An Analysis of Black Economic Empowerment in Merger Regulation and Its Impact on SMEs Under the South African Competition Act of 1998

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I, Sindisiwe Mbasane, Student number 201601209, declare that this Proposal with the title "**An Analysis of Black Economic Empowerment in Merger Regulation and its Impact on SMEs Under South African Competition Act of 1998**" submitted for the award of the LLM degree in the Faculty of Law at the University of Fort Hare, is my work and has never been submitted for any other degree at this University or any other institution of higher learning.

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ABSTRACT

The assessment of mergers is, firstly, whether they will lessen or prevent competition; secondly, whether there are any technological or pro-competitive gains justifying an otherwise anti-competitive merger; and lastly, whether they are justified on the grounds of public interests. Section 12A(3) of the Competition Act states that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider several factors. These include the ability of small businesses or firms controlled or owned by historically disadvantaged persons to enter, compete, and expand in the market, and the ability of national industries to compete in international markets as well as the promotion of a greater spread of ownership to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. This gives rise to Black economic empowerment (BEE) as public interests grounds for consideration when the competition authorities evaluate a merger. It should be noted that a pro-competitive merger can be blocked based on the grounds of public interest of BEE and vice versa. The consideration of BEE has seen the promotion of SMEs owned mainly by the black community. Therefore, this study seeks to determine whether the intervention of competition laws and policies has effectively achieved the policy goals of promoting a greater spread of ownership in the economy to increase the ownership stakes of historically disadvantaged persons. The study examines the extent to which BEE has been explicitly realised in the context of merger acquisition and regulation in South Africa to foster the growth and performance of SMEs. The study will use the desktop methodology where primary and secondary sources of data will be used to collect information.

Keywords: Small and Medium Enterprises, black economic empowerment, public interests, merger regulation, historically disadvantaged individuals.

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DEDICATION

I dedicate this thesis to my late parents. Their sacrifices and the discipline they instilled in me have made me who I am today. Thank you for being my guardian angel. I further dedicate my thesis to my only living ancestor (grandfather), and my gratitude for your support and for being my pillar of strength has no boundaries.

Lastly, I dedicate this thesis to all young emerging female scholars like me who are still trying to navigate academia. May God be with you in your future endeavors.

LIST OF ABBREVIATIONS AND ACRONYMS.

BEE	Black Economic Empowerment
B-BBEE	Broad-Based Black Economic Empowerment
CAC	Competition Appeal Court
Commission	Competition Commission
DTI	Department of Trade and Industry
HDI	Historically Disadvantaged Individuals
ISBDS	Integrated Small Business Development Strategy
ISEDS	Integrated Small Enterprise Development Strategy
OECD	Organisation for Economic Co-operation and Development
RDP	Reconstruction and Development Programme
SLC	Significant Lessening of Competition
SMEs	Small and Medium Enterprises
SMMEs	Small, Medium, and Micro-Enterprises
Tribunal	Competition Tribunal

CONTENTS

CHAPTER 1
BACKGROUND OF STUDY

1 1 INTRODUCTION

A merger occurs when one or more companies directly or indirectly acquire or establish direct or indirect control over the entire or a portion of another company's business.[1] The element of control is vital in establishing whether a merger exists.[2] Control can be expressed as one firm's ability to direct another firm's activities as defined in section 12(2) of the Competition Act.[3] Furthermore, sections 2 and 3 of the Companies Act define control similarly.[4] Public interests are essential in the latter context because of one's firm ability to direct another firm's activities, which means that the element of control is central to the existence of a merger.[5]

The purpose of the Competition Act is to promote and maintain competition in the Republic to:

> (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, particularly to increase the ownership stakes of historically disadvantaged persons.[6]

This purpose aligns with the right to equality contained in section 9 of the Constitution of the Republic of South Africa.[7] The Constitution states that the state must advance the equality of previously disadvantaged people.[8] Mncube and Ratshisusu opine that the objective of increasing the ownership stakes of historically disadvantaged persons in the Competition Act is a legislative measure to promote the achievement of equality.[9] Small and medium-sized enterprises (SMEs) in

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[1] Section 12(1)(a) of the Competition Act 89 of 1998. GN 1392, GG 19412. Assented to 20 October 1998. Commenced: 30 November 1998 (the Competition Act).
[2] Section 12(1)(a) of the Competition Act.
[3] Section 12(2) of the Competition Act.
[4] Section 2 and 3 of the Companies Act 71 of 2008. GN 421 GG 32121 Assented to 8 April 2009. Commenced 1 May 2011.
[5] Din "South African Merger Litigations" 2013 *The Antitrust Bulletin* 58–62.
[6] Section 2(1) (e) and (f) of the Competition Act.
[7] Section 9(3) of the Constitution of the Republic of South Africa 1996 (the Constitution).
[8] Section 9(2) of the Constitution; see also Tavuyanago "Public Interest Considerations and their Impact on Merger Regulation in South Africa" 2015 Global *Journal of Human-Social Science: E Economics* 24–43.
[9] Mncube and Ratshisusu "Competition Policy and Black Empowerment: South Africa's Path to Inclusion" 2022 *Journal of Antitrust Enforcement* 74–90.

South Africa are crucial as they play an important role in creating a stable social environment and helping a country's GDP grow.[10] It is a known fact that the majority of a nation's socio-economic issues are resolved when the economy is strong.[11] As such, a strong economy ensures that previously disadvantaged people, most of whom belong to the black community, benefit in terms of business ownership and securing employment.[12]

At its core, competition policy is a reaction to the universal quest for economic dominance.[13] In other words, the abuse of economic power is a significant driver of competition law development in many nations, including South Africa.[14] One of the public interest reasons specified in the Competition Act was the effect of large enterprises' economic dominance on small businesses or firms operated by historically disadvantaged people.[15] The Competition Act prohibits mergers that are likely to significantly limit or impede competition unless mitigated by technical efficiency or other pro-competitive advantage or justified on specific public interest grounds.[16] As such, in South Africa, substantial barriers lesson competition among firms and allow anti-competitive conduct in the market, which is more harmful to emerging businesses or SMEs.[17]

Black economic empowerment (BEE) is fundamental for the people of South Africa, especially looking at past policies of apartheid that championed inequality.[18] During the apartheid era, the the Maintenance and Promotion of Competition Act was used to regulate competition law [19], and the South African government-enforced policies that had a wide-ranging impact on civil society, including systematic discrimination and marginalisation.[20] The result was that very few people

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[10] Robu *The Dynamic and Importance of SMEs in Economy* (2013) 31.
[11] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[12] Din 2013 *The Antitrust Bulletin* 58.
[13] Fox "Competition Policy at the Intersection of Equity and Efficiency: The Developed and Developing Worlds" 2018 The *Antitrust Bulletin* 3–6.
[14] Angumuthoo "Public Interest in Mergers: South Africa" 2020 *The Antitrust Bulletin* 312–332.
[15] Section 12A(3)(c) of the Competition Act.
[16] Section 12A (1) of the Competition Act. See also Horwitz "An Assessment of Employment Equity and Broad-Based Black Economic Empowerment Developments in South Africa" 2011 *Equality, Diversity and Inclusion: An International Journal* 297–317.
[17] Ibid.
[18] Tavuyanago 2015 Global *Journal of Human-Social Science: E Economics* 24.
[19] Maintenance and Promotion of Competition Act 96 of 1979.
[20] Brooks "Redefining the objectives of South African competition law" 2001 *The Comparative and International Law Journal of Southern Africa* 295–309.

participated in the economy, and those who did had the support of the state through state funding.[21] The government's policies allowed few actors in the economy, leading to the creation of monopolies.[22] The primary goal of competition policy has always been to promote competition to advance economic efficiency, international competitiveness, adaptability, and market access of small, medium, and micro-enterprises ("SMMEs").[23] It should be noted that since the advent of democracy and the passage of the Competition Act in 1998, BEE has played a critical role in determining mergers.[24]

This study investigates issues concerning BEE when companies propose merging. The study considers BEE a key component that firms should actively examine when entering into merger agreements.[25] The importance of BEE is evidenced by the fact that the Competition Act specifically incorporates the regulation of public interests in its provisions and mandates that the public interests be considered.[26] Section 12A of the Competition Act, as amended by Section 9 of the Competition Amendment Act, regulates the Competition Commission's or Tribunal's evaluation of mergers.[27] When the Commission or the Tribunal reviews a merger, they are now compelled to consider various public interest factors found in terms of section 12A (3) (a–e) of the Competition Act.[28]

It should be noted that from the policy objectives that the Competition Act intends to achieve and the aims of the changes brought about by section 9 of the 2018 Competition Amendment Act, a number of these identify with public interests.[29] Among others, these include the promotion of ownership by previously disadvantaged individuals and the creation of employment.[30] In addition, the Competition Act provides five (5) grounds that must generally be considered and be effected

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[21] Neuhoff *A Practical guide to South African Competition Policy and Law* (2006) 12.
[22] Hartzenberg "Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa's Competition Policy" 2007 https://ideas.repec.org/h/elg/eechap/4024_8.html (accessed on 2 November 2023).
[23] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 300.
[24] Section 12(3) of the Competition Act 1998.
[25] Moodaliyar and Roberts *The Development of Competition Law and Economics in South Africa* (2013) 15.
[26] Moodaliyar and Roberts (2013) 18.
[27] Section 12A of the Competition Act 1998; see also Section 9 of the Competition Amendment Act 18 of 2018.
[28] Section 12A (3) (a–e) of the Competition Act.
[29] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[30] Section 2 of the Competition Act.

by parties when considering whether public interests have been catered for in their undertakings/agreements. These are (a) impact in a particular industrial sector or region; (b) employment; (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market; (d) the ability of national industries to compete in international markets; and (e) the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms.[31]

The broad public interest considerations provided above cater to specific BEE provisions within merger regulation.[32] Section 12A(3)(c) of the Competition Act 1998, the effects of a merger on the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive must be evaluated as part of the public interest test.[33] This section should be read together with section 12(3)(e) of the Competition Act 2018, which promotes a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms.[34] The requirement above that there must be a greater spread of ownership aligns with one of the aims of the Competition Act as provided for in the preamble: to spread ownership to a more significant number of South Africans.[35]

Given that the nation is still in transition and working to overcome the legacy of apartheid, which saw most Africans excluded from work and the ownership of businesses and other important economic sectors, BEE's inclusion as a public interest in merger evaluation appears to be a significant factor.[36] Against this background, this study examines the extent to which BEE has been realised, specifically in the context of merger acquisition and regulation in South Africa, to foster the growth and performance of SMEs.

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[31] Section 12A(3)(a)(b)(c)(d)(e) of the Competition Act as amended by section 9 of the Competition Amendment Act 18 of 2018, as was previously inserted by section 6 of the Competition Amendment Act 39 of 2000.

[32] Fox 2018 The *Antitrust Bulletin* 3–6.

[33] Section 12A(3)(c) of the Competition Act 1998.

[34] Section 12A(3)(a)(b)(c)(d)(e) of the Competition Act as amended by section 9 of the Competition Amendment Act 18 of 2018, as was previously inserted by section 6 of the Competition Amendment Act 39 of 2000 Act.

[35] Moodaliyar and Roberts *The Development of Competition Law and Economics in South Africa* (2013) 3; see also Fox 2018 The *Antitrust Bulletin* 3–6.

[36] Moodaliyar and Roberts (2013) 3.

1 2 PROBLEM STATEMENT

Section 2 of the Competition Act provides that the purpose of the Competition Act is to ’promote and maintain competition’ in South Africa. The section further states that the purpose is to achieve several objectives, including “to ensure that small and SMEs have an equitable opportunity to participate in the economy; and to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons (HDIs).”[37] The preceding statement reflects two views: balancing free competition to achieve economic growth and the state intervention to promote historically disadvantaged persons.[38] SMEs have been struggling to survive in the face of mergers as their interests are not considered during merger evaluation in the same way as those of large firms.[39] Even though mergers are highly regulated in the Competition Act, evidence on the ground has shown serious biases against small businesses in South Africa that ultimately stifle competition.[40]

Although mergers and BEE have been championed by, it cannot be said that they have been achieved fully. The reason is that BEE seems to conflict with a free and competitive market to harness economic growth.[41] In trying to cater for BEE, the competition authorities will have to block a merger with pro-competitive gains if that merger does not fulfil the public interest of BEE.[42] As such, BEE will always be restricted in the interest of free competition unless the competition authorities intervene in the interest of BEE.[43] The tensions and complementarities between these two powerful forces frequently play out in the arena of South Africa’s unique and rapidly developing competition law regime.[44]

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[37] Section 2(1)(f) of the Competition Act.
[38] Tavuyanago 2015 *Global Journal of Human-Socil Science: E Economics* 24.
[39] Church “Aspects of the Interface between the Promotion of Small and Medium Enterprises (SMEs) and Statutory Competition Law” 2018 *THRHR* 194. It should be noted that large firms may have a greater say in the process of merger thereby impeding the effective participation of SMEs. Large firms use their economic power to impede the interests of smaller firms.
[40] Federico “SAA II: Abuse of Dominance in the South African Skies” 2013 *J Comp L & Econ* 709.
[41] Du Plessis “The Role and Nature of The Public Interest in South African Competition Law” 2021 *SA Mercantile Law Journal* 1.
[42] Du Plessis 2021 *SA Mercantile Law Journal* 1.
[43] Ibid.
[44] Nzero 2017 *THRHR* 602.

In South Africa, numerous studies have looked at the impact of mergers on the economy in the context of public interests. Still, very few have mainly dealt with the interpretation of BEE in mergers and its effects on SMEs.[45] Shava conducted one example of such a study, looking at the prospects and challenges of BEE in South Africa.[46] What emerges from the above discussion is that the regulation of mergers plays a vital role because mergers have a direct impact on the economy in South Africa.[47] With the coming into effect of the 2018 Competition Amendment Act, the law is moving in the right direction regarding the advancement of BEE in mergers.[48]

Despite the divergent views held by the authorities discussed in the literature review of this study on the application of BEE, the judgments consulted show steady signs of policing the inclusion of provisions aimed at ensuring that BEE is recognised in merger agreements between merging companies.[49] The discussion above shows that not only the competitive or anti-competition effects must be the focal point of merger regulation. Equally important should be the consideration of public interests.[50] As such, the Competition Act has dealt with the latter aspect, and consideration of public interests has further been strengthened by the amendments brought about by the Competition Amendment Act 2018.[51] It is noted that the competition authorities have been very active in their efforts to promote public interest objectives. However, it cannot be said that SMEs and businesses controlled by HDIs are thriving.[52] The crucial question is why this is so, and does it require the further use of competition policy through the enactment of the Amendment Act?[53]

One reason that can be singled out for challenges faced by businesses controlled by HDIs is that mergers tend to disregard the interests of HDIs and champion only the interests of powerful businesses.[54] In the case of *ECP Africa Fund IV LLC v Competition Commission*, [55] the

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[45] Tavuyanago 2015 *Global Journal of Human-Social Science: E Economics* 23.
[46] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[47] Nzero 2017 *THRHR* 602.
[48] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[49] See *Emerging African Property Partners (Pty) Ltd v Lisaline Investment Holdings (Pty) Ltd* 2020 ZACT 4 and *Ethos Fund VII v Echotel Proprietary Limited* 2019 ZACT 5.
[50] Sutherland and Kemp *Competition Law of South Africa* (2013) 14.
[51] Staples et al "Taking public interest too far: *Walmart Stores Inc v Massmart Holdings Ltd*" 2013 *South African Mercantile Law Journal* 94–106.
[52] Mncube & Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90..
[53] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[54] Mncube & Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90..
[55] *ECP Africa Fund IV LLC v Competition Commission* 2021 ZACT 99.

Commission rejected the formation of the merger on the basis that the merger would violate the provisions of section 12A(3)(e) of the Competition Act 1998[56] concerning the owning of businesses by the previously disadvantaged.[57] The Commission believed that if the violation of the provisions of the Competition Act were permitted, the aim to promote ownership of businesses by the previously disadvantaged would not be realised.[58]

To this end, this research seeks to determine whether the intervention of competition laws and policies has effectively achieved the policy goals of promoting a greater spread of ownership in the economy to increase the ownership stakes of HDIs. This study seeks to find potential strategies to help small businesses stay in the market despite the merger.

1 3 RESEARCH AIMS

This research analyses BEE in mergers and its significance for SMEs in South Africa. This study seeks to contribute to a better understanding of the challenges SMEs face due to mergers and identify potential strategies to mitigate these adverse effects.

1 5 RESEARCH QUESTIONS

The primary research question of this research is:

1. What are the legal implications of BEE on SMEs in the context of merger regulation in South Africa,?

1 4 RESEARCH OBJECTIVES

1. To examine the historical background of competition law and policy goals in South Africa
2. To critically analyse the legal interpretation of section 12A(3) of the Competition Act of 1998 and the role public interest is envisaged to play in mergers under the Act.

[56] Section 12A(3)(e) of the Competition Act provides for the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.
[57] Mizner 2021.
[58] Section 2 of the Competition Act read together with the provisions of the Constitution.

3. To discuss the rationale for the inclusion of public interest in merger regulation in the Competition Act 1998.
4. To examine the effectiveness of the inclusion of BEE provisions in merger regulation.
5. To identify the legal and regulatory frameworks to address abuse of BEE, specifically focusing on their effectiveness in protecting SMEs.
6. To provide recommendations for policymakers, regulators, and SME support organisations on ways to enhance protection for SMEs during the creation of mergers, fostering a more equitable business environment.

1 6 LITERATURE REVIEW

Mergers are inevitable in a developing nation like South Africa. Companies utilise them for various reasons.[59] It could be that companies want to expand their business or seek to enter a new business area.[60] For the purpose of this study, the challenge lies in whether these mergers cater to BEE when considering public interests. From the outset, Morphet discusses how the Competition Act has reflected a clear focus on competition law and public interest issues, including provisions to enhance small businesses and overcome historical discrimination wrought by apartheid.[61] The first significant case in this regard arose in the *Walmart Stores Inc v Massmart Holdings Ltd* when Walmart, the American firm, sought to acquire control over Massmart, a local group.[62]

The case, although uncontentious from a competition perspective, was intensely contested on public interest grounds.[63] Most of the contentious issues related to employment, but there were also concerns relating to procurement. The matter was ultimately decided by the Competition Appeal Court (CAC), which, among other conditions, required the establishment of a supplier development fund to enhance the capacity of local suppliers.[64] In monitoring compliance with those conditions, the Commission emphasised that "any supplier development must lead to

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[59] Mncube & Ratshisusu 2022 *Journal of Antitrust Enforcement* 74.
[60] Kelly *Principles of Competition Law in South Africa* (2017) 35.
[61] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" 2021 https://www.ibanet.org/south-africa-competition-law-enforcement#_ftn18(accessed 4 November 2023).
[62] *Walmart Stores Inc v Massmart Holdings Ltd* 2011 ZACT 42.
[63] *Walmart Stores* para 28.
[64] *Walmart Stores* para 59.

sustainable improvements, with a bias towards small enterprises, those owned by HDIs, and those with labour-intensive practices."[65]

Furthermore, in another case, *Anheuser-Busch InBev SA/NV v SABMiller plc*,[66] conditions have been imposed to try to protect and aid small farmers. A high-water mark occurred in this case when ABInbev acquired SABMiller, a rival beer manufacturer.[67] This mega transaction was approved subject to extensive public interest conditions, including those imposed to maximise local production and sourcing of inputs, support and promote small beer producers, invest in capacity development of new emerging and commercial farmers, and invest in enterprise development.[68]

Brooks explores the legal historical background of competition law in South Africa.[69] He traced how the apartheid regime and political development at any given time always shaped competition enforcement and development.[70] As such, the work is so important to show that South African society comes from a historically discriminatory past that favoured certain groups of people and led to economic inequality.[71] Brooks shows that the regulation of mergers is paramount to monitor those firms that might have benefited from the discriminatory past so as not to continue the legacy of apartheid to the exclusion of HDIs.[72] Notably, the author agrees that public interest considerations are necessary and are meant to redress those past injustices.[73]

Walter and Ritchken look at the emergence of BEE in competition law immediately after the fall of apartheid.[74] The authors agree and assert that after the fall of apartheid in South Africa, it emerged as a central policy aimed at redressing the imbalances of the past by fairly transferring

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[65] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" 2021 https://www.ibanet.org/south-africa-competition-law-enforcement#_ftn18 (accessed 4 November 2023).
[66] *Anheuser-Busch InBev SA/NV v SABMiller plc* 2016 ZACT 72.
[67] *SABMiller plc* para 32–35.
[68] Rodseth "Why New Competition Act Is Actually Bad News for Small Business" *Business Live* (22 May 2019) www.businesslive.co.za/bd/opinion/2019-05-22-why-new-competition-act-is-actually-bad-news-for-small-business(accessed 4 November 2023).
[69] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 295.
[70] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 295.
[71] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 295.
[72] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 295.
[73] Brooks 2001 *The Comparative and International Law Journal of Southern Africa* 295.
[74] Walter and Ritchken "Black economic empowerment regulation and risk incentives" 2022 *Journal of Economic Dynamics and Control* 3–56.

financial and economic resources to the majority of its citizens.[75] Corporations voluntarily conduct BEE deals in response to regulatory constraints designed to incentivise firms to draw in previously disadvantaged citizens as shareholders without the need for them to provide much initial capital.[76]

Ayandibu provides information on the importance of SMEs and why they are worth being protected. The study defines SMEs as enterprises that have fewer than 250 employees. In distinguishing between SMEs small and medium-sized enterprises, a small enterprise is defined as one with fewer than 50 employees.[77] The study examines the significance of SMEs in a specific economy.[78] It demonstrated why SMEs require our complete attention and how to support existing ones while enticing more to open. SMEs significantly impact a country’s local economic development.[79] Since small businesses employ citizens of the nation, they help to reduce crime rates, support the development of systemic productive capacities, and support the building of resilient economic systems through links between small and large enterprises. This is why SMEs in developing countries significantly contribute to employment generation.[80] Their production methods also tend to be more labour-intensive than those of major businesses, which increases employment and promotes a fairer income distribution.[81]

Mncube and Ratshisusu discuss the rationale for the inclusion of BEE in the Competition Act.[82] The authors argue that competition law is about more than just the efficiency goal. It also includes placing value on opportunities for black-owned businesses to enter, expand, and participate in markets. It will likely be a key element in South Africa’s route to becoming an efficient, competitive economic environment focused on developing and benefiting all South Africans.[83] It should be highlighted that South Africa’s first democratic administration prioritised social development on a non-racial, democratic, and local basis.[84] The expectation was that all laws in

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[75] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[76] Walter and Ritchken 2022 *Journal of Economic Dynamics and Control* 1.
[77] Ayandibu “The Role of Small and Medium Scale Enterprise in Local Economic Development (LED)” 2017 *JBRMR* 134–139.
[78]Ayandibu 2017 *JBRMR* 135.
[79] Ayandibu 2017 *JBRMR* 135.
[80] Ayandibu 2017 *JBRMR* 135.
[81] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[82] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[83] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90..
[84] Angumuthoo, Lotter & Wood “Public Interest in Mergers: South Africa” 2020 *The Antitrust Bulletin* 312–332.

South Africa would contribute to, among other things, economic transformation, redressing the imbalances created by previous racial divisions, and, more importantly, encourage previously marginalised people to participate in the mainstream economy.[85] In South Africa, equity is a recognised goal and a permissible consideration under competition law, as well as a crucial driver of inclusive markets, economic development, and, eventually, BEE.[86]

Kampel posits that there may be a time when a small firm merges with a larger firm so that the firm can venture into other business opportunities.[87] It should be noted that the South African competition law has been simplified to accommodate smaller firms that merge with larger firms. This is an attempt to ensure that SMEs compete with larger in the market and diversify their investment interests as they rely on the economic muscle of larger firms to compete equitably in the market.[88] Simplicity or flexibility is important as it aids the government's purpose to ensure SMEs' growth and ultimate transition to the formal sector. Kampel sought to examine how the Competition Act had faced concerning its support of SMEs as outlined in Section 2(e) of the Act, after five years of its existence.[89] She looked at all provisions of the Competition Act that relate to SMEs and evaluated reasons for the low number of SME cases brought before the Tribunal despite the fact that "many of the cases which come before formal SME entities bring the competition authorities."

1 7 RESEARCH METHODOLOGY

The study uses the desktop literature review approach. It will consult both primary and secondary sources of law in South Africa. Primary sources include case law, legislation, common law, and national and foreign case law. Secondary sources include journal articles, theses, textbooks, and internet sources that will offer an analysis on the BEE assessment topic. The nature of the research is analytical, explorative, and observatory. It will analyse the sources collected, including the Competition Act and case law. Furthermore, the study will explore the literature on BEE and observe the conclusions emanating from that literature.

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[85] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90..

[86] Tavuyanago 2015 Global *Journal of Human-Social Science: E Economics* 24.

[87] Kampal *The Role of South African Competition Law in Supporting SMEs* (2004) 15.

[88] Kampal (2004) 15.

[89] Kampal (2004) 15.

1 8 PROPOSED CHAPTER OUTLINE

Chapter One is an introduction to the study. It presents research problems, research aims, and research questions. Further, the chapter provides the research methodology, literature review, chapter outline, and reference style adopted by the study.

Chapter two will examine the contextualisation of BEE in the South African Competition Act 1998. The chapter provides a brief overview of merger regulation in South Africa. The chapter further provides the contextualisation of black economic empowerment in the South African Competition Act 1998.

Chapter three provides a judgment-led analysis of BEE in South Africa. The chapter provides for the merger analysis, particularly aspects related to public interest inquiry.

Chapter four examines whether the South African competition policy framework is an appropriate and effective tool to regulate competition in South Africa with regard to helping SMEs.

Chapter five provides recommendations and conclusions.

1 9 LIMITATIONS

Time constraints limit the study, and it does not look at all the other BEE in other Acts of Parliament but only the Competition Act. The study will also be limited by resources to embark on a large-scale investigation into SMEs. As such, it will focus on merger regulation and particularly the public interests that relate to the BEE to the extent that the resources are available.

10 ETHICAL CONSIDERATIONS

This research project will comply with the University of Fort Hare Research Ethics Policy 2019. The research does not involve human or animal participants, and informed consent is thus not applicable. An application for Ethical Clearance has been completed on the Secondary Data Research Ethics Application Form. The Ethical Clearance (Secondary Data Research) application was submitted to the Faculty Research Ethics Committee in the Faculty of Law for approval. No further research was conducted thereafter until the Research Ethics Committee published an Ethical Clearance letter, and a Project Number was assigned to this research. The ethical clearance number for this research is COL021SMBA01.

CHAPTER 2

BRIEF BACKGROUND OF MERGER REGULATION AND THE CONTEXTUALISATION OF BLACK ECONOMIC EMPOWERMENT IN THE SOUTH AFRICAN COMPETITION ACT 1998

2 1 INTRODUCTION

During the apartheid era, South Africa experienced institutionalised racial discrimination that led to persistent racial inequality.[90] For this reason, in 2003, the government ultimately enacted the Broad-based Black Economic Empowerment (B-BBEE) Act, which aims to reduce racial inequality by economically empowering black people.[91] However, the BEE began long before the enactment of the policy, as is one of the aspirations of the Constitution, which is the right to equality that seeks to advance equality for all, regardless of race.[92] Therefore, this study is concerned with BEE, which is provided for in the Competition Act, and other pieces of legislation to the extent that it is necessary to advance the aims of the study.

Since its election, the democratic government of South Africa has prioritised the transformation of society on nonracial, democratic, and local foundations.[93] This is evidenced by the government's commitment to making all laws in South Africa to contribute to economic transformation and redress the imbalances related to past racial divisions.[94] The Competition Act was enacted as a transformative legislation to enhance the government's goal.[95] It should be noted that apartheid saw black businesses being systematically excluded from participating in the formal economy by discriminatory laws.[96] Racially discriminatory laws and policies, such as subsidies and support programs favouring white businesses, were crafted to protect and promote white-owned

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[90] Mncube and Ratshisusu "Competition Policy and Black Empowerment: South Africa's Path to Inclusion" 2022 *Journal of Antitrust Enforcement* 74–90.

[91] Broad-based Black Economic Empowerment Act 53 of 2003.

[92] See section 9 of the Constitution.

[93] Kelly *Principles of Competition Law in South Africa* (2017) 171.

[94] Hodge et al "Public Interest Provisions in the South African Competition Act: A Critical Review" 2009 *Competition Policy, Law & Economics Conference* 9–10.

[95] Angumuthoo et al "Public Interest in Mergers: South Africa" 2020 *The Antitrust Bulletin* 312–332.

[96] Tavuyanago 2015 Global *Journal of Human-Social Science: E Economics* 24.

enterprises while hindering competition from black-owned firms.[97] These measures erected obstacles for black entrepreneurs, effectively barring them from full economic participation.[98]

The preamble of the Competition Act provides the political reasons behind the State's competition law.[99] It highlights historical factors such as apartheid and past discriminatory practices, which led to an imbalanced concentration of economic power.[100] Apartheid's discriminatory laws resulted in fewer opportunities for emerging black entrepreneurs to participate in markets.[101] The preamble to the Competition Act provides that restrictions on free and full participation in the economy by all South Africans are unjust and that an efficient, competitive economic environment focused on development will benefit all South Africans.[102]

The present chapter will look at the development of competition law in South Africa and a brief background of merger regulation in South Africa because the study is concerned with BEE in the context of merger regulation. It should be noted that the Competition Commission (Commission) and Competition Tribunal (Tribunal) should carefully consider both BEE ownership implications and the public interest factors during merger evaluation.[103] Furthermore, an important debate on the efficiency of competition versus BEE will be discussed. Also, the chapter will provide an understanding of mergers and whether there is a need to regulate mergers along the public interests grounds in South Africa. Finally, the chapter will provide information on mergers and BEE and the effects of merger regulation.

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[97] Brooks 2001 *International and Comparative Law Journal of Southern Africa* 295.
[98] Angumuthoo et al 2020 *The Antitrust Bulletin* 312–332.
[99] Section 2 of the Competition Act 1998.
[100] Radu "The Social, Cultural and Political Factors that Influence the Level of Mergers and Acquisitions" 2015 *International Journal of Academic Research in Accounting, Finance and Management Sciences* 33-44.
[101] Horwitz "An Assessment of Employment Equity and Broad-Based Black Economic Empowerment Developments in South Africa" 2011 *Equality, Diversity and Inclusion: An International Journal* 297–317.
[102] Preamble to the Competition Act 1998. It provides that "The people of South Africa recognise: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices. and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans…."
[103] Mashalanye and Maunye "Public Interest Justification for Mergers – The Need for Legal Certainty in Approach to s 12A(3)(e)" 2022 *Rebus law Journal* 20–26.

2 2 CONTEXTUAL BACKGROUND OF COMPETITION LAW IN SOUTH AFRICA

The history of competition law in South Africa can be traced back to the apartheid period commencing in 1948 after the National Party came to power.[104] However, the latter system of government was not popular with most of the African majority and, indeed, the international community. This is why economic sanctions were levelled against South Africa by the international community, particularly the United States of America.[105] These sanctions led to the suffering of millions of South African people, particularly black South Africans.[106] The apartheid government's unpopularity also affected a market-oriented economy.[107] The participation of the black South African population in the economy was hampered, for example, by placing restrictions on corporate ownership and the free movement of persons, providing for job reservations, and the forced removal of certain entrepreneurs from central business districts. The exclusion made some firms more powerful, given the State's support.[108] The legislature decided to restrain these companies by creating regulations for competition law.[109]

The firms that previously enjoyed state support may propose merging with weaker firms that are still in their infancy, are just starting to grow, or are with other larger firms.[110] As a result, competition authorities always have to assess whether a proposed merger is pro or anti-competitive.[111] Thus, the competition authorities also have to assess if efficiency or technological gains warrant the approval of a proposed merger.[112] Finally, they must assess if any public interest considerations may warrant the approval or refusal of a merger.[113] This study is concerned with

[104] Brooks 2001 *International Law Journal of Southern Africa* 295.
[105] Brooks 2001 *International Law Journal of Southern Africa* 295.
[106] Angumuthoo et al "Public Interest in Mergers: South Africa" 2020 *The Antitrust Bulletin* 312.
[107] Hartzenberg, "Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries" 2006 *Northwestern journal of international and Business Law* 667–675.
[108] Kelly (2017) 320.
[109] Maintenance and Promotion of Competition Act 1979; Undue Restraint of Trade Act 59 of 1949; and Regulation of Monopolistic Conditions Act 24 of 1955; See Brooks 2001 *CILSA* 295–308.
[110] Changole and Boshoff "Non-Competition Goals and Their Impact on South African Merger Control: An Empirical Analysis" 2022 *Review of Industrial Organization* 361–401.
[111] Kelly (2017) 320.
[112] Section 12A(1)(a) of the Competition Act.
[113] Section 12A(1)(b) and (1A) of the competition Act.

the latter aspect of merger consideration, particularly the issue of BEE.[114] This aspect is important because it seeks to address the division of the past in line with the Constitution's aspirations and the survival of SMEs, as most of them are owned by previously disadvantaged black South Africans. As such it is important to provide an overview of black economic empowerment and attempt to establish equity and efficiency.

2 3 BLACK ECONOMIC EMPOWERMENT: EQUITY VERSUS EFFICIENCY

A policy document is not a law, but it will often identify new laws needed to achieve its goals. On the other hand, laws set out standards, procedures, and principles that must be followed.[115] At its core, competition policy responds to the universal quest for economic power. Those with economic power acquire it at the expense of those who do not.[116] While there are other reasons for competition law, hostility towards the abusive use of economic power primarily underlines the adoption of competition law in many countries, including South Africa.[117]Since the advent of democracy in South Africa in 1994, the state's economic policy has pursued two intertwined yet occasionally conflicting aims.[118] The first objective is to embrace the advantages of free and competitive markets to foster economic growth, leading to increased employment and national income. Conversely, the second objective seeks to empower a developmental state to intervene in the economy, ensuring equitable market outcomes and inclusive economic growth. This objective seeks to rectify the distortions caused by apartheid-era discriminatory laws.[119] These two forces frequently clash and complement each other within the framework of South Africa's unique and rapidly evolving competition law system.[120]

[114] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (2016).
[115] Brooks 2001 *International and Comparative Law Journal of Southern Africa* 295.
[116] Fox 2018 *The Antitrust Bulletin* 3–6.
[117] Griffiths and Gumbie "The public interest test in the South African merger control regime" 2015 Journal *of Antitrust Enforcement* 408–424.
[118] Kleynhans and Kruger "Effect of Black Economic Empowerment on Profit and Competitiveness of Firms in South Africa" 2014 *Acta Commercii* 1–10.
[119] Morphet "Competition v Promoting Small Business and Black Economic Empowerment – An Evaluation of South African Competition Law And Its Enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[120] Tavuyanago 2015 *Global Journal of Human-Social Science: E Economics* 23.

Notably, the Competition Act explicitly states that historically disadvantaged individuals and small businesses will be the primary emphasis of the State of South Africa from the outset.[121] This focus is reasonable considering that South Africa was emerging from an era of state-supported huge firms during the apartheid era, which excluded a vast number of people from the economy, especially those from historically disadvantaged backgrounds.[122] Hence, the Preamble to the Competition Act underscores the imperative that the economy should be accessible to a broader spectrum of South Africans.[123] Section 2 of the Act explicitly outlines its purpose as promoting and sustaining competition within South Africa to accomplish various goals, notably ensuring that small and medium-sized enterprises receive fair opportunities to engage in the economy. Additionally, it aims to facilitate more widespread ownership, particularly to elevate historically disadvantaged individuals' ownership interests.[124]

Since eighteenth century, economists have noted that market competition boosts productivity, makes the most of available resources, and directs them toward the most beneficial uses for society.[125] The nineteenth-century economic advances provided precise explanations of how competition maximises efficiency. This viewpoint became crucial in the implementation of competition laws by numerous nations worldwide.[126] Furthermore, nations that prioritised competitive markets started to understand that these domestic markets create comparative advantages in international markets. In short, businesses that have been honed by local rivalry are more competitive in international markets.[127]

While acknowledging the justifications for efficiency, the Competition Act has also offered other justifications for preserving competition law.[128] These justifications are found in the objectives of the Competition Act. The basic goal of competition law in South Africa is "to promote and

[121] Griffiths and Gumbie 2015 Journal *of Antitrust Enforcement* 408–424.
[122] Griffiths and Gumbie 2015 Journal *of Antitrust Enforcement* 408–424.
[123] Preamble to the Competition Act.
[124] Section 2 of the Competition Act.
[125] Vaheesan "The Twilight of The Technocrats' Monopoly on Antitrust? 2018 *Yale Law Journal Forum* 980–995.
[126] Du Plessis "The Role and Nature of the Public Interest in South African Competition Law" 2021 *SA Mercantile Law Journal* 234–252.
[127] Njisane and Ratshisusu "Public Interest Issues in Cross-Border Mergers: Is There a Role for Competition Authorities?" In Bonakele (ed) *Competition Policy for the New Era: Insights from the BRICS Countries* (2017) 185–198.
[128] Vaheesan 2018 *Yale Law Journal Forum* 980–995.

maintain competition."[129] This implies that resource allocation should be based on competitive markets rather than more invasive government regulation or control.[130] Furthermore, six other goals are attached to the main objective, all of which are focused on building an inclusive economy.[131] The first objective is economic efficiency, which acknowledges the standard of total well-being. The second objective is to secure competitive pricing and options for customers, acknowledging the principles of consumer welfare and choice.[132]

The remaining four objectives of competition law are centred around the public interest. The first of these aims is to foster employment opportunities.[133] The second objective is to enhance access to global markets.[134] The third objective is to guarantee fair chances for SMEs to engage in economic activities.[135] Lastly, the fourth objective is to facilitate a broader distribution of ownership, particularly aiming to elevate the ownership stakes of historically disadvantaged individuals.[136] The Competition Act has empowered competition authorities to take into account these specified public interest matters, including black empowerment, in their decision-making processes.[137]

Fox explains that the prevailing notion, at least since the 1960s with increased momentum in the 1980s, was that competition law should exclusively prioritise efficiency as its goal.[138] Pursuing public interest objectives within competition law was seen as unwarranted, as it was believed to potentially undermine the efficiency goals of competition law.[139] The development of South Africa's competition law stemmed from a unique legislative process specific to the country, involving input from various stakeholders with divergent interests.[140] In post-apartheid South Africa, there was a widespread distrust of concentrated markets and large white-owned firms that

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[129] Section 2(1) of the Competition Act.
[130] Angumuthoo "Public Interest in Mergers: South Africa" 2020 *The Antitrust Bulletin* 312–332.
[131] Section 2(1) (a–f) of the Competition Act 1998.
[132] Section 2(1)(a) (b) of the Competition Act 1998.
[133] Section 2(1)(c) of the Competition Act 1998.
[134] Section 2(1)(d) of the Competition Act 1998.
[135] Section 2(1)(e) of the Competition Act 1998.
[136] Section 2(1)(f) of the Competition Act 1998.
[137] Mckenzie "The Increasing Focus on Public Interest Concerns in Competition Policy" 2023 *SA Financial Regulation Journal* 1–7.
[138] Fox 2018 *The Antitrust Bulletin* 3–6.
[139] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[140] Mckenzie 2023 *SA Financial Regulation Journal* 1.

had historically benefited from privileges. This posed a dilemma for the drafters of the Competition Act: on the one hand, the concentration of economic power in a few white hands was deemed offensive, while on the other hand, allowing inefficient firms to persist could result in higher prices and lower quality products for consumers.[141]

The preceding paragraph illustrates how discussions concerning product markets and market access inherently involve equity and efficiency considerations.[142] The explicit inclusion of both efficiency and public interest goals within competition law necessitates coherent implementation.[143] Striking a meaningful balance between these objectives is achievable through certain approaches. Firstly, the Competition Act outlines specific criteria for defining public interest and addressing concerns regarding discretionary boundaries.[144] Secondly, in processes such as merger control, a comprehensive competition analysis is conducted separately from a public interest analysis.[145] This sequential approach ensures a careful evaluation of the impact of mergers on public interest factors as a whole. By maintaining this separation, clarity is preserved regarding the requirements of competition. Additionally, this division enables predictions regarding the outcomes of competition enforcement actions for third parties.[146]

The Competition Act in South Africa has created a competition strategy whose objective is to foster and uphold competition in order to advance defined equality goals, such as black empowerment.[147] Lewis correctly notes that there would be no competition law in South Africa if there were no space to take into account the public interest goals, such as safeguarding entry opportunities for those without power.[148]

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[141] Fox 2018 *The Antitrust Bulletin* 3–6.
[142] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[143] Du Plessis "The role and nature of the public interest in South African competition law" 2021 *SA Mercantile Law Journal* 1–10.
[144] Du Plessis 2021 *SA Mercantile Law Journal* 1.
[145] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[146] Tavuyanago 2015 *Global Journal of Human-Social Science: E Economics* 24.
[147] Neuhoff (2006) 22.
[148] Lewis *Thieves at the dinner table: Enforcing the Competition Act: A Personal Account* (2012) 42.

2 4 MERGER REGULATION IN SOUTH AFRICA

Mergers are becoming a strategy of choice for companies attempting to maintain a competitive advantage over other companies.[149] Radu wrote that companies spend most of their money every year in pursuit of this strategy, and they are in a permanent search for the best transaction to satisfy their needs.[150] The Competition Act 1998 defines a merger as when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.[151] Mergers are most commonly accomplished by purchasing or leasing shares and assets, joint ventures, and/or merging companies/businesses.[152] A merger can be accomplished by purchasing or leasing the shares, an interest, or assets of the other firm in question or by amalgamating or combining the two firms.[153]

Control is central to the existence of a merger as it is the only recognised form by which a merger may come into being. The Competition Act regards a merger to have occurred where one or more companies directly or indirectly acquired or established direct or indirect control over another company's whole business (or part thereof).[154] Control can be expressed as one firm's ability to direct another firm's activities as defined in section 12(2) of the Competition Act of 1998.[155] Furthermore, section**s** 2 and 3 of the Companies Act 71 of 2008 also define control similarly.[156] *Competition Commission v Edgars Consolidated Stores* held that control would result when an asset purchase enables the acquiring firm to increase its market share or to pre-empt a rival from increasing its sales.[157] In *Bulmer SA (Pty) Ltd v The Competition Commission*, the Competition Tribunal dealt with the element of control.[158] The distinction between "direct and indirect control" was made in this instance, and the problem of the merging parties constituting a single economic entity was also addressed. The Tribunal determined that shareholders needed to have a "common

[149] Radu 2015 *International Journal of Academic Research in Accounting, Finance and Management Sciences* 1.
[150] Radu 2015 *International Journal of Academic Research in Accounting, Finance and Management Sciences* 1.
[151] Section 12(1) of the Competition Act; See also Din 2013 *The Antitrust Bulletin* 58.
[152] Neuhoff (2006) 179.
[153] Neuhoff (2006) 179.
[154] Section 12(1)(a) of the competition Act.
[155] Section 12(2) of the Competition Act.
[156] Section 2 and 3 of the Companies Act 71 of 2008.
[157] *Competition Commission v Edgars Consolidated Stores* para 23.
[158] *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd / Distillers Corporation (SA) Lts, Stellenbosch Farmers Winery Group (Pty) Ltd & The Competition Commission* 2001 ZACT 14.

directing mentality" in order for the ultimate change of control argument to succeed in determining whether the parties were part of a single economic organisation.[159] Pre-merger, the element of "common controlling mind" was found to be missing, and the Tribunal ruled that the proposed transaction was notifiable.[160]

The Competition Act empowers competition regulators to investigate transactions that meet intermediate and large merger requirements.[161] Further, the Act distinguishes between small, intermediate, and large mergers.[162] In consultation with the Competition Commission, the Minister of Trade, Industry, and Competition must set lower and higher threshold levels for intermediate and large mergers based on combined annual turnover or assets, or combinations of turnover and assets, in the Republic, in general, or in relation to specific industries, from time to time.[163]

Competition authorities must approve large and intermediate mergers before they can be implemented.[164] The Competition Act, on the other hand, allows for the voluntary notification of small mergers.[165] A small merger occurs when the combined assets and annual turnover of the acquiring firm(s) and target firm(s) are below R560m, and the target firm(s) assets or turnover are less than R80m.[166] A merger will qualify as an intermediate merger if its value falls between the lower and higher thresholds established by the Minister – combined annual turnover and/or asset value of acquiring firm(s) and target firm(s) is R560m or higher and target firm(s) assets or turnover of at least R190m.[167] A merger will qualify as a large merger if its value is equal to or exceeds the higher threshold established by the Minister – combined annual turnover and or asset value of acquiring firm(s) and target firm(s) is R6.6 billion or higher and target firm(s) assets or turnover of at least R190m. The preceding kinds of mergers are referred directly to the Competition Tribunal for consideration.[168] The Commission has the authority to approve or disapprove intermediate mergers on an unconditional or conditional basis. The Competition Commission

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[159] *Bulmer* para 3.
[160] *Bulmer* para 3; see also Kelly (2017) 105.
[161] Section 13(a) of the Competition Act.
[162] Section 11(5)(a), (b) and (c) of the Competition Act.
[163] Section 11(1)(a) of the Competition Act.
[164] Ibid.
[165] Section 13(1)(a) of the Competition Act.
[166] Section 11(5)(a) of the Competition Act.
[167] Section 11(5)(b) of the Competition Act.
[168] Section 11(5)(c) of the Competition Act.

recommends to the Tribunal whether a merger should be approved unconditionally, conditionally, or prohibited for significant mergers. The Tribunal decides large mergers.[169]

A merger that adheres to the legal definition and that passes the threshold test for an intermediate or larger merger must be notified to the Competition Commission.[170] Notification must take place any time before the transaction is implemented. The regulation of mergers in South Africa show that special attention must be given to SMEs as normally the merger include the amalgamation of a big firm and a smaller firm. Consideration of public interests becomes relevant in the context of merger regulation so as to promote historically disadvantaged people.

2 5 RATIONAL FOR MERGER REGULATION

Commentators in competition law hereunder agree that mergers can be an important tool for economic development and contribute to market competition. They also agree that the converse is true, that the same mergers have the potential to create monopolies and/or eliminate competition. From this brief note, the need to regulate mergers is patent. Merger regulation aims to prevent the formation of anti-competitive structures within a market via mergers and acquisitions.[171] As Lewis suggests, mergers raise both legal and economic concerns due to the potential establishment of single-firm dominance. This dominance could result in unilateral abusive conduct or an increased likelihood of anti-competitive horizontal agreements. Coppola adds that merged entities may be incentivised to exploit market dominance, thus detrimentally impacting competition.[172] Furthermore, according to Kelly, mergers can have unilateral effects, where the merged entity unilaterally increases prices or output, or coordinated effects, where fewer firms compete post-merger, prompting coordination among remaining competitors.[173] For the preceding reasons, the regulation of mergers must and has to continuously form an integral part of competition law.[174]

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[169] Section 11(5)(c) of the Competition Act.
[170] Section 13 of the Competition Act.
[171] Davis et al *Companies and other business structures in South Africa* (2009) 151.
[172] Coppola Consideration of Public Interest Factors in Antitrust Merger Control 2015 https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-in-antitrust-merger-control (accessed on 22 January 2024).
[173] Kelly (2017) 105.
[174] Kelly (2017) 105.

The necessity for merger regulation in competition law, according to Nzero, is not just motivated by a desire to prevent or regulate anticompetitive business mergers.[175] Instead, promoting and maintaining a competitive market system is necessary for the economy's and consumers' benefit.[176] The knowledge that corporate mergers can be both pro and anti-competitive motivates the latter goal. As a result, it is necessary to guarantee that merger regulation is effective and flexible enough to discourage any potential or actual harm to competition while promoting corporate transactions through beneficial mergers.[177]

Regulation of competition is an attempt to regulate the structure of the economy and markets to ensure that they work efficiently and avoid market structures growing in a way that harms consumers by resulting in unilateral or cooperative market power.[178] The Competition Act was designed to ensure that the competition authorities examine the widest possible range of potential merger activities, which could adversely alter the existing market structure and reduce the level of competitiveness in the relevant market.[179]

2 6 MERGERS AND BEE

South Africa has been at the forefront of advocating for a competition regulation regime that addresses not only market efficiency but also equity objectives to tackle disparities in opportunity distribution.[180] Scholars widely agree that the South African merger-control framework has effectively prevented mergers from resulting in adverse socio-economic consequences that could perpetuate inequality, unemployment, and poverty.[181] Consequently, the Competition Act prohibits mergers that are likely to significantly impede or diminish competition unless offset by technological efficiency or other pro-competitive benefits or justified on specific public interest grounds.[182] Prior to the 2018 amendment to the Competition Act, a merger could be blocked if it

175 Nzero 2014 *THRHR* 440.
176 Fox 2018 *The Antitrust Bulletin* 3–6.
177 Nzero 2014 *THRHR* 440.
178 Lewis (2012) 77.
179 Lewis (2012) 77.
180 Nair et al “The Inter-Relationships Between Regulation and Competition Enforcement in the South African Liquid Fuels Industry” 2015 *J. energy South. Afr.* 11–19.
181 Church 2018 *THRHR* 194; Du Plessis 2021 *SA Mercantile Law Journal* 1; Fox 2018 *The Antitrust Bulletin* 3–6.
182 Section 12A (1) of the Competition Act.

adversely affected the ability of firms controlled by HDIs to compete, irrespective of its anti-competitive nature.[183]

Notably, the competition authorities' focus in applying public interest concerns in merger control has been largely on preserving jobs and opening access to value chains. The most interesting case relating to public interests was the Tribunal's decision in *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* in 2002[184]. This decision, in the early stages of the new merger regulation dispensation, may have relaxed the enforcement and focus of the Competition Commission.[185] In this case, the Commission recommended the conditional approval of a merger between Shell and Tepco. The reason for the transaction to be underpinned by a condition was that it did not have an anti-competitive effect. Hence, most importantly, the transaction could be approved on public interests.[186] What was most telling for the Tribunal was the question of ownership of the firm, which was to remain in the hands of the previously disadvantaged.[187] The conditions sought to ensure that Tepco continued to exist in South Africa and that its BEE shareholders retained a controlling stake in the merged business.[188] An amendment to the shareholders' agreement was necessary in this case. However, the Tribunal raised concerns regarding the proposed conditions and ultimately rejected them. Instead, the Tribunal approved the merger without imposing any conditions. In its decision, the Tribunal provided the following rationale:

> The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case, the Employment Equity Act, the Skills Development Act, and the Charter [Charter for the South African petroleum and liquid fuels industry] itself immediately spring to mind. The competition authorities, however well-intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they precisely damage those interests that they ostensibly seek to protect.[189]

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[183] Section 12A(3)(d) of the Competition Act.
[184] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* 2002 ZACT 13.
[185] Du Plessis 2021 *SA Mercantile Law Journal* 1.
[186] *Tepco Petroleum* para 32.
[187] *Tepco Petroleum* para 40.
[188] *Tepco Petroleum* para 47.
[189] *Tepco Petroleum* para 58.

Black empowerment's inclusion in merger considerations was severely constrained by the Tribunal's comprehension of the public interest in mergers in the *Tepco Petroleum* decision.[190] It took the Commission at least a decade to actively enforce the requirement for merger parties to take into account empowering historically disadvantaged individuals, consequently incorporating BEE into their considerations.

In 2016, another notable example of the intersection between mergers and BEE occurred when the Commission conditionally approved a merger involving SABMiller Plc, Gutsche Family Investments (Pty) Ltd, and the Coca-Cola Company. This merger aimed to merge the bottling operations of their non-alcoholic beverages (NABs) businesses in South Africa into a unified entity named Coca-Cola Beverages South Africa.[191] Additionally, as part of this transaction, SABMiller would transfer brands such as Appletiser, Grapetiser, Fruitiser, Peartiser, and its Lecol brand to The Coca-Cola Company (TCCC). The proposed transaction posed a challenge to B-BBEE as it was expected to result in a reduction of B-BBEE shareholding from 20% to 11.3% after the merger.[192] To mitigate this concern, the Commission and the merging parties devised a series of remedies that received approval from the Tribunal. The Tribunal imposed conditions mandating Coca-Cola to elevate its B-BBEE stake in South African operations from 11% to 20%.[193]

In *Emerging African Property Partners (Pty) Ltd & Lisaline Investment Holdings (Pty) Ltd*,[194] The Competition Tribunal approved their merger under the 2018 Competition Amendment Act. After conducting the competition test inquiry, the Tribunal determined that the merger wouldn't likely harm competition in the relevant market.[195] Additionally, the merger was found to bring about a "pro-public interest" benefit. This benefit stemmed from the collaboration between a black-owned women empowerment company and the Government Employees Pension Fund.[196] Notably, this

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[190] Du Plessis 2021 *SA Mercantile Law Journal* 1.
[191] *Coca-Cola Beverages Africa Ltd/Various Coca-Cola and Related Botting Operations* 2016 ZACT 68 para 1.
[192] *SABMille*r para 56.
[193] *SABMille*r para 56.
[194] *Emerging African Property Partners (Pty) Ltd v Lisaline Investment Holdings (Pty) Ltd* 2020 ZACT 4 para 1.
[195] *Lisaline* para 8.
[196] *Lisaline* para 9.

public interest benefit aligned with the new section 12A(3)(e) of the Competition Amendment Act.[197]

2 7 EFFECTS OF BEE ON SMES

Following independence, the South African government implemented policies aimed at empowering black citizens.[198] The government introduced initiatives like the Preferential Procurement Policy Framework Act to accelerate their involvement in economic activities.[199] This Act aimed to encourage support for SMEs, prompting multinational enterprises to increase procurement from SMEs and thereby fostering black participation in job creation.[200] Additionally, the government introduced the BEE framework in 2003, delineated by the Department of Trade and Industry (DTI). This framework focused on three main pillars: ownership, human resources development, and indirect empowerment. Subsequently, the BEE framework was formalised through the enactment of the B-BBEE Act.[201]

The B-BBEE was implemented to address inequality and various socio-economic challenges prevalent in South Africa.[202] Among its objectives is to enhance SMEs' access to finance.[203] The B-BBEE Act defines BEE as the economic empowerment of all black people, encompassing women, workers, youth, individuals with disabilities, and rural residents. This empowerment is achieved through diverse socio-economic strategies, including increasing black ownership, management, and control of enterprises and productive assets, facilitating ownership and management by communities, workers, cooperatives, and other collective enterprises, as well as investing in enterprises owned or managed by black individuals. The BEE serves as a pivotal tool

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[197] Section 12A(3)(e) of the Competition Amendment Act.

[198] Musabayana and Mutambara "The Implementation of the Broad-Based Black Economic Empowerment (B-BBEE) Policy in South Africa: A Myth or a Reality in SMEs?" 2022 *Australasian Accounting Business and Finance Journal* 73–84.

[199] Preferential Procurement Policy Framework Act 5 of 2000.

[200] CHD "Shifting sands: A recent shakeup to the preferential procurement regime in South Africa" https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Sector/Public/public-law-alert-24-march-2022-shifting-sands-a-recent-shakeup-to-the-preferential-procurement-regime-in-south-africa.html (acccessed 30 January 2024).

[201] Based Black Economic Empowerment Act 53 of 2003.

[202] Mpehle "Black Economic Empowerment in South Africa" 2011 *Administratio Publica* 140–153.

[203] Horwitz "An Assessment of Employment Equity and Broad-Based Black Economic Empowerment Developments in South Africa" 2011 *Equality, Diversity and Inclusion: An International Journal* 297–317.

for transforming South Africa and addressing the legacy of apartheid's racial discrimination.[204] It stands as a necessary government intervention to rectify the systematic exclusion of the majority of South Africans from fully participating in the economic development of their country.[205]

2 7 1 *Role played by BEE on SMEs*

Encouraging SMEs is crucial for the economic development of South Africa and the creation of much-needed jobs to address poverty and unemployment.[206] SMEs are viewed as essential in addressing the legacy of apartheid and are vital for the country's sustained economic growth.[207] Within the South African economy, SMEs play a pivotal role in poverty alleviation by generating employment opportunities and facilitating transformation through the achievement of B-BBEE objectives.[208] The government's primary aim through the B-BBEE program is to empower black individuals by providing financial support, which, in turn, helps alleviate unemployment by creating more job opportunities.[209]

The BEE program was seen to be the most effective means of enabling South Africa's indigenous black population to engage in the State's economy and eventually take control of it.[210] One of the main goals of BEE is to increase SMEs' access to financing. As such, it appears that the government had a noble idea to empower the black community by providing financial resources essential to operating a business.[211] The government saw SMEs as a source of jobs and believed that in order to fight rising unemployment, SMEs needed to be created and supported. It is clear that for BEE to succeed in South Africa, small enterprises must be fully supported.[212] It follows that the inclusion of BEE as one of the public interest objectives in the Competition Act is not

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[204] Section 1 of the B-BEEE Act 2003.
[205] Van De Rheede "Black Economic Empowerment in South Africa: Is Transformation of The Management Structures of Enterprises as Essential as it Should Be?" 2022 *Law, Democracy and Development* 84–105.
[206] Smit and Watkins "A Literature Review of Small and Medium Enterprises (SME) Risk Management Practices in South Africa" 2012 *African Journal of Business Management* 6324-6330.
[207] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[208] Bushe "The Causes and Impact of Business Failure Among Small to Micro and Medium Enterprises In South Africa" 2019 Africa's *Public Service Delivery and Performance Review* 270.
[209] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[210] Horwitz 2011 *Equality, Diversity and Inclusion: An International Journal* 297.
[211] Bushe 2019 Africa's *Public Service Delivery and Performance Review* 270.
[212] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.

surprising, especially in regard to merger regulation. This advancement ensures SMEs do not disappear or lose their significance when merging with big businesses.[213]

2 7 2 *Contribution of SMEs to the economy of South Africa*

Fox contends that SMEs have contributed a great deal to the development of the economy in South Africa and have also helped eradicate poverty and unemployment.[214] Their continued existence and support are desirable in South Africa to foster sustainable development for the economy.[215] In the context of merger regulation, BEE has ensured that the interests of SMEs are catered to foster an inclusive economy.[216] It is emphasised that the SMEs play an important role with regard to economic growth, job creation and poverty alleviation, especially in developing nations.[217] In this regard, the South African government has put a high priority on supporting SMEs.[218]

The importance placed on SMEs stems from the historical context where, under the pre-independence apartheid regime, black individuals were systematically excluded from entrepreneurship and meaningful participation in the economy.[219] During apartheid, black people were predominantly relegated to providing cheap labour and had minimal ownership, decision-making power, and creative involvement in economic activities.[220] In post-apartheid South Africa, SMEs have emerged as significant employers, responsible for employing a substantial portion of the workforce and contributing to nearly 43% of the total salaries and wages paid. This highlights SMEs' pivotal role in providing employment opportunities and distributing income within the economy.[221]

2 8 SUMMARY

In conclusion, it should be noted that SMEs play an integral part in the South African economy. Most of these SMEs are owned and controlled by HDIs, particularly black people of South Africa.

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213 Church 2018 *THRHR* 194.
214 Fox 2018 The *Antitrust Bulletin* 3.
215 Shava 2017 *Journal of Economics and Behavioral Studies* 161.
216 Shava 2017 *Journal of Economics and Behavioral Studies* 161.
217 Fox 2018 The *Antitrust Bulletin* 3.
218 Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
219 Shava 2017 *Journal of Economics and Behavioral Studies* 161.
220 Fox 2018 The *Antitrust Bulletin* 3.
221 Church 2018 *THRHR* 194.

The government's BEE policies have ensured that SMEs are supported to the extent that they even access financing from the government. As such, the inclusion of BEE as a public interest goal in merger regulation seeks to accelerate the government’s effort to ensure that past inequality is aggressed to expose black people to business opportunities previously reserved for a few white people.

The chapter sought to look at the development of competition law in South Africa and a brief background of merger regulation in South Africa because the study is concerned with BEE in the context of merger regulation. Furthermore, an important debate on the efficiency of competition versus BEE was discussed. The chapter has shown that at the interface of competition law, public interest goals that aim at equity may clash with efficiency goals. It was noted that South Africa has a unique competition law that speaks to its past and balances efficiency goals with equity or public interest goals. Also, the chapter provided an understanding of mergers and whether there is a need to regulate mergers in South Africa. Finally, the chapter provided information on mergers and BEE and the effects of BEE on merger regulation.

The next chapter will provide an analysis of public interest goals on merger regulation and give a judgment-led analysis of BEE in merger regulation in South Africa.

CHAPTER 3

AN ANALYSIS OF PUBLIC INTEREST GOALS WITH SPECIFIC REFERENCE TO BLACK ECONOMIC EMPOWERMENT IN MERGER EVALUATION UNDER THE COMPETITION ACT 1998

3 1 INTRODUCTION

The main objective of competition policy is to preserve market competition by creating an environment that fosters the efficiency and responsiveness of businesses and serves consumers' interests.[222] Competition law aims to increase consumer welfare, primarily through efficiency.[223] However, in recent years, there has been a rise in the inclusion of non-competition goals in competition law, especially in developing countries.[224] These non-competition goals, which may not serve efficiency aims, are often referred to as "public interest" goals. Arguably, competition policy advances 'the public interest' to the extent that it is concerned with the welfare of consumers or broader society in relation to a particular market.[225] In competition policy, however, "public interest" goals run parallel to competition goals but rely on competition law as the enforcement framework.[226] South Africa evaluates mergers on public interest grounds as part of its substantive test. These public interest criteria are outlined as an additional factor and separate from conventional competition factors, resulting in a parallel assessment.[227] Competition authorities may approve an anticompetitive merger on public interest grounds or prohibit a merger that would be considered pro-competitive.[228]

The present chapter examines aspects related to the consideration of public interests in the evaluation of mergers and the assessment criteria used by the competition authorities. The chapter

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[222] Smith and Swan "Africa: Public Interest factors in competition decisions" 2014 *The African and Middle Eastern Antitrust Review* 1–6.
[223] Changole and Boshoff "Non-competition Goals and Their Impact on South African Merger Control: An Empirical Analysis" 2022 *Review of Industrial Organization* 361–40.
[224] Capobianco and Nagy "Public Interest Clauses in Developing Countries" 2016 *Journal of European Competition Law & Practice* 45–51.
[225] Changole and Boshoff 2022 *Review of Industrial Organization* 361–40.
[226] Oxenham "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with The Quest for Multi-Jurisdictional Merger Control Certainty" 2013 *US-China Law Review* 211–227.
[227] Angumuthoo, Lotter and Wood "Public interest in mergers: South Africa" 2020 *The Antitrust Bulletin* 312–332.
[228] Capobianco and Nagy "Public interest clauses in developing countries" 2020 *Journal of European Competition Law and Practice* 46–51.

goes further and examines judgments that either approved or refused mergers on the grounds of BEE as a public interest consideration in merger evaluation.

3 2 EVALUATION OF MERGERS IN SOUTH AFRICA: AN OVERVIEW

Section 12A (1) of the Competition Amendment Act 2000 provided that whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger was likely to substantially prevent or lessen competition by assessing the factors set out in subsection (2), and –

> (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine
>
> (i) whether or not the merger is likely to result in any technological, efficiency, or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
>
> (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
>
> (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).[229]

Three considerations had to be made. First, the authorities had to initially determine whether the merger was likely to substantially prevent or lessen competition based on the listed competition considerations.[230] Secondly, if the merger was likely to prevent or lessen competition substantially, the authorities had to determine whether the merger was likely to lead to any technological, efficiency, or other pro-competitive gains that would offset the anti-competitiveness and would not occur but for the merger.[231] Thirdly, the authorities had to determine whether such a merger could or could not be justified on substantial public interest grounds (known as "the competition

[229] Section 12A(1)(a)(ii) and (b) of the Competition Amendment Act 2000.
[230] Section 12A(1)(a) of the Competition Amendment Act 2000.
[231] Section 12A(1)(a)(i) of the Competition Amendment Act 2000.

test").[232] Finally, the authorities had to determine whether the merger could or could not be justified on substantial public interest grounds, separate from the competition test but in identical wording.[233] In essence, merger evaluation in South Africa involves a bilateral test of competition and public interests considerations. This bilateral test of competition and public interest considerations in merger evaluation is unique in that not many countries, save for a few developing countries, explicitly include public interest considerations in their merger analysis.[234]

3 3 AMENDMENT TO THE COMPETITION ACT

Section 12A of the Competition Act has since been amended by section 9 of the Competition Amendment Act 2018.[235] Following the amendment, section 12A(1)(a)(ii) and (1)(b) have been replaced by the new section 12A(1)(b) and (1A), respectively. The wording of subsection (1)(a)(ii) has been retained in the new subsection (1)(b) in its previous form and has the same substantive effect.[236] In its complete version, section 12A now provides that:

> (1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in subsection (2) and if it appears that the merger is likely to substantially prevent or lessen competition, then determine—
>
> (a) whether or not the merger is likely to result in any technological, efficiency, or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented; and
>
> (b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

[232] Section 12A(1)(a)(ii) of the Competition Amendment Act 2000.
[233] Section 12A(1)(b) of the Competition Amendment Act 2000.
[234] Smith and Swan "Africa: Public Interest Factors in Competition Decisions" 2014 *Global Competition Review*. See also Oxenham "Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty" 2012 *US-China Law Review* 211.
[235] Section 9 of the Competition Amendment Act 2018.
[236] Angumuthoo at al 2020 *The Antitrust Bulletin* 312.

> (1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).[237]

Prior to amendment, section 12A(1)(b) of the Competition Act, as quoted earlier, began with the word "otherwise". The difference between the two subsections is that the current subsection begins with the word "despite." The dictionary meaning of the word "otherwise" is "in another manner" or "in other respects."[238] Whereas the word despite means "in spite of."[239] The Tribunal has interpreted the word "otherwise" to mean informed by its context.[240] The meaning the Tribunal ascribed was that, regardless of the competition analysis leg, the public interest analysis leg must still be carried out.[241] In its view, this interpretation is consistent with the meaning of the newly used word "despite." Therefore, the inquiry into the consideration of public interests remains the same.[242]

Under the original Competition Act introduced in 1998, a merger is justifiable on public interest grounds after considering its effect on 1) a particular industrial sector or region, 2) employment, 3) the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and 4) the ability of national industries to compete in international markets.[243] Subsequent amendments to competition legislation expanded the above list to include the goal of promoting a greater spread of ownership, particularly to increase the ownership levels of historically disadvantaged persons and workers.[244] It should be noted that with this amendment, two public interest goals relate to BEE in the merger evaluation.[245]

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[237] Section 12A(1)(a), (b) and (1A) of the Competition Act 1998.
[238] Dictionary.com www.dictionary.com/browse/otherwise(accessed 6 December 2024).
[239] Dictionary.com (accessed 6 December 2021).
[240] *Kumba Resources* para 138.
[241] *Kumba Resources* para 138.
[242] Angumuthoo et al 2020 *The Antitrust Bulletin* 312.
[243] Section 12(3)(a), (b), (c) and (d) of the Competition Act.
[244] Section 12(3) (e) of the Competition Act 1998.
[245] Du Plessis 2021 *SA Mercantile Law Journal* 1.

The legal test for merger evaluation is one of the few legal tests that rely heavily on prediction, as opposed to remedying an act that has already occurred or an act that is imminent to occur.[246] To this effect, the Competition Tribunal, in the merger case between *Mondi Limited and Kohler Cores and Tubes (a division of Kohler Packaging Limited*)[247], aptly acknowledged that:

> Of course, a prediction must be supported by evidence, but no amount of reliable evidence will remove the predictive or 'probabilistic' element in merger adjudication. This is explicitly recognized in the Act, which enjoins us to determine the 'likely' consequences of a transaction before us. The Act explicitly provides a regime where the effect of a merger is assessed prior to its implementation.[248]

It is important to note that public interest considerations may still prohibit a pro-competitive merger, and conversely, a merger that promotes public interest considerations may still be prohibited based on competition considerations.[249] This only presupposes that the two tests are on equal footing. However, even where equality exists, a compromise must still be made for those rare occasions when contradictions arise.[250]

3 4 PUBLIC INTEREST MUST BE MERGER SPECIFIC

One of the important limitations of the public interest considerations is that they must be merger specific.[251] The public interest analysis is also affected by merger specificity in the competition assessment. Concerns about public interest can only be considered if they are caused by the merger. It is not the role of competition law to go beyond the specific transaction and address issues unrelated to the merger.[252] The Tribunal explained in *Massmart* that being merger-specific meant that unless the merger was the cause of public interest concerns, the Tribunal had to refrain from acting on the merger. The Tribunal explained in Massmart that being merger-specific meant that unless the merger was the source of public interest concerns, the Tribunal had to refrain from

[246] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[247] *Mondi Limited and Kohler Cores and Tubes (a division of Kohler Packaging Limited)* 2002 ZACT 40.
[248] *Mondli* para 24.
[249] *Harmony Gold Mining Co Limited/Gold Fields Limited* 2005 ZACT 29.
[250] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[251] *Tepco* para 58.
[252] Carrim and Ndlovu *Handbook of Case Law* (2020) 48.

acting on the merger.[253] In other words, the merger must be the source of public concern. If it is discovered that the public interest existed prior to and independent of the merger transaction, it cannot be considered merger specific.[254] A good example of merger specificity is when a merger will result in job losses; the Commission may seek to prevent this from happening by imposing a moratorium on layoffs.[255]

In *Glencore International PLC & Xstrata PLC*,[256] several public-interest issues did not or could not arise as a result of the merger. Concerns were raised in this case about the future of domestic coal prices and their impact on South Africa's electricity prices. The Tribunal acknowledged that, while this was concerning, it was an industry-wide issue that could be addressed through other policy instruments unrelated to the merger transaction.[257] The Tribunal noted that it could not do anything more than highlight such concerns as they were not merger-specific, however weighty.[258] The court held that the Tribunal was correct in not pursuing such public interest concerns any further; doing so would be ultra vires because the authorities' role in such circumstances was not to determine whether public interest concerns were legitimate policy goals, but rather whether there was causation between the concerns and the merger. There can be no foundation for a competition authority intervention if there is no link between the public interest concerns and the merger.[259]

3 5 PUBLIC INTEREST MUST BE SUBSTANTIAL

The Competition Act not only requires competition authorities to assess the impact of a merger on public interest grounds, but it also requires them to do so to a high standard: substantial public interest grounds.[260] Substantial, in the context of the Competition Act, indicates that the benefits of a merger to the public interest must outweigh the disadvantages to competition[261] Parties alleging substantiality must justify the "substantial positive effects" it alleges will benefit public

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[253] *Walmart Stores Inc v Massmart Holdings* Ltd 2011 ZACT 42 para 32.
[254] *Massmart* paras 32−33.
[255] Carrim and Ndlovu (2020) 40.
[256] *Glencore International PLC v Xstrata PLC* 33/LM/Mar12 para 103.
[257] *Glencore* paras 103–104. See also Staples et al "Taking public interest too far: *Walmart Stores Inc v Massmart Holdings Ltd*" 2013 *South African Mercantile Law Journal* 25 on the discussion that the Tribunal's imposition of a bargaining condition in *Massmart* was an unacceptable overstretch of the public interest inquiry.
[258] *Glencore* para 103–105.
[259] Carrim and Ndlovu (2020) 48.
[260] Section 12A(1)(b) of the Competition Act 1998.
[261] Balkin and Mbikiwa "Balancing Competition Act: paradox" 2014 *Business Law and Tax Review* 2.

interest.[262] After that, the competition authorities will have to weigh the negative implications on competition against the favorable effects on the public interest. Simply defined, the public interest must be so strong that its impact cannot be overlooked.[263]

The approach to determining substantiality was adopted in *Massmart*.[264] The significance of the public interest is judged using this technique against the backdrop of the entire economy, rather than just the environment of the merging parties.[265] In the case of *Glencore*, for example, the Tribunal was forced to protect 100 employment in a field where thousands of jobs are lost every month due to market conditions.[266] According to Balkin and Mbikiwa, the ruling in the later instance was not significant because it was impossible to reconcile every merger being hampered "by the likelihood of only a few retrenchments." The substantiality requirement requires that the context of the South African economy be assessed in respect to the effect of a specific merger on the public interest.[267]

3 6 TESTS THAT ARE USED TO DETERMINE COMPETITION AND PUBLIC INTERESTS IN MERGER EVALUATION

The Competition Act provides three tests to determine whether a proposed merger transaction can be approved or refused.[268] Essentially, the test assists in the inquiry into the effects of the proposed merger on competition and public interest.[269]

3 6 1 *Competition considerations*

The Competition Act encourages the competition authorities to determine whether the merger will substantially prevent or lessen competition and, if so, whether the merger is likely to result in any technological, efficiency, or other pro-competitive gains that may offset the lessening of

[262] Section 12A(1)(b) of the Competition Act 1998.
[263] Balkin and Mbikiwa 2014 *Business Law and Tax Review* 2.
[264] *Massmart* 32.
[265] Balkin and Mbikiwa 2014 *Business Law and Tax Review* 2.
[266] *Glencore* paras 103−105.
[267] Balkin and Mbikiwa 2014 *Business Law and Tax Review* 2.
[268] Nzero "The implications of public interest considerations in the interpretation and application of the failing-firm doctrine in South African merger analysis" 2017 *THRHR* 602.
[269] Hodge et al 2009 *Competition Policy, Law & Economics Conference* 9–10. See also Katsoulacos *International Law and Economics* (2016) 291.

competition.[270] In their pursuit, the authorities must determine the relevant market or markets to be affected.[271] This determination is for a simple reason: to understand and fully acquaint with the structure of the affected market or markets.[272] Section 12A(2) provides a non-exhaustive list of factors[273] that serve as guidelines upon which an assessment must be based to evaluate whether the transaction in question is likely to "substantially prevent or lessen competition."[274]

3 6 2 *Defences: efficiencies, technological, and other pro-competitive gains*

Section 12A(1)(a) of the Competition Act enlists three defences to justify otherwise 'anti-competitive' mergers.[275] It registers efficiencies, technological, and other pro-competitive gains as justifications for mergers that would otherwise be considered as being anti-competitive.[276] In other words, even though a proposed merger might have negative competition effects, the same merger may be advantageous on grounds of efficiency, which would benefit the economy in general. Therefore, the Commission or the Tribunal must determine whether substantial benefits exist to justify an otherwise anti-competitive merger in the second leg of the test.[277]

The efficiency defence is considered a full defence in the South African competition law regime.[278] Efficiencies have been concisely defined as "the measure of the level of wastage of the society's resources."[279] This presupposes that "conduct is 'efficient' if it minimises waste and 'inefficient' if it increases waste." For instance, it may be efficient for firms competing in the same market to merge because the merger would result in better economies of scale and an increase in size and consumer outreach.[280] The Competition Tribunal has held that efficiencies must be quantified and

[270] Section 12A(1)(a) of the Competition Act 1998.
[271] Angumuthoo et al 2020 *The Antitrust Bulletin* 312-332.
[272] Angumuthoo et al 2020 *The Antitrust Bulletin* 312-332.
[273] These factors are: (a) the actual and potential level of import competition in the market; (b) the ease of entry into the market, including tariff and regulatory barriers; (c) the level and trends of concentration, and history of collusion, in the market; (d) the degree of countervailing power in the market; (e) the dynamic characteristics of the market, including growth, innovation, and product differentiate; (f) the nature and extent of vertical integration in the market; (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and (h) whether the merger will result in the removal of an effective competitor.
[274] Changole and Boshoff 2022 *Review of Industrial Organization* 361–401.
[275] Section 12A(1)(a) the Competition Act.
[276] Section 12A(1)(a) of the Competition Act.
[277] Boshoff et al "The Economics of Public Interest Provisions In South African Competition Policy" 2014 Competition Commission http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf (accessed 29 February 2024).
[278] Sutherland and Kemp *Competition Law of South Africa* (2013) 75.
[279] Griffiths and Gumbie 2015 Journal *of Antitrust Enforcement* 408–424.
[280] Griffiths and Gumbie 2015 *Journal of Antitrust Enforcement* 408–424.

verifiable, which is a direct consequence of the merger.[281] A merger that raises competition concerns may thus be approved if merging parties can establish that the merger is likely to result in efficiency or any benefits that might outweigh or offset any likely result that might have anti-competitive effects.[282] However, even if efficiency or any other benefits can be established, the merger is still subjected to further scrutiny under the public interest criteria.[283]

3 6 3 *Public interest considerations*

The legislature thought it fit to have the public interest considerations as a standalone test for merger analysis. After conducting the competition test, the Competition Act provides that the competition authorities must determine whether the merger can or cannot be justified on substantial public interest grounds.[284] Neuhoff opines that the public interest test is the ultimate test in determining the fate of a merger.[285] This is important because it shows that regardless of the findings of the first two tests, that is, the competition and efficiency defence test, the merger must still be assessed for public interest compatibility. The public interest leg can thus result in the acceptance of a merger that would have failed the first two obstacles or in its prohibition despite passing the first two.[286]

Section 12A(1)(b), on the one hand, is the public interest test that seeks to reconcile the competition test with the public interest test. This provision juxtaposes merger review on whether the merger will likely result in the lessening or prevention of competition and, if so, whether it may be justified on competition defences[287] and whether such a merger may also be justified on listed public interest grounds. In other words, where a merger is likely to substantially prevent or lessen competition, the authorities must determine whether such a merger is likely to result in any competition defences and whether it can or cannot be justified on public interest grounds.[288]

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[281] *Pioneer Hi-Bred International Inc/ Pannar Seed (Pty) Ltd Case* 81/AM/Dec10.
[282] Boshoff et al 2014 Competition Commission http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf (accessed 7 March 2024)
[283] Section 12A(1)(b) and (1A) of the Competition Act.
[284] Section 12A(1)(b) and section 12A(1A) of the Competition Act.
[285] Neuhoff *A Practical Guide to the South African Competition Act* 2 ed (2017) 245.
[286] See Kelly *Principles of Competition Law in South Africa* (2017) 354.
[287] The Competition defences as provided in the Competition Act 1998 are technological, efficiencies or other pro-competitive gain.
[288] Section 12A(1)(b) and (1A) of the Competition Act.

Section 12A(1A), on the other hand, is a balancing approach that essentially requires the public interest test to balance against a merger's effects on competition. In *Anglo American Holdings Ltd & Kumba Resources Ltd*, the Tribunal rightly stated that the public interest inquiry in the old section 12A(1)(b) meant that authorities must have regard to the public interest considerations even where competition is not implicated because of the word "otherwise" in the provision.[289] As noted by the Tribunal in Distillers Corporation SA Limited & Stellenbosch Farmers Winery Group Ltd, the public interest in this provision may permit an otherwise anti-competitive merger and, conversely, permit the prohibition of an otherwise pro-competitive effect.[290] Further, the public interest inquiry in this provision always emerges as having passed the competition inquiry.[291]

Two of the listed public interest grounds relate to BEE. These are the ability of small-sized businesses or firms previously owned or controlled by HDIs to compete[292] and the promotion of a greater spread of ownership to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.[293] These are important for this study because they relate to BEE and speak to the promotion of SMEs. The Tribunal and Competition Appeal Court (CAC) have pronounced all the public interests' considerations, but this study will focus on selected judgements related to BEE. The study also attempts to draw the legal implications of BEE on SMEs in the context of merger regulation.

3 7 JUDGMENT LED ANALYSIS OF BLACK ECONOMIC EMPOWERMENT IN THE CONTEXT OF MERGER REGULATION

The Tribunal and CAC have made several judgements regarding each of the public interests listed above. This study, however, focuses on the two public interest considerations that deal with BEE. As such, those judgments will be consulted, and an attempt will be made to see how SMEs are catered to in those judgements. Changole and Boshoff opine that SMEs are the future of South Africa and other developing nations because they boost the economy by creating more jobs and empowering the most disadvantaged people in society.[294] As such, their continued survival and

[289] *Kumba* para 138.
[290] *Distillers Corporation SA Limited & Stellenbosch Farmers Winery Group Ltd*, (08/LM/Feb02) para 214.
[291] *Harmony Gold Mining Company Limited & Gold Fields Limited* 93/LM/Nov04 para 43.
[292] Section 12A(3)(c) of the Competition Act.
[293] Section 12A(3)(e) if the Competition Act.
[294] Changole and Boshoff 2022 *Review of Industrial Organization* 401.

protection are in the best interests of the State. Therefore, even in the context of merger regulation that appears to be dealing with SMEs more often, competition authorities should ensure that public interest consideration relating to BEE is prioritised to ensure SMEs' profitability and growth prospects.

3 7 1 *The effects of a merger on the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive*

In terms of section 12A(3)(c) of the Competition Act, the effects of a merger on the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive must be evaluated as part of the public interest test.[295] This requirement is in line with one of the definite aims of the Competition Act as provided for in the preamble,[296] to spread greater ownership by a greater number of South Africans.

In *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*,[297] one of the largest mergers in South Africa, Thebe, a BEE company, attempted to sell off its subsidiary, Tepco, to Shell South Africa. The reason for the sale was that Tepco found itself in financial problems, suffering net losses due to the mature nature of the industry as well as high structural barriers to entry. Per the Competition Act, the Tribunal's first question was whether the merger was likely to prevent or lessen competition.[298] In this regard, it was found that the merger was not likely to prevent or lessen competition.[299]

The second question that the Tribunal asked was whether there were any public interest grounds for not approving the merger.[300] The Tribunal considered the merger's effect on the ability of small, black-owned/controlled firms to become competitive.[301] The Tribunal noted that the Commission had approved the merger subject to several conditions. One of the conditions imposed by the Commission was that Tepco had to continue to exist in the market jointly controlled/owned by

[295] Section 12A(3)(c) of the Competition Act.
[296] Preamble to the Competition Act.
[297] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* 66/LM/Oct01.
[298] *Tepco* para 32; ee also section 12A (1) of the Competition Act.
[299] *Tepco* para 35.
[300] *Tepco* para 36.
[301] *Tepco* para 13.

Thebe and Shell South Africa.[302] However, the Tribunal was critical of this condition because it amounted to the parties restructuring the deal in a form that neither of the parties wanted. The Tribunal stated: "Empowerment is not furthered by obliging firms controlled by HDIs to continue to exist on a life support machine.[303] The Tribunal was also critical of a number of other conditions imposed by the Commission on the proposed merger. In fact, the Tribunal approved the merger without any conditions. The Tribunal found that the Commission had adopted a paternalistic approach.[304]

In *Anglo American Holdings Ltd v Kumba Resources,* the Competition Tribunal approved the merger between Anglo American Plc and Kumba Resources. Anglo attempted to purchase Kumba, a BEE company.[305] In this case, the Industrial Development Corporation (IDC), a statutory body whose primary function is to foster economic development pertaining to black-owned businesses, intervened on public interest grounds. The IDC argued that the merger would pose a barrier to entry for potential black-owned firms and, therefore, impede empowerment in the industry. The IDC recommended that Kumba needed to remain a BEE -controlled firm.[306] The IDC maintained that in interpreting the provisions in the Competition Act pertaining to BEE, the Tribunal ought to adopt a purposive interpretation and not confine itself to the literal wording of the Competition Act 1998.[307] Hence, the IDC argued that when interpreting the Competition Act, the Tribunal must respect the objectives of promoting a greater spread of ownership and increasing stakes of historically disadvantaged persons in South Africa. The IDC wanted the provision to be interpreted widely in the light of the preamble and section 2.[308] The apartheid economic system led to excessive concentration of business ownership in the economy, and one of the goals of the Competition Act was to promote a wider spread of ownership of economic assets by a greater number of South Africans.[309] It was accordingly argued that a merger between Anglo and Kumba

[302] *Tepco* para 2.
[303] *Tepco* para 42.
[304] *Tepco* para 58.
[305] *Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation* (intervening) (46/LM/Jun02) 2003 ZACT 45.
[306] *Kumba* paras 148-152.
[307] *Kumba* paras 151 and152.
[308] Preamble and section 2 of the Competition Act.
[309] Changole and Boshoff 2022 *Review of Industrial Organization* 389.

had to be prohibited or allowed, subject to conditions that allowed these assets to come into the hands of previously disadvantaged persons.[310]

On the other hand, Anglo argued that the Tribunal should not use a broad interpretation of these provisions. In its argument, Anglo submitted that such an interpretation would have dangerous policy consequences because it would transform the Competition Act from an antitrust statute into an unchecked vehicle for redistribution. Anglo argued further that the legislature had not intended to invest such an ambitious power in an un-elected body without clear language in the provisions.[311]

In its finding, the Tribunal did not pronounce which interpretation it preferred as was the correct one. However, it did say that if the IDC's approach were to be applied, there was no evidence to suggest that the merger would frustrate the Competition Act's purpose.[312] The Tribunal found no evidence to suggest that the merger would close the door to the increase of historically disadvantaged persons' ownership in the industry.[313] Furthermore, it needed to be sufficiently shown that the interests of previously disadvantaged persons in Kumba would not be increased despite the Anglo take-over.[314] The Tribunal, therefore, approved the merger. The Tribunal stated that although it had not found for the IDC in this decision, it benefited from its participation as an intervener, given the economic and social significance of the transaction.[315]

3 7 2 *Effect on the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*

In *Emerging African Property Partners (Pty) Ltd & Lisaline Investment Holdings (Pty) Ltd*,[316] the Competition Tribunal approved the merger between the two parties pursuant to the 2018 Competition Amendment Act. On the competition test inquiry, the Tribunal found that the merger

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[310] *Kumba para.* para 148.
[311] *Kumba* para 156.
[312] *Kumba* para 161.
[313] *Kumba* para 167.
[314] *Kumba* para 170 and 173.
[315] *Kumba* para 168.
[316] *Emerging African Property Partners (Pty) Ltd v Lisaline Investment Holdings (Pty) Ltd* 2020 ZACT 4 para 1.

was not likely to prevent or lessen competition in the relevant market.[317] It further found that the proposed merger resulted in a “pro-public interest” benefit. The benefit of public interest was that a black-owned women's empowerment company was partnering with the Government Employees Pension Fund.[318] This public interest benefit, by necessary implication, fell squarely under the new section 12A(3)(e) of the Competition Amendment Act.[319]

In *Harmony Gold*, the second public interest concern was the greater spread of ownership by historically disadvantaged people. In this regard, the Tribunal found that because both Harmony Gold and AngloGold were JSE-listed companies, with Harmony Gold’s shareholding at the group level being +30% B-BBEE, this would result in a greater spread of ownership and increased levels of ownership by historically disadvantaged persons.[320] As a result, the Tribunal concluded that no public interest concerns arose from the proposed merger. The merger was also an example of how to apply the new public interest factor introduced by section 12A(3)(e), which refers to a greater spread of ownership and increased levels of ownership by historically disadvantaged persons.[321]

The most high-profile case dealing with HDIs was the Competition Commission’s prohibition in June 2020 of the sale of Burger King (South Africa) (RF) (Pty) Ltd (“BKSA”) to private equity firm ECP Africa. It was the first time since the Competition Act came into force on 1 September 1999 that a merger had been prohibited solely on public interest grounds.[322] The merger raised no competition concerns, and the sole reason for the prohibition was that the post-merger shareholding of HDIs in BKSA would decrease from 68% to 0%.[323] Following discussions with the merging parties and the Minister of Trade, Industry, and Competition, the Commission changed its view and accepted a conditional approval of the merger, which the Tribunal approved. The conditions included undertakings to:

- increase the procurement of products and/or services from “B-BBEE accredited suppliers” in South Africa;

[317] *Lisaline* para 8.
[318] *Lisaline* para 9.
[319] Section 12A(3)(e) of the Competition Amendment Act 2018.
[320] *Harmony Gold* para 19.
[321] Section 12A(3)(e) of the Competition Amendment Act 2018.
[322] *The Burger King (South Africa) Rf (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd* 2021MAR0009.
[323] *Burger King* para 15.

- establish an employee share ownership program to acquire an "effective 5% interest" in BKSA;
- dispose of a meat plant (which made patties for BKSA) to a HDI buyer, and that BKSA would conclude a supply agreement with the plant/HDI buyer.[324]

The competition authorities recently approved Several other mergers subject to BEE-related conditions. A good example is a merger involving Puregas (Pty) Ltd, which was approved subject to the condition that Puregas invest in training and education for certain employees and their children and provide support to a HDP owned gas transport company and an HDI-owned potential provider of carbon oxide.[325] In terms of the public interest, the Commission found that the transaction would lead to a dilution of shareholding by HDIs. To remedy this, the Commission and the merging parties agreed that Puregas would (i) invest in training and education for Employees and their Children, (ii) provide financial and other support to an HDI-owned gas transport company entering the market for speciality gases, and (iii) provide technical advice and support to a HDP-owned potential provider 4 of Carbon Dioxide relating to the establishment of a Carbon Dioxide plant or similar project in South Africa.[326] Of interest is that the Commission accepted these non-ownership-related conditions to deal with its concern about the post-merger dilution of the HDI shareholding in Puregas. This indicates a more subtle approach compared to the Commission's 2020 prohibition of the BKSA merger.[327]

In another case, a merger involving Altantica South Africa Operations (Pty) Ltd was approved subject to the condition that it implements a B-BBEE ownership transaction, including an employee share ownership program and a minimum 8% shareholding by HDI employees.[328] The merger did not raise competition concerns. Atlantica is not owned or controlled by a member of a

[324] *Burger King* para 26.
[325] *The NA Family Trust ("NA Trust") / Puregas (Pty) Ltd ("Puregas")* Case number 2015Nov0629.
[326] Ibid.
[327] Walter and Ritchken "Black Economic Empowerment Regulation and Risk Incentives" 2022 *Journal of Economic Dynamics and Control* 1.
[328] *Atlantica Sustainable Infrastructure plc and The Employees of Abengoa South Africa (Pty) Ltd* Case no: LM094Oct21. See also Steryn "The Increasing Importance of Broad-Based Black Economic Empowerment ("BBBEE") in South African competition law" https://competitionlawblog.kluwercompetitionlaw.com/2022/05/02/the-increasing-importance-of-broad-based-black-economic-empowerment-bbbee-in-south-african-competition-law/ accessed 22 February 2024).

historically disadvantaged group as defined in Section 3(2) of the Competition Act.[329] However, the merging parties submitted that post-transaction, the shareholders of the primary acquiring firm, Atlantica South Africa Operations, will be: a. Atlantica South Africa (which is not owned or controlled by historically disadvantaged persons); and b. Yet-to-be-established BEE partners (intended to hold 8% of the shares in Atlantica South Africa Operations). However, this has yet to be confirmed at the time of the merger filing.[330]

3 8 SUMMARY

In conclusion, this chapter sought to examine aspects relating to the consideration of public interests in the evaluation of mergers and the assessment criteria used by the competition authorities. The merger assessment criteria follow a three-test analysis. That is to say, a merger must be evaluated on purely competition terms. Furthermore, it must be analysed whether there are no technological or any other efficiency goals that can lead to the approval of an otherwise anti-competitive merger. Despite the above analysis, whether a merger can or cannot be approved on public interests grounds should be analysed. Particularly within the public interests analysis, the Competition Act provides for BEE provisions, some of which have been recently added under the new Competition Amendment Act of 2018. The chapter also examines judgments that either approve or refuse mergers on the grounds of BEE as a public interest consideration of merger evaluation.

The next chapter will examine whether the South African competition policy framework is an appropriate and effective tool to regulate competition in SA with regard to helping SMEs.

[329] Section 3(2) of the Competition Act.
[330] *Atlantica Sustainable Infrastructure plc and The Employees of Abengoa South Africa (Pty) Ltd* Case no: LM094Oct21 para 10.

CHAPTER 4
SOUTH AFRICAN COMPETITION POLICY FRAMEWORK AS AN APPROPRIATE AND EFFECTIVE TOOL TO REGULATE COMPETITION WITH REGARDS TO HELPING SMES

4 1 INTRODUCTION

The South African Competition Act does not seek to protect competition for its own sake but, as reflected in the objectives of the Competition Act, does so to promote economic development, more equitable participation, and wider ownership, especially by historically disadvantaged persons.[331] The Competition Act does this by restraining certain trade practices, assessing and prohibiting mergers that substantially prevent or lessen competition, and prosecuting firms that seek to abuse positions of market power to the detriment of competition, economic efficiency, and consumers.[332] Furthermore, the explicit provisions regarding the evaluation of public interest concerns that may arise from merger transactions are, by design, a means towards linking competition law with the greater socio-economic development agenda of the State.[333] Specifically, these provisions seek to protect employment, strategic industrial sectors or regions in the context of industrial policy, and small or medium-sized businesses, particularly those previously disadvantaged people.[334]

The present chapter seeks to highlight how the competition policy framework is an appropriate and effective tool to regulate competition in South Africa to advance SMEs and BEE. The chapter starts by defining competition policy in South Africa. Furthermore, the chapter looks at policy reforms since the promulgation of the Competition Act and beyond that have been aimed at the advancement of SMEs and BEE. Lastly, the chapter will delve into the question of whether the provisions of public interests in merger regulation, particularly those relating to BEE, have been an appropriate tool for advancing SMEs or whether there is still a need for further amendments to achieve total equality within the competition framework.

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[331] Preamble and Section 2 of the Competition Act.
[332] Fox 2018 The *Antitrust Bulletin* 3–6.
[333] Kelly et al *Principles of Competition Law in South Africa* (2017) 171.
[334] Section 12A(3) of the Competition Act.

4 2 DEFINING COMPETITION POLICY

Competition policy can be understood as a set of policies and laws that guarantee that competition in the marketplace is not constrained in a way that is detrimental to society.[335] If competition fails to accomplish the policy goal of promoting economic prosperity for society, it is considered "detrimental to society." [336] Therefore, public interest concerns may occasionally take precedence over economic efficiency in competition policy.[337] Competition policy should not focus on defending competitors but on fostering public interest and fair competition.[338] Competition reforms enable markets to operate more efficiently for the benefit of consumers and drive sustainable economic growth.[339] This establishes a clear link between assisting SMEs and promoting fair competition and economic growth. To this end, the study has shown that merger regulation specifically includes public interest goals that aim to protect SMEs and thereby stimulate BEE.

The practical challenges that SMEs face during the formation of a merger are indicative of SMEs' place in the economy.[340] It is recognised that the only way that competition policy may help SMEs is in the context of a more broad, practical government strategy for small businesses.[341] Fundamental issues need to be addressed, such as access to resources and facilitating and incentivising SMEs to mobilize and consolidate themselves.[342] It should be noted that the government has developed policies to help SMEs in the broader context.[343] Government policy is the crux of this chapter, as the survival and existence of SMEs will create a conducive environment for competition policy to further strengthen SMEs, especially in merger regulation.

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[335] Motta *Competition Policy: Theory and practice* (2004) 8.
[336] Balthasar *The Interface of Competition Law, Industrial Policy, and Development Concerns: The Case of South Africa* (2018) 167.
[337] Sokol "Tensions between Antitrust and Industrial Policy" 2015 *George Mason Law Review* 1247–1248.
[338] OECD "Prioritising Gendered Public Interest Considerations" 2021 https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-6-prioritising-gendered-public-interest-considerations.pdf(accessed 1 May 2024).
[339] Neuhoff (ed) *A Practical Guide to the South African Competition Act* 2nd ed (2017) 235.
[340] Ibid.
[341] Roberts "The Role for Competition Policy in Economic Development: The South African Experience" 2010 *Development Southern Africa* 227–243.
[342] Morphet "Competition v Promoting Small Business and Black Economic Empowerment – An Evaluation Of South African Competition Law and Its Enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[343] Ibid.

4 3 POLICY FRAMEWORKS

The basis of transformative legislation in South Africa has its roots in the Constitution.[344] Section 9(2) of the Constitution states that the right to equality includes the full and equal enjoyment of all rights and freedoms by all individuals, regardless of race, gender, or other characteristics.[345] The Constitution states that in order to achieve this objective, legislation granting preferred rights to previously disadvantaged citizens may be promulgated to achieve equality.[346] As a result of the provision, other legislation was promulgated to provide substantive and procedural regulations that various stakeholders may use to accomplish the aforementioned equality goal. The 1995 White Paper was created in response to the constitutional requirement for an inclusive society, promoting small business growth.[347]

Therefore, South Africa's SME policies have been heavily informed by the 1995 White Paper on a national strategy for developing and promoting small businesses.[348] The White Paper emphasised the need for the government to provide an enabling legislative framework to ease access to information, funding, cheap infrastructure, and procurement.[349] All of this was anchored on the Reconstruction and Development Programme (RDP) philosophy and principles, which served as a national framework for addressing apartheid's legacy and the impacts of racial marginalisation.[350]

The National Small Business (NSB) Act[351] was created in 1996 to implement the principles of the RDP and the White Paper strategy, and sector-specific provisions were included in the Broad-Based Black Economic Codes of Good Practice.[352] The National Small Business Act's objectives were as follows: "to provide for the establishment of the Advisory Body and the Small Enterprise Development Agency; to provide guidelines for state organs in order to promote small enterprises

[344] Constitution; see also KibetI and Fombad "Transformative Constitutionalism and The Adjudication of Constitutional Rights in Africa" 2017 *African Human Rights Law Journal* 340–366.
[345] Section 9(2) of the Constitution.
[346] Section 9(4) of the Constitution.
[347] Shava 2017 *Journal of Economics and Behavioral Studies* 161; see also White Paper on National Strategy for the Development and Promotion of Small Business in South Africa. WPA/1995.
[348] White Paper 1995.
[349] White paper 1995; see also Mncube & Ratshisusu 2021 *Black Economic Empowerment Project SCIS Working Paper Number* 22.
[350] Reconstruction and Development Programme 1994.
[351] National Small Business Act 102 of 1996.
[352] Broad Based Black Economic Codes of Good Practice 2007.

in the Republic; and to provide for matters incidental thereto."[353] This resulted in the establishment of agencies to facilitate the development of SMEs, which were then distributed among five government departments: the Presidency, the Department of Agriculture, the Department of Science and Technology (DSE), the Department of Trade and Industry (DTI), and the Department of Economic Development (DED).[354]

4 4 THE INSTITUTIONAL AGENCIES

Various institutional agencies have been established to facilitate the realisation of small-scale enterprises. Amongst these were the National Youth Development Agency (NYDA),[355] the Small Business Development Agency (SEDA),[356] the National Empowerment Fund (NEF),[357] the National Small Business Advisory Council (NSBAC),[358] and the Micro Agricultural Financial Institute of South Africa (MAFISA).[359] Despite other factors, the main aim of government policies, plans, and schemes has been to boost small business development in South Africa by providing access to financing, modern technology, affordable infrastructure, and the acquisition of the requisite skills.[360]

4 4 1 *The Integrated Small Business Development Strategy (ISBDS)*

The Integrated Small Business Development Strategy (ISBDS) seeks to increase financial and non-financial support for SMEs, generate demand for products and services, and reduce regulatory constraints.[361] As recorded in the Review of Ten Years of Small Business Support, the Integrated Small Business Development Strategy summarises and corrects the errors and shortcomings that emerged from the development of institutional arrangements and frameworks for small business

[353] National Small Business Act 102 of 1996.
[354] Changole and Boshoff 2022 *Review of Industrial Organization* 361-402.
[355] National Youth Development Agency Act 54 of 2008.
[356] See The National Small Business Act 102 of 1996. It aims to provide guidelines for organs of state in order to promote small business in the Republic; and. to provide for matters incidental thereto.
[357] National Empowerment Fund Act 105 of 1998.
[358] See The National Small Business Act 102 of 1996.
[359] National Small Business Advisory Council (NSBAC), and the Micro Agricultural Financial Institute of South Africa 2006. MAFISA provides financial services to smallholder producers in the agriculture, forestry, and fisheries sector. The objective of the scheme is to address the financial services needs of smallholder producers in the sector. Services provided through the scheme include production loans, facilitation of saving mobilization and capacity building for member owned financial institutions (intermediaries).
[360] Robu *The Dynamic and Importance of SMEs in Economy* (2013) 31.
[361] DTI. The Integrated Small Business Strategy 2004-2014.

support.[362] According to the strategy, it is important to acknowledge the wide variety of small businesses and their requirements. It also calls for increased awareness and comprehension among all help providers regarding the types of support each offers, to whom, and under what circumstances.[363]

Furthermore, the ISBDS works to strengthen the presence of small-enterprise interest groups in current or growing business associations to provide feedback on specific needs.[364] Concern was expressed about the fact that different provinces, regions, and industries continue to differ significantly in their capacity to absorb small-business support programs. It conveyed discontent over the insufficient alignment between other pillars of the government's support for socioeconomic growth and small-business assistance initiatives.[365] The 2010 ISBDS review found that in addition to a lack of thorough, ongoing monitoring and evaluation of the changing support processes, the Center for the Promotion of Small Business was unable to coordinate all of the small business support programs created by various national government departments between 1994 and 2004.[366] The result was the adoption of the Integrated Small Enterprise Development Strategy, which provides a framework for action from 2004 to 2014.[367]

4 4 2 *The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014*

The ISEDS is based on three pillars that aim to unlock South African entrepreneurs' potential.[368] Pillar 1 targets the promotion of entrepreneurship, which is intended to strengthen national awareness about the critical role of entrepreneurship, promote an alternative focus on ownership, expand franchise opportunities, strengthen business associations and networks, and provide information, research, monitoring, and evaluation.[369] Pillar 2 puts emphasis on the creation of enabling environments around which the following will be observed: to maintain small business sensitive regulations, improve access to finance, strengthen access to markets via procurement,

[362] Ayandibu "The role of Small and Medium Scale Enterprise in local economic development (LED)" 2017 *JBRMR* 134–140.
[363] Ayandibu 2017 *JBRMR* 134.
[364] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[365] Mpehle "Black Economic Empowerment in South Africa" 2011 *Administratio Publica* 140–153.
[366] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[367] The Integrated Small Enterprise Development Strategy (ISEDS) for 2005-2014.
[368] Van De Rheede "Black Economic Empowerment in South Africa: Is Transformation of The Management Structures of Enterprises as Essential as it Should Be?" 2022 *Law, Democracy and Development* 84–105.
[369] Shava 2017 *Journal of Economics and Behavioral Studies* 161.

exports, and business linkages, facilitate the availability of business infrastructure and premises, and increase the effectiveness of enterprise support.[370] Pillar 3 aims to enhance competitiveness and capabilities at the enterprise level by strengthening managerial, business and technical skills, facilitating improved quality, productivity and competitiveness.[371] It also supports technology transfers, incubation and the commercialisation of business services. The strategy is further centred on the expansion of SME-focused support strategies, information, research, monitoring, and evaluation.[372]

The Integrated Strategy has been designed to address the needs and development potential of the whole small-enterprise sector, which includes micro, small and medium-sized enterprises, but with a special focus on the previously disadvantaged groups which remain hindered by the burden of South Africa's dual economy.[373] It noted that 'South Africa is still burdened by a dual economy in which established white-owned businesses have greater access to resources and opportunities than black-owned businesses.[374] Further, the ISEDS noted that small businesses often find it more difficult to penetrate new markets due to barriers to entry.[375] The framework aims to address market failures in specific small enterprise sectors, the extent to which these segments create opportunities to support the government's special development goals, and the viability of appropriate instruments for the government to impact these sectors to demolish this economic dualism.[376]

4 4 3 *The Broad-Based Black Economic Empowerment (B-BBEE)*

In pursuit of equality as enshrined in the South African Constitution, the South African government developed several documents to stimulate the empowerment project.[377] Amongst these are the Strategy for Black-Based Economic Empowerment, The Broad-Based Black Economic

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[370] Van De Rheede 2022 *Law, Democracy and Development* 84–105.
[371] Ibid.
[372] Kanza et al "Developing Business Incubation Process Frameworks: A Systematic Literature Review" 2023 *Journal of Business Research* 162.
[373] Mpehle 2011 *Administratio Publica* 140–153.
[374] Jeannine "Black economic empowerment in South Africa: Is transformation of the management structures of enterprises as essential as it should be?" 2022 *Law democr. Dev* 84-105.
[375] Bushe "The Causes and Impact of Business Failure Among Small to Micro and Medium Enterprises in South Africa" 2019 Africa's *Public Service Delivery and Performance Review* 270.
[376] Bushe 2019 Africa's *Public Service Delivery and Performance Review* 270.
[377] Shava 2017 *Journal of Economics and Behavioral Studies* 161.

Empowerment Act,[378] and the Codes of Good Practice, which explain the government's approach to be adopted in the measurement of B-BBEE compliance by all business entities in South Africa.[379] As adopted by the South African government, the B-BBEE implies the promotion of black people to ownership and control of the means of production.[380] Among other things, it seeks to promote empowerment through procurement sourced from the qualifying Broad-Based Black empowered enterprises and enterprise development through the provision of financial and operational assistance to such enterprises.[381]

4 4 4 *The objectives of the B-BBEE*

BBBEE aims to achieve several specific goals, such as advancing economic transformation to allow Black people to engage in the economy meaningfully, changing the racial makeup of ownership and management structures, and improving the skilled jobs offered by both new and existing businesses.[382] Its goal is to enhance the ownership and management of both new and established firms by communities, workers, cooperatives, and other collective enterprises.[383] It also aims to increase access to economic activities, infrastructure, and skills training.[384] The BBBEE also attempts to encourage preferential procurement practices, investments in black-owned or managed firms, and financing availability for BEE. Moreover, it promotes rural communities' involvement in development initiatives and programs. Black people, including African, Indian, and Coloured people, are said to benefit greatly from all of these.[385]

4 5 HAVE THE PUBLIC INTEREST PROVISIONS IN MERGER REGULATION BEEN EFFECTIVE IN PROMOTING SMES

The competition authorities have been working hard to advance goals that serve the public interest. SMEs and companies under HDI supervision, however, cannot be called to be prospering.[386] The important question is: why is this the case, and does this mean that competition policy has to be

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[378] The Broad Based Black Economic Empowerment Act 53 of 2003.
[379] The Strategy for Black Based Economic Empowerment 2003.
[380] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[381] Van De Rheede "Black economic empowerment in South Africa: Is transformation of the management structures of enterprises as essential as it should be?" 2022 *Law, Democracy and Development* 84–105.
[382] Section 2 of the B-BBEEA.
[383] Section 2of the B-BBEEA.
[384] Section 2of the B-BBEEA.
[385] Van De Rheede 2022 *Law, Democracy and Development* 84–105.
[386] Mncube and Ratshisusu 2021 *Black Economic Empowerment Project SCIS Working Paper Number* 22 15.

used going forward, as the Amendment Act of 2018 has done? The evidence indicates that SMEs have constraints since the nation's economy is not expanding at a rate that would promote their establishment and success, which brings us to our second question.[387] Furthermore, while large-scale production can benefit consumers, new market entrants do not always promote competition.[388] Furthermore, continually introducing legislation to address identified shortcomings is often counterproductive and deters investment.[389] Rather, South Africa ought to take advantage of its well-established industrial foundation to support SMEs. The automobile sector serves as a good example of the potential for small business development and change.[390]

4 6 SUMMARY

The chapter sought to highlight how the competition policy framework is an appropriate and effective tool to regulate competition in South Africa to advance SMEs and BBE. The chapter defined competition policy in South Africa. Furthermore, the chapter looked at policy reforms since the promulgation of the Competition Act and beyond that have been aimed at the advancement of SMEs and BEE. The chapter noted that there are many legislations that have been developed to advance BEE. This legislation includes the B-BBEEA, which has taken steps to empower the black community. The inclusion of BEE in the Competition Act should be seen as a government effort to deal with inequality that had been perpetuated by the apartheid government. Lastly, the chapter delved into the question of whether the provisions of public interests in merger regulation, particularly those relating to BEE, have been an appropriate tool for advancing SMEs or whether there is still a need for further amendments to achieve total equality within the competition framework. It is noted that the government has done a lot towards promoting SMEs through policies and has particularly affected the amendments of the Competition Act in 2018 to strengthen provisions relating to SMEs.

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[387] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[388] Du Plessis 2021 *SA Mercantile Law Journal* 1.
[389] Nzero 2017 *THRHR* 602.
[390] Du Plessis 2021 *SA Mercantile Law Journal* 1.

CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

5 1 INTRODUCTION

The BEE forms the basis of public interest considerations in merger analysis. The position of black economic concerns in merger analysis has been consolidated by the 2018 amendments to the Competition Act that saw the inclusion of the "Effect on the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market" as an additional public interests concern. The inclusion of public interest concerns, particularly those relating to BEE, shows the legislature's commitment to redressing past injustices and creating a new society based on equality, especially for economic opportunities. This chapter will provide conclusions that can be drawn from the study, and further, it will provide recommendations going forward.

5 2 RECOMMENDATIONS

As a result of the apartheid history in South Africa, there are a number of key areas on which the government should focus its attention. As such, this study proposes a number of recommendations that seek to enhance the promotion of SMEs through merger regulation. The study acknowledges that the government has done a lot through various pieces of legislation, including the recent amendment to the Competition Act, to foster a culture of inclusivity in the economy of South Africa. However, the study generally recommends that more be done, including reviewing the Guidelines for public interest considerations.[391]

In order to guarantee employment and reduce poverty, the government must view the promotion of market-related outcomes as critical.[392] This can be achieved by focusing their efforts on supporting SMEs, encouraging foreign direct investment, and letting the market forces create jobs. In connection with this, the South African government needs to keep up its strategy of supporting the Competition Authorities' independence to maintain competition policy's credibility.[393]

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[391] Amended Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (2023).
[392] Fox 2018 The *Antitrust Bulletin* 3–6.
[393] Angumuthoo 2020 *The Antitrust Bulletin* 312-332.

Based on available data, it appears that a relatively small number of small and medium-sized enterprises are utilising the protection that the Competition Act provides.[394] More SMEs should be encouraged to approach the Commission and even the CAC by means of a more clear interpretation and application of the Competition Act's objectives by the Commission.[395] This would ensure that these cases' investigation and resolution are not overly expensive or drawn out.[396] Therefore, the government should review the Commission's funding model to determine a way to make it self-funding by using administrative fines. Alternatively, the Commission could be reorganised to include a division dedicated to giving priority to complaints from small and medium-sized businesses.[397]

The Commission has created guidelines that largely stem from the 2019 Competition Act amendments, which required competition regulators to consider how a merger would affect the promotion of a wider distribution of ownership among workers and HDPs in a given market.[398] The 2019 amendment raised significant issues for South African society, given that apartheid laws that prevented Black people from engaging in the country's economy have left the country's economy materially unequal and characterized by skewed ownership.[399] A new facet of competition law enforcement in South Africa was brought about by the 2019 amendments to the Competition Act, which aim to use the Competition Act to address the high levels of concentration and uneven ownership distribution in the country's economy.[400]

It should be noted that efforts by the government to address ownership changes and promote meaningful empowerment within the South African economy through other legislative and related interventions have been deemed insufficient. As such, the government has employed merger

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[394] Morphet "Competition v promoting small business and black economic empowerment – an evaluation of South African competition law and its enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
[395] Bowmans "South Africa: Final Guidelines on the revised approach to public interest in merger control" 2024 https://bowmanslaw.com/insights/south-africa-final-guidelines-on-the-revised-approach-to-public-interest-in-merger-control/ (accessed 20 May 2024).
[396] Shava 2017 *Journal of Economics and Behavioral Studies* 161.
[397] Mncube & Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[398] Amended Public Interest Guidelines Relating to Merger Control 2023.
[399] Angumuthoo, et al 2020 *The Antitrust Bulletin* 312.
[400] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90..

regulation to attain these goals.[401] Therefore, it is imperative to provide strong support for reasonable policies aimed at addressing economic disparity in South Africa.[402] It is reasonable to worry that using merger regulation for this reason is the wrong approach and will not produce significant outcomes as this will clearly scare away firms that genuinely want to invest in South Africa for fear that despite satisfying competition concerns, the firms will still be subjected to further equity goals.[403]

It is argued that using individual mergers piecemeal to achieve ownership and empowerment outcomes that only apply to the merging parties will probably be ineffective, undermine meaningful and economically motivated investment in the economy, and materially increase the costs and uncertainty associated with doing business in South Africa.[404] These concerns are made worse by the legal interpretation that the Guidelines seem to endorse, which conflicts with the Competition Act's statement of the public interest.[405] The Guidelines, which represent the stance of the Commission, are likely to worsen the current state of uncertainty and deter investment in South Africa, particularly if implemented rigidly.[406]

The updated Guidelines view the promotion of a wider distribution of ownership as a prerequisite for all mergers, and public objectives pertaining to BEE are meant to apply to all mergers.[407] According to the Guidelines, failing to do so could make the merger unjustified on the grounds of public interest.[408] Despite the justifiable concern for the public interest, this approach raises an interpretation problem that violates the Competition Act and has not been taken into account by the Competition Tribunal or the courts.[409] Therefore, it is advised that while a greater spread of ownership distribution may be considered in merger analysis, this approach should be applied with

[401] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[402] Mashalanye and Maunye 2022 *Rebus law Journal* 20.
[403] Mashalanye and Maunye 2022 *Rebus law Journal* 20.
[404] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[405] Changole and Boshoff 2022 *Review of Industrial Organization* 361–401.
[406] Mashalanye and maunye 2022 *Rebus law Journal* 20.
[407] Changole and Boshoff 2022 *Review of Industrial Organization* 361–401.
[408] Mashalanye and maunye 2022 *Rebus law Journal* 20.
[409] Morphet "Competition v Promoting Small Business And Black Economic Empowerment – An Evaluation of South African Competition Law and Its Enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).

caution and should never be used to prevent a merger that meets other public interest considerations, such as the creation of jobs.[410]

The Guidelines also aim to cover mergers that occur outside of South Africa and have only a tenuous relationship with the country.[411] One could argue that this will promote a lack of interest in investing in South Africa and lead to under-investment in the country.[412] The Commission's application of BEE provisions in the merger approach should be changed, as it seems inappropriate and could have unintended consequences that discourage investment in South Africa and the benefits that go along with it.[413] These benefits could include undermining the public interest and the competition laws' intended promotion of competition outcomes.[414] It is important to encourage the Commission to actively participate in each merger on an individual basis and in a way that supports job creation by advancing the South African economy in particular.[415]

It is advised that SMEs and HDI enterprises fully participate in the merger formation process and offer comments on the merger processes.[416] In this manner, the Commission can make sure that mergers that obstruct SMEs' and HDI enterprises' ability to participate in the market are prohibited.[417] In response to proposed mergers, the Commission may also demand remedies like collaboration and the establishment of development funds to boost enterprise development and market competitiveness for SMEs and HDI businesses.[418] Several development funds have been established through merger conditions that have facilitated the entry and expansion of SMEs and HDI firms in the economy, such as the R250 million Agro-Processing Competitiveness Fund and

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410 Bowmans "South Africa: Final Guidelines on the Revised Approach to Public Interest in Merger Control" 2024 https://bowmanslaw.com/insights/south-africa-final-guidelines-on-the-revised-approach-to-public-interest-in-merger-control/(accessed 20 may 2024).
411 Vilakazi and Bosiu "Black Economic Empowerment, Barriers to Entry, and Economic Transformation in South Africa" in Andreoni, Mondliwa, Roberts and Tregenna (eds.) *Structural Transformation in South Africa: The Challenges of Inclusive Industrial Development in a Middle-Income Country* (2021) 189.
412 Mckenzie 2023 *SA Financial Regulation Journal* 1.
413 Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
414 Bowmans "South Africa: Final Guidelines on The Revised Approach to Public Interest in Merger Control" 2024 https://bowmanslaw.com/insights/south-africa-final-guidelines-on-the-revised-approach-to-public-interest-in-merger-control/ (accessed 20 May 2024).
415 Changole and Boshoff 2022 *Review of Industrial Organization* 361–401.
416 Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
417 Morphet "Competition v Promoting Small Business And Black Economic Empowerment – An Evaluation of South African Competition Law and its Enforcement" https://www.ibanet.org/south-africa-competition-law-enforcement (accessed 17 January 2024).
418 Mckenzie 2023 *SA Financial Regulation Journal* 1.

R100 million Massmart Supplier Development Fund. Notifications of proposed mergers are publicised in the media and SMEs and HDIs should monitor them closely.[419]

5 3 CONCLUSIONS

The South African competition policy was formulated as a direct response to the serious need to further the socio-economic rights of the majority of South Africans, hence the inclusion of non-competition objectives in the Competition Act 1998.[420] Including public interest objectives in the Competition Act was a way to address the inequalities brought about by the apartheid policies.[421] The BEE and employment are major societal concerns that also form part of the national policy objectives.[422] It is unthinkable that reference to these key concerns would have been omitted from a piece of socio-economic legislation as significant as the Competition Act.[423]

Considering the history of South Africa, the nature of the economy, and the unequal distribution of wealth and resources that resulted from unfair and unjust apartheid economic policies, the inclusion of public interest considerations in the Competition Act 1998 is justified.[424] When one puts everything into a historical context, there needs to be a policy that addresses such inequalities in the field of competition law.[425] Employment creation and BEE are major challenges to sustainable development in South Africa, and explicit reference to these factors is, thus, to be expected in a significant area of policy and law such as the Competition Act.[426] It is evident that in a developing country such as South Africa, while economic growth and development are paramount, broader social factors should be considered in attempting to further that economic growth.[427]

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[419] Bowmans "South Africa: Final Guidelines on the revised approach to public interest in merger control" 2024 https://bowmanslaw.com/insights/south-africa-final-guidelines-on-the-revised-approach-to-public-interest-in-merger-control/ (accessed 20 May 2024).
[420] Tavuyanago 2015 *Global Journal of Human-Social Science: E Economics* 23.
[421] Brooks 2001 *International Law Journal of Southern Africa* 295.
[422] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[423] Angumuthoo et al. "Public interest in mergers: South Africa" 2020 *The Antitrust Bulletin* 312.
[424] Tavuyanago 2015 *Global Journal of Human-Social Science: E Economics* 23.
[425] Changole and Boshoff "Non-competition Goals and Their Impact on South African Merger Control: An Empirical Analysis" 2022 *Review of Industrial Organization* 248.
[426] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.
[427] Mncube and Ratshisusu 2022 *Journal of Antitrust Enforcement* 74–90.

The study has further shown that the Competition Act deals with the structure of the market through the control of mergers.[428] Any firm proposing to merge with another firm would have to acquire the Commission's approval before they can do so.[429] When mergers are being evaluated, SMEs or HDI firms may participate by making written submissions, either for or against a merger affecting their competitiveness in the market.[430] In analysing mergers, the Commission requires, amongst other things, the effects of the merger on the competitiveness of SMEs and HDI firms, particularly their ability to effectively enter into, participate in, or expand within markets.[431] The 2018 amendments to the Competition Act now require the Commission to assess mergers' impact on the promotion of a greater spread of ownership, particularly to increase the level of ownership by HDIs and workers in the market.[432]

The study has also shown that encouraging SMEs is crucial for the economic development of South Africa and the creation of much-needed jobs to address poverty and unemployment.[433] Furthermore, SMEs are viewed as essential in addressing the legacy of apartheid and are vital for the country's sustained economic growth.[434] One of the functions of SMEs is poverty alleviation by generating employment opportunities and facilitating transformation by achieving B-BBEE objectives.[435] The government's primary aim through the B-BBEE program is to empower black individuals by providing financial support, which, in turn, helps alleviate unemployment by creating more job opportunities.[436]

The study revealed that there is efficiency versus equity goals at the interface of merger regulation.[437] The primary objective of competition law is to promote competition, which brings efficiency or competitiveness to competition law.[438] This study has shown that there are other

[428] Du Plessis "2021 *SA Mercantile Law Journal* 1.
[429] Section 13 of the Competition Act 1998.
[430] Church 2018 *THRHR* 194.
[431] See Section 12A(1A) of the Competition Act 1998.
[432] Section 12(3) (e) of the Competition Act 1998.
[433] Smit and Watkins "A Literature Review of Small and Medium Enterprises (SME) Risk Management Practices In South Africa" 2012 *African Journal of Business Management* 6324-6330.
[434] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[435] Bushe 2019 Africa's *Public Service Delivery and Performance Review* 270.
[436] Musabayana and Mutambara 2022 *Australasian Accounting Business and Finance Journal* 73–84.
[437] Fox 2018 *The Antitrust Bulletin* 3–6.
[438] Griffiths and Gumbie 2015 Journal *of Antitrust Enforcement* 408–424.

goals of competition law prevalent from the Competition preamble to promote equity. This is understandable given the history of apartheid with its systematic segregation of the black community.[439] It is noted that the Competition Commission must balance such goals when evaluating a merger to effect both these objectives of the Competition Act.[440]

While competition goals are important, studies have revealed that public interest concerns in merger regulation play an important role, too.[441] The Competition Act provides for four objectives that cater for public interests concerns. The last one specifically facilitates a broader distribution of ownership, particularly aiming to elevate the ownership stakes of historically disadvantaged individuals.[442] These objectives are given meaning or context in merger regulation under section 12(3) of the Competition Act, where the competition authorities are enjoined to consider public interest concerns after considering competition concerns.[443]

To sum up, one notes that for SMEs to survive and expand in a free market, adequate infrastructure must be in place to safeguard competition. This is due to the possibility that SMEs may be the target of competition law violations, especially from large, dominant businesses who may utilize tactics to drive out smaller rivals from the market to solidify their position further. Anti-competitive behaviour may affect SMEs in a number of ways, including suppliers, purchasers, or competitors. The chapter sought to provide conclusions that can be drawn from the study, and further, the chapter provided recommendations going forward.

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[439] Vilakazi and Bosiu "Black Economic Empowerment, Barriers to Entry, and Economic Transformation in South Africa" in Andreoni, Mondliwa, Roberts and Tregenna (eds.) *Structural Transformation in South Africa: The Challenges of Inclusive Industrial Development in a Middle-Income Country* (2021) 189.
[440] Fox 2018 *The Antitrust Bulletin* 3–6.
[441] Njisane and Ratshisusu "Public Interest Issues in Cross-Border Mergers: Is There a Role for Competition Authorities?" In Bonakele (ed) *Competition Policy for the New Era: Insights from the BRICS Countries* (2017) 185–198.
[442] Section 2(1)(f) of the Competition Act.
[443] Section 12(3) of the Competition Act.

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