LABOUR AS A PUBLIC INTEREST CONSIDERATION IN MERGER REGULATION

by

NONDWE MGWEBI

Submitted in fulfilment of the requirements for the degree

Master of Laws

In the Faculty of Law,
University of Pretoria

FEBRUARY 2020

Supervisor : PROFESSOR CM VAN HEERDEN

Declaration of originality

.

Full names of student: Nondwe Mgwebi

Student number: 18356843

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 original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person 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 of student:.....……

Signature of supervisor:…….....……

SUMMARY

In the South Africa context for merger consideration the issue of labour has always been a pertinent focus and consequential to that the Competition Act, 89 of 1998 as amended (Competition Act) establishes a compulsory merger notification approach. It is therefore necessary to scrutinize the role that labour as a public interest concern has played and is likely to play subsequent to the Competition Act, Public Interest Guidelines and the Competition Amendment Act 18 of 2018 coming into operation.

This paper looks at the number of ground-breaking cases which have been umpired with intervention from several government departments and trade unions and places the focus on how labour issues are assessed in mergers. The cases are fundamental to the application of public interest considerations on proposed mergers and also to specifically determine the impact that labour as a public interest consideration has on what the Competition Act intends to achieve as indicated in its preamble and purpose.

The content and impact of the Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act will be deliberated with reference to how the competition authorities deal with employment as a public interest consideration.

The issue of public interest consideration in mergers is a developing area of our competition law system and this study seeks to demonstrate the importance of labour as public interest consideration in merger regulation and how instrumental labour is to the promotion of competition policies.

INDEX

Chapter 1: Background to study

1.1. Introduction

Political landscape vicissitudes have long had an impact on the welfare of South Africans which have in some junctures led to organisational transformation wherein employees are affected and exposed to mergers. The latter has continued to be an impasse in merger regulation henceforth the need to have a defined mandate for competition authorities regarding mergers especially on the aspect of public interest considerations. However, it is imperative for purposes of this study to first briefly grapple with the history of competition regulation in South Africa prior to its transformation in 1999 with the coming into effect of the Competition Act.[1]

Pre-democracy state subsidised enterprises in South Africa enjoyed protection and benefits from the government which led to a widened ability to manipulate the market.[2] An initiative to surpass this monopoly behaviour was introduced in the form of the Regulation of Monopolistic Conditions Act 24 of 1955 (hereinafter also 1955 Act) , which dealt with monopoly conditions or restrictive practices. The Regulation of Monopolistic Conditions Act did however not deal with issues pertaining to mergers. The Board of Trade and Industry tasked with the enforcement of the 1955 Act was also powerless as the Minister of Trade and Industry could revoke the decisions of the Board.[3] It became clear that a body with more powers was needed to deal with amongst other things, mergers, hence the introduction of the Maintenance and Promotion of Competition Act 96 of 1979 (hereinafter also the 1979 Act). The 1979 Act ensured that restrictive practices which included resale price maintenance and market divisions were declared illegal, but issues of merger control, enforcement and exemptions were not made mandatory.[4] A competition board with more powers than the ones conferred on the Board established under the Regulation of Monopolistic Conditions Act was also established by the Minister of Trade and Industry, even though there were no actual prosecutions.[5] With the transition to a democracy in 1994, the new government sought to create competition policies which would promote competition in South Africa and would move away from authoritative bodies tasked with competition enforcement but which lacked independence and appropriate

[1] Competition Act, 89 of 1998 as amended.
[2] Lewis Enforcement *Competition Rules in South Africa: Thieves at the Dinner Table* (2013)71-90.
[3] Sutherland and Kemp *Competition Law of South Africa* (Service issue 21) 3-28.
[4] OECD Peer Review, *Competition Law and Policy in South Africa* (2003) 13.
[5] Ibid.

enforcement powers. This then saw the formation of a three-tiered system of independent institutions, namely the Competition Commission, Competition Tribunal and Competition Appeal Court, tasked to implement competition policies interwoven with public interest considerations through the introduction of the Competition Act 89 of 1998. [6]

The South African Competition act takes a hybrid approach to the goals it seeks to achieve. As such section 2 of the Act provides that the purpose of the Act is "to promote and maintain competition in the Republic in order-

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

(b) to provide consumers with competitive 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."

From the aforementioned it is clear that the South African Competition Act seeks to actively promote the public interest considerations listed in section 2 and is thus not only seeking to promote pure competition goals such as lower prices and more choices for consumers. Notably the public interest considerations mentioned in section 2 surface again expressly in the context of merger regulation under the Act.

Mergers are regulated by Chapter 3 of the Competition Act. The latter chapter sets out the assessment process regarding mergers and the relevant authorities who are mandated to consider the merger.[7] When deliberations are made on public interest

[6] These competition authorities and their duties are provided for in section 19 to 39 of Chapter 4 of the Competition Act. See further Hodge *Public interest provisions in the South African Competition Act: A critical review* in Moodaliyar and Roberts (eds) *The Development of Competition Law & Economics in South Africa* (2012) 5 (Hereinafter Hodge).
[7] Section 12A (1) of the Competition Act.

considerations, parties must be able to comprehend what is meant by a merger and the process thereof. Firms usually engage in merging with other firms in order to enhance or establish market power.[8] For purposes of the Competition 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 or another firm.[9] This definition is inclusive of vertical[10], horizontal[11] and conglomerate[12] mergers, which may be achieved in any manner, including through lease or purchase of shares, an interest or assets of the target firm or an amalgamation or other combination with the target firm.[13]The acquisition of "control" is of paramount importance in determining whether a merger has occurred between firms as contemplated in the Competition Act.[14] Furthermore, mergers can be classified as either small, intermediate and large depending on the applicable thresholds.[15] The Competition Commission must be notified if the merger falls into the threshold for an intermediate or larger merger, however, small merger do not generally require notification to competition authorities, unless so required but within a period of six months.[16]

The first and most important step of a merger enquiry after receipt of merger notification is for the Commission to determine whether or not the merger poses a likelihood of substantially preventing or lessening competition.[17] If the answer to this question is in the affirmative then the Commission must consider whether there are any technological, efficiency or pro-competitive gains and public interest considerations which can be discounted or not. [18] The Commission is then tasked with

[8] Market power is defined in section 1 of the Competition Act as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors , customers or suppliers."
[9] See Section 12 (1)(a) of the Competition Act.
[10] According to Sutherland and Kemp 10-93, a vertical merger comprises of players operating at different levels of the supply chain, for example from manufacturer to distributor which can create barriers to entry and upstream independence.
[11] According to Sutherland and Kemp 10-93, a horizontal merger involves the supply of the same market industry products by competitors within the same geographical area thus removing competition between the two firms. Competition concerns are the possible price hikes and increase market concentration.
[12] According to Sutherland and Kemp 10-93, a conglomerate merger encompasses different markets, products, and consumers wherein the parties have no apparent economic relationship. This may include geographic extension and product extension mergers.
[13] Section 12(2)(b) of the Competition Act.
[14] Section 12(2) (a) to (g) of the Competition Act.
[15] Section 11 of the Competition Act.
[16] Section 13(5)(b) & 14 of the Competition Act.
[17] Section 12A (1) of the Competition Act.
[18] Section 12(1) (a) (i) of the Competition Act.

the duty to determine if the merger can be justified or not on substantial public interest grounds.[19] This process takes into consideration the effect that such a merger will have on the following specifically listed public interest considerations:

"*a particular industrial sector or region; employment; the ability of small businesses, or those controlled by historically disadvantaged persons, to become competitive; and the ability of local industries to compete internationally*."[20]

It is clear from the preamble of the Competition Act that economic freedom must be achieved by increasing ownership of the market to more South Africans thereby ensuring effective and efficient economic development and balance beneficial to all South Africans. This is further reaffirmed by section 2 of the Competition Act when it states the purpose of the Act is to promote and maintain competition in South Africa in order to promote the efficiency, adaptability and development of the economy; to provide consumers with competitive prices and product choices *and also to* promote employment and advance social and economic welfare of South Africans*;* to enable small and medium sized enterprises to participate in the economy; and to promote a wider ownership spread, particularly in relation to historically disadvantaged persons.[21]

Merger control is an important facet of enforcement of competition law in South Africa, and in this context the issue of labour as public interest consideration in merger regulation is particularly pertinent. There has been a number of ground-breaking cases with intervention from several government departments and trade unions which places the focus on how employment issues are assessed in mergers.[22] However a thorough an analysis of some of the merger cases adjudicated that dealt with employment as a public interest consideration shows that the competition authorities have not prohibited these mergers where employment concerns were raised but have imposed employment related conditions which do not necessarily redress the welfare of the employees concerned.[23] The merger assessment-process also gives labour interest explicit recognition as trade unions must be notified and provided with relevant information regarding mergers if they wish to participate in the merger review

[19] Section 12A (3) read together with Section 12A (1) of the Competition Act.
[20] Section 12A (3) of the Competition Act.
[21]Hodge 4.
[22]Section 12B and Section 18(1) of the Competition Act.
[23] Lewis *Thieves at the Dinner Table* (2012) 118.

proceedings.[24] In particular, the *Final Guidelines on the assessment of public interest provisions in merger regulation*[25] that were issued by the Competition Commission provide guidance on how the effect of a merger on employment must be considered[26] and is in support of disclosure of potential merger-related retrenchments .

1.2. Research question and objectives

It is imperative to note that inclusion of employment as a public interest consideration is not unique to the South African Competition Act but that the process regarding notifications and participations by parties is novel. Notably section 10 of the Maintenance and Promotion of the Competition Act of 1979 also dealt with considerations relevant to public interest grounds as the former board occasionally rejected mergers because of adverse employment effects.[27]

Employment as a public interest consideration plays a crucial role in merger assessment given that it impacts on the approval of a merger where merger-related retrenchments are at stake. The Competition Amendment Act 2018[28] has however amplified the role of public interest considerations in merger regulation thus creating a platform for employment as a public interest consideration to play an increasingly bigger role in this context. It is therefore necessary to carefully scrutinize the role that labour as a public interest concern has played prior to the Amendment Act and the role it is likely to play subsequent to the Amendment Act coming into operation.

The Study will therefore seek to answer the following research questions:

a) What does employment as a public interest consideration entail and why is it of such crucial importance in South African merger regulation?

---

[24] Section 13A of the Competition Act denotes that employees must be given proper information about the effect of a merger on the direct interest.

[25] Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (31 May 2016), Government Gazette of the Republic of South Africa, 2 June 2016 Vol 612, No 40039.

[26] Burger-Smidt *Public Interest Considerations, Employment and Temporary Employment Services* available at https://www.werksmans.com/legal-updates-and-opinions/public-interest-considerations-employment-and-temporary-employment-services/ (accessed on 19 August 2019).

[27] *Competition Law and Policy in South Africa, An OECD Peer Review,* (May 2003) available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed on 13 August 2019).

[28] Competition Amendment Act No 18 of 2018, Government Gazette of the Republic of South Africa, 12 July 2019 Vol 649, No 42578.

b) How did the competition authorities deal with employment as a public interest consideration in merger regulation before the public interest guidelines were issued by the Competition Commission?

c) How did the public interest guidelines impact on employment as a public interest consideration during merger regulation?

d) How will the Competition Amendment Act 2018 change the role of public interest considerations, and particularly employment as a public interest consideration, during merger assessment?

1.3. Research Methodology

The study will comprise of desk-top doctrinal research comprising of a critical review of policy documents legislation, relevant case law, contributions in books and journal articles.

1.4. Chapter layout

This dissertation will consist of four chapters and the structure will be as follows: Chapter 1 provides an introduction and background on the Competition Act specifically the narrative of mergers and public interest considerations in South Africa and also sets out the rationale for the study, the research question and objectives, methodology and chapter lay-out. Chapter 2 will consider employment and merger assessment prior to the Public Interest Guidelines. Chapter 3 will evaluate the Public Interest Guidelines and their impact as well as employment and merger regulation after the public interest guidelines. Chapter 4 will finalise the study with some observations on the new Competition Amendment Act 18 of 2018 and will provide the study's conclusions and recommendations.

Chapter 2: Employment and merger assessment prior to the Public Interest Guidelines

2.1. Introduction

South Africa is a developing country which is profoundly impacted by a history of political and economic instability. The structure and development of the South African competition policies and laws is cognisant of this history hence, factors deemed to fulfil economic and social obligations are incorporated in merger regulations, conspicuously issues pertaining to public interest consideration. As indicated in Chapter One, public interest provisions in the South African Competition Act are found in section 2 which sets out the purpose of the Act as well as section 12 that deals with merger assessment. This inclusion of public interest in merger regulation has largely been influenced by the need of the democratic elected government to ensure economic redistribution post 1994.[29] In this regard public interest provisions were included as a means to respond to different objectives other than the economic objective of consumer welfare.

Competition authorities recognise the importance of consideration of public interest as part of evaluating mergers, and as such an assessment of the competition authorities decisions for the period between 1999 to 2009 is adequate proof that public interest continues to be influential in merger regulation.[30] Furthermore, it is imperative to note that since the inception of the Competition Act, no merger has been condemned due to antagonistic public interest, rather the competition authorities have included context into how these public interest considerations must be addressed in mergers.

In a country riddled with high unemployment,[31] it would be inexcusable for competition authorities to ignore the impact mergers have on employment. Of mergers that were considered in 2001, 16% took employment into account and this is due to the fact that wherever there are major challenges in the economy, like the continued slowdown in economic activities as of 2000 with the eventual Global Financial Crisis in 2008, labour

[29] Lewis *Thieves at the Dinner Table* (2002) 133-134.
[30] Oxenham '*Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty' (*2012) *US–China Law Review 9.*
[31] Statistic South Africa 2019 Census: Census results available at http://www.statssa.gov.za/ (accessed on 27 October 2019).

as a public interest consideration in merger regulation also adapted the same pattern with substantial slowdown in employment.[32]

Notably the rights of employees are protected by various other pieces of legislation in South Africa.[33] The labour component of legislation goes as far as to address employees right in cases on amalgamation or transfer of business so that the new employer takes over the employment obligations of the business being amalgamated.[34] This then addresses the issues of retrenchments to ensure that employees are not left in conditions less favourable. It is for these reasons that competition law should be a measure of last resort where no other existing law or regulation that provides for the labour interests of South Africans can remedy the situation.

2.2. Employment as a public interest consideration prior the public interest guidelines

The Minister of Trade and Industry is required to determine annually the threshold of annual turnover below which the merger control provisions of the Competition Act will not apply.[35] As indicated in Chapter One, the competition authorities must be notified of intended mergers and acquisitions.[36] It is mandatory that the competition authorities prevent mergers if they are likely to substantially lessen competition. To determine this, the competition authorities must inter alia consider the strength of competition in the relevant market and the probability that the firms will act competitively rather than co-operatively.[37]

Trade unions which are normally deemed to be interested parties must also be notified of the proposed merger to enable them to decide if they want to participate in the review of the merger.[38] This notion of notification and participation also afford them an opportunity to appeal the decision of the competition authorities if dissatisfied with the initial outcome. The inclusion of the term '*interested party*' with no clear indication of what the exact interest or obligation has in some instances provided to be challenging,

[32] Njisane '*The rise of Public Interest: Recent high profile mergers*'(2011) 5.
[33] The Constitution Act No 108 of 1996, the Labour Relations Act No 66 of 1995 as amended ("LRA"), Basic Conditions of Employment Act No 75 of 1997 and Employment Equity Act No 55 of 1998.
[34] Section 197 of the LRA.
[35] Section 11 of the Competition Act.
[36] Section 13A of the Competition Act.
[37] Section 12A (2) of the Competition Act.
[38] Section 13A (2) of the Competition Act.

as some of these interested parties can intervene in proceeding which will not have an employment impact, consumer and competition effect. When setting out their case of alleged harm to public interest, intervening parties must establish merger specificity to the claimed harm and the remedies proposed must be *"appropriate, proportional and enforceable*."[39]

Important to note is that merging entities need to give sufficient consideration to issues such as job losses (retrenchments) and conditions of employment at an early stage of the merger transaction, in order to be able to tender an appropriate counter-condition to address any identified negative effect of the proposed merger. Even when the merging parties have raised grounds of efficiency to justify any job losses, it is not always adequate to allow the merger to pass muster as such justification must offset the prevailing public interest consideration of labour. This means that even though the merging parties may demonstrate a connection between the proposed employment losses and justifiable savings as a result of the retrenchment, this would not be sufficient if the efficiency gain is a private one and not public in nature.[40] Staples, Holland and Rossouw remark that section 12A of the Competition Act is not for purposes of private efficiency gains and can only be considered as an offset to anti-competitive effects and not public interest.[41] It is not clear from the Competition Act how far the mandate of the competition authorities can extend on labour related issues, however, there is clear jurisprudence in this regard, established through a number of cases, as will be illustrated below.

The balancing act between strict and broad interpretations of competition law led to the inclusion of public interest considerations in the Competition Act. The specific public interest considerations which the competition authorities must consider before approving a merger are as follows:[42]

a) effect on a particular industrial sector or region;

b) employment;

[39] *Walmart Stores Inc and Massmart Holdings Limited, Case no: 73/LM/Dec10*, para 121.
[40] Staples, Holland and Rossouw '*Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd*'(2013) 102-105.
[41] Ibid 99.
[42] See Section 12A (3) of the Competition Act.

c) *the ability of small businesses to become competitive, specifically those controlled or owned by historically disadvantaged persons; and*

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

Over the years employment has been one of the main public interest considerations that the competition authorities have focussed on in its assessment of the impact of certain mergers, as will be illustrated below. Section 13A of the Competition Act provides that in instances of public interest grounds pertaining to employment, the parties to the merger must notify competition authorities accordingly.

2.3. Merger evaluation

Section 12A sets out the process for merger evaluation in terms of the Competition Act. It provides that whenever the Competition Commission or Competition Tribunal is required to consider a merger, they must determine whether or not the merger is likely to substantially prevent or lessen competition (the so-called SLC-test). In doing so, the competition authorities must assess the strength of competition in the relevant market, and the probability that post-merger the firms in the market may behave competitively or co-operatively by taking into account any factor that is relevant to competition, including the factors set out in section 12A(2) ,[43]namely:

a) *the actual and potential level of import competition in the market;*

b) *the ease of entry into the market, including tariff and regulatory barriers;*

c) *the level and trend of concentration, and history of collusion, in the market;*

d) *the degree of countervailing power in the market*

e) *the dynamic characteristics of the market, including growth, innovation, and product differentiation;*

f) *the nature and extent of vertical integration in the market;*

g) *whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail (the so-called failing firm-defence); and*

[43] Section 12A (2) of the Competition Act.

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

If the conclusion is that the merger will substantially prevent or lessen competition in the market post-merger, then the competition authorities have a duty to assess whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and which will offset, the effects of any substantial prevention or lessening of competition as a result of the merger and which gains would not likely be obtained if the merger is prevented.[44] The competition authorities must also further assess whether the merger can or cannot be justified on those substantial public interest grounds indicated above that are set out in section 12A(2).[45]

In *Harmony Gold Mining v Goldfields Limited[46],* Goldfields Limited requested the competition authorities to reject the merger [‘*hostile takeover’]* allegedly on public interest grounds, even though there were no indication that the proposed merger would have a likelihood to substantially lessen competition. The competition authorities ring-fenced the evaluation of mergers on two possible outcomes of competition evaluation, that is, the competition enquiry and the public interest enquiry.[47]The Competition authorities gave a clear distinction on why the words “can or cannot” were a part of this enquiry.[48] It is clear from this case that if the merger does not lessen competition, the competition authorities still have to determine whether the proposed merger can be justified on public interest grounds-they cannot ignore this requirement. Therefore, the Competition Act is clear in section 12A(3) read together with section 12A(1) that merger evaluation *must* consist of an examination of whether the merger is likely to substantially prevent or lessen competition by an examination of the factors set out in section 12A(2) of the Competition Act.

It has been argued[49] that the provisions of section 12A(1) are not clear in addressing whether public interest must be considered where the merger is found to have been anti-competitive but is justified as a result of a technological, efficiency and other pro-

[44] Section 12(1)(a)(i) of the Competition Act.
[45] Section 12A(1)(a)(ii) of the Competition Act.
[46] *Harmony Gold Mining v Goldfields Limited 93/LM/Nov04.*
[47] Ibid para 42.
[48] Ibid para 31.
[49] For a detailed discussion, see Distillers Corp (South Africa) Ltd and Stellenbosch Winery Group Limited v Blumer (SA) (Proprietary) Ltd and Seagram Africa (Proprietary) Ltd 08/CAC/May01.

competitive gain which surpasses the anti-competitiveness of the proposed merger.[50] In this latter instance the efficiency test will be induced to validate the anti-competitive proposed merger. However, it must be noted that irrespective of the outcome of the assessments as illustrated above, a public interest test must be conducted.[51] The public interest-test is therefore mandatory in all merger assessments.

In *Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd*[52], the competition authorities had initially departed from the established approach in the context of mergers provided for in terms of section 12A of the Competition Act. This matter was subsequently appealed and the two stage-approach for merger assessment set out in section 12A of the Act was confirmed. In the case of *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd,*[53] which involved the acquisition by Distillers of the business of SFW, ultimately urging on whether there would be in change in control.[54] The competition authorities had to adjudicate the issue of conflicting public interest considerations wherein the merging parties were of the view that the merger would create an international firm which would be good for the market thereby improving issues pertaining to public interest.[55] The trade unions who were the intervening parties however argued that the merger would have adverse effect on labour hence they requested the competition authorities to prohibit the merger on the basis of public interest grounds, specifically the impact that it would have on labour, as provided for in section 12A(3)(b). This case resulted in a recommendation for a three-staged approach to be used by competition authorities to address the possibility of conflicting public interest considerations,[56] namely:

a) *Each asserted public interest ground must be considered in isolation and it must be determined whether such ground is substantial.*

[50]Section 12A(1)(a)(i) of the Competition Act.
[51] For a detailed discussion, see *Anglo American Holdings Limited v Kumba Resources Limited (Industrial Development Corporation) 45/LM/Jun02,* wherein the competition authorities had approved the merger between Anglo and Kumba and further had to adjudicated on the use of the word "otherwise" in the Competition Act and held that it means the public interest evaluation must be undertaken regardless of the outcome of the competition enquiry.
[52]Medicross Healthcare Group (Pty) Ltd v Prime Cure Holdings (Pty) Ltd (55/CAC/Sep05) [2006] ZA CAC 3.
[53]*Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* CT Case no. 08/LM/Feb02.
[54] Section 12(1) and 12(2) of the Competition Act.
[55] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 para 214-215.
[56] Ibid para 221-222.

b) *If the answer to the above is in the affirmative, and there are at least two contradictory grounds, then the competition authority must attempt to reconcile the conflicting grounds.*

c) *If the competition authority is unable to reconcile the substantial contradictory grounds, then the grounds must be balanced, and the competition authority must reach a net conclusion as to the public interest.*

In *BB Investment Company (Pty)Ltd and Adcock Ingram Holdings (Pty) Ltd*,[57] the merging parties had indicated that at least 51 employees would be affected by merger as some jobs had become redundant, however, it was not clear whether the employment effect was merger specific or due to operational requirements of the merging parties. The merger was initially approved on condition that the retrenchment of the employees be limited to 51 employees as presented by the merging parties. After further deliberations, the competition authorities approved the merger on condition that no retrenchment will be effected for a period of a year from date of approval of the merger.[58] In the *Kansai v Freeworld*[59] merger, the competition authorities approved the hostile takeover of Kansai subject to public interest conditions which included the prohibition of retrenchment for a period of three years and the implementation of a Black Economic Empowerment deal within a period of two years from the date the proposed merger was approved.[60]

2.4. Observations

Section 12A of the Competition Act does not provide guidance on how the balance between competition assessment and a specific listed countervailing public interest consideration should be conducted, save to indicate that the latter interest must be "substantial" before a decision is made to prohibit a merger or to approve it subject to conditions.[61]The approach undertaken by the competition authorities when interpreting and applying the provisions of section 12A (3) of the Competition Act must be done by referring to the purpose of the Competition Act which also cements the

[57] *BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd* (CT Case No:18713).
[58] Ibid para 104-110.
[59] *Kansai Paint Co. Ltd v Freeworld Coatings Ltd* (53/AM/JUL11) [2012] ZACT 7 (20 January 2012).
[60] Ibid para 36.
[61] Balkin and Mbikiwa '*Public interest test in Competition Act: Have the competition authorities applied the test correctly'* (2014) 2.

importance of public interest considerations similar to those in section 12A(3).[62] However, based on the cases as discussed above it is clear that the competition authorities are unlikely to prohibit a merger that is otherwise not anti-competitive purely on public interest grounds.

To gain better insight into how the competition authorities dealt with labour as a public interest consideration before the Commission issued its Public Interest Guidelines the undermentioned cases deserve consideration:

2.4.1. *Unilever Plc v Competition Commission*[63]

This case dealt with an issue where the merging parties were unable to provide a definitive analysis of the impact of the merger on employment at the time of notification of the merger. This created a predicament for the competition authorities as they could not make a valid assessment of the effect of the merger on employment. The main public interest issue identified by the participants in this proposed merger was the number of potential job losses alleged to be a consequence of the merger. The merger was thus approved subject to conditions.[64] This meant that the acquiring firm had to consult with the trade unions on issues of employment once an agreement had been reached with the target firm.[65] The competition authorities noted in its decision that "*In our view the most significant right that the* [South African] *Competition Act extends to employees and their unions is the right to timeous information with respect to the potential employment impact of a merger".*[66] The competition authorities also articulated that there are other forums for trade unions to address employment related issues arising from a merger including private collective bargaining agreements but as indicated imposed a condition that the merging parties had to consult the trade unions regarding the job losses that would follow from the merger.[67]

[62] The purpose as detailed in Section 2 of the Competition Act.
[63] *Unilever Plc Unifoods (a division of Unilever South Africa (Pty) Ltd) / Hudson & Knight (a division of Unilever South Africa (Pty) Ltd) / Robertsons Foods (Pty) Ltd / Robertsons Food Service (Pty) Ltd and Competition Commission of South Africa / CEPPWAWU / FAWU / NUFBWSAW, 55/LM/Sep01, (2002)*.
[64] Ibid para 36
[65]Ibid para 43.
[66] Ibid para 43.
[67] Ibid para 172-173, See also Tavunayango Public Interest Consideration and their impact on merger Regulation in South Africa (LLM-thesis, University of Pretoria, 2014) 26.

2.4.2. *DB Investments SA v De Beers Consolidated Mines Limited*[68]

This pivotal case also dealt with employment issues in mergers, notably the adverse impact on employment as a result of a merger. Concerns about the adverse impact on employment as a result of the proposed merger was raised by the relevant trade unions. This resulted in the merging parties offering an undertaking to the employees that their conditions of employment would not change following the merger and that this would also apply in perpetuity. However, the competition authorities approved the merger but reiterated that it cannot be expected for merging parties to explore conditions which apply in perpetuity as this would defeat the balance of a public interest and competition assessment which the competition authorities always aim to achieve.[69]

2.4.3. Daun et Cie AG / Kolosus Holdings Ltd[70]

In this matter the trade unions expressed concerns and sought assurances that job losses as a consequence of the merger would be limited. The trade unions initial submission indicated estimated job losses of 150, which was later indicated to be more by the merging parties.[71] The resultant pre-condition for approval of the merger from the competition authorities was that job losses must not exceed the numbers provided by the trade unions for the year post the merger. [72]This case was pivotal in highlighting the role of trade unions in matters that affect the rights of employees. The issue of accurate disclosure of all the facts when notifying a merger was also highlighted by the competition authorities.[73]

2.4.4. *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Other* [74]

This case dealt with the consequences of a proposed merger which would see the loss of 45 permanent jobs and 1000 seasonal jobs. The competition authorities approved this merger subject to the following pre-conditions:[75]

a) That there would be retrenchment of no more than 45 employees from the

[68] *DB Investments SA v De Beers Consolidated Mines Limited* [2001-2002] CPLR 172 (CT).
[69] Ibid para 1.
[70] *Daun et Cie AG / Kolosus Holdings Ltd* 10/ LM/Mar03.
[71] Ibid para 121.
[72] Ibid para138.
[73] Ibid para 136.
[74] *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Others* 46/LM/May05.
[75] Ibid para 132.

aggregate number of employees employed by both firms immediately prior to the order; and

b) That the merging parties would make available an amount of R2 million for the purpose of training all affected persons.

The competition authorities sought to impose a condition that would incorporate a training fund for the benefit of the retrenched workers and the community to the value of R2 million. The merging parties however considered the amount of R2 million as excessive and instead offered an amount of R250 000 for retraining.[76]Consequently, the competition authorities conditionally approved the merger, ordering the merging parties to set up a training fund to the value of R2 million, that would benefit retrenched workers[77]and also required the application of a moratorium on retrenchments for a period of three years from date of approval of the merger.[78]

2.4.5. *The Metropolitan Holdings Limited and Momentum Group Limited*[79]

This is one of the landmark cases on employment as a public interest consideration in merger evaluation. In 2010, the competition authorities had to adjudicate on a merger wherein Metropolitan intended to acquire 100% of ordinary shares of Momentum. The post-merger market shares for the applicable markets were identified to be between 20 to 30%, which would not have deterred other small industry players.[80] Therefore, the notified merger did not pose any competition issues. However, the competition authorities still had to evaluate public interest which was concluded to pertain to employment. The merging parties indicated that close to 1000 jobs would be affected by the merger due to some positions becoming redundant and the overall improvement of efficiencies post-merger. Some of the evidence presented by the merging parties, notably the reduction of premiums to customers, could not be substantiated before the competition authorities.[81]

Trade unions participated in the fight against job losses, arguing that that the proposed merger would substantially affect employment and that the merging parties had not

[76] Ibid.
[77] Ibid para 151.
[78] Ibid.
[79] Case 41/LM/Jul10.
[80] Ibid para 43 and 52.
[81] Ibid para 63.

justified the 1000 job losses. The competition authorities conditionally approved the merger subject to a two-year moratorium on job losses. This moratorium excluded senior employees as it was construed that they would be better positioned to find alternative employment and if included would defeat the ambit of employment as public interest consideration in mergers.[82]

The competition authorities were also very clear on the importance of factual assessment of possible job losses and how these can be linked to the efficiencies and justifications raised by the merging parties. The competition authorities emphasised the importance of the merging parties having to justify the reasons for job losses if jobs cannot be preserved. Furthermore, the aspect that the Competition Act makes provision for special rights granted to labour,[83] was also praised as it was held to give rise to a joint effort between the merging parties and trade unions on issues of job losses.[84]

2.4.6. Walmart Stores Inc and Massmart Holding Ltd[85]

The target firm for this merger was Massmart, a local wholesaler and retailer of grocery, liquor and general merchandise and the acquiring firm was Walmart, the largest retailer in the world. This merger was a turning point in relation to mergers that raise no competition concerns after the *Metropolitan/ Momentum* case. There was also a view at some point that the entry of the acquiring firm into the market would be pro-competitive. The Department of Economic Development, Department of Trade and Industry and trade unions became the intervening parties to this merger, wherein they intervened to raise public interest concerns pertaining to the effect of the merger on employment, a particular sector or region and opportunities for small businesses or firms controlled by historically disadvantaged persons to become competitive.[86]

The acquiring firms' bad reputation on labour related issues and the divisional approach of the target firm resulted in the trade unions seeking conditions which would

[82] Ibid para 64.
[83] See section 13A (2) of the Act
[84] *Case 41/LM/Jul10* para 117 and 118.
[85] Case no: 73/LM/Nov10.
[86] Machine *Public Interest Test and Merger Control in South Africa: The Walmart Case Revisited* https://africanantitrust.com/2014/12/03/public-interest-merger-control-the-walmart-case-revisited/ (accessed on 20 September 2019).

introduce closed shop and centralised bargaining.[87] The competition authorities did not contend this request as the condition would have ensured that the merging firms honoured existing labour agreement and recognised trade unions.[88]This was regarded as important as it created a platform for merging firms to engage with organised labour on issues beyond employment losses. The impact on employment was assessed. However, the competition authorities noted that there was no evidence to substantiate the allegations that the merger would result in retrenchments, and they found that the merger would instead create jobs.[89] The competition authorities were also cautious of relying on documentary evidence for retrenchments as there were indications that the merging parties would be creating jobs within South Africa post-merger and there was a possibility that some divisions of the merging parties would perform better than others thus resulting in retrenchments.[90]

The impact of the merger on a particular sector or region and small businesses, which was of concern as it would divert the demand for local supply resulting in closure of small companies, was also adjudicated. The competition authorities held that a supplier development fund to the sum of R200 million for a period of five years had to be created to assist these small businesses, so that they could participate in Walmart's global value chain training programme. The competition authorities further ruled for an advisory board to be stablished by Massmart for purposes of giving advice and recommendations on proposed projects.[91]

The competition authorities' conditional approval of the merger led to a number of controversies relating to competition policy and the application of public interest, especially the intervention aspect relating to interested parties and how this can have an undue influence on competition matters being used to drive public policy issues. The public interest ground of employment has received significant attention from the

[87] According to Section 26 of the LRA, a closed shop arrangement is a collective agreement whereby a majority trade union and an employer agree that as part of the condition of employment all employees must be members of the majority trade union , wherein centralised bargaining establish a bargaining council in order to negotiate with all employers in the sector or region as envisaged by section 27 of the LRA. It is also important to highlight that bargaining councils are voluntary bodies which are established by registered trade unions and registered employers' organisations that have achieved a threshold of representativity in a defined sector.
[88] *Case no: 73/LM/Nov10* para 59.
[89] Ibid para 39.
[90] Ibid para 40.
[91] Ibid para 119 and 122.

competition authorities, and it is important to note from the cases as discussed that this public interest concern also empowers competition authorities to protect certain levels of employment through prescribed conditions. Furthermore, it is not clear from the Competition Act or from the existing case law what the extent of the competition authorities' mandate is to consider employment related issues hence the huge impact the Walmart/Massmart merger had on employment in merger regulation.

2.4.7. *Edgars Consolidated Stores Ltd v Pick n Pay Retailers (Pty) Ltd*[92]

In this matter the competition authorities confirmed that the merging parties are not mandated to impose more favourable conditions lobbied by trade unions than those which pre-existed before the merger. In this case the Independent Commercial Hospitality and Allied Workers Trade Union (ICHAWU), contended for Edgars to be bound by an existing recognition agreement for a period of three years. The existing recognition agreement had a termination provision with a notice period of three months, and ICHAWU was contending for a contract duration more favourable than the existing conditions hence the ruling by the competition authorities.[93] This illustrates why the Competition Act specifically requires that trade unions of affected employees be notified of any proposed mergers that are notifiable to the competition authorities and why it is pivotal for competition authorities to be mindful of other regulatory authorities when evaluating the effect of the merger on employment so that no party can claim that the other has overstepped its mandate. It is for other regulatory authorities within the different spheres to deal with issues related to wages, collective bargaining and working conditions if, and when proved not to be merger specific.

2.4.8. *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited*[94]

The competition authorities were concerned with the large number of job losses and the overall effect of the above merger on the employment of the unskilled and semi-skilled employees of the merging parties. The issue of negotiation of retrenchment packages and whether they would be sufficient were raised.[95] It is clear that the

[92] *(05/LM/Feb04) [2004] ZACT 24(7 April 2014).*
[93] Ibid para 10 -12.
[94] Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Limited, Case no: 08/LM/Feb02, para 210.
[95] Ibid para 242-243

imposition of merger conditions by the competition authorities can redeem a merger that is on the verge of collapse due to public interest ground.

The Tribunal indicated that merging parties cannot make claims on potential job losses which cannot be substantiated by documentary or oral evidences. This is important for competition authorities as it shows the extent to which they must study each matter and the impact on labour. The competition authorities sets the evidentiary test to determine that a reasonable process has been followed when deliberating on the possible job cuts and that '*the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act*.' [96]

2.5. Conclusion

The competition authorities have a duty to ensure that the merging parties are aware of the limits to bearing the burden of justification on substantial public interest grounds.[97] It is a known fact that the evidential burden shifts to the merging parties to refute the conclusion that a merger may not be justifiable on substantial public interest grounds. This will involve a three-step merger enquiry including public interest assessment which must be conducted regardless of the outcome of the competition analysis.[98]

The current South African competition legislation, namely the Competition Act 89 of 1998, was enacted post the apartheid era, with the aim to ensure achievement of economic balance for all South Africans. The economic inequalities which previously came with an undemocratic government meant that most South Africans had limited access to education, therefore, eligible to only get semi or unskilled labour.[99] The latter is a clear indication of who gets affected when merging parties do not consider the impact of the merger on employment and the approach taken by the competition authorities is commendable in this regard.

There is a clear consensus that in developing South African competition policies many job losses can be addressed by imposition of preconditions for mergers as is evident from the cases discussed in this chapter that dealt pertinently with the impact of

[96] Ibid para 237.
[97] Ibid para 242.
[98] Section 12A (2) of the Competition Act.
[99] *Harmony Gold Mining Company Limited/Goldfields Limited* 93/LM/Nov04, para 89-91.

mergers on employment as a public interest consideration. Accordingly, employment as a public interest consideration must be considered with every proposed merger regardless of the outcome of the competition test.

Chapter Three: Evaluation of the Public Interest Guidelines and their impact

3.1. Introduction

It would be precocious for any authoritative government to not recognise that the economy of South Africa requires greater contribution, after the social injustices of the past. The latter redressing is supported by the preamble of the Competition Act which acknowledges that in order to achieve a competitive economy that balances the interests of all South Africans, the South African economy must be open to greater ownership by a greater number of South Africans in an efficient and competitively economic environment.[100]

The Department of Trade and Industry (DTI) was the first to provide an insight into the scope of what public interest[101]entails resulting in certain public interest considerations being further incorporated and listed in the goals set out in section 2 of the Competition Act as alluded to in Chapter One of this dissertation. As indicated section 12A(3) of the Competition Act also lists certain public interest factors that must be considered by the competition authorities during merger assessment.The Competition Act requires that a merger must be assessed for both pure competition concerns as well as on public interest grounds. It is possible that a merger may raise no competition issues but still be prohibited or conditionally approved depending on the outcome of the assessment on public interest grounds.[102] Alternatively it may be found that the merger raises substantial negative public interest effects resulting in conditions being imposed to counter the effect of the merger. A merger can also be approved if the public interest benefits outweighs the anti-competitive effect of the proposed merger although such a situation has not yet occurred in South African merger assessment.[103]

As indicated in Chapter Two employment as a public interest consideration has played a significant role in various mergers that were dealt with by the competition authorities. Nevertheless, despite a number of merger decisions that dealt with public interest considerations there was still uncertainty as to the exact role that public interest

---

[100] For a detailed discussion, see the Preamble and Section 2 of the Competition Act.

[101] Government of South Africa, Department of Trade and Industry *The Evolution of Policy in SA: Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development* (1997).

[102] Section 12A (3) of the Competition Act.

[103]Nkomo and van Wyk '*Public Interest Criteria in Mergers – Protectionist Measures?'* Sixth Annual Competition Law, Economics and Policy Conference in South Africa (2012) 3.

considerations should play during merger regulation and how the competition authorities were likely to approach issues of public interest. The lack of clear principles regarding the application of public interest considerations in merger regulation gave rise to the need for the Commission to issue Public Interest Guidelines, as discussed below.

3.2. The Public Interest Guidelines

The preamble of the Competition Act recognises that there needs to be a balance between the interest of consumers, entities and their employees in order to deliver on the key objectives of the Competition Act, which in turns ensures an efficient and competitive economy.[104] Consequently, on 23 January 2015, the competition authorities published draft guidelines on assessment of public interest provisions in merger regulation.[105] A second draft of the guidelines was published on 22 December 2015,[106] after considering comments received from various stakeholders and still open to further comments. On 2 June 2019, the competition authorities issued final guidelines[107]on the assessment of public interest provisions in merger regulation. All these guidelines were drafted in terms of section 79(1) of the Competition Act, which authorises the competition authorities to prepare guidelines to indicate the applicable competition policy approach to matters within its jurisdiction. However, it must be pointed out that these are simply guidelines and are not binding. Nevertheless, these guidelines provide useful guidance for competition authorities when evaluating public interest in a proposed merger.

In terms of the Guidelines the competition authorities undertake the following analysis on public interest when umpiring on a proposed merger:[108]

a) "determine the likely effect of the transaction on the public interest;

[104] See the general preamble of the Competition Act and Section 2 thereof.
[105] Competition Commission, Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998, Government Gazette of the Republic of South Africa, 30 January 2015, No 38448.
[106] Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998, Government Gazette of the Republic of South Africa, 22 December 2015, Vol 606, No 39560.
[107]Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998(31 May 2016), Government Gazette of the Republic of South Africa, 2 June 2016 Vol 612, No 40039. ("the Guidelines")
[108] Ibid 7.

b) *determine whether or not the effect is merger specific;*

c) *assess whether the effect is substantial;*

d) *assess whether the merging parties can justify the likely effect based on public interest considerations; and*

e) *consider possible remedies to address any negative public interest effect."*

When conducting the analysis mention above, there are two possible outcomes to a competition enquiry that could inform the public interest enquiry. The competition authorities must determine whether there is any substantial positive public interest ground that could justify the approval of the merger even if there is a negative competition finding. In the event that there are no competition issues then the competition authorities are required to consider whether the merger raises any substantial negative public interest effects.[109] Should the enquiry have a positive effect on public interest then the enquiry will stop. The Guidelines indicate that there is no conclusive answer to instances wherein a merger has positive impact on a given consideration and a negative one on another. In all instances it is clear that public interest effects must be merger specific and substantial[110].

Rights of employees are protected by the Constitution[111] and the Labour Relations Act (LRA).[112]However, given the obligation to also consider the impact of a merger on labour as a public interest ground listed in section 12A(3), once the merger assessment pertaining to the effect of the merger on competition has been conducted, then the competition authorities will look at the factors articulated in section 12A (3)., Notably when assessing the likely impact of a merger on employment, the Guidelines indicate that the competition authorities will follow the analysis set out as follows:[113]

a) *"Step 1: determine the likely effect on employment generally;*

b) *Step 2: determine whether any identified effect on employment is specific to the proposed merger;*

[109]Ibid 7.
[110] Ibid 14-15
[111] Constitution of the Republic of South Africa, 1996.
[112] Labour Relations Act No 66, 1995.
[113] The Guideline 9.

c) *Step 3: determine whether the likely effect on employment is substantial;*

d) *Step 4: consider whether such an effect could be justified; and*

e) *Step 5: determine the appropriate remedy to address the likely substantial negative effect on employment."*

In determining the likely effect on employment,[114] the competition authorities will require the merging parties to disclose all the contemplated job cuts, regardless of whether they are merger specific or not, at the time of the filing of the merger. This will assist in determining the potential impact of the merger when consideration is had to a particular industrial sector or region.[115]

In the *Bytes Peoples Solutions*[116] merger, there was a significant time delay due to the fact that the competition authorities had to further investigate the matter as the required information on how the merger would affect employment was not presented by the parties to the merger at the initial stages of the proposed merger. This case clearly articulates the importance of proper disclosure of information regarding employment, as it can save the merging parties costs and avoid time delays in approval and possible rejection of the proposed merger. It is also important to highlight in this context that in terms of section 15 of the Competition Act the competition authorities may revoke an approval or conditional approval of a merger based on incorrect information.

Parties generally bear the onus of proving that the job cuts or losses are not merger specific within one-year period from date of filing following the approval.[117] This stage is important for purposes of determining that the job losses are not merger specific and are not periodically interlinked to the merger. It is also important to ascertain at this stage that the job losses would have occurred regardless of the merger and that

[114]Mendelsohn *South Africa: Competition Commission Publishes Draft Public Interest Guidelines For Public Comment* http://www.mondaq.com/southafrica/x/372606/Antitrust+Competition/Competition+Commission+Publishes+Draft+Public+Interest+Guidelines+For+Public+Comment (accessed on 7 November 2019).
[115] According to the Guidelines 16.
[116] *Bytes People Solutions a Division of Bytes Technology Group South Africa (Pty) Ltd and Inter-Active Technologies (Pty) Ltd Competition Tribunal Case Number: 020123.*
[117] Sutherland and Kemp *Competition Law of South Africa* (2016) 10-131.

any proposal to lay off employees is not associated with the intentions, incentives and management style of acquiring firm.[118]

When the competition authorities have to determine the substantiality of the effect of employment, consideration must be had to a number of key issues, notably, the number of the affected employees; affected sector, the skills level of the affected employees; likelihood of finding alternate employment which is in most instances dependant of the skills level that is semi-skilled or unskilled; the acquiring firm employment conditions and the type of potential employees. Unskilled and semi-skilled employees tend to be greatly affected by mergers as the prospect of alternate employment are very low and as such this will have more substantial effect to employment and require careful consideration by the competition authorities.[119]

In *Nedbank Ltd v Imperial Bank Ltd*,[120] Nedcor Bank (erstwhile name of Nedbank Group and ultimate controller of Nedbank) acquired 50.1% of the share capital of Imperial Bank Limited from Imperial Bank Holdings in January 2001. Even though less than 1% of the combined workforce would be affected, it still amounted to 464 employees losing their jobs.[121] The competition authorities considered that most of the employees that would be affected were skilled, with extensive work experience and would be able to source alternate employment. The merger was conditionally approved, subject to the undertaking by the merging parties to ameliorate employment consequences brought by the merger. [122]

In order to justify the effect of the merger on employment, the merging parties must adhere to the following requirement-[123]

a) *"demonstrate the rationality the link between the number of jobs lost and the reasons;*

b) *justify the job losses and the countervailing public interest considerations; and*

[118] Ibid.
[119] Ibid.
[120] *Nedbank Ltd v Imperial Bank Ltd [2009] 2 CPLR 442 (CT).*
[121] Ibid para 9.
[122] Ibid para 16.
[123] *Metropolitan Holdings and Momentum Group Limited (41/LM/Jul 10),* para 69 -72.

c) *demonstrate that they have provided full and complete information to the competition authorities and employees to facilitate consultation on the merger."*[124]

Lastly, as has been indicated in many cases, the competition authorities have various remedies which they can apply to rectify labour concerns occasioned by a merger. Such remedies include either conditionally approving the merger by placing moratoriums on job losses for a specified period, restricting the number of job losses and demanding that the firm upskills its employees by investing funds into programmes aimed at empowering the affected employees.[125] In addition to the remedies as conferred above, the competition authorities can also approve the proposed merger without conditions or prohibit the merger on public interest grounds.[126]

3.3. Employment and merger regulation after the public interest guidelines

The competition authorities issued its final public interest guidelines on June 2, 2016[127] as a way of assisting both the competition authorities and the merging parties in addressing issues pertaining to public interest in merger regulation. These guidelines are not binding on the parties but provide guidance on the approach the competition authorities will follow when dealing with public interest grounds during merger evaluation. The merging parties must disclose all crucial information to the competition authorities to ensure approval of the merger once the evaluation process has been completed.[128] The following cases provide a glimpse into the application of employment as a public interest consideration since the publication of the Guidelines, initially in their draft form and later in their final form.

3.3.1. *SABMiller/Coca-Cola*[129]

In November 2014, The Coca-Cola Company, SABMiller plc and Gutsche Family Investments (GFI, majority shareholders in Coca-Cola Sabco) announced that they had agreed to combine the bottling operations of their non-alcoholic ready-to-drink

[124] See the Guidelines on page 17.
[125] According to Neuhoff (2017) 291-292, these are some of the possible remedies that can be considered by the competition authorities when approving or conditionally approving a merger.
[126] Section 27 read together with section 59 and 60 of the Competition Act.
[127] The Guideline
[128] Ibid 11.
[129] *Coca-Cola Beverages Africa Limited and Various Coca-Cola and Related Bottling Operations, CT Case No. LM243Mar15*.

beverages businesses in Southern and East Africa. In March 2015, the entities formally filed a merger notification with the competition authority;[130] and In May 2016, the competition authorities conditionally approved the merger between the Coca-Cola Beverages Africa (Coca Cola), SABMiller plc(SABMiller), the Coca-Cola Company, and Gutsche Family Investments which would ultimately be one of Africa's largest soft drink beverage operations and the new bottler, Coca-Cola Beverages Africa. The merged entity would serve twelve high-growth countries accounting for approximately forty percent of all Coca-Cola beverage volumes in Africa.[131] The merger was subjected to a number of regulatory approvals which included competition authorities in South Africa, Namibia, Tanzania, Kenya as well as the Common Market for Eastern and Southern Africa (COMESA).[132]

The conditions that were envisaged by the competition authorities entailed that Coca Cola must increase its broad-based empowerment ownership of its subsidiary from eleven percent to twenty percent and also sell twenty percent of its Appletiser South Africa, which is its subsidiary to black shareholders. This was the first merger in South Africa in which the competition authorities specified that shareholding in a company must be black-owned. The merging entity also committed to localisation of supply-chains. The competition authorities further required Coca Cola to invest R800 million to support enterprise development.[133]

The merging parties also undertook to maintain the number of employees employed for a maximum period of three years and committed not to retrench bargaining unit employees as a result of the merger.[134] The merging parties further agreed to provide redeployment of twenty percent of affected employees within three years of approval of the merger and offered the right to preferential reemployment of any employees retrenched within two years from date of approval of the merger subject to terms and conditions.[135]

[130] Ibid para 5.
[131] Zengeni *Reflection on the Coca-Cola bottling merger* https://www.competition.org.za/review/2015/11/20/reflection-on-the-coca-cola-bottling-merger (accessed on 3 January 2020).
[132] Ibid.
[133] Ibid para 6 and 8
[134] Ibid para 9.1-9.2.
[135] Ibid para 9.3.

3.3.2. *SABMiller/AB InBev*[136]

In this merger, AB InBev filed a merger notification in December 2015. However, the competition authorities identified numerous competition and public interest issues during its investigation. In particular it identified that the merged entity had the likelihood to foreclose its competitors by refusing access to input material.[137]

In June 2016, the merger was conditionally approved. In dealing with the competition concerns, the merging entities agreed that they would continue the supply of input material for a period of five years post-merger, without entering into exclusive agreements with third parties. They also agreed that that they would free up to ten percent of fridge space in order to accommodate small and medium enterprises and ensure that the merged entity maximizes local production of beer and ciders, and support the participation of small craft-beer producers in domestic markets.[138]AB InBev also had to commit to making R1 billion available over the next five years for investment into various programmes aimed at local agricultural, enterprise and societal development including funding 40 scholarships for South African engineering and agronomy students.[139]

On the issue of labour, the competition commission's recommendations that the merging entities would not retrench any employee which would endure in perpetuity and the merging parties undertaking not to retrench any employee in South Africa as a result of the merger was removed by the Tribunal as perpetuity in merger related retrenchments would be questionable.[140] The Tribunal instead indicated that any retrenchment made within a period of five years after the approval of the merger would be presumed to have been as a result of the merger unless the merged entity can demonstrate otherwise.[141]

It is clear that on a case by case basis the competition authorities have a lot of power which are incorporated in the remedies usually imposed on merging entities and

[136] *Anheuser-Busch InBev SA/NV and SABMiller Plc, CT Case No. LM211Jan16.*
[137] Ibid para 2.1.
[138] Ibid para 7.
[139] Ibid para 15.
[140] Ibid para 41-42.
[141] Ibid para 43.

parties must also be mindful of the costs that can accrue in mergers as clearly demonstrated by the cases discussed in this chapter of the study.

3.3.3. GLENCORE/CHEVRON[142]

In March 2018, the competition authorities conditionally approved a large merger between Chevron SA and Sinopec. This resulted in a second merger proposition due to the pre-emptive rights accorded to Off the Shelf 56 RF (Pty) Ltd in terms of a shareholder agreement signed between the shareholders of Chevron SA and conditionally approved in September 2018.[143] Ultimately Chevron SA was controlled by Off the Shelf 56 RF (Pty) Ltd, a Broad-Based Black Economic Empowerment consortium, which operates a crude oil refinery in Cape Town and is involved in local sales and supply of petroleum products (which entity would later be renamed Chevron SA Astron Energy). Glencore SA, on other hand, was a wholly owned subsidiary of Glencore SA Oil Investment (Pty) Ltd and controlled by Glencore plc, a public company with shares listed on the London and Johannesburg Stock Exchanges.[144]

The Economic Development Department, Chemical, Energy, Paper, Printing, Wood and Allied Workers union and various other stakeholder raised a lot of public interest concerns ranging from employment, local supplier ability to become competitive, refinery upgrading and expanding capacity and broad based black economic empowerment and for purposes of this study, the attention will be on the employment concerns raised.[145] The merging entities were then requested to make submissions to the competition authorities on the public interest concerns, including those which the intervening and merging entities had agreed on.[146]

The merging entities agreed that no retrenchments would take place as a result of the merger and that Glencore would maintain the number of employees employed in aggregate by Chevron SA for a period of at least five years.[147] Glencore made an undertaking to expand levels of employment through Chevron SA sales and production to third parties and would ensure that Chevron SA increased indirect employment through the investment in production and the "Development Plan" which

[142] *Glencore South Africa Oil Investment (Pty) and Chevron South Africa, CT Case No. LM185Oct18*.
[143] See *Tribunal Case No. LM050May17 and Tribunal Case No. LM232Nov17* respectively.
[144] *Glencore/Chevron* para 3.
[145] Ibid para 35-36.
[146] Ibid para 37.
[147] Ibid para 40.

it would establish.[148] The merging entity also committed to the following matters which are key for public interest:[149]

a) *"Glencore must within a period of 5 years invest R6 billion, over and above Chevron SA's current investment plans, to develop the Western Cape refinery;*

b) *Glencore will procure the inputs locally within South Africa, wherever practically possible and feasible;*

c) *Where independently owned service stations are to be established Chevron SA shall give preference to Small Businesses, especially black-owned businesses*

d) *Glencore will ensure that Chevron SA will not substitute current, local, South African owned suppliers with offshore suppliers of goods or services*

e) *Glencore will procure that Chevron SA shall maintain or increase the current level (as a proportion) of expenditure on local procurement of goods and services*

f) *Glencore must establish a development fund of approximately R220 million over a period of 5 years to support Small Business and Black-owned Businesses which are involved in Chevron SA's value chain; and*

g) *Glencore shall use all reasonable endeavours to increase its current Broad Based Black Economic Empowerment scorecard rating by two levels, from level 4 to level 2 within 2 years."*

In March 2019, the competition authorities conditionally approved the merger as per some of the conditions listed above. Of paramount importance was that there would be no retrenchments as a result of the merger at Chevron SA. Furthermore, all Chevron SA's decisions were to be taken in South Africa and implemented using local skills and expertise, which is key for skills development in South Africa. Glencore would on the other hand ensure that ongoing contractual obligations toward retired employees of Chevron SA were met and that all existing contracts with independent fuel distributors were not amended to be less favourable.[150]

[148]Ibid para 41 and 42.
[149] Ibid para 60, list is not exhaustive as there are many other public interest conditions agreed to by the merging entities, see para 60 of the Tribunal Conditions for the full list of the conditions referred hereto.
[150]Ibid para 40-42.

3.3.4. IDC/ Celrose[151]

The Industrial Development Corporation of South Africa SOC (Pty) ("IDC") (a state-owned subsidiary that gives financial support to businesses or entrepreneurs through loans and equity) and Edcon Limited (a majority shareholder of Celrose which owns and supplies clothing and footwear to the Edcon Group through Eddels Shoes (Pty) Ltd) notified the competition authorities of their intended merger. It is a well-known fact that Edcon had been under financial constraints with some of their stores closing across South Africa. Consequently, the IDC sought to acquire Celrose, an initiative which raised concerns about the potential job security of the employees.[152]

The competition authorities determined that the proposed merger was unlikely to substantially prevent or lessen competition in any market and in April 2019, they approved the IDC/Celrose merger – subject to a moratorium on retrenchments for five years. The moratorium was specific on the conditions and inter alia entailed that:[153]Celrose should not retrench any employees as a result of the merger for a period of five years from the implementation date of the merger, Also Celrose had to, during the first five-year period of the merchandise supply agreement, provide reports to the competition authorities in relation to the agreement.

This case also indicates that the scope of the power of the competition authorities when adjudicating on merger issues goes beyond assessing the anticipated impact of the merger on employment but also encompasses the power to create remedies for the merging parties when faced with potential retrenchments that are merger specific.

3.3.5. SIBANYE/ LONMIL[154]

Sibanye-Stillwater is one of the largest producers of platinum and palladium and features among the world's top gold producing companies with a portfolio of operations and projects around the globe, whilst Lonmin Plc is a British producer of platinum group metals with operations in South Africa. In March 2018 the merging parties notified the competition authorities of their proposed merger and after investigation by the competition authorities which entailed competition and public interest assessment,

[151]*The Industrial Development Corporation South Africa SOC Ltd and Celtrone (Pty) Ltd, Case No. LM271Mar19.*
[152]Ibid para 2.2.
[153]Ibid para 3.
[154] *Sibanye Gold Limited(T/A) Sibanye- Stillwater and Lonmil PLC, CAC Case No. 169/CAC/Dec18.*

it was concluded that the merger was unlikely to substantially lessen competition in the platinum market. In November 2018, the merger was conditionally approved by the competition authorities.[155]

Trade unions had been granted the right to intervene and had raised excessive public interest concerns which included, *inter alia,* concerns relating to the negative impact of the merger on employment, procurement from historically disadvantaged persons ("HDPs"), existing arrangements with the BEE Bapo ba Mogale Community as well as noncompliance to Lonmin's Social and Labour Plans ("SLPs").[156]The intervening parties had indicated that the possible number of operational job losses had been estimated at between 10 156 (Lonmin) and 13 444 (Sibanye) respectively.[157]The merging entities argued that Lonmin had been under dire financial constraints for a number of years due to weak platinum prices and could possibly function as a going concern, which necessitated retrenchments due to operational requirements. This was largely disputed by the trade unions as the exact number of retrenchments were allegedly not conclusive.[158]

After an extensive investigation by the competition authorities the merging entities were found to have been transparent and cooperative in their disclosure of information pertaining to the losses of jobs with Sibanye undertaking to initiate a possible Agri-Industrial Community Development Programme in the Rustenburg area, once a roll out plan had been implemented and finalised for the greater West Rand district.[159] Sibanye also undertook to conduct an economic assessment of further investments in identified shafts thereby potentially reducing planned operational retrenchments and a consultative forum would also be established to implement "Social Labour Plans".[160]

The competition authorities also imposed a six-month moratorium on all retrenchment once the merger had been effected. The rationale was that this would afford the merging parties an opportunity to consult about the operational requirements with the trade unions and all the other relevant stakeholders about other public interest

[155]*Sibanye Gold Limited(T/A) Sibanye- Stillwater and Lonmil PLC, CT Case No. LM315Mar18*(hereinafter the *Sibanye Lonmil PLC*).
[156] *Sibanye/ Lonmil* para 6-7.
[157] Ibid para 8.
[158] Ibid.
[159] Ibid para 15.
[160] *Sibanye Lonmil PLC* para 2.12.

concerns which are not part of this study. The trade unions appealed against the order of the tribunal however, the appeal was dismissed, and the only change made was to the economic variables and pre-requisites as indicated in paragraph 3.3 of the conditions outlined in the tribunal order of 21 November 2018.[161]

In this case we can clearly see that the competition authorities are very objective in deciding on cases and are not influenced by trade unions, and it underscores the importance for an authoritative body to be objective. The thorough investigation into the merger is also noted as it again heightens the importance of disclosure of information by the merging parties or affected parties to ensure the possible public interest concerns are duly raised and that there are no delays and also that the eventual decision is well informed.

3.3.6. MILCO/CLOVER[162]

In February 2019, a consortium led by Milco and an investor named Brimstone Investment made an offer to buy Clover shares. Brimstone Investment subsequently recused itself from the transaction upon protest from various protest groups. Various trade unions had concerns with this transaction, notably in relation to issues pertaining to employment and how the merger would have dire consequences for the South African based labour constituencies through a project called Project Sencillo. Project Sencillo was a project that Clover had initiated to ensure better utilisation of their assets in a five-year period.[163] The merging parties had indicated that 516 employees would be retrenched once Project Sencillo was completed which was unrelated to the proposed merger. The trade unions were however very vocal in their disapproval of the transaction and as such the competition authorities deem fit that they make representations.[164]

As the merger proceedings continued Clover indicated that they had managed to reduce the potential job losses to affect 277 employees, which was a result of Milco undertaking to create 550 new jobs through another project of Clover called Project

[161] Ibid para 3.1 -3.5 read together with *Sibanye/ Lonmil* para 63.
[162] *Milco SA Proprietary Limited and Clover Industries Limited, CT Case No. LM263Mar19*.
[163] Ibid para 1.19.
[164] Competition Tribunal Report *Tribunal approves Milco / Clover merger after merging parties improve conditions* https://www.comptrib.co.za/info-library/case-press-releases/tribunal-approves-milco-clover-merger-after-merging-parties-improve-conditions (accessed at 30 December 2019).

Masakhane. Project Masakhane was another initiative from Clover which was aimed at increasing market distribution to reach informal traders.[165]

In September 2019, the competition authorities approved the merger but made it subject to a number of conditions.[166] These included that when addressing issues of employment, the merging entities agreed not retrench any employees as a result of the completion of Project Sencillo, which commitment would be effective for two years after the implementation of the proposed merger.[167]The merging entities also agreed that they would not retrench any employees in South Africa as a result of the merger. This commitment however did not extend to employees within the confines of the Labour Relations Act processes.[168] Furthermore, the merging entities had to agree that they would create 550 new jobs within a five year period after the implementation of the merger, which would be done by expanding Project Masakhane.[169] The latter process would also entail a contribution of R10 000 000 (ten million Rand), which would be allocated for relocation and training of employees who successfully applied for positions in Project Masakhane. [170]Permanent employees of Project Masakhane would also enjoy the same benefits as those permanently employed at Clover.[171]

The competition authorities highlighted the importance of going beyond the due diligence analysis when parties are considering a merger due to the potential impact a proposed merger can have on local suppliers and the surrounding communities. The merging entities also had to make an undertaking regarding local procurement, wherein they agreed that they would continue to supply bulk juice concentrate to local suppliers for a period of three years post merger implementation unless such ability to supply is affected by a *force majeure* event.[172]

---

[165] *Milco/Clover* para 2.6.
[166] Ibid para 2.7.
[167]Creamer Media Report *Tribunal approves Milco / Clover merger after merging parties improve conditions* https://m.polity.org.za/article/tribunal-approves-milco-clover-merger-after-merging-parties-improve-conditions-2019-09-25 (accessed on 30 December 2019).
[168] Operational requirement or changes market circumstances unrelated to the merger, dismissal for poor work performance, dismissal applicable after the moratorium applicable to the Project Sencillo, Voluntary separation agreements, voluntary early retirement packages and unreasonable refusal to be redeployed- para 2.6 of the Conditions for the merger.
[169] *Milco/Clover* para 3.7.4.
[170] Ibid para 2.12.
[171] Ibid para 2.13.
[172]Bhugwandeen and Dhorat *Applying a broader perspective* https://withoutprejudice.co.za/free/article/6754/view ac7 (accessed on 7 January 2020).

3.4. Conclusion

Based on the cases above it is clear that the competition authorities exercise the powers given to them by the Competition Act[173] in conjunction with the methodology indicated by the guidelines. Although the guidelines are not binding on the merging parties, they have been very influential in debating and crafting public interest conditions when disputes arise during merger evaluation. Based on the cases as discussed in this study, the competition authorities can either approve a merger without conditions, prohibit a merger and or conditionally approve the merger. The Competition Act provides that the competition authorities have to carry out a two-pronged assessment when evaluating a merger,[174] which rests on the foundation of the competitive and the public interest assessment of the merger. Therefore, competition authorities in economies undergoing structural changes must be alert to the potential anticompetitive consequences of mergers including those envisaged due to public interest.

[173] Section 141(b) of the Competition Act.
[174] Section 12A of the Competition Act.

Chapter 4: Some observations on the Competition Amendment Act, conclusions and recommendations

4.1. Competition Amendment Act (Amendment Act)

A discussion of labour as a public interest concern is not complete without also briefly referring to the impact of the 2018 Competition Amendment Act in this regard: In December 2017, the Minister of Economic Development published an extensive set of proposed amendments to the Competition Act,[175] which included significant changes to the merger control provisions set out in section 12 of the Competition Act. The key features of the proposed bill predominantly made their way into the Amendment Act 18 of 2018**[176]** which on 13 February 2019, received the presidential assent. All that remained was a proclamation of a commencement date from which the Amendment Act would find application. On 12 July 2019, the President of the Republic of South Africa, published a notice in the Government Gazette to immediately bring into force certain of the provisions of the Amendment Act.[177]

The Amendment Act seeks to enhance to a certain extent the public interest consideration in merger evaluation, which in essence will address economic concentration and transformation. The amendment to section 12A(1) clarifies that the competition authorities must determine if a merger can or cannot be justified on public interest grounds, *even if* the competition authorities have determined that a merger can or cannot be justified based on impacts on competition[178] and must consider the effect the merger will have on the ability of SMEs and black-owned businesses to enter, participate and expand in the market.[179] This has the possibility of creating aggregate employment as there will be industrial expansion and economic growth, thereby reducing the influxes of retrenchments. An economy that is growing means there is less people to retrench even in instances of mergers, however, there are specific regulatory instruments which have been adopted in this regard and care should be taken not to create undefined powers on the part of the competition authorities.

---

[175]Competition Amendment Bill, 2017("draft Bill), Government Gazette of the Republic of South Africa, 1 December 2017 Vol 630, No 41294.
[176] Competition Amendment Act 18 of 2018, Government Gazette of the Republic of South Africa, 12 July 2019 Vol 649, No 42578.
[177] Government Gazette of the Republic of South Africa, 12 July 2019 Vol 649, No 42578.
[178] Section 12A (1) of the Amendment Act.
[179] Section 12A(3)(c) &(d) of the Amendment Act.

Section 12A(2)(i) and (j) has been amended to mandate the competition authorities to take into account the *extent of shareholding or ownership* by a firm which is a party to a merger or in related markets; and whether there are any relations to the firm to the merger in another firm or other firms in related markets including directorship or common members. [180]This approach by the competition authorities would assist in collating information on common directorship or shareholding of the firms involved in the merger. Further information would also need to provide to indicate if in the preceding years the parties have concluded any mergers.[181]

The amendments also confirmed the requirement for the merging parties to prove that the merger will benefit either the competition interest or public interest before it can be approved.[182] The amendment to section 12A(1) therefore, provides for the competition authorities to determine if the merger will have an impact on *both* competition and public interest.

The Amendment Act also gives powers to the competition authority to amend or revoke its own decision to approve or conditionally approve a merger, if the competition authorities decision was based on wrong information provided by the merging parties.[183] The amendments to section 17(1)(c) clarifies that the Minister has this right to appeal a decision of the Tribunal on matters of public interest where the Minister participated in the proceedings of the Competition Commission or Tribunal on public interest grounds, or upon application to the Competition Appeal Court.

The public interest provisions have been amended to clarify their importance in the assessment process. It has also been indicated that the President of the Republic of South Africa intends to establish a committee which will include members of Parliament to deal with issues pertaining to national security interest and any adverse effect when dealing with foreign transactions.[184]

Furthermore, the Amendment Act has introduced a new public interest ground in addition to the exist public interest grounds which will promote greater ownership for

[180] Irvine '*Proposed amendments to the merger review provisions of the Competition Act'* Without Prejudice,2018.
[181] Section 12A (2) (k) of the Amendment Act.
[182] Section 12A (1) of the Amendment Act.
[183] Section 15(1) of the Amendment Act.
[184] Section 18A of the Amendment Act.

historically disadvantages persons and workers or employees in firms.[185] Consideration will be afforded to small and medium sized businesses to participate within the relevant markets and by so doing to also enhance the ownership stakes of workers (employees) which thus reinforces the importance of labour as an instrument for economic upheaval. The involvement of small and medium businesses provides opportunities for employment across a number of segments of the labour force which include low-skilled workers and provides opportunities for skills development. These are fundamental elements that competition authorities have enforced in those cases requiring remedial conditions before a merger is approved.

The scope of the competition authorities application of public interest, notably employment as a public interest consideration, albeit indirectly, has thus been widened.

4.2. Conclusions and recommendations

Post-apartheid, the newly elected democratic government had the huge task of reforming the economy, and ensuring that all the historic policies and state ownership resulting in undue protection of some companies were eradicated and that competition policies befitting a developing country on the crust of a new wave of market concentration developed.[186] Lewis aptly stated that: *"The new regime clearly seeks to distinguish itself by its promotion of greater equality to access to wealth and income earning opportunities; it wants interest groups marginalized by the previous order, essentially the new party's electoral constituency, to be the principal beneficiaries behind the new order. However government also recognizes that these distributional goals can be achieved only through a significant improvement in economic performance, in economic efficiency."*[187]

The Competition Act was enacted with the specific purpose of promoting and maintaining competition in South Africa.[188] The key objectives of the Competition Act were amongst others to promote employment which would advance the social and economic welfare of the country, and to promote greater ownership of the market by

[185] Section 12A (3) (e) of the Amendment Act.
[186] Hodge 2.
[187] Lewis *The role of Public Interest in Merger Evaluation*, International Competition Network, Merger Working Group Naples (2002) 2.
[188] Section 2 of the Competition Act.

historically disadvantaged persons and promote an efficient economy for all South Africans.[189]

Consequently, the Competition Act created a mammoth task for competition authorities as they have to adjudicate on both public interest grounds or policies and pure competition aspects during merger evaluations, which may create issues in applying independence and objectivity for the competition regulatory body. The objectives of the Competition Act cannot be simultaneously applied in merger evaluation and will commonly triumph each other.

There has been some arguments that competition policies ought to extend the pure competition objectives and not those which include political and non-competition objectives, such as issues pertaining to employment.[190] In particular, Reekie viewed the inclusion of public interest in terms of section 12A (3) of the Competition Act as undesirable, stating as follows:

"The scope for error, flexible interpretation, subjectivity of judgement seems great. Prospective local or foreign investors could then well be deterred from takeover activity if there are to be unknown and unpredictable reactions by the authorities. A reduction in such activities could adversely affect exports, corporate tax revenue, and hamper possible spin-off demand for products of small and medium scale enterprises."[191]

He warned that this can compromise the goals of the Competition Act should there be individuals with personal interests in the outcome of the merger.[192] It could further alienate prospective foreign investors from mergers due to the unpredictable conditions to the merger that competition authorities can impose.

Over the years though, public interest grounds have however gained more momentum in merger proceedings as opposed to pure competition goals. As indicated the Competition Act provides an elaborate list of factors which must be considered during

[189] Read Section 2(a) to 2(f) of the Competition Act for a further analysis of the purpose of the Competition Act.
[190] Myeni *Public Interest and Merger Controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations* (LLM-thesis, University of Cape Town, 2016) 54 & 40.
[191] Reekie *The Competition Act, 1998: An Economic Perspective'* (1999) 283.
[192] Ibid 4.

merger evaluations when assessing public interest grounds. [193] Guidelines which sought to give guidance to the competition authorities on the approach suitable for analysing a merger and the type of information that may be require to evaluate the public interest ground in terms of section 12A(3) were also introduced.[194] The introduction of these guidelines has been fundamental for an understanding of the basis for intervention by intervenors who wish to raise public interest issues.

Conditions such as those imposed by the competition authorities in the *Walmart* case discussed as part of this study, which required the merging entities to honour existing labour agreements and not change the position of a trade union which had large union representation however need to be highlighted. This was clear example of the competition authorities exceeding the scope of the public interest consideration regarding employment as enshrined in the Competition Act and is precisely the type of overreaching that the competition authorities need to guard against when imposing conditions. By implication, a merger that raises no competition concerns may still conceivably be prohibited because of public interest considerations.

There are various laws enacted specifically to protect the interest of employees if and when affected by retrenchments and it is submitted that competition authorities must at all times be mindful of these specific laws. Greater care is required when competition authorities adjudicate on public interest concerns as competition authorities have a duty to ensure competition policies are adequately applied.

As indicated, it is a prerequisite of the Competition Act that the competition authorities must be notified in advance of the merger before implementation thereof, which notification must be done in accordance with specified formalities.[195] The merging parties must disclose all the relevant information about the merger to enable the competition authorities to come to a correct conclusion within reasonable time. The Minister of Economic Development and trade unions representing merging parties must also be notified.[196]The parties are generally required to make submissions about the proposed merger which will assist the competition authorities in reaching a decision about the

[193] Section 12A (3) of the Competition Act and Oxenham '*Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty' (*2012) 9 *US–China Law Review.*
[194]The Guidelines.
[195] Section 13A of the Competition Act.
[196] Section 13A read together with Section 18 of the Competition Act.

merger. This could however potentially be the start of disputes between the merging entities and intervenors to the proposed merger as all public interest concerns will need to be raised at this stage. This can have the result that the merger review can become very lengthy and, as indicated in the cases analysed as part of this study, it can lead to significant and costly delays for parties wishing to finalise the merger. The adjudication process which normally ensues can also be very lengthy and costly for merging parties who were not prepared or aware of the public interest implications of the merger, especially when it is a big merger like the one in the *Milco/Clover*[197] merger which was estimated to be R4.8 billion. Not only must the merging parties be concerned about the litigation costs, but they must also strategize, and plan should the competition authorities impose conditions which require monetary benefits to the merged entities' employees, as well as to local suppliers and communities. There is clear potential that some of these conditions imposed as a result of public interest concerns related to employment can deter potential investors from using mergers as a means to invest in South Africa.

It is clear that whenever a case of potential merger is brought before the competition authorities, both the effect of the proposed merger on competition and on public interest must be evaluated.[198]This was clearly illustrated in the preceding Chapters of this study. It is in the same breath that public interest considerations under the South African Competition Act will become increasingly important in the context of merger regulation as also indicated in the study and the conditions normally imposed by the competition authorities, especially in recent times in relation to employment concerns. It then becomes of paramount importance for competition authorities to act within the confines of their mandate and its objectives and not be forced into merely serving the political initiatives and objectives of the government.

It is common cause that broadened socio-economic needs of South Africa are as a result of its history which encompassed a wide scale of unjust policies, which did not in any way promote equal distribution of wealth and resources. The preamble of the Competition Act is very clear on the Act's objective to create a better and more competitive economic dispensation for all South Africans, which are further supported by

[197] Supra footnote 162.
[198] Section 12A (3) of the Competition Act.

section 2 thereof.[199] Issues of labour speak to the social ills of the economy and any boost in labour is likely to lead to increased sustainability of the economy and it is accordingly on this basis that the incorporation of public interest considerations in the Competition Act are justified.

The Competition Act is specific on the order that must be followed in merger evaluation. The first step will entail the competition consideration assessment and only then is a public interest assessment conducted, which must at all times be balanced.The Competition Act specifically requires the competition authorities to consider regardless of the outcome of the competition enquiry, whether a merger can or cannot be justified on public interest grounds, including the effect that a merger will have on employment.[200]Employment should however not be viewed in isolation to the other public interest grounds if the aim is to have greater economic growth.

South Africa is a country riddled with a high unemployment rate, therefore the impact of a merger on employment is pivotally significant. The competition authority can approve or conditionally approve or prohibit a merger if the merger has an effect on public interest ground. The decisions which the competition authorities have made in relation to labour is commendable and has continued to receive good appraisals over the years. It might be due to this ability to create good jurisprudence that the competition authorities are now inundated with more workload when it comes to merger regulations.

The cases discussed as part of this study indicate that employment related conditions are normally imposed to reduce or save the number job losses that may occur as a result of a proposed merger, with the competition authorities requiring the merger parties to either provide training programmes to ensure employees are employable or self-employed, retrenchment moratoriums to the maximum of five years in the recent years and retrenchments not targeting unskilled employees. It is submitted that in order to attain the goals alluded to in the preamble, the competition authorities should continue to impose extended retrenchment moratoriums to ensure jobs losses are not

[199]The preamble of the Competition Act speaks of the need for economic participation and issues of ownership and Section 2 of the Competition Act outlines the purpose as the provision and maintenance of competition in order to achieve six outcomes.

[200] Section 12A of the Competition Act states that whenever required to consider a merger, competition authorities must first determine whether or not the merger is likely to substantially prevent or lessen competition.

at any stage merger specific. The preamble of the Competition Act articulates that competition authorities *'must balance the interest pf workers, owners and consumers and focused on development which will benefit all South Africans.'*[201] It is clear from this that public interest grounds play an important role which is paramount for advancing the objectives of competition policy.

Trade unions have over the years increased their participation in merger proceedings, which is indicative on merger conditions imposed by the competition authorities. The involvement of these trade unions is highly encouraged as it ensures participation from employees.[202]The Competition Act[203]also provides the Minister with the right to intervene and make representations on the public interest grounds listed in terms of section 12A (3). The Minister's rights are not to coerce the competition authorities into implementing governmental policies but rather to assist in shedding light into issues within his executive mandate.

The competition authorities also seem to embrace the concept of broad-based empowerment ownership and I fully support this notion. However further analysis must be conducted on the rate of employment or retrenchment that these mergers discussed in this study have actually occasioned. Furthermore, it is evident that the Competition Amendment Act 2018 has a central role in the evaluation of mergers in particular, the effect of small scale businesses and businesses owned by previously disadvantaged individuals and workers to enter into and effectively compete in the market, abuse of dominance and conducting of market inquiries. The inclusion of section 12A(1A) and definition of "workers" effectively promotes the expansion of ownership in merger, which should to a certain extent curtail retrenchment.

[201] Preamble of the Competition Act.
[202] Section 13A of the Competition Act.
[203]Section 18 of the Competition Act.

Bibliography

Books

Kelly L; Unterhalter D; Goodman I *et al, Principles of Competition law in South Africa* (2016) Oxford University Press.

Lewis D *Enforcement Competition Rules in South Africa: Thieves at the Dinner Table* (2013): Edward Elgar Publishing

Neuhoff M, Govender M, Versfeld M and Dingley D *A practical Guide to the South African Competition Act (2017*) Durban: Lexis Nexis

Sutherland P & Kemp K *Competition law of South Africa* (2013) Durban: Lexis Nexis

Journals

Buthelezi Z and Njisane Y '*The incorporation of public interest considerations during the assessment of prohibited conduct: a juggling act'* (2015).

Irvine H '*The world after Wal-Mart – Will South African mergers ever be the same again?' Without Prejudice.* June 2012

Hodge J, Goga S, Moahloli T *Public Interest provisions in the South African Competition Act: A critical review contained in Moodaliyar K and Robert S the Development of Competition Law and Economics in South Africa* (2012) Cape Town: HSRC Press

Mohamed Z '*Public Interest perspectives*.' *Without Prejudice.* 2012

Njisane Y '*The rise of Public Interest: Recent high profile mergers'* (2011).

Oxenham J '*Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty '(*2012) 9 *US–China Law Review.*

Staples J and Masamba M '*Fourteen years later: An assessment of the realisation of the objectives of the Competition Act 89 of 1998'* (2012).

Staples J, Holland M and Rossouw J '*Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd* ' (2013)

Internet

Boshoff W, Dingley D and Dingley J *The Economics of the Public Interest Provisions in South African Competition Policy*: available at http://www.compcom.co.za/assets/Uploads/events/SIxth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pd (accessed on 21 March 2019).

Kariga R, Ngobeni J and Ngobese M *Is South Africa a Good Investment Destination? A Relook on Conditions in Merger Cases*: available at http://www.compcom.co.za/assets/Uploads/events/SIxth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/Is-South-Africa-a-good-investment-destination-22.08.2012-F.PDF (accessed on 22 March 2019).

Lewis D Presentation on *The Role of Public Interest in Merger Evaluation at Competition Network: Merger Working Group, Naples (28-29 September 2002)* available at http://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf (accessed on 10 March 2019).

Lee Mendelsohn 'Competition Commission Publishes Draft Public Interest Guidelines for Public Comment' *ENSafrica* 27 January 2015 available at

https://www.ensafrica.com/news/Competition-Commission-Publishes-Draft-Public-Interest-Guidelines-for-Public-Co?Id=1680&STitle=competition%20newsflash(accessed on 13 March 2019).

Mutizwa, G. Metropolitan Momentum merger summary available at http://www.compcom.co.za/wp-content/uploads/2014/09/December-2010-issue.pdf (accessed on 20 August 2019)

Working papers and reports

Competition Commission, Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998(31 May 2016)

Department of Trade and Industry (South Africa) Proposed guidelines for competition policy: A framework for competition and development, 27 November 1997

Government Gazette of the Republic of South Africa, 6 March 2009 Vol 525, No 31957

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

Government Gazette of the Republic of South Africa, 2 June 2016 Vol 612, No 40039

Caselaw

Anheuser-Busch InBev SA/NV and SABMiller Plc, CT Case No. LM211Jan16.

Coca-Cola Beverages Africa Limited and Various Coca-Cola and Related Bottling Operations, CT Case No. LM243Mar15.

Daun et Cie AG / Kolosus Holdings Ltd 10/ LM/Mar03.

DB Investments SA v De Beers Consolidated Mines Limited [2001-2002] CPLR 172 (CT).

Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited (08/LM/Feb/02) [2003] ZACT 36 (18 June 2003).

Edgards Consolidated Stores Ltd v Pick n Pay Retailers (Pty) Ltd (05/LM/Feb04) [2004].

Glencore South Africa Oil Investment (Pty) and Chevron South Africa, CT Case No.LM185Oct18.

Metropolitan Holdings Ltd v Momentum Group Ltd (41/LM/Jul10) [2010] ZACT 87 (9

December 2010).

Milco SA Proprietary Limited and Clover Industries Limited, CT Case No. LM263Mar19

Minister of Economic Development and others v Wal-Mart Stores Inc. and others

(110/CAC/Jun11 and 111/CAC/Jun11) [2012] ZACAC (9 March 2012).

Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 28 (31 May 2011).

The Industrial Development Corporation South Africa SOC Ltd and Celtrone (Pty) Ltd, Case No. LM271Mar19.

Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Others 46/LM/May05.

Sibanye Gold Limited(T/A) Sibanye- Stillwater and Lonmil PLC, CAC Case No. 169/CAC/Dec18.

Sibanye Gold Limited(T/A) Sibanye- Stillwater and Lonmil PLC, CT Case No. LM315Mar18.

Unilever Plc Unifoods (a division of Unilever South Africa (Pty) Ltd) / Hudson & Knight (a division of Unilever South Africa (Pty) Ltd) / Robertsons Foods (Pty) Ltd / Robertsons Food Service (Pty) Ltd and Competition Commission of South Africa / CEPPWAWU / FAWU / NUFBWSAW, 55/LM/Sep01, (2002).

Legislation- South Africa

Basic Conditions of Employment Act 75 of 1997

Competition Act 89 of 1998 as amended

Competition Act 18 of 2018

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995 as amended

The Constitution Act 108 of 1996

Research Studies

Myeni W, *Public Interest and Merger Controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations*, LLM Dissertation, 2006, University of Cape Town.

Tavuyanago S, *Public Interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, 2014, University of Pretoria.

Teage IG, *The role of the public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2005, University of Cape Town.