THE ROLE OF COMPETITION LAW IN PROMOTING SMALL AND MEDIUM ENTERPRISES

Dissertation submitted in partial fulfilment of the requirements for the degree Magister Legum (Mercantile law)

by

PETER MASINGITA SITHOLE

U18255168

RHP803

Supervisor Prof C Van Heerden

Plagiarism declaration

Full names	PETER MASINGITA SITHOLE
Student number	U18255168
Topic of work	THE ROLE OF COMPETITITION LAW IN PROTECTING SMALL AND MEDIUM-SIZED ENTERPRISES

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this dissertation is my own originalwork. Where other people's work has been used (either from a printed source, internet or any other source), this has beenproperly acknowledged and referenced in accordance with the requirements as stated in the University's plagiarism prevention policy.
3. I have not used another student's past written work to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature ___SITHOLE PM____

Summary

The purpose of the Competition Act 89 of 1998 (the Competition Act) to a large extent supports the role of competition law in the South African law. Competition law forbids practices within the competition environment which are anti-competitive. The general purpose of the Competition Act is to promote and maintain competition in the Republic of South Africa. There are various provisions within Chapter 2 of the Competition Act which are aimed at maintaining competition. The provision of chapter 2 (e) of the Competition Act is of great importance in this research.Chapter 2 (e) provides that in order to promote and maintain competition, competition law must ensure that small and medium-size enterprises have an equitable opportunity to participate in the economy.

This thesis will give an in-depth analysis on three main provisions of the Act which create an environment which enables small and medium-sized enterprises to participate in the economy. The exemption clause of the Competition Act makes provision for small and medium-sized enterprises to apply to the Competition Commission to be exempted from the application of the Competition Act if they can show that the practice that they engage on even though it may be prohibited, it contribute to the promotion of the ability of small business or firms controlled or owned by historically disadvantaged persons, to become competitive. Under this chapter the exemption clause will be analysed and instances in which exemption can be grated will be looked at.

The Competition Act also affords protection to small and medium-sized enterprises under merger regulation. This dissertation will therefore investigate how competition law enhances and promotes small and medium-sized enterprises and lastly the dissertation will look at the role of competition law under abuse of dominance as to how it protect and promote Small and medium-sized enterprises. The focus will only be on the South African perspective and the finally there will be a conclusion.

INDEX

Chapter One: Introduction

1.1 Background

Competition law is a fairly new specialized field of law in South Africa with the first competition legislation under the democratic dispensation signed into law in 1998.[1] The preamble of the Competition Act 89 of 1998 (the Act) recognizes the unjust restriction placed by the previous apartheidregime on full participation by black people in the economy.[2] The aim of the Act is to provide all South Africans with equal opportunity to participate fairly in the national economy. It is further aimed to restrain particular trade practices which undermine a competitive economy.[3]

In terms of section 3 the Act applies to all activity within, or having an effect within, South Africa. The following activities are exempt from the application of the Act:[4]

(a) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (act 66 of 1995)

(b) a collective agreement, as defined in section 213 of the Labour Relations Act 1995 and

(e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

Chapter 2 of the Act states that its purpose is to promote and maintain competition in the Republic in order:

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

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

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

---

[1] The Competition Act 89 of 1998.
[2] The Competition Act 89 of 1998,
[3] The Competition Act 89 of 1998.
[4]Section 3 of the competition act 89 of 1998.

(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.[5]

From the aforementioned it is clear that the South African Competition Act is unique in the sense that it not only has the usual goals that competition laws acrossthe globe contain such as better prices and more choices for consumers but South Africa has also chosen to incorporate specific public interest goals into theCompetition Act.

1.2 What is an SME?

Before embarking on a discussion of the role of competition law in relation to SMEs it is firstnecessary to appreciate what the concept SME means from the perspective of South African law. SME development is important because of the structure of the South African economy. The high level of concentration and the conglomerate structure of business in many sectors that rangefrom mining to manufacturing, to services, are important challenges for small business development in South Africa that are above and beyond the common challenges that SMEsface.[6] Promoting a broader spread of ownership, especially among historically disadvantaged persons, reflects concerns about the skewed distribution of income and wealth in South Africa.

Chapter 1 of the National Small Business Act No 102 of 1996 indicates that a small business means “a separate and distinct entity, including cooperative enterprises and non-governmental organizations managed by one owner or more which, including its branches or subsidiaries, if any, is predominantly carried on in any sector or subsector

[5] Chapter 2 of the Competition Act 89 of 1998.
[6]Hartzenberg “Competition Policy Practice in South Africa: Promoting competition for development” 2006 *NW.J.Int’l L. & Bus* 669.

of the economy.[7] Small enterprises have been seen to be the breeding ground for entrepreneurs and they are a source of the entrepreneurial spirit.[8]Small businesses are flexible and able to adapt to changing market trends and regulatory demands. The South African government, and in particular the Department of Trade and Industry (DTI), has on a number of occasions identified franchising as a potential solution to, or vehicle for, entrepreneurship, job creation and economic growth.[9]

The Competition Act defined "small business" in section 1 thereof to have the meaning set out in the National Small Business Act, as indicated above. Subsequent to recent its amendment by the Competition Amendment Act of 2018[10]affected various amendments to section 1 of the Competition Act. The definition of "small business" was expanded and the Amendment Act also introduced a definition for "medium sized business" in the Competition Act. The definition of small business now a "small firm, determined by the Minister by notice in the Gazette, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act no 102 of 1996)." A "medium sized business" is a medium sized business as determined by the Minister in the Government Gazette. It is thus now also possible for the Minister to designate other categories of business other than those mentioned in the Small Business Act as small businesses for purposes of the Competition Act.

1.3 Research statement and objectives

The evaluation of the relationship between competition law and small and medium size enterprises (SMEs) in as far as the protection afforded to SMEs is concerned will form the basis of this research. To date the Act is used as a catalyst to promote and enhance the future ofSMEs in many respects. Of cardinal importance in this context are the

---

[7] Chapter one of the National Small Business Act 102 of 1996.

[8]Church "Aspects of the interface between the promotion of small and medium enterprises (SMEs) and statutory competition law" (2018) *THRHR* 202.

[9] Biggs, *An evaluation of the impact of the consumer protection act 68 of 2008 on the relationship between franchisors and franchisees* (LLD Thesis, NMMU, 2016) 194.

[10]Competition Amendment Act 18 of 2018 as published in Government Gazette GG42231 of 14 February 2019.

provisions in the Act dealing with exemptions and also those dealing with mergers and acquisitionsas well as the abuse of dominance provisions. These provisions are the core provisions from which SMEs derives protection from the Act. The need for these protections derive from a broader understanding of what SMEs are, their role in the economy and why it is so important for government to offer protection to SMEs.

The core objective of this research is therefore to interrogate the relationship that has developed between competition law and SMEs and to track the evolution of this relationship as it has been developed inter alia through case law since the Act came into operation. Accordingly regard will be had to how the interests of SMEs are dealt with in the course of exemption applications, mergers and acquisitions and also in the context of abuse of dominance.

1.4 Research methodology

The research methodology adopted in this study is a critical literature review. Various sources in the form of legislative measures, case law, scholarly journal articles and academic writings, books, theses, news reports and reports generated by the competition authoritieswill be examined.

1.5 Chapter outline

Chapter 1 is the introduction to the study. It gives a brief background on what SMEs are and maps out the course that the study will take, including the research statement and objectives, research methodology and chapter-lay-out.

Chapter 2 will deal with the provisions in the Act that deal with exemptions and how they impact on the promotion and growth of SMEs.

Chapter 3 will consider the provisions relating to mergers and acquisitions and how they contribute to the promotion and growth of SMEs.

Chapter 4 will consider the provisions in the Act dealing with abuse of dominance and how these provisions impact on SMEs.

Chapter 5 will contain the conclusions and recommendations of the study.

Chapter 2 **Exemptions and SMEs**

2.1 Introduction

The term “exemption” refers to being excused or freed from an obligation under the Competition Act.[11] In accordance with section 10 of the Act, the Commission may exempt an agreement or practice from the application of Chapter 2 which sets out specific prohibited practices.[12] South African competition law provides for the preferential treatment or exemption of agreements or practices that would otherwise contravene the prohibited practice provisions of the Act as captured in sections 4 to9.[13]The Act provides for the following categories of exemptions: selected agreements and practices; categories of agreements and practices (block exemptions); and rules of professional associations. A party can apply for an exemption if it can show that the practice or agreement that it will engage in is essential to achieve certain socio-economic and political objectives; or is necessary for the exercise of intellectual property rights; or relates to the activities of a professional association.[14]

Church indicates that it is clear that the exemptions posited in the Act lie at the intersection of competition law policy and broader economic and social policy objectives.[15] The preamble of the Act recognises that the economy should be open to greater ownership by a greater number of South Africans, and effective structures to administer those laws which are necessary for the efficient functioning of the economy.[16]

Moreover, it acknowledges that “an efficient”, competitive economic environment balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.[17] It is therefore the dutyof competition law to ensure the equal participation of all people in the economy as the preamble to the Act

---

[11]Neuhoff et al “*A practical guide to the south African competition act*” (2nded) 209 (hereinafter Neuhoff).
[12] Sutherland and Kemp “*Competition law of South Africa*” (Service Issue 21) 5-113 (hereinafter Sutherland and Kemp).
[13]Neuhoff 209.
[14] Ibid.
[15] Church “Aspects of the interface between the promotion of small and medium enterprise (SMEs) and statutory competition law” (2018) *THRHR* 213.
[16] The competition act 89 of 1998.
[17] Church “Aspects of the interface between the promotion of small and medium enterprise (SMEs) and statutory competition law” (2018) *THRHR* 212.

provides. By granting exemptions in the Act the idea is thatcertain prohibited practices will go unpunished by the law.

The process for exemption is set out in Section 10 of the Competition Act and pertains to exemption ofconduct that would otherwise be prohibited as constituting restrictive horizontal practices, restrictive vertical practices, abuse of dominance and certain prohibited pricing practices. Broadly speaking the exemptions afforded by the Act are necessary in order to advance and promote essential economic and social policy objectives.[18] The Competition Commission is the only body in South Africa which has been tasked with the power to grant exemption applications.

The exemption provisions in section 10 regulate the grounds on which the Competition Commission may grant an exemption (section 10(1) to (3)); the grounds on which a firm may apply for an exemption relating to the exercise of intellectual property rights (section 10(4): the powers of the Commission to grant or refuse to grant an exemption (section 10(2)(a) and (b)); the powers of the Commission to grant or refuse an exemption relating to the use of intellectual property rights (section 10(4A) read with section 10(4)); the grounds on which the Competition Commission may revoke an exemption that has been granted (section 10(5)); the process that the Commission must follow prior to granting or revoking an exemption (section 10(6)(a) to (b); the discretion of the Commission to conduct an investigation prior to granting or revoking an application for exemption (section 10(6)(c)): the notice that the Commission is required to give in the Government Gazette of any exemption granted, refused or revoked (section 10(7): the appeal of a decision by the Commission to grant, refuse or revoke an exemption application(section 10(8)): and the withdrawal of a notice of refusal to grant an exemption, and the reconsideration of an exemption.[19]

The following conduct may qualify for exemptions under the Competition Act:

[18]Section 10 of the Competition act 89 of 1998.
[19]Neuhoff 208.

(a) conduct that contributes to and is essential to the maintenance or promotion of exports;

(b) conduct that contributes to and is essential to promote the ability of small business or firms controlled or owned by historically disadvantaged persons to become competitive;

(c) conduct that is required to ensure the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry.[20]

A party may also apply for an exemption on intellectual property grounds if the agreement or practice concerned relates to the exercise of intellectual property rights, including the acquisition and protection of rights under the following Acts: the Performers Protection Act 11 of 1967; the Plant Breeders' Right Act 15 of 1976; the Patents Act 57 of 1978; the Copyright Act 98 of 1978; the Trade Marks Act 194 of 1993 and the Designs Act 195 of 1993.[21]

This dissertation will however focus on the exemption on the basis that the conduct concerned is necessary for the promotion of the ability of small businesses and firms controlled by historically disadvantaged persons to become competitive. A discussion of the other grounds of exemption and the exemptions pertaining to intellectual property grounds is thereforebeyond the scope of this discussion.

2.2 Exemptions in terms of section 10

A firm may apply to the Competition Commission to exempt from the application of Chapter 2, and agreement or practice, if that agreement or practice meets the requirements of section 10(3); or a category of agreements or practices, if that category of agreements and practices meets the requirements of section 10(3).[22] Upon receiving an exemption application under section 10(1) the Commission must grant a conditional or unconditional exemption if the agreement or practice concerned or category of agreements or practices concerned comply with the requirements of section 10(3). Such

[20]Neuhoff215.
[21] Section 4 and 4A of the Competition Act 89 of 1998.
[22] Section 10(1)(a) and (b) of the Competition Act 89 of 1998.

exemption must be for a specified term.[23] Alternatively the Commission may refuse to grant an exemption if the agreement or practice concerned , or category of agreements or practices fails to meet the requirements of section 10(3) or does not constitute a prohibit practice under Chapter 2 of the Act.[24]

Section 10(3) sets out the basis on which the Commission may grant an exemption. It provides that the Commission may grant an exemption in terms of section 10 (2) (a) only if:[25]

(a) "any restriction imposed on the firms concerned by the agreement or practice concerned or category of agreement or practices concerned, is required to attain an objective mentioned in paragraph (b) and

(b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports

(ii) promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive

(iii) change in productive capacity necessary to stop decline in an industry or

(iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for the industry."[26]

The Commission may revoke an exemption application that was granted on the following grounds: if the exemption was granted on the basis of false or incorrect information; if a condition for the exemption is not fulfilled; or if the reason for granting

[23] Section 10(2)(a) of the Competition Act 89 of 1998.
[24] Section 10 (2)(b)(i) and (ii) of the Competition Act 89 of 1998.
[25] Section 10(3)(a) and (b).
[26]Section 10 (2) (b) of the Competition Act 89 of 1998.

the exemption no longer exists.[27] Certain formalities are also prescribed by the Act before granting or revoking of an exemption. These formalities require the Commission to give notice in the Government Gazette of the application for an exemption or of the Commission's intention to revoke the exemption. Interested parties must be allowed 20 business days from date of publication of the notice to make representations as to why the exemption should not be granted or revoked. [28]The Commission is also given the discretion to conduct an investigation into the agreement or practice concerned or the category of agreements or practices concerned.[29]The Commission is further obliged to give notice in the Government Gazette of any exemption that it has granted, refused or revoked.[30]Appeal to the Competition Tribunal against the Commission's decision by the firm concerned or any other person with a financial interest affected by such decision of the Commission is provided for in section 10(8). Finally section 10(9)(a) and (b) provide that, at any time after refusing to grant an exemption on the basis that the agreement does not constitute a prohibited practice under the Act (as per section 10(2)(b)(ii)) the Commission may withdraw its notice of refusal to grant exemption and if it withdraws such notice of refusal it must then consider the application for exemption.

Notably the Competition Amendment Act of 2018 recently amended section 10(3)(b) (iii) so that it now list the "promotion of the effective entry into, participation in or expansion within a market by small and medium businesses or firms controlled by historically disadvantaged persons" as a ground for exemption.

2.3 Discussion

Exemption applications do not occur frequently. However the Commission's general approach towards exemption applications by SMEs appears from the cases and notices discussed below.

The promotion and protection of small businesses is the focus area of this dissertation. To grow the economy in South Africa President Cyril Ramaphosarecently launched a

[27] Section 10(5)(a) to (c) of the Competition Act 89 of 1998.
[28] Section 10(6)(a) and (b) of the Competition Act 89 of 1998.
[29] Section 10(6)(c) of the Competition Act 89 of 1998.
[30] Section 10(7) of the Competition Act 89 of 1998.

fund headed by some of the country's most prominent business people that will invest in small and medium enterprises and start-ups.[31] The South African Small and Medium Enterprise fund (SME Fund) comes out of the Chief Executive Officers (CEO) initiative, which was set up by heads of major businesses to "address some of the most pressing challenges to the country's economic growth" especially the SME sector. This initiative is starting to pay off andShapak comments that it is operating "at a level that matters most."[32] This initiative clearly indicates the government's commitment towards the development of SMEs in South Africa. According to the World Bank SME finance plays a major role in most economies particularly in developing countries. Formal SMEs contribute up to 60% total employment and up to 40% of national income (GDP) in emerging economies.[33]

Sutherland and Kemp however point out that the exemption provision in section 10(3)(b)(ii) relating to SMEs does not allow for the general protection of small business or historically disadvantaged persons for their own sake but only if it can be shown that the agreement or practice would ultimately lead to greater efficiency for the firms concerned.[34]

Because of their financial capabilities SMEs as individual or juristic persons are in no position to negotiate big discounts with their creditors and they therefore lack bargaining power. Competition law does not give a blanket exemption and the applicant should indicate in their application what is it that they require to be exempted from.

Sutherland and Kemp indicate that there are probably two circumstances where this exemption will be relevant, namely some co-operative agreements or practices concluded by small business and firms owned or controlled by historically disadvantaged persons may be pro-competitive but will be *per se* prohibited; and where

---

[31] https://www.forbes.com/sites/tobyshapshak/2019/03/29/south-africa-launches-95m-fund-to-grow-small-businesses/#327da8604850/2019/04/13.
[32] https://www.forbes.com/sites/tobyshapshak/2019/03/29/south-africa-launches-95m-fund-to-grow-small-businesses/#327da8604850/2019/04/13.
[33]World Bank "Small and Medium Enterprises (SMEs) Finance" available at https:www. worldbank.org (accessed 17 December 2019).
[34] Sutherland and Kem 5-115.

an agreement or practice is not *per se* prohibited, exemption will seldom be possible as pro-competitive effects already will be discounted in terms of section 4 (1)(a).[35]

A good example of how the exemption provisions are applied to SMEs on a practical level occurred when, in 2014, the Competition Commission granted an exemption to the National Health Network (NHN).[36] The purpose of the application for exemption was stated as "agreeing collectively to implement prices negotiated and entered into on their behalf by NHN with medical schemes and or medical schemes and or medical scheme administrators" and "promoting the interests of NHN member's benchmarking and marketing members services with a view to improving efficiencies.The objective of the exemption was to promote the ability of small business or firms controlled or owned by historically disadvantaged persons to become competitive as set out in section 10(3)(b)(ii) of the Act. The Competition Commission was accordingly of the view that an exemption would have enabled the NHN members to collectively negotiate prices and compete better. Exemption was therefore granted for a period of five years.

2.4 Final remarks

Competition law plays a major role in the development of the economy especially in the context of job creation. The economy experiences growth when new entrants enter the economic landscape. This in turn contributes greatly to the GDP of the Republic at large. The Competition Act,through its exemption provision, facilitates a passage through which SMEs are able to enter and compete in the economy. The exemption provisions in the Act should however not be viewed as a discriminatory tool that affords SMEs a licence to violate competition law provisions. Especially the provision insection 10(2)(b)(ii) is critical in that it enables the participation in the economy by previously marginalised persons and at the same time the law recognises the fact that their participation will not be enabled if some of the competition law rules are not relaxed in their favour.

---

[35] Ibid.

[36] *National Health Network (NHN*) Case2013Nov0553 and Government Notice 867 of 2014.

Chapter 3 Merger regulation and SMEs

3.1. Introduction

Chapter 3 of the Competition Act provides the framework for merger regulation.[37] The purpose of such merger regulation is to level the playing field in as far as mergers are concerned to ensure that a merger between two firms do not create an entity that might substantially lessen competition in a particular industry.

3.2. Merger control

According to section 12 (1) (a) of the Act a merger occurs "when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another".[38]Neuhoffpoints out that the concept of control forms the crux of this definition.[39] In broad terms the notion of "control" refers to one's firm ability to direct the activities of another firm.[40] Section 12 (b) provides that a merger may be achieved in any manner including throughpurchase or lease of the shares, an interest or assets of the other firm in question, oramalgamation or other combination with the other firm in question."[41]

As indicated the concept of "control" needs to be understood broadly when it comes to mergers and acquisitions. Section 12 (2) provides that a person controls a firm if that person

"(a) beneficially owns more than one half of the issued share capital of the firm.

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person.

---

[37]Chapter 3 of the Competition Act 89 of 1998.
[38]Section 12 of the competition act 89 of 1998.
[39]Neuhoff160.
[40] Ibid.
[41] Section 12 (b) of the Competition Act 89 of 1998.

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm.

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1 (3) (a) of the companies act 1973 (Act61 of 1973)

(e) in the case of a firm that is a trust, has the ability to control the majority of the trustees, to appoint or appoint the majority of trustees or appoint or change the majority of the beneficiaries of the trust.

(f) in the case of a close corporation, owns the majority of the member's interest or controls directly or has the right to control the majority of member's votes in the close corporation or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) and (f)."[42]

3.3. Notification of a merger

The Competition Commission is the primary enforcer of competition law and all mergers above a certain threshold must be notified to the Commission. Firms may merge for a variety of reasons, considerable benefits arise out of the merger activity and the threat of acquisition acts as an important discipline on under-performing or inefficient firms and their management.[43]In many instanceshowever mergers may result in the merged firm being able to exploit efficiencies of scale andscope. The rationale for merger regulation is thus found in the fact that mergers have the ability to fundamentally alter the structure of markets. A merger may lead to a firm acquiring a dominant position or market power in one or more markets, or expanding and entrenching its market power.[44]Accordingly it is necessary to guard against mergers that may have such substantial anti-competitive effects.

---

[42] Section 12 (2) of the Competition Act 89 of 1998.
[43]Neuhoff162.
[44] Ibid.

3.4. Categories of merger

Section 11 (5) of the Act makes provision for the following types of mergers:

(a) "a small merger" means a merger or proposed merger with a value at or below the lower threshold established in terms of section 11(1) (a)

(b) "an intermediate merger" means or proposed merger with a value between the lower and higher thresholds established in terms of section 11 (1) (a); and[45]

(c) "a large merger" means a merger or proposed merger with a value at or above the higher threshold established in terms of section 11 (1) (a).[46]

Where a transaction does fall within the definition of a merger, the Competition Commission must be notified of the proposed merger if it is an intermediate or large merger, whereafter a substantive analysis must be undertaken by the Commission to determine whether the proposed merger should be prohibited or approved with or without conditions.[47]

3.5 Merger assessment

As provided for in section 12A of the Act, a two-pronged assessment must be undertaken by the Commission (and subsequently by the Tribunal in the vent of refusal of an intermediate merger and in the case of a large merger). During the first leg of the assessment it must be determined to what extent, if any, the proposed merger would be likely to substantially prevent or lessencompetition.[48] Here considerations of a purely economic nature would be taken into account. The Commission is required to assess the strength of competition in the relevant market as well as the probability that the firms in the market after the merger will behave competitively or co-operatively. For this purposes the Commission must take into account any factor that is relevant in that

[45]An intermediate merger is one where the combined figure is R600 million or more and the asset value in South Africa or turnover value in, into South Africa of the target firm (depending on which is the highest) in the preceding financial year is equal to or more than R100 million.
[46]Section 11(5) of the Competition Act 89 of 1998.
[47] Church "Aspects of the interface between the promotion of small and medium enterprise (SMEs) and statutory competition law" (2018) *THRHR* 214.
[48]Section 12A (1) (a) (i) of the Competition Act 89 of 1998.

market, including the following: the actual and potential level of import competition in such market; the ease of entry into that market (including tariff and regulatory barriers to entry); the level and trends of concentration and history of collusion in that market; the level and trends of concentration and history of collusion in that market; the degree of countervailing power; the dynamic characteristics of the market inclusive of growth , innovation and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of one of the merging parties has failed or is likely to fail and whether the merger will result in the removal of an effective competitor.[49]

If it appears to the Commission that the merger is likely to substantially prevent or lessen competition then it must determine whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result from the merger ad which gains would not likely be obtain should the merger be prevented. It must further also consider whether the merger can or cannot be justified on substantial public interest grounds by assessing the following factors as set out in section 12A(3), namely the effect that the merger will have on:

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small business or firms controlled or owned by historically disadvantaged persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

Even if the merger has no substantial anti-competitive effects, the Commission must as a final step during merger assessment consider whether the merger can or cannot be justified on *substantial* public interest grounds by having regard to the abovementioned factors as set out in section 12A(3). These public interest grounds thus play a critical role in merger assessment as they may prevent the acceptance of a merger which

[49] Section 12A(2)(a) to (h) of the Competition Act 89 of 1998.

poses no anti-competitive effects or may allow an otherwise anti-competitive merger to pass muster.

3.6 The public interest consideration pertaining to SMEs

Regarding the impact of a proposed merger on SMEs, it is to be noted that the Commission has indicated that it will look into whether or not the proposed merger will result in raising or creating barriers to entry; preventing access to key inputs; denying access to suppliers, and denying access to funding for business development growth. [50] The Commission will further consider whether SMEs and Historically Disadvantaged Individuals (HDIs) are impeded from competing in the market, whether they constrain larger players, such that their impediment restricts dynamic competition and growth, whether the restriction in growth and competition limits growth and expansion of SMEs and HDIs and participation effect has an impact on the public interest grounds. [51] On 23 January 2015 the Competition Commission published guidelines on the assessment of public interest provisions in merger regulation under the Competition Act.[52]In relation to the impact of a merger on SMEs section 9 of the guideline provides that in general, when assessing the likely effect on the ability of SMEs or HDIs to compete, the Commission will consider whether the effects are merger specific, substantial and justified.

The Commission will in general adopt the following steps when analysing each of the public interest considerations:

a) it will determine the likely effect on the public interest;

b) it will determine whether the alleged effect on a specific public interest is a result of the merger or is merger specific. In other words, is there a sufficient casual nexus between the merger and the alleged effect?;

---

[50] http://www.mondaq.com/southafrica/x/372606/Antitrust+Competition/Competition+Commission+Publishes+Draft+Public+Interest+Guidelines+For+Public+Comment2019/07/01

[51] http://www.mondaq.com/southafrica/x/372606/Antitrust+Competition/Competition+Commission+Publishes+Draft+Public+Interest+Guidelines+For+Public+Comment2019/07/01

[52]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 22.

c) it will determine whether these effects are substantial;

d) it will consider whether the emerging parties can justify the likely effect on the particular public interest; and

e) it will consider possible remedies to address any likely negative effect on the public interest.[53]

As a rule of thumb, in applying the general approach, where an effect is found to be non-merger specific, the enquiry should stop at that stage. Where an effect is found to be merger specific but not substantial the enquiry should stop at that stage. In other words there is no need for parties to justify an effect that is not substantial.[54]

The Commission will take the following steps in order to determine the impact of a merger on SMEs:

“Step 1:determine the likely effect on the ability of SMEs and HDIs to compete;

Step 2: determine whether any likely effect on the ability of SMEs and HDIs to compete is specific to the proposed merger;

Step 3: determine whether the likely effect of the merger on the ability of SMEs and HDIs to compete is substantial;

Step 4: consider whether such an effect could be justified, and

Step 5: determine the appropriate remedy to address the identified negative effect on the ability of SMEs and HDIs to compete.”

With regard to step 1 as listed above the Commission will determine whether any of the following effects arise on SMEs and HDIs among others: [55]whether the merger raises existing barriers to entry or creates barriers to entry; whether the merger prevents

[53]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 9.
[54]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 9.
[55]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 23.

access to key inputs; whether the merger will result inunfair pricing and supply conditions with respect to volume, discounts, quality, and services; whether the merger will have the effect of denying access to suppliers; whether the effect of the merger will be to prevent training, skills upliftment and development in the industry, and whether the merger will result in the denial of access to funding for business development and growth.[56]

Under step2, the Commission will determine whether the identified effect on SMEs and HDIs is the result of the merger. Where an alleged effect already exists, the Commission will consider whether the merger exacerbates such effect. [57]In analysing step 3 the Commission will generally consider:whether the affected SMEs or HDIs are impeded from competing in the market;whether they constrain large players in the market such that their impediment restricts dynamic competition, innovation and growth in the market;whether the restriction in growth and competition limits growth and expansion of SMEs and HDIs and their participation in other adjacent sectors; and whether the effect of the merger on SMEs and HDIs has an impact on other public interest factors such as employment and the industrial/sector or region.[58]

Where a merger has the effect of restricting dynamic competition by raising barriers to entry, impeding the development and expansion of SMEs and HDIs in relevant markets and adjacent sectors and resulting in other public interest concerns, these effects will be considered as substantial.[59]Considering whether such an effect could be justified entails that the onus will rest on the merging parties to provide arguments to justify a substantial positive or negative effect on the ability of SMEs and HDIs to compete. In analysing the arguments presented, the Commission will therefore consider whether

[56]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 23.
[57]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 23.
[58]Ibid.
[59]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 23.

there is any public interest justification that could mitigate the effect of the merger on SMEs and HDIs or that would allow it to approve an anti-competitive merger.[60]

When the Commission has to determine the appropriate remedy to address the identified negative effect on the ability of SMEs and HDIs to compete, the Commission will consider the appropriate remedy on a case-by-case basis. This will include consideration of the following:

a) establishing a supplier development fund for technical and financial support and assistance of SMEs and HDIs;

b) requiring the merging parties to provide favourable discounts and prices;

c) establishing skill development and training programs; and /or

b) obligating parties to continue access and supply.[61]

The Commission by means of these guidelines makes it a priority to ensure the promotion and protection of SMEs. It is without doubt that these guidelines will go a very long way in addressing the challenges which SMEs encounter as a result of a merger or hostile takeover by big corporates and conglomerate

3.7 Merger remedies

Merger remedies are primarily conditions which competition authorities impose on merging parties in instances where the merger is likely to affect competition negatively. The Commission may either approve the merger unconditionally or with conditions. The Commission may also not approve the merger at all. In different jurisdictions all over the world, including in South Africa, the Commission have come with both structural and behavioural remedies. These remedies have to a large extent been very useful in as far as the protection of SMEs is concerned.[62]

---

[60]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 24.
[61]Guidelines on the assessment of public interest provisions in merger regulations under the competition Act no 89 of 1998 (as amended) 24.
[62] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex 5.*

3.8 Types of remedies

In the economic literature remedies are generally classified into structural and behavioural remedies.[63]As explained by Binge and Van Eeden, structural remedies modify the allocation of property rights, whereas behavioural remedies set constraints on how those property rights are exercised. A structural remedy aims to restore pre-merger market structure, for example by full or partial divestiture of the firm.[64] A behavioural remedy usually aims to control the impact of a change in market structure, for example by price control, non-discrimination provisions and compulsory licensing and access agreements. Structural remedies can bemodified.[65]

In general structural remedies are able to eliminate market power rapidly while creating or invigorating competitors.[66] Once properties have been divested there is no need for ongoing monitoring. Divesture is defined in the English Oxford Dictionary as "the process of selling of subsidiary business interests or investments".[67] Divesture is the most common form of structural remedy, used as a tool by the competition authorities, to ensure that competition is preserved in a relevant market after a merger has been implemented.[68]This may occur in the form of sale of a business or part of a business or assets of an entity to a purchaser who is newly entering the market.

Divestures are considered to be the most drastic type of remedy and their use has been controversial especially in abuse of dominance cases. They can however, eliminate market power rapidly and are more likely to have long run-pro-competitive effects than other remedies.[69] In this sense divesture is therefore useful to eliminate competition which will cripple the development of SMEs. Even though divesture is easy to administer and it is said that divestiture requires only a single intervention by the competition authorities divestiture remedies nevertheless sometimes require some

[63] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex 5.*
[64] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex 5.*
[65]Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex 5.*
[66]Binge and Van Eeden *"Remedy Design and Application in South Africa" (2010)Econex 5.*
[67] Oxford Dictionary of English Angus Stevenson (eds) (2010) (3ED) Oxford University Press.
[68] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex 8.*
[69] Binge and Van Eeden*"Remedy Design and Application in South Africa" (2010)Econex 5.*

supervision when they are coupled with behavioural remedies for example when firms are prohibited from buying back shares.[70]

Divesture as a remedy in competition law is regulated by section 60 of the Act which provides as follows:“ifa merger is implemented in contravention of Chapter 3 the Tribunal may

a) order a party to the merger to sell shares, interest or other assets it has acquired pursuant to the merger, or

b) declare void any provision of an agreement to which the merger was subject.[71]

The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any firm, or any other person, to sell any shares, interest or assets of the firm if:

a) it has contravened section 8, and

b) the prohibited practice:

(i) cannot adequately be remedied in terms of another provision of this Act, or

(ii) issubstantially a repeat by that firm of conduct previously found by the tribunal to be a prohibited practice.”[72]

Where the Tribunal makes a divestiture order in terms of section 60(2) such order must be confirmed by the CAC failing which it will have no force or effect.[73] In terms of section 60(4) an order made in terms of section 60(1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

---

[70] Binge and Van Eeden*“Remedy Design and Application in South Africa” (2010) Econex 5.*
[71]Section 60 of the Competition Act 89 of 1998
[72] Section 60 of the Competition Act 89 of 1998
[73]Section 60(3) of the Competition Act 89 of 1998.

A merger was approved between *Ferro South Africa (Pty) Ltd and Revertex South Africa* where in a divesture was imposed as a remedy to address the lessening of competition.[74] The proposed merger was however not without concerns in as far as competition is concerned. One of the concerns was in relation to information sharing between AKZO Nobel, one of shareholders of Revertex and Ferro. The following divesture conditions were imposed by the Commission:

a. the merging parties were obliged to purchase the fifty percent shareholding held by AKZO Nobel in Arkem;

b. if the merging parties failed to acquire the shareholding within a certain period of time from the approval of the transaction then the merging parties had to dispose of their fifty percent shareholding in Arkem to an independent third party.

In *Astral Foods Limited (Astral) and National Chicks Limited* the merger was conditionally approved by the Tribunal.[75] The Tribunal prescribed a structural remedy for the horizontal leg of the merger and the full shareholding of Astral held in Nutrex[76] had to be sold by way of divesture to an independent third party buyer within a specified time period.[77] The behavioural part of the remedy prohibited Astral from discriminating against its independent customers who did not wish to conclude the standard agreement or customers that sold products from other suppliers through various price or volume discount.[78] Even though the facts of this case do not indicate that independent customers are small or big business it can be concluded on a balance of probabilities that some customers may be small businesses and beginners in the business who do not possess the same financial muscles as Astral did.

When Astral refused to supply these customers it was going to create an uneven terrain wherein small players would not be able to compete in the market.[79] The Commission was also concerned that the post-merger vertical structure of the market would provide

---

[74]*Ferro South Africa (Fero0) (Pty) Ltd and Revertex South Africa* case no LM261 March16.
[75] Competition Tribunal Case number 69/AM/Dec01.
[76]Nutrex was an effective competitor of Astral from the animal feed market.
[77]Competition Tribunal Case number 69/AM/Dec01 at 3.
[78]Competition Tribunal Case number 69/AM/Dec01 at 12.
[79] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010) *Econex*14.

Astral with the ability to price-discriminate in favour of its own downstream operations because the dominant supplier would be purchasing its largest independent customer.[80] In replying to the above discussed remedies the Commission cautioned against the use of behavioural rather than structural remedies, since these remedies were likely to be circumvented.[81] Although the Tribunal agreed in principle, they suggested that the circumstances where either divesture or prohibition could be imposed might be too drastic and that there were other remedies that could address anti-competitive effects adequately without imposing an unreasonable monitoring burden on the Commission.[82]

Some of the conditions imposed by the Commission, the Tribunal and the courts in merger cases include the establishment of a "Supplier Development Fund" by the merging parties. Such a fund is generally aimed at development in a particular industry.

In *Glenco South Africa Oil Investments (Pty) Ltd/ Chevron South Africa (Pty) Ltd* (now known as Astron Energy Proprietary Limited) a Supplier Development Fund was established .[83]Glencowould ensure that within two years of the implementation date of the merger, Astron would establish the development fund in order to support those small businesses and black owned businesses which are involved in Astron's value chain.[84] The development fund would be focused on the development of small businesses and black owned businesses and was required to have the following objectives: support the sustainable establishment and development of existing or potential local South African business, particularly small businesses that contribute to Astron's value chain, through both financial support and technical support and training, in order to expand the level of local procurement of goods and services in South

[80].Competition Tribunal Case number 69/AM/Dec01 par 36.
[81] Binge and Van Eeden"Remedy Design and Application in South Africa" (2010)*Econex*14.
[82]Competition Tribunal Case number 69/AM/Dec01 at 12.
[83]*Glencore South African Oil Investments (Pty) Ltd and Chevron South Africa (Pty) Ltd (Now Known as Astron Energy Proprietary Limited)* Case No: LM185Oct18.
[84]*Glencore South African Oil Investments (Pty) Ltd and Chevron South Africa (Pty)Ltd (Now Known as Astron Energy Proprietary Limited)* Case No: LM185Oct18.

Africa.[85] One can thus again see from the aforementioned how competition law came to the rescue and support of fair competition by giving protection to SMEs.

The merger of Wal-mart and Massmart in 2010[86] presents a further good example of the role of public interest in merger regulation as it raised a number of public interest considerations. Of critical importance is the issue that concerns small business. The Commission found that Wal-mart, the largest retailer in the world, would benefit local suppliers in South Africa by committing to continue sourcing products locally.[87] Furthermore, Massmart had indicated that it did not intend on reducing the number of local SMEs suppliers.Also Massmart had indicated that it did not have the intention to reduce the number of local SMEs suppliers.[88] Based on these considerations, the Commission found that the merger was unlikely to have a significant negative impact on employment, small business or a particular industry or sector and recommended that the merger be approved without conditions[89]

The merger was subsequently referred to the Tribunal. With regard to the Commission's analysis, the Tribunal found that the merger did not raise any competition concerns as Walmart did not compete with Massmart in South Africa, and that its only presence in the country was through its procurement arm which purchased South African produce for the export market.[90] The Tribunal however acknowledged that the merger raised some public interest concerns related to employment and the potential displacement of small business in markets underserved by large retailers.[91]

Some government departments however intervened as they were apprehensive that the merged entity would, post-merger, switch some of its procurement away from domestic supplies to imports. It was their view that such import substitution would likely

---

[85]*Glencore South African Oil Investments (Pty)Ltd and Chevron South Africa (Pty) Ltd (Now Known as Astron Energy Proprietary Limited)* Case No: LM185Oct18.
[86]Commission case number: 2010Nov5445.
[87] Commission case No:73/LMDec10 par 122.
[88]Mandiridza, Sithebe and Viljoen 'An ex-post review of the Wal-Mart/Massmart Merger' working paper *CC2016/03, 6.*
[89]Commission case No:73/LMDec10 par 74.
[90]Commission case No:73/LMDec10 par 22.
[91]MandiridzaSithebe andViljoen *'*An ex-post review of the Wal-Mart/Massmart Merger' working paper *CC2016/03, 6.*

compromise the sustainability and participation of local SMEs and HDI manufacturing and assembly firms. The knock-on effect would be an adverse impact on domestic employment and a reduction in output in those sectors which economic policy is aimed at developing.[92]

The Tribunal approved the merger conditionally and incorporated some undertakings proposed by the parties inter alia the establishment of the Massmart Supplier Development Fund as conditions.

The matter was subsequently appealed to the Competition Appeal Court (CAC).[93] The CAC inter alia contemplated the purpose, scope and functions of the aforesaid Fund. It found that the Fund should be designed to respond to the threat of loss of employment and sales by local suppliers including SMEs, as a result of their potential displacement by way of imported goods. The CAC further held that the Fund should incentivise the merged entity to buy products from South African producers and manufacturers over and above the types of products that would in any event be purchased. It indicated that in this manner the domestic suppliers would be integrated into Massmart's local and potentially Walmart's global, supply chain. The CAC indicated that the Fund's target market would include new and existing suppliers which could benefit from improved market access and capacity development. It was envisaged that these enterprises would supply niche products to Massmart in certain areas. It was further indicated that the projects and programmes supported under the Fund should also take cognisance of developmental factors such as the labour intensity of the suppliers' operations, whether the business is owned by HDI and whether the enterprises fall into the SME classification. The CAC ruled the type of assistance provided should include financial assistance as well as skills development. It ordered that R200 million be allocated to the Fund by Massmart over a 5 year period.

3.9 Final remarks

[92] Ibid.
[93] 110/CAC/Jun11 and 111/CAC/Jun11(9 Oct 242).

It appears from the discussion above that the Competition Commission has over the years promoted the purpose and objective of our competition legislation and also the interests of SMEs insofar as it did not allow mergers to constrain the ability of SMEs to become competitive. The public interest guidelines issued by the Commission is a particularly useful tool which has been design to offer protection based on competition law practices and promotion of the ability of SMEs to become competitive are dealt with extensively in these guidelines. The creation of development funds as witnessed in Wal-Mart/Massmartand Glenco serve as good examples of how the Competition Commission and the Tribunal have been consistent in the furtherance of the protection afforded to SMEs by the Act.

Chapter 4The abuse of dominance provisions and SMEs

4.1 Introduction

According to Sutherland and Kemp, when a practitioner is confronted with a potential instance of abuse of dominance, it is necessary to answer the following three fundamental questions:

a) do the abuse provisions apply to the situation in question?

b) is the firm dominant?

c) if so has the firm engaged in any conduct prohibited by the abuse provisions?[94]

Unless the answer to all three of these questions is in the affirmative the aforesaid authors indicate that there is no liability under the abuse provisions.[95]

Notably application of the abuse provisions depends firstly on the territorial application of the Act as directed by section 3 and secondly on whether the potential respondent exceeds the financial threshold laid down in section 6 of the Act, which is currently R5000.[96] Once it has been established that the Act applies and that the monetary threshold has been met the enquiry turns to section 7 which sets out the test for dominance.

4.2 When is a firm dominant?

Section 7 of the Act provides for circumstances upon which a firm may be considered dominant, namely

---

[94] Sutherland and Kemp 7-8.
[95] Ibid.
[96] Ibid.

a) if the firm has at least 45% of that market;

b) if the firm has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or

c. if the firm has less than 35% of the market, but has market power.[97]

Sutherland and Kemp point out that the 45% criterion for dominance creates an irrebuttable presumption of dominance and if this market share threshold is met the enquiry as to dominance ends there. In respect of the 35% criterion the onus is on the firm accused of being dominant to prove that it is not dominant. Where a firm has less than 35% of the market the onus to prove dominance is on the complainant, and if it is not discharged the firm is not dominant.[98]

Given that dominance for purposes of the Act relates to both market share and market power it is necessary to consider how the Act defines market power. Section 1 defines "market power" as the ability to control prices, exclude competition, or behave to an appreciable extent independently of a competitor's customers and suppliers.[99]

Lewis further observes that the determination of market share is not a matter of simple arithmetic but is rooted in a rigorous identification of the relevant market.[100]According to him the finding of dominance says nothing about the finding of an actual abuse of dominance because for such a finding much more remains to be proven.[101] No contravention is founded purely on the basis of a finding of dominance. Significant additional hurdles have to be crossed in order to make a finding of actual abuse. Lewis indicates that to take a view on proving dominance without thinking about proving abuse is to miss the essential point.[102]Lewis points out that the finding of dominance brings the plaintiff, the Commission or the private party to the starting line only.[103] The plaintiff still

[97]Section 7 of the Competition Act 89 of 1998.
[98] Sutherland and Kemp 7-11.
[99]Neuhoff141.
[100]Lewis "Defining Dominance" (2008) 4 Competition L. Int'l 1.
[101]Lewis "Defining Dominance" (2008) 4 Competition L. Int'l 1.
[102]Lewis "Defining Dominance" (2008) 4 Competition L. Int'l 2.
[103]Lewis "Defining Dominance" (2008) 4 Competition L. Int'l 2.

needs to prove the actual abuse. It is thus not dominance in itself that is wrongful but the actual abuse of dominance that should be sanctioned.

Sutherland and Kemp indicate that before one proceeds with examining the instances of prohibited conduct individually, some general points should be made about such conduct: [104] First, intention is not a prerequisite for abuse of dominance. The complainant need not prove that the dominant firm aimed to misuse its market power or to create an anti-competitive effect. Nor it is sufficient for a complainant to prove that the dominant firm had such an aim in order to establish an anti-competitive effect under section 8 (c) or 8 (d).[105]Secondly, it does not matter that third parties agreed to, or even requested, the conduct engaged in by the dominant firm. A customer or supplier who willingly entered into a prohibited agreement with the dominant firm cannot absolve the dominant firm from having contravened the prohibitions against abuse of dominance simply by their waiver or consent. Abuse of dominance does not require another party as a victim.[106]

4.3 The abuse of dominance prohibitions in section 8

Section 8 of the Act provided (before its amendment by the Competition Amendment Act of 2018) that it is prohibited for a dominant firm to

"(a) charge an excessive price to the detriment of customers

(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 an act listed below if the anti-competitive effect of that act outweighs its technological efficiencies or other pro-competitive gain;

[104] Sutherland and Kemp 7-8.
[105] Ibid.
[106] Sutherland and Kemp 7-36.

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiencies or other pro-competitive gains which outweigh the anti-competitive effect of its act:

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or forcing a buyer to accept a condition unrelated to the object of a contract

(iv) selling goods or service below their marginal or average variable cost or

(v) buying up a scare supply of intermediate goods or resources required by the competitor."

4.4 The price discrimination prohibitions in section 9

Before its amendment by the Competition Amendment Act of 2018, as discussed later in this chapter, section 9 provided that an action by a dominant firm, as the seller of goods or services is prohibited price discrimination if

"a) it is likely to have the effect of substantially preventing or lessening competition;

b) it relates to the sale, in equivalent transactions of goods or services of like grade and quality to different purchasers; and

c) it involves discriminating between those purchasers in terms of

(I) the price charged for goods or services;

(ii) any discount, allowance, rebate or credit given or allowance in relation to the supply of goods or services; or

(iv) payment for services provided in respect of goods or services."[107]

4.5 *Nationwide Poles* Decision

The seminal South African case relating to the impact of abuse of dominance on a small business is undoubtedly that of *Nationwide Poles and Sasol Oil (Pty) Ltd*.[108] The complainant, Nationwide Poles was a small producer of treated wooden poles based in the Eastern Cape. Given its size it is clear that Nationwide Poles was an SME. It procured supplies of untreated pine poles from sawmills and then treated the poles with a wooden preservative (creosote).[109] On 30 April 2003 Nationwide lodged a complaint against the respondent (Sasol Oil) with the Competition Commission alleging contravention of sections 4 (1) (b) and 9 (1) of the Act. It received a notice of non-referral from the Commission on the 12 November 2003.[110]

Mr Foot, the owner of Nationwide Poles then elected to approach the Tribunal directly. In the Tribunal proceedings Nationwide Poles was only pursuing a claim in terms of section 9 of the Act in relation to prohibited price discrimination. Nationwide Poles alleged that the discount structure utilised in the pricing of Sasol's wood preservative, creosote, met the test of prohibited price discrimination and it requested the Tribunal to make a finding to this effect.[111] Nationwide Poles sought two remedies: a declaratory order and an interdict.[112] Nationwide Poles also requested the Tribunal to order Sasol to supply it on the same price terms as those available to its competitors.[113] The Tribunal found that Sasol indeed contravened section 9 of the Act.[114]

This finding was however subsequently overturned by the CAC. On appeal the CAC agreed with the Tribunal's observation that the prohibition on price discrimination in the

---

[107]Section 9 of the Competition Act 89 of 1998.
[108]*Nationwide Poles and Sasol (Oil) Pty Ltd* Case No:72CR/Dec03 par 1.
[109] Creosote is a wax additive produced by Sasol. It contains various phenols and other organic compounds, distilled from coal tar and is used as wood preservative.
[110]*Nationwide Poles and Sasol(Oil) Pty Ltd* Case No:72CR/Dec03 par 5.

[111]*Nationwide Poles and Sasol (Oil) Pty Ltd* Case No:72CR/Dec03 par 5.
[112]*Nationwide Poles and Sasol (Oil) Pty Ltd* Case No:72CR/Dec03 par 143.
[113]*Nationwide Poles and Sasol (Oil) Pty Ltd* Case No:72CR/Dec03 par 5.

[114]*Nationwide Poles and Sasol (Oil) Pty Ltd* Case No:72CR/Dec03 par 140.

Act is aimed at protecting SMEs.[115] The CAC's focus was mainly on substantial prevention and lessening of competition and what evidence would be required to prove such a lessening or prevention.[116] The CAC however eventually found that no evidence of such reasonable possibility of harm was proved by Nationwide Poles.

4.6 Criticism of the *Nationwide Poles* CAC decision

As pointed out, section 9 of the Act, as it currently stands, prohibits price discrimination by a dominant firm if the price discrimination implicates equivalent transactions and is likely to result in a substantial lessening or prevention of competition. The discrimination may be justified on certain grounds, including allowances for differences in costs of supply, meeting price competition, and changing market conditions.[117] Of particular importance in the *Nationwide Poles* decision is that the CAC criticised the lack of evidence that supported the Tribunal's finding that Sasol's action resulted in the lessening of competition.[118]

It thus seems like section 9 put a heavy burden of proof on the applicant in the *Nationwide Poles* case. One way of discharging this onus is to show that as a result of the discriminatory conduct a particular firm has gone out of business. It can be argued after the fact that the CAC had expected actual proof at the time that Nationwide Poles had gone out of business or that such fate befell any other company or corporation in a position similar to Nationwide Poles. The amendment to section 9 of the Act, as mentioned below in paragraph 4.8, has fortunately brought some relief because it does away with the requirement to prove harm which was a significant hurdle that Nationwide Poles struggled with. Given that the CAC's stance was that the purpose of competition

[115] http://www.mondaq.com/southafrica/x/40070/Trade+Regulation+Practices/Landmark+Price+Discrimination+Case+Overturned+by+The+Competition+Appeal+Court2019/08/15.

[116] *Sasol Oil (Pty) Ltd and Nationwide Poles CC* 49CACAPRIL05 at 27.

[117] http://www.mondaq.com/southafrica/x/40070/Trade+Regulation+Practices/Landmark+Price+Discrimination+Case+Overturned+by+The+Competition+Appeal+Court2019/08/15.

[118] *Sasol Oil (Pty) Ltd and Nationwide Poles CC* 49CACAPRIL05 at 27.

law is to protect competition and not individual competitors the *Nationwide Poles* case actually dealt a blow to the objective of the Act to promote the ability of SMEs to become competitive.

4.7 *The Competition Commission v Sasol Chemicals industries (SCI) Ltd, Yara South Africa (Pty) Ltd and Omnia Fertilisers Ltd*

In 2010 the Commission entered into a settlement agreement with Sasol Chemical Industries (SCI) after it agreed that it violated section 8 and 9 (in particular excessive pricing, refusal to supply and price discrimination) of the Act. Notably Ammonia was at the time produced by Sasol at both their Secunda and Sasolburg plants. Ammonia is the key input in the production of nitrogenous fertilisers. The ammonia produced by Sasol and imported by Omia, Foskor and Kynoch (Yara) is used in the production of ammonium nitrate.[119] Ammonium nitrate, in either its liquid or solid form, is a substance that is used in the production of fertilisers or explosives.[120]

Nutri-Flo lodged a complaint with the Commission on 3 November 2003. In its complaint Nutri-Flo:

a)alleged that SCI and its competitors acted in contravention of section 4 of the Act that deals with horizontal restrictive practices (cartels);

b) contended that SCI, while dominant in the market for the supply of limestone ammonium nitrate (LAN) and ammonium nitrate solution (ANS) , committed an abuse of its dominant position by charging excessive prices as contemplated in section 8(a) for such LAN and ANS;[121]

c) complained of exclusionary conduct on the part of SCI in that SCI priced its products at a level that left Nutri-Flo with no capacity to make a proper profit on sale;

---

[119]Grimbeek, Giya&Mahlalela"The impact on competition in the fertiliser industry after the Sasol divesture of blending facilities in 2010" working paper No.1 July 2017.
[120] Ibid.
[121]*The CompetitionCcommission v Sasol Chemical Industries, Yara South Africa (Pty) Ltd Aand Omnia Fertilisers Ltd case* No. 31/CR/May06.

d) alleged that this “margin squeeze” meant that Nutri-Flo could trade only at a loss and was unable to expand in the market;

e) stated that Sasol took deliberate steps to prevent Nutri-Flo from expanding its market and, as a result its market penetration had shrunk.[122]

A margin squeeze typically arises where a vertically integrated firm with dominance upstream also operates in a competitive market downstream; the dominant firm controls access to an essential input upon which downstream competitors rely to compete in the downstream market; and the dominant firm leverages its dominance upstream by raising the access price charged to downstream competitors.[123]

SCI was found guilty of an abuse of dominance in terms of section 9 of the Act by charging customers, including Profert,more for LAN than it charged Kynoch. The Commission and Sasol subsequently reached a settlement agreement in which Sasol agreed to undertake a divesture and disposal of the affected assets by sellingits Ammonium Nitrate Based Fertilisers to its customers on an ex-works basis from its premises.[124]SCI further agreed not to impose any restriction or obligation upon any customer as regards the terms of resale of the above mentioned fertiliser products; not to differentiate in its pricing, other than on standard commercial terms such as volume and off-take commitments and that any discounts and or allowances granted would be transparent and available to all customers willing and able to meet such volume and off take commitments.[125]

There are a number of other agreements that Sasol entered into with the Commission but they are beyond the scope of this dissertation. The gist here is that by selling its interest Sasol opened an opportunity for small and medium sized upcoming

---

[122] *The Competition Commission v Sasol Chemical Industries,Yara South Africa (Pty) Ltd and Omnia Fertilisers ltd case* No. 31/CR/May06

[123] Kelly and Van der Vijver “Lessis more:Senwes and the concept of ‘margin squeeze ‘ in South African Competition law” (2009) *South African law journal*part 2 at 246.

[124] *The Competition Commission v Sasol Chemical Industries,Yara South Africa (Pty) Ltd and Omnia Fertilisers Ltd case* No. 31/CR/May06

[125] Ibid.

enterpriseswho do not have the same financial muscles that Sasol has to enter into or expand in the market for the supply of fertilisers.

4.8 The amended section 8

Only those parts of section 8 that have been amended that have a direct bearing on the ability of competition law to promote SMEs will be dealt with. Notably the Competition Amendment Act introduces a new section 8(4)(a) to (d). The new section *(4)(a) prohibits a dominant firm, in a sector designated by the Minister in terms of the newly added section 8(4)(d), to directly or indirectly require unfair prices or other trading conditions from a firm, or to impose unfair terms or other trading conditions, on a supplier, that is a small or medium sized business or a firm controlled or owned by historically disadvantaged persons.

In terms of the new section 8(4)(b) it is prohibited for a dominant firm in a sector designated by the Minister in accordance with section 8(4)(d) “to avoid purchasing, or to refuse to purchase, goods or services from a supplier that is a small or medium sized business or a firm controlled or owned by historically disadvantaged persons” to circumvent the operation of section 8(4)(a). The new section 8(4)(c) stipulates that if there is a prima facie case of a contravention of section 8(4)(a) or 8(4)(b) then the dominant firm that is alleged to have contravened those subsections must show that:

(a) in the case of section 8(4)(a), the price or trading condition is not unfair; and
(b) in the case of section 8(4)(b), that it has not avoided purchasing or has not refused to purchase, goods or services from a supplier referred to in section 8(4)(b) in order to circumvent the operation of section 8(4)(a).

The new section 8(4)(d) states that the Minister must, in terms of section 78 of the Competition Act, make regulations designating the sectors, and in respect of firms owned by historically disadvantaged persons, the benchmarks, for determining the firms to which section 8(4) will apply. These regulations are required to also set out the relevant factors and benchmarks in those sectors for determining whether the prices and other trading conditions envisaged in section 8(4)(a) are fair.

4.9 The amended section 9

The Competition Amendment Act of 2018 has also introduced extensive amendments to section 9.[126] The amendments to section 9 introduces a new section 9(1A)which provides that it is prohibited for a dominant firm to avoid selling, or to refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of section 9 (1)(a)(ii).''[127]

Section 9(2) is amended to provide that despite section 9(1), but subject to section 9 (3), conduct involving differential treatment of purchasers in terms of any matter listed in section 9(1)(c) is not prohibited price discrimination if the dominant firm establishes that the differential treatment:

(a) makes only reasonable allowance for differences in cost or likely costs of manufacture, distribution, sale, promotion or delivery resulting from: the differing places to which goods or services are supplied to different purchasers; the methods by which goods or services are supplied to different purchasers; or the 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: any acts in response to the actual or imminent deterioration of perishable goods; any action in response to the obsolescence of goods; a sale pursuant to a liquidation or sequestration procedure; or a sale in good faith in discontinuance of business in the goods or services concerned.

The new section 9(3) stipulates that if there is a prima facie case of a contravention of section 9(1)(a)(ii) then section 9(2)(a)(ii) is not applicable and the dominant firm must, subject to the regulations issued under section 9(4), show that its action does not

[126]Clause 5 of the Competition Amendment Act 18 of 2018.
[127]Clause 6 of the Competition Amendment Act 18 of 2018.

impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to “participate effectively.”

A new section 9(3A) is also added which provides that if there is a prima facie case of a contravention of section 9(1A), the dominant firm alleged to have contravened section 9 (1A) must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in section 9(1A) in order to circumvent the operation of section 9(1)(a)(ii).In terms of the new section 9(4) the Minister is required to make regulations in terms of section 78 to give effect to section 9, including the setting of benchmarks for the application of section 9 to firms owned and controlled by historically disadvantaged persons. These regulations must also set out the relevant factors and benchmarks for determining whether the actions of a dominant firm constitute price discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons.

4.10Final remarks

The development of competition law in South Africa remains an ongoing process. The Commission, the Tribunal and the courts have done a lot to date to advance the objectives of the Act since it came into operation. In as far as abuse of dominance is concerned there is however a dearth of case law and little has been done to enhance the promotion of SMEs. It appears that South African competition legislation is a very good tool but clearly some sections of the Act needed to be reviewed to ensure greater protection for SMEs. The amendment to sections 8 and 9 of the Act which obliges dominant firms not to impose unfair prices or trading conditions on SMEs and not to sell or to avoid selling to SMEs, was long overdue.

The requirement in section 9(3) that the dominant firm must show that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to “participate effectively” is an additional provision

that serves to impose a new onus on dominant firms.[128] It is clear that with the abovementioned amendments of sections 8 and 9 amendment a major step has been taken to enhance the welfare of SMEs and their ability to become , or to be, competitive, from a competition law perspective.

Chapter 5 Conclusions and Final remarks

[128] https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-c 2019/08/01.

5.1 Introduction

One of the purposes of the Act as enshrined in section 2 (e) is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the South African economy.[129] The furtherance of the growth of SMEs has a very special place in the Act because, as indicated, the Act was promulgated with an extended purpose which not only seeks to promote consumer welfare but also inter alia to ensure that SMEs are able participate meaningfully in the economy. The question posed in this dissertation was accordingly how exactly the Act set about to achieve its objective in relation to SMEs. This question was sought to be answered by looking at three provisions on the Act which, namely the provision relating to exemptions as provided for under section 10, the provisions relating to mergers and acquisitions provided for under Chapter 3 of the Act and finally the abuse of dominance provisions provided captured in sections 8 and 9 of the Act.[130]

Under the exemption provisions in section 10 the Commission may exempt an agreement or practice from the application of Chapter 2 of the Act which concerns prohibited practices.It was pointed out that South African competition law provides for the preferential treatment or exemption of agreements or practices that would otherwise contravene the prohibited practice provisions of the Act as captured in sections 4 to 9. One of the grounds on which an exemption can be based, as was stated in section 10(3)(b)(ii) prior to its amendment by the Competition Amendment Act of 2018, was“if the agreement or practice concerned contributes to the promotion of the ability of small businesses and firms controlled by historically disadvantaged persons to become competitive.”In the *National Health Network (NHN)*-case it was stated that the purpose of an application for exemption was “agreeing collectively to implement prices negotiated and entered into on their behalf by NHN with medical schemes and or medical schemes and or medical scheme administrators” and “promoting the interests of NHN member’s benchmarking and marketing members services with a view to

[129] Section 2 (e) of the Competition Act
[130] Section 8 of the Competition Act

improving efficiencies.[131]The changes to section 10(3)(b)(ii) effected by the Competition Amendment of 2018 has broadened and enhanced the basis on which SMEs can apply for exemption by providing that such exemption can be based on the promotion of the effective entry into, or participation in or expansion within a market.

Merger regulation in particular, is a field of competition law which, if not properly administered would see a number of SMEs finding it very hard to survive after a merger that creates a new larger, dominant competitor. In the context of merger regulation the Act provides for a number of public interest considerations to be considered during merger assessment.As pointed out, provision is made in the Act for both structural and behavioural remedies which can be implemented to ensure that SMEs still find a space to operate profitably after a merger. Merger remedies are primarily conditions which competition authorities imposes to merging parties in instances where the merger is likely to affect competition negatively. [132] Divesture is the most common form of structural remedy, used as a tool by the competition authorities, to ensure that competition is preserved in a relevant market after a merger has been implemented.[133] When a divesture is implemented it provides a chance to SMEs to buy shares or take over a certain part of the business of a big firm thereby level the playing field between the SMEs and the big firm. Notably competition authorities are not in favour of behavioural remedies because it needs constant monitoring of the behaviour of a firm hence structural remedies are more likely to be imposed, thus improving opportunities for SMEs to branch out in the post-merger market. The public interest merger guidelines issued by the Competition Commission has in particular made it easier for competition authorities to justify imposing conditions on mergers that may affect the ability of SMEs to become competitive. It is also clear that the competition authorities apply behavioural and structural merger remedies to expand opportunities for SMEs to competitive effectively in the post-merger market.

The abuse of dominance provisions in the Act also have a particularly significant role to play in the context of promoting opportunities for SMEs to participate in the economy.

---

[131]*National Health Network (NHN*) Case2013Nov0553 and Government Notice 867 of 2014.
[132]Binge and Van Eeden*"Remedy Design and Application in South Africa" (2010) Econex*5.
[133]Binge and Van Eeden*"Remedy Design and Application in South Africa" (2010) Econex 8.*

An uncontrolled dominance by big firms does not give room for SMEs to flourish in the economy. As pointed out it must be understood that dominance itself is not the problem but the abuse thereof is. Firms which traditionally enjoyed state support have been found to have abused the dominance that they enjoyed due to such support. Prior to the amendments effected by the Competition Amendment Act of 2018 case law, specifically the *Nationwide Poles* case, however painted quite a grim picture of how the abuse of dominance provisions in the Competition Act operated to promote the ability of SMEs to participate in the economy.In*Nationwide Poles v Sasol* the Commission found that Sasol had abuse its dominance in relation to its pricing structure by preferring larger clients over small ones. This decision was overturned on appeal but attracted a lot of criticism from the competition law fraternity. The CAC cited lack of evidence to support its finding that Sasol's action did not result in the lessening of competition, famously stating that competition law"s function is to protect competition, not to protect competitors. The fact that Sasol charged its customers different prices for the same product should have been enough to secure a victory for Nationwide Poles. However the small firm was hung out to dry in this case. The amendments to sections 8 and 9 introduced by the Competition Amendment Act of 2018 as dealt with in Chapter 4 of this dissertation will go a long way in making sure that SMEs are not hung out to dry in future.

5.2 Final remarks

One of the big advancements brought about by the Competition Amendment Act of 2018 is that it has amended various sections of the Act to augment the provisions relating to the ability of SMEs to become effective participants in the South African economy. It is especially the obligations placed on dominant firms to actively promote the ability of SMEs to become or to be, competitive, that are commendable. Hopefully the amendments introduced by the Competition Amendment Act wil, when applied on a practical level, indeed open up opportunities for greater participation in the markets by SMEs.

BIBLIOGRAPHY

Books

Angus Stevenson (eds) *Oxford Dictionary of English* (2010) (3ed) Oxford University Press, Oxford UK

Biggs *An evaluation of the impact of the consumer protection act 68 of 2008 on the relationship between franchisors and franchisees* (LLD Thesis) Nelson Mandela Metropolitan University (2016))

Neuhoff et al A practical guide to the South African Competition Act" (2ND ed)

Sutherland and Kemp K*Competition law of South Africa*(Service Issue 21)

Journal articles

Church J "Aspects of the interface between the promotion of small and medium enterprise (SMEs) and statutory competition law" (2018) *THRHR*202

Hartzenberg T "Competition Policy Practice in South Africa: Promoting competition for development" (2006) *NW.J.Int'l L. & Bus*669

Kelly and Van der Vivjer "Lessis more:Senwes and the concept of 'margin squeeze ' in South African Competition law" (2009) *South African Law Journal*, Part 2 246

Lewis "Defining Dominance" (2008) 4 *Competition L. Int'l*1

Legislation

The Competition Act 89 of 1998

The Competition Amendment Act of 2018

The Constitution of the Republic of South Africa, 1996

The National Small Business Act 102 of 1996

Cases

*African Marine Products (pty) ltd, Cape Lobster Exports Association, Ovenstone Agencies (Pty) Ltd, Oceana Lobster ltd, Ruwekus, Premier Fishing (pty) ltd C*ase 2013jul0332

Anheuser-Busch InBEV SA/NV and SABMiller plc case number: LM211Jan 16

Glencore South African Oil Investments (Pty) Ltd and Chevron South Africa (Pty) Ltd (Now Known as Astron Energy Proprietary Limited) Case No: LM185Oct18

*Minister of Economic Development and Massmart Holdings Limited C*ase No 110/CAC/jun11

Nationwide Poles and Sasol (Oil) Pty Ltd Case No:72CR/Dec03

National Health Network (NHN) Case2013Nov0553

SAPIA Case 2009Dec4813

The Competition Commission v Sasol Chemical Industries, Yara South Africa (pty) LTD AND Omnia fertilisers ltd case No. 31/CR/May06

Unilever Plc and others and the Competition Commission of South Africa Tribunal case number 55/LM/Sep01

Competition law working papers and media releases

Competition Commission of South Africa Media release "*Competition Commission Concludes Assessment of AB InBEV/SABMiller merger*" 31 May

http://www.compcom.co.za/wp-content/uploads/2016/01/SABMiller_AB-InBev_31May16_1530-3.pdf 11/06/2019

Guidelines on the assessment of public interest provisions in merger regulations under the Act no 89 of 1998 (as amended)http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf 11/06/2019

Mandiridza, Sithebe and Viljoen *'An ex-post review of the Wal-Mart/Massmart Merger' working paper CC2016/http://www.compcom.co.za/wp-content/uploads/2016/11/CC201603-Mandiriza-T-Sithebe-T-and-Viljoen-M-2016-An-expost-evaluation-of-the-Walmart-Massmart-merger.pdf/ 11/06/2019*

GrimbeeK, Giya&Mahlalela*"The impact on competition in the fertiliser industry after the Sasol divesture of blending facilities in 2010" working paper No.1* July 2017

Notices

Notice 41970 Government Gazette, 2018

Government Notice 867 of 2014

Government Notice 340 of 2010

Notice CC 11(2) of the Competition Commission of South Africa.

Internet sources

https://www.forbes.com/sites/tobyshapshak/2019/03/29/south-africa-launches-95m-fund-to-grow-small-businesses/#327da8604850/2019/04/13

https://www.oxfordlearnersdictionaries.com/definition/english/exemption#targetText=%E2%80%8B%5Buncountable%2C%20coutable%5D%20exemption,Oxford%20Collocations%20Dictionary/2019/04/17

http://www.mondaq.com/southafrica/x/40070/Trade+Regulation+Practices/Landmark+Price+Discrimination+Case+Overturned+by+The+Competition+Appeal+Court2019/08/15

https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-c 2019/08/01

https://www.oxfordlearnersdictionaries.com/definition/english/exemption#targetText=%E2%80%8B%5Buncountable%2C%20coutable%5D%20exemption,Oxford%20Collocations%20Dictionary