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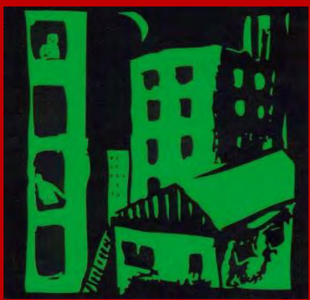

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From monopoly to justice: The (non) evolution of public interest objectives in South African competition law

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ABSTRACT

This article examines the historical development and contemporary influence of selected public interest objectives in South Africa's competition law. It traces the trajectory from colonial and apartheid-era statutes that entrenched monopoly power and excluded black entrepreneurs to the transformative ambitions of the Competition Act 89 of 1998 and its 2018 amendments. The article argues that while public interest provisions were introduced to promote economic inclusion, their implementation has been inconsistent and susceptible to excessive ministerial discretion and conceptual vagueness. A review of case law reveals doctrinal tensions between traditional competition adjudicative frameworks and the Act's transformative objectives. The article contends that the transformative potential of competition law will remain unrealised unless these tensions are resolved through more explicit interpretive guidance and a principled balancing of public interest factors. It concludes that South Africa's competition regime must strengthen the adjudicative framework and ensure institutional independence in order to transform competition law from a symbolic policy commitment to a substantive mechanism for advancing inclusive and equitable economic justice.

Keywords: competition law; economic transformation; inequality; public interest; South Africa

1 INTRODUCTION

South Africa's Competition Act[1] is notably more progressive than the competition laws of many developing countries. It expressly incorporates public interest objectives designed to dismantle structural power imbalances and redress past injustices. Yet despite these aspirations, the application of public interest provisions has often been inconsistent, vaguely articulated, and susceptible to excessive political or ministerial discretion. The argument in this article is that, in its (non) evolution, South African competition law has rhetorically endorsed the public interest but not developed substantively into a coherent evaluative framework. As Jafta J observed in *Competition Commission v Senwes*,

> some of the Act's objectives are directed at addressing the inequalities and imbalances created by apartheid. However, operationalising those objectives has proven challenging. Understanding the pre-democratic legal context is therefore crucial for avoiding past inefficiencies and clarifying what a transformative competition regime should achieve.[2]

Under the colonial and apartheid regimes, laws and policies relegated black people to economic subordination and entrenched monopoly power in the hands of white people.[3] The liberation movement, led by the African National Congress (ANC), identified the need to dismantle harmful conglomerates and lower the high barriers to entry that had long excluded historically marginalised groups from effective market participation. This imperative was part of a broader project to remedy structural impediments, such as extreme market concentration and discriminatory access, which black entrepreneurs faced in the pre-democratic economy.

In 1994, the Interim Constitution was passed into law. The final 1996 Constitution provides the normative baseline, with its foundational values of equality, dignity and freedom.[4] These values contrast with the past racially discriminatory laws that thrived on

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1 Competition Act 89 of 1998.

2 *Competition Commission of South Africa v Senwes Ltd* (CCT 61/11) 2012 ZACC 6.

3 See African National Congress *Ready to govern: ANC policy guidelines for a democratic South Africa* (1992) at 3.

4 Constitution of the Republic of South Africa, 1996.

the disempowerment of the majority black population.[5] The Constitution is supreme, and its section 39(2) commands that all courts "promote the spirit, purport and objects of the Bill of Rights when interpreting legislation" because the Bill of Rights is the "cornerstone of our democracy".[6] Enacted legislation, such as the Competition Act, thus bears a responsibility to advance economic transformation and inclusion, fight the entrenched inequalities of the past, and deconcentrate markets so that they reflect the demographics of the Republic. In adhering to that responsibility, the Competition Act would advance South Africa's democratic values by guaranteeing previously marginalised market participants equality and inclusion in the formal economy.

Post-colonial and post-apartheid South Africa remains a work in progress toward democratic, inclusive economic participation. Competition law is one of several instruments intended to advance that economic transformation. The Act does this by promoting the empowerment of historically disadvantaged persons (HDPs), protecting employment, and encouraging opportunities for small businesses.[7] By addressing structural impediments such as market concentration and barriers to entry faced by HDPs, the Competition Act was intended as a tool of economic transformation.[8]

The article proceeds as follows. It begins with a historical overview of South African competition law and policy before 1994, highlighting how they addressed (or failed to address) anti-competitive conduct and how apartheid-era priorities excluded public interest considerations. The article then examines the transitional period when the ANC's economic policy vision shifted from calls for nationalisation to using a rule-of-law-based competition framework as a tool of transformation. Thereafter, it analyses the post-1998 competition regime, one characterised by the interplay between aspiration and ambiguity; here, the analysis engages with the content of the 1998 Act and its public

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5 Section 1 of the Constitution.

6 Section 39(2) of the Constitution.

7 Preamble and section 2 of the Competition Act.

8 The preamble of the Competition Amendment Act states: "Apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans."

interest provisions, its subsequent amendments (notably in 2018), and evolving policy guidance. Next, the article delves into selected case law, exposing doctrinal incoherence in the enforcement of public interest objectives. These cases under analysis reveal where the law's transformative aims have been either undermined or cautiously advanced. Finally, the conclusion underscores the need for consistency and institutional independence to fulfil the law's public interest promises.

For readers, the article offers both historical insight and normative reflection. It reveals how past policy choices continue to shape the structure of South Africa's economy. It demonstrates why a coherent, transparent, and constitutionally aligned framework for applying public interest is vital for genuine transformation. By understanding this trajectory, scholars, regulators, and policy-makers can better assess whether South Africa's competition regime has moved beyond rhetoric towards real economic justice.

2 PRE-DEMOCRATIC COMPETITION LAW AND POLICY

2.1 The historical foundations of exclusion

Before 1994, South Africa's competition policy reflected and reinforced the racially structured nature of its political economy. The apartheid government did not prioritise equality, fairness, or dignity; instead, its policies ensured that markets were racially segmented and served white economic interests. Discriminatory legislation systematically excluded black entrepreneurs from formal economic participation and ownership. Overtly discriminatory policy measures had excluded black entrepreneurs from participating in the formal economy. They shielded white-owned businesses against black competition (for instance, by subsidising white farmers), excluding black entrepreneurs from meaningful market participation.[9] White farmers were granted land ownership and preference in government support programmes, reinforcing the structural inequalities with which modern-day South Africa grapples.

Although the apartheid regime occasionally expressed concern about rising monopoly power, its interventions focused narrowly on consumer prices rather than

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9 Wise M "Competition law and policy in South Africa" (2004) 5(4*) OECD Journal of Competition Law and Policy* 7.

aiming to open markets or enable broader participation. The competition policy of this era largely ignored the structural exclusion of the black majority and imposed no transformative obligations on entrenched firms.[10] The state's approach at the time could be described as narrow and reactive. This is because it sought to stabilise prices and prevent overt collusion rather than restructure ownership or promote participation by black South Africans. Early legislative interventions, such as the Unlawful Determination of Prices Act 5 of 1931 and the Undue Restraint of Trade Act 59 of 1949, addressed price fixing and restrictive agreements but failed to establish an independent enforcement regime that was free from excessive ministerial power. Enforcement power was concentrated in the hands of the minister and advisory bodies such as the Board of Trade, which could only "recommend" rather than impose sanctions. This concentration of authority rendered enforcement weak and politically driven.

By the 1980s, the economy was dominated by a handful of large conglomerates: four diversified corporate groups and two financial companies controlled an overwhelming share of private assets.[11] At the dawn of democracy, five investment conglomerates owned 80 per cent of the capitalisation of the Johannesburg Stock Exchange (JSE), with one group alone accounting for nearly half of this share.[12] These firms (primarily in finance, mining, and minerals) were notorious for anti-competitive and predatory behaviour, contributing to the absence of dynamic small, medium and micro enterprises (SMMEs).[13]

The degree of wealth concentration was staggering. According to economic studies, the wealthiest 5 per cent of the population owned 88 per cent of all personally owned assets. At the time, only 2 per cent of the total assets of the private sector were owned by black people, and 90 per cent of the managerial positions were set to remain in the hands

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[10] Buthelezi T, Mtani T & Mncube L "The extent of market concentration in South Africa's product markets" *Competition Commission of South Africa Working Paper* CC2018/05 (2018).

[11] Arkebe O, Fiona T & Imraan V *The Oxford handbook of the South African economy* Oxford: Oxford University Press (2022) at 119.

[12] See Wise (2004) at 10. The Anglo-American Corporation, then a global mining giant, controlled a significant portion of the JSE. Alongside Anglo-American, conglomerates such as Rembrandt and De Beers entrenched their dominance over critical markets.

[13] Arkebe, Fiona & Imraan (2022) at 12.

of the white population. In the 1996 population consensus, whites' average per capita income was 7.5 times that of African South Africans. Additionally, 62 per cent of Africans fell below the poverty line of R250 in 1996, in contrast to the 3 per cent of white people with a lower poverty line at R250.[14] This legacy of inequality meant that economic power and opportunity were still overwhelmingly skewed by race even though apartheid had formally ended.

The Anglo-American Corporation, a mining-based conglomerate, controlled a significant portion of the JSE. Alongside Anglo-American, companies such as Rembrandt and De Beers established their dominance in key industries. As the competition scholar (and former Commissioner) David Lewis observed, "the reach of these behemoths was so wide that it would have been difficult for any player in the South African economy to avoid engagement as a customer, supplier or competitor with interests that [the] dominant conglomerates controlled".[15] This observation highlights the persistence of structural inequality and echoes analysis by Seekings, who has documented the continuation of economic advantage and disadvantage along racial lines in South Africa's modern history.[16] In short, apartheid-era market structures concentrated private power in a few (white) hands, posing a formidable challenge for the nascent democracy to undo.

During the late apartheid period, some anti-monopoly provisions were enacted; however, these measures did not implement the transformative interventions necessary to empower the black majority. To understand the roots of today's public interest objectives, it is essential to examine the precursor statutes from 1907 through 1979 that formed South Africa's early competition framework. Six key Acts in the first half of the 20th century paved the way (albeit unintentionally) for the later inclusion of public interest considerations in the post-1998 Competition Act. These are discussed below.

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14 Arkebe, Fiona & Imraan (2022) at 12.

15 See Lewis D *Enforcing competition rules in South Africa: Thieves at the dinner table* Johannesburg: Jacana Media (2012). The author observes the ubiquity of conglomerate influence in the apartheid-era economy, illustrating the formidable structural challenges facing the new competition authorities.

16 Seekings J "Race, class and inequality in the South African city" in Bridge G & Watson S (eds) *The New Blackwell Companion to the City* (2010) 47. Seekings analyses how apartheid's legacy entrenched class and racial inequalities, noting continuity in economic hierarchies after 1994. His work provides context as to why additional state intervention (through competition law and other measures) is needed to break that continuity.

2.2 Early legislative attempts to regulate monopolies

South Africa did have some early laws aimed at curbing certain anti-competitive practices. The first competition-related statute in South Africa was the Cape Meat Trade Act 15 of 1907, passed in the colonial era. Section 3 of that Act prohibited any act, contract or conspiracy that constituted an unreasonable constraint on trade among butchers. This early provision was intended to prevent collusive behaviour (specifically in the meat trade) that could harm consumers. This was a narrow, sector-specific measure, but it signalled an emerging recognition of the dangers of collusion. Years later, Parliament introduced the Unlawful Determination of Prices Act 5 of 1931 (as amended), which tackled resale price maintenance in the petrol industry. This made it an offence to compel or induce resale price maintenance that increased the price of petrol; the Act was later amended to include all products.[17] This highlights the government's focus on regulating key industries (such as meat sales and petrol sales) through competition law, specifically by imposing restraints on trade and prohibiting resale price maintenance.[18] This consumer-price lens primarily protected consumers from high prices rather than transforming market structure or promoting fairness in business opportunities.

In 1937, a Board of Trade was established with a mandate to investigate monopolistic conditions and their effects on prices. Although this marked the first independent investigatory body for competition issues, the Board's powers were limited: it could only advise the Minister of Economic Affairs and had no authority to impose sanctions. The Board depended on ministerial referrals rather than having proactive investigative powers.[19] Its remit encompassed practices such as concerted price-setting, exclusive dealing, and other arrangements that were likely to distort competitive conditions, and it was tasked with determining whether monopolistic conditions were compatible with the

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[17] Republic of South Africa "Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955" (1978) 23(1) *Antitrust Bulletin* 147 at 150–151.

[18] Resale price maintenance is a practice in which a supplier or manufacturer sets a minimum or fixed price at which retailers must sell their products. This restricts retailers from independently determining the selling price, thereby maintaining uniform pricing across the market.

[19] Republic of South Africa (1978) at 151.

public interest.[20] This introduced, at least in principle, a public interest criterion as early as the 1940s. However, because the Board lacked teeth, decision-making rested with the minister. Without institutional independence; this public interest criterion was vulnerable to being shaped by political consideration rather than applied on principled grounds.

In 1949, while the Board was still in operation, an interim measure was passed: the Undue Restraint of Trade Act 59 of 1949 ("URT Act"). This was the first competition law enacted by the apartheid government. The URT Act was introduced as an interim response to the increasing "monopolistic tendencies" that had engulfed the market. It prohibited agreements between rival distributors of commodities not to compete with one another, including arrangements involving price fixing. Additionally, the URT Act provided that any undue restraint of trade, where detrimental to the public interest (as understood at the time), was unlawful. Resale price maintenance was subject to criminal prosecution under the Act, a measure that overlapped with the earlier 1931 Unlawful Determination of Prices Act, which had already prohibited resale price maintenance across all products. Like its predecessor, the 1949 URT Act maintained a framework that was incapable of advancing equitable participation, given that "the public" under apartheid excluded black economic citizenship.

Beyond this foundational limitation, the 1949 URT Act suffered from significant structural weaknesses in its enforcement design. It concentrated enforcement power in the hands of the minister and did not establish an independent agency to investigate or prosecute anti-competitive conduct. The Board of Trade continued to merely *advise* the minister if its inquiries revealed harm. The only sanction the minister could impose was the publication of the offending practice; a reputational measure that proved an inadequate deterrent. A further weakness was that the Act relied excessively on voluntary complaints rather than proactive investigation – an unsatisfactory method for detecting harmful practices.[21]

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[20] Republic of South Africa (1978) at 149.
[21] Republic of South Africa (1978) at 152–153.

In 1955, at the height of apartheid, the government enacted the Regulation of Monopolistic Conditions Act 24 of 1955 ("RMC Act"). This was the first statute in South Africa dedicated solely to competition matters. Under the RMC Act, the Board of Trade was elected to administer the Act in the capacity of a (none too) independent decision-making body. The Act may be considered cautious and lenient in that it did not prohibit key anti-competitive practices such as collusion. Collusion was not prohibited per se: restrictive agreements were merely "watched".[22] This meant that firms in the apartheid era were left to their own devices and could collude with each other at any time without facing strict legislative consequences for such harmful anti-competitive conduct. This framework legitimised conglomerate coordination as long as it appeared to be administratively supervised. In effect, firms remained free to collude: the Act's stance was to *monitor* rather than prohibit such conduct, meaning cartels could operate with little fear of sanction.

The RMC Act also lacked any merger control provisions, unlike modern competition statutes. No guidance was given on reviewing mergers, which meant the law did nothing to prevent further economic concentration through acquisitions (a critical omission given the highly conglomerated state of the then economy). Overall, the RMC Act's division of power proved problematic: ministerial discretion was so great that the Board's oversight had minimal impact.[23] Although the Board could make inquiries and recommendations, final decisions and remedies rested with the minister, undermining the Board's independence. In an economy structurally designed to benefit white capital, the laws in place were structurally incapable of effectively curbing anti-competitive conduct. In such instances, when ministerial power goes unchecked by independent oversight, corruption and regulatory inaction tend to thrive. Heavy ministerial control, combined with weak penalties, ensured that the RMC Act did not seriously threaten the entrenched monopoly power of that period.

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22 Republic of South Africa (1978) at 154.
23 Wise (2004) at 12.

In all these early statutes, a common thread was the extraordinary power vested in the minister and the lack of genuine enforcement mechanisms. The minister had the sole authority to act on anti-competitive practices and could impose only mild remedies (if any). A firm found to engage in harmful conduct might, at worst, be publicly admonished. Such light-touch regulation failed to level the playing field in any meaningful way. By the 1960s and 1970s, it was clear that the existing legislative framework was inadequate: it neither prevented anti-competitive collusion nor addressed the broader issue of an untransformed, highly concentrated market structure.

In sum, pre-1994 legislation was characterised by limited prohibition, weak enforcement, and a lack of transformative intent. The government was content to allow a concentrated, racially exclusive economy to flourish, intervening only to restrain the most egregious price-fixing or abuse when it threatened specific consumer or political interests. The result of these statutes was an economy structured decisively in favour of white-owned capital, with laws that did little to challenge the scale of private economic power or the racial exclusion underpinning it. By the 1980s, as noted, a few conglomerates dominated the economy, and the laws had proven ineffective in curtailing anti-competitive behaviour or reducing concentration. This ineffectiveness made it clear to the liberation movement that entirely new legislation would be needed to undo entrenched monopolistic structures and achieve a more equitable economy in post-1994 South Africa.

2.3 Nationalisation and an anti-monopoly framework

As the apartheid era drew to a close, there was debate within the ANC and its allies about how to restructure the economy.[24] Nationalisation was initially the preferred mechanism for breaking up the few conglomerates that dominated the economy and broadening ownership in line with South Africa's demographics. However, the ANC's sentiment transitioned to utilising robust competition enforcement to break up conglomerates and thereby expand ownership and create a more equitable economy.[25] The 1955 Freedom Charter identified monopolies as targets in its quest for policy reform, doing so under the

24 Lewis (2012) at 8.
25 Lewis (2012) at 8.

rubric, "The people shall share in the country's wealth". In 1992, the policy unit of the ANC drafted a document entitled *Ready to govern: ANC policy guidelines for a democratic South Africa*[26] ("the Policy Guidelines"). These recognised the particular disadvantages faced by women and other HDPs, and envisaged a multi-instrument transformation strategy, one including anti-monopoly rules and merger scrutiny aligned with international norms.

The Policy Guidelines intended to transform economic power hitherto concentrated in the minority white population by the apartheid system.[27] The plan was not only to adopt a law that followed international norms and practices but to curb the continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector. The Guidelines aimed to undo apartheid laws that had sought to consign the black population to "lives of subordination and low-income jobs".[28] They envisioned that post-1994 economic transformation policy would utilise various mechanisms to achieve transformation.

Following Nelson Mandela's release in February 1990, his landmark speech at the Cape Town City Hall reaffirmed the ANC's commitment to nationalisation and the aim of fundamentally transforming prevailing white monopoly power.[29] Other ANC leaders likewise strongly advocated for the re-nationalisation of previously privatised public utility corporations.[30] In time, however, support for nationalisation diminished, supposedly due to adverse reaction from the market and other business constituencies.[31] One can argue that this reflected a change in the ideological stance of the ANC leadership. Be that as it may, the shift laid the foundation for a rule-of-law-based approach in which

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26 African National Congress *Ready to govern: ANC policy guidelines for a democratic South Africa* (1992).

27 Wise (2004) at 14.

28 African National Congress (1992) at 3.

29 "South Africa's new era: Transcript of Mandela's speech at Cape Town City Hall: 'Africa it is ours!'" (12 February 1990) *The New York Times* at https://www.nytimes.com/1990/02/12/world/south-africa-s-new-era-transcript-mandela-s-speech-cape-town-city-hall-africa-it.html (accessed 1 February 2025).

30 Habib A & Padayachee V "Economic policy and power relations in South Africa's transition to democracy" (2000) 28 *World Development* 245 at 248.

31 Seekings (2010) at 346.

robust, independent competition enforcement, rather than ministerial discretion, would become the primary tool to deconcentrate markets and broaden economic participation.

What is clear, then, is that by the mid-1990s, the ANC was gravitating toward a rule-of-law-based approach: instead of direct state takeovers of industry, the focus would be on independent competition enforcement alongside other market reforms; a significant departure from the state-ownership model previously favoured by liberation movement.

3 THE POST-1998 FRAMEWORK: BETWEEN ASPIRATION AND AMBIGUITY

The Competition Act 89 of 1998 was introduced as one of many policy mechanisms aimed at economic transformation and justice. Its purpose was to ensure that post-apartheid and post-colonial South Africa would see a greater spread of ownership by increasing the ownership stakes of HDPs and securing the participation of firms owned or managed by HDPs and SMMEs. This was to be achieved alongside the traditional goals of promoting competition and efficiency. In short, post-apartheid South Africa would use competition law as both a shield against anti-competitive conduct and a sword to advance socio-economic equity.

3.1 The purpose and objectives of the 1998 Act

In its preamble and section 2, the Competition Act directs authorities to consider how conduct or agreements affect HDPs and workers. In specific circumstances, the Act permits exemptions for HDP-owned firms. Section 2(1)(c) of the Act states that its core purpose is to promote employment and advance the economic welfare of the South African population. In short, the Act seeks to protect, empower, and stimulate the growth of small and black-owned businesses.

These provisions mirror the transformative vision laid out in prior ANC policy documents. Indeed, the historical drive behind the Act is evident in commentary and political statements from the time. For instance, the Act aimed to counter the influence of wealthy family-owned conglomerates (such as the Rupert family's empire, which had grown massively under apartheid and then remained a force across sectors such as finance, mining, and consumer goods).[32] The new government prioritised increased ownership and market access for black people as essential for restoring the dignity and economic power which apartheid had stripped away from them.

The hybrid philosophy underpinning the 1998 Act of balancing competition objectives with broader developmental goals has remained the defining feature of South Africa's competition regime in the decades since its enactment. In a telling acknowledgement of this enduring orientation, the Minister of Trade, Industry and Competition, Ebrahim Patel, noted in his 2021 budget vote speech that "South Africa's competition regime blends traditional competition concerns with developmental outcomes appropriate for its unique circumstances. Competition policy aims to address and promote economic inclusion and transformation."[33]

The structure of the Act duly incorporates public interest considerations in three main areas: mergers,[34] exemptions,[35] and (to a limited extent) abuse of dominance.[36] Authorities are mandated to balance traditional efficiency goals with transformative objectives that facilitate access and participation by firms that have been historically excluded from markets. Specifically, when assessing mergers, the Competition Commission and the Competition Tribunal must consider not only whether a merger is likely to prevent or reduce competition substantially, but also whether it could be justified

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[32] Lewis (2012) at 5. For a review of the Rupert family's Remgro, which has continued to diversify in post-apartheid South Africa, see Arkebe, Fiona & Imraan (2022) at 434.

[33] Department of Trade, Industry and Competitition "Media statement: Government releases competition policy strategy for jobs and industrial development to build on more than R25 billion in investment raised in competition agreements" (20 May 2021) available at https://www.thedtic.gov.za/government-releases-competition-policy-strategy-for-jobs-and-industrial-development-to-build-on-more-than-r25-billion-in-investment-raised-in-competition-agreements/ (accessed 1 February 2025).

[34] See section 12A(3) of Competition Amendment Act 18 of 2018 for the listed public interest objectives that should be considered in mergers. When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger would have on (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (d) the ability of national industries to compete in international markets.

[35] Section 10 of the Competition Act 89 of 1998. The exemption may be granted if there is a contribution towards the public interest objectives listed in section 10(3)(b) of the Act.

[36] See section 9(1)(a)(ii) of the Competition Amendment Act 18 of 2018.

on substantial public interest grounds.[37] Public interest factors (listed in section 12A(3) of the Act) include the effect of the merger on employment, on a particular industrial sector or region, on the ability of small businesses or firms controlled by HDPs to compete, and on the ability of national industries to compete internationally. These factors in effect inject socio-economic considerations into merger control.

Similarly, section 10 of the Act provides that firms may apply for exemptions from the Act's prohibitions if their agreements or practices contribute to specific goals such as promoting the competitiveness of small businesses or firms controlled by HDPs or serving other public interest objectives listed in section 10(3)(b) of the Act. This means some otherwise anti-competitive arrangements might be allowed if they demonstrably further transformation or other public interest aims. In regard to the issue of abuse of dominance, the 1998 Act, as initially enacted, had less explicit public interest content than the merger and exemption proceedings, focusing as it did on classic abuses (such as price discrimination, refusals to deal, and predatory pricing) with an efficiency defence. However, the Act's section 1 interpretation clause, read with the preamble, arguably invites authorities to be mindful of the Act's purposes even in these cases.

Despite the explicit inclusion of public interest in the Act's text, the actual impact of these provisions over the two decades since 1998 has been in doubt. On paper, South Africa's law went further than most jurisdictions in embedding multiple goals. In 2007, the International Competition Network (ICN) published a report in which 33 agencies were surveyed on the objectives of their unilateral conduct laws.[38] The report noted that South Africa appears to regard enhancing an effective competitive process as both an end in itself and a means to achieve other socio-economic objectives that support its broader developmental agenda: the latter agenda encompasses poverty alleviation, employment, and equality, among other objectives.[39] By contrast, other jurisdictions, such as Australia, Jamaica, the United Kingdom, and Singapore, seem to regard the purpose of competition

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37 Section 12A of the Competition Act 18 of 1998.

38 Waked D "Antitrust in developing countries: Policy alternatives and normative choices" (2015) *Seattle University Law Review* 38.

39 Other countries that adopt the same perspective are Canada, Sweden, Italy, Hungary, Ireland, Jersey, Korea, Latvia, the Netherlands, New Zealand, Romania, Slovak Republic, South Africa, and the United States.

law as exclusively concerned with enhancing the competitive process. Taken at face value, then, South Africa would seem to have taken a step in the right direction by embedding socio-economic transformation objectives within its competition law and policy framework, going further than jurisdictions that confine competition law to the protection of the competitive process alone.

In practice, though, the integration of public interest has not been straightforward. Policy statements since then continue to characterise South African markets as concentrated and exclusionary.[40] High concentration reduces opportunities for SMMEs and black entrepreneurs, making it rational to target barriers at their root, namely the market structure. Studies by the Competition Commission (covering 2009–2016, for example) identified the existence of dominant firms in a large numbers of sectors and found high Herfindahl-Hirschman Index (HHI)[41] levels in industries ranging from telecommunications to banking, a fact indicative of persistent oligopolies.[42] Generally, high barriers to entry continue to frustrate the emergence of black-owned startups as significant competitors. This reality led Parliament to amend the Act several times to strengthen transformation-oriented tools and close perceived gaps.

3.2 The 2018 amendments: Strengthening public interest enforcement

The South African government explicitly pushed for "radical economic transformation", impatient with the slow progress in deconcentrating markets and empowering black business. In his 2017 State of the Nation Address, then President Jacob Zuma explicitly committed the country to "radical economic transformation" through forthcoming

40 Department of Trade, Industry and Competition *Competition policy for jobs and industrial development* (2021) at 4.

41 The HHI is a standard measure of market concentration. An HHI above 2 500 is generally considered indicative of a highly concentrated market. High HHI levels therefore signal that a small number of firms dominate the relevant market.

42 Buthelezi, Mtani & Mncube (2018) at 11.

legislative measures.[43] This high-level political support set in motion the development of the Competition Amendment Bill of 2018 (ultimately Act 18 of 2018), the aim of which was to address the country's racially skewed ownership structures and increase market access for businesses owned by HDPs.[44] The Amendment Act (as noted) expanded the legal mandate for public interest scrutiny of mergers. Coming into effect from mid-2019, it introduced several key changes along these lines.

A particularly significant innovation of the 2018 amendments was the introduction of section 12A(1A), which fundamentally alters how public interest is evaluated in mergers.[45] This section mandates the Competition Commission or Tribunal to assess in every case whether a proposed merger may be justified on substantial public interest grounds (as outlined in section 12A(3)) regardless of its impact on competition. Under the previous framework, public interest factors were considered only if a merger was first found to reduce competition, effectively allowing firms to use public interest benefits as a defence for anti-competitive outcomes. The new section 12A(1A) removes that contingency by requiring a parallel public interest inquiry even where no competition concerns are present. This ensures that every merger undergoes case-by-case evaluation on both competition and public interest grounds, thus making transformation objectives an integral part of merger assessments.

Accordingly, since the 2018 amendments came into force, the scope for exemptions and conditions that promote transformation has widened. For instance, the amendments expanded the substantive criteria for public interest analysis under section 12A(3). Regulators must now consider a broader set of public interest factors than before when evaluating mergers. Notably, section 12A(3)(e) adds a fifth factor, namely ensuring that mergers promote a greater spread of ownership, particularly by increasing equity participation by HDPs and workers. Together, these changes make the public interest inquiry mandatory and parallel rather than conditional on a prior finding of competitive

43 Department of Economic Development "Overview of Competition Amendment Bill, 2018: Presentation to Select Committee" (9 October 2018).

44 Department of Economic Development (9 October 2018).

45 Department of Economic Development (9 October 2018) at 28.

harm.[46] Merger control thus now simultaneously addresses traditional competition concerns as well as broader socio-economic objectives, a development reflecting a more holistic approach to enforcement.

The 2018 amendments also strengthened abuse-of-dominance provisions to benefit SMMEs and black-owned firms. New provisions in section 9 (price discrimination) and section 8 (dominant-buyer power) were introduced to prohibit dominant firms from unfairly discriminating against or exploiting small and HDP-controlled suppliers. Section 9(1)A of the Competition Act 18 of 2018 prohibits a dominant firm from avoiding or refusing to sell to an SMME or HDP-owned firm. This provision essentially prevents dominant firms from circumventing the price discrimination restrictions outlined in section 9(1)(a) of the Act – the latter prohibits a dominant firm from engaging in price discrimination that could impede the effective participation of SMMEs and HDP firms in the market. However, the provisions apply only in sectors designated by the Minister of Trade, Industry and Competition. Ministerial discretion still plays a role, and the application of these abuse-of-dominance protections is accordingly limited to those specific industries designated by the Minister.

The Amendment Act broadened the criteria for obtaining an exemption from the Act. It explicitly allows exemptions for agreements that promote transformation and growth, and specifies as an objective the "promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by HDPs".[47] This provides flexibility for co-operative arrangements that could strengthen the capability of HDP firms or SMMEs (for instance, joint ventures or collective bargaining by small suppliers) to be granted immunity from competition rules if they advance inclusivity. The overall drive of the 2018 amendments is to address market structure and concentration: protecting and empowering HDPs (and SMMEs) has become as important

[46] Competition Commission of South Africa *Revised public interest guidelines relating to merger control* (2024).

[47] See section 10(3)(b)(ii) of the Competition Act 18 of 2018.

as protecting consumers. Indeed, the preamble explicitly laments the "excessive concentration of ownership" and calls for measures to deconcentrate markets.[48]

Following the amendment, the Competition Commission issued revised Guidelines on the Assessment of Public Interest in Merger Regulation to assist firms and practitioners in understanding how it would evaluate public interest factors.[49] The public interest guidelines spell out, among other things, the process and criteria for merger review under section 12A(3), reflecting the post-2018 reality that public interest is a parallel consideration to pure competition issues in every merger assessment. They emphasise, for example, that if a merger would result in job losses, reduced small business participation, or diminished HDP ownership, the parties carry the burden of justifying the merger or proposing remedies to alleviate its effects.[50]

Despite these enhancements, uncertainties remain. Neither the Act nor the Guidelines provide a precise threshold or formula for balancing public interest against pure competition concerns, leaving much to the competition authorities' discretion on a case-by-case basis. This flexibility can lead to uneven implementation. For example, what quantum of ownership change is considered a "substantial" public interest issue in a merger? Likewise, how should trade-offs be handled if a merger might save a failing firm (thus preserving jobs) but reduce black ownership?

The lack of clear, uniform standards means that parties and even authorities must navigate these issues primarily on the basis of evolving precedent. This can impose additional burdens on merging parties in terms of producing qualitative and quantitative evidence in support of any claims that a merger would benefit or harm the public interest, burdens that come over and above the standard competition analysis. The Commission and Tribunal have sought to articulate standards through cases. In their merger decisions after 2019, they have shown a willingness to block or condition mergers on public interest grounds alone. For instance, the high-profile Burger King[51] case in 2021 (discussed later)

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[48] See preamble of the Competition Act 19 of 2018.
[49] Competition Commission of South Africa (2024).
[50] Competition Commission of South Africa (2024).
[51] *ECP Africa Fund IV LLC and Others v Competition Commission of South Africa* 2021 ZACT 99.

was a landmark occasion: here the Commission initially prohibited a merger solely because it would reduce black ownership levels, even though no competition harm was found. The Tribunal later approved it with conditions to address that concern. This case demonstrated the newfound assertiveness of authorities in using public interest to negotiate remedies.

In summary, the post-1998 framework of South African competition law reflects high aspirations to utilise competition policy to achieve economic justice, but it also presents significant ambiguities and challenges in its implementation. The 1998 Act laid the foundation by embedding public interest objectives; subsequent amendments in the 2000s and, in particular, in 2018 strengthened those aspects on paper. The next part of the article turns to consider how case law and enforcement practice have, or have not, given life to these objectives, with the results of this enquiry then indicating whether the evolution of public interest in competition law has stalled or made progress.

4 CASE LAW AND DOCTRINAL INCOHERENCE

Having outlined legislative and policy evolution, we now examine the jurisprudence to evaluate whether South Africa's competition law has realised its public interest objectives in practice. A critical reading of case law brings various doctrinal shortcomings and policy design lessons to light. In some instances, legal interpretation has relied on traditionally narrow competition principles (emphasising efficiency and consumer welfare), which, arguably, undermines the Act's transformative aims; in others, creative settlements have indeed incorporated public interest remedies, only to raise questions about consistency and legal principle.

4.1 Price discrimination and the limits of protecting small firms

The tension between efficiency and transformation also manifests itself in enforcement matters other than merger control. South Africa's experience with price-discrimination cases and public interest settlements reveals how consumer-welfare reasoning continues to predominate, often diluting the purpose of the Act. This tension becomes particularly critical in cases involving price discrimination by dominant firms, where the victims of the discriminatory conduct are SMMEs or HDP-owned businesses.

The case of *Nationwide Poles CC v Sasol Oil*[52] is an example of this tension, one which tested the bounds of section 9(1)(a) of the Act. Section 9 prohibits a dominant firm from discriminating in price between equivalent transactions if this is likely to have the effect of substantially preventing or lessening competition (a so-called "secondary line" injury, akin to the concern in the US Robinson-Patman Act and article 102 of the Treaty on the Functioning of the European Union). In *Nationwide Poles v Sasol Oil*, the Tribunal found that Sasol's volume-based discounts disadvantaged SMMEs such as Nationwide Poles, effectively excluding them from downstream competition. However, the Competition Appeal Court (CAC) reversed this finding, emphasising that section 9(1)(a) protected the competitive process rather than individual firms. This narrow interpretation prioritised efficiency and consumer welfare over the empowerment of HDPs and SMMEs, perpetuating the same patterns of structural exclusion that the Act seeks to undo.

The facts of the case are as follows. Sasol Oil is a dominant seller of creosote, a wood preservative chemical, and used a volume-based pricing structure. Nationwide Poles, a small downstream pole manufacturer, alleged that this pricing contravened section 9(1)(a) of the Competition Act.[53] As a dominant seller, Sasol Oil participated in this discount system, a fact likely to have substantially prevented or reduced the downstream pole manufacturing market. The downstream effect is referred to as a "secondary line" injury, which arises when the discriminatory conduct of a dominant seller (Sasol Oil) places one of its purchasers (Nationwide Poles) at a competitive disadvantage.

Notably, not all volume-based discount pricing structures are considered anti-competitive. Sometimes, an efficient pricing structure might encourage competition while increasing seller revenue. However, in South Africa's highly concentrated market, such pricing structures may conflict with affirmative action policies aimed at empowering black-owned businesses. By favouring larger (often white-owned) firms, volume-based discounts can limit the ability of HDPs and SMMEs to compete. Volume-based discounts might artificially squeeze out competitors, resulting in limited competition, fewer consumer choices, and higher consumer prices.

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

53 Competition Act 89 of 1998.

The Tribunal examined multiple issues, including Sasol Oil's market dominance. It confirmed that Sasol Oil was presumably the dominant firm in the creosote market as per section 7 of the Competition Act.[54] The evidence established that Sasol Oil enjoyed more than 45 per cent of the market. Moreover, the Tribunal held that Sasol's Oil volume-based discount pricing structure met the elements of price discrimination as per the provisions of section 9 of the Act. The pricing practice was likely to impede competition in the downstream market significantly, ultimately disadvantaging smaller players such as Nationwide Poles.

It was determined that Sasol Oil's behaviour, characterised by differential treatment, was gradually eliminating small businesses in the pole manufacturing market. In determining whether the volume-based pricing structure was likely to have the effect of substantially preventing or lessening competition, the Tribunal reasoned as follows:

> [S]ubsection 9(1)(a) invites the complainant to establish a competitive relevance to his complaint but does not require proof of some standard of harm as contended for by Sasol. When the legislature asks, "Is it likely?", it asks us to situate the complaint as one relevant to competition. When it asks "substantial", it invites us to distinguish a trivial effect from the weightier.[55]

Applying this reasoning, the Tribunal concluded that Sasol's discount system created a material disparity between large, favoured firms and smaller, disadvantaged competitors. Given that creosote is a critical input, price discrimination in regard to this product placed Nationwide Poles at a significant disadvantage relative to dominant firms that benefited from the discount.[56] Furthermore, the Tribunal ruled that the volume-based pricing structure was likely to render Nationwide Poles and similar small businesses, which cannot benefit from the volume-based discount system, ineffective

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54 Competition Act 89 of 1998.

55 *Sasol Oil (Pty) Ltd v Nationwide Poles* CC (49/CAC/Apr05) 2005 ZACAC 5 ("*Sasol Oil*") at 5.

56 *Sasol Oil* (2005) at 7.

competitors. Without Sasol Oil's conduct, Nationwide Poles and other SMMEs could become significant competitors to their larger competitors, such as Woodlines.[57]

Sasol Oil appealed to the CAC (which took a narrower view). The main issue before Davis JP was the interpretation of section 9(1)(a). Sasol Oil argued that the Act protected the competitive process rather than small businesses. It held that section 9 intends to protect the competitive process or ecosystem because that is the intention or purpose of competition. It also submitted that when considering mergers, the Tribunal would be expected to determine whether the merger "is likely to prevent or lessen competition".[58] In making this point, counsel for the appellant submitted that the enquiry mandated by section 9(1)(a) should be read as in section 12A because the legislature "could not have intended the same words to bear different meanings, in provisions of the same Act".[59]

Nationwide Poles maintained that the volume-based pricing structure was anti-competitive because it had the ongoing effect of reducing competition in the downstream market. In response to Sasol's argument that the price had an insignificant effect on the respondent, Mr Foot, who owned Nationwide Poles, felt otherwise. He submitted that the discount policy's difference in total cost significantly impacted his business, such that Nationwide Poles would possibly close shop. The CAC in turn held that nothing in section 9 explicitly aimed to protect small businesses at the expense of competitive efficiency. Moreover, Nationwide Poles failed to provide sufficient evidence linking its decline to Sasol Oil's pricing structure. The CAC found that the closure of small businesses in the market could not be directly attributed to the alleged price discrimination. Thus, the requirements of section 9(1)(a) were not met. The court emphasised that Nationwide Poles should have presented clearer evidence demonstrating how volume-based discounting harmed SMMEs in the market. Without such evidence, the case failed.

The CAC's ruling reflects a strong consumer-welfare orientation prioritising efficiency over direct protection of SMMEs. The outcome probably discouraged similarly situated small or black-owned firms from pursuing section 9 claims and informed later

[57] *Sasol Oil* (2005) at 7.
[58] *Sasol Oil* (2005) at 9.
[59] *Sasol Oil* (2005) at 9.

amendments to section 9, which clarified the standard.[60] From a doctrinal standpoint, the Nationwide Poles case revealed a disconnect: the Tribunal was inclined to read the Act considering its broader purpose (protecting the competitive opportunity of SMMEs and HDPs), whereas the CAC stuck to a classical view (competition law protects competition, not competitors). This incoherence left observers uncertain how far one could push public interest arguments within the existing statutory language, at least until the law was amended.

By contrast, recent settlements demonstrate a trend towards embedding public interest remedies. A notable example of this approach is the case of Primedia, which was found guilty of price-fixing.[61] The company agreed to provide free out-of-home advertising services to SMMEs as part of its remedial commitments. This commitment, valued at R1 358 976, was to be implemented over a 12-month period. Furthermore, on 17 February 2025, the Competition Tribunal confirmed the settlement agreement, which includes a R1 million payment and public interest commitments amounting to R100 million over five years, including a R20 million bursary fund between the Commission and DH Brothers Industries (Pty) Ltd, trading as the Willowton Group.[62] This settlement was for alleged price-fixing in the market for edible oils in contravention of section 4(1)(b)(i) of the Competition Act.

These settlements demonstrate a creative approach to aligning competition enforcement with South Africa's developmental priorities. Yet they also reveal a lack of

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[60] Section 9(1)A of the Competition Amendment Act 18 of 2018 prohibits a dominant firm from avoiding or refusing to sell to an SMME or HDP firm, essentially preventing it from circumventing the price discrimination restrictions outlined in section 9(1)(a) of the Act. The latter prohibits such a firm from engaging in price discrimination that could impede the effective participation of SMMEs and HDP firms in the market.

[61] Competition Commission of South Africa "Media statement: Commission settles with Primedia: Primedia agrees to pay R2.7 m administrative penalty & provide R1.3 m free advertising space to SMMEs" (15 February 2024) at https://www.compcom.co.za/wp-content/uploads/2024/02/Settlement-Agreement-between-the-Commission-and-Primedia.pdf (accessed 14 August 2024).

[62] Pillay Y "Competition Commission settles nine-year litigation with Willowton Group" (18 February 2025) *Independent Online* available at https://iol.co.za/business-report/economy/2025-02-18-competition-commission-settles-nine-year-litigation-with-willowton-group/ (accessed 17 February 2025).

consistency and clarity. Firms found guilty of similar conduct face different obligations, reflecting ad hoc negotiation rather than a uniform approach. Such ad hoc negotiation is also reflected in the Commission's revised public interest guidelines, which state that the approach to the public interest legislative framework involves assessment on a case-by-case basis.[63]

4.2 Merger control and public interest

Merger control jurisprudence offers clear insight into how public interest considerations operate, as well as how inconsistently they are applied. The Walmart-Massmart merger[64] became a landmark affair when the Tribunal imposed conditions such as supplier development funds and job protection, thereby explicitly acknowledging the need to mitigate harms to workers and local producers. The conditions were explicitly aimed at minimising harms to workers and small suppliers, effectively protecting public interest groups through the merger deal.

However, the approach to public interest in mergers has not always been so protective or forward-thinking. A contrasting case from the early 2000s is the merger between Shell South Africa (SSA) and Tepco Petroleum. The case concerned the acquisition of Tepco Petroleum by SSA.[65] Tepco Petroleum, a subsidiary of Thebe Investment Corporation ("Thebe"), was South Africa's first black-controlled petroleum firm and had provided financial backing for Tepco, whose principal business activity was the production and distribution of petroleum products.[66]

SSA, a subsidiary of Royal Dutch Shell, was restructuring its operations in South Africa. Its primary business was the manufacture and sale of petroleum products.[67] SSA would be restructured into two companies – Shell South Africa Energy (Pty) Ltd, responsible for manufacturing and selling petroleum products, and Shell South Africa Marketing (Pty) Ltd, which would be responsible for retail marketing, marketing

63 Competition Commission of South Africa (2024) at 6.

64 *Walmart Stores Inc v Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 42 (29 June 2011) at paras 199–120.

65 *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) 2002 ZACT 13 ("*Shell*").

66 *Shell* (2002) at para 3.

67 *Shell* (2002) at para 13.

distribution networks, commercial fuels, liquified petroleum gas, aviation, marine, lubricants, and bitumen.[68] The merger agreement granted Thebe a 25 per cent stake in Shell SA Marketing. Shell SA Marketing would retain the Tepco brand and develop it in the market for as long as it remained viable and profitable. Additionally, according to the parties, Tepco would be managed by the then-management of Tepco. While Thebe had representation on the Board, Shell retained control over key decisions, including the appointment of three Board members (including the chairman and managing director), leaving Thebe with just one Board seat. Ultimately, Tepco Petroleum would become a wholly owned subsidiary of Shell SA Marketing.

The transaction was “a huge milestone and in line with government objectives of securing 25 per cent black ownership in all sectors of the local fuel industry in the next eight years”.[69] However, from a competition law perspective, the merger raised concerns about predatory consolidation by a multinational oil giant with revenue exceeding South Africa’s gross domestic product. The transaction would absorb Tepco Petroleum in Shell SA Marketing, which would not increase the ownership stakes of black persons. In this transaction, Thebe post-merger would own at most 25 per cent of the newly formed Shell SA Marketing, which would seem insufficient as a justification to eliminate a black-owned firm in South Africa’s highly concentrated petroleum market. The unconditional approval of this merger without regard for the spread of ownership in the petroleum industry was probably the catalyst for the jurisprudence relating to competition and public interest objectives.

One might question whether an alternative arrangement, such as a joint purchasing and marketing agreement, would have been a more effective solution for the financially struggling Tepco Petroleum. A joint agreement could have leveraged economies of scale, improving efficiency and competitiveness without necessitating complete absorption into Shell SA Marketing. This case highlights potential shortcomings in applying public

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[68] *Shell* (2002) at para 2.

[69] “Shell deal boosts Tepco operations” (16 April 2002) *News24* available at https://www.news24.com/fin24/shell-deal-boosts-tepco-operations-20020416 (accessed 10 June 2024).

interest objectives under South African competition law. While the merger was framed as advancing black ownership, it diminished independent black participation in the petroleum industry. The Competition Tribunal's failure to explore alternative solutions such as joint ventures or purchasing agreements suggests that public interest considerations were not sufficiently robust to preserve or expand meaningful black ownership. The decision arguably reinforced existing concentration and raised enduring questions about how effectively South African competition law balances economic transformation with competitive rivalry.

4.3 The Burger King SA-ECP Africa Funds merger

On 17 April 2021, the Tribunal approved, with conditions, an acquisition of Burger King SA and a meat plant in Cape Town that manufactures burger patties (Grand Foods Meat Plant).[70] The acquiring company was ECP Africa Funds. Burger King holds a long-term master franchise licence of the American multinational fast-food restaurant chain. This transaction involved ECP Africa Funds seeking to acquire nearly 95 per cent of Burger King SA. Before the merger, Burger King SA was wholly owned by Grand Parade Investments (GPI), which held a 95.36 per cent controlling stake in Burger King SA. Similarly, prior to the merger, HDPs held a 68.56 per cent stake in GPI and black women, a 22.87 per cent stake.[71] In turn, before the merger, the ECP Africa Fund had no ownership of HDPs. According to ECP Africa Funds, the rationale for the proposed merger was that it was "an opportunity for it to invest in a high-growth target in line with its investment strategy and group mandate".[72]

During the Competition Commission's investigation in the previous year, it was found that the fact that the merger would adversely affect the B-BBEE levels was sufficient to prohibit it. As contemplated in section 12(1A) of the Act, the competition authorities require the Competition Commission to decide whether a merger can be justified because of the effect on public interest objectives. Among those "public interest objectives" is the

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70 *ECP Africa Fund IV LLC and Others v Competition Commission of South Africa* 2021 ZACT 99 ("*ECP Africa*").

71 *ECP Africa* (2021) at para 16.

72 *ECP Africa* (2021) at para 19.

effect of the merger on employment, on the promotion of a greater spread of ownership by HDPs, and on increased ownership levels by HDPs.[73]

The Burger King case highlights a positive application of the public interest provisions in South African competition law. The initial prohibition of the merger demonstrated the Competition Commission's commitment to protecting black ownership in strategic industries. The Tribunal's conditional approval, requiring remedial steps such as an employee share-ownership programme, illustrates how public interest concerns can shape merger outcomes and ensure that economic transformation remains a key consideration in competition policy.

5 CONCLUDING REMARKS

South Africa's competition regime has evolved from a narrow focus on monopoly control in the colonial and apartheid eras to an explicitly inclusive framework that embeds public interest objectives at its core. Over the years, the competition regime has been progressively designed to address the country's socio-economic imperatives. Public interest tools remain essential for undoing past discriminatory injustices and fostering enhanced participation in the formal economy. The 1998 Act, as amended in 2018, provides for public interest considerations to broaden ownership trends and empower SMMEs and firms owned by HDPs. These provisions mark a significant commitment to economic transformation and equity. Nevertheless, key weaknesses and ambiguities persist – for example, excessive ministerial discretion in certain areas, the vagueness and the open-ended nature of "public interest", and the adoption of case-by-case remedies that sometimes lack uniformity and predictability.

Historically, colonial and apartheid-era legislation concentrated immense regulatory power in the hands of the minister, leading to weak enforcement. The drafters of the 1998 Act consciously sought to move towards independent, skilled decision-makers free from political influence. However, even in the modern framework, ministerial powers seem to have been extended by the 2018 Act. Effective competition enforcement requires that

[73] Section 12A(3)(e) of the Competition Amendment Act 18 of 2018.

decisions be made on principled grounds by expert bodies rather than ones bending to political power. To that end, it is essential to ensure that authorities retain their independence and to limit excessive ministerial power.

Another persistent issue, as noted, is the vagueness and open-ended nature of public interest objectives. The law tasks authorities with weighing the public interest alongside efficiency, but it offers limited guidance on how to achieve that balance. This leaves significant discretion to the Commission and Tribunal, which must evaluate each case's competing interests (for example, potential job losses versus lower prices), often under intense scrutiny. The case-by-case approach can exacerbate perceptions that public interest outcomes lack consistency. Moreover, merging parties usually bear an added burden to produce qualitative and quantitative evidence as to how a merger would affect the public interest, one which in essence requires them to prove a negative (that it will not harm jobs or black ownership, for instance). More straightforward guidelines are needed to alleviate uncertainty. The publication of the Commission's public interest guidelines, as well as reasons in cases such as Walmart-Massmart, Shell-Tepco, and Burger King, is indeed helping to build a body of precedent; however, more is required in this vein in order to make public interest considerations more predictable.

In conclusion, South African competition law has come a long way from the days of mere monopoly oversight: it now aspires to serve as a redistributive tool to serve justice and inclusivity. The journey, though, is not complete. By addressing the identified shortcomings and recognising the lessons from both successes and missteps, the competition regime can evolve into an effective tool for achieving economic justice and fostering broader participation for an inclusive and equitable economy.

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