

Can socio-economic justice be adequately addressed through the competition law system: A look at the efficacy of structural remedies in abuse of dominance matters in light of the structure of South Africa's economy

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ABSTRACT

It is trite that government policy informs the manner in which laws are drafted and implemented. Competition law dispensation is therefore no exception. Section 2 (c), (e) and (f) of the Competition Act No. 89 of 1998, as amended (the Act) speak to a familiar policy outlook that has been the mantle of the South African government since the advent of democracy; the pursuit of greater socio-economic rights for all. The question here is whether the pursuit of socio-economic rights and social justice, as intimated by the abovementioned sections in the Act, under competition law, is appropriate and efficacious in trying to achieve wealth distribution and social and economic welfare. This question will be looked at from the perspective of abuse of dominance primarily in recognition of the economic structure of South Africa. In addressing this question further, the paper will consider the usefulness of the types of remedial powers that our competition authorities are afforded, and especially in relation to structural remedies, under the Act to determine the efficacy of the same in achieving these goals.

I. INTRODUCTION

The purpose of competition law in any jurisdiction is informed by dynamic and varying policy objectives. Whish observes that, ‘...*competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally...Different systems of competition law reflect different concerns*¹. David Lewis reiterates the same by putting forward the argument that the approach to competition enforcement will be and arguably ought to be significantly informed by the history and structure of that particular economy where the rules are being enforced². Thus, the purpose encompassed under section 2 of the Competition Act No. 89 of 1998 (“the Act”) reflects, *inter alia*, the redistributive aims sought to be pursued generally under the competition rules of the Republic.

The above raises debate and invokes questions around economic efficiency, consumer welfare and economic equity in relation to what extent it forms part of the preoccupation of the aims of competition law within the Republic and whether one or all should be given ascendancy at any given time. Some commentators have argued that the pursuit of economic equity is an inappropriate policy objective to pursue under competition law and better addressed by other legislative or political instruments, felicitous to address issues of social justice. Competition law should rather concern itself with the pursuit of economic efficiency and/or the enhancement of consumer welfare.

It is conversely arguable that the nature of remedial powers afforded to competition authorities in terms of particular prohibited conduct are indicative of the policy objectives sought to be addressed within the context of competition law. Therefore the rationale of affording structural remedies to competition law authorities in abuse of dominance matters points to, *inter alia*, the legislature’s objective in avoiding the aggregation or concentration of resources and wealth in the hands of the few which is undoubtedly inimical to equal economic opportunity. Moreover, in the broader sense, this type of concentration in any market may hinder competition on the merits, especially, in the parlance of the general redistributive aims of the government of the

¹ Richard Whish, *Competition Law*, at page 19

² David Lewis, *Chilling Competition*, at page 2 – 3

Republic since the advent of democracy, to those groups in society who were previously disadvantaged and restrained by discriminatory legislation from engaging in meaningful economic activity.

I. A. Purposes of Competition Law

Competition policy is broadly said to aim to emulate free market conditions to ensure equal opportunities for all business, stimulate economic efficiency and protect consumers³. As referred to above by Whish, the purpose of competition law may mean that competition authorities give primacy either to consumer welfare or economic efficiency depending upon the prevailing policy objectives at any given time. What is pertinent about the pursuit of either is that a citizen, in the context of constitutional law, is not necessarily transposed to a relevant consumer and/or producer for purposes of determining whether conduct by a dominant firm is either anti-competitive or pro-competitive and has caused harm to the market. Consequently not every citizen is accorded the same standing as a consumer for purposes of competition law in assessing the likely harm caused by a dominant firm engaging in prohibited conduct. The standard is therefore one of aggregate harm or welfare and could be likened to a more utilitarian outcome rather than one that seeks to emulate perfect market conditions.

With the above in mind, the writer argues that the confinement or restraint imposed by economic and legal rationale in the decisions by competition law authorities acts as a barrier to any unbridled pursuit of social justice beyond the confines of the Competition Act. Indeed the Competition Tribunal (“Tribunal”) in *Trident Steel (Proprietary) Limited and Dorbyl Limited* (“Trident/Dorbyl”) intimated that meaningful wealth redistribution cannot be achieved at all times by competition law especially as a consumer welfare standard is harder to evidence⁴. However, the writer posits that it does not necessarily follow that where redistributive justice can be achieved as a broader policy consideration within the available competition law instruments that it

³ Neuhoff et al, *A Practical Guide to the South African Competition Act* at page 11

⁴ *Trident Steel (Proprietary) Limited (“Trident Steel”) and Dorbyl Limited (“Dorbyl”) for the acquisition of three operation of Baldwins Steel, a division of Dorbyl Limited* Case No. 89/LM/Oct00 at paragraph 81

ought to hold that it is still not competent for competition authorities to engage in this type of exercise. Rather, it is arguable that the legislature's inclusion of, *inter alia*, section 2 (c), (e) and (f) cannot be relegated to some oversight on its part or even undisciplined enthusiasm, as it undertook extensive consultation in the promulgation of the Act. Rather, the writer believes that section 2 points to a clear intention by the legislature to encompass, to a certain extent, the pursuit of socio-economic justice within the dispensation of competition law: an aim that was arguably foreseen as likely achievable under the auspice of competition law, although to a limited extent.

Professor Reekie conversely posits that policy objectives under section 2 of the Competition Act are best achieved elsewhere in the scope of other government policy instruments or at best are already addressed without the need to be specified under the Act. He argues that for example section 2 (e) is already addressed in terms of section 2 (a) and (b) by virtue of the fact that small, medium and micro enterprises ("SMMEs") can thrive within the economy provided that they produce what consumers want as per section 2 (b) and do so efficiently as per section 2 (a). He qualifies this with the proviso that the above is achievable where there are no artificially imposed entry barriers⁵. He further states that other policy objectives outside competition law serve as a more appropriate forum for example in dealing with wealth distribution and equitable ownership within the economy, such as the removal of socially biased legislation to ratify inequalities caused by past discriminatory laws⁶.

This is no doubt, *prima facie*, a fair argument to advance. However, upon further consideration, some points of consternation emerge. To begin with market conditions which engender competition on the merits do not necessarily prevail within the Republic. Some key industries are characterised by high, or in some cases and in the parlance of the Tribunal '*insurmountable barriers to entry*'⁷ that hinder entry by those previously excluded from market participation. Previous investigations by the Competition Commission ("Commission") have also revealed that key industries such as steel and construction generally, are largely not only characterised by high barriers

⁵ W. Duncan Reekie, '*The Competition Act, 1998: An Economic Perspective*' 1999 SAJE V67 (2) at page 260

⁶ *Ibid*

⁷ *Harmony Gold Mining Company Ltd & Durban Rooderpoort Deep Ltd v. Mittal Steel South Africa Ltd & Macsteel International BV* Case No. 13 / CR / FEB04 at paragraph 106

to entry especially higher up in the supply chain where dominance is more entrenched, but also that prevalent previous anti-competitive conduct at the lower levels of the supply chain restrict the ability of, *inter alia*, SMMEs and others from entering and competing effectively in the market. Thus SMMEs are prevented from successfully and effectively gaining a significant foothold to trade against or alongside non-dominant firms who may be, *inter alia*, vertically integrated with the dominant firm in the market or perhaps incumbent clients of dominant firm due to historical relationships nurtured over time along the supply chain.

It is imperative that cognisance is taken of the economic, political, historical and social factors which inform the current structure of markets and how market players have historically engaged with one another therein. There is a much to be said about the fact that as competition law experts, competition authorities are best placed to deal with policy related issues subject to the confines of the parameters of competition law which determine how decisions are adjudged.

II. SOCIO-ECONOMIC RIGHTS UNDER THE COMPETITION ACT

Section 2 of the Act states that,

The purpose of this Act is to promote and maintain competition in the Republic in order

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- a) to promote the efficiency, adaptability and development of the economy;*
- b) to provide consumers with competitive prices and product choices*
- c) to promote employment and advance the social and economic welfare of South Africans*
- d) ...*
- 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 disadvantage persons*

As stated above, socio-economic rights encompassed under section 2 of the Act are

not guaranteed to all citizens in the manner analogous rights under the Constitution⁸ are guaranteed and enforceable. It would go beyond the remit of competition law to delineate the rights under section 2 of the Act as justiciable in the manner which analogous rights under the Constitution are justiciable and enforceable. Even under the Constitution socio-economic rights are not absolutely guaranteed to the extent that some of the so-called 'first generation rights' are. Illustratively, the State may, during a state of emergency, derogate from the protection and guarantee of socio-economic rights whereas most 'first generation rights' are non-derogable even in a state of emergency⁹. In the Certification judgement, the Constitutional Court decided on how socio-economic rights under the Constitution ought to be treated: 'These rights are, at least to some extent, justiciable. As we have stated...many of the civil and political rights entrenched...will give rise to similar budgetary implications without compromising their justiciability...At the very minimum, socio-economic rights can be negatively protected from improper invasion.'¹⁰ This may give credence to some of the arguments raised by Professor Reekie in that, *inter alia*, to a certain extent even some socio-economic rights under the Constitution are qualified. Therefore, seeking to encompass such rights under specialised legislation such as the Competition Act would prove at the very best inconsistent or inappropriate. However the author again reiterates that the legislature could have only but intended to pursue such purpose under the Act hence the inclusion of section 2 (c), (e) and (f). Difficulty in addressing the purpose under section 2 of the Act does not mean that competition authorities should nonetheless not apply their minds to section 2 in their determinations¹¹. Section 2 undoubtedly engenders the competition authorities to employ a purposive interpretation of the Competition Act specifically in determining the appropriate remedy once anti-competitive conduct has been established.

The decision of the Tribunal in *Nationwide Poles* enunciated principles regarding the application of section 9 read with section 2 (e) of the Act. The Tribunal held, *inter alia*,

⁸ Act No. 108 of 1996

⁹ See section 37 (5) of the Constitution which lists a table of non-derogable rights

¹⁰ *The Government of Republic of South Africa, The Premier of the Province of the Western Cape, Cape Metropolitan Council & Oostenberg Municipality v. Irene Grootboom & Others* Case No. CCT 11/00 at paragraph 20

¹¹ See the comment of Davis JP in *Mittal Steel South Africa Limited, Macsteel International BV & Macsteel Holdings (Pty) Limited v. Harmony Gold Mining Company Limited & Durban Roodepoort Deep Limited* Case No. 70/CAC/Apr07 at paragraph 29

that ‘...the proscription of price discrimination reflects the legislature’s concern to maintain accessible, competitively structured markets, markets which accommodate new entrants and which enable them to compete effectively against larger and well-established incumbents. This set of concerns points directly to problems confronting small and medium sized enterprises (SMEs) which, in the absence of a ‘level playing field’, or, what is the same thing, in the presence of discrimination, may well find it difficult to enter new markets and even more difficult to thrive, to compete effectively ‘on the merits’...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...This is powerfully manifest, inter alia, in an industrial policy that places the development of SMEs at the centre of attempts to improve the workings of the market mechanisms. This conclusion is grounded not only in an examination of the general industrial policy context in which concern for SME development looms but also in an examination of the Act itself.¹²’

The Competition Appeal Court (“CAC”) did in fact overturn the decision of the Tribunal by refuting that small firms required particular protection under the Competition Act. However, the CAC did, to some extent, give cognisance to the notion that abuse of dominance provisions under the Act ought to be read in line with section 2, especially where anti-competitive conduct by a dominant firm leads to a significant lessening of competition in the market that consequently is to the particular detriment of SMMEs. This was highlighted by reference, at page 19 of the decision of the CAC, to the Korean Competition Advisory Board which stated that, ‘In a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolise domestic markets...This will give rise to public dissatisfaction since the game itself has is not been played in a socially acceptable, fair manner’. This clearly illustrates that competition authorities are in fact best placed to address the socio-economic objectives under section 2 of the Act in a

¹² *Nationwide Poles v. Sasol (Oil) Pty Ltd* Case No. 72/CR/Dec03 at paragraphs 81 - 88

competition law context. The above further demonstrates the challenge in clearly demarcating the protection of competition and the protection of competitors in the market especially in reference abuse of dominance provisions.

Section 60 (2) mandates the Tribunal to impose structural remedies where appropriate including, in abuse of dominance matters. This is in doubt another indication of the intention of the legislature to transpose its social justice agenda to the dispensation of the competition law. This section states that,

The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any firm, or another other person to sell any shares, interest or assets of the firm if –

- a) it has contravened section 8, and*
- b) the prohibited practice –*
 - i. cannot adequately be remedied in terms of another provision of this Act; or*
 - ii. is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice*

Section 60 (2) (a) clearly seeks to address the challenge of concentrated market structures that effectuate abuse of dominance conduct.

Commentators have identified particularly concentrated market structures which they perceive problematic enough to warrant structural intervention by competition authorities. Motta and de Streel refer to non-regulated markets characterised by high and non-transitory barriers to entry which perpetuate incorrigible anti-competitive conduct by a dominant firm¹³. Where there is a dominant firm in a market characterised by ‘uncontested, incontestable and unregulated markets’¹⁴ which cannot be adequately addressed by the imposition of, for example, an administrative penalty, then as per section 60 (2), structural remedies may be warranted. It must be

¹³ Massimo Motta and Alexandre de Streel, ‘Exploitative and Exclusionary Prices in EU Law’ at page

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¹⁴ Ibid fn 7

pointed out that largely most competition authorities, in this context, would be preoccupied with those dominant firms which have attained their market position as former state-owned enterprises that have not necessarily ascended to dominance without historical state support¹⁵. These types of dominant firms are distinguished from those that attain their dominance due to innovation and vigorous and fair competition. Therefore the consequence of such invasive remedial intervention by the competition authorities has the potential to achieve the distributive aims under section 2 (f) of the Act in, *inter alia*, opening up markets to new entrants that particularly derive from historically disadvantaged. There is no doubt a cognisable link between the remedial powers accorded to competition authorities under section 60 (2) of the Act and the pursuit of those named objectives under section 2 of the Act, especially in light of the history of the Republic that legally constrained a large group of society from meaningful market participation.

III. THE STRUCTURE OF THE SOUTH AFRICAN ECONOMY

The South African economy is described as largely 'characterised by high levels of industrial concentration, high barriers to entry...high levels of minimum efficient scale relative to demand and extensive former state support in key strategic industries. These factors contribute to creating markets that are susceptible to monopolisation'¹⁶. Again emphasis is drawn on the need to make a meaningful distinction of how dominance was attained. In fact section 60 (2) enjoins that type of assessment in determining whether or not structural remedies ought to be pursued especially in light of section 2. This is because innovative markets generally engender vigorous competition despite the presence of a dominant firm. Further, Simon Roberts points out that, '...concentration and price mark-ups in the South African economy have been associated with low levels of productivity and employment growth'¹⁷. This is a significant observation in light of the employment growth aspect mentioned. Economic

¹⁵ Much of the discontent with the District Court's decision in *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) is that Microsoft was a dominant corporation which competed vigorously and innovated to attain its market position and thus is the antithesis of the dominant firms referred to by Motta and de Streel.

¹⁶ Andrew Swan & Reena das Nair '*Appropriate standards for assessing exclusionary conduct: a case study of the nitrogenous fertilizer industry in South Africa*' at page 14

¹⁷ See Simon Roberts, '*Assessing Excessive Pricing: The Case of Flat Steel in South Africa*' at page 873

theory posits that vigorous competition has the potential to encourage, in the long-term, employment be it due to innovation that leads to growth in productivity and capacity or, in terms of encouraging some levels of entrepreneurial initiatives. There is a clear correlative link between vigorous and fair competition on the merits which touches upon policy objectives such as those spoken to in terms of section 2 of the Act. The competition authorities' advantage of being placed in a position to fully understand or at least have access to the esoteric information of industries and how they function and compete is imperative in determining appropriate remedial redress. Professor Reekie's point relating to the removal of discriminatory legislation would, *prima facie*, be enough in order to achieve market efficiency along with dealing with the objective of social justice, premised on the fact that markets will be open to all participants thus affording those from previously disadvantaged backgrounds the opportunity to partake, in turn increasing employment and wealth distribution. However the removal of discriminatory legislation in terms of market participation is arguably ineffective without further intervention, particularly by competition authorities in terms of how markets actually function. By way of illustration, the fact that a black consortium can open up its own Mittal equivalent steel manufacturing business, as discriminatory legislation that existed prior is no longer enforceable, says nothing about whether in fact it can do so. This is even assuming that the consortium has unlimited resources. The reality is that the historical conduct and relationships that the dominant firm has nurtured over time will form a significant determinant on how and whether a new entrant would in fact thrive.

By way of illustration, the allegations of, *inter alia*, abuse of dominance that the Commission alleged against Sasol Chemical Industries¹⁸ ("SCI") point directly to the unique role that competition authorities play as competition law experts in addressing esoteric market conduct which informs on how the Act is interpreted in relation to particular conduct on the market as well as the nature of the market participant alleged to have contravened the Act. In the SCI matter the Commission alleged that SCI was able to abuse its dominant position in terms of section 8 (a) excessive pricing¹⁹ (c)

¹⁸ Tribunal Case Number 31/CR/May05

¹⁹ It is prohibited for a dominant firm to charge an excessive price to the detriment of consumers

exclusionary conduct²⁰ and alternatively section 8 (d) (ii) refusal to supply²¹ of the Act. From this the Commission adduced that SCl was able to abuse its dominance in the market for ammonia as well as colluding with competitors on the ammonia derivative markets due to it, *inter alia*, having sole control of a 'bottleneck' good²². Such conduct illustrates that although, following the advent of democracy, markets are open to all participants on a non-discriminatory basis, the reality is that market conduct is still informed by the historical and social context which sought to confine wealth distribution at the expense of competition on the merits. Thus, in deciphering recondite conduct on market, competition authorities, in their position as specialists, are able to better articulate the imposition of structural remedies, informed by a broader understanding encompassed in section 2 of the Act.

These types of concerns are recognised as important preoccupations with competition authorities in developing economies where liberalisation and free market policies cannot simply be emulated or transposed from international jurisdictions where industrialisation is more advanced. These have to be contextualised within the historical and political outlook of that developing economy such as South Africa. The imperative for contextualisation was foreseen by the Department of Industry ("DTI") in its 1997 policy document²³. There the DTI identified 'a number of policy pillars upon which a uniquely South African competition policy will rest...'²⁴. The DTI significantly captured the recognition that 'competition policy proposed here accepts the logic of free and active competition in markets...the need for greater economic efficiency...and the facilitation of entry into markets – all within a developmental context that consciously attempts to correct structural imbalances and past economic injustices'²⁵ (emphasis my own). The above elucidates the fact that, although the Act

²⁰ It is prohibited for a dominant firm to engage in an exclusionary act, ...if the anti-competitive effect of that at outweighs its technological, efficiency or other pro-competitive gain

²¹ It is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act – refusing to supply scarce goods to a competitor when supplying those goods is economically feasible

²² Ibid fn 16 at page 4 – 13

²³ '*Proposed Guidelines of Competition Policy: A Framework for Competition, Competitiveness and Development*', Department of Trade and Industry Pretoria, 27 November 1997

²⁴ Ibid at paragraph 2.4

²⁵ Ibid at paragraph 2.4.11

encompasses the section 2 purpose, this in no way amounts to carte blanche for competition authorities to intervene with the aim of redistributive justice beyond the confines of the Act. In following guidance from the CAC, competition authorities are, ‘...required to engage with the text and the language employed therein: it must produce an interpretation which can justify after this engagement with the legislation’²⁶. Thus although the outlook of the DTI and the Economic Development Department (“EDD”) may be that of an over-arching social justice agenda, competition authorities are still nevertheless bound by the Act. However this is not to say that as the competition authorities engage with the language of the Act they should not seek to engage with a purposive interpretation of the Act where appropriate which, goes beyond engaging with the black letter of the law and recognise the context in which the legislation is sought to be implemented.

IV. STRUCTURAL REMEDIES

Structural remedies ‘modify the allocation of property rights while creating new players on the market or reinforcing existing ones. Structural remedies might range from the complete break-up (or dissolution) of an undertaking (horizontally, vertically, functional or organisational) to the divestiture of a (sic) individual or multiple business unit. Structural remedies intervene directly on what is deemed to be an excessive concentration of market power and are considered to be self-executing, more stringent and effective than behavioural remedies’²⁷. The Organisation for Economic Co-operation and Development (“OECD”) recognised that a ‘commonly mentioned objective for remedies and sanctions applied in response to competition law violations...is to restore the opportunity for competition...For a remedy to be considered a success from a consumer welfare standpoint it must restore the opportunity for competition that would have existed if the violation had not taken place. Otherwise the remedy would leave consumers exposed to ongoing harm from the reduction in competition caused by the unlawful activity’²⁸.

²⁶ Supra fn 11 at paragraph 28

²⁷ Alessandro Tajana, ‘TILEC Discussion Paper: Structural Remedies and Abuse of Dominant Position’ at page 6. Footnotes omitted

²⁸ OECD Policy Brief December 2008

There has only been one structural remedy order of the Tribunal in South Africa in the context of abuse of dominance provisions. In June 2011 SCI concluded a settlement agreement with the Commission regarding its conduct on the ammonia derivative markets²⁹. The complaints against SCI formed part of multiple complaints against it in terms of restrictive horizontal practices as well as allegations of abuse of dominance. At the time of the divestiture settlement agreement SCI had already settled on the section 4 restrictive horizontal practices allegations where it admitted to conduct which formed part of the *Nutri-Flo* complaint referral³⁰. Profert³¹ also brought a complaint against SCI alleging price discrimination and exclusionary conduct which the Commission later consolidated with the outstanding allegations of excessive pricing in the *Nutri-Flo* referral.

To put the allegations against SCI in perspective, LAN and ANS are nitrogenous based products that form part of the production chain based on ammonia. Ammonia is an important input in the manufacturing of fertilizer and explosives. SCI is the sole producer of ammonia in South Africa. There are only two producers of LAN in South Africa; Omnia and SCI. There are only 3 local manufacturers of ANS; Omnia, Yara and SCI. Allegations of collusion and abuse of dominance stemmed from the type of markets that SCI operated in. The essential element, for purposes of this paper, is the fact that fertilizer is an important input in agriculture. It is seen as a significant input in the overall development and economic objectives of the government in terms of, *inter alia*, rural development through, for example agro-processing³². Far more essential is that that agriculture impacts upon small scale growers who may derive income from their farming activities or may rely on their farming activities for subsistence. The price of fertilizer invariably impacts upon food prices which trickle down to end consumers. Furthermore by raising competitors' costs through exploitative abuse of its dominant position, SCI was allegedly also able to ensure ineffective competition on the market. The latter was what was alleged by Profert which stated that it could not penetrate the market and thus was inhibited by the

²⁹ The specific product markets were limestone ammonium nitrate (LAN) and ammonium nitrate solution (ANS)

³⁰ Supra fn 18

³¹ Ibid

³² 2010/11 – 2012/13 Industrial Policy Action Plan at page 16

conduct of SCI from growing in the market³³.

In order to measure the impact of a structural remedy one would have to consider how effective it would be in addressing the identified competition concern. Tajana states that the 'effectiveness of a remedy...seems to be concerned more with its capacity to solve the competition problem than with the impact of the remedy itself on the performance of the undertaking and, ultimately, of the market'³⁴. In further determining this, the type of market structure is indispensable in the assessment undertaken by competition authorities in seeking to impose an effective structural remedy. As pointed above, structural remedies seek, *inter alia*, to intervene in the excessive concentration of market power. Therefore the rationale for the imposition of the structural remedy is informed by the Act and how competition authorities have sought to interpret it. Should competition authorities employ a purposive interpretation of the Act, in a manner cognisant of section 2, the latter section would at least inform on the effectiveness of the remedy. Thus, in determining efficacy, one has to look, over-time, at, *inter alia*, the performance of any newly created market player and, in the immediacy, likelihood of its success or failure.

It is recognised that structural remedies, in the short-term, may destabilise the firm creating uncertainty that may trickle down to end consumers in the form of shortage of output which may invariably lead to higher prices. In the context of SCI, the aim was arguably not necessarily to address deconcentration of the market by creating new competitors but rather by reinforcing existing competitors and further encourage vigorous competition in the downstream markets. Such has been the interest of Profert in SCI's Potchefstroom site as well as Kynoch Fertiliser in SCI's liquid fertilizer manufacturing plant; the Endicott facility. These plants formed part of the subject-matter of the settlement agreement between the Commission and SCI.

In terms of the broader policy considerations, section 2 (f) objectives could be indirectly achieved due to the deconcentration of SCI's market power in the ammonia

³³ Paragraph 2.1.5 of the Settlement Agreement in terms of cases 45/CR/May06 and 31/CR/May05

³⁴ Ibid fn 27 at page 13

derivatives market. However, it is not lost on the author that the potential to address such a concern, to whatever extent, will depend upon, *inter alia*, whether the existing competitors are able to increase their capacity within the market thus affording a broader pool of market players, so defined under, for example section 2 (f), an opportunity to engage in meaningful economic activity, to whatever extent. In following economic theory, vigorous competition amongst the existing competitors in the ammonia derivatives market, absent the inimical anti-competitive conduct of SCI, ought to then, over time, lead to lower prices that would have a concomitant effect on agriculture and ultimately food prices. Although it is a simplistic and theoretical outlook it is nonetheless indicative of how competition law is not an end in itself but certainly as a useful instrument within the context of overall development and economic equity. To a certain extent it is a useful instrument in addressing market-related lacunae created by the adverse political and social history of the Republic.

The above should also inform on the terms on which the sale agreements over the divested interests as well as the nature of the purchaser. These will form imperative aspects in measuring the efficacy of the structural remedy imposed, both in the immediacy and over time. There is a glaring dichotomy presented within the context of the aims enunciated by the DTI and the IPAP strategy document above in trying to promote economic activity from those who were previously disadvantaged and the likely potential purchasers of the divested SCI assets. This could undoubtedly be applied broadly, should a structural remedy be imposed by the competition authorities in the context of abuse of dominance, and ought to require competition authorities to be mindful of such factors in dealing with efficacious structural remedies informed by section 2.

It is more likely that a purchaser that is more likely to increase competition and stand a better chance of success in the market would be an incumbent market player who may not necessarily fall within the description under section 2 (f). This speaks to the argument of whether structural remedies within the context of abuse of dominance matters have the very real potential to address socio-economic rights enunciated under, *inter alia*, section 2 (f) of the Act. However one might also argue that although

the purchaser may not be derive from the pool of previously disadvantaged, there is nothing to say that lower barriers to entry which engender competition cannot lead to some attainment or address the remainder of the socio-economic rights espoused under section 2.

Further, the role that competition authorities play, directly or indirectly, is of significance in terms of having a say as to the nature of the purchaser as well as the terms on which the purchase may be agreed upon. It seems the logical conclusion that competition authorities would prohibit the divested firm repurchasing an interest in its divested assets through its subsidiary, an entity that it has an interest in or the like. However it may be important in bolstering the effectiveness of the structural remedy for the competition authorities to have some oversight, the extent of which can be open to debate, over how and who in fact purchases the divested assets. A public 'auction' of the divested assets would likely draw a bigger and more diverse pool of potential purchasers of the divested assets. However, discretion to the divested firm in approaching particular interested parties to conclude a sale agreement could likely be more expeditious but raises issues of altruism on the part of the divesting firm. These agreements are also still likely to be subject to oversight by the competition authorities, in line with, perhaps the terms of the settlement agreement or as notifiable mergers. A caveat applies here if such direct approaches stall the divestiture process that may lead to the divesting firm seeking extensions and consequently the use of the divested assets until sale is effected. This will delay the implementation of the structural remedy. It is also unlikely that in the event of such a persistent and reoccurring impasse that the competition authorities would want to intervene directly by forcing a sale through the direct imposition of a buyer. This may therefore lead to the divesting firm seeking further extensions which will lead to delays in effecting the remedy, to the cost of competition authorities who are required to monitor the implementation of the remedy. At worst, it may induce inertia in the competition authorities where the divesting firm in the end keeps the divested assets with the perpetual intent of selling that never comes to fruition. Arguably a structural remedy with the specific section 2 purpose in mind assists in constructing a remedy with a clear goal beyond that of deconcentration and ceasing the conduct but also gives a broader meaning which will inform on the drafting of the remedy itself and with clearer

specificity.

V. CONCLUSION

It is trite that competition authorities are bound by the Act and thus a purposive approach to the Act can only be done within the parameters delineated by the legislation. Section 60 (2) requires justification in terms of either recidivism by the dominant firm or suitability of the remedy in order for it to be implemented. Therefore the socio-economic rights agenda within the context of competition law is restrained by economic and legal principles and thus not devoid of contextual application. Structural remedies can be a useful tool in directly or indirectly addressing social equity within the market economy in the context of abuse of dominance provisions, where anti-competitive conduct occurs in those markets described by Motta and de Streel. The inclusion of section 2 (c), (e) and (f) within the Act is, as stated above, not insignificant and is in fact a reflection of the discussions which occurred prior to the inception of the Act. Therefore there was then and there still is now a real recognition that competition law can serve as a meaningful tool or instrument of redistributive justice, subject of course to the parameters of the Act. This type of intervention can have real and long-term effects that encourage economic equity. It further has the potential to address exclusionary market structures that create, *prima facie*, concentrated wealth distribution that is not real and does not lead to true open markets which create growth that would trickle down to the so-called 'grassroots'.

The SCI settlement agreement is only such an example where structural remedies were imposed in the context of abuse of dominance. It is a recent agreement which real effects will be felt over time including whether it has led to the attainment, to some extent, of the specific purposes mentioned under section 2 of the Act, little of which was actually referred to in the settlement agreement. The reality is that South African legislation stems from a particular social and historical context that the executive has actively sought to recognise in the preambles of most if not all legislative instruments. There is a real recognition that competition law, in dealing specifically with market performance and competitiveness has the potential to be instrumental in addressing unique social issues that are idiomatic to our historical context. Arguably this is

already being encompassed to some extent in merger provisions under the Act in that for example trade unions are given greater standing in merger transactions than they are accorded in any other jurisdiction with an effective competition law system. In following Justice Moseneke³⁵, although international jurisprudence is important in granting guidance in the application and interpretation of our Act, it is nonetheless subject to that context of the particular jurisdiction. Therefore the potential to achieve, to a limited extent, social justice within the purpose under section 2, forms part of the holistic political outlook together with other legislative instruments that work in conjunction with competition law dispensation.

³⁵ *Laugh It Off Promotions CC v. South African Breweries International (Finance) B V T/A Sabmark International* SCA Case No. 242/2003 at paragraph 19 Justice Moseneke stated, in reference to JA Harms, '...it must be understood that it is done principally in order to illustrate or to compare. The different statutory setting of all these cases must always be kept in mind. It is also not suggested that the outcome in those cases would necessarily have been the same had the case been decided under our legislation and in our social context'

BIBLIOGRAPHY

Books

1. Whish, Richard *Competition Law* 6th Edition Oxford University Press (2009)
2. Neuhoff, M. Govender, M. Versfeld, M. & Dingley, D. *A Practical Guide to the South African Competition Act* Lexis Nexis Butterworths (2006)

Articles

1. Lewis, D. *Chilling Competition* Speech by David Lewis, as Chairperson of the South African Competition Tribunal (last accessed on the 12th March 2009 at <http://www.comptrib.co.za/Publications/Speeches/lewis13.pdf>)
2. Reekie, D. *The Competition Act, 1998: An Economic Perspective* 1999 South African Journal of Economics Volume 67 (2) 258 – 288
3. Motta, M. and de Streel, A. *Exploitative and Exclusionary Prices in EU Law*. A paper presented at the 8th Annual European Union Competition Workshop, (June 2003) Florence(last accessed on 1 September 2011 at http://professorgeradin.blogs.com/professor_geradins_weblog/files/ExcessivePrices18122003.pdf)
4. Swan, A. & das Nair, R. *Appropriate Standards for Assessing Exclusionary Conduct: A Case Study of the Nitrogenous Fertilizer Industry in South Africa*. Presented at Competition Commission, Competition Tribunal, and Mandela Institute Second Annual Competition Law and Economics Conference, Johannesburg, 22 may 2008
5. Roberts, S. *Assessing Excessive Pricing: The Case of Flat Steel in South Africa* Journal of Competition Law & Economics 4 (3) 871
6. Tajana, A. *Structural Remedies and Abuse of Dominant Position* TILECT Discussion Paper DP 2005-033, December 2005

Case law

South Africa

1. *Trident Steel (Proprietary) Limited (“Trident Steel”) and Dorbyl Limited (“Dorbyl”) for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited* Case No.: 89/LM/Oct00
2. *Harmony Gold Mining Company Ltd & Durban Rooderpoort Deep Ltd v. Mittal Steel South Africa Ltd & Macsteel International BV* Case No. 13 / CR / FEB04
3. *The Government of the Republic of South Africa, The Premier of the Province of the Western Cape, Cape Metropolitan Council & Oostenberg Municipality v. Irene Grootboom & Others* Case No. CCT 11 / 00
4. *Mittal Steel South Africa Limited, Macsteel International BV & Macsteel Holdings (Pty) Limited v. Harmony Gold Mining Company Limited & Durban Rooderpoort Deep Limited* Case No.: 70/CAC/Apr07
5. *Nationwide Poles v. Sasol (Oil) Pty Ltd* Case No.: 72/CR/Dec03
6. *Sasol (Oil) Pty Ltd v. Nationwide Poles* Case No.: 49/CAC/April05
7. *The Competition Commission of South Africa v. Sasol Chemical Industries (Pty) Ltd, Yara South Africa (Pty) Ltd, Omnia Fertilizer Ltd & African Explosives & Chemical Industries Ltd* Case No.: 31/CR/May05 & 45/CR/May06
8. *Competition Commission v. Sasol Chemical Industries Limited The Competition Commission of South Africa v. Sasol Chemical Industries Limited, Yara South Africa (Pty) Ltd, African Explosives and Chemical Industries Limited & Competition Commission v. Sasol Chemical Industries Limited, Yara South Africa (Pty) Ltd & Omnia Fertiliser Limited* Case Nos.: 45/CR/May06 & 31/CR/May05
Settlement agreement between the Competition Commission and Sasol Chemical Industries Limited in respect of alleged contraventions of section 8 and 9 of the Competition Act 89 of 1998
9. *Laugh It Off Promotions CC v. South African Breweries International (Finance) B V T/A Sabmark International SCA* Case No. 242/2003

The United States of America

1. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000)

Statutes & Regulations

1. Competition Act No. 89 of 1998 of South Africa
2. Constitution of the Republic of South Africa No. 108 of 1996
3. Article 82 E.C. (now Article 102 E.C. following entry into force of the Treaty of Lisbon on 1 December 2009)
4. Office of Fair Trading Guidelines: Enforcement: Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, December 2004

Policy Documents

1. *'Proposed Guidelines of Competition Policy: A Framework for Competition, Competitiveness and Development'*, Department of Trade and Industry Pretoria, 27 November 1997
2. Organisation for Economic Co-operation & Development, Policy Brief December 2008
3. 2010/11 – 2012/13 Industrial Policy Action Plan (IPAP) Economic Sectors and Employment Cluster, Portfolio Committee, 23 February 2010