining; pharmaceuticals and transport. Also see the Competition Amendment Bill 2017 GG No. 41294 at 10.

¹³⁵ Competition Amendment Bill 2017 GG No. 41294 at 10.

¹³⁶ 89 of 1998.

¹³⁷ Section 8 of the Act. The abuse of a dominant position by a firm may include excessive pricing of goods or services, refusing competitors access to an essential facility and other exclusionary acts including inducing suppliers or customers not to deal with a competitor, refusal to supply scarce goods to a competitor, bundling goods or services, charging prices that are below cost so as to exclude rivals, and buying-up a scarce input required by a competitor.

¹³⁸ K Kempel "Competition law and SMEs: Exploring the competitor/ competition debate in a developing democracy" (2004) Working paper 109/2004 Centre on Regulation and Competition at 5.

¹³⁹ K Kempel "Competition law and SMEs: Exploring the competitor/ competition debate in a developing democracy" (2004) Working paper 109/2004 Centre on Regulation and Competition at 5.

¹⁴⁰ N Chabane, S Roberts & A Goldstein "The changing face and strategies of big business in South Africa: more than a decade of political democracy" (2006) 15 *Industrial and Corporate Change* at 557.

On the other hand, some of these companies that were protected by apartheid policies and under state control were privatised.¹⁴¹ By means of privatisation, State-Owned Entities (hereinafter referred to as 'SOEs') were required to be subject to what companies in the private sector would ordinarily be subject to, such as financial constraints and competition policies.¹⁴² Furthermore, it was argued that the privatisation of SOEs would result in the strengthening of effective competition as well as ensuring that SOEs are proficient.¹⁴³ Notwithstanding these objectives, the lack of strengthening measures to help support the economic transformation structures in this regard resulted in a continuation of government intervention and a high degree of vertical integration.¹⁴⁴

The reform process stipulated in the RDP with specific reference to the facilitation of economic growth included the increase of competitiveness of SOEs.¹⁴⁵ The government had identified large SOEs that dominated fundamental sectors of the economy and held that their market power had the potential to either enhance or deteriorate the desired economic reform.¹⁴⁶ SOEs have also been notoriously known for anti-competitive behaviour, especially where such an entity enjoys the market power of a monopoly.¹⁴⁷ As pointed out by Robb and Mondliwa, out of a total of twenty-one cases of abuse of dominance that were referred to the Competition Tribunal between 1999 and 2016, thirteen of these cases involved State Owned

¹⁴¹ World Bank "An incomplete transition: Overcoming the legacy of exclusion in South Africa" 30 April 2018 available at: <http://documents.worldbank.org/curated/en/815401525706928690/pdf/WBG-South-Africa-Systematic-Country-Diagnostic-FINAL-for-board-SECPO-Edit-05032018.pdf> (accessed 23 May 2018) (hereinafter referred to as "World Bank "An incomplete transition: Overcoming the legacy of exclusion in South Africa") at 67.

¹⁴² G Robb "Competition without privatisation? South Africa's experience of the corporatisation of state-owned enterprises" (2014) 2nd South African Economic Regulators Conference (SAERC) available at: http://www.nersa.org.za/Admin/Document/Editor/file/Notices/Upcoming%20Events/Competition%20without%20privatisation%20South%20Africa%E2%80%99s%20experience%20of%20the%20corporatisation%20of%20state%20owned%20enterprises_G%20Robb.pdf (accessed 12 June 2018) (hereinafter referred to as "G Robb "Competition without privatisation? South Africa's experience of the corporatisation of state-owned enterprises" (2014)) at 1.

¹⁴³ G Robb "Competition without privatisation? South Africa's experience of the corporatisation of state-owned enterprises" (2014) at 1.

¹⁴⁴ World Bank "An incomplete transition: Overcoming the legacy of exclusion in South Africa" at 67.

¹⁴⁵ DJ Fourie "Restructuring of State-Owned Enterprises: South African Initiatives" (2001) 23 *Asian Journal of Public Admin* at 205.

¹⁴⁶ DJ Fourie "Restructuring of State-Owned Enterprises: South African Initiatives" (2001) 23 *Asian Journal of Public Admin* at 206.

¹⁴⁷ G Robb & P Mondliwa "SOCS and Competition: Reflections on South Africa's Experience Telecommunications and Energy" (2018) Working Paper 2/2018 Centre for Competition, Regulation and Economic Development (CCRED) of the University of Johannesburg at 2.

Entities.¹⁴⁸ This form of anti-competitive behaviour results in an adverse effect on competitive markets and the economy. SOEs have also been key players creating significant barriers to entry instead of lowering them.¹⁴⁹ Robb and Mondliwa however submit that SOEs have the capability to lower entry barriers and simultaneously allow for the participation of new competitors which ultimately increases innovation in the respective sectors, easily increases variety for consumers at lesser prices.¹⁵⁰ In a simplified manner, their argument is that SOEs ought to be considered as agents that encourage greater competition from large to smaller businesses and not merely monopolies.¹⁵¹

2.4 SMEs and competitive challenges

Another issue, which eventuates from the current situation of overly concentrated markets and untransformed ownership, is the adverse effect imposed on SMEs in South Africa. As mentioned in Chapter One, SMEs play a significant role towards the growth of the South African economy and is regarded as a catalyst for an economic boost.¹⁵² Notwithstanding SMEs profound contributions to the economy, Olawale and Garwe comment that the success of these SMEs is unfortunately evanescent.¹⁵³ Approximately 75% of start-up SMEs are unsuccessful in attempting to become established firms in the market, therefore, are unable to contribute to the growth of the South African economy.¹⁵⁴ The South African SMEs failure rate is one of the highest in the world and this is attributable to many factors such as lack of access to

¹⁴⁸ G Robb & P Mondliwa "SOCS and Competition: Reflections on South Africa's Experience Telecommunications and Energy" (2018) Working Paper 2/2018 Centre for Competition, Regulation and Economic Development (CCRED) of the University of Johannesburg at 2.

¹⁴⁹ G Robb & P Mondliwa "SOCS and Competition: Reflections on South Africa's Experience Telecommunications and Energy" (2018) Working Paper 2/2018 Centre for Competition, Regulation and Economic Development (CCRED) of the University of Johannesburg at 3.

¹⁵⁰ G Robb & P Mondliwa "SOCS and Competition: Reflections on South Africa's Experience Telecommunications and Energy" (2018) Working Paper 2/2018 Centre for Competition, Regulation and Economic Development (CCRED) of the University of Johannesburg at 3.

¹⁵¹ G Robb & P Mondliwa "SOCS and Competition: Reflections on South Africa's Experience Telecommunications and Energy" (2018) Working Paper 2/2018 Centre for Competition, Regulation and Economic Development (CCRED) of the University of Johannesburg at 41.

¹⁵² K Kempel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁵³ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4 *African Journal of Business Management* at 730.

¹⁵⁴ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4 *African Journal of Business Management* at 730.

finance, lack of resources and the conditions of economic markets.¹⁵⁵ Although there are various reasons contributing to the failure of SMEs, it is worth noting that highly concentrated markets impose significant restrictions upon SMEs in terms of entrance into such markets, access to primary inputs and successful participation thereafter.¹⁵⁶

The market power that these large firms obtain enables them to use it to their advantage and exclude other participants, more specifically, SMEs.¹⁵⁷ Exclusionary acts need not be openly displayed but may even be done in a very deceitful manner.¹⁵⁸ For instance, refusal by a dominant firm to provide SMEs with resources or charging prices to consumers at a substantially low rate to such an extent that a smaller business finds it difficult to continue to compete without eventually running out of business; this is commonly known as predatory pricing.¹⁵⁹ In this way, SMEs face a predicament, due to the unfavourable circumstances, and are compelled to exit the market.¹⁶⁰ Where new SMEs successfully enter predominantly concentrated markets and provide consumers with innovative products and technologies, dominant firms often feel threatened by such competitiveness.¹⁶¹ As a result, Kampel remarks that dominant firms in such markets rely on anti-competitive behaviour in order to eliminate such competition and safeguard their dominant positions.¹⁶²

¹⁵⁵ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4 *African Journal of Business Management* at 730-731.

¹⁵⁶ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4 *African Journal of Business Management* at 731.

¹⁵⁷ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁵⁸ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁵⁹ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁶⁰ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁶¹ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4 *African Journal of Business Management* at 729.

¹⁶² K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 242.

Vertical agreements between a supplier and a distributor may also be implemented with the intention to eliminate competition.¹⁶³ Vertically integrated firms could possibly eliminate competition in downstream markets by refusing to provide smaller firms participating in the downstream markets with essential inputs; this conduct is also known as “market foreclosure”.¹⁶⁴ A “margin squeeze” is said to occur when a vertically integrated dominant firm in an upstream market that also participates in downstream market controls access to an essential component in the downstream market.¹⁶⁵ The control that is afforded to the dominant firm in respect of the essential component enables it to restrict or withhold access from other competitors in the downstream market.¹⁶⁶ Ultimately, downstream competitors become inoperative due to limited access to the primary component or no access at all and are ‘squeezed out’ the market.¹⁶⁷ Such “harsh rules of play” that are enforced by dominant firms become unbearable to SMEs.¹⁶⁸

In *Competition Commission v Senwes Limited*, a complaint was lodged by a small grain trader, namely, CTH Trading regarding the differential storage tariffs applied by Senwes Limited.¹⁶⁹ The latter was a vertically integrated firm in its upstream position, providing storage facilities to grain farmers and traders, simultaneously trading in grain in the downstream market.¹⁷⁰ The Competition Commission argued that Senwes Limited is a dominant firm in the upstream market and that the differential storage tariffs ultimately constituted an exclusionary act in the form of a “margin squeeze”, which is prohibited by section 8(c) of the Act.¹⁷¹ Subsequently, the Competition Tribunal held that Senwes Limited was indeed a dominant firm and its

¹⁶³ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁶⁴ K Kampel “Competition law and SMEs: Exploring the competitor/ competition debate in a developing democracy” (2004) Working paper 109/2004 Centre on Regulation and Competition at 6.

¹⁶⁵ L Kelly & T van der Vijver “Less is more: Senwes and the concept of ‘margin squeeze’ in South African Competition Law” (2009) 126 *South African Law Journal* at 246.

¹⁶⁶ L Kelly & T van der Vijver “Less is more: Senwes and the concept of ‘margin squeeze’ in South African Competition Law” (2009) 126 *South African Law Journal* at 246.

¹⁶⁷ L Kelly & T van der Vijver “Less is more: Senwes and the concept of ‘margin squeeze’ in South African Competition Law” (2009) 126 *South African Law Journal* at 246-247.

¹⁶⁸ K Kampel “Competition law and SMEs: Exploring the competitor/ competition debate in a developing democracy” (2004) Working paper 109/2004 Centre on Regulation and Competition at 6.

¹⁶⁹ *Competition Commission v Senwes Limited* 110/CR/Dec06 at 1-2.

¹⁷⁰ *Competition Commission v Senwes Limited* 110/CR/Dec06 at 15-21.

¹⁷¹ *Competition Commission v Senwes Limited* 110/CR/Dec06 at 12 & 31.

conduct was considered to be anti-competitive and in contravention of section 8(c) of the Act.¹⁷² Thus, the Competition Tribunal in this case recognised the concept of “margin squeeze”.¹⁷³ The Competition Amendment Bill identifies and proposes the concept of a “margin squeeze” as an exclusionary act provided for under section 8(1)(d)(vii) of the Act.¹⁷⁴ According to the Bill, a “margin squeeze” is said to ‘occur when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively’.¹⁷⁵

2.5 Survival of the fittest

The phrase ‘survival of the fittest’ is appropriate to describe the situation of SMEs participating in the highly concentrated South African markets. The phrase originates from the theory of natural selection by Charles Darwin.¹⁷⁶ Comparatively, it has been used loosely to describe instances whereby only a select group, amongst others, are able to adapt, compete or survive in unfavourable circumstances.¹⁷⁷ The growth and survival of SMEs are determined by both internal and external factors, which can be either favourable or unfavourable.¹⁷⁸ Anti-competitive conduct imposed on SMEs such as refusal to an essential facility or primary input and “margin squeeze” in most cases ultimately precludes the existence of SMEs in markets. However, some SMEs are able to withstand unfavourable circumstances and successfully continue to operate economically. SMEs with readily accessible financial support and primary

¹⁷² *Competition Commission v Senwes Limited* 110/CR/Dec06 at 16; 30-31; 72 & 79.

¹⁷³ *Competition Commission v Senwes Limited* 110/CR/Dec06 at 40 & 79.

¹⁷⁴ Competition Amendment Bill 2017 GG No. 41294 at 16 & 29.

¹⁷⁵ Section 1(e) of the Competition Amendment Bill 23 of 2018 at 3.

¹⁷⁶ G Claeys “The ‘survival of the fittest’ and the origins of social Darwinism” (2000) 61 *Journal of the History of Ideas* at 235.

¹⁷⁷ G Claeys “The ‘survival of the fittest’ and the origins of social Darwinism” (2000) 61 *Journal of the History of Ideas* at 235.

¹⁷⁸ F Olawale & D Garwe “Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach” (2010) 4(5) *African Journal of Business Management* at 730-731.

resources as well as a comprehensive understanding of the dynamics of the specific industry allow them to continue operating in unfavourable circumstances.¹⁷⁹

2.6 Conclusion

The aforementioned discusses how the post-apartheid government attempted to resolve the economic challenges inherited from the apartheid regime. Notwithstanding the government's response and combined efforts towards achieving economic transformation, the high levels of concentration in markets and untransformed ownership remain persistent. Some of the current dominant firms and SOEs still enjoy the level of market power that is akin to monopoly power due to the amount of State support provided and lack of effective competition legislation during the apartheid years. SMEs are constantly faced with competitive challenges that could be to the detriment of their survival in highly concentrated markets and thus lead to failure or withdrawal from participating in markets. These rife conditions of the South African markets and the unscrupulous conduct of dominant firms and SOEs have a direct impact on SMEs ability to enter markets, grow and survive as a going concern.

¹⁷⁹ F Olawale & D Garwe "Obstacles to the growth of new SMEs in South Africa: A principal component analysis approach" (2010) 4(5) *African Journal of Business Management* at 732.

Chapter 3: Competition law and policy

3.1 The significant role of competition law and policies in respect of SMEs

As mentioned in chapter 1, competition law and policy is about putting in place regulations that govern the market economy and such regulations certainly can be amended in such a way that they favour certain outcomes, for example constructively opening up markets.¹⁸⁰ The Competition Act in South Africa, contrary to other jurisdictions, includes public interest objectives in conjunction with its purpose to promote and maintain competition.¹⁸¹ This enables the Competition Act to seek to achieve socio-economic objectives that are beyond the ordinary bounds of competition.¹⁸² Nonetheless, it must be constantly emphasised that these public interest objectives cannot be achieved solely through the Competition Act.¹⁸³ Hence, there is an increased need for supporting legislation and policy.

3.2 Public interest

Boshoff et al remark that in a legal framework, public interest concentrates on the recognition of political and moral values that ought to be taken into consideration when interpreting the law and when making a decision in conflict disputes.¹⁸⁴

¹⁸⁰ S Roberts “Barriers to entry and implications for Competition Policy” (2017) Working Paper 13/2017 Centre for Competition Regulation and Economic Development at 2.

¹⁸¹ T Hartzenberg “Competition policy & promoting competition for development on competition law and policy in developing countries” (2006) 26 *North Western Journal of International Law and Business* at 667. Also see Neuhoff at 8.

¹⁸² T Hartzenberg “Competition policy & promoting competition for development on competition law and policy in developing countries” (2006) 26 *North Western Journal of International Law and Business* at 668. Also see J Hodge, S Goga & T Moahloli “Public interest provisions in the South African Competition Act- A critical review” (2009) Competition Policy, Law and Economics Conference available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Public-Interest-Provisions14-August-2009-2.docx> (accessed 08 February 2018) (hereinafter referred to as ‘J Hodge, S Goga & T Moahloli “Public interest provisions in the South African Competition Act- A critical review” (2009)’ at 3.

¹⁸³ Competition Amendment Bill 2017 GG No. 41294 at 6.

¹⁸⁴ W Boshoff, D Dingley & J Dingley “The economics of public interest provisions in South African competition policy” available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> (accessed 02 May 2018) (hereinafter referred to as ‘W Boshoff, D Dingley & J Dingley “The economics of public interest provisions in South African competition policy” (2014)’ at 3.

Moreover, they point out that in instances where disputes are premised on public interest, courts would impartially determine what is in the best interests of the general public and would prevent government's interference in disputes that concern the economy and public interest.¹⁸⁵ In the *Barkhuizen v Napier* case, it was held that notions of fairness, justice and reasonableness that are deeply embedded in the fabric of the Constitution inform public policy ('public policy' used interchangeably with 'public interest').¹⁸⁶ Therefore, the government's intention to create an equitable and fair competitive environment is well in line with the supreme law of the country, the South African Constitution.¹⁸⁷

3.3 Public interest and competition law

Generally, competition legislation is put in place to maintain competition in markets, in order to ensure and promote efficiency and consumer welfare.¹⁸⁸ Competition policy is perceived as an aid to achieving government's intention of economic development, more specifically, to encourage competitive markets whereby unnecessary barriers to entry are eliminated and to ensure that all forms of businesses are able to participate, and ultimately, generating economic efficiency and consumer welfare.¹⁸⁹ Additionally, in South Africa, it is acknowledged that the conduct of firms may have an impact on the ultimate goal of macroeconomic growth and stability as well as industrial policy.¹⁹⁰ For instance, the promotion of SMEs and the ability of firms to compete in international markets.¹⁹¹

Supplementary to the primary goal of the Competition Act, the aim to 'ensure that small and medium-sized enterprises have an equitable opportunity to participate in

¹⁸⁵ W Boshoff, D Dingley & J Dingley "The economics of public interest provisions in South African competition policy" (2014) at 2.

¹⁸⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) at 12, 13 & 32.

¹⁸⁷ Section 39(2) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

¹⁸⁸ EM Fox "Equality discrimination and competition law: Lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 579.

¹⁸⁹ Y Njisane "Pricing conduct, State aid and the implications for industrial development in South Africa" (2015) available at: 2015.essa.org.za/fullpaper/essa_2960 (accessed 01 February 2018) at 4.

¹⁹⁰ Neuhoff at 8

¹⁹¹ Neuhoff at 8.

the economy' is pronounced amongst five other objectives.¹⁹² It is clear from the consideration of SMEs and the five other public interest objectives in the Competition Act that the government intends to eliminate the legacy of apartheid.¹⁹³ Evidently, the economic conditions of the past were rather unfavourable towards the participation and success of small businesses.¹⁹⁴ By means of competition policy, various issues such as the levelling of playing fields in markets can be achieved.¹⁹⁵ Furthermore, large firms with great market power can be monitored in order to prevent any form of abuse of their positions to manipulate competition law or that would be detrimental to the participation of smaller players.¹⁹⁶

The GEAR macroeconomic strategy which was implemented complementary to the RDP realized the important role that SMEs plays in contributing to the growth of the economy and emphasized the need to increase the support of SMEs development in South Africa.¹⁹⁷ Previously, the support bodies employed for small businesses were ineffective and failed to play an impactful role when it came to dealing with the restrictive competition due to the dominance of large businesses.¹⁹⁸ Advocates for small businesses played an essential role in the identification of problems encountered by SMEs and the development of solutions through implementing new policies and improving the already existing competition policy.¹⁹⁹

¹⁹² K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

¹⁹³ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 239.

¹⁹⁴ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 241.

¹⁹⁵ A Berry *et al* "The Economics of SMMes in South Africa" Trade and Industry Policy Strategies (2002) available at: <http://www.tips.org.za/files/506.pdf> (accessed 6 August 2018) at 86.

¹⁹⁶ Neuhoff at 29.

¹⁹⁷ Department of Finance Growth Employment and Redistribution: A Macro-Economic Strategy (1996) available at: <http://www.treasury.gov.za/publications/other/gear/chapters.pdf> (accessed 07 February 2018) at 4.

¹⁹⁸ White Paper on National Strategy for the Development and Promotion of Small Business Notice number 213 of 1995 available at: https://www.thedti.gov.za/sme_development/docs/White_paper.pdf (accessed 26 July 2018) at 5.

¹⁹⁹ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 240.

The gravity of the high market concentration to a certain extent determines the players participating in the markets and ultimately, the survival of SMEs is also questioned.²⁰⁰ The governmental response to the highly concentrated economy has manifestly been one of the greatest challenges of the constitutional democracy and development of the law.²⁰¹ It was a demanding task in that the content of the new legislation was required to address both traditional and developmental competition goals.²⁰² Striking a balance between the two seemed attainable as there was a sense that if competitiveness and development were to be adequately aligned, they would actually complement each other instead of being contradictory.²⁰³

3.4 Interpretation and application of the of the Competition Act by competition authorities

Generally, courts ought to be very cautious when determining how to interpret legislation in order to make decisions according to the legislature's legitimate intention. The preamble to the Competition Act contains values that guide the governing of the coordination of competition law and public interest objectives.²⁰⁴ These values are not only provided for in the preamble but also in specific provisions of the Act.²⁰⁵ Additional to the definitions of key terms that must be taken into account when reading the Act is the explicit provision of interpretation. It is provided that the Act must be interpreted in such a manner that it gives effect to the constitutional ethos and the policy objectives stipulated in section 2.²⁰⁶

²⁰⁰ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 240.

²⁰¹ C Smit "The rationale for competition policy: a South African perspective" (2005) at 1.

²⁰² J Hodge, S Goga & T Moahloli "Public interest provisions in the South African Competition Act- A critical review" (2009) at 4. Also see Department of Trade and Industry, Proposed Guidelines for Competition Policy, A Framework for Competition and Development (1997) at para 8.

²⁰³ J Hodge, S Goga & T Moahloli "Public interest provisions in the South African Competition Act- A critical review" (2009) at 4. Also see Department of Trade and Industry, Proposed Guidelines for Competition Policy, A Framework for Competition and Development (1997) at para 2.

²⁰⁴ W Boshoff, D Dingley & J Dingley "The economics of public interest provisions in South African competition policy" (2014) at 3.

²⁰⁵ W Boshoff, D Dingley & J Dingley "The economics of public interest provisions in South African competition policy" (2014) at 3.

²⁰⁶ Section 1(2) of the Act.

The Competition Act is classified as an ordinary statute whereby the interpretation of the provisions is in accordance with the ordinary grammatical meaning of the words used²⁰⁷, which is referred to as the “literalist-cum-intentionalist” approach according to du Plessis²⁰⁸. This form of interpretative method contains a twofold approach: firstly, determining the intention of the legislature, secondly, understanding the language used by the legislature.²⁰⁹ According to Sutherland and Kemp, it is essential to take into consideration the precepts provided in the Act in order to effectively interpret the context and purpose of the provisions in the Act.²¹⁰

Whilst appreciating the urgent and imperative need to address the inequities and hardships of apartheid through effective competition legislation that advocates for economic transformation, it must be noted that the use of competition legislation will be limited in that regard.²¹¹ Sutherland and Kemp remark that in instances where competition authorities ought to balance out the extensive interests set out in section 2 and the role of promoting and maintaining competition law it is vital that they do so within respective bounds without deviating from the original purpose of the Act.²¹² Some authorities have emphasized the fact that including extensive goals in competition legislation would obscure the true role of competition law and would restrict the use of foreign law by competition authorities.²¹³ Notwithstanding the complexity that will be produced by the inclusion of these extensive goals to the traditional competition goals, Sutherland and Kemp however argue that the possibility of complexity should not be unreasonably amplified.²¹⁴

²⁰⁷ Sutherland & Kemp at 4-6.

²⁰⁸ L du Plessis *Re-Interpretation of Statutes* (2007) at 107-111.

²⁰⁹ L du Plessis *Re-Interpretation of Statutes* (2007) at 107.

²¹⁰ Sutherland & Kemp at 4-7.

²¹¹ Sutherland & Kemp 1-59.

²¹² Sutherland & Kemp 1-59.

²¹³ Sutherland & Kemp 1-58.

²¹⁴ Sutherland & Kemp 1-58.

3.4.1 Enforcement by competition authorities

Competition authorities are expected to apply provisions of the Act in such a manner that it upholds the aim to promote the participation of SMEs.²¹⁵ Competition authorities have attempted to provide some form of relief to SMEs claimants in cases involving the equitable participation of SMEs in the economy. For instance, in the *Competition Commission v Patensie Sitrus Beherend* case, the Competition Tribunal found that the articles of association requiring customers (the members to the association) not to deal with competitors was prohibited conduct in terms of abuse of dominance and that the relevant articles of association denied the small farmers from expanding their business.²¹⁶ Kampel however remarks that despite the significant milestones which have been achieved by competition policy in tackling anti-competitive conduct and redressing the distortions of the legacy of apartheid it, unfortunately, has not been without any shortcomings in terms of SMEs participation.²¹⁷

The *Nationwide Poles v Sasol (Oil) Pty Ltd*²¹⁸ case, which was initiated by a small one man-business, emphasised the huge disparity between what is advocated for in competition policy and the application in actuality. Mr Foot, the managing director of Nationwide Poles, in his personal capacity instituted legal proceedings against Sasol subsequent to receiving a Notice of Non-referral from the Competition Commission and bravely represented Nationwide Poles. Thereafter, Mr Foot imparted his experience in order to raise awareness for small firms that are contemplating to institute legal proceedings.²¹⁹

²¹⁵ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 256.

²¹⁶ *The Competition Commission v Patensie Sitrus Beherend Beperk* 37/CR/Jun01 at 26-28.

²¹⁷ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 238.

²¹⁸ (72/CR/Dec03) [2005] ZACT 17.

²¹⁹ T Hartzenberg "Competition policy & promoting competition for development on competition law and policy in developing countries" (2006) 26 *North Western Journal of International Law and Business* at 678. Also see Nationwide Poles & J Foot "*Nationwide Poles vs Sasol – Price Discrimination - The Sequel*" (2012) available at: <http://www.comphelp.co.za> (accessed 04 September 2018).

Moreover, many prejudicial factors working against competitiveness of small businesses were echoed; ranging from costly legal representation, time constraints and technicalities of competition cases regarding submissions, participation, and the evidential burden.²²⁰ Kampel states that in a competition action an SME is most likely unable to meet the requirement of proving the effect of substantial prevention or lessening of competition in a market considering the insignificant market share that an SME would typically hold in a market.²²¹ This notion was also pointed out by Mr Foot from Nationwide Poles in the Tribunal.²²² Nevertheless, Kampel concedes that the heavy evidential burden is also justified as it prevents the risk of opening the door to frivolous matters that would undermine and deplete the already limited resources of the Competition Commission.²²³

The Tribunal, in its decision making in the *Nationwide Poles* case, leaned a lot more towards the legislature's purpose to ensure equitable treatment of small businesses.²²⁴ The Tribunal held that the legislature intended to protect small firms against price discrimination and thus extended the meaning of section 9(1)(a) in that regard.²²⁵ More expressly, the Tribunal stated that section 9 of the Act is a 'hybrid of public interest and antitrust'.²²⁶ Furthermore, the Tribunal held that Sasol's pricing conduct would ultimately produce a likelihood that small firms in the market such as Nationwide would become less competitive towards bigger firms as well as limit the entry of new and small entrants in the market.²²⁷

When the *Nationwide Poles* case served before the Competition Appeal Court (hereinafter referred to as the 'CAC'), the CAC focused a lot more on the evidence that was brought forward to prove whether competition had been substantially

²²⁰ T Hartzenberg "Competition policy & promoting competition for development on competition law and policy in developing countries" (2006) 26 *North Western Journal of International Law and Business* at 678.

²²¹ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 253.

²²² *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 25.

²²³ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 251.

²²⁴ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 20-22.

²²⁵ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 25.

²²⁶ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 34.

²²⁷ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 29 &30.

prevented or lessened without placing much emphasis on the policy objectives of the Act with regards to SMEs.²²⁸ The CAC agreed with the Tribunal concerning the need to ensure the equitable participation of SMEs in the economy.²²⁹ Notwithstanding this, the CAC in the *Sasol v Nationwide Poles* case seems to have applied quite the contrary in that it focused on the exploitation of consumers and exclusion of competitors in the assessment of a lessening of competitors in the assessment of a lessening of competition.²³⁰ The CAC referred to evidence that was provided to prove that other SMEs participating in the same market were successfully operating despite the price structure applied by Sasol, some of which decided to change suppliers.²³¹ Consequently, the CAC disagreed with the manner in which the Tribunal interpreted section 9(1)(a) of the Act and noted that focus should be placed on the fact that whether or not the discrimination alleged of has substantially prevented or lessened competition.²³² In this case, Nationwide Poles failed to furnish evidence proving substantial prevention or lessening of competition.²³³ Hence the CAC upheld Sasol's appeal.²³⁴ A couple of months subsequent to the decision made by the CAC, Nationwide Poles closed its doors and was no longer in operation.²³⁵

3.4.2 'Protect competition and not competitors'

It is acknowledged that competition law is employed to 'protect competition, not competitors' and this doctrine was invoked in both the Tribunal and CAC hearing of the *Nationwide Poles* case. The Tribunal made mention of how this doctrine is commonly used by firms as a loophole to further its own interest by eliminating competition, especially in the form of smaller businesses.²³⁶ As a result, it stated that competition authorities ought to apply the cautionary rule when dealing with parties

²²⁸ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 26-27.

²²⁹ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 18 & 1.9

²³⁰ Neuhoff at 60-62. Also see *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 26.

²³¹ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 21.

²³² *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 26.

²³³ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 15 & 27.

²³⁴ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 27.

²³⁵ Nationwide Poles & J Foot "Nationwide Poles vs Sasol – Price Discrimination - The Sequel" (2012) available at: <http://www.comphelp.co.za> (accessed 04 September 2018) at 3.

²³⁶ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 21.

who skilfully use the doctrine in an unscrupulous manner.²³⁷ On the other hand, the CAC made use of the doctrine to justify that the mere fact that one competitor is unable to compete in a market, despite other competitors successfully operating, does not entitle that individual competitor special protection from competition authorities.²³⁸ As pointed out by Kampel, generally, when competition authorities consider the effect of an anti-competitive conduct involving SMEs, most emphasis is placed on the *overall* impact on the consumer welfare rather than the impact on an individual SME or a collective of SMEs.²³⁹

3.4.3 Competition law and policy in theory vs implementation

Although the Competition Act explicitly provides for the protection of SMEs and ensuring an equitable participation in the South African economy, Kampel remarks that the execution of competition precepts often contrast what it actually entails to protect SMEs.²⁴⁰ Just like in any other legal proceedings there are rules and regulations which judicial bodies are expected to adhere to when applying substantive competition law provisions. In the same respect, competition authorities are also provided with a mandate of procedural aspects such as complaint procedures and referrals to the Tribunal when applying provisions of the Competition Act.²⁴¹ Several anti-competitive complaints that are lodged with the Commission are lodged by SMEs, however, as pointed out by Kampel, only an insignificant number of these complaints are referred any further.²⁴² A case study that was conducted between the years 1999 and 2004 proves that complaints that are made by SMEs to

²³⁷ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 21.

²³⁸ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5 at 27.

²³⁹ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 253-254.

²⁴⁰ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

²⁴¹ The Competition Act 89 of 1998.

²⁴² K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 248.

the Competition Commission do not often reach the adjudication of the Tribunal via referral by the Competition Commission.²⁴³

Kampel further states that SMEs often misunderstand the evidential burden required to prove a claim of an anti-competitive practice and, as a result, these SMEs are seldom successful when lodging complaints to the Competition Commission due to factors such as lack of sufficient merit.²⁴⁴ Competition law cases often involve complex issues and one may be required to seek assistance from both legal and economic experts in order to provide the Commission with a compelling case.²⁴⁵ Hence, SMEs should be willing and able to incur costs in order to seek expert knowledge. Mr Foot of Nationwide Poles alludes to the fact that SMEs are prejudiced by the proceedings that follow after lodging a complaint as they are financially in a subordinate position as opposed to large firms in terms of being able to seek expert knowledge.²⁴⁶ A significant number of SMEs would be unable to seek assistance from competition law experts due to financial restrictions. It is such practical constraints that restrict the realisation of the aim to ensure equitable opportunities for SMEs to participate in the economy.²⁴⁷

3.5 Bill

The Bill recognises and reinforces the need to promote competition and economic transformation; subsequently, eliminating the existing levels of high concentration in markets.²⁴⁸ Furthermore, the Bill emphasises the need to protect and stimulate small businesses.²⁴⁹ The proposed amendments of the Competition Act, with regards to small businesses, focuses on providing special attention to the impact of the anti-

²⁴³ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 249.

²⁴⁴ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 252.

²⁴⁵ K Kampel “The role of South African competition law in supporting SMEs” in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 252.

²⁴⁶ Nationwide Poles & J Foot “*Nationwide Poles vs Sasol – Price Discrimination - The Sequel*” (2012) available at: <http://www.comphelp.co.za> (accessed 04 September 2018) at 3.

²⁴⁷ Section 2(e) of the Act.

²⁴⁸ Competition Amendment Bill 23 of 2018 at 2.

²⁴⁹ Competition Amendment Bill 23 of 2018 at 2.

competitive conduct on small businesses.²⁵⁰ Similarly, the Draft Bill proposes to robustly prohibit cartel activities in concentrated markets, as a result, opening markets in favour of small businesses.²⁵¹ Other proposed amendments focusing on protection and promotion of small business involve the provisions dealing with abuse of dominance, price discrimination, exemptions and mergers.²⁵²

In terms of abuse of dominance, section 8(4)(a) of the Bill provides that a dominant firm is prohibited from directly or indirectly, requiring or imposing, unfair prices or other trading conditions on small and medium businesses.²⁵³ Moreover, section 8(4)(b) provides that a dominant firm is prohibited to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business.²⁵⁴ The proposed amendment to section 9 of the Competition Act now provides for the prohibition of 'price discrimination by a dominant firm as a seller' and stipulates that price discrimination is prohibited if it is likely to have the effect of substantially preventing or lessening competition; or impeding the ability of small and medium businesses to participate effectively.²⁵⁵ Hence, if there is a prima facie case of a contravention of the section mentioned above, a dominant firm will have to prove that its conduct of price discrimination does not impede the ability of small and medium businesses to operate effectively.²⁵⁶

Amendments have been made to section 10(3)(b)(ii) and it is now proposed to read as follows: 'promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons'.²⁵⁷ Furthermore, it is proposed 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 the ability of small and medium businesses, or firms

²⁵⁰ Competition Amendment Bill 23 of 2018 at 24.

²⁵¹ Competition Amendment Bill 2017 GG No. 41294 at 14.

²⁵² Competition Amendment Bill 23 of 2018.

²⁵³ Competition Amendment Bill 23 of 2018 at 5.

²⁵⁴ Competition Amendment Bill 23 of 2018 at 5.

²⁵⁵ Section 9(1)(a)(i)-(ii) of the Competition Amendment Bill 23 of 2018 at 5.

²⁵⁶ Section 9(3) of the Competition Amendment Bill 23 of 2018 at 6.

²⁵⁷ Competition Amendment Bill 23 of 2018 at 6.

controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market.²⁵⁸

Essentially the Bill is aimed at enhancing the provisions of the Competition Act in order to vehemently address the structural challenges of the South African economy, namely, economic concentration and the spread of racially-skewed ownership of firms in the economy.²⁵⁹ The Minister of Economic Development, Ebrahim Patel stated that “the Competition Amendment Bill closed numerous gaps in anti-competitive behaviour which previously existed at the expense of small and local business”.²⁶⁰

3.6 Conclusion

The general viewpoint is that competition law and policy will help alleviate and eliminate the hardships and consequences of Apartheid. Competition legislation has been the catalyst for renewed attempts at socio-economic transformation and has brought about a great departure from the past. The alarming number of complaints by SMEs lodged with the Commission has emphasised the importance to protect SMEs against anti-competitive conduct. Competition authorities are constantly faced with complex issues that deal with the balancing between the best interests of SMEs and traditional competition goals. Competition authorities have been granted powers and the mandate to ensure equitable opportunity for the participation of SMEs in the economy. The Competition Amendment Draft Bill seeks to eliminate structural issues in the South African economy which will, in turn, be to the benefit of the promotion and protection of SMEs.

²⁵⁸ Section 12(3)(c) Competition Amendment Bill 23 of 2018 at 7.

²⁵⁹ Competition Amendment Bill 23 of 2018 at 24.

²⁶⁰ K Magubane *Competition amendments close loopholes and support small business - Ebrahim Patel* Fin24 11/09/2018 available at: <https://www.fin24.com/Economy/competition-amendments-close-loopholes-and-support-small-business-ebrahim-patel-20180911> (accessed 17 September 2018).

Chapter 4:

Final remarks, conclusions and recommendations

4.1 Introduction

The current condition of the South African economy remains a vivid representation of the impact of the dimensions of the past.²⁶¹ With most markets being concentrated and dominated by large firms, challenges are imposed on smaller potential competitors to enter such markets and to successfully remain in operation. Various strategies and legislation have been implemented in order to alleviate the high levels of concentration and untransformed ownership in markets.

4.1.1 Competition legislation and policy

The implementation of the 1998 Competition Act brought about a new dispensation that advocates for socio-economic transformation, hence, the inclusion of public interest objectives in the purpose of the Act.²⁶² Competition law in South Africa, consistent with the international trend in most developing countries, advances the development of SMEs mainly because of their fundamental contribution to economic growth.²⁶³ Notwithstanding the explicit intention to ensure equitable opportunity for SMEs to participate in the economy as well as SMEs innovative efforts to be competitive, the overall participation of SMEs is still prejudiced by the high levels of concentration in several markets that are inclined to orchestrate anti-competitive conduct.²⁶⁴

The Draft Competition Bill recognises that the explicit inclusion of concentration in competition legislation entails that the legislation has a role to ensure that the present concentration and firms with substantial market power do not result in the

²⁶¹ C Smit "The rationale for competition policy: a South African perspective" (2005) at 1.

²⁶² DM Davis "The Development of Competition Law and Economics in South Africa" (2014) 131 *South African Law Journal* at 712.

²⁶³ EM Fox "Equality discrimination and competition law: lessons from and for South Africa" (2000) 41 *Harvard International Law Journal* at 579-580.

²⁶⁴ K Kampel "The role of South African competition law in supporting SMEs: Can David really take on Goliath?" Summary of a paper prepared for 48th ICSB World Conference "Advancing Entrepreneurship and Small Businesses" 15-18 June 2003, Belfast, Northern Ireland, available at: <https://www.comptrib.co.za/assets/Uploads/Speeches/kim.pdf> (accessed 30 January 2018) (hereinafter referred to as 'K Kampel "The Role of South African Competition Law in Supporting SMEs: Can David really take on Goliath?" (2003)) at 2.

prevention of SMEs participation.²⁶⁵ Competition legislation is continuously amended in order to address the challenges and needs that are brought about by the constantly changing South African social, economic and political conditions.²⁶⁶

With all things considered, the Competition Act and supporting policy proactively recognizes the inherited high levels of concentration in markets and as a result, the heightened probability of anti-competitive conduct.²⁶⁷ The government has also taken progressive steps in order to try and reduce the concentration levels in various markets and subsequently encourage SMEs participation.²⁶⁸

4.1.2 Enforcement by competition authorities

Competition authorities are under a general obligation to interpret and enforce the promotion of economic efficiency, simultaneously having regard to the promotion of SMEs as well as the other policy objectives provided for in the Act.²⁶⁹ Kampel remarks that although the provisions of the Competition Act advocate for the promotion of SMEs in theory, the enforcement of the Competition Act by the competition authorities is often in contrast with the actual interests of SMEs.²⁷⁰

The amalgamation of traditional competition goals and socio-economic objectives in the Competition Act has often presented complexities and scepticism surrounding the interpretation and application thereof.²⁷¹ For example, the inconsistency between the two competition authorities that was conveyed in the Nationwide Poles case

²⁶⁵ Competition Amendment Bill 2017 GG No. 41294 at 13.

²⁶⁶ S Roberts "Barriers to entry and implications for Competition Policy" (2017) Working Paper 13/2017 Centre for Competition Regulation and Economic Development at 2.

²⁶⁷ R Kaplinsky & C Manning "Concentration, competition policy and the role of small and medium-sized enterprises in South Africa's industrial development" (1998) 35 *The Journal of Development Studies* at 139-140.

²⁶⁸ K Kampel "The role of South African competition law in supporting SMEs" in P Cook, R Fabella & C Lee (eds) *Competitive advantage and competition and competition policy in developing countries* at 237.

²⁶⁹ F Banda, G Robb & S Roberts "The links between competition policy, regulatory policy and trade and industrial policies" (2015) Centre for Competition, Regulation and Economic Development Review Paper 2 available at: https://www.competition.org.za/s/Reviewpaper2draft_28042015.pdf (accessed at 05 February 2018) at 4. See also section 2 of the Act.

²⁷⁰ K Kampel "The role of South African competition law in supporting SMEs: Can David really take on Goliath?" (2003) at 1.

²⁷¹ P Ncube & T Paremoer "Competition policy in SA and small business: A review of enforcement cases" (2014) available at: www.compcom.co.za/wp-content/uploads/2014/09/Draft-19082009-Phumxile-Ncube-and-Tamara-Paramoer-final-2.doc (accessed 22 February 2018) at 1.

whereby two different approaches and decisions were reached by the respective competition authorities.²⁷²

Competition authorities are afforded powers and functions to equally merge the traditional competition goals with public interests.²⁷³ Hence, the role of competition authorities is regarded as extremely pivotal for the successful realisation of the objectives of the Act, specifically, ensuring that SMEs have an equitable opportunity to participate in the economy. Their role can be perceived as the driving force behind SMEs ultimately being able to equally and competitively participate in the economy, free of intimidation and imposed anti-competitive conduct.

4.2 Recommendations

Over the years numerous authors have made valid recommendations with regard to the role of competition law towards the protection and promotion of SMEs. Kampel suggests ways in which the Competition Act can be translated in a practical and purposeful manner that could further promote and advance SMEs.²⁷⁴ In that regard, it is proposed that establishing a publicized database that provides SMEs with guidelines in terms of the interpretation of the provisions of the Act as well as factors that the competition authorities take into consideration when dealing with complaints and cases would be beneficial towards SMEs providing them with certainty and clarity on various matters.²⁷⁵ The author of this dissertation supports this proposal as it will contribute to creating awareness for SMEs and help promote a clear perspective on provisions of the Act that could easily be misinterpreted; the guidelines will also effectively highlight the procedural requirements and processes that ought to be adhered to.

Kampel warns competition authorities against placing insurmountable hurdles that create procedural problems for SMEs, which in turn, makes justice under the

²⁷² R Hawthorne "Has the conduct based approach to competition law in South Africa led to consistent interpretations of harm to competition?" (2008) 11 *SAJEMS* 297-298.

²⁷³ K Kampel "The role of South African competition law in supporting SMEs: Can David really take on Goliath?" (2003) at 6.

²⁷⁴ K Kampel "The role of South African competition law in supporting SMEs: Can David really take on Goliath?"(2003) at 7.

²⁷⁵ K Kampel "The role of South African competition law in supporting SMEs: Can David really take on Goliath?" (2003) at 7.

Competition Act inaccessible.²⁷⁶ In other words, procedures that present no difficulty towards SMEs should be implemented in order to improve the accessibility to competition authorities. However, it is important that if competition authorities are to consider relaxing certain procedural requirements in favour of SMEs interests, that the relaxation is done so in a manner that does not have an effect of undermining the precepts of the Competition Act. Furthermore, Kampel emphasises the undeniable intimidation that SMEs encounter when pursuing a competition complaint or case.²⁷⁷ Henceforth, it is important that competition authorities take cognisance of the fact that SMEs are likely to get intimidated when pursuing competition enforcement against their larger counterparts.²⁷⁸ When dealing with cases that concern SMEs interests against the notion to protect competition or vis-à-vis, authorities need to take extreme caution because SMEs interests could be easily overlooked when seeking to protect the effectiveness of competition in a market, as emphasised by the Tribunal in the *Nationwide Poles* case.²⁷⁹

As mentioned above, the process of aligning competition law to public interest objectives is complex.²⁸⁰ The explicit mentioning of SMEs interest in the merger and exemption provisions affords competition authorities with specific direction as to what to consider when protecting the interest of SMEs.²⁸¹ Thus, a policy that seeks to provide guidelines to competition authorities as to how to interpret and apply other relevant provisions of the Act according to the intention of the legislature when dealing with cases involving SMEs would be highly beneficial because it will promote unambiguity and uniformity. The proposed guidelines should be akin to those provided for the assessment of public interest provisions in merger regulation.

²⁷⁶ K Kampel “The role of South African competition law in supporting SMEs: Can David really take on Goliath?” (2003) at 6.

²⁷⁷ K Kampel “The role of South African competition law in supporting SMEs: Can David really take on Goliath?” (2003) at 7.

²⁷⁸ K Kampel “The role of South African competition law in supporting SMEs: Can David really take on Goliath?” (2003) at 7.

²⁷⁹ *Nationwide Poles v Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 at 21.

²⁸⁰ Sutherland & Kemp 1-58.

²⁸¹ P Ncube & T Paremoer “Competition policy in SA and small business: A review of enforcement cases” (2014) available at: www.compcom.co.za/wp-content/uploads/2014/09/Draft-19082009-Phumxile-Ncube-and-Tamara-Paramoer-final-2.doc (accessed 22 February 2018) at 2. Also see section 10 (3)(b) & 12A(3) of the Act.

4.3 Conclusion

Despite the challenges and shortfalls of the amalgamation of both traditional competition goals and socio-economic goals, competition law and policy has contributed significantly towards economic transformation in South Africa. The South African social, economic and political conditions are constantly changing and these changes are brought about by the changes in values, attitudes and needs. The law regularly needs to adapt to accommodate these changes and the challenges they bring. And in the same spirit, competition law and policy must be developed in order to stay keep abreast with any economic changes and challenges. Progressive competition law developmental efforts, such as the proposed Bill, are essential for ensuring the effectiveness of competition legislation and policy to continue to sufficiently monitor markets, identify grey areas and initiate innovative solutions.²⁸²

The inevitable concentration and untransformed ownership in market structures produce a number of issues such as the threatening of SMEs survival in the relevant markets. Therefore, it is important that competition authorities are adequately geared to tackle anti-competitive conduct imposed upon SMEs, restricting their ability to enter markets and successfully remain in operation. Chiefly, that competition law and policy sufficiently facilitate the government's intention of fundamental economic transformation and inclusive growth.

²⁸² Competition Amendment Bill 23 of 2018.

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