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**COMPETITION LAW AND SMES:
EXPLORING THE
COMPETITOR/COMPETITION
DEBATE IN A DEVELOPING
DEMOCRACY**

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COMPETITION LAW AND SMES: EXPLORING THE COMPETITOR/COMPETITION DEBATE IN A DEVELOPING DEMOCRACY

Kim Kampel

A. INTRODUCTION

South Africa's new competition law has been in business for over five years. Its competition legislation, the Competition Act, Act 89 of 1998 has been praised by many as one of the most sophisticated on the African continent. Throughout the Act's formulation and the brief reign of the new competition authorities, they have had to grapple with numerous debates about the merits of incorporating various public interest objectives into the Act. The particular objectives that are addressed in this paper are those that aim to protect SMEs.¹

In a previous paper, the dearth of SME-related complaints that are enforced before the competition authorities was highlighted². In recent weeks a small business case was successfully brought when the Tribunal ruled in favour of a small business owner who alleged price discrimination by its main supplier, Sasol. In *Nationwide Poles v Sasol Oil (Pty) Ltd*, the complainant, a small vineyard pole producer in the Eastern Cape, charged Sasol Oil, its main supplier of a vital chemical-treatment input in the pole manufacturing process, with discriminating against it in favour of its larger customers in terms of price. Sasol was giving its larger customers a discount based on the volumes of the chemical they purchased. It alleged that Sasol was charging Nationwide Poles more for the chemical input than it was charging other larger competitors, without any economic justification for this discrepancy. The conduct meant that the complainant's input costs were much higher than its larger rivals, resulting in the inability of the complainant to compete equitably by selling on its own treated poles to its downstream competitors. The Tribunal upheld many of

¹ This article is a modified extract from a presentation in Cape Town, September 2004 "Pro-Poor Regulation and Policy" and submitted as a Centre for Regulation and Competition working paper. "SMEs" refers to small and medium-sized enterprises, whilst "SMMEs" incorporates micro enterprises. This paper is concerned with the former.

² See paper entitled "The Role of South African Competition Law in supporting SMEs" focussed on enforcement problems in respect of SME complaints being prosecuted before the authorities. K. Kampel. 2004 .

the complainant's assertions, holding that the purpose of section 9, the Act's provision prohibiting price discrimination, was to express the legislature's desire to maintain accessible, competitively structured markets, markets which accommodate new entrants and which enable them to compete effectively against larger and well-established incumbents.

The case is undoubtedly a landmark in the competition authorities' history. It is the first time a small business owner has laid a complaint direct at the Tribunal's doors; the first time the Competition Act's controversial price discrimination provision has been tested and the first time a small business has represented itself in Tribunal proceedings and succeeded. Dubbed by the press as a case of David against Goliath, the lone business, tenaciously represented by its sole proprietor, successfully pitted itself against an army of Sasol Oil's lawyers to come up trumps. Though the case was the first to be brought by an SME under the "small business" banner, it is essentially dealing with a peculiar section of the act, section 9, which is a "carve out" from the rest of the prohibited practice provisions of the Act. Nevertheless, for the first time in the competition authorities' history, the case highlights the credence the legislature places on leveling the playing fields for SMEs under the Act. It is not the aim of this paper to comment in depth on the ramifications of this case³. However, key aspects of the case are discussed in this paper since they reflect, in many respects, the challenges faced by small business in bringing competition complaints before the South African competition authorities, as well as some of the policy issues that the competition authorities have to grapple with when asked to articulate certain public interest goals in the Act⁴.

One of the South African Competition Act's specific goals is to *"to ensure that **small and medium-sized enterprises** have an equitable opportunity to participate in the economy.*⁵ These goals are echoed in certain other provisions of the Act⁶. This focus on SMEs has been interpreted by some as creating a potential risk of safeguarding smaller competitors at the expense of competition per se. Modern competition/antitrust policy constantly confronts the question: Are we protecting competition or competitors? Since there is general consensus that the latter

³ In fact an appeal has been noted against the Tribunal's decision, as at April 2005.

⁴ K Kampel op cit

⁵ See Competition Act, At 89 of 1998, purpose section 2(e)

⁶ See Section 10 (3)(b)(ii), the exemption provisions, and Section 12A(3)(c) the merger provisions.

approach, that is, protecting competitors from competition, could potentially lead to higher prices and other market-distorting effects, most competition regimes tend to steer clear of this policy approach as far as possible.

The inherent tension between the pro-competition versus the pro-competitor debate is not a new one. This paper argues that this debate may take on a different hue in differing socio-economic contexts. A particular competition authority's interpretation of this question must be informed by the unique socio-economic context within which that country finds itself. In a relatively small, developing market such as South Africa, the legacy of economic concentration, state ownership and state protection has had the effect of preventing smaller competitors from getting into and competing within the market in the first place. Dominant firms in these markets may not have achieved their market positions through high levels of efficiency, innovation or strategic vision, but precisely because they have never had to compete, due to a legislative and economic history of discriminatory laws and protectionist government policies. What then, are the implications for the policy approach the competition authorities should adopt when SME creation and small business promotion is a key item on the government of the day's agenda?

This paper delves more closely into these policy issues, exploring in particular the notion of how difficult it is for competitors, especially smaller ones, to establish competitive harm or anti-competitive effect with respect to prohibited practices, which is where the competitor/competition paradox manifests. It is observed that under the South African competition regime, though the policy goals to protect small business and level the playing fields are apparent, the implementation of this may be limited by the application of a pure consumer welfare standard of assessing harm.

B. SOUTH AFRICA'S POLITICAL AND ECONOMIC CONTEXT

It is no secret that right until the early 90's, South Africa was an isolated and protected economy. Over the apartheid years, government subsidies, strict market controls, high tariffs, low levels of foreign direct investment and high levels of government ownership engendered a highly concentrated economy⁷. Isolation and lack of competition from abroad allowed large incumbent firms to entrench their

⁷ Kampel op cit.

monopoly power domestically in a safe comfortable trading environment. With the transition to a new democracy, the liberalisation of markets heralded many positive economic changes for the economy in terms of competition from sources abroad. As a result, incumbent firms are now faced with the threat of new entry and hence have an incentive to use their market power to engage in anti-competitive or exclusionary conduct to inhibit their prospective rivals.

C. CHALLENGES FACING SMES

Despite South Africa's relatively newly-liberalised market status, foreign firms may elect not to enter the South African market. Being such a small market, it is often simply not worthwhile for such firms to invest in South Africa, especially in a context where already large, integrated, dominant local firms have such a stranglehold on downstream channels of distribution or upstream supply sources or strategic resources. This is a common feature of many small market economies.⁸ Small producers or customers in SA often have no choice but to rely on such local firms for supply, especially in a small developing economy where exchange rate fluctuations and other costs limit the viability of imports as substitutes⁹.

In South Africa, as in many small economies with high entry barriers, size matters, whether it is in gaining access to valuable retail space, or in procuring preferential discounts from suppliers. Furthermore, incumbent large firms in many sectors are able to select larger customers or suppliers that they prefer to deal with, which facilitates their control over the entire supply chain.

Being large and dominating a particular market per se is not an offence under the South African competition statute. However, it has been recognized that in South Africa, there is a tendency for large firms which have been used to the easy life attained through market dominance, to resort to anti-competitive behaviour in order to protect their positions of market dominance¹⁰. It is commonly accepted that barriers to entry which entrench monopoly power may arise from large firm behaviour in established distribution networks or from control over key inputs (Zalk &

⁸OECD3 (2003)

⁹ See Mondi Limited and Kohler Cores and Tubes. 20/CAC/Jun02)

¹⁰ "...the Bill prohibits outright the most serious anti-competitive practices...or the practice, all too common in SA whereby competitors in pursuance of the quiet life divide up markets between themselves..." Hansard Parliamentary debate on the merits of the Competition Bill, p 6832

Roberts: 2004).¹¹ Exclusionary or anti-competitive conduct to entrench market share is not uncommon and for competitors, particularly small firms, these practices hurt them where they are most vulnerable, either by denying them access to customers or suppliers or by squeezing their cashflow. Anecdotal evidence suggests that many large suppliers have favourable agreements with large customers in terms of which they agree not to sell to their larger customers' smaller competitors, alternatively to sell to them at an inflated price. Vertically integrated firms may deny critical inputs or equipment to smaller competitors in downstream markets where those same large firms compete.

These harsh "rules of play" imposed by big business mean that the upshot is that the new entrant must pay a higher price, face an increased cost base and be forced to trade on thin margins, restraining its ability to grow and flourish. Efficient smaller firms may find a lucrative market niche where the revenue-generating potential becomes attractive for a dominant firm, and the smaller firm is gradually "muscled out" of the market. It is not uncommon for large, vertically-integrated firms to buy up smaller competitors to acquire greater market share. Even though an SME may receive pecuniary compensation, it is effectively coerced into exiting the market. Though this may not necessarily be bad for competition, since an enterprising firm can deploy funds so received to another business, competition is harmed when, as frequently occurs, the efficiency levels of the large firm drop. Since there are no alternate suppliers, consumers are denied the quality of products or services that the smaller firm could have provided and since there are no efficiency savings to pass on, prices to consumers are not lowered.

As far back as 1998 when the Competition Bill was being negotiated, the effect of high concentration and monopolization by big business on smaller firms and potential new entrants was recognized and acknowledged by most political constituencies. The Competition Act's attention to small business interests was therefore born out of a need to protect small (especially Black-owned) businesses by facilitating access to markets hitherto controlled by white-held monopolists¹².

In South Africa, five years on, it is apparent that many markets remain highly concentrated, notwithstanding the valiant attempts by the competition authorities to

¹¹ Roberts and Zalk (2004), p 10

¹² See Kampel op cit.

forestall monopolies through merger control and by closely monitoring anti-competitive conduct in various markets. Despite the high level of activity by the competition authorities in the merger control arena, there has not been a similar scale of intervention in respect of restrictive practices, and an authoritative belief lingers that markets remain highly concentrated and hostile to new entrants.

In a ten-year review of government policies, it is remarked that:

*"...there is concern that the competition authorities have not been as effective in the field of combating prohibited practices...Industry concentration remains high in South Africa...As a result, price markups in South Africa are high by international standards, especially in certain key intermediate products."*¹³

Accessing and growing within markets remains a crucial challenge facing SMEs. A recent review commissioned by the DTI and conducted by Trade & Industry Policy Strategies (TIPS) found, in highlighting the unequal growth rates between informal and formal SMEs, that attention needed to be focused on lowering of barriers to entry for SMEs into the formal sector of the economy¹⁴. In reviewing two specific sectors, that is, food production and tourism, the report finds that *"the concentrated structure of these markets functions if not as a direct barrier to entry, as a powerful constraint on the growth potential of existing and emerging SMMEs in these sectors."* The review highlights competition policy as an area for intervention to support the "upgrading and establishment of SMMEs."

Can competition law and policy in fact play a role in ameliorating the plight of SMEs in the context of a highly concentrated market structure?

D. THE ROLE OF COMPETITION POLICY

There is broad international consensus that the "core" goals of competition law and policy of promoting and protecting the competitive process for the benefit of economic efficiency and consumer welfare should be incorporated into most competition regimes. This is achieved by competition authorities striving to apply the competition law so as to encourage firms to reduce prices and create greater choice of goods or services.

¹³ See Towards a Ten Year Review (2003), page 40

¹⁴ See Annual Review of Small Business (2003), page 23.

In exercising their functions, most competition authorities tend to focus on the detrimental effects at the consumer level encountered when there are high levels of market concentration, since typically this takes the form of raised prices or limited output by dominant or monopolistic firms. The authorities do not generally strive to protect individual competitors against anti-competitive harm if larger incumbent firms' conduct will bring down prices for and otherwise benefit consumers. However, notwithstanding the effects on consumers, when a few large firms dominate the competitive landscape, monopolistic conduct can affect smaller competitors by restricting their ability to enter into or compete within markets, or by precluding them from challenging the entrenched positions of their larger rivals. In this way, the *contestability* of markets is reduced. In practice, seeking to give effect to competitor concerns inevitably brings competition authorities into conflict with their core goal, which is to protect the consumer welfare at large. SMEs, by virtue of sheer lack of economies of scale, will be unlikely to guarantee lower prices or greater choice. The fundamental tension between pure competition goals and other public policy goals typically create a dilemma of which class of rights to protect at the expense of the other.

To what extent should the manner in which a large firm exerts its market power to the detriment of competitors, as opposed to the detriment of consumer welfare at large (or competition), be a concern of competition authorities? Indeed, it is a fine distinction, because by protecting competition and the competitive process, we are in fact protecting competitors, who make up the fabric of competitive markets! If there are no competitors, there is no competitive process to protect!!

This dilemma of antitrust policy takes on even greater proportions in the context of an Act which seeks to level the playing fields for SMEs. It has been confronted by competition authorities the world over and is discussed in the next section.

E. OTHER JURISDICTIONS

US Policy Approach

Tracing the evolution of antitrust policy in the U.S., it appears that it has travelled full circle. In the 60's and 70's there was a concerted attention to favouring the protection of smaller competitors against larger competitors, even at the expense of

efficiency losses.¹⁵ This changed in the 80's when economic efficiency became the overriding goal of anti-trust policy, under the auspices of enhancing consumer welfare. (Fox: 2003)¹⁶. This approach, associated with the Chicago school of thought, focused on allowing the market to operate on the principle of efficiency, by maximizing economies of scale, rather than on protecting small competitors against larger rivals (Hamner: 2002)¹⁷. Under this doctrine, competition law should only intervene where conduct reduces output or raises price, in other words, where market conduct produces "inefficient" outcomes. No other socio-political considerations are relevant. This is rationalised on the basis that to protect competitors would penalize large efficient firms and discriminate between market participants. Under this approach, dominant firm exclusionary strategies would seldom be objectionable, in deference to the principle of efficiency. (Pitofsky: 2003)¹⁸

The U.S. today is a highly sophisticated and developed economy which is characterized by open, highly competitive markets¹⁹. Furthermore, it has been pointed out that current US policy choice is informed by a need to encourage large firms to improve their products and lower their prices in a context where innovation in a high-tech market-place is crucial for survival (Fox: 2003). Under current US anti-trust policy, productive efficiency is the overriding concern of antitrust (Areeda: 1999). Accordingly, efficiency arguments by large dominant firms would, understandably, be likely to prevail against allegations of harm to competitors. Put simply, competition in the US is already fully entrenched as part of the US citizen's every day culture and commercial reality and barriers to market entry are relatively low. This efficiency-based approach in current-day antitrust in the US is in marked

¹⁵ See Brown Shoe Co. v United States 370 U.S. 294, S.Ct.1502, 8 L.Ed.2d 510. This decision has been interpreted as a mandate to protect competitors, particularly small businesses, against being swallowed up by larger corporate rivals. The Supreme Court approach reflected what they perceived to be Congress' desire to still the increasing economic concentration in the US economy through corporate expansion. The Supreme Court was concerned to promote competition through the protection of viable, small, locally owned business, accepting the possibility that this could mean an efficiency loss to society in the form of higher costs and prices from the maintenance of fragmented industries and markets.

¹⁶ Fox (2003) , Page 4

¹⁷ See The Globalisation of Law: International Merger Control and Competition Law in the United States, The European Union, Latin America and China" 2002. 11 J.Transnational Law and Policy".

¹⁸ See Pitofsky (2003)

¹⁹ Fox remarks on the state of industrialization in the US that "markets including capital markets, are generally robust; successful business has generally achieved its position on merits, maybe by luck, but probably not by government privilege." Fox (2003), p 4

contrast to that favoured in Europe where "other goals" besides pure efficiency ones have been known to be propagated²⁰.

EU Policy Approach

In the EU, competition policy has focused on the over-arching goal of integrating the common market, but protection of competitors and viability of smaller businesses have also been of central concern to the European Commission along with economic efficiency considerations. (Janow: 2003) ²¹ This is because the EU has been known in its decisions to protect the structure and in particular, the accessibility and openness of markets. An undertaking with a dominant position has been said to have "a special responsibility not to allow its conduct to impair genuine undistorted competition in the Common Market."²²

Therefore, under the restrictions on abuse of dominance under Article 82 of the Treaty of Rome, any conduct which detracts from the openness of markets is condemned by the European Courts.²³ SMEs are therefore protected under "fair competition" principles which endorse open and accessible markets and uphold the competitive process (Jenny: 2002 p 320).

Current EU policy therefore favours a more interventionist role by competition agencies than does the US. In the words of Mario Monti:

*"enshrined in the Treaty is ...an open market economy with free competition... Personally I believe that an open market economy does not imply an attitude of unconditional faith with respect to the operation of market mechanisms. On the contrary, it requires a sense of commitment – as well as self-restraint – by public powers, aimed at preserving those mechanisms."*²⁴

Similarly, some member states have afforded a special status to SME constituencies under their applicable competition statutes. In Germany, the amendments to the Act against Restraints on Competition ("ARC") post 1973, reinforces the legislature's

²⁰ This contrasting approach has become patently clear through various high profile decisions such as GE/Honeywell COMP/M2220 3 July 2001.

²¹ Specifically with reference to Article 82 of the Treaty of Rome, concerned with firms having dominant positions. See Janow (2003)

²² See Nederlandsche Baden-Industrie Michelin NV v. Commission, 1983 E.C.R. 3461 Case No. 322/81,

²³ See Hoffmann-La Roche Case 85/76 [1979] E.C.R. 461, Tetra Pak Case T-83/91 [1994]E.C.R.II-755

²⁴ See Monti (2000), p 257

instruction to use competition law to protect small and medium sized businesses against aggressive competition by larger firms.²⁵

Section 19 states that it is abusive for dominant firms to impair the competitive opportunities of other firms significantly without justifying reasons.²⁶ In particular, it is an offence to unduly impede or discriminate against small and medium sized-firms.²⁷ Similarly, it controls discrimination and “unfair hindrance” by dominant firms, associations, and cartels, which may not use their market position to demand preferential terms “without objective justification.” This section is based on a relationship of economic dependence insofar as it applies particularly to their dealings with small or medium-sized enterprises, as suppliers or purchasers, who depend upon them and lack reasonable opportunities to resort to other outlets or sources.

This attention to SME interests reflects Germany’s post-war social market approach whereby companies are held accountable to shareholders, stakeholders, employees, customers and suppliers. This process approach is captured in its competition policy which aims to protect structures within which firms compete so that effective competition amongst competitors is maintained and no one firm or firms become too influential.²⁸

Accordingly, it is apparent that the successful adoption and application of a particular competition policy is more a question of context-specific economic conditions, which must be dynamically shaped to reflect a particular country’s prevailing market characteristics at any one point in time, if the policy is to be credible, effective and legitimate.²⁹

Next, how do the South African competition authorities apply competition policy?

²⁵ See ARC Act

²⁶ Section 20 sub-sec 4 (or ARC)

²⁷ Section 20 sub-sec 3 GWB

²⁸ Janow, 1996.

²⁹ This inconsistency in antitrust approaches has frequently been described as a function of the varying economic and political conditions between countries over time. See Hamner (2002).

F. COMPETITION POLICY IN SOUTH AFRICA AND ITS APPLICATION

Like most pieces of Competition legislation, the South African Competition Act commits itself to the protection of the consumer by providing them with “competitive prices and product choices”. However, the Act goes further than most and incorporates other policy goals, such as “promoting the efficiency, adaptability and development of the economy; employment-creation and advancing the social and economic welfare of all South Africans; promoting a greater spread of ownership, particularly amongst previously disadvantaged individuals and ensuring that *small and medium-sized enterprises have an equitable opportunity to participate in the economy.*”

The legislative intent as evidenced by the “equality for all” principles enunciated in the preamble and the purpose section of the Competition Act aligns closely with the European approach, to protect the openness of and access to markets.³⁰ As in the EU, the South African competition authorities have the power to prohibit anti-competitive dominant-firm conduct in the form of exclusionary practices, these being proscribed as abuses of dominance.³¹ The primary legislative purpose of the competition statute was to redress the structural imbalances of the past, by chilling the anti-competitive conduct of monopolies and dominant firms. Commentators have remarked on the strong presumptions against dominant-firm conduct contained in Section 8.³² However the OECD has noted that the absence of more cases suggests that these are not being optimally used for that purpose.³³

The Act’s explicit purpose to give SMEs an equitable opportunity to compete in the economy is given expression to under the public interest provisions in the chapter on mergers. Similarly, SMEs are given special consideration in exemption proceedings³⁴. The incorporation of public interest goals within the Act, to be balanced against other

³⁰ See Jenny et al (2002)

³¹ Section 8(c) and (d) of the Act explicitly proscribes exclusionary conduct.

³² In particular, section 8(a) which prohibits excessive pricing, section 8(b) which prohibits refusal to give a competitor access to an essential facility. The OECD Peer Review remarks at page 28 that “the strong language implies that South Africa’s law is suspicious of large-firm behaviour and aims to control and overcome the history of highly-concentrated industry.” OECD (2003)

³³ OECD4 Peer Review: 2003, page 28

³⁴ Although this was with a view to SMEs being perpetrators of anti-competitive conduct, which they seldom are in the SA context.

goals, indicates the legislature's intention to maintain the centrality of SME protection within the entire competition architecture.³⁵

Though SME interests are explicitly catered for under the merger provisions, there is no explicit reference to small business interests or indeed, any of the public interest goals under Chapter 2, dealing with the prohibited practice provisions of the Act.³⁶ This means that up until the Nationwide Poles case, no decisions had specifically interpreted how small business interests could be given effect to under the prohibited practice provisions of the Act, nor how to enact the Act's stated purpose to level the playing field for SMEs "*to ensure that **small and medium-sized enterprises** have an equitable opportunity to participate in the economy*".

It is true that there have been few full blown prohibited practice cases prosecuted before the competition authorities. Similarly, pre-Nationwide Poles, there have been proportionately few SMEs which conscientiously challenged large firm behaviour by bringing complaints brought before the competition authorities. Though prohibited practice complaints may be lodged, they either die a quiet death at the doors of the investigator (Competition Commission) when they are non-referred, alternatively do not garner sufficient resources to take to the adjudicative (Tribunal) stage.³⁷ This is somewhat alarming, when one considers that in 2001, the Commission reported that 72% of all the prohibited practice cases filed with it were by SMEs.³⁸

Amidst the handful of complaints successfully adjudicated at the Tribunal stage, there have been complaints initiated by an SME but they have succeeded, not on public interest grounds, but because the conduct complained of was either an exclusionary practice by a dominant firm³⁹ or a per se offence.⁴⁰ Though they have obliquely benefitted small business, the basis of upholding their claims was pure competition principles. The Nationwide Poles case is the first to fully ventilate the

³⁵ Since the Nationwide Poles case the authorities have also formally recognised the relevance of price discrimination under section 9 to SME interests.

³⁶ Kampel op cit. Prohibited anti-competitive practices are prosecuted under the Act either as restrictive agreements which have the effect of substantially preventing or lessening competition in a market (Sections 4, 5) or as abuses of a dominant position including exclusionary acts and price discrimination (sections 8 and 9).

³⁷ Kampel op cit. These enforcement difficulties were more fully ventilated.

³⁸ Commission Annual Report: 2001

³⁹ See Competition Commission and Patensie Sitrus Beherend (Bpk) 37/CR/Jun01, SAR & JP Slabber and SAD Holdings & SAD- 4/IR/Oct99 where exclusionary conduct was prohibited under the exclusionary practice provisions in section 8.

⁴⁰ Cancun Trading No 24 CC v Seven-Eleven Corp SA and Competition Commission v Federal Mogul Aftermarket. These both dealt with infringements of section 5(2), the vertical practice of resale price maintenance.

constraints SMEs face in the economy at the hands of big business, in fact this section prohibiting price discrimination was aptly described by the tribunal in this case as “a hybrid of public interest and anti-trust”.⁴¹

It is not uncommon to see a track record of poor enforcement of prohibited practice cases in developing countries, especially in the competition regime’s infancy and South Africa is no exception. Large interest groups or firms have the resources, expertise and infrastructure to interpret, apply and shape the country’s competition law. This naturally works against firms not having the same resources, but nevertheless being the victims of anti-competitive conduct.

Furthermore, the lack of enforcement of complaints before the competition authorities may well be attributable to another key factor –an inability for the complainant to prove anti-competitive effect or to show “substantial” competition harm. In the next section, we explore the extent to which the bringing of more anti-competitive complaints by SMEs may be hamstrung by rigid requirements of proving harm to consumer welfare. Are the authorities taking enough cognisance of small firms that are effectively barred entry to or hampered from growing within markets?

G. WHAT IS ANTI-COMPETITIVE EFFECT?

Pursuing a complaint against a firm under the competition act is a two-stage process. Firstly, the Commission investigates whether there is enough evidence to ground a claim before the Tribunal to establish a negative effect on competition. If there is, it will refer it. If there is not, the commission washes its hands but the complainant still has another bite at the cherry and can make a complaint directly to the tribunal, provided it bears its own costs.

Many of the prohibited practice sections of the Act stipulate that in order to succeed in proving anti-competitive conduct, the complainant must prove anti-competitive effect. What determines anti-competitive effect? Some sections require evidence of “a substantial prevention or lessening of competition” in a particular market in order to ground harm to competition.⁴² The term “substantial” implies there must be a

⁴¹ See Nationwide Poles and Sasol Oil (Pty) Ltd 72/CR/Dec03 at paragraph 152

⁴² Sections 4(1)(a), 5(1), 9(1)(a)

systemic degradation of the competitive process sufficient for the authorities to intervene and not merely the exit of one competitor. Other sections require proof of exclusionary conduct to establish anti-competitive effect.⁴³ Exactly what is required to prove anti-competitive effect under these sections is still somewhat of a grey area, since jurisprudence is still evolving. Exclusionary acts are a species of abuse of dominance, which admits of a different type of competitive harm, namely that the act “impedes a firm entering into, or expanding within, a market”.⁴⁴ Harm flowing from an exclusionary act has been given a fairly liberal interpretation in some cases – where no exclusionary effect was required to be proven (Patensie Citrus) and a more conservative one in other cases - requiring establishment of the 'anti-competitive effect' of the practice, which, in one case, required the applicant to show that market power was created or extended in consequence of the alleged act (York Timbers).

Accordingly, despite a few practices being *per se* offences, that is, not requiring a showing of anti-competitive effect, nor permitting any pro-competitive defence, a finding of a violation of the Competition Act depends on a showing of net anti-competitive effect.⁴⁵

It is not surprising then, that when it comes to interpreting the standard of harm to ground anti-competitive effect, the competition authorities' have exhibited an overriding concern with protecting the consumer welfare, that is, they have tended to first and foremost, proscribe conduct that raised prices or lowered product choices. Therefore for instance, in previous prohibited practice cases prosecuted, the authorities have definitely stated that it is not their role to protect competitors, especially where the respondent has provided pro-competitive justifications for its conduct, which may include claims of improved efficiencies.⁴⁶

Unlike under the merger provisions, where the authorities are required to prospectively forecast whether competition is likely to be substantially prevented or lessened, under the prohibited practice provisions, SMEs, and indeed other complainants, seeking redress under the Act are called upon to retrospectively prove actual competitive effect. This is understandably difficult for a small, under-resourced

⁴³ Section 8(c) and (d).

⁴⁴ Section 1 (x) of the Competition Act

⁴⁵ See OECD Peer Review: 2003 at 22. Per se offences include sections 4(1)(b)(i) to (iii), 5(2) and 8(a) and (b).

⁴⁶ Nkosinauth Ronald Msomi & Others vs British American Tobacco – 49/IR/Jul02.

competitor. An SME complainant seeking to enforce its rights at the competition authorities will always confront the question: *What is harm to competition?* It is here where the competitor versus competition debate comes to the fore. Potential small business litigants are therefore hamstrung by a fundamental failure to prove competitive effect under the Competition Act.

The difficulty of small businesses proving anti-competitive effect was acknowledged by the tribunal in Nationwide Poles. In this regard the Tribunal remarked that:

"Foot points out that on a consumer welfare test small business will always fail, precisely because it is not able to correlate harm that is inflicted upon it to harm that is inflicted on the broader market. A small firm will always be met with the response that its troubles are, in relation to the market as a whole, de minimus, that is, that they have little, if any, effect on competition in the market as a whole."

It is significant that at the Commission first-stage level, 8% of the total number of cases investigated in 2003-4 were referred and 63% were not referred to the Tribunal for prosecution.⁴⁷ Of those non-referred, the Commission cites 29% as being non-referred due to a failure to prove a substantial prevention or lessening of competition. Interestingly, Nationwide Poles was one of those cases in respect of which a Notice of Non-Referral was issued by the Commission.

The argument that in order to ground anti-competitive effect, one has to evaluate the degree to which they and other competitors have been ousted from a particular market, often leaves small firms floundering. In the absence of any specific evidence of firms exiting a particular market, it is assumed that there is no anti-competitive effect nor has any harm to the competitive fabric of the market been occasioned. However, one must not under-estimate the incidental, less measurable anti-competitive consequences flowing from such conduct. The definition of "exclusionary" conduct in section 8 does envisage that competitors may be simply restricted from expanding within or be *deterred from* entering markets. What is more significant as far as SMEs and other potential new entrants are concerned, is that they may be or discouraged from engaging in any form of innovation, where perceived barriers to entry and raised costs make capital investments non-viable. These growth-restraining effects can never be fully measured. As a consequence, the

⁴⁷ Presumably, the remainder are still under investigation. Competition Commission (2004).

incidental loss to consumer welfare as a whole can never be entirely quantified, but that does not mean that it is not there.

The SME-friendly policy aspirations ventilated in the Nationwide Poles case allowed the Competition Tribunal to apply a lower threshold test for interpreting “likely to substantially prevent or lessen competition” in evaluating this concept in its decision. It acknowledged that since the legislature could not have intended small firms to be non-suited in proving anti-competitive effect under section 9, all the complainant had to prove was *competitive relevance*. In other words, it had to establish that the complaint was relevant to competition, as opposed to a mere narrow claim to protect its own commercial interests.⁴⁸

However, insofar as these findings were constrained to section 9 of the Act and though the case highlights the policy goals of the legislature with regard to small business, it still leaves somewhat of a question mark over how the competition authorities will apply the “levelling of the playing fields” aspirations of the Act to other prohibited practice provisions. Certain pronouncements in the decision indicate that in cases other than those where competitive effect need not be proven, small business complainants will still have a high bar to clear to sustain allegations of competitive harm under the other Chapter 2 provisions:

“Where the general anti-competitive acts are concerned (referring to sections 4(1)(a), 5(1) and 8(c)) the complainant has, in order to secure a conviction, to establish that the act complained of is anti-competitive in its effect. This is the complainant’s onus – it does not avail him to simply describe the elements of the act, he must establish the anti-competitive consequences that flow from it... However in respect of each of these acts named in 8(d)(i)-(v) the anti-competitive effect is presumed once the elements of the act have been established.”⁴⁹

Nationwide Poles demonstrates that the policy goals to protect small business and level the playing fields are very much a part of the Act and can be applied to prohibited practice cases. However, by having to adhere to a pure consumer welfare standard to assessing harm, SMEs could potentially still face an uphill battle when

⁴⁸ See Nationwide Poles and Sasol Oil (Pty) Ltd 72/CR/Dec03 at paragraph 103

⁴⁹ Para 95- 96. Underlined portion is inserted.

confronted with some of those sections of the Act which are not per se or where anti-competitive effect is not presumed. Application of this standard in all cases could be misplaced in a context where SMEs face a hostile and distorted market context where there is a certain reticence about pursuing anti-competitive infringements under the Act. In this sense then, the act could be raising the bar too high.

To describe this context, it is now useful to examine some of the peculiar dynamics in the South Africa context.

H. UNIQUE SOUTH AFRICAN CONTEXT

Within South Africa's traditionally highly concentrated markets where large firms dominate, small business is frequently *dependent* on big business – either as customers, or as suppliers. In South Africa, the perceived risk of reprisal or of being boycotted and lack of representation ensures that SME complainants are too terrified to even lay a complaint at the competition authorities which would allow proper investigation into harm to the competitive process.⁵⁰ Furthermore, a culture of dominance prevails such that SMEs are not sure whether they indeed have the right to take on big business. There is therefore a quiet acceptance of the status quo directly related to the hostile market structure South African SMEs face. Monopolistic conduct may therefore remain pervasive and entrenched.

The ramifications for ultimate competition are severe. What is frequently underestimated is the effect of the perceived might of larger competitors in many sectors, which further deters entry by potential new entrants.⁵¹ SMEs in particular, will simply refrain from entering certain markets or be coerced not to enter markets where they compete head-on with larger rivals. In this way the contestability of markets is reduced, damaging the competitive *process* which will harm consumer welfare in the long-term.

What the Nationwide Poles case succeeds in exposing is the phenomenon whereby dominant firms do in South Africa tend to pursue the comfortable “quiet life” whereby they are able to maintain their entrenched positions by keeping their larger customers or suppliers happy, despite the absence of efficiency gains to the benefit of consumer welfare. In doing so, it highlights a key unique feature of the South

⁵⁰ This has been attested to by several SME witnesses in various cases in hearings before the Tribunal.

⁵¹ See The Clicks Organisation and Purchase Milton & Associates (Pty) Ltd and Others 24/LM/May03

African economic market-place which serves to keep the playing fields from being level. Large firms are able to maintain the status quo by keeping smaller, potentially obtrusive firms out. It was pointed out in the case how Sasol's behaviour was frequently "irrational" insofar as they behave anti-competitively in markets where they do not even compete.⁵²

The reality is that no matter what interventions have been made to break up monopolies, South Africa is still feeling the economic hang-over from the days when monopoly firms reigned supreme, to such an extent that exclusionary practices by dominant firms may well be accepted as "business as usual" in the South African context. This would further explain the low level of enforcement activity.

Some competition academics have argued that in certain contexts, competition authorities' focus should be oriented more towards guarding against incorrectly finding that there is no abuse, instead of incorrectly finding that there is an abuse.⁵³ Nowhere is this more applicable than in South Africa.

The rationale of a US-based, Chicago School pure efficiency approach is to protect the innovation and technology gains of a particular firm from rivals who wish to "free ride" on such innovations. However, it is rare, in a developing, small economy context, to find ruthless smaller competitors banging down the doors of big companies and piggy-backing on their inventions or copying their innovations. In fact, they have frequently had to learn to be *more* innovative, *more* efficient and *more* differentiated just in order to stay in the market, or indeed, operate on the fringes thereof, as opposed to some of their larger established counterparts used to the "quiet life" acquired through government privilege or political isolation. Similarly, the perceived risk of stifling competition by "protecting a competitor" at the expense of the integrity of the market mechanism does not seem to be justified in the South African context. The competition authorities have, in other cases, been eager to denounce opportunistic attempts by competitors, large or small, to abuse the competition mechanisms to further their own commercially-motivated claims.⁵⁴ The requirements that claims must be "competitively relevant" evidences this approach

⁵² The complainant's expert, remarking on the irrationality of Sasol seeking to eliminate downstream competitors in a market in which it did not compete: "However, it is not something that hasn't been observed or I haven't observed in other markets as a somewhat irrational behaviour of South African firms with market power." Hearing Transcript page 295.

⁵³ Fingleton: 2003

⁵⁴ See in particular, York Timbers Ltd and SA Forestry Company Ltd – 15/IR/Feb01

and rules out the likelihood of frivolous competition claims being entertained. In any event, anecdotal evidence from small businesses suggests that, far from seeking preferential advantage, small players merely request a level playing field on which to compete. While it is not suggested that pure competition goals should be abandoned, the market mechanism cannot function when large firms alone dictate the rules of play.

What is even more distinct in the South African context, is the absence historically of alternative policy mechanisms to support SMEs. Government SME policies are being revisited, but it is widely accepted that up until the present day, they have failed to deliver. While it is not suggested that competition policy should replace industrial policy in this regard, competition policy should nevertheless not disregard the position of SMEs in a very unique market context in which large firms have the resources to use their size and privileged positions to deter firm growth and new entry. Furthermore, what is quite apparent in South Africa, is the marked absence in the past of sophisticated consumer protection legislation.⁵⁵ This, together with a lack of active consumer lobby groups and networks has created a culture of consumer apathy reducing the likelihood of any serious challenges to large firm behaviour. The existence of a sophisticated legal system means that unlike in the US, where consumer rights are very advanced, in South Africa high legal costs and the inaccessibility of legal assistance means that SME complaints against big business are unlikely to be addressed even in civil enforcement arena. This serves to entrench the reticence and acceptance of the status quo. Furthermore, under South African competition law, anti-competitive actions can only be followed up by private claims for damages in the High Courts once the Tribunal has declared conduct to be anti-competitive under the Act.

I. APPROACH IN TRANSITION ECONOMIES

It has been argued that in small economies, efficiency goals should take primacy over other social and political goals.⁵⁶ Therefore, competition policy should allow for enhancement of output of individual firms through amongst other means, mergers, which allows for the exhaustion of economies of scale. However, it is also conceded

⁵⁵ Again, there are plans afoot to institute national consumer protection legislation but in the meantime, we must take the market as we find it.

⁵⁶ There is also much debate around this particular issue but this will not be canvassed here.

that such a policy creates highly concentrated markets, which can dampen entrepreneurial spirit and widen income distribution inequities.⁵⁷

There is support for the view that in transition economies where there is a history of state protection that has shielded various monopolies from competition, some sort of "middle-road" approach, focused on the competitive *process* and on preserving the openness of markets, short of protecting competitors, should be adopted in favour of new entrants.:

"Further, numerous fledgling antitrust economies have among their many tasks the job to create and root competition. Often they are operating in an environment of state-owned or recently privatized enterprises, state-granted privileges, and weak capital markets. They must keep a watchful eye on entry conditions and contestability of markets. Preserving incentives of firms without power to enter markets, expand and innovate, is of great importance to the success of their project to support a market economy." (Fox: 2003)

Discussion of this topic at the February 2003 meeting of the OECD Global Forum on Competition disclosed that countries with developing economies may find it important to pursue non-efficiency goals, at times giving them primacy.

There is accordingly a generally accepted acknowledgement of the peculiar economic and political circumstances facing developing economies as they strive toward economic maturity. In other words, a policy approach that takes account of the country's unique socio-economic history, as opposed to an approach based on rigid efficiency prescriptions as applied in the U.S., is crucial. There is a recognition that competition authorities in developing countries should therefore be wary about borrowing wholesale competition prescriptions from other more developed market contexts, where the same socio-economic conditions do not exist.

J. THE FUTURE IN THE WAKE OF NATIONWIDE POLES

Nationwide Poles is the first competition case which has really "puts SME concerns" on the map, so to speak. It is the first time the Tribunal has pronounced in one of its

⁵⁷ Gal: 2003, p 52

decisions, on the legislature's intent in leveling the playing fields for business as well as recognizing definitely where the focus of competition enforcement should lie for the benefit of the South African economy:

*"In our view the relevant, that is, the South African, legal and political economy context favours competition enforcement that is concerned to protect the market mechanism from conduct that has the effect of undermining it."*⁵⁸

It addresses the phenomenon whereby larger firms have become accustomed to the easy life and for this reason may resort to conspiring with their larger customers to oust smaller firms that compete with them. In this sense, it acknowledges that the presence of structural imbalances inherited from the past impact directly on SMEs and their freedom to compete.

The case is also ground-breaking in that it recognises the difficulty of a small competitor to establish anti-competitive effect as required by a consumer welfare standard. The case is careful though to delineate price discrimination as a separate section of the Act with unique evidentiary requirements. Though the competition tribunal professes to protect the market mechanism, the decision does not make any definitive pronouncements on the standard of harm to be applied in interpreting "competitive effect" under the other sections of the Act. Though the tribunal clarifies that under section 9, smaller competitors are given the luxury of a lower threshold test, we are still left with the question of what sort of harm competitive effect envisages, particularly under sections 8 (c), 4(1)(a) and 5(1). Therefore, it still leaves somewhat of a question mark over how the competition authorities will apply the "leveling of playing fields" interpretation of the Act to these other prohibited practice provisions, those "**general anti-competitive acts**" which will perhaps demand more stringent burdens of proof from complainants. It is very likely that complaints will still be evaluated very much through the lens of harm to consumer welfare and again, SME complainants may run aground in seeking to prove anti-competitive effect.

Nevertheless, with its SME-friendly tone, the upshot of the Nationwide Poles decision might well be the creation of a perception amongst SMEs that the competition authorities are not merely an instrument of big business. It could give SMEs impetus

⁵⁸ At paragraph 87

and the confidence to expose any anti-competitive conduct of their larger counterparts by engendering an awareness of the competition authorities' sensitivity to SME concerns in the market-place. It also could alleviate the reticence and reluctance amongst smaller players to lodge complaints before the competition authorities in the first place. It might well lead to a frenzied rush of complaints being brought before the competition authorities. However, the tenor of the tribunal's decision cautions against us assuming that smaller competitors will be arbitrarily protected for frivolous claims.

Tried and tested international precedent represents a sound basis for evaluating competition concerns, but does it pay enough attention to small business grievances in the context of a developing country with a highly concentrated market structure? While the consumer welfare standard is an essential standard to distinguish anti-competitive from pro-competitive conduct, where does it leave smaller, under-resourced competitors and is it always apposite in our context? The government's 10 year audit's revelation of persistently high concentration levels serves as an opportunity to re-think and to re-examine whether the correct approach is being applied in accordance with the legislature's policy goals.

K. CONCLUSIONS

It must be recognized that unlike in the developed markets of the US or even the EU, in South Africa, it is difficult for SMEs to enter into and expand within many markets in the first place because of the distorted market structure. An approach which loudly proclaims the virtues of efficiencies of large monopolistic firms over smaller players, or that lays down as a precursor to establishing competitive harm, an onerous showing of market exit or a negative consumer welfare effect, disincentivises vital potential new entrants from challenging the status quo, thereby inhibiting much needed growth in many market sectors.

In our unique socio-political context, the specific vested interests are becoming much stronger and more persuasive and the stakeholder pressure to afford SMEs redress from the legacies of a hostile market structure is becoming increasingly insistent. The Department of Trade and Industry's new policy initiatives signal that all areas of government intervention are being mobilised to support and enhance the plight of small and medium sized businesses and not surprisingly, the Competition Act is also

coming under scrutiny. Competition authorities need to be seen to be *creating* competition and attending to needs of its smaller stakeholders, not just those of big business. This would further assist to lower the perceived risks of entry into markets by small and medium-sized players.

OECD policy discussions like the GCF have revealed more starkly the unique pressures facing developing countries in applying competition law, as distinct from developed markets. In a context where the government is fixed on a path to alleviate poverty and encourage entrepreneurship at all levels of the economy, the competition authorities in South Africa should take a cue from Mario Monti's "sense of commitment". This might entail intervening and proactively applying their inquisitorial powers, in the name of upholding the integrity of the competitive process, without fear of stepping over the line and being accused of disregarding competitive market forces and "protecting competitors". The tribunal have gone some way towards acknowledging this in the Nationwide Poles case.

It is still early days in the South African competition regime's life and a culture of being free to compete without interference still needs to be cultivated. The question of course, is how to create this culture. Competition on the merits must prevail, therefore where do we draw the line between protecting competitors and protecting consumer welfare? In South Africa big firms need to be conscientised as to what is acceptable and unacceptable business conduct. This can only be achieved by the competition authorities taking a nuanced and holistic view of barriers to access to and expansion within markets and by taking proactive and decisive steps towards punishing large firms which transcend this line. With the Nationwide Poles case having paved the way, the competition authorities need to continue to take cognisance of the legacy of economic concentration which dominates South African economic history and focus on how to keep markets open to new entry so that, particularly smaller, efficient players can compete. Within the prescribed framework of the Act, there is sufficient flexibility and interventionist potential by the authorities to empower the competition authorities to rigorously scrutinise abuse of dominance claims brought at the behest of SMEs, evaluating these claims in the of the South African context. In this regard, the approach in Nationwide Poles is heartening.

The ultimate policy aim of competition law should always be to protect the consumer welfare. The question that the competition authorities will continue to face is what is required to *show* anti-competitive effect – must the complainant in all circumstances establish harm to the consumer in the form of raised prices or limited output? The authorities should bear in mind that on a strict consumer welfare test, it is very difficult for competitors, SMEs in particular, to enforce a prohibited practice complaint and they will very rarely succeed under this standard. It is submitted that proof that the competitive process has been *unfairly* interfered with, distorted or manipulated in favour of a larger, well-resourced firm, to the exclusion of (smaller) competitors, should be enough to invoke the penalties under the Act. In enforcing this approach, protecting the competitive process ultimately benefits consumers. The difficulty of course arises when such exclusionary conduct *is* welfare-enhancing, but to the detriment of the smaller rival.

The competition commission should proactively initiate investigations where there is a discernable pattern of restrictive practice complaints. The Commission can already initiate a complaint itself in a particular sector.⁵⁹ Using its powers to investigate allegations of abuses of dominance in concentrated market sectors where firms are used to the quiet life of not having to compete rigorously, would take some of the pressure off isolated smaller complainants of having to prove anti-competitive conduct. Without abandoning the core adherence to preserving the integrity of competition in the market, the Competition Commission can, as the gatekeeper of the public interest, afford to adopt a somewhat “activist” approach to SME and other public interest complaints.

Through its advocacy function, the Commission should encourage SMEs to participate by giving evidence as witnesses in these investigations, but this would need to be subject to some sort of anti-victimisation guarantees. This would afford some protection to SME complainants wanting to give evidence or to actively participate in merger or enforcement proceedings, free of threat and intimidation.

In fairness, the competition authorities can only act within the confines of the Competition Act. Plans are afoot to amend the Act so perhaps policy-makers could take a cue from some of these prohibited practice constraints under chapter 2 that have been highlighted.

⁵⁹ In terms of section 49B(1) of Act 89, 1998.

Given the peculiar South African market context and prevailing hostile market structures, the competition legislation might need to be amended in order to go as far as the EU does, to impose a special responsibility on large firms " to maintain genuine undistorted competition " in the market.

Similarly, the Act may require amendment to provide a catch-all provision that envisages harm to smaller competitors, along the lines of those provisions contained in competition statutes of other countries. Perhaps the adoption of an alternative threshold test for certain types of anti-competitive conduct vis-à-vis SMEs is mandated. For instance, this may entail inserting specific sections into the competition statute dedicated to preventing firms from "impeding" the competitive conduct of smaller firms, yet still allowing for defences of rational commercial conduct. Similarly, inserting provisions making it an offence for firms to use their market power to unduly impede the competitive opportunities of small and medium sized competitors, as in Germany, is a possibility.

Previously, the importance of sector trade associations as possible vehicles to bring complaints on behalf of particular small business sectors was highlighted and the authorities can play a role in encouraging these sorts of interventions. The bringing of complaints by networks of SME organisations, would fortify allegations of harm to the competitive process and enable SMEs to access and galvanize the requisite legal skills and financial resources they are currently lacking. This would entail vigorous lobbying and advocacy work, directed at these groupings by the Commission.

South Africa, as a relatively new democracy, is still very much a country in transition. Accordingly, the focus of competition policies and institutions should be geared towards developing competitive market structures and creating an enabling environment for fair competition and market forces to '*take root*'. In the meantime, the focus should be on creating developing country rules and standards which pays homage to context-specific conditions and barriers to entry to markets. A consistent balance will have to continue to be struck between application of the purely economic, efficiency-based competition theory of foreign, particularly US, competition jurisdictions and the current model, which incorporates public interest considerations, in order to create a uniquely South African jurisprudence.

What is clear is that what will be required is rigorous case by case analysis and investigation as the Competition Act's compliance with the vast array of public interests at large will undoubtedly be further tested over time.

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