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The role of competition law in protecting, promoting and stimulating the growth of small to medium enterprises: A South African perspective

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ABSTRACT

This article aims to evaluate whether competition law has a role in promoting and stimulating the growth of small to medium enterprises (SMEs) in South Africa. To achieve this, it first assesses whether the social goals are compatible with the Competition Act 89 of 1998. It is also shown that this approach accords with South Africa's history of segregation and apartheid. The article argues that the approach is in line with South Africa's constitutional values and principles, as well as its national interest. An assessment of the Competition Act demonstrates that the protection and promotion of SMEs is one of its important goals, as contained in section 2. This goal is closely linked to other goals in the Act, such as the protection of the interests of historically disadvantaged persons – although sometimes there can seemingly be tension between these goals. It is shown that the Act, before its amendment in 2018, did not indicate clear ways in which this protection could be enforced. This was exemplified in the case of Sasol Oil (Pty) Ltd v Nationwide Poles CC, where it was exposed that the Act, in its form at the time, was difficult to enforce owing to issues such as a high burden of proof. However, the Competition Amendment Act, to a greater degree, resolves these issues. Changes to the Act bolster several provisions with respect to how the interests of SMEs are protected and promoted. These include provisions on price discrimination, exemptions, public interest in mergers, and mitigating and aggravating factors in administrative penalties. Therefore, it is made clear from these discussions that competition law has a key role in the protection of SMEs. Accordingly, in the future, it will be easier for competition authorities to stimulate the growth of SMEs.

Keywords: SMEs; competition law; competition goals; transformation; public interest; Competition Amendment Act; South Africa

1 INTRODUCTION

The question of what the goals of competition law are has raged for as long as competition or antitrust law has existed. Notwithstanding how old this debate is, in recent times there has been renewed interest in it.[1] South Africa has not been exempted from it: in fact, it could even be said that the country is positioned at the centre of this conversation, and for two main reasons. The first is that South Africa has a unique competition law design that makes it an interesting case for study. The second reason is that the Competition Act 89 of 1998 has undergone significant changes over the years, with the most recent amendment (in 2018) bringing to the fore questions around whether the legislature has overreached in its prescriptions in the Act.[2]

One of the widely cited issues surrounding these developments has to do with the social issues captured in the framework of the Act.[3] These pertain to considerations such as transformation, the public interest, and the development of small to medium enterprises (SMEs). This is in contradistinction to other jurisdictions that do not provide for similar considerations.[4] The basis of this is that the primary aim of competition law is to enhance efficiency and that socio-political goals hence do not have a place within the scope of a Competition Act.[5] One of the arguments in support of this assertion is that efficiency and non-efficiency are contradictory and cannot exist within the same scheme.[6] To crystallise this, it can be considered how prioritising the interests of an SME within the market is not the most efficient outcome for competition within that market.

This article considers whether competition law has a role to play in protecting, promoting and stimulating the growth of SMEs. In other words, it engages with the question of whether promoting these ideals fits in with the goals of competition law.

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1 Stylianou K & Lacovides M "The goals of EU competition law: A comprehensive empirical investigation' (2022) 42(4) *Legal Studies* 620.

2 See Competition Amendment Act 18 of 2018.

3 See section 2 of the Competition Act.

4 For example, the Competition Act (chapters 14–28) in Zimbabwe seeks only to maintain competition and advances only economic objectives. Similarly, the Fair Competition Act (Chapter 285) in Tanzania also provides for only economic objectives.

5 Elzinga KG "The goals of antitrust: Other than competition and efficiency, what else counts?" (1977) 125(6) *University of Pennsylvania Law Review* 1191.

6 Elzinga (1977) at 1191.

2 THE GOALS OF SOUTH AFRICAN COMPETITION ACT

The preamble of the Competition Act sets out the aspirations of the Act. It recognises the effects of apartheid and other discriminatory laws, namely that they have led to excessive concentrations of ownership in the national economy and resulted in unjust restrictions that impact on the full and free participation of South Africans in the economy.[7] As a result, the Competition Act aspires to open the economy to greater ownership by more South Africans.[8] Furthermore, the preamble notes the importance of establishing a competitive environment in which competing interests, such as those of workers, owners and consumers, are balanced.[9] The aspirations encompassed in the preamble of the Act are contextualised properly in section 2 of the Competition Act. Section 2 provides that the overarching goal of the Act is to maintain and promote competition in the Republic.[10] The purpose of this, as set out in section 2, is as follows:

> (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.

A close reading of the above demonstrates that the objectives of the Competition Act are manifold. Several interests, specifically those of a socio-economic-politico nature, are covered. This is inconsistent with the views of the Chicago School of thought, which are that, at bottom, market efficiency is the most important goal of competition law (or antitrust, as it is known in the United State of America).[11] However, this single-goal

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7 Preamble of the Competition Act.

8 Preamble of the Competition Act.

9 Preamble of the Competition Act.

10 See section 2 of the Competition Act.

11 Bartalevich D "The influence of the Chicago School on the commission's guidelines, notices and block exemption regulations in EU competition policy" (2016) 54(2) *Journal of Common Market Studies* 267 at 270.

approach to competition law does accord with the Harvard School of thought, which favours intervention in the market and opposes market concentration; the thinking of Harvard scholars is that, when markets are concentrated, this is likely to lead to firms engaging in anticompetitive conduct.[12] Posner's views on the difference between the two schools is worth mentioning.[13] He argues that the distinction has eroded, largely because of the diminishing role of the industrial organisation that was at the intellectual foundation of the Harvard School.[14] Posner also maintains that the distinction between these schools was most visible during the 1950s and early 1960s.[15]

This notwithstanding, it could still be argued that the distinction is still relevant for competition law purposes as evidenced in some jurisdictions. For instance, the Zambian Competition and Consumer Protection Act 24 of 2010 provides that its main purpose, in relation to competition, is to safeguard and protect competition.[16] In other words, efficiency is marked as the sole goal of the Act, at least in respect to competition. The Namibian Competition Act 2 of 2003, by contrast, contains plural objectives. These in many ways mirror those in the South African Act.[17] In regard to efficiency side, the Act aims to enhance and protect competition in order to promote efficiency, adaptability and the development of the Namibian economy and provide consumers with competitive prices and product choices.[18]

With respect to non-efficiency objectives, several objectives of a socio-politico nature are found in the Act. These include the promotion of employment and the advancement of the social and economic welfare of Namibians; ensuring that small businesses have the opportunity to participate in the economy; expanding opportunities for Namibians to participate in world markets; and promoting a greater spread of ownership, in particular by increasing ownership among historically disadvantaged persons (HDPs).[19] Comparable objectives exist within the South Africa Competition Act. Evidently, there are

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12 Piraino TA "Reconciling the Harvard and Chicago schools: A new antitrust approach for the 21st century" (2007) 82(2) *Indiana Law Journal* 345 at 349.

13 Posner RA "The Chicago School of antitrust analysis" (1979) 127(4) *Penn Law Review* 925.

14 Posner (1979) at 925.

15 Posner (1979) at 925.

16 See preamble of the Zambian Competition and Consumer Protection Act.

17 Section 2 of the Namibian Competition Act.

18 Section 2(a) and (b) of the Namibian Competition Act.

19 Section 2 of the Namibian Competition Act.

jurisdictions that model themselves on the Chicago School and those that model themselves on the Harvard School, with the differences between them being clear.

As shown above, the South African Competition Act contains both efficiency and non-efficiency objectives; the question thus arises as to their ranking in importance – that is, which objectives carry more weight than others?[20] Roberts argues that a jurisprudential evaluation of competition cases demonstrates that economic efficiency is the overriding principle in South African competition law.[21] He contends that this is due to the fact that, during its drafting, the Competition Act was modelled on Canadian legislation in the case of provisions relating to mergers and on Australian legislation in the case of for provisions on prohibited practices – with both the Canadian and Australian legislation based on the Chicago School.[22] In 2006, Hartzenberg opined as follows:

> South Africa's new competition policy and law were drafted during the early years of South Africa's new democracy, a period characterized by important domestic policy and regulatory reform. These reforms were not only part of the comprehensive program for the country's economic, social, and political transformation, but also its integration into the global economy after decades of isolation under the apartheid regime. In the case of competition policy, however, concerns about specific development challenges entrenched by the previous era of political and economic control, had to be explicitly reflected in the new South Africa's law and policy. It was clear that a robust competition law would only be politically possible if the law specifically addressed public interest concerns. The core focus of economic efficiency had to be tempered by a strong emphasis on development. In the end, the new competition law, even with the broad sweep of its objectives, puts economic efficiency center-stage. Public interest objectives are articulated alongside the goal of economic efficiency. Only as the jurisprudence develops will the nature of the trade-offs within this nexus of objectives become clear.[23]

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[20] Roberts S "The role of competition policy in economic development: The South African experience" TIPS Working Paper 8 (2004) 1 at 7.

[21] Roberts (2004) at 7.

[22] Roberts (2004) at 7.

[23] Hartzenberg T "Competition policy and practice in South Africa: Promoting competition for development" (2006) 26(3) *Northwestern Journal of International Law & Business* 667.

Indeed, Hartzenberg was far-sighted in her assertion that trade-offs between efficiency and non-efficiency goals would become clearer as the implementation of the Competition Act progressed. Initially, the courts and the Tribunal focused on economic efficiency, but the role and place of non-efficiency objectives has grown steadily over time.[24] One is even tempted to claim that, to some extent, these objectives are now almost on par with each other in terms of importance. This can be supported by the fact that the objectives in section 2 of the Competition Act are not structured in a hierarchy. While the efficiency objectives are stated first in section 2(a) and (b), there is nothing in the Act to suggest that the rest of the objectives are any less important.

Essentially, the objectives of the Act must be read as being complementary and mutually reinforcing. For instance, one can consider the fact that there is no purpose in having efficient markets if they benefit only the few that enjoy historical advantages. This would be inconsistent with the Competition Act's aim to create socially just and equitable markets in line with the prescripts of the Constitution. Therefore, the thinking is that economic efficiencies do not arise in a vacuum but operate in a social context where competing interests and values have to be counterbalanced against each other.

However, this view can be subjected to strong criticism. This is because, while the Competition Act does not express a hierarchy in terms of its objectives, competition analysis, at its core, focuses on economic efficiency. Brooks makes an argument that supports this counter-view:

> The multiple objectives have not expressly been given a particular hierarchical structure. Nevertheless, it can be argued that the raison d'être of the Act, and hence its principal objective, is to ensure the maintenance and promotion of competition in a market, which is the crux of all assessments. Depending on the facts and circumstances of a particular case, and the finding on the state of competition in the market, the other objectives then come into play. They will either have no material bearing on the central inquiry, could feature as exculpatory or mitigating factors, extend the grounds on which exemptions are granted, or may present additional obstacles to persons whose conduct is being scrutinised. In the event of more than one

[24] See Boshoff W et al. *The economics of public interest provisions in South African competition policy* 6th Annual Conference on Competition Law, Economics and Policy Pretoria: Competition Commission South Africa (2012).

objective being pertinent to an assessment, the facts and circumstances will usually provide some assistance in making an educated estimate of what weighting should be given to each of them. This line of reasoning is premised on a contextual, as distinct from a textual (literal), approach to the interpretation of the Competition Act 1998. It allows one to move away from narrow section-focused, transaction-specific assessments to assessments that analyse the situation that has arisen or facts that are presented in a broader context.[25]

Brooks's argument is indeed an interesting one. This is because it brings another dimension to light in understanding competition objectives, namely that they can be considered from a textual or a contextual perspective, with the contextual perspective being the most relevant of the two. Furthermore, historically, competition matters were seldom evaluated or dismissed solely on social or public interest grounds, with such considerations generally treated as subordinate to economic objectives. This article, however, contends that this approach is outdated. While courts have traditionally assessed competition matters through a predominantly economic lens, the transformative agenda embedded in the Competition Act 89 of 1998 must be given due weight. Competition law represents a key site in which the project of transformation is actively pursued. Accordingly, constitutional aspirations for societal change must be realised through a range of legislative instruments, extending beyond statutes such as the Broad-Based Black Economic Empowerment Act 53 of 2003.

Prins and Koornhof seem to be in support of this view.[26] They submit that the nature of competition law is "distinctly socio-economic".[27] This entails that social and economic considerations are inherently intertwined and should be treated as a single, integrated class. In this approach, economic analysis must proceed concurrently with social considerations; to treat them as unrelated would risk disregarding the broader objectives of the competition law framework.

It is also worth noting that an overriding focus on efficiency could be detrimental to an economy. For example, in 2019, Triggs and Leigh observed that Australia had a

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[25] Brooks PEJ "Redefining the objectives of South African competition law" (2001) 34(3) *Comparative and International Law Journal of Southern Africa* 295 at 306.

[26] Prins D & Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law, Democracy & Development* 136 at 142.

[27] Prins & Koornhof (2014) at 142.

competition problem.[28] To their minds, this was due to a Chicago-style competition policy that had resulted in over-concentrated industries and, in turn, in weak competition.[29] This, in their view, was a result of the Chicago School's misplaced faith in the ability of markets to self-correct and realise competitive outcomes.[30] They concluded that a strong case could be made for understanding the object of competition law as including further objectives such as reducing inequality.[31] The authors show that competition and equality are intrinsically linked, with the result that a reduction in competition, such as that taking place in Australia, would lead to increased inequality.[32]

The non-efficiency goals in the South African Competition Act are integral to the realisation of the principles and values enshrined in the Constitution, and play an important role in protecting and advancing the rights contained in the Bill of Rights.[33] This is because, as Mncube and Ratshisusu note, the Competition Act was enacted as transformative legislation meant to align with the government's aim of creating a transformed society based on non-racial, democratic and local foundations.[34] The authors note that the Act promotes transformative goals such as a greater spread of ownership, especially by HDPs, goals which are consistent with the right to equality in South Africa's Constitution.[35]

3 THE ALIGNMENT OF COMPETITION GOALS AND NATIONAL INTEREST

An argument could be made that advancing non-efficiency goals in South African competition law is also a means of protecting the country's national interest. National interest may be defined in this case as the protection and promotion of the country's national sovereignty and constitutional order, as well as the well-being, safety and

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28 Triggs A & Leigh A "A giant problem: The influence of the Chicago School on Australian competition law, economic dynamism and inequality' (2019) 47(4) *Federal Law Review* 696.

29 Triggs & Leigh (2019) at 696.

30 Triggs & Leigh (2019) at 696.

31 Triggs & Leigh (2019) at 696.

32 Triggs & Leigh (2019) at 696.

33 See generally Kampel K "Competition law and SMEs: Exploring the competitor/competition debate in developing democracy" Centre on Regulation and Competition Working Paper Series Paper No. 109 (2004) 1 at 3.

34 Mncube L & Ratshisusu H "Competition policy and black empowerment: South Africa's path to inclusion" SCIS Working Paper No. 22 (2021) 1 at 3.

35 Mncube & Ratshisusu (2021) at 3.

prosperity of its citizens, in the pursuit of a better Africa and world.[36] A number of national interests are relevant in understanding competition law. For instance, political and human rights interests are important in shaping competition law in that they influence the considerations that must be made within this field of law and others.

Here, it needs to be borne in mind that South Africa's Constitution mandates the reconciliation of past divisions and the creation of a society founded on democratic principles, social justice, and fundamental human rights.[37] As such, constitutional aspirations have been infused into the South African Competition Act, as demonstrated by section 2 of the Act as read with the preamble. As such, constitutional aspirations have been infused into the South African Competition Act, as reflected in section 2 read together with the preamble. In this regard, the Act recognises the persistence of historical divisions and underscores the need for deliberate legal and policy interventions to promote the development of a non-racial, non-sexist society grounded in equality and human solidarity.[38] Without this, it would be difficult to maintain a stable political environment, which is key to ensuring the growth and development of the economy.[39]

The goal of human development also impacts on the aspirations of the South African Competition Act. Human development is critical in growing the economy, reducing poverty, and improving the quality of life of all South Africans.[40] Accordingly, this interest serves to ensure that all sectors of government combat the triple challenge of poverty, unemployment and inequality.[41] Several goals in the Competition Act are thus structured to tackle these challenges. They include opening the economy to greater ownership by a greater number of South Africans, especially HDPs; the regulation of transfer of economic ownership in a manner that serves the public interest; the promotion of employment and social and economic welfare; and the facilitation of equitable participation by SMEs.[42]

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[36] Department of International Relations and Cooperation (DIRCO) *Framework document on South Africa's national interest and its advancement in a global environment* (January 2023) available at https://www.dirco.gov.za/wp-content/uploads/2023/01/sa_national_interest.pdf (accessed 26 January 2024) 1 at 9.

[37] DIRCO (2023) at 10.

[38] DIRCO (2023) at 10.

[39] DIRCO (2023) at 10.

[40] DIRCO (2023) at 10.

[41] DIRCO (2023) at 10.

[42] See section 2 of the Competition Act as read with the preamble.

The national interest of economic prosperity also influences the direction of the Competition Act:

> The Constitution instructs us to improve the quality of life of all citizens and free the potential of each person to ensure their freedom from want. South Africa needs an economy that is more inclusive, more dynamic and in which the fruits of growth are shared equitably in order to eliminate poverty and reduce inequality. In order to raise living standards, South Africa will need faster and sustainable economic growth, higher investment, increased employment and productivity growth. Economic development and transformation require a process of upgrading and diversifying productive activities in which industrialisation is central.[43]

The preamble and the objectives of the Competition Act have numerous provisions that seek to give effect to these considerations. For instance, the preamble speaks to the establishment of a competitive economic environment that benefits all South Africans and provides them with an equal opportunity to participate fairly in the national economy; this, in turn, allows people to realise their full potential. Other considerations, such as sharing the fruits of the economy, are well documented within the Act. These include the desire to open the economy to a greater spread of ownership, especially by HDPs;[44] creating an economy beneficial for all South Africans; and regulating the transfer of economic ownership in line with the public interest. By achieving these goals, other goals, such as reducing inequality and poverty, can be attained indirectly. Furthermore, addressing these issues is key to furthering the goals of economic development and transformation. Promoting economic interests is also important in ensuring the country's competitiveness in the global market. In this regard, the Framework Document on South Africa's National Interest provides as follows:

> In a world of competing interests due to the scarce nature of resources, South Africa should position itself to become an integral player in the global economy. In its international engagements, the country should strive to strengthen

[43] DIRCO (2023) at 11–12.

[44] See section 3(2) of the South African Competition Act.

> productivity and competitiveness and attract sustainable investments to grow its economy.[45]

The Competition Act also envisages this goal in section 2. It provides that one of the goals of the Act is to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic. Employment is viewed as another important consideration in the context of the national interest of economic prosperity given that employment affects economic growth and consumer spending. This can be explained through the multiplier theory, which proposes that when people have money to spend on goods, this boosts consumer spending (as they have more disposable income) and in turn creates more jobs.[46] To this end, the Framework Document provides that

> [a]s a country, South Africa fully subscribes to the belief that economic development depends on growing regional and international cooperation in an interdependent world and at the same time, we must ensure policy space to pursue national development goals, including the use of natural endowment to drive the creation of higher levels of employment.[47]

Employment is denoted as a goal for competition in the preamble and, more directly, section 2 of the Competition Act. Employment is also expressed as a goal in other parts of the Act, such as section 10 (exemptions), section 12A (merger considerations), and section 43A(3) (features of a market for goods and services).

Therefore, it can be seen that competition objectives in South Africa have not been established randomly; rather, the Act was designed to give effect to the country's national interests as well its values and principles, including those that have been constitutionally entrenched. As noted in the Framework Document, the substance and focus of each national interest is given content by the relevant line-function departments.[48]

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45 DIRCO (2023) at 12.

46 "Why employment matters for economic growth" *Skills Training Group* available at https://www.skillstg.co.uk/blog/why-employment-matters-for-economic-growth/ (accessed 26 January 2024).

47 DIRCO (2023) at 12.

48 DIRCO (2023) at 15.

Furthermore, it is noted that national interests are factored into government planning and priorities as well as sector-specific strategies.[49]

4 LESSONS FROM NATIONWIDE POLES V SASOL (OIL) PTY LTD

4.1 Nationwide Poles v Sasol (Oil) Pty Ltd

A case in point when considering social issues in South African competition law, particularly those relating to SMEs, is *Nationwide Poles v Sasol (Oil) Pty Ltd.*[50] This matter was deliberated by the courts in the early days of the implementation of the Competition Act and was a landmark judgment. Here, a small business owner had laid a direct complaint with the Competition Tribunal about a potential breach of the price discrimination provision.[51]

This matter dealt with a complaint made by Nationwide Poles CC ("Nationwide"), a small producer of treated wooden poles in the Eastern Cape, against Sasol Oil (Pty) Ltd ("Sasol"), a major subsidiary of the Sasol group of companies which serves as a marketing company for Sasol's liquid fuel and lubricants.[52] In the treatment of its poles, Nationwide used a creosote preservative, specifically a brand called SAK K and produced by Sasol.[53] Nationwide's allegation was that Sasol was charging it a higher price for creosote than what was charged to its competitors.[54]

This was confirmed in a price list reluctantly furnished by Sasol to Nationwide's owner.[55] For instance, the price charged to Nationwide was substantially higher than that to Woodline, a large pole manufacturer in the Eastern and Western Cape and Nationwide's most important competitor.[56] One of the reasons for this was that Sasol's price schedule allows for discounts based on volume, with its largest customers receiving the best prices and the smaller customers, the least preferred prices.[57] Consequently, Nationwide, owing

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49 DIRCO (2023) at 15.
50 *Nationwide Poles v Sasol (Oil) Pty Ltd* [2005] ZACT 17 ("*Nationwide Poles").*
51 Kampel (2004) at 3.
52 *Nationwide Poles* (2005) at paras 1–2.
53 *Nationwide Poles* (2005) at para 1.
54 *Nationwide Poles* (2005) at para 4.
55 *Nationwide Poles* (2005) at para 4.
56 *Nationwide Poles* (2005) at para 4.
57 *Nationwide Poles* (2005) at para 4.

to its position as one of the smallest customers, was charged the highest price on Sasol's price schedule.[58]

Against this backdrop, Nationwide alleged that there was a contravention of section 4(1)(b) of the Competition Act, which prohibits collusive practices (price fixing, market allocation and collusive tendering), and 9(1) of the same Act, which bars parties from engaging in price discrimination.[59] Essentially, the main allegation was that the discount structure offered by Sasol amounted to price discrimination.[60]

In considering this issue, the Tribunal ventured to explain the need to advance the interests of SMEs. It observed that the prohibition in the Competition Act demonstrated the interest of the legislature in maintaining accessible and structured markets that provide new entrants with an opportunity to enter them and compete effectively against bigger, more-established players.[61] It recognised that the ability to enter and effectively participate in a market as one of the crucial challenges facing SMEs.[62] Accordingly, the Tribunal observed that the development of SMEs, through their "equitable treatment", is a crucial goal of the Competition Act.[63]

The Tribunal also observed that, in ensuring "equitable treatment", consideration is given to fairness.[64] It noted that while considerations of equity are anathema to a pure competition approach, where the sole basis of analysis is a consumer welfare standard, such an approach (one considering equity) is not foreign to the South African Competition Act.[65] The Tribunal went on to state that "[t]he Competition Act is, itself, punctuated with references to the legislature's desire that the statute should promote market access and equality of opportunity particularly, in this field, where small enterprise is concerned".[66] The example was cited of public interest considerations in merger analysis, where equity is the very basis on which deliberations are made.[67]

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58 *Nationwide Poles* (2005) at para 4.
59 *Nationwide Poles* (2005) at para 4.
60 *Nationwide Poles* (2005) at para 4.
61 *Nationwide Poles* (2005) at para 81.
62 *Nationwide Poles* (2005) at para 81.
63 *Nationwide Poles* (2005) at para 81.
64 *Nationwide Poles* (2005) at para 82.
65 *Nationwide Poles* (2005) at para 83.
66 *Nationwide Poles* (2005) at para 88.
67 *Nationwide Poles* (2005) at para 83.

Within this framework, SMEs too are given consideration.[68] The Tribunal observed the consideration of SMEs in the exemptions granted in section 10 of the Competition Act.[69] Accordingly, it noted that these considerations challenge antitrust (competition) orthodoxy.[70] It further observed that these considerations are contrary to the mantra that the goal of competition law is to protect competition and not competitors.[71] The Tribunal said that within the paradigm of the South African legal and political economy, the object of competition enforcement is geared towards protecting the market mechanism from conduct which has the ability to undermine it.[72] It further stated that a review of South Africa's industrial policy, to the extent that it places SMEs in a central role with regard to developing the market mechanism, as well as a review of the Competition Act itself, would demonstrate the importance of SMEs.[73]

The Competition Tribunal averred as follows:

> The Act is clearly concerned to promote market access for SMEs and an important mechanism by which it seeks to do so is by ensuring "equitable treatment".... In short, the legislature proscribed price discrimination perpetrated by dominant firms because of the threat it poses to its victims, these being a competitive and accessible market structure and the small firms that animate it, potentially robust, though still slender, saplings that will not take root in the face of treatment that is manifestly inequitable relative to that accorded their better resourced competitors. This then is why Section 9 has been carved out of the general abuse of dominance provisions: it is uniquely concerned with the structural impact of abuse of dominance and it is recognised that its victims are most likely to be small customers.[74]

Having regard to the above, the Tribunal concluded that Sasol was a dominant firm whose conduct met the test for establishing prohibited price discrimination.[75] Based on the evidence presented, the Tribunal was of the view that Sasol's conduct violated section

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68 *Nationwide Poles* (2005) at para 83.
69 *Nationwide Poles* (2005) at para 83.
70 *Nationwide Poles* (2005) at para 84.
71 *Nationwide Poles* (2005) at para 84.
72 *Nationwide Poles* (2005) at para 87.
73 *Nationwide Poles* (2005) at para 87.
74 *Nationwide Poles* (2005) at para 89.
75 *Nationwide Poles* (2005) at para 140.

9 of the Competition Act. It emphasised that it was important to note that section 9 of the Act was hybrid in nature in that it has public interest as well as antitrust aspects.[76] It also observed that the market for poles was characterised by unusually low barriers to entry that made this market ideal for small players.[77] Consequently, the Tribunal took the view that this sector was of the kind the legislature had in mind when it crafted the provision that outlawed price discrimination in order to realise one of the express purposes of the Competition Act, namely to ensure that SMEs have an equitable opportunity to participate in the economy.[78] The Tribunal then made an order to the effect that a prohibited practice had taken place in terms of section 65(6)(b).[79]

The case raised significant debate on what the proper object of competition law is: To protect competition or to protect competitors?[80] Kampel has reflected in depth on this facet of the Sasol case.[81] She begins by pointing out that South Africa has a unique competition context.[82] Here, historically concentrated markets dominated by large firms with market power make it challenging for small businesses to have a voice.[83] Small businesses constantly have to rely on big businesses either as suppliers or customers.[84] Thus, when it comes to sounding the alarm on potentially anti-competitive behaviour, these businesses are fearful about consequences such as boycotts or reprisals.[85] They thus tend to avoid certain markets dominated by big players, resulting in reduced competition within these markets.[86]

Kampel observes as follows:

> What the Nationwide Poles case succeeds in exposing is the phenomenon whereby dominant firms do in South Africa tend to pursue the comfortable "quiet life" whereby they are able to maintain their entrenched positions by keeping their larger customers or suppliers happy, despite the absence of efficiency gains to the

[76] *Nationwide Poles* (2005) at para 142.
[77] *Nationwide Poles* (2005) at para 142.
[78] *Nationwide Poles* (2005) at para 142.
[79] *Nationwide Poles* (2005) at paras 143–144.
[80] Kampel (2004) at 4.
[81] Kampel (2004) at 18–20.
[82] Kampel (2004) at 18.
[83] Kampel (2004) at 18.
[84] Kampel (2004) at 18.
[85] Kampel (2004) at 18.
[86] Kampel (2004) at 18.

> benefit of consumer welfare. In doing so, it highlights a key unique feature of the South African economic market-place which serves to keep the playing fields from being level. Large firms are able to maintain the status quo by keeping smaller, potentially obtrusive firms out. It was pointed out in the case how Sasol's behaviour was frequently "irrational" insofar as they behave anti-competitively in markets where they do not even compete."[87]

More precisely, Kampel illustrates the ease with which large firms pursue economically obstructive, exclusionary business practices while the market normalises such conduct as "business as usual".[88] With this in mind, she notes that in a developing economy such as South Africa, large businesses enjoy advantages – such as that of a "quiet life" borne of government privilege or political insulation – which ensure that small competitors do not come banging on their doors in the marketplace.[89] She draws the conclusion that, while pure competition goals should not be abandoned, the market mechanism should not be allowed to work in such a manner that the large players alone dictate the rules of engagement.[90]

Kampel then makes the following observation:

> While it is not suggested that competition policy should replace industrial policy in this regard, competition policy should nevertheless not disregard the position of SMEs in a very unique market context in which large firms have the resources to use their size and privileged positions to deter firm growth and new entry. Furthermore, what is quite apparent in South Africa, is the marked absence in the past of sophisticated consumer protection legislation.[91]

Kampel is spot on in her observations. South Africa's unique history demands that we pay attention to interests such as those of SMEs that have a historically disadvantaged position in the marketplace.

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87 Kampel (2004) at 18–19.
88 Kampel (2004) at 19.
89 Kampel (2004) at 19.
90 Kampel (2004) at 19.
91 Kampel (2004) at 19.

4.2 Sasol Oil (Pty) Ltd v Nationwide Poles CC

However, the case discussed above went on appeal in *Sasol Oil (Pty) Ltd v Nationwide Poles CC*.[92] In a surprising turn of events, the Competition Appeal Court (CAC) overturned the decision of the Competition Tribunal.[93] The CAC was in support of the view that while the volume-based discounts led to SMEs paying higher prices for their product, there was an equally compelling possibility that, in order to recoup loss of profit, the average price would have to increase in the market if smaller purchases were charged a lower price.[94] Accordingly, it would be against the welfare of consumers for the decision of the Tribunal to be upheld, owing to the central importance of consumer welfare in competition law.[95] Furthermore, the effect of the higher prices levied on Nationwide's other competitors was not demonstrated, and nor was its effect on the downstream industry.[96]

On this basis, the CAC pointed out that it could not reasonably come to a conclusion that competition had been substantially prevented or lessened.[97] It observed that, in the best possible scenario and considering the evidence in the best light, it could be said that Nationwide was at a disadvantage due to the additional cost imposed by the discount system in the purchasing of creosote.[98] However, the CAC took the view that this would not offend competition law because the object of competition law was to protect competition and not competitors.[99] To this end, the court went on to state that the fact that one competitor had been prejudiced did not mean that section 9(1)(a) had been infringed.[100] The injury of one firm was therefore not sufficient to prove harm to the relevant market.[101]

The CAC bemoaned the lack of involvement of the Competition Commission in the matter, which it believed could have made a difference in providing access to the industry and securing much-needed evidence to demonstrate the effect on competitors in the

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92 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2005] ZACAC 5 ("*Sasol*").
93 *Sasol* (2005) at 27.
94 *Sasol* (2005) at 26.
95 *Sasol* (2005) at 26.
96 *Sasol* (2005) at 26.
97 *Sasol* (2005) at 26.
98 *Sasol* (2005) at 26–27.
99 *Sasol* (2005) at 27.
100 *Sasol* (2005) at 27.
101 *Sasol* (2005) at 27.

industry.[102] This was because the Tribunal had to rely on evidence led by respondent who had limited access to the industry.[103] The CAC highlighted that

> [o]ur decision does not seek to minimize the particular weight which the legislature has given to price discrimination nor the need to ensure that small and medium businesses are able to use the Act to protect their ability to compete freely and fairly. When the evidence is read holistically, however, it appears that the Tribunal based its conclusion that [the] appellant's conduct substantially prevented or lessened competition almost exclusively on an evidentially unjustified conclusion that the price differential assists in limiting the entry of new and small entrants and their ability to thrive. There was no reliable evidence regarding small business in the creosote market nor of the manner in which appellant's major competitor would react to an altered price structure.[104]

As is apparent, the CAC focused on the fact that the evidence that the Tribunal relied upon was incomplete and inappropriate. The Tribunal's considerations regarding SMEs, and the significance the legislature attaches to their protection, were appropriate. However, it was ultimately logical for the CAC to conclude that the section 9(1)(a) complaint could not succeed, given that the requisite elements had not been satisfied.[105]

This judgement presents many important points for consideration. One such point that comes alive owing to this case relates to the high burden of proof placed on competition authorities or parties alleging harm.[106] While this was not apparent in the Tribunal matter, it was clear in the CAC matter. In analysing this case, Klaaren noted that the evidentiary burden placed on the authorities in competition matters is too high.[107] He stated:

> While an outlier in some respects, the case demonstrates that the burdens of proof and effects-based tests in the South African competition regime allow for the hearing of extensive economic evidence and analysis. Especially where matters are

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[102] *Sasol* (2005) at 27.
[103] *Sasol* (2005) at 27.
[104] *Sasol* (2005) at 27.
[105] *Sasol* (2005) at 27.
[106] Klaaren J "Laying the table: The role of business in establishing competition law and policy in South Africa" (2018) 33(1) *International Review of Applied Economics* 129 at 130.
[107] Klaaren (2018) at 131.

> complex and hearings are lengthy, the need for economic and other technical, financial or industrial experts puts particular strain on the resources of the competition authorities and contributes to the poor success record of the authorities with respect to excessive pricing.[108]

This burden of proof is even more difficult to meet in instances such as the one in the present matter, where the burden of proof has to be discharged by a complainant that lacks access to information which can be found only within the industry and from competitors or those with an interest.

5 THE IMPACT OF THE COMPETITION AMENDMENT ACT

Sasol Oil (Pty) Ltd v Nationwide Poles CC also exposed challenges involved in interpreting the Competition Act, particularly with regard to price discrimination.[109] This was because the Competition Act, in its form at the time of the case, did not have enough teeth to challenge big business and concentrations of economic ownership, especially in regard to SMEs.[110] However, the Competition Amendment Act 18 of 2018 has changed the situation, as it is arguably the most far-reaching amendment in the history of the Competition Act.

Among other things, it brings substantive changes pertaining to SMEs and HDPs, some of which focus on the issue of price discrimination tackled in *Sasol*. In its preamble, the Amendment Act declares that it seeks to introduce provisions to, inter alia, clarify and improve the determination of price discrimination; and protect and stimulate the growth of SMEs and firms that are owned or controlled by HDPs while at the same time advancing other interests such as employment, employment security, and worker ownership.[111] Furthermore, the Act seeks to provide for greater flexibility with respect to the granting of exemptions, which promote transformation and growth.[112]

As for price discrimination, section 6 of the Competition Amendment Act provides a raft of changes with regard to price discrimination, SMEs and businesses owned or

[108] Klaaren (2018) at 131.
[109] Klaaren (2018) at 131–132.
[110] Klaaren (2018) at 130.
[111] Preamble of the Competition Amendment Act 18 of 2018.
[112] Preamble of the Competition Amendment Act 18 of 2018.

controlled by HDPs. The changes introduced by this provision came into operation on 13 February 2020.

The first major change is the amendment of the title of the provision. Section 6(a) the Competition Amendment Act amended the title of section 9 of the Competition Act to read "price discrimination by a dominant firm as seller prohibited". This entails that when a firm is a seller in a market, it is prohibited from discriminating between customers in terms of the price at which its sells its goods.

The second change arising from the Competition Amendment Act is that it introduces public interest considerations with respect to establishment of price discrimination. Section 6(b) of the Act provides that an action by a dominant firm that is a seller of goods and services in a particular market is prohibited if the action is likely to have the effect of substantially lessening or preventing competition or if it impedes the ability of SMEs or firms controlled by HDPs to participate effectively.[113] Evidently, the Amendment bolsters the position of SMEs and businesses owned and controlled by HDPs with respect to price discrimination, as their interests are now a firm consideration when deliberating the question of whether price discrimination has taken place. This was one of the failures in the previous version of the Competition Act in properly advocating for these issues with specific provisions. The tendency was to have such issues captured as broad-ranging considerations in the preamble and section 2 of the Act.

The third consideration relates to the practice of refusing to deal with an SME or the business of an HDP in order to escape the provisions of the Competition Act. In terms of this, section 6(c) of the Competition Amendment Act provides that it is prohibited for a dominant firm to avoid or to refuse to sell goods or services to a purchaser that is an SME or a firm owned or controlled by an HDP in order to circumvent the operation of section 9(1)(a)(ii) of the Competition Act.[114] Therefore, firms cannot avoid the consequences of price discrimination by avoiding doing business with SMEs or HDPs and their businesses.

The fourth consideration arising out of section 6 of the Competition Amendment Act relates to the issue of onus of proof. Section 6(e) of the Act provides that a dominant firm, subject to the regulations issued under section 9(4) of the Competition Act, must show

[113] See section 9(1)(a) of the Competition Act.
[114] Section 9(1A) of the Competition Act.

that it did not restrict the ability of a SME or a firm owned or controlled by an HDP from participating effectively within the relevant market.[115] Accordingly, this provision introduces a reverse onus on the accused party to absolve itself of the claim that it restricted or lessened competition to the detriment of an SME or a business owned or controlled by an HDP.

Owing to the fact that competition proceedings, except those under section 73A, are civil in nature, this burden of proof has to be discharged on a balance of probabilities. This is reinforced by section 68 of the Competition Act, which provides that "[i]n any proceedings in terms of this Act, other than proceedings in terms of section 49C or criminal proceedings, the standard of proof is on a balance of probabilities".[116] This raises constitutional questions around the right to a fair trial and the presumption of innocence.

Section 35(3) of the South African Constitution provides that every accused has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during proceedings. In *Prinsloo v Van der Linde and Another*,[117] the court considered whether there was a constitutional right to a fair civil trial, and if so, whether a provision on onus of proof might infringe such a right.[118] However, the court decided against pronouncing on this question because, in its view, this issue was not central to the question at hand. Brickhill asserts that section 34 of the Constitution of South Africa grants the right to a fair civil trial while section 35 guarantees the right to a fair criminal trial.[119] He goes on to state that while the contents of the right to a fair criminal trial were clearly articulated in section 35, in contradistinction section 34 was silent on what the right requires.[120] Section 34 reads "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[121]

The right to be presumed innocent in the context of section 34 would then be inferred from the "fairness" criteria set out in the provision. For example, Brickhill and Grobler

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115 Section 9(3A) of the Competition Act.

116 Section 68 of the Competition Act.

117 *Prinsloo v Van der Linde and Another* [1997] ZACC 5 ("*Prinsloo"*).

118 *Prinsloo* (1977) at para 9.

119 Brickhill J 'The right to a fair civil trial, the duties of lawyers and law students to act pro bono" (2005) 21 *South African Journal on Human Rights* 293.

120 Brickhill (2005) at 293.

121 Section 34 of the Constitution of South Africa.

assert that the right to a "fair hearing" requires that, in some civil matters, the state has to provide legal representation at its expense, with failure to do so tainting the proceedings with unfairness.[122] Equally, it could be said that the right to a fair trial requires that an accused in a civil trial be afforded the right to be presumed innocent, with the failure to provide for this right rendering the proceedings unfair. The reversal of onus in a civil matter would then infringe a constitutionally protected right.

It is also worth noting that violating the right to be presumed innocent can further affect other rights in the Constitution, such as the right to equality and equal protection and benefit of the law.[123] This is because human rights are interconnected and indivisible, and, therefore, the breach of one right has implications for other related rights,[124] especially cross-cutting rights such as equality, dignity and human freedom. When a reverse onus is utilised, this tilts the scale in favour of the state in the sense that the proceedings do not advance from a point of equality.[125]

Although the reverse onus could be vindicated as a justifiable limitation in terms of section 36 of the Constitution,[126] Boshoff, Sutherland and Theron argue that it should be reconsidered.[127] The reasons they advance are different, though, to those above. The authors are of the view that shifting the burden of proof will have the effect of preventing or lessening competition within markets.[128] They also contend that while the provision on price discrimination has been structured to protect small firms, it is only in rare instances that upstream firms have the incentive to harm competition down-stream.[129]

The Competition Amendment Act 18 of 2018 makes other notable changes relating to SMEs and HDPs beyond those related to price discrimination. The exemption provision, as mentioned in the discussion on the preamble, is one such affected provision. Section

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122 Brickhill J & Grobler C "The right to civil legal aid in South Africa: *Legal Aid South Africa v Magidiwana*" (2016) 8(1) *Constitutional Court Review* 256 at 256–257.

123 *Ramabele v S; Msimango v S* [2020] ZACC 22 at para 32. See also section 9(1) of the Constitution of South Africa.

124 See *S v Coetzee and Others* [1997] ZACC 2 at para 9.

125 Mthembu MH "The constitutionality of presumptions in South African law" (1998) 31(2) *Comparative and International Law Journal of Southern Africa* 213 at 214.

126 Mthembu (1998) at 227.

127 Centre for Competition Law and Economics (CCLE) "Competition Amendment Bill (2017): Comments" available at https://blogs.sun.ac.za/ccle/files/2017/11/CCLE-Comments-on-Competition-Amendment-Act-300118_final.pdf (accessed 29 January 2024) 1 at 15.

128 CCLE (2017) at 15.

129 CCLE (2017) at 15.

10(3) of the Competition Act now states that the Competition Commission may grant an exemption in section 10(2)(a) if it results in 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 historically disadvantaged persons".[130] In other words, SMEs and HDPs and their firms can apply for exemptions to engage in anti-competitive conduct that enhances their competitiveness within a particular market.[131] Conversely, they can apply to block an exemption application by a firm that could affect their competitiveness.[132] This provision is important because it allows SMEs and HDPs to receive preferential treatment that places them at an advantage within markets.

This is in line with the approach of addressing historical injustices as contained in both the Competition Act and the Constitution. Section 9(2) of the latter provides that in order to promote the achievement of equality, legislative and other measures may be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. The measures contained in the exemption clause concerning SMEs and HDPs constitute mechanisms aimed at advancing these interests. By contrast, it is argued that such firms have a vested interest in ensuring that firms at other levels of the production chain remain efficient.[133]

Another change brought into play by the Competition Amendment Act is in regard to the public interest.[134] It clarifies the position of small businesses under the Competition Act with respect to public interest considerations in mergers. Here, the focus is not simply on whether a proposed merger affects small businesses, but also on whether it impacts on the ability of SMEs enter, participate in or expand within markets.[135] This is important in ensuring that parties do not restrain SMEs from entering into or growing within a market, thereby restraining competition.

Section 9(f) of Act 18 of 2018 introduces section 12A(3)(e) of the Competition Act. It states that in determining whether a merger can or cannot be justified on public interest

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[130] Section 10(3)(b)(ii) of the Competition Act.

[131] See Competition Commission "The Competition Act: A Guide for SMEs" (2017) available at https://www.compcom.co.za/wp-content/uploads/2017/11/SME.pdf (accessed 29 January 2024) 1 at 2.

[132] See Competition Commission (2017) at 2.

[133] CCLE (2017) at 15.

[134] See section 12A(3) of the Competition Act; section 9(e) of the Competition Amendment Act 18 of 2018.

[135] See section 12A(3) of the Competition Act.

grounds, the Competition Commission or Competition Tribunal must also consider the effect that it has on promoting a greater spread of ownership, in particular ownership by HDPs and workers in firms.[136] This provision tackles the issue of concentration, one which the preamble of the Competition Act refers to as the historical nemesis of competition in South Africa. The specifics as to how the Competition Commission will go about this process are contained in the Draft Amended Public Interest Guidelines Relating to Merger Control.[137] The provision, therefore, accords with the vision of creating a "growing, deconcentrated and inclusive economy".[138] Furthermore, it is essential in tackling creeping concentration and other structural features.[139] Boshoff, Sutherland and Theron note that

> [t]hese amendments must be placed in context. From an economics perspective, any effects-based merger analysis has to consider the structure of the market, which includes previous mergers and increases in concentration. The analysis should also take into consideration the history and structural features of any market. Nevertheless, as these are important features, it might be worth specifically requiring that it be done.[140]

Jacobs believes that this provision places greater emphasis on ownership by HDPs in merger assessments than it does on the interests of SMEs; however, it could be said that these goals are not in conflict with the wider objective of enhancing and entrenching public interest in merger analysis.[141] It demonstrates only that there are multiple public interest goals, and not necessarily that they are contradictory. In fact, SMEs and HDPs and their businesses suffer the same effects within markets. For instance, the Department of Trade, Industry and Competition (DTIC) notes that economic concentration has led to

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[136] Section 12A of the Competition Act.

[137] See Competition Commission "Draft amended public interest guidelines relating to merger control (27 September 2023) available at https://www.compcom.co.za/wp-content/uploads/2023/09/Draft-Revised-Guideline-on-Public-Interest-for-Publication-27092023ii.pdf (accessed 29 January 2024) 1 at 20.

[138] See the cover page of the Competition Act.

[139] CCLE (2017) at 18.

[140] CCLE (2017) at 18.

[141] Jacobs R "Striking the balance: The correct approach to competing public interest considerations" (14 June 2023) *Cliffe Dekker Hofmeyr* available https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Competition/competition-law-alert-14-june-striking-the-balance-the-correct-approach-to-competing-public-interest-considerations (accessed 29 January 2024).

fewer opportunities for SMEs and HDPs.[142] This challenge, it says, is worsened by large firms that abuse their dominance by foreclosing markets to smaller new entrants, and imposing higher cost structures on the economy.[143]

A final important amendment concerning SMEs and HDPs was in regard to aggravating and mitigating factors set out in section 59(3) of the Competition Act. When considering an appropriate penalty, the Tribunal must, inter alia, consider the market circumstances in which the contravention took place.[144] In particular, it must be investigated whether, among other factors, the contravention affected SMEs and businesses owned or controlled by HDPs.[145] This provision is extremely important in giving the Competition Act the "enforcement teeth" it needs. This means that, when considering an appropriate penalty, the fact that specific market conduct by a party affected SMEs or HDPs and their businesses can be used to aggravate the penalty which is meted out.

6 CONCLUSION

Competition law seeks to restrain practices that harm competition or reinforce market power.[146] This article discussed the role such law plays in promoting SMEs. It found that since the enactment of the Competition Act, socio-economic issues such as promoting the interests of SMEs have been addressed. However, one of the challenges has been that the Act lacked proper enforcement tools for achieving its goals. For instance, while enhancing SMEs was referenced in the preamble and the objectives clause of the Act, it was not adequately integrated in the Act's substantive provisions – the only detailed provision in this regard was section 12A(3), dealing with public interest in mergers.

However, since the implementation of the Competition Amendment Act, the legal framework is in a better position to advance the rights of SMEs in practical terms. This is as a result of the revision of certain provisions and the introduction of others, including

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142 Department of Trade, Industry and Competition "Update on the implementation of the Competition Amendment Act, 2018: Presentation to Portfolio Committee on Trade and Industry" (20 October 2020) available at https://www.thedtic.gov.za/wp-content/uploads/Competition_Act_REVISED.pdf (accessed 29 January 2024) 1 at 3.

143 Department of Trade, Industry and Competition (October 2020) 1 at 3.

144 Section 59(3) of the Competition Act.

145 Section 59(3) of the Competition Act.

146 Vilakazi T & Ponte S "The political economy of competition, regulation and transformation: Black Economic Empowerment (BEE) and quota allocations in South African industrial fisheries" CBDS Working Paper No. 2020/3 (2020) 1 at 6.

ones relating to price discrimination, exemptions, public interest, and administrative penalties. This has provided the Competition Act with the enforcement teeth it needs in order to safeguard the interests of SMEs.

The result, it has been argued here, is consistent with South Africa's constitutional values and principles, national interests and industrial policy. It was also shown that other public interest goals advanced in the Competition Amendment Act, such as those relating to HDPs, do not necessarily conflict with this goal; rather, they all aim to address challenges within markets such as market concentration. In the light of these changes, the CAC's views in *Nationwide Poles v Sasol (Oil) Pty Ltd* should be revisited.

BIBLIOGRAPHY

Journal articles

Bartalevich D "The influence of the Chicago School on the commission's guidelines, notices and block exemption regulations in EU competition policy" (2016) 54(2) *Journal of Common Market Studies* 267

Brickhill J & Grobler C "The right to civil legal aid in South Africa: *Legal Aid South Africa v Magidiwan'*" (2016) 8(1) *Constitutional Court Review* 256

Brickhill J "The right to a fair civil trial, the duties of lawyers and law students to act pro bono" (2005) 21 *South African Journal on Human Rights* 293

Brooks PEJ "Redefining the objectives of South African competition law" (2001) 34(3) *Comparative and International Law Journal of Southern Afric*a 295

Elzinga KG "The goals of antitrust: Other than competition and efficiency, what else counts?" (1977) 125(6) *University of Pennsylvania Law Review* 1191

Hartzenberg T "Competition policy and practice in South Africa: Promoting competition for development" (2006) 26(3) *Northwestern Journal of International Law & Business* 667

Klaaren J "Laying the table: The role of business in establishing competition law and policy in South Africa" (2018) 33(1) *International Review of Applied Economics* 129

Mthembu MH "The constitutionality of presumptions in South African law" (1998) 31(2) *Comparative and International Law Journal of Southern Africa* 213

Piraino TA "Reconciling the Harvard and Chicago schools: A new antitrust approach for the 21st century" (2007) 82(2) *Indiana Law Journal* 345

Posner RA "The Chicago School of antitrust analysis" (1979) 127(4) *Penn Law Review* 925

Prins D & Koornhof "Assessing the nature of competition law enforcement in South Africa" (2014) 18 *Law, Democracy & Development* 136

Stylianou K & Lacovides M "The goals of EU competition law: A comprehensive empirical investigation' (2022) 42(4) *Legal Studies* 620

Triggs A & Leigh A "A giant problem: The influence of the Chicago School on Australian competition law, economic dynamism and inequality' (2019) 47(4) *Federal Law Review* 696

Legislation

Competition Act 89 of 1998

Competition Amendment Act 18 of 2018

Namibian Competition Act 2 of 2003

Tanzanian Fair Competition Act (Chapter 285)

Zambian Competition and Consumer Protection Act 24 of 2010

Zimbabwean Competition Act

Case law

Nationwide Poles v Sasol (Oil) Pty Ltd [2005] ZACT 17

Prinsloo v Van der Linde and Another [1997] ZACC 5

Ramabele v S; Msimango v S [2020] ZACC 22

S v Coetzee and Others [1997] ZACC 2

Sasol Oil (Pty) Ltd v Nationwide Poles CC [2005] ZACAC 5

Internet sources

"Why employment matters for economic growth" *Skills Training Group* available at https://www.skillstg.co.uk/blog/why-employment-matters-for-economic-growth/(accessed 26 January 2024)

Centre for Competition Law and Economics "Competition Amendment Bill (2017): Comments" available at https://blogs.sun.ac.za/ccle/files/2017/11/CCLE-Comments-on-Competition-Amendment-Act-300118_final.pdf (accessed 29 January 2024)

Competition Commission "Draft amended public interest guidelines relating to merger control" (27 September 2023) available at https://www.compcom.co.za/wp-

content/uploads/2023/09/Draft-Revised-Guideline-on-Public-Interest-for-Publication-27092023ii.pdf(accessed 29 January 2024)

Competition Commission "The Competition Act: A guide for SMEs" (20017) available at https://www.compcom.co.za/wp-content/uploads/2017/11/SME.pdf (accessed 29 January 2024)

Department of International Relations and Cooperation *Framework document on South Africa's national interest and its advancement in a global environment* (January 2023) available at https://www.dirco.gov.za/wp-content/uploads/2023/01/sa_national_interest.pdf (accessed 26 January 2024)

Department of Trade, Industry and Competition "Update on the implementation of the Competition Amendment Act, 2018: Presentation to Portfolio Committee on Trade and Industry" (20 October 2020) available at https://www.thedtic.gov.za/wp-content/uploads/Competition_Act_REVISED.pdf (accessed 29 January 2024)

Jacobs R "Striking the balance: The correct approach to competing public interest considerations" (14 June 2023) *Cliffe Dekker Hofmeyr* available https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Competition/competition-law-alert-14-june-striking-the-balance-the-correct-approach-to-competing-public-interest-considerations (accessed 29 January 2024)

Working papers

Boshoff W et al. *The economics of public interest provisions in South African competition policy* 6th Annual Conference on Competition Law, Economics and Policy Pretoria: Competition Commission South Africa (2012) 1

Kampel K "Competition law and SMEs: Exploring the competitor/competition debate in developing democracy" Centre on Regulation and Competition Working Paper Series Paper No. 109 (2004) 1

Mncube L & Ratshisusu H "Competition policy and black empowerment: South Africa's path to inclusion" SCIS Working Paper No. 22 (2021) 1

Roberts S "The role of competition policy in economic development: The South African experience" TIPS Working Paper 8 (2004) 1

Vilakazi T & Ponte S "The political economy of competition, regulation and transformation: Black Economic Empowerment (BEE) and quota allocations in South African industrial fisheries" CBDS Working Paper No. 2020/3 (2020) 1