SOUTH AFRICA, COMPETITION LAW AND EQUALITY: RESTORING EQUITY BY ANTITRUST IN A LAND WHERE MARKETS WERE BRUTALLY SKEWED

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I. INTRODUCTION: THE CONSTITUTION, THE COMPETITION ACT, AND THE AMENDMENTS

Equality is an imperative value of all law in South Africa. This essay about equality and the South African Competition Law begins by locating the value in the Constitution of the New South Africa. It proceeds to examine the law as developed under the 1998 Competition Act, to examine the recent amendments geared towards greater inclusiveness of a still racially skewed economy, to consider the fit of the amendments with the goals of efficiency and equity, and to identify challenges to the institutions to make the amendments work.

The Constitution of South Africa was adopted upon the overthrow of apartheid, which had heinously excluded the country's majority population, black Africans. The Constitution contains a Bill of Rights. First among all enumerated rights – higher than freedoms of expression and of property – is equality. Second is dignity. The Constitution authorizes affirmative action in favor of historically disadvantaged people.

Then Deputy Chief Justice Dikgang Moseneke captured the depth of the Constitutional guarantee in his judgment in *Minister of Finance v. Van Heerden*:

> The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance. . . . In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person.'[2]

The New South Africa hoped for a transformation of the society. All law was expected to contribute. The Competition Act of 1998 is part of this fabric. Black Africans had been totally excluded by positive law from participating in the formal economy, and opening markets was expected to open the doors wide to black participation. Thus, the Competition Act included in its Purposes:

> "(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; [and]
>
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

2 *Minister of Finance v. Van Heerden* (CCT 63/03) [2004] ZACC 3, 2004 (6) SA 121 (CC), paras 22-23.

The Purposes clause, however, was not textually woven into the prohibitory provisions of the Act, leaving ambiguity in the law. Over the next 20 years, the competition jurisprudence missed opportunities to lean towards inclusiveness in ways that might have better satisfied the goal of equal economic opportunity[3] – despite much excellent enforcement helping society by lowering prices of necessities.[4]

In 2017, then-President Jacob Zuma noted with urgency that the radical transformation had not occurred. South Africans still did not participate equally or close to equally in the South African economy. Zuma announced that the Competition Act would need to be amended to facilitate the transformation. He promised that the government would bring forward amendments to the Act to

> address the need to have a more inclusive economy and to de-concentrate the high levels of ownership and control we see in many sectors. … In this way we seek to open up the economy to new players, give black South Africans opportunities in the economy and indeed help to make the economy more dynamic, competitive and inclusive. This is our vision of radical economic transformation.[5]

Minister of Economic Development Ebrahim Patel took up the cause and promised that the plan would include the following:

> 9. . . . [Market inquiries] [T]he competition authorities must be empowered to consider these questions proactively or at the request of key stakeholders . . . . *Markets plagued by* over-concentration and *untransformed ownership* will be identified, investigated and appropriate measures applied to remedy these market features. These inquiries, and any remedies that result, will target the primary structural impediments to market entry and ownership by black South Africans.
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> 10. The proposed amendments also will seek to incentivise firms to develop relationships and adopt strategies that would alter market structure, reduce concentrations by encouraging entry of historically disadvantaged South Africans (particularly those who own small and medium-sized enterprises), reduce barriers to entry, and expand ownership to ensure that more enjoy substantive economic citizenship.[6]

The Amendments were proposed and adopted.[7] They fall largely into five categories: 1) *Dominant firms' abuses*; 2) *Exemptions for anti-competitive agreements and practices*; 3) *Mergers*: Transformation was added to the list of public interests, and a process was introduced for vetting mergers that may threaten national security; 4) *Market inquiries*: power to investigate markets for distortions of competition was enhanced and strong remedies authorized, and distortion was defined to include adverse impact on SMEs and HDPs; and 5) *Institutional*: the Minister was given more powers of intervention, and in general the Executive is given more power. I elaborate selectively on these reforms.

A. Dominant Firms

Excessive pricing. The 1998 Act prohibited excessive pricing by dominant firms, and cases were brought, but the cases were lost in view of demanding burdens of proof. The Amendments shift the onus. If the plaintiff shows that the price was excessive (in accordance with factors stated in the law and guidelines to be provided by the Commission), the defendant must prove that the price was reasonable.

This shift of the onus effectively overrules, among others, the *Mittal Steel* case.[8] The super-dominant parastatal had charged low export prices, where it faced world competition, but it charged exorbitant domestic prices (cost plus phantom transportation costs, also called import price parity), handicapping domestic steel buyers in their businesses going forward. Moreover, an effective remedy was available – opening arbitrage opportunities for purchasers for export.

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3 See Eleanor M. Fox and Mor Bakhoum, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT AND COMPETITION LAW IN SUB-SAHARAN AFRICA (Oxford 2019), Chapter 5: Leaning in Towards Inclusive Development.

4 See David Lewis, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT (Jacana 2012). See in general the annual reports of the Competition Commission, www.compcom.co.za.

5 President Jacob Zuma, 2017 State of the Nation Address.

6 Background Note issued by the Minister of Economic Development, May 25, 2017. Italics added.

7 On February 13, 2019, President Cyril Ramaphosa signed the Competition Amendment Bill in Law and on July 12, 2019, President Ramaphosa published a notice immediately bringing into force certain of the provisions of the Competition Amendment Act. The provisions brought into force do not include the national security provision in mergers or the buyer power and price discrimination sections of the abuse of dominance law.

8 *Harmony Gold Mining Co. v. Mittal Steel Corp.*, 70/CAC/Apr07 [2009] ZACAC 1. See discussion in Making Markets Work at pp. 106-07.

Margin squeeze. The Amendments add margin squeeze to the list of practices prohibited unless justified.

Buying power. The Amendments prohibit exercise of monopsony power in sectors to be designated by the Minister. (The Minister has now designated agro-processing, grocery retail, and on-line intermediation services.) In the designated sectors a dominant firm may not impose unfair prices or other unfair trading conditions on a supplier that is a small or medium business ("SME") or historically disadvantaged person ("HDP").[9] Where the plaintiff makes a prima facie case, the dominant firm must prove that the prices or trading conditions are not unfair.

Draft regulations issued by the Minister and draft guidelines issued by the Commission were posted for public comment and are being finalized. They will clarify factors that, among other things, will be used to determine unfairness.[10]

Price discrimination. The 1998 Act prohibits dominant firms from engaging in price discrimination likely to substantially prevent or lessen competition. The Amendments prohibit, also, dominant firms' price discrimination that would impede SMEs and HDPs from participating effectively in the market. Moreover, where plaintiff makes a prima facie case of prohibited discrimination, plaintiff wins its case unless the dominant firm can show that the price discrimination did not impede the ability of the SME or HDP to participate effectively.

This amendment effectively overrules *Nationwide Poles v. Sasol*.[11] There, dominant supplier Sasol, having no cost justification, charged small businessman Mr. Foot much more than it charged his big business rivals for a critical input. Foot was squeezed from the market, but (appearing pro se) he did not prove that the price discrimination harmed competition in the output market. Today, the burden would shift to Sasol to prove that it was not the price discrimination that impaired Mr. Foot's ability to compete effectively. Otherwise, Mr. Foot would win.

The Minister's regulations and the Commission's guidelines, which are being finalized after a period of public comment, will identify when a price discrimination is likely to impede effective participation.

Exclusionary acts in general. The definition of exclusionary acts (which are subject to pro-competition, pro-efficiency justifications) always included acts that impede or prevent a firm from entering and expanding in a market. It now also includes acts that keep a firm from *participating* in the market. "Participation" is defined as the ability of or opportunity for firms to sustain themselves in the market.

B. Exemptions: Anticompetitive Agreements and Practices

Anticompetitive agreements and practices may be eligible for an exemption. Under the 1998 Act, an exemption could be granted if the agreement[12] promoted exports, promoted the ability of SMEs or HDPs to become competitive, stopped a decline in an industry, or fostered economic stability. The amendments add as grounds for exemption: promotion of the ability of SMEs and HDPs to participate (as well as enter and expand) in the market; and "competiveness and efficiency gains that promote employment or industrial expansion." They also add as grounds for exemption "development, growth, [and] transformation" (along with stability) of an industry. "Transformation" is the key concept that we will refer to below.

C. Mergers

Public interest. Since the adoption of the 1998 Act, the authorities must vet mergers not only for their anticompetitive effects but also for effects on enumerated public interests including employment and the ability of SMEs and HDPs to become competitive. The Amendments embellish the SME/HDP clause. The substituted clause requires consideration of the effect of the merger on the ability of SMEs and HDPs "to effectively enter into, participate in or expand in the market." They also add as a factor that must be considered: "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by [HDPs] and workers in firms in the market.*" (Emphasis added.) As under the 1998 Act, the Minister may appear as a party on any public interest issue.

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9 The category of historically disadvantaged persons refers to people who, before the current Constitution, were discriminated against on the basis of race, and entities owned or controlled by them. According to the Minister's regulations, to qualify as an HDP, a firm may supply not more than 20 percent of the purchases of the dominant buyer for the good or service.

10 See Commission website, www.compcom.co.za.

11 *Nationwide Poles v. Sasol Ltd.*, 71CR/Dec03 [2005] ZACT 17. See discussion in Making Markets Work at pp. 110-12.

12 "Agreement" is used hereafter to include "practices" because agreement is the principal category contemplated.

Mergers that may affect national security. After this amendment comes into force, the President must appoint a committee to consider whether acquisitions by a foreign acquiring firm may have an adverse effect on the national security interests of the country.

D. Market Inquiries

Before the Amendments the Commission could decide to conduct market inquiries where it had reason to believe that features of the market impeded, distorted or restricted competition. At the conclusion of any such inquiry, the Commission could make recommendations. The Amendments give market inquiries teeth by giving the Commission on approval of the Tribunal the power to order remedies; even significant structural remedies. The Amendments give the Minister power to require market inquiries. In making its decision, the Commission must have regard to whether the structure of the market has an adverse effect on SMEs of HDPs. Effect on SMEs/HDPs is an identified feature that may constitute a distortion of competition. As Minister Patel said, "markets plagued by. . . untransformed ownership will be identified."[13]

II. EQUALITY

A. The 1998 Act

I shall comment on the salience of equality in the South African competition law; first, before the Amendments; then, in view of them.

In view of South Africa's history and aspirations, pushing towards greater equality is imperative. A racially skewed economy not only offends all of the ideals and aspirations of the New South Africa; it is not sustainable. The question is not whether to give regard to equality, but how.

But what kind of equality? What kind of equality is possibly achievable by a competition law? How can competition law help in a meaningful way to "free the potential"[14] of the most unequal citizens, who bear the scars of historic exclusion?

There is one thing that markets policed by competition law do well. They provide opportunity to people to enter markets and grow on their merits. If markets are clogged by power and if the firms shore up their power by excluding outsiders, that is bad for consumers and it is also bad for budding entrepreneurs.[15]

South Africa's Competition Act of 1998 was an admirable start. Its Purposes clause made clear that it always valued inclusiveness; and inclusiveness, translated into antitrust, means vigilant concern for lowering barriers, opening markets, and trusting in the not-yet-imagined contributions of outsiders to increase competition and innovation. In this space, efficiency and equity meet.[16] The Tribunal tried to cultivate this space and to lean on the side of the poorer and un-advantaged population. Several of its decisions would have done so, but technicalities of the law produced reversals.[17]

The Amendments to the Competition Act try to reset this balance. They also go much further, accounting for the fact that the great mass of historically disadvantaged individuals systemically get less favored treatment.

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13 See Minister Patel quoted above, text at note 6.

14 See Deputy Chief Justice Moseneke in *Minister of Finance v. Van Heerden*, quoted at note 2, *supra*.

15 Of course the entrepreneurs need education and training to be positioned to take advantage of economic opportunity in the first place, and before that, they need nourishing food, clean water, and medicines, all of which necessities other policies must provide. This is only to say that the burdens disadvantaged people face are huge even before they confront exclusionary monopolists and unforgiving markets.

16 See Eleanor Fox, Outsider Antitrust: "Making Markets Work for People," as a Post-Millennium Development Goal, Chapter 2 in COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM BRICS AND DEVELOPING COUNTRIES (Tembinkosi Bonakele, Eleanor M. Fox and Liberty Mncube, eds., Oxford 2018); Competition Policy at the Intersection of Equity and Efficiency: the Developed and Developing World, Chapter 23 in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY (Gerard and Lianos, eds., Cambridge 2019).

17 See Making Markets Work at pp. 99-112.

B. The Amendments

Some of the Amendments fit the project outlined above: marrying equity with efficiency; making the markets work better for consumers by giving outsiders[18] a fairer shot to participate. As to other Amendments – e.g. law to control abuses of buyer power – the prohibition can be efficient. It is common cause that some uses of monopsony power are anticompetitive. And some of the Amendments are purely redistributive of wealth and opportunity.[19] Much of the pricing behavior identified by the Amendments is unfair exploitation made possible by grossly unequal bargaining power. The authorities face significant challenges to identify "unfairness" in a manner that has standards and is justiciable. (This is an important and complex category but I do not engage with it further here. The Commission has grappled with it, and the results of its thinking will be reflected in the forthcoming guidelines.) Finally, some mergers and some agreements may become the subject of a bargain with the Minister for an undertaking to facilitate transformation, which could be in the form of a promise by the parties to give shareholding to or enter a joint venture with workers or HDPs in order to get clearance or exemption.

In this section I discuss two prominent aspects of the Amendments: more weight given to market participation by SMEs and HDPs, and conditioning clearances on the promise of benefits to SMEs or HDPs in the interests of a greater spread of ownership and thus of transformation.

1. Special Attention to Opportunity for Entry, Participation and Expansion of SMEs and HDPs

Most small businesses are HDPs, so that the SME/HDP categories are largely overlapping. Moreover, the category of firms without market power is disproportionately comprised of small businesses. Valuing entry, participation and expansion of firms without power in the application of substantive principles of antitrust is largely congruent with the aim of making markets more robust.[20]

Antitrust is process-oriented. It does not engineer outcomes. It means to set in place an environment likely to facilitate the forces and incentives that produce robust competition. The ecosystem gives opportunity to firms to compete on their merits, which in its turn makes people as consumers better off. The process is likely to produce firms that are competitive at home and in world markets. Ideally, the system operates as a *deus ex machina*. Antitrust clears away the clogs and lets the impersonal machinery work. The Amendments' attention to SMEs' entry and success would normally fit well with the goal of healthy competition and competitive markets.

If the goal is healthy, efficient competition that produces best results for consumers, can the mandate to ease participation of SMEs be over-used, drive up prices, and retard the growth of a competitive economy? This is possible but is not the intention[21] and need not be the result. The enforcers and the judiciary should concentrate on the considerable space for simultaneously encouraging SMEs and protecting the forces of competition. The South African law demands that they find this space.

2. Exemption of Agreements and Practices

The amendments add grounds for exemption of agreements and practices (hereafter generalized as "agreements.") The added grounds include: effective market participation of SMEs/HDPs; development, growth and transformation; and competitiveness and efficiency gains that promote employment or industrial expansion.

Some of these grounds are properly part of the competition analysis and should not require exemption. For purposes of strengthening rule of law, including predictability and transparency, it is important for the authorities to complete the competition analysis on its own terms and not to reflexively push cases into the space of exemption. Most agreements (and practices) are not anticompetitive and should not need an exemption. Agreements that are efficient and agreements that improve competitiveness are usually also procompetitive. Agreements that are

18 I do not refer to inefficient, laggard outsiders but those who could and would provide what consumers want and deliver on their merits.

19 "Redistribution" is often regarded as a pejorative word by economists; a tool to avoid lest it drag down the efficient state of being. But the "efficient state of being" of South Africa was built upon outrageous and now fortunately unconstitutional redistribution – apartheid. It may be more accurate to call the Amendments a very modest rebalancing.

20 The category of SMEs is not fully congruent with the condition of and aspirations for HDPs. The expansion (or more realistic appreciation) of the concept of exclusionary practices in antitrust is one step, but not sufficient, to address and redress the concerns.

21 See language of then President Zuma, quoted at note 5, *supra*.

anticompetitive are almost always harmful and should not be allowed absent a clear showing of a higher public benefit.[22] It would be bad antitrust and consumer policy to greenlight anticompetitive agreements on grounds that the contracting parties agree to give business opportunities to HDPs. This need not happen and I believe that the current competition authorities and Minister will guard against it, but a caveat is important especially for the future.

Good antitrust policy would maximize the space for determining what is not anticompetitive and not in need of exemption. To facilitate this objective, the authorities might give advisory opinions in ambiguous cases, helping to minimize the parties' risk of falling foul of an antitrust prohibition and incurring a penalty despite good faith attempts to comply.

By another point of view and possibly the intended one, parties to all agreements of ambiguous effect would be advised to seek an exemption. They may be likely to get an exemption in a wide grey area if they structure their deal to contribute sufficiently to transformation. The challenges of this course of action are the same as those connected with merger clearance, which we discuss below.

3. Mergers

Transformation is now a public interest objective that the authorities must consider in clearing mergers. This means that mergers — even if procompetitive — may be conditioned on the parties' agreement to give shares in the deal or to offer partnerships in a joint venture, or (carrying over from pre-Amendment requirements but with more emphasis) to offer significant worker retraining and entrepreneurial capacity-building to HDPs.

South African competition jurisprudence already offers examples of merging parties' agreements to provide retraining for redundant workers and capacity-building for small suppliers. For many years, the authorities have imposed on merging parties a requirement to retrain redundant workers. The merger is causing redundancies, and unemployment is in crisis. It is fair for merging parties to invest in solving a problem they create? But the past programs have not been well-monitored. They may not be well designed or sufficient for workers' transitions. Much more work can be done in this area for creative solutions that maximize workers' potentials, even with the same amount of money that the firms currently spend on redundant employees and retraining.[23] Creative methodologies to reposition redundant workers could make a positive difference.

For building capacity of small suppliers, lessons can be drawn from the *Walmart/Massmart* case.[24] This large supermarket merger threatened the existence of the small suppliers, who feared their displacement by giant Walmart's global value chain. Walmart undertook, by court order, to invest 200 million Rands (U.S. $13 million) on top of 40 million Rands already spent by Massmart, for capacity training of small suppliers with a view to their qualification to enter the global value chain. In an *ex post* review, the program was found to have made a positive contribution to job creation and local procurement.[25]

But this is not the principal category envisioned by the merger Amendments. A principal category is the envisioned transformation, using mergers as the occasion for providing business opportunities to historically disadvantaged people.[26]

What will be the parameters of required contributions to transformation? On the side of the parties, will they be advised of the scope of required contributions so that they can assess the costs of their deal in advance of their commitment to it? On the side of the beneficiaries, since the Amendments envision new players, not just the "usual suspects," will prospective beneficiaries get notice of and access to the opportunities to participate? Will the standards be sufficiently clear so that the mandate and its execution are justiciable and the courts will have a template for assessment?[27]

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22 The most obvious category in which an exemption might be granted is combinations of very small market actors to obtain countervailing bargaining power against big players. These are not agreements likely to be subjected to a social obligation.

23 See Making Markets Work at p. 87.

24 *Wal-Mart Stores Inc. and Massmart Holdings Ltd.* 73 LM/Dec10 [2011]ZACT 41.

25 Ex-Post Review of the Wal-mart/Massmart Merger by Thulani Mandiriza,Thembalethu Sithebe and Michelle Viljoen, WORKING PAPER CC2016/03.

26 The category bears a resemblance to the Black Economic Empowerment ("BEE") program. The BEE program is voluntary. It does important work but its success rate is not entirely encouraging. See Athandiwe Saba, Has BEE been a dismal failure?, Mail & Guardian (Africa), 31 Aug. 2018.

27 Similar questions on a larger scale are relevant in the event of market inquiries based on untransformed markets.

The category presents challenges of transparency, clarity, predictability and equal treatment for those who will contribute to transformation; equality of opportunity of prospective beneficiaries to participate; and a selection profile that will maximize the chances of the beneficiaries' successful business engagements.

Skewed ownership is a critical problem for South Africa. Competition policy has been identified as a tool to help solve the problem. The degree of clarity and transparency, and of efficiency with due process in clearing or exempting transactions, will be hallmarks of successful implementation.

III. CONCLUSION

In summary, I make six points.

1. More equity in the constituency of the South African economy is a necessary objective for South Africa.

2. There is a natural fit between more equity and more efficiency in applying competition law in South Africa. Until the long left-out majority are meaningfully integrated into the economic mainstream, the South African economy cannot begin to realize its potential for efficiency. Moreover, higher barriers and deeper entrenchment of cronyism and vested interests mean more fragility of outsider competition. This means that leaning towards inclusiveness, rather than leaning towards freedom for incumbents, is a sounder route towards competitive markets as well as fairly constituted ones.

3. The 1998 Act meant to embed the inclusiveness value in the law, but could have done more. The 2018 Amendments should be interpreted in this spirit: giving regard to SMEs and HDPs to make markets more dynamic; not to shelter inefficiencies. So interpreted, the Amendments should enhance both competition and equity in South Africa.

4. To the extent that equity and efficiency share common space, the law is both distributive to historically disadvantaged people and also good for consumers and competitiveness.

The law could be interpreted to prioritize inclusiveness outside of the space of overlap. For clarity, rigor and transparency, the authorities should complete the competition analysis first, and, at a second stage, do the public interest analysis, as they have been doing all of these years.[28]

5. Especially in the case of exemptions of agreements and clearance of mergers, the transformation objective may be paramount. Standards and transparency are critical elements.

6. The institutions face the challenge to make the Amendment project work so as to deliver, along with competitive markets, the twin Constitutional values of (more) equality and dignity. The competition institutions of South Africa are strong. The administrators of the system are thoughtful and they care about both equality and markets – which can deliver aspects of equality. The project of implementing the Amendments requires enormous thought, planning and hard work beforehand (which is being done) to lay the foundations of a system that is both administrable, with rule of law, and likely to engage the creative talents of the left-out majority.

28 See, e.g. *Shell South Africa and Tepco Petroleum Ltd.*, Case 66/LM/Oct01, Feb.22, 2002.

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