

Transformative Constitutionalism and Competition Law: South Africa's transformative merger control as a model on how competition law should be used to realise structural transformation*

Abstract:

This paper addresses the critical issue of economic transformation and equality. It departs from the premise that access to and effective participation in the economy are essential to realising constitutionally protected human and socio-economic rights, and examines the role competition law has played and can play in advancing the constitutional goals of equality and transformation. While the Competition Act has always had a transformative undertone, the past decade has seen a more explicit focus on transformation, especially in merger control. South African merger control, particularly via its public interest provisions, strengthened by the 2018 amendments to the Competition Act, has become a tool to address structural economic inequality and deconcentrate economic power. This is evident, among other things, in the new section 12A(3)(e), which imposes a positive duty on merging parties to promote broader ownership, including by historically disadvantaged persons and workers. Drawing on several post-2019 cases, the article assesses how far merger control advances transformative constitutionalism in practice and critically explores the tensions, limits, and constitutional requirements shaping this evolving jurisprudence. It concludes by arguing for a shift from viewing competition law merely as economic or industrial policy law towards a theory of 'Transformative Competition Law', in which competition legislation in South Africa and beyond is used to dismantle structural economic inequality and drive transformation of both the economy and society.

Keywords: Competition Act; economic participation; HDP; public interest; South Africa; transformation; transformative constitutionalism

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1. INTRODUCTION

Before the democratic dispensation in South Africa, there was a striking divide in economic participation and a general marginalisation of Africans due to segregatory laws and policies enacted by the apartheid government. Consequently, Africans were largely excluded from meaningful participation in the formal economy. The advent of democracy prompted recognition of the necessity to confront and remedy the injustices inflicted under the apartheid regime. The Constitution responds to this imperative by establishing a transformative framework, one that demands not merely the removal of formal discrimination but the active restructuring of society and the economy toward equality, dignity, and justice.¹

This article focuses on the Competition Act's transformative mandate and the inclusion of public interest goals under its merger control regime, as means of advancing substantive economic participation in accordance with constitutional principles of equality and equity. I advance that the integration of transformation as a goal of the Competition Act through the incorporation of non-traditional competition objectives, is both appropriate and necessary to open access to the economy for previously excluded groups, which access is fundamental to the realisation of other constitutionally enshrined rights. In that vein, the public interest provisions in the merger framework constitute an expression and instrument of transformative constitutionalism.

Whereas this paper focusses on the South African merger control regime, it is apposite to state from the onset that the Competition Act, as enabled by and as an extension of the Constitution, is inherently transformative.² The redress of historical injustices, which is a founding principle of the South African constitutional democracy, cannot be achieved without confronting structural market challenges that continue to disadvantage consumers, employees, historically disadvantaged persons and small and medium-sized (SMEs) enterprises. These challenges include excessive market concentration, entrenched ownership patterns within the national economy and proliferation of barriers to entry and participation, which affect the economic and social

¹ Preamble to the Constitution of the Republic of South Africa, 1996 (hereafter, *Constitution*).

² Preamble, Competition Act 89 of 1998 (hereafter, *Competition Act*); which opens with recognising the economic legacy of apartheid and the need to transform the economy by opening it up to a greater ownership by a greater number of South Africans.

well-being of all South Africans. The Competition Act, in regulating markets and rooting out market abuse and anticompetitive conduct, tangentially transforms the economy by creating conditions for and an environment in which firms controlled or owned by historically disadvantaged persons can effectively enter into, participate and expand within a market thereby transforming the composition and structure of the economy.

It has been argued elsewhere that while the inclusion of social goals in competition law may be an appropriate response to the history and needs of a particular jurisdiction, such an expansion of goals without the conceptual framework or means to effect them often results in a disconnect between aspirations and practice.³ To this end, this contribution advances that transformative constitutionalism provides a cogent theoretical foundation for the incorporation of transformative objectives into the Competition Act, and that transformative competition law offers the normative framework through which the interpretation and application of the Competition Act generally and its merger provisions specifically, must be undertaken in future.

The paper follows the following structure: Part two provides a historical context for the goals of competition law, laying a foundation for a normative justification of including equity goals and transformation in the Competition Act. Part three examines transformative constitutionalism as a theoretical and constitutional framework that supports the incorporation of a transformative agenda into competition law. Part four analyses South African merger control, with emphasis on the recently added public interest consideration in section 12A(3)(e) of the Act, demonstrating how transformative aims permeate merger review and competition law practice in South Africa. This part also engages with critiques concerning the use of competition law to advance broader social policy objectives. Part five offers key observations and concluding remarks.

2. HISTORICAL CONTEXT: A DIVIDED COUNTRY, CONCENTRATED POWER AND THE TRANSFORMATION IMPERATIVE

2.1. Apartheid's Economic Legacy

³ See Davis "Transformative Competition Law Adjudication: A Dworkinian Perspective" (2026) 32 *European Law Journal* 9-25; Davis "Competition Law and Public Interest: A Challenge for Adjudication" (2026) 32 *European Law Journal* 97.

The apartheid system was premised on racial “apartness” and systematically excluded black South Africans from meaningful participation in the economy.⁴ It comprised both physical and emblematic segregation of black South Africans. Physically, through the creation of ‘homelands’,⁵ and emblematically, through limited to no access to among others, healthcare, education & economic participation.⁶ Former South African President Thabo Mbeki described the legacy of apartheid as being one that created ‘two nations’. He noted that:

[Apartheid & the conditions created by it] divided our country into two nations, the one black and the other white...One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure. The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure...This reality of two nations, underwritten by the perpetuation of the racial, gender and spatial disparities born of a very long period of colonial and apartheid white minority domination, constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations.⁷

The ‘two nations’ referred to by Mbeki reveal themselves in different social and economic aspects of South Africans’ lives. For example, in education, apartheid had the effect of benefiting the white population and leaving the black population either uneducated or barely educated.⁸ This had the effect of excluding black people from entry and participation in the formal economy by making jobs that required an

⁴ Goldberg “The Status of Apartheid under International Law” (1985) 13(1) *Hastings Const. LQ* 1; Karlsson “Remembering Apartheid Political Discourse in School Space” in Edwards & Usher (eds) *Space, Curriculum and Learning* (2000) 13-14.

⁵ Through the 1913 Native Land Act, later known as the Black Land Act 27 of 1913, which saw thousands of black families forcibly removed from their land and placed into designated reserves by the apartheid government.

⁶ See Posel “What’s in a name? Racial categorisations under apartheid and their afterlife” (2001) 47 *Transformation: Critical Perspectives on Southern Africa* 50; Giliomee “The Making of the Apartheid Plan 1929 – 1948” (2003) 29(2) *Journal of Southern African Studies* 373; Mhlauli, Salani & Mokotedi “Understanding Apartheid in South Africa Through the Racial Contract” (2015) 5(4) *International Journal of Asian Social Science* 205.

⁷ See African National Congress “Umrabulo Debating the Issues” <https://www.anc1912.org.za/wp-content/uploads/2021/07/Umrabulo-Issue-No.5-3rd-Quarter-1998.pdf> (accessed 8 February 2026); Gelb “Inequality in South Africa: Nature, Causes and Responses” (2004) [https://www.tips.org.za/files/Gelb Inequality in SouthAfrica.pdf](https://www.tips.org.za/files/Gelb%20Inequality%20in%20South%20Africa.pdf) (accessed 8 February 2026); Nattrass and Seekings ““Two Nations”? Race and Economic Inequality in South Africa Today” (2001) 130(1) *Daedalus* 45.

⁸ Education is used as a point of departure as it provides the key to unlock other constitutionally enshrined rights that require both literacy and formal participation in the economy.

education out of reach.⁹ The impact of apartheid on education was crisply captured in *Nasionale Pers*,¹⁰ where the Competition Tribunal (Tribunal) noted that given the importance of education to unlocking other socio-economic benefits, it was important to bring transformation to that sector. The Tribunal made the following remarks in respect of the education sector:

It is trite to observe that we are dealing with a particularly important sector of the economy and one particularly damaged by South Africa's past...the consequences of the apartheid system in seventies and eighties, students who either did not complete secondary education or whose schooling has left them unprepared for further education or the world of work.¹¹

The scars left by apartheid on the education system, access to education and consequentially, access to the economy were also captured by Moseneke DCJ who observed that because “education is the engine of any society... an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage”.¹² With the black population excluded from the economy, what naturally followed was a concentration of ownership. Gelb notes that towards the twilight of apartheid, ownership concentration was so skewed that in 1990, six conglomerates centred on mining and finance, controlled companies with 80 per cent of the market capitalisation on the Johannesburg Stock Exchange.¹³ The concentration of economic ownership demonstrated by Gelb is apartheid's most durable economic legacy.

The intersectionality of the effects of the apartheid government's exclusionary policies are sharply illustrated in *Mediclinic*,¹⁴ in which the Constitutional Court had the task of considering a merger within one of the sectors that is not only highly concentrated, but also one where the exclusion of black people was prevalent— health care. The court noted, regarding the history of exclusion in South Africa:

Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national

⁹ See, for example, the Preamble of the South African Schools Act 84 of 1996, which records as a victory of democracy, the consignment to history of the past system of education, which was based on racial inequality and segregation.

¹⁰ *Nasionale Pers Limited and Educational Investment Corporation Limited* CT 45/LM/Apr00 (*Nasionale Pers*).

¹¹ *Nasionale Pers* para 24.

¹² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2009 ZACC 32 (*Ermelo*) para 2.

¹³ Gelb (2004) 24.

¹⁴ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* 2021 ZACC 35 (*Mediclinic*).

economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots.¹⁵

Further, with respect to levels of ownership, the ‘two nations’ referred to by Mbeki, are captured by Chabane, Goldstein and Roberts, who note that under the apartheid regime, South African business was marked by a high degree of concentration, both in terms of ownership and activities.¹⁶ They argue that this concentration was created and reinforced by the exclusions linked to apartheid.¹⁷ These sentiments are echoed by Kathree-Setiloane, who notes that the legacy of apartheid intensified the concentration of wealth in the hands of the minority, thus, necessitating state intervention in the pursuit of economic justice.¹⁸

This position, of having ‘two nations’ was untenable & democracy demanded that individuals not only have personal and political freedom but economic freedom as well. In pursuit of economic freedom through unlocking the economy, the Competition Act stands as the bastion of economic inclusion and transformation. It echoes the constitutional aspirations of freedom, equality, belonging and quality of life for all citizens.¹⁹ It is, therefore, in the above context and against this historical backdrop that the transformational goals and provisions of the Competition Act will be assessed.

2.2. Economic transformation as a constitutional imperative

In 1994, the apartheid era came to an end and a new democratic dispensation was ushered in. The Constitution, which forms the foundation of South Africa’s constitutional democracy, is by its nature deliberately transformative.²⁰ It entrenches fundamental human rights and more importantly, equality in respect of access to and enjoyment of those rights.²¹ In that light, the Constitution is broadly viewed and has been lauded as a mechanism for redressing inequality and poverty.²² Armed with the

¹⁵ *Mediclinic* para 4.

¹⁶ Chabane, Roberts & Goldstein “The Changing Face and Strategies of Big Business in South Africa: More than a Decade of Political Democracy” (2006) 15(3) *Industrial and Corporate Change* 549.

¹⁷ *ibid.*

¹⁸ Kathree-Setiloane “Moseneke and Economic Justice” (2017) *Acta Juridica* 205.

¹⁹ Preamble, Constitution.

²⁰ Rapatsa “South Africa’s Transformative Constitution: from Civil and Political Rights Doctrines to Socio-Economic Rights Promises” (2015) *Tribuna Juridica* 210.

²¹ See also s 9(1-2), Constitution.

²² See Andrews “The South African Constitution as a Mechanism for Redressing Poverty” (2006) https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2476&context=fac_articles_chapters (accessed 8 February 2026) 57-59; Liebenberg & Slade “Applying a Human Rights Lens to Poverty and Economic Inequality: The Experience of the South African Human Rights Commission” (2023) 51(3) *Federal Law Review* 296; Liebenberg & Goldblatt “The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution” (2007) 23(2) *SAJHR* 335.

Constitution, South African were free of the shackles of racism, segregation, and authoritarian rule.²³ However, for the new found freedom to have meaning and impact every citizen, it had to be accompanied by economic freedom as well; free, unfettered and equal access to the economy. Bhorat *et al* note that the end of apartheid not only signified political freedom but also as an era of foundation for economic prosperity and inclusion.²⁴ Economic transformation and equitable access to the economy are therefore not peripheral aspirations but fundamental constitutional imperatives, inextricably linked to the realisation of the full range of constitutional rights.

Economic transformation and equitable access to the economy are fundamental to the realisation of other rights enshrined in the Constitution. The Constitutional Court held in *Grootboom*²⁵ that the Bill of Rights entrenches both civil and political rights and socio-economic rights, and that “affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2”.²⁶ In that sense, transformation, through the protection and advancement of socio-economic rights is a constitutional imperative.²⁷ To buttress the above, the former Chief Justice of the Constitutional Court, Mogoeng CJ, noted the following in *Mediclinic*:

It does not require an award-winning and world-acclaimed economic scientist to be persuaded that almost everything of consequence turns on the economy, here and across the nations of the earth... After all, poverty alleviation, the provision of high-quality education, the best health-enhancing facilities or necessities, and the enablement of the best business environment and job opportunities, would all be a pipe dream in the absence of an inclusive, ethical, truly human rights-oriented and vibrant or prosperous economy.²⁸

Mogoeng’s observations ground the constitutional case for using economic regulation, including competition law and merger control, as a vehicle for economic transformation. The operationalisation of economic transformation as a constitutional imperative included the enactment of legislation that, among other things, addressed the government’s concerns regarding the concentration of ownership and control within the South African economy.²⁹ The Competition Act was enacted in direct

²³ See *S v Makwanyane* 1995 3 SA 391 (CC) paras 261-262.

²⁴ Bhorat *et al* “Economic policy in South Africa – past, present and future” in Bhorat, Hirsch & Ravi (eds) *The Oxford Companion to the Economics of South Africa* (2014) 2-4.

²⁵ *Government of the Republic of South Africa and Others v Grootboom* 2000 ZACC 19 (*Grootboom*).

²⁶ *Grootboom* para 23.

²⁷ See s 27, Constitution.

²⁸ *Mediclinic* para 2.

²⁹ Competition Act 89 of 1998, and the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act).

recognition of the imperative to transform the economy and deliver economic freedom as apartheid had resulted in excessive and skewed concentrations of ownership and control within the national economy.³⁰

Although some may argue that government's industrial policy and politics should not influence competition law, Stiglitz contends that politics and economics (and, by extension, competition law) cannot be separated.³¹ He proffers that "an agglomeration of economic power almost inevitably results in an agglomeration of political power—which can and typically does reinforce the agglomeration of economic power".³² Based on Stiglitz's theory, in addressing challenges such as inequality created and maintained by abuse of political power, such as the case of apartheid, it is necessary to address a concentration of economic power as well. He notes further that monopoly and monopsony power play an important role in explaining inequality. To that end, competition law, as part of a policy aimed at regulating market power, plays a role in the reduction of inequality.³³ There is, therefore, a cogent argument for using competition law as a tool for economic transformation and the reduction of structural inequality.

Considering the above, it is essential to consider equity objectives in any economic law since all economic policy decisions should align with South Africa's broader goals of development, welfare, and transformation. In this context, the Competition Act goes beyond merely promoting competition; it emphasises using competitive power to address the wider developmental and transformational needs of society. Against this backdrop, the Act's non-competition goals and public interest provisions in merger control are not extraneous to competition law, they are constitutionally demanded.

3. TRANSFORMATIVE CONSTITUTIONALISM AS THE PANACEA TO APARTHEID'S ECONOMIC LEGACY

3.1. The need and Constitutional Mandate for Transformation

South Africa is widely characterised in the scholarly literature as exhibiting one of the highest, and in many assessments the highest, levels of income and wealth inequality

³⁰ Preamble, read with s 2, Competition Act.

³¹ Stiglitz "Towards a Broader View of Competition Policy" in Bonakele, Fox & Mncube (eds) *Competition Policy for the New Era Insights from the BRICS Countries* (2017) 4.

³² *ibid.*

³³ Stiglitz (2017) 14.

globally,³⁴ with a Gini Coefficient of 63 as per 2026 rankings.³⁵ In terms of ownership (of land and other means of production), the white minority, which accounts for about 10 per cent of the population, owns and or controls more than 80 per cent of the wealth.³⁶ These statistics are a direct result and legacy of the apartheid policies that excluded the black majority from participation in the economy.³⁷ During the democratisation process, an urgent need emerged to restructure not only the formal political institutions, but also the broader social configuration and the patterns of access to economic resources. The Constitutional Court held in *Grootboom* that the Bill of Rights entrenched both civil and political rights and socio-economic rights, and that “human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”³⁸ Economic transformation and equitable access to the economy are therefore not peripheral aspirations but fundamental constitutional imperatives, inextricably linked to the realisation of the full range of constitutional rights.

Mogoeng reinforced this in *Mediclinic*, observing that “almost everything of consequence turns on the economy” and that “poverty alleviation, the provision of high-quality education, the best health-enhancing facilities or necessities, and the enablement of the best business environment and job opportunities, would all be a pipe dream in the absence of an inclusive, ethical, truly human rights-oriented and vibrant or prosperous economy.”³⁹ These observations ground the constitutional case for using economic regulation, including competition law in general, and merger control in particular, as vehicles for transformation.

The Competition Act was enacted in direct recognition of these imperatives. Its Preamble records that apartheid “resulted in excessive concentrations of ownership

³⁴ World Bank “Inequality in Southern Africa: An Assessment of the Southern African Customs Union” (2022) <https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf> 1 (accessed 29 May 2026).

³⁵ World Population Review “Gini Coefficient by Country 2026” (2026) <https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country> (accessed 29 May 2026).

³⁶ ICTJ “South Africa Most Unequal Country in the World: Report” (3 October 2022) <https://www.ictj.org/node/35024> (accessed 29 May 2026).

³⁷ See generally Czajka & Gethin “Racial Inequality and Redistribution in Post-Apartheid South Africa” (2025) EU Tax Observatory Working Paper No. 40 <https://taxobservatory.world/www-site/uploads/2025/12/Racial-Inequality-and-Redistribution-in-Post-Apartheid-South-Africa.pdf> (accessed 29 May 2026).

³⁸ *Grootboom* para 23.

³⁹ *Mediclinic* para 2.

and control within the national economy” and “unjust restrictions on full and free participation in the economy by all South Africans.”⁴⁰ Against this backdrop, the Act's public interest provisions are not extraneous to competition law; they are constitutionally demanded

3.2. Transformative constitutionalism

3.2.1. Meaning and Scope

The phrase ‘transformative constitutionalism’ entered the scholarly lexicon principally through the foundational work of Karl Klare, whose 1998 seminal article on Legal Culture and Transformative Constitutionalism offered a systematic account of what he termed a ‘postliberal’ constitutional vision.⁴¹ According to Klare’s formulation, transformative constitutionalism entails “a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction”.⁴²

In the first instance, transformative constitutionalism, is a product of South Africa’s unique history, which necessitated a transition from segregation, inequality and exclusion, to a future founded on constitutional values, entailed the enactment of the Constitution. The Constitution was drafted in the specific context of dismantling apartheid, a legal order that had constitutionalised racial dispossession and structural subordination for nearly half a century.⁴³ Davis and Klare note that the South African Constitution is different, in that it is a transformative Constitution, committed to social and economic transformation,⁴⁴ which Langa refers to as “a social and an economic revolution”.⁴⁵ The transformative ambition referred to by Davis and Klare is embedded in the text of the Constitution, including but not limited to the Preamble’s commitment to “healing divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.”⁴⁶ It is also apparent through the

⁴⁰ Preamble, Competition Act.

⁴¹ Klare “Legal Culture and Transformative Constitutionalism” (1998) 14(1)F *South African Journal on Human Rights* 151-152.

⁴² Klare (1998) 150.

⁴³ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) 3.

⁴⁴ Davis & Klare “Transformative Constitutionalism and the Common Customary Law” (2010) 26(3) *South African Journal on Human Rights* 404.

⁴⁵ Langa “Transformative Constitutionalism” (2006) 17(3) *Stellenbosch Law Review* 352.

⁴⁶ Preamble, Constitution.

prominence of the founding values of human dignity, equality and freedom;⁴⁷ the justiciability of socio-economic rights;⁴⁸ and the horizontal application of the Constitution to private actors and juristic persons.⁴⁹ The foregoing sections are reflective of a constitutional architecture designed to reach beyond formal political transition.⁵⁰ In the second instance, transformative constitutionalism is both a theory of constitutional interpretation and an enforcement mandate directed at South African institutions, courts, regulatory bodies, and lawmakers to actively pursue a transformed social and economic order.

The realisation of the transformative project is predicated on the fulfilment of Klare's constitutive elements that characterise transformative constitutionalism. First, it is a temporally extended project: therefore, while constitutional enactment is foundational, transformation is not accomplished by promulgation of the text alone but unfolds through the dialectical engagement between constitutional norms, judicial interpretation, legislative action, and social practice. Second, it is structurally oriented: it targets systemic inequalities embedded in property relations, economic markets, labour markets, racial hierarchies, and patriarchal social arrangements, not merely episodic rights violations, which all need to be dismantled as an ongoing project. Third, it demands a particular interpretive sensibility from lawyers and judges, one that is purposive, contextual, and oriented toward the emancipatory potential of constitutional text rather than its formal or originalist meaning.⁵¹

The Constitutional Court has, on numerous occasions, affirmed this transformative character of the South African Constitution. In *Makwanyane*, the Court noted that "What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future".⁵² In *Beadica*, the Court described the Constitution as "a transformative document which serves as a shining beacon for an ongoing constitutional project aimed at achieving a

⁴⁷ S 1, Constitution.

⁴⁸ Ss 26-29, Constitution.

⁴⁹ S 8(2), Constitution.

⁵⁰ Although Davis and Klare conclude in an article that formal political transition is necessary for the realisation of transformative constitutionalism. They note that "the promise of transformative constitutionalism is contingent on the emergence of an appropriately conducive political environment and of social and political movements dedicated to the project". See Davis & Klare "Two Cheers for Transformative Constitutionalism" (2024) 35 *Law and Critique* 487-533.

⁵¹ Klare (1998) 149, 157.

⁵² *Makwanyane* para 262.

democratic and egalitarian society.”⁵³ In *Barnard*, the Court observed that South Africa was “deeply divided and unequal on the basis of race, gender and class lines”, necessitating the reimagining of society.⁵⁴ In *Venter*, the Court held that the Constitution “is characterised as being transformative precisely because it is intended for use as a tool to terminate socio-economic inequality and injustices”.⁵⁵ In *Solidarity*, it was noted that the Constitution enjoins relevant parties to take active measures to achieve substantive equality, particularly for those that were disadvantaged by unfair discrimination in the past.⁵⁶

From this transitory reference to the Constitutional Court’s confirmation of the Constitution’s transformative nature, it becomes relevant to assess the role of courts and other institutions in realising this transformative mandate.

3.2.2. *The role of enforcement institutions in realising transformation*

As noted in Klare’s characterisation of transformative constitutionalism, it can be viewed as a theory of constitutional interpretation and practice that views the Constitution not merely as a set of rules limiting government power, but as a tool for long term social change. At its heart is the mission to transform society and the public and private spheres, which all require that a country’s institutions be leveraged for social change.⁵⁷ To that end, transformative constitutionalism must not only appear in the text of the Constitution, but be seen in practice through the interpretation and application of the Bill of Rights.⁵⁸

In a lecture reflecting on transformative constitutionalism and the courts, Justice Mbenenge provides not just a conceptualisation of transformative constitutionalism, but a framework of how the theory has been and should be brought to life through application by the courts and other judicial tribunals.⁵⁹ He notes that the definition of transformative constitutionalism “makes judges, and other functionaries and institutions role-players...[and] judges are custodians of constitutional values such as

⁵³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 100.

⁵⁴ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29.

⁵⁵ *Venter v Khan and Others* [2014] ZAKZDHC 48 para 80.

⁵⁶ *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC) para 99.

⁵⁷ Davis & Klare (2010) 403-404.

⁵⁸ See Klare’s third aspect of his characterisation, insisting that transformative constitutionalism must be brought to life in practice by those charged with interpreting the Constitution.

⁵⁹ Mbenenge “Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape” (2018) 32(1) *Speculum Juris* 1-7.

human dignity, equality and freedom”.⁶⁰ Mbenenge suggests that in fulfilling their role in the realisation of the transformation mandate, judges must follow a purposive interpretation of the Constitution.⁶¹ This approach enables the court to take into account factors other than mere legal rules such as the objectives of the rights, the circumstances in which interpretation has to be conducted, the future impact of the interpretation and the impact of the court’s construction on future generations.⁶²

3.3. Constitutional limits on transformative constitutionalism

It is important to note that transformative constitutionalism is not without limitations. It must be pursued “within the discipline of the Constitution.”⁶³ In that vein, the Constitutional Court has cautioned that measures designed to advance the interests of previously disadvantaged persons must be constructed in a manner: that respects the dignity of all persons affected; that is genuinely beneficial rather than punitive; and that is constitutionally disproportionate. Moseneke ACJ specified in *Barnard* that such measures must not unwittingly harm those they were designed to benefit and must be implemented in a way that advances the interests of the previously disadvantaged.⁶⁴

In highlighting the need to follow a nuanced approach in the adjudication of matters implicating transformation, Cameron J, Froneman and Majiedt AJ note what they term ‘transformative tension’.⁶⁵ They acknowledge that in effecting redress, in line with transformative constitutionalism, there are often competing interests such as equality of an individual and equality of society as a whole. There is therefore a need to balance these constitutional imperatives in a manner that is true to the Constitution.⁶⁶

These constitutional limits are directly relevant to the critical analysis of section 12A(3)(e) undertaken in Part 4. Transformative merger conditions that are formulaic, disproportionate, or that produce no tangible benefit to HDPs or workers cannot claim constitutional shelter under the umbrella of transformative constitutionalism. The commitment to transformation must be real and meaningful, not merely symbolic.

⁶⁰ Mbenenge (2018) 2.

⁶¹ Mbenenge (2018) 3.

⁶² Mbenenge (2018) 3-4; see also *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BGD).

⁶³ *Barnard* para 30; see also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15 para 76.

⁶⁴ *Barnard* paras 31-32.

⁶⁵ *Barnard* para 77.

⁶⁶ *Barnard* para 79.

4. MERGER REGULATION AS A VEHICLE FOR TRANSFORMATIVE CONSTITUTIONALISM

4.1. Constitutional foundations of South African Competition Policy

It is accepted that the overarching goal of competition law, as advanced by some scholars, is to ensure fair competition in markets, resulting in better product quality and choice for consumers.⁶⁷ Put differently, the core mission of competition law and what it hopes to achieve is to protect consumers' rights to low prices, innovation, and diversity in product choices.⁶⁸ This is done by structuring the market for goods and services through the imposition of controls designed to promote competition within that market.⁶⁹ Thus, market governance in a bid to achieve free and unfettered competition is the primary objective of competition law.

However, South African competition law is unusual in global context as it explicitly incorporates socio-economic and redistributive goals alongside efficiency objectives.⁷⁰ This plurality of goals is pertinently captured in the introduction of the Act, where it is noted that as a result of apartheid, South Africa's economy is characterised by high levels of concentration of ownership, which present an impediment to full and unrestricted access to and participation in the economy by all South Africans.⁷¹ The Act, therefore, includes public interest objectives insofar as it attempts to balance the scales regarding access to and participation in the economy.

While the Act contains certain efficiency goals,⁷² it also provides for social objectives framed as public interest goals.⁷³ According to Bouwer and van Heerden, public interest goals are rooted in the socio-economic and political climate that may exist in a particular market.⁷⁴ Further, considering the history of South Africa with respect to

⁶⁷ See Hovenkamp *Federal antitrust policy: The law of competition and its practice* (2020) 12.1; Hovenkamp *The antitrust enterprise: Principle and execution* (2005) 1.

⁶⁸ Kelly *et al* *Principles of Competition law* (2017) 2-3; Hovenkamp (2005) 1.

⁶⁹ Brassey (ed) *Competition Law* (2002) at 1.

⁷⁰ S 2, Competition Act.

⁷¹ Preamble, Competition Act; see also Fox "Antitrust and institutions: Design and change" (2010) 41 *Loyola University Chicago Law Journal* 475, where she provides an insight into how institutional design in competition law is and should be responsive to the challenges of each jurisdiction. She cites the South African case and notes that "When South Africa adopted its post-apartheid competition law, it needed to counter the toothless competition regime preceding it, which had reinforced the white oligarchy. It had to include room for the public interest, especially the interest in empowering the black majority who had been designedly excluded from the economic system."; see further Kelly *et al* (2017) 4.

⁷² See ss 2(a), 2(b), 2(d), 2(g) & 2(h), Competition Act.

⁷³ See ss 2(c), 2(e) & 2(f), Competition Act.

⁷⁴ Bouwer & van Heerden (2023) 424-425.

political and economic segregation and economic concentration, it was only appropriate that the Competition Act include social goals such as the protection and promotion of employment, the opening up of the economy to businesses owned by historically disadvantaged persons and the promotion of a greater spread of ownership to historically disadvantaged persons.⁷⁵

From a reading of the objectives and the purpose of the Competition Act, there is no doubt that the Act sought to transform the status quo, of concentration of markets and exclusion of the majority from effective participation in the economy. The goals of the Act align with the constitutional mandate to realise equality, human dignity, economic freedoms and access to socio-economic rights. Considering the supremacy of the constitution, the fact that all legislation must promote the spirit and purport of the Constitution, and the fact that the Competition Act belongs to a legal system that is founded on Constitutional values, there is therefore a constitutional basis for the pursuit of non-competition objectives.⁷⁶ This legislative design reflects constitutionalised competition policy and the subordination of market efficiency to the broader objectives of the transformative constitutional order, in what can be termed ‘Transformative Competition Law’.⁷⁷

4.2. Transformative Merger Regulation

Section 39(2) of the Constitution obliges every court, tribunal, and forum to “promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation.⁷⁸ This is not a discretionary interpretive tool but a constitutional obligation that applies directly to the competition authorities and the courts when applying the Competition Act. Mogoeng CJ confirmed in *Mediclinic* that “the invocation of section 39(2) of the Constitution in interpreting legislation that implicates a right in the Bill of Rights, ought not to be viewed as an optional extra. It should rather be seen as a constitutional

⁷⁵ See s 2, read with s 12A(3), Competition Act.

⁷⁶ See Bernatt “Competition law through the lenses of national constitutions: connecting competitive markets with socio-economic and environmental values” (2025) 13(2) *Journal of Antitrust Enforcement* 286.

⁷⁷ See Tavuyanago “Transformative competition law or protectionism? Assessing the rise of the ‘B-BBEE test’ in merger analysis through *ECP Africa Fund IV LLC & others v Competition Commission of South Africa* [2021] ZACT 99” (2024) 36(2) *South African Mercantile Law Journal* 297-318; Bernatt and Darr “Transformative Competition Law” (2026) 32 *European Law Journal* 2-8; Davis “Transformative Competition Law Adjudication: A Dworkinian Perspective” (2026) 32 *European Law Journal* 9-25; Davis “Competition Law and Public Interest: A Challenge for Adjudication” (2026) 32 *European Law Journal* 91-105.

⁷⁸ S 39(2), Constitution.

injunction.”⁷⁹ In light of the foregoing, before even considering specific aspects of the merger regulation framework which are transformative in nature, the mere interpretation and application of the Competition Act’s provisions on merger regulation should align with constitutional interpretation, promoting transformative constitutionalism.

Merger regulation is a particularly powerful mechanism for realising this constitutional mandate because it governs the transfer and concentration of economic ownership, the very phenomena that apartheid systematically distorted in favour of a racial minority. It has been suggested that the control of mergers is an attempt to proactively regulate the structure of the economy and markets to ensure the optimal functioning of those markets.⁸⁰ Because it is proactive, merger regulation has been likened to a prophylactic, intended to prevent or limit market power rather than attempt to control its abuse.⁸¹ The preoccupation with merger control is thus preventing market structures from developing, which would enable and enhance the ability of firms to abuse their unilateral or coordinated market power.⁸² The public interest provisions of the Competition Act, and section 12A(3)(e) in particular, are the legislature’s response to this constitutional imperative: to ensure that the transformation of ownership patterns is actively advanced, not merely passively permitted, by the merger control regime.

4.2.1. The merger regulation framework

Section 12A of the Competition Act governs the analysis of merger by the Competition Commission and the Competition Tribunal.⁸³ It provides that:

Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in subsection (2), and

- (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

⁷⁹ *Mediclinic* para 9.

⁸⁰ Neuhoﬀ (ed) *A practical guide to the South African Competition* (2017) 237.

⁸¹ Trebilcock *The law and economics of Canadian competition policy* (2002) 131.

⁸² Neuhoﬀ (2017) 237.

⁸³ The Competition Commission investigates and assesses all mergers (small, intermediate and large). However, it can only make a determination in respect of small and intermediate mergers. Regarding large mergers, the Commission’s role is to conduct the assessment and make a recommendation to the Tribunal, which then makes a determination on whether to approve the merger, approve it subject to conditions or prohibit the merger. See ss 14 and 14A, Competition Act.

- (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
 - (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
- (b) determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).⁸⁴

The section further provides that despite the determination made in subsection (1), the competition authorities must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).⁸⁵ In essence, the relevant competition authority must conduct a two-pronged assessment of a merger, consisting of three stages. In the first prong (the competition test), the authority must assess whether the proposed merger is likely to substantially prevent or lessen competition, and if so, whether there are any efficiency defences (stage one). Having considered the existence or non-existence of 'efficiency gains', the authority must consider whether the proposed merger can or cannot be justified on 'public interest grounds' in section 12A(3) (stage two).

Regardless of the outcome in stages one and two, the authority must move to the second prong of the assessment (stage three), which entails an 'independent assessment' of the public interest grounds set out in section 12A(3).⁸⁶ The net effect of this two-pronged test is that a competitive merger that adversely affects substantial public interest grounds may be prohibited based on its impact on public interest. Conversely, an anti-competitive merger may be saved where it has a substantive positive impact on public interest.⁸⁷ For the object of this paper, I will only discuss the

⁸⁴ S 12A(1), Competition Act, as amended by s 9(a), Competition Amendment Act 18 of 2018.

⁸⁵ S 12A(1A), Competition Act, inserted by s 9(b), Competition Amendment Act 18 of 2018.

⁸⁶ The 'independent assessment' in stage three means that none of the findings or outcomes in stages one and two have a bearing on the stage three assessment. Stages two and three entail the second enquiry that must be conducted – the Public Interest enquiry; see also *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another* (110/CAC/Jul11, 111/CAC/Jun11) [2012] ZACAC 2 paras 1, 11, 47, 68.

⁸⁷ Tavuyanago "Public interest considerations and their impact on merger regulation in South Africa" (2015) 15(7) *Global Journal of Human and Social Science: E Economics* 23; see also Competition Commission of South Africa "Guidelines on the Assessment of Public Interest: Provisions in Merger Regulation Competition Act" (2016) Economic Development Department Notice 309 of 31 May 2016, *Government Gazette No. 40039* (2 June 2016) para 6.

second prong of the assessment, as it is within the consideration of public interest grounds that transformative constitutionalism finds resonance.

4.2.2. *The Public Interest Test*

The most evident intersection between competition law and transformative constitutionalism is the inclusion of public interest considerations (PICs) in the merger control framework. The competition authorities are empowered to consider a proposed merger's potential impact on a closed list of PICs consisting of: a particular industrial sector or region,⁸⁸ employment,⁸⁹ the ability of SMEs, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market,⁹⁰ the ability of national industries to compete in international markets,⁹¹ and the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged (HDPs) and workers in firms in the market.⁹²

Ensuing the competition assessment, the authority must independently consider the proposed merger's impact on the PICs. In conducting this assessment, two lines of enquiry must be performed. Following an adverse finding under the competition enquiry, the authority must determine whether any substantial positive public interest grounds could justify the anti-competitive merger's approval.⁹³ This means that the authority could approve an anti-competitive merger if substantial merger-specific positive public interest grounds justify the merger's approval.⁹⁴ In the alternative, following a positive finding regarding the competition enquiry, the authority must consider whether the merger raises any substantial adverse public interest effects.⁹⁵ The nature of the public interest enquiry therefore is that it can save an anticompetitive merger or can lead to the prohibition of an otherwise competitive one.⁹⁶ This double-

⁸⁸ S 12A(3)(a), Competition Act.

⁸⁹ S 12A(3)(b), Competition Act

⁹⁰ S 12A(3)(c), Competition Act

⁹¹ S 12A(3)(d), Competition Act

⁹² S 12A(3)(e), Competition Act

⁹³ Guidelines on the Assessment of Public Interest (2016) para 5.5.

⁹⁴ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (*Distillers/SFW*) para 214; Guidelines on the Assessment of Public Interest (2016) para 5.5.

⁹⁵ Guidelines on the Assessment of Public Interest (2016) para 5.6.

⁹⁶ See *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13, which was one of the earliest cases involving public interests and where the Tribunal noted this aspect at para 38.

faced nature of public interest grounds was succinctly summarised in *Distillers/SFW*,⁹⁷ where the Tribunal made the following observation:

Thus the public interest asserted pulls us in opposing directions. However, the legislation expressly allows for this. Just as the legislation may allow for the public interest to resurrect a merger that will harm competition, it also contemplates a situation where a public interest ground may justify the prohibition of a merger even if a merger does not have an anti-competitive effect.⁹⁸

The PICs specified in section 12A(3) arose as a result of policy developments and regulatory reforms that took place at the end of apartheid, which were crafted in order to propel economic, social and political transformation.⁹⁹ The importance of the PICs to the transformative agenda cannot be gainsaid, since laws have a constitutive role in the design of socio-economic structures.¹⁰⁰ Prior to 2019, when the Competition Amendment Act 18 of 2018 became effective with increased focus on SMEs owned or controlled by HDPs and introducing the ‘greater spread of ownership clause’,¹⁰¹ the use of PICs in South African merger cases had mainly been in relation to the employment consideration.¹⁰² While employment is a cardinal aspect of the transformative agenda, as it among other things, unlocks access to other

⁹⁷ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15.

⁹⁸ *Distillers/SFW* para 214; see also paras 211 to 248 on a more in-depth analysis of public interest grounds considered by the Tribunal.

⁹⁹ Hartzenberg “Competition policy and practice in South Africa: Promoting competition for development” (2006) 26(3) *Northwestern Journal of International Law & Business* 667-686.

¹⁰⁰ Bernatt (2025) 1.

¹⁰¹ S 12A(3)(e), Competition Act.

¹⁰² See *Wal-Mart Stores Inc and Massmart Holdings Ltd* 73/LM/Nov10 where the merged entity was to continue to honour existing labour agreements and a 2-year moratorium on retrenchments was attached as a condition for approval; *Metropolitan Holdings Limited and Momentum Group Limited* 41/LM/Jul10 where the merger was approved subject to the condition of a 2-year moratorium on retrenchments; *DB Investments SA and De Beers Consolidated Mines Ltd / De Beers Centenary AG* (20/LM/Mar01) [2001] ZACT 20 at para 40, where the Tribunal notes that job losses must be linked to the merger and conditions cannot be placed on merging parties to provide guarantees against job losses post-merger where job losses are not an issue at the time of the merger; *Distillers/SFW* at para 232, where the Tribunal noted that there are other statutes and institutions better placed and resourced to deal directly with some of the public interest issues (specifically employment); *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* (LM243Mar15) [2016] ZACT 68 at para 9 of Annexure A “Non-confidential Conditions”, where conditions were imposed on the merging parties including a commitment not to retrench any employees for at least three years; *Sibanye Platinum Bermuda(Pty)Ltd v Aquarius Platinum Ltd* (LM186Nov15) [2016] ZACT 50 at paras 66-68, where the proposed merger was approved subject to conditions. The conditions relating to employment included a commitment not to retrench employees as a result of the merger for a period of 24 months from the date of implementation of the merger and where consolidation was to occur within the 24 months, the parties would limit the retrenchments to 260 employees; *Steinhoff Africa Holdings (Pty) Ltd and the North Eastern Cape Forest Joint Venture & Goeiehoop Farming (Pty) Ltd* (93/LM/Sep05) [2006] ZACT 6 at para 33, where the Tribunal noted that the proposed merger had no public interest concerns, instead having positive prospects relating to the creation of approximately 4 500 new jobs.

constitutionally enshrined rights that were beyond the reach of black South Africans,¹⁰³ the most apparent manifestation of transformative constitutionalism can be observed post the 2019 amendments to the Competition Act. Below I discuss the introduction of the ‘spread of ownership’ clause.

4.2.3. Introduction of section 12A(3)(e): The Spread of Ownership Obligation

Section 12A(3)(e), introduced by the 2018 amendments and operative from February 2019,¹⁰⁴ is the most far-reaching and contested of the PICs. The section reads:

- (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—
 - (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.¹⁰⁵

The section requires the competition authorities to consider whether a merger promotes a greater spread of ownership for two specific, and historically marginalised groups; historically disadvantaged persons (HDPs), and workers. The term ‘historically disadvantaged person’ is given a broad definition, as a catch-all for all those who were disadvantaged by apartheid policies.¹⁰⁶ However, in the main, it is understood to be ‘a person or category of individuals who, before the Constitution came into operation, were disadvantaged by unfair discrimination on the basis of race’.¹⁰⁷ Considering the definition of HDP, the constitutional logic underlying section 12A(3)(e) is compelling. The concentration of corporate ownership along racial lines is among apartheid’s most durable economic legacies, and the deconcentration of ownership is therefore both an economic and a constitutional imperative. Section 12A(3)(e) operationalises this imperative by requiring that every significant corporate transaction involving the transfer of ownership or control, contribute, however incrementally, to the redistribution of economic power.

¹⁰³ For a detailed discussion on employment as a PIC and its importance to competition jurisprudence see Tavuyanago “Exploring the sensitive interplay between labour law and competition jurisprudence: Coca-Cola Beverages Africa (PTY) Ltd v Competition Commission of South Africa & Another [2024] ZACC 3” (2024) *De Jure* 196-205.

¹⁰⁴ S 12A(3)(e) was inserted by s 9, Competition Amendment Act 18 of 2018.

¹⁰⁵ S 12A(3)(e), Competition Act (added by s 9(f), Competition Amendment Act).

¹⁰⁶ S 3(2), Competition Act

¹⁰⁷ *ibid.*

The constitutional rationale for section 12A(3)(e) can be found in the equality clause of the Constitution.¹⁰⁸ Apart from declaring everyone as equal before the law, with rights to equal protection and benefit of the law,¹⁰⁹ the Constitution also provides that “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.¹¹⁰ Section 9(2) is an enabling provision, allowing latitude in respect of measures that may be taken to address the legacy of inequality. Section 12A(3)(e) is thus one of the ‘measures which may be taken’, as it seeks to address economic inequality and skewed patterns of ownership and control. In that light, section 12A(3)(e) is precisely such a measure, grounded in the Constitution, pursued through competition law, and directed at dismantling structural inequality in ownership patterns.

The constitutional rationale for section 12A(3)(e) is buttressed by the OECD’s taxonomy of competition law goals, which confirms that public interest goals’ aimed at promoting the socio-economic welfare of consumers, among others are a legitimate and recognised category of competition objectives.¹¹¹ In respect of section 12A(3)(e) playing an equalising role, Mogoeng CJ’s observations in *Mediclinic* remain authoritative:

[...] Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions.¹¹²

Merger review, with its mandatory public interest assessment, is one of the state’s most effective instruments to intervene at the moment of ownership transfer, precisely when the question of concentration is most live. Section 12A(3)(e) therefore gives concrete legal form to this constitutional imperative and represents that ‘more deliberate, intentional and systematic confrontation appropriately enabled by

¹⁰⁸ S 9, Constitution.

¹⁰⁹ S 9(1), Constitution.

¹¹⁰ S 9(2), Constitution.

¹¹¹ OECD “The Objectives of Competition Law and Policy” (2003) 5(1) *OECD Journal of Competition Law and Policy* 8.

¹¹² *Mediclinic* para 3.

independent, incorruptible, efficient and effective law enforcement' contemplated by Mogoeng CJ.

4.2.4. A snapshot of section 12A(3)(e) case law

While the jurisprudence regarding section 12A(3)(e) is still developing, the precedent set by the six cases briefly discussed below show a pattern of reliance on the transformative nature of the recently introduced 'spread of ownership obligation'. It is imperative to assert that the following case discussions do not seek nor do they pretend to attempt thorough case analyses, a task too herculean for and beyond the scope of this paper, and which would require proper case notes on each case. Rather, the cases are discussed in broad strokes, to illustrate chiefly, the application of section 12A(3)(e) and to what extent the authorities have embraced use of the provision since its coming into effect.

*Mediclinic*¹¹³ is viewed by scholars as the most significant merger post the 2019 amendments to the Competition Act.¹¹⁴ The case concerned a merger in the private healthcare services sector, which implicated the right to healthcare protected under the Constitution.¹¹⁵ In placing the matter in context, Mogoeng CJ observed that "everything of consequence turns on the economy", including the "ability of government to function in keeping with and for the advancement of shared constitutional aspirations, in circumstances where integrity and meritocracy are necessarily allowed to occupy their rightful place".¹¹⁶ Mogoeng went on to observe that the fact that colonialism, neocolonialism and apartheid institutionalised concentration of ownership along racial lines is incompatible with the founding values of the Constitution. The Competition Act therefore got to see the light of day in order to address the concentration of ownership and control and in so doing, realise the constitutional imperatives laid out in the Preamble of the Constitution.¹¹⁷

The merger had to be considered in the context of among other things, the need for the economy to be open to greater ownership by a greater number of South

¹¹³ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35.

¹¹⁴ See Bernatt (2025); Tavuyanago (2024); Davis "Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another" (2022) 18(1) *Competition Law International* 37-42.

¹¹⁵ *Mediclinic* para 1; s 27, Constitution.

¹¹⁶ *Mediclinic* para 2.

¹¹⁷ *Mediclinic* para 4.

Africans.¹¹⁸ Regarding the dismantling of concentration of ownership and opening the economy to a greater number of South Africans, two pointed questions arose. First, whether “the approval of the merger would contribute towards ownership and control in the private health care services market still being excessively concentrated in the hands of historical players or in a way that would contribute towards the progressive realisation of the set ownership-spread objectives”.¹¹⁹ Second, whether “entry into this market or sector would be eased to allow for greater participation by a greater number of South Africans or would be allowed to become an even more difficult objective to achieve”.¹²⁰ The second question was intrinsically linked to one of the key considerations of the case, the right to access to healthcare. It was opined elsewhere in the case that the potential substantial prevention or lessening of competition in the healthcare market, from a competition perspective, and the need to open and allow for greater participation and ownership by more South Africans in that economic sector, from a public interest perspective, were both intrinsically linked to a matter of general public importance— access to and affordability of healthcare.¹²¹

In Mogoeng’s view, the merger under consideration had to be viewed through the prism of institutional racial discrimination which had resulted in high levels of concentration and which needed to be dismantled by among other things, using the Competition Act as a tool to effect transformation of the economy.¹²² Mogoeng found that the Tribunal had adequately grappled with a pertinent public interest concern regarding a high and historical concentration of ownership and control in the private hospital sector which would be somewhat exacerbated by the proposed merger.¹²³ He also found that the Tribunal had taken into account “the inability of the merger to promote a greater spread of ownership by a greater number of South Africans in line with the Preamble to the Act and its purpose,”¹²⁴ and therefore agreed with the findings of the Tribunal that the merger was not in the public interest.¹²⁵ He thus concluded that

¹¹⁸ *Mediclinic* para 5; Preamble, Competition Act.

¹¹⁹ *Mediclinic* para 8 (question (a)).

¹²⁰ *Mediclinic* para 8 (question (b)).

¹²¹ *Mediclinic* para 37.

¹²² *Mediclinic* paras 8-9.

¹²³ *Mediclinic* para 77.

¹²⁴ *Mediclinic* paras 42, 77.

¹²⁵ *Mediclinic* para 80.

“constitutionally-inspired public interest consideration would be harmed rather than advanced by the proposed merger”.¹²⁶

Although the outcome of the case did not formally turn on the interpretation and application of section 12A(3)(e), the Constitutional Court substantively engaged with the core concerns underpinning that provision. Among the various enquiries undertaken in the context of the proposed merger, central emphasis was placed on the imperative to remedy the structural economic harms produced by the apartheid regime and to facilitate equal, inclusive, and non-discriminatory participation in the economy. In particular, the Constitutional Court directly addressed the question of broadening ownership and control to a larger number of South Africans and concluded that the proposed merger was deficient in advancing transformation within the healthcare sector. This lack of meaningful transformation, considered alongside other relevant factors, led to the prohibition of the merger and the Court’s endorsement of the Tribunal’s decision.

The judgment underscores the normative significance of constitutional and human rights considerations within the competition law framework. It does not merely acknowledge the relevance of constitutional values to competition law, but expressly positions competition law as an instrument through which constitutional objectives, foremost among them socio-economic transformation, ought to be pursued. The integration of transformation objectives into merger assessment via public interest provisions generally, and section 12A(3)(e) in particular, is thus shown not to be an incidental or ancillary development. Rather, it reflects a deliberate regulatory design aimed at giving concrete effect to constitutional values, including the substantive equality envisaged in section 9(2) of the Constitution. The transformative provisions governing merger regulation, as interpreted in *Mediclinic*, align with the theoretical framework of transformative constitutionalism, which conceives of the Constitution and its value system as an ongoing project of structural social, economic, and institutional transformation.

In the *Simba/Pioneer*,¹²⁷ Simba (Pty) Ltd sought to acquire the entire issued share capital, excluding shares held by subsidiary companies of Pioneer. The Tribunal concurred with the Commission’s finding that the proposed transaction was unlikely to

¹²⁶ *Mediclinic* para 81.

¹²⁷ *Simba (Pty) Ltd v Pioneer Food Group Limited* (LM108Sep19) [2020] ZACT 88.

substantially prevent or lessen competition in any relevant market from a horizontal or vertical perspective.¹²⁸ Regarding public interest, the Commission recommended to the Tribunal that the following conditions be attached to an approval:

- that there be no retrenchments for a period of five years post-merger, and the creation of 500 additional jobs at the merged entity;
- that there be an investment of approximately R5 billion in the local economy, especially impacting HDIs; and
- that there be an implementation of a B-BBEE transaction that will increase the equity level of HDIs and worker participation to approximately 12.9 per cent.¹²⁹

The Minister of Trade, Industry and Competition participated in the Tribunal hearing to make representations on s 12A(3)(e) of the Competition Act, and the Food and Allied Workers' Union also made representations regarding employment and the proposed B-BBEE plan.¹³⁰ The Tribunal eventually approved the merger subject to the above-mentioned conditions, noting that the agreement that had been reached between the Minister and the merging parties whereby Pioneer workers' trust stock would be held in PepsiCo but must, after five years, be converted into a direct shareholding in Pioneer of up to 13 per cent, was progressive and practical.¹³¹ This case established the pattern of substantive ownership restructuring as a condition of large merger approval.

In *SA Bidco/Comair*,¹³² Bidco was a newly established company that was created for the proposed transaction and sought to acquire 99 per cent of the issued shares in Comair. After conducting the competition assessment, the Commission concluded that the proposed transaction was unlikely to prevent or lessen competition in any market substantially.¹³³ In the public interest assessment, employment and the spread of ownership were noted as two grounds of concern. Regarding employment, the Commission believed that the proposed transaction would save 1600 jobs, as in the absence of the merger, the target firm would have been liquidated.¹³⁴

Regarding the spread of ownership, the Minister was of the view that the proposed transaction appeared to be inconsistent with s 12A(3)(e) of the Competition Act and

¹²⁸ *Simba/Pioneer* para 34.

¹²⁹ *Simba/Pioneer* para 36.

¹³⁰ *Simba/Pioneer* paras 38-39.

¹³¹ *Simba/Pioneer* paras 79-81.

¹³² *K2020704995 (South Africa) (Pty) Ltd v Comair Ltd (In Business Rescue)* (LM137Oct20) [2020] ZACT 47 (22 December 2020).

¹³³ *SA Bidco/Comair* para 23.

¹³⁴ *SA Bidco/Comair* para 28.

suggested that the merged entity offer the employees equity through an ESOP equivalent to the value of unpaid salaries and that the merged entity commit a minimum of 5 per cent shareholding towards an ESOP with a B-BBEE participation.¹³⁵ The merger was approved subject to conditions, which included that the merged entity allocate a portion of its shares to a B-BBEE ownership structure, which would consist of the participation of an ESOP with a broad representation of Black participants. A further condition was that there be the inclusion of one or more B-BBEE investor groups agreeable to participating in the initiative on mutually acceptable terms and who can demonstrate an alignment of interests and strategic skills which shall support and advance the medium- to long-term business of Comair.¹³⁶ *SA Bidco/Comair* demonstrated the growing role of the Minister as an active participant in enforcing the transformative ownership mandate, and confirmed that even distressed asset acquisitions are subject to the section 12A(3)(e) obligation.

In *ECP Africa Fund*¹³⁷ the Commission initially prohibited the merger between ECP Africa Fund (acquiring firm), Burger King and Grand Foods Meat Plant (target firms) in terms of which ECP Africa Fund would acquire 95.78 per cent of Burger King's issued share capital and 100 per cent of the issued share capital of Grand Foods Meat Plant from Grand Foods Propriety Limited.¹³⁸ Of import to this discussion is that pre-merger, 95.36 per cent of Burger King was controlled by Grand Foods Investments 1 Proprietary Limited, which was wholly owned by Grand Foods, which in turn is wholly owned by Grand Parade Investments ('GPI'). GPI was an 'empowered' company, where 68.56 per cent of its shareholding was held by HDPs, including 22.87 per cent by black women.¹³⁹ ECP Africa Fund on the other hand, had no HDP shareholders, with the effect that post-merger, neither ECP Africa Fund, Burger King, nor Grand Foods would be owned either in whole or in part by HDPs and workers.¹⁴⁰

Although the Tribunal approved the merger, such approval was subject to onerous conditions, most of which had to address section 12A(3)(e). For example, the parties agreed to undertake to procure the investment of no less than R500 million in

¹³⁵ *SA Bidco/Comair* para 29.

¹³⁶ *SA Bidco/Comair* para 31.

¹³⁷ *ECP Africa Fund IV LLC and Others v Competition Commission Of South Africa* (IM053Aug21) [2021] ZACT 99.

¹³⁸ *ECP Africa Fund* para 11.

¹³⁹ *ECP Africa Fund* para 16.

¹⁴⁰ *ECP Africa Fund* para 28.

aggregate capital expenditure by the end of 2026, to be utilised towards the establishment of new Burger King stores in South Africa; increase the number of Burger King outlets in South Africa to at least 150 (from 90) by the end of 2026; to increase the number of permanent employees in South Africa by no less than 1,250 historically disadvantaged individuals by the end of 2026; and increase the total value of their payroll and employee benefits in respect of all employees employed by not less than R120,000,000 by the end of 2026.¹⁴¹

In *Trade Retail*,¹⁴² the proposed transaction involved BKB and VKB implementing certain internal corporate restructuring transactions, in terms of which their trade retail businesses would each be transferred to a designated subsidiary (BKB Trade Retail SubCo and VKB Trade Retail SubCo respectively); and the fuel retail business would be transferred to a designated subsidiary (BKB Fuel Retail SubCo and VKB Fuel Retail SubCo).¹⁴³ The Commission conducted a competition assessment and found that the merged entity would face competition from various other retailers in the areas where they operate, namely Vrede, Frankfort, and Heilbron. The transaction was, therefore, unlikely to substantially prevent or lessen competition in any market. Regarding the public interest assessment, the Commission was concerned that the internal restructuring occasioned by the merger would adversely impact HDIs. However, BKB provided an undertaking to ensure that it would implement a transformation initiative within 24 months of implementation, which was imposed as a condition.¹⁴⁴ The transformation initiative involved a commitment by BKB to the effect that at least 25 per cent of the shareholding in BKB Fuel Retail would be directly or indirectly held by one or more HDP shareholders within two years.¹⁴⁵ (see *Trade Retail/AgriFin/BKB/VKB 'Annexure A'* para 2.3). This case is significant because it illustrates the breadth of section 12A(3)(e)'s reach. It would appear that even an internal restructuring with no conventional merger dimension is subject to the transformative ownership obligation.

In *FLM/Everfresh*¹⁴⁶ the Tribunal conditionally approved a large merger in terms of which FLM SA Proprietary Limited sought to acquire 51 per cent of the entire

¹⁴¹ *ECP Africa Fund* paras 35, 50, 52, 54.

¹⁴² *Trade Retail HoldCo and AgriFin HoldCo v The Trade Retail, Fuel and Financial Services Business of BKB and VKB* (LM140Oct20) [2021] ZACT 33.

¹⁴³ *Trade Retail* para 7.

¹⁴⁴ *Trade Retail* para 38.

¹⁴⁵ See *Trade Retail 'Annexure A'* para 2.3.

¹⁴⁶ *FLM Proprietary Limited v Everfresh Market Ballito (Pty) Ltd and Others* (LM126Oct22) [2023] ZACT 1.

shareholding in respect of Everfresh Market Ballito (Pty) Ltd, Everfresh Market Hillcrest (Pty) Ltd and Riverbend Trade and Invest 11 (Pty) Ltd.¹⁴⁷ The Commission found that the transaction was unlikely to substantially prevent or lessen competition in any relevant market, which the Tribunal concurred with.¹⁴⁸ Turning to the public interest test, the Commission considered the proposed transaction's effect on employment and the spread of ownership. In respect of the spread of ownership, the Commission was concerned that the proposed transaction did not promote a greater spread of ownership, particularly concerning HDPs and or workers in terms of s 12A(3)(e) of the Competition Act as neither the acquiring nor target firms had any HDP or worker ownership. The Commission, therefore, requested the merging parties to provide remedies to alleviate this concern.¹⁴⁹ The DTIC also raised concerns about the lack of HDP or worker ownership and requested that the Commission engage with the merging parties to acquire firm commitments to support HDP and/or SMEs as new entrants into the sector.¹⁵⁰ Following engagements between the Commission and the merging parties, the merger was approved subject to the following conditions:

- that FLM SA was to ensure that three of the stores it would open in the KZN region within the next five years would have a significant HDP component — either by virtue of being wholly-owned and operated by HDP franchisees or will be co-owned by FLM SA as to 51 per cent and an HDP Joint Venture partner as to 49 per cent;¹⁵¹ and
- that FLM SA would ensure that the target stores would continue to procure from existing small to medium and/or HDP suppliers for a period of five years from the implementation date provided that all suppliers meet FLH's minimum listing requirements.¹⁵²

FLM/Everfresh is particularly notable for two reasons. The first is that the competition authorities applied section 12A(3)(e) proactively, in a transaction where HDP ownership absence was not a pre-existing concern of the parties. Second, the conditions imposed on the parties included structural ownership obligations extending

¹⁴⁷ *FLM/Everfresh* para 1.

¹⁴⁸ *FLM/Everfresh* para 21.

¹⁴⁹ *FLM/Everfresh* para 26.

¹⁵⁰ *FLM/Everfresh* para 27.

¹⁵¹ *FLM/Everfresh* para 29.

¹⁵² *FLM/Everfresh* para 30.

beyond the merging parties themselves,¹⁵³ illustrating the reach of the application of the spread of ownership obligation.

4.3. A deliberate use of competition law to achieve economic transformation

What is evident from the above cases is that there has been an increasing reliance on the newly minted section 12A(3)(e) of the Competition Act. The addition of section 12A(3)(e) and its application in the case law drew some criticism from observers, with the main contention being that the section had created a great deal of uncertainty regarding the attitudes and approaches that the authorities would take in applying section 12A(3)(e).¹⁵⁴ In response to the criticisms, the Competition Commission released Public Interest Guidelines,¹⁵⁵ to clarify its approach in applying section 12A(3)(e). Through the Public Interest Guidelines, the Commission pronounced in no uncertain terms that section 12A(3)(e) confers a positive obligation on merging parties to promote or increase a greater spread of ownership, in particular by HDPs and/or Workers in the economy.¹⁵⁶

This means that it is insufficient to demonstrate that a merger does not diminish existing HDP or worker ownership as parties must demonstrate that the transaction actively promotes a greater spread of ownership.¹⁵⁷ The Public Interest Guidelines further provide that this obligation applies to all mergers having an effect in South Africa, including foreign-to-foreign transactions, private equity acquisitions, mergers involving already substantially empowered firms, and acquisitions of minority interests.¹⁵⁸ The Public Interest Guidelines also specify that even if a merger promotes ownership by HDPs, this does not preclude the obligation to consider increased

¹⁵³ The conditions mandating HDP ownership or HDP joint ventureship open up, in this instance, the retail market to the entry of new participants who are HDPs, ensuring market access and increasing ownership stakes of HDPs.

¹⁵⁴ See Lodolo, Eveleigh & Taljaard “Competition Commission Publishes ‘Public Interest Guidelines Relating to Merger Control’” (2023) <https://africanantitrust.com/category/full-article/> (accessed 30 May 2026); BusinessDay “Competition Commission’s public interest guidelines may deter investment in SA” (2023) https://www.businessday.co.za/bd/opinion/2023-11-17-competition-commissions-public-interest-guidelines-may-deter-investment-in-sa/#google_vignette (accessed 30 May 2026);

¹⁵⁵ Competition Commission of South Africa “Revised Public Interest Guidelines Relating to Merger Control” (2024) https://www.compcom.co.za/wp-content/uploads/2024/07/CC_Public-Interest-Guidelines-.pdf (accessed 30 May 2026); also see Proclamation R4544 *Government Gazette* 50323 (20 March 2024).

¹⁵⁶ Public Interest Guidelines para 6.5.2.

¹⁵⁷ Public Interest Guidelines paras 6.5.2 – 6.5.3.

¹⁵⁸ Public Interest Guidelines para 6.5.6.

ownership by Workers, and vice versa, particularly where a merger results in a dilution of ownership by HDPs or Workers.¹⁵⁹

Where a merger results in a dilution of HDP or worker ownership, or fails to promote a greater spread of ownership, it implicates section 12A(3)(e),¹⁶⁰ and the Commission will typically seek conditions including:

- an Employee Share Ownership Programme (ESOP) holding a minimum range of 5 -10% of the equity of a merging party or the merged entity and which must represent a broad base of Workers (as opposed to a few highly skilled Workers);¹⁶¹
- the sale of minimum range between 5% to 25% of the equity of a merging party or the merged entity to one or more HDPs;¹⁶²
- direct share ownership schemes in terms of which Workers will acquire shares in a merging party or the merged entity, at no cost to Workers for a reasonable period post the merger's implementation;¹⁶³
- divestiture of a business or assets of a merging party or the merged entity to HDP purchasers within a reasonable period post the implementation of the merger;¹⁶⁴ and
- Community or other investment trusts that hold shareholding in an operational firm, for the benefit of HDP beneficiaries.¹⁶⁵

The remedies contemplated by the Commission in the Public Interest Guidelines speak directly to the betterment of HDPs and workers, either through the establishment of ESOPS, shareholding or access to market participation as suppliers or as joint venture partners. These remedies speak directly to the transformation of HDP and workers' socio-economic positions, which is at the core of transformative constitutionalism. However, some of the formulations of the Commission's approach to section 12A(3)(e) and the proposed remedies create some potential friction with orthodox competition goals, the facilitation of a conducive investment climate as well as the constitutional limits of s 12A(3)(e). These potential challenges warrant further discussion.

4.4. Critiques of and challenges to transformative merger regulation

The use of merger regulation to advance transformative constitutional objectives has attracted a number of critiques. These include a deviation from the true purpose of

¹⁵⁹ Public Interest Guidelines para 6.5.9.

¹⁶⁰ Public Interest Guidelines para 6.5.12.

¹⁶¹ Public Interest Guidelines para 6.5.13.1.

¹⁶² Public Interest Guidelines para 6.5.13.2.

¹⁶³ Public Interest Guidelines para 6.5.13.3.

¹⁶⁴ Public Interest Guidelines para 6.5.13.4.

¹⁶⁵ Public Interest Guidelines para 6.5.13.5.

competition law; the increased reliance on transformation potentially having a chilling effect on investments through mergers; and, the uncertainty created by the Commission and the Tribunal's approaches to section 12A(3)(e). These critiques and challenges are engaged hereunder.

4.4.1. What of 'real' Competition Goals?

The 'competition goals objection' holds that competition law's proper purpose is the promotion of competition and consumer welfare, and that the incorporation of ownership redistribution goals distorts its analytical framework and may harm economic efficiency.¹⁶⁶ Further, if one considers one of the traditional goals of competition, consumer welfare, the inclusion of public interest seems in contrast with that goal. This is because the costs borne by firms in complying with public interest obligations are arguably shifted to consumers in terms of increased prices, thus putting consumers in an even more precarious position.¹⁶⁷

While the 'competition goals' argument has force in the abstract, it is inapt as applied to South Africa. Fox has argued compellingly that "when the South African competition law was drafted in the late 1990s, the big challenge was to give equity and mobility to the black majority" and that the Act had to "include room for the public interest, especially the interest in empowering the black majority who had been designedly excluded from the economic system."¹⁶⁸ The 'competition goals' objection cannot be assessed in isolation from the market failures created by apartheid itself, which were neither competitively neutral nor efficiency-promoting. An economy structured by deliberate racial exclusion requires remedial interventions that go beyond the conventional efficiency calculus.

It has already been discussed elsewhere in this article that equity goals are legitimate depending on the history and context of a particular jurisdiction. In South Africa in particular, the inclusion of equity goals and in the Competition Act is a direct operationalisation of the Constitution, whose founding principles are equality, dignity and freedom.¹⁶⁹ The PICs advance equality by addressing concentration of ownership

¹⁶⁶ See Bouwer & van Heerden (2023) 421, 423-424 on the Chicago and Freiburg schools.

¹⁶⁷ See Boshoff, Dingley and Dingley "The Economics of Public Interest Provisions in South African Competition Policy" <https://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> 14-16.

¹⁶⁸ Fox "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia" (2000) 41 *Harvard International Law Journal* 579, 593.

¹⁶⁹ See s 1(a), Constitution.

that resulted from discriminatory policies; provides dignity to HDPs and workers by first and foremost, recognising them as victims of injustice and second, by giving them access to economic spaces they were previously excluded from because of race and or social status; and, gives HDPs and workers the freedom of economic activity, ownership and control of key levers of the economy. The inclusion of PICs in the Competition Act and the expansion of those PICs to include the ‘spread of ownership obligation’ is therefore historically, sociologically and constitutionally sound.

4.4.2. Chilling of Investments

In terms of the Protection of Investment Act,¹⁷⁰ mergers are recognised as an investment vehicle.¹⁷¹ The regulation of mergers, therefore, has a direct impact on foreign investment flows, which, in turn, have a direct impact on economic development.¹⁷² The ‘chilling investment objection’ has basis because the regulation of mergers, as an investment instrument, is supposed to create an environment that encourages and incentivises investment, or at the very least, does not deter investments. In 2024, the Competition Tribunal prohibited the R13.2 billion *Vodacom/Maziv*¹⁷³ transaction,¹⁷⁴ in part based on the effect of the merger on section 12A(3)(e).¹⁷⁵ The decision was widely criticised as threatening significant investment in South Africa's digital infrastructure.¹⁷⁶ The decision also illustrates the tension between transformative merger control and the need to attract investment.

¹⁷⁰ Protection of Investment Act 22 of 2015.

¹⁷¹ S 2(1)(c), PIA.

¹⁷² On the relation between foreign investment and economic development, see Masipa “The relationship between foreign direct investment and economic growth in South Africa: Vector error correction analysis” (2018) 18(1) *Acta Commercii* 1-8; Malikané and Chitambara “Foreign Direct Investment, Democracy and Economic Growth in Southern Africa” (2017) 29(1) *African Development Review* 92-102; Tshepo “The Impact of Foreign Direct Investment on Economic Growth and Employment in South Africa: A Time Series Analysis” (2014) 5(25) *Mediterranean Journal of Social Science* 18-27.

¹⁷³ *Vodacom (Pty) Ltd and Business Venture Investments no 2213 (Pty) Ltd* LM148Dec21.

¹⁷⁴ See Competition Tribunal of South Africa “Competition Tribunal prohibits Vodacom/Maziv merger” (2024) <https://www.comptrib.co.za/info-library/press-room/competition-tribunal-prohibits-vodacom-maziv-merger> (accessed 30 May 2026).

¹⁷⁵ *Vodacom/Maziv* paras 1247, 1277.

¹⁷⁶ See generally Government of South Africa “Minister notes Competition Tribunal's decision on Vodacom, Maziv merger” (2024) <https://www.sanews.gov.za/south-africa/minister-notes-competition-tribunals-decision-vodacom-maziv-merger> (accessed 30 May 2026), where the Minister of Trade Industry and Competition intervened in support of the merger; Reuters “South Africa's Competition Tribunal blocks Vodacom's merger with Maziv” (2024) <https://www.reuters.com/markets/deals/south-africa-blocks-vodacom-proposed-merger-with-maziv-2024-10-29/> (accessed 30 May 2026); Wright Rose-Innes “Vodacom-Maziv merger blocked: competition vs public interest” (2025) <https://www.wri.co.za/Our-Insights/ArticleDetail/Title/Vodacom-Maziv-merger-blocked-competition-vs-public-interest--> (accessed 30 May 2026).

Mavuso has opined “By integrating public interest considerations into competition assessments of mergers and acquisitions, the policy creates an unduly complex regulatory environment,”¹⁷⁷ which then has the effect of deterring foreign investments. She continues to note that “the reliance on ‘the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers within that market’ — can be seen as misguided” mainly because there is other legislation such as the B-BBEE that should drive transformation.¹⁷⁸

van Wyk, Pretorius & Blaauw suggest that the increased powers of the Commission in applying public interest considerations in mergers, from an investment perspective, have raised some concerns.¹⁷⁹ They argue that in a climate where big investors such as Shell, GM Motors and BNP Paribas are leaving South Africa, the country’s merger regime, particularly the increased reliance on public interest, may discourage potential investment through mergers.¹⁸⁰ Lodolo, Eveleigh and Taljaard argue that firms are often concerned about the potential dilution of existing shareholders’ equity, regardless of the size of the firm. Therefore, foreign investors may be concerned about the impact of the allocation of new shares to employees on their current ownership stakes in line with section 12A(3)(e), potentially reducing their control and influence over the merged entity.¹⁸¹

In rejoinder to the ‘chilling investment objection’, it is relevant to emphasise from the onset that the scholars and commentators discussed above do not adduce any evidence that there are business or firms exiting or staying away from the South African market as a consequence of the application of public interest considerations in mergers. Be that as it may, in consideration of the ‘investment tax’ that equity goals may impose on foreign businesses, Stiglitz has suggests that use should be made of

¹⁷⁷ Mavuso “The good, the bad and the ugly: South Africa’s competition policy” (2024) <https://blsa.org.za/thought-leadership/op-ed-the-good-the-bad-and-the-ugly-south-africas-competition-policy/> (accessed 30 May 2026).

¹⁷⁸ *ibid.*

¹⁷⁹ Van Wyk, Pretorius & Blaauw “South Africa’s Competition Law has Special Conditions for Company Mergers: Do They Benefit Society or Hinder Business?” (2024) <https://theconversation.com/south-africas-competition-law-has-special-conditions-for-company-mergers-do-they-benefit-society-or-hinder-business-232570> (accessed 30 May 2026).

¹⁸⁰ *ibid.*

¹⁸¹ Lodolo, Eveleigh and Taljaard (2023).

the public interest test not only in mergers but in conduct as well.¹⁸² He goes even further regarding public interest and investments, arguing the following:

Mandates on domestic firms (like lending to underserved communities or participation of historically disadvantaged persons) should be imposed on foreign firms, even if it is more difficult for them to fulfil such a mandate. No country should sign a trade or investment agreement that makes this difficult or impossible.¹⁸³

The rationale behind imposing a mandate on foreign investors is to address inequality and transformation within the society in which businesses operate. It can, therefore, be argued that where foreign firms are aware of past inequity in target jurisdictions, there is a positive obligation on them to actively pursue redress of such inequity, should they want to conduct business in such jurisdiction. This speaks to the philosophy of business with a conscience or social justice-sensitive economy discussed by Mogoeng in *Mediclinic*.¹⁸⁴

It may further be contended that, given the range of legal, administrative, and regulatory compliance requirements that an investor must ordinarily satisfy to establish an investment in South Africa,¹⁸⁵ requirements for which investors routinely plan and make contingencies, any objection to the transformative character of the Competition Act is, at best, disingenuous. There appears to be no principled basis for insisting on

¹⁸² Stiglitz (2017) 18.

¹⁸³ *ibid.*

¹⁸⁴ *Mediclinic* para 2.

¹⁸⁵ For example, a company intending to do business in South Africa must comply with among other key pieces of legislation: the Constitution of the Republic of South Africa, 1996; the Immigration Act 13 of 2002, as far as the different types of business and work permits are concerned; the Protection of Investment Act 22 of 2015 as far as the regulation of investments is concerned; the Companies Act, which requires registration of the company with the Companies and Intellectual Property Commission; the Consumer Protection Act 68 of 2008, as far as supply of quality goods and services to consumers is concerned; the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998, National Minimum Wage Act 9 of 2018, Skills Development Act 97 of 1998, Skills Development Levies Act 9 of 1999, Compensation of Occupational Injuries and Diseases Act 130 of 1993; Occupational Health and Safety Act 85 of 1993 as far as employment and employment conditions are concerned; the Broad-Based Black Economic Empowerment Act 53 of 2003, as far as the promotion of black economic empowerment is concerned; the Protection of Personal Information Act 4 of 2013, as far as the protection of data subjects that deal with a company's information is concerned; the Currency and Exchanges Act 9 of 1933, as far as exchange controls are concerned; the Customs Control Act 31 of 2014, as far as import and export is concerned; the Income Tax Act 58 of 1962, Value Added Tax Act 89 of 1991, Tax Administration Act 28 of 2011, South African Revenue Service Act 34 of 1997, as far as tax is concerned; the National Environmental Management Act 107 of 1998, National Environmental Management Waste Act 59 of 1997, National Heritage Act 25 of 1999, as far as environmental and heritage protection is concerned; and the Superior Courts Act 10 of 2013, Magistrates Court Act 32 of 1944, Enforcement of Civil Judgments Act 32 of 1988, International Arbitration Act 15 of 2017, as far as dispute resolution is concerned, and potentially many more sector specific pieces of legislation and regulations.

strict adherence to all other legislative frameworks while treating the Competition Act as an exception. Moreover, when a firm seeks to conduct business within a particular jurisdiction, compliance with that jurisdiction's legal framework is not optional; it constitutes a precondition for, and an integral aspect of, lawful commercial activity.

Against this backdrop, the fact that the Competition Act obliges firms engaged in conduct regulated by it to contribute to the pursuit of a broader transformative agenda cannot properly be characterised as punitive. Rather, it is an expression of the normative objectives embedded in South Africa's constitutional and legislative architecture. Accordingly, firms must incorporate the promotion of equity and transformation objectives into their strategic and operational computations, in the same manner as they account for other regulatory and market variables, when determining whether and how to participate in the South African market.

4.4.3. Conflicting approaches between authorities

The Commission in its Public Interest Guidelines has stated categorically that s12A(3)(e) applies to all mergers, and on the evidence of the cases discussed above, could be considered determinative of a merger outcome. The Commission also stipulates that where section 12A(3)(e) is implicated, remedies specific to HDP and work ownership will be imposed.¹⁸⁶ However, this is at odds with the approach of the Tribunal, which views the public interest assessment as a holistic one, in terms of which no one factor is on its own, determinative of the outcome. Further, under the Tribunal's holistic assessment, the negative effects under one or more public interest grounds could be compensated for by positive effects under others.¹⁸⁷ For example, if a merger has a negative effect on employment, parties to the merger could remedy the effect on public interest by addressing another ground, such as the promotion of SMEs through the conclusion of preferential procurement agreements, committing to the sourcing of goods and services from SMEs to promote their growth within a particular industry.¹⁸⁸ In specifically discussing the impact of s12A(3)(e) on the holistic approach, the Tribunal noted the following in *Epiroc*:

¹⁸⁶ Public Interest Guidelines para 6.5.13

¹⁸⁷ See *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd* CT 08LM/Feb02 paras 217-219; *Harmony Gold Mining Company Ltd/ Gold Fields Ltd* CT 93/LM/Nov04 para 54.

¹⁸⁸ See for example *Epiroc Holdings South Africa (Pty) Ltd and K2022596519 (South Africa) (Pty) Ltd and Polkadots Properties 117 (Pty) Ltd* CT LM148Nov2022.

As regards the public interest analysis under section 12A (3) of the Act, the Tribunal has previously explained that it is a holistic one, in terms of which the different public interest grounds listed in section 12A (3) must be separately assessed, and then, if necessary, weighed against each other in order to arrive at a net conclusion on the public interest effects of the merger. Whilst this previously expressed approach predates the amendments to section 12A brought about by the Competition Amendment Act, 2018, we do not believe that those amendments impact upon the holistic approach to be followed in the assessment. Therefore, even if, on a consideration of all the evidence, a merger would have a substantial negative effect insofar as section 12A (3)(e) is concerned, that effect might be mitigated or outweighed by positive effects in relation to one or more of the other factors listed in section 12A (3).¹⁸⁹

Epiroc was decided before the promulgation of the Commission's Public Interest Guidelines, in terms of which the Commission insists that "where a merger has an effect on a particular public interest ground, it will require remedies that specifically address the effect in relation to that ground and not one that addresses other public interest grounds".¹⁹⁰ This dissonance between the authorities' approaches is cause for concern as it impacts certainty. There is a real possibility that an intermediate merger may be prohibited by the Commission, using its 'specific ground – specific remedy' approach, and then be overturned by the Tribunal, using the holistic approach to the public interest assessment. The discord between the Commission and Tribunal's approaches will not sit well with investors, who seek certainty before making substantial investments. Nevertheless, what is of import to this paper is the fact that both the Commission and the Tribunal acknowledge the legitimacy and value of the 'spread of ownership obligation'. The divergence on approaches is a kink that can be ironed out between the authorities, while the application of section 12A(3)(e) and its role in transforming the economy is undisputed by both agencies.

In summary, the above critiques and challenges do not invalidate transformative merger regulation; they refine and discipline it. As Mncube and Ratshisusu have argued, competition policy must chart "South Africa's path to inclusion" — but that path must be walked with constitutional discipline, genuine transformative purpose, and sensitivity to the economic conditions necessary for a growing and inclusive economy.¹⁹¹

¹⁸⁹ *Epiroc* paras 75-77.

¹⁹⁰ Public Interest Guidelines para 5.3.

¹⁹¹ Mncube & Ratshisusu "Competition Policy and Black Empowerment: South Africa's Path to Inclusion" (2023) 11(1) *Journal of Antitrust Enforcement* 74.

5. CONCLUDING REMARKS

Transformative constitutionalism in South Africa represents one of the twentieth century's most ambitious attempts to harness constitutional law as an instrument of structural social change. Its jurisprudential achievements, from the socio-economic rights adjudication of *Grootboom* to the constitutional integration of competition policy in the 2018 Amendment Act, are intellectually sophisticated and globally influential. Yet the project faces the enduring challenge identified by Davis and Klare: that a transformative constitutional culture cannot be created by courts alone and requires the transformation of legal education, the reorientation of the legal profession, and ultimately the mobilisation of political and social forces committed to constitutional values beyond the courtroom. These sentiments were echoed by Langa CJ, who noted that for transformative constitutionalism to truly be realised, the responsibility must be shared. He opined that “widespread transformation of economic and social conditions is beyond the powers of courts alone. Only when our judicial commitment is coupled with legislative reform and appropriate executive action can the vast disparities that continue to exist in South Africa be eradicated”.¹⁹²

This article has argued that South African merger regulation is both an expression and an instrument of transformative constitutionalism. The public interest provisions of the Competition Act, culminating in the positive ownership obligation in section 12A(3)(e), reflect a deliberate legislative effort to use merger control to address the concentration of economic and political power that apartheid bequeathed, and to open economic participation to those previously excluded. This legislative effort is what Justice Langa points to as part of the mechanics of realising true transformative constitutionalism.

Considering the history of colonialism and apartheid, which resulted in the disenfranchisement of the majority of the population, South Africa and, indeed, its laws, should never be apologetic about fervently pursuing redress in the form of transfer of ownership and the advancement of the interest of historically disadvantaged individuals. The post-2019 case law demonstrates both the growing ambition of the transformative merger control project and its constitutional grounding. The aim of a ‘deconcentrated, growing and inclusive economy’ is a clarion call of the

¹⁹² Langa (2006) 358.

Competition Act, and the competition authorities are guided by that objective of the Act in their interpretation of the transformative text of the Act.

The overarching lesson of this analysis is that transformative constitutionalism, as applied to merger regulation, demands more than formal compliance. It demands that every merger assessment ask whether the transaction, and any conditions attached to it, genuinely advances the constitutional project of a more equal, inclusive, and deconcentrated South African economy. Merger regulation, guided by the normative philosophy of transformative constitutionalism and properly and proportionately applied remains one of the constitutional democracy's most powerful instruments for doing so.

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