

# **The Role of South African Competition Law in Supporting SMEs**

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## **1. INTRODUCTION AND AIMS**

The South African Competition Act 89 of 1998 reflects the government's aims to incorporate particular public interest policies that reflect the changing socio/economic and political context within which the Act was promulgated. One of the Act's explicit purposes is to "ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy". Such policy considerations are embodied in certain provisions of the Act, which is interesting from the perspective of a developing country with a fledgling competition regime. Nearly five years on, it is useful to examine how the Act has fared<sup>2</sup>.

The ultimate goal of any competition policy is to enhance consumer welfare. The premise is that markets are not competitive where it can be shown that prices increase or the choice of product or service available to the consumer is limited as a result of monopolistic conduct. However the South African Act specifically mandates attention to SME interests. Therefore, South African competition law is in theory SME-friendly, insofar as it proclaims to protect SME interests by promoting access to markets as well as acknowledging their rights to participate in the economy. However, the enforcement of competition law may in reality sometimes be incompatible with SME interests. The difficulty is

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<sup>1</sup> The author writes in her personal capacity and her views should in no way be attributed to those of the Competition Tribunal.

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precisely that frequently the larger, integrated firm is more efficient than its SME counterpart. Large firms are able to leverage their relative strength in the market to source at lower cost and to achieve scale benefits which its smaller counterpart simply cannot match, thereby bringing down prices for consumers. Most sophisticated competition regimes adhere to a competition policy that protects competition itself (ensuring lower prices and greater product choice for consumers) at the expense of protecting individual competing firms, who may not be able to offer the lowest prices or widest choice. Whilst optimally, markets should ensure competitive prices and services, they also function properly if they eliminate inefficient players. But surely competitors – regardless of size - make up the fabric of competitive markets and therefore, too, deserve protection under competition law? This dichotomy is not always easy to understand and leads to misapplication of the Competition Act's provisions.

What this paper seeks to do is to evaluate to what extent South African competition law assists SMEs, primarily by reference to those SME cases that have been dealt with by the competition authorities between 1999 and 2004. It describes the manner in which the South African Competition Act has been implemented and policy goals interpreted with regard to SMEs including evaluating how efficiency-driven competition principles interface with SME considerations. Focus is placed on South African competition law's protection of SME interests vis-à-vis larger competitors engaging in anti-competitive conduct, rather than on SMEs as perpetrators of anti-competitive conduct. This paper therefore serves as an internal review of SME-related provisions and procedures within the Competition Act and their application to real-life SME-initiated cases. Such an analysis is conducted with due consideration to the extent to which the competition authorities' task is complicated by certain structural market features, which frequently may create a hostile environment for SMEs. It will be shown that South African competition law by and large presents a competent model for a country emerging from a protected and distorted economic history. However as yet, competition, and not small business interests, have been the basis for the determination of decisions under South Africa competition law.

## **1.1 Parameters of the Paper**

Ideally it would be beneficial to examine the impact of competition law on SMEs by measuring the long-term effects of the decisions of the competition authorities on SMEs that have been affected by them. This would involve longitudinal empirical assessments of growth in profitability, sales and employment. However, the competition authorities are too young and their decisions too fresh for this type of an analysis to be done at this stage. Moreover, data collection is difficult, since the Competition Commission, which interacts to a greater extent with SMEs seeking to initiate complaints, has, as at the date of writing, no formalised database dedicated to SME matters and much of the available information is confidential.

## **1.2 Definition of Small Business**

Small businesses in South Africa vary in size across a broad spectrum and are characterised by a large informal sector. The National Small Business Act, No. 102 of 1996 sets out an expansive definition of the South African small business sector, reflecting its stratified nature. SMEs are categorized as either survivalist; very small (or micro); or formal small and medium sized entities, in accordance with various thresholds of turnover, assets and employee numbers. (Berry: 2002, p.35)<sup>3</sup> SMEs in South African competition law are defined in accordance with this Act<sup>4</sup>.

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<sup>3</sup> Micro firms have growth potential and involve the owner and family members or 4 employees at most, turnover is below R150,000. Formal small and medium firms have five to 100 and 100 to 200 employees respectively which are still owner-managed operate formally. Turnover is between R2 to R25 million for small and between R4 to R50 million for medium enterprises.

<sup>4</sup> See Chapter 1, Section 1, sub-section (xxxii) of Competition Act.

The survivalist sector refers to the informal sector in South Africa and competition issues and therefore competition law is not within their immediate ambit of concern. Many of the cases which come before the competition authorities are brought by formal SME entities. Therefore this paper will focus on such formal micro, small and medium-sized enterprises<sup>5</sup>.

## 2. SMES AND THE COMPETITION ACT 89 OF 1998

The South African Competition Act 89 of 1998 (“the Act”) became operative in September 1999. The Act lists a plurality of goals, including - to a. to promote the efficiency, adaptability and development of the economy; b. to provide consumers with competitive prices and product choices; c. to promote employment and advance the social and economic welfare of South Africans; d. to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic. Primarily therefore, the Competition Act seeks to maximise consumer welfare by efficiently allocating resources, whilst furthermore incorporating amongst its goals the furthering of certain socio-economic objectives. (Whish:2001)<sup>6</sup> Two additional purposes of the Act, state specifically:

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

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<sup>5</sup> The acronym “SME”, as opposed to “SMME” will be used throughout this paper.

<sup>6</sup> According to Whish, it is common for different legal systems to reflect different societal policy issues which run counter to striving for (strict economic) allocative and productive efficiency.

The latter section is designed to cater for Black Economic Empowerment (“BEE”) companies and the former, to SMEs. How these two sets of goals interact will be evident later on.

## **2.1 The New Act: Context and Background**

The new Act 89 of 1998 was designed to cure the deficiencies of its predecessor, the Maintenance and Promotion of Competition Act of 1979, regarded by many as a blunt instrument against the monopolies which it confronted. The Competition Act’s attention to SME and other public interest considerations reflects the post-Apartheid government’s intention to “remove or reduce the distorting effects of excessive economic concentration and corporate conglomeration, collusive practices and the abuse of economic power by firms in a dominant position.” It was furthermore hoped that this policy would ensure that “the participation of efficient small and medium sized enterprises in the economy was not jeopardized by anti-competitive structures and conduct.” (OECD Peer Review: 2003, p6 citing Notice 1954)

The Act also reflects the culmination of a controversial and charged debate. When the new bill was being drafted, big business opposed using the new competition legislation for the attainment of broader socio-economic interests. Their sentiments echoed an established school of thought which abhorred the idea of the Act incorporating social goals underpinning competition policy. (Gal: 2003). Competition law purists have questioned whether it is the job of competition authorities to protect smaller players, or whether such a task is more effectively pursued by sector regulators, trade associations, or more appropriately, through enforcement of social legislation or application of industrial policies.<sup>7</sup>

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<sup>7</sup> This constitutes an entirely different debate and is not the focus of this paper

However, small business proponents advocated that, in order for small business to be able to participate in the economy, the prevailing high levels of market concentration needed to be urgently addressed and that internal competition measures were needed to address the market power of monopolies. The drafters eventually managed to strike a balance between the views of these opposing camps. The new Act therefore bravely incorporates these competing interests.

South Africa has a unique economic history. Its exclusion from world markets for many years resulted in the development of an extremely protected economy during the earlier part of the 20<sup>th</sup> century. Government concessions, including subsidised inputs in industries such as manufacturing and agriculture, together with strict market controls, high tariffs, low levels of foreign direct investment and high levels of government ownership, have over the years, contributed to the creation of a highly concentrated economy. This means that in many market sectors, few large firms hold considerable market power, measured in terms of their share of the relevant market. The creation of statutory monopolies in utilities such as telecommunications has only served to heighten this restrictive and protected environment. [OECD report:2003]. Today, high levels of market concentration, specifically in manufacturing, agriculture and mining, are still evident in various sectors of the South African economy.

**Table 1: PROPORTION OF MARKET SHARE ACCOUNTED FOR BY LEADING SOUTH AFRICAN FIRMS IN VARIOUS SECTORS**

<i>Industry/ Sector</i>	<i>Number of Leading Firms</i>	<i>Approximate Market Share commanded by leading firms</i>
Paper	2	98%
Plastics	3	74%
Manufacture of wine and beer	2	80%
Iron and steel basic industries	3	73%
Sugar	2	50%+
Gold Production	3	87%

*Source: African Statistics (Pty) Ltd 2001, various Tribunal decisions*

## 2.2 The Rationale for Protection of SMEs

Why do SMEs deserve special protection? Firstly, the post-1994 government has committed itself to a small business strategy on the basis of the notion that small business will act as an impetus to growth within the economy.

Furthermore, the economic context in South Africa has historically been hostile to small business. Several industries in South Africa have been categorized as tight oligopolies, where several large firms dominate the competitive landscape, typically producing a large portion of industry output and protected by high entry barriers. Higher concentration levels, whereby a few firms typically dominate most sectors, increase the likelihood of their potentially exerting their market power to the exclusion of other, especially smaller competitors. Large firms may frequently control access to raw materials or other strategic resources or, if vertically-integrated, to more than one level of the supply chain. Smaller producers or customers in South Africa often have no choice but to rely on such firms for supply, especially in the context of a small developing economy, where exchange rate fluctuations and other costs limit the viability of imports as substitutes<sup>8</sup>. A dominant firm's leverage in the market is often strategically used to push SMEs out of the market in order to capture market share, entrench market power and ultimately, drive prices up. Such exclusionary tactics may be surreptitiously invoked, such as refusing to supply the SME with vital inputs, manipulating pricing of such inputs or levying abnormally low prices on their own products or those of a vertically-integrated subsidiary, in order to force smaller competitors out of business. Since SMEs are highly susceptible to cash flow problems and lack economies of scale, it does not take long before they are driven from the market.

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<sup>8</sup> See for example Mondi Limited and Kohler Cores and Tubes 20/CAC/Jun02

In this market context, some South African SMEs are keenly aware of the might of their larger rivals and of the risk that if they stepped into their competitive terrain they could be wiped out in an instant. This awareness in many instances drives SMEs to greater efficiencies, to either lower their cost base or to innovate. They tend to niche themselves by differentiating a product or targeting a specific market which enables them to compete more effectively. For instance, many SME family-run businesses rely on concessions granted by suppliers, based on sound, established relations built up over several years. In certain industries, relatively small firms are able to survive for extraordinarily long periods. This could be attributable to demand, technological conditions or a sector's unique craft characteristics being conducive to small firms establishing a product niche and a reliable customer base that enables them to remain competitive despite the relatively small scale of their operations.<sup>9</sup> A legitimate pro-competitive response, many would argue. However, in a highly concentrated market context, even efficient dynamic new firms will experience difficulty in breaking into the market while such market structures would also prevent existing viable firms from growing and expanding their market reach. For instance, in a highly concentrated retail sector, some SMEs cite bias against local products as a barrier to entry at retail level.<sup>10</sup> Similarly, where SMEs niche themselves with respect to a particular market, and start producing favourable returns, larger firms may look on this market as potentially lucrative and engage in anti-competitive or exclusionary conduct in order to grab market share from the smaller firm. In some respects, merely the reputation of the market power of dominant, integrated competitors could well serve as a deterrent to entry or to innovation and growth for SMEs in respect of a particular market.

This explains why, in South Africa, accessing markets has been highlighted by many small business lobbyists and independent business proponents as the single biggest competitive challenge facing SMEs (Small Business Project: 1997). They have highlighted the prevalence of monopoly capitalism and

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<sup>9</sup> Bidvest and Paragon 56/LM/Oct01. In a merger in the stationery supplies market, it emerged that sub-contracting enabled small players to win large contracts and then to sub-contract components of the contract to other players.

<sup>10</sup> As in case of Fume cosmetic group, see article entitled "Fume foray into retail" Business Day 10 October 2002

wealth centralization in South Africa as an inhibitor of robust market rivalry which constrains growth in South Africa and have appealed to the competition authorities to address these issues (Wakeford: 2003). Precisely how this has been achieved under South African competition law in the context of a highly concentrated market, is dealt with below.

### **3. THE INTERFACE BETWEEN BEE AND SME GOALS**

SME interests are closely aligned with BEE interests under the Act. For instance, the public interest clauses under the merger provisions discussed in the next section, specifically mandate the authorities to consider the merger transaction's effect on "the ability of small *and* black owned firms to be competitive". Due to South Africa's unique political history, apartheid policies excluded the majority of the population from formal employment and economic activities, fuelling the growth of large white-owned businesses. Post-1994, the attention to SME enhancement is designed to compensate for the massive unemployment rate and the inability of the formal employment sector to absorb the unemployed.<sup>11</sup> BEE therefore ranks high on the government agenda. Small business interests are closely aligned with promoting BEE since BEE business operations are frequently (though not always) small. Therefore in a competition context, more often than not, the two are conflated and expression is given to SME claims under the auspices of BEE claims<sup>12</sup>. However, the competition authorities will refrain from upholding a mere romantic public interest claim, where doing so would jeopardise precisely those interests they seek to protect.

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<sup>11</sup> The Government has established an affirmative procurement strategy designed to assist SMEs owned by previously disadvantaged individuals.

<sup>12</sup> Various sections of the Act, notably section 12A (3)(c), the public interest provision in mergers, contain a unitary reference to BEE and SME considerations. Similarly, the Commission's brochure guide for small business incorporates black business, and states that small and black business stand to benefit from the application of the Act through: "investigations of practices prohibited by the Act; merger control and the granting or refusing of exemption applications."

In early 2002 the competition authorities dealt with a merger involving a major petroleum company, Shell and a smaller retail outlet, Tepco, the division of a BEE holding company. The disposal of Tepco was criticized as selling out a BEE competitor to a dominant white-controlled firm. However, the smaller company was a failing firm, likely to exit the market in any event. Its holding company would acquire, in exchange for the sale, a significant minority share in Shell's marketing arm. The Commission in fact recommended that the Tribunal give greater credence to public interest issues and impose conditions on the merger which would entail ensuring that control of Tepco remained in the hands of historically disadvantaged persons, and that the Tepco brand remain in the market. On appeal, the Tribunal, in approving the merger unconditionally, considered that the holding company's sale of its troublesome asset was a commercially prudent decision and one that ultimately would benefit black economic empowerment since it enabled them to usefully deploy the capital into other BEE ventures.

Having set the context for the evolution of the Act, those salient provisions which are relevant to small business interests, will now be examined.

#### **4. PROVISIONS OF THE COMPETITION ACT AS THEY RELATE TO SMES**

The bulk of the substantive work carried out by the competition authorities is devoted to addressing mergers and practices prohibited in terms of the Competition Act.

##### **4.1 SMEs and Merger Control**

All mergers above a defined threshold must be notified to the competition authorities. The thresholds for parties to notify mergers, set by the Minister of Trade and Industry, are determined by the total assets or turnover of merging parties.

Small firms are more likely to be encouraged to enter a market if the possibility of merger provides a financial cushion in the event of failure. (Bjork: 1978). Moreover, the ability to merge provides the small, successful firm with the opportunity to sell out to a larger firm and re-channel the proceeds into other ventures<sup>13</sup>. In recognition of this, the merger process under South African law has been made more flexible vis-à-vis those small transactions that are required to be notified. In response to various criticisms, recent amendments to the Act raised the thresholds for small mergers to be notified to the Commission from R5 million to R30 million of turnover or assets for the target firm. Notification for those small mergers that do qualify is now voluntary, alternatively the Commission may require notification within six months of the parties implementing the merger, but only if it feels that the merger has anti-competitive consequences. This means that smaller firms who are acquired by a larger firm no longer face stiff notification fees and long investigative time periods. These amendments enable cash-strapped SMEs relying on the investment of larger companies to grow and therefore compete equitably in the market. Alternatively, they can use the funds to deploy into another SME venture. This flexibility is important in a context where the government seeks to encourage SME growth and transition up the ranks of the formal sector.

When larger companies merge, structural changes may occur in a market which consolidates market power in a particular sector in the hands of the merged entity, often to the exclusion of other smaller competitors. Under the merger provisions, the Act sets out an array of factors to consider to determine

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<sup>13</sup> Two mergers where this has occurred is Pioneer Foods (Pty) Ltd and SAD Holdings Limited - 23/LM/Apr02 and Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd 66/LM/Oct01.

whether competition in the market will be “prevented or substantially lessened” and therefore whether the merger should be prohibited, approved or approved with conditions<sup>14</sup>. A unique feature of the Act, is the encapsulation of SME interests under the public interest mandate in the merger provisions of the Act. Under this provision, the authorities must consider whether the merger can or cannot be justified on substantial public interest grounds. In other words, the public interest clauses of the Act dictate that the competition authorities are empowered to assess mergers on the basis of various “non-efficiency” arguments. These include - the transaction’s effect on employment; on a particular industrial sector ; **on the ability of small and black owned firms** to be competitive and, finally, on the ability of South African business to be competitive internationally.

To date, no transaction has been determined on grounds of public interest alone. The competition authorities have never permitted an anti-competitive merger transaction because of its positive impact on public interest; and they have never prohibited a pro-competitive transaction because of its negative impact on the public interest.

Despite the fact that public interest grounds have not determined any particular merger, several mergers, decided on purely competition grounds, did pay homage to SME interests through the imposition of conditions in their favour. For instance in one such merger, conditions were imposed, though not on the basis of the public interest provisions of the Act, but rather on competition grounds which had the *effect* of benefiting small business<sup>15</sup>. The merger concerned two dominant furniture retailers in the furniture retail industry. The target firm supported a wide range of small, local independent manufacturers of furniture and bedding, while the acquiring firm purchased its furniture and bedding predominantly from

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<sup>14</sup> Section 12B of the Act

<sup>15</sup> See J D Group Limited and Profurn Limited 60/LM/Aug02. In this case, competition concerns arose out of the vertical integration issues arising from the merger.

a dominant furniture manufacturer<sup>16</sup>. The concern was that the merged entity would divert furniture purchases from the independent suppliers to the large furniture manufacturer, thereby leading to the demise of the independents. In this way, the merger would increase concentration in the furniture manufacturing sector and thereby increase barriers to entry into the retail sector. Approximately 12-15 independent furniture manufacturers intervened to voice these concerns. The Tribunal ultimately approved the merger on condition that the merged firm continue to purchase from independent furniture manufacturers in the same proportion as they had prior to the merger for a period of time. The order applied generally to independents and not merely those that intervened.<sup>17</sup>

Similarly, in a merger between a large fast-moving consumer group and a retail convenience store chain, the Tribunal imposed conditions on its approval of the merger which had the effect of ensuring a level playing field for the franchisees (small businesses) being acquired<sup>18</sup>. In order to address the concern about potential competitive asymmetries and discrimination between competing franchisees, the condition stipulated that the acquiring firm conclude new franchise agreements with all its franchisees.

Incorporation of public interest considerations into a merger evaluation ensures the transparency and inclusiveness of the whole process vis-à-vis SMEs. All three competition institutions – the Competition Commission, Competition Tribunal and Competition Appeal Court - are completely independent of any political authority. The Minister of Trade and Industry has a right to make representations on public

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<sup>16</sup> Though in the Tribunal decision the view is expressed that the independent manufacturers were not SMEs but previously disadvantaged individuals, it seems that many of them would fall into the strict definition of a small business. In any event, subsequent discussion around this case has regarded these independent manufacturers as small business entities.

<sup>17</sup> Note this case was overturned by the Competition Appeal Court in September 2003. The CAC ordered that all conditions imposed on the merger by the Tribunal be set aside. Perhaps if this had been decided on public interest grounds, the CAC would not have overturned it so readily. Competition officials have commented that this should not be viewed as a setback to small business interests. “Suppliers no long protected in JD merger”. Colin Anthony. Real Business Supplement October 2003. Subsequent to this case, similar conditions were imposed in favour of independent furniture manufacturers in another merger between a dominant furniture manufacturer and its subsidiary which supplies it with MDF and chip board inputs. Once again, the smaller manufacturers voiced their concerns. This decision has not to date been released by the Tribunal.

<sup>18</sup> Fluxrab Investments No. 58(Pty) Ltd and Seven Eleven Africa (Pty) Ltd 44/LM/Aug03.

interest grounds only as a party to merger proceedings<sup>19</sup>. Therefore the competition authorities answer only to the Competition Act and the Constitution, free of any ministerial override or veto. Holding a single competition authority responsible for the entire evaluation, as opposed to deferring the public interest aspect of decision-making to another political authority, ensures that the competition authorities are empowered to proactively influence and give effect to SME and other public interest considerations in a tangible and expedient way.

We now turn to an evaluation of how the prohibited practice provisions of the Act cater for SMEs.

## **4.2 SMEs and Prohibited Practices**

In a relatively small, highly concentrated economy, enforcement of the prohibited practice provisions of the Act under Chapter 2 is one area where the Act has the potential to assist those SMEs aggrieved by anti-competitive practices by larger firms. Prohibited practices refer to those substantive infringements of competition law perpetrated by large powerful companies<sup>20</sup>. Typically, the victims are smaller competitors or SMEs. They are prosecuted either as restrictive agreements which have the effect of substantially preventing or lessening competition in a market (Sections 4, 5) or as abuses of a dominant position including exclusionary acts and price discrimination (sections 8 and 9). Subsequent comment on the Act has remarked that the price discrimination provision signals to small business that the Act caters to their interests.<sup>21</sup>

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<sup>19</sup> Section 18 of the Act

<sup>20</sup> Unlike in the merger provisions of the Act, there is no express provision for SMEs or other public interest groups with respect to the prohibited practice provisions, nevertheless these sections were designed with such interest groups in mind.

<sup>21</sup> With respect to price discrimination, we follow US legislation, the Robinson-Patman Act 1936 and Clayton Act 1914. Reekie: 1999 comments that the main purpose was to prevent powerful retailers from obtaining undue favours from their suppliers relative to SME traders. This section has to date not been successfully invoked by SMEs under SA competition law. However, a case alleging price discrimination by a large supplier vis-à-vis its customer, a small business, is presently being dealt with by the Competition Tribunal.

SMEs are themselves unlikely to be the perpetrators of restrictive practices or abusers of dominance. The Minister of Trade and Industry has set a de minimis threshold of R5 million in turnover or assets, below which abuse of dominance prohibitions do not apply, in order to ensure that small firms will not be considered dominant in small markets. (OECD:2003, p13). However in instances where SMEs themselves may, potentially infringe the Act, they are afforded an immunity from prosecution under the exemption provisions of the Act. If a group of SMEs feels any agreement or practice it engages in might amount to a prohibited practice, it can apply for an exemption from being scrutinized, on the grounds that the objective of the practice is to promote the ability of small businesses or firms controlled by previously disadvantaged persons to become competitive<sup>22</sup>. This would arise for instance where many SMEs collaborate to form a buying group in order to garner bulk discounts. In one matter, an association of individually owned pharmacies were exempted from the Act and permitted to advertise and market jointly in order to compete with the larger chains. Under normal circumstances, such an association would have been outlawed in terms of the section prohibiting competitors combining to fix price or other trading condition.<sup>23</sup> The joint marketing effort however had the effect of boosting the group's growth, persuading the Commission to extend the exemption for another 5 years. In practice however, such concessions are rarely sought from the competition authorities. There are heavy exemption fees involved.

The "abuse of dominance" provisions, a subset of the prohibited practice provisions, were envisaged by the drafters of the Act as being an important means for smaller competitors to challenge the abusive conduct of their larger, unscrupulous rivals<sup>24</sup>. Competition law recognizes in these provisions the need to

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<sup>22</sup> Section 10(3)(b)(ii) of the Act

<sup>23</sup> Section 4 (1) (b) (i) of the Act

<sup>24</sup> Section 7 of the Act sets out thresholds in terms of which a firm is either dominant or presumed to be dominant or has market power, depending on its percentage market share in a particular market.

check the abusive market power of unconstrained monopolists. Specifically, they outlaw a range of exclusionary acts which are most likely to be perpetrated vis-à-vis SMEs or smaller market participants as existing firms or new entrants seeking access to markets. Depending on which type of prohibited practice it invokes, an SME must either prove that competition in a specifically defined market will be “substantially prevented or lessened”, alternatively that a dominant firm is abusing its position in that market.<sup>25</sup>

## **5. HOW ARE SME RIGHTS PURSUED UNDER COMPETITION LAW?**

Some of the procedural protections though benefiting complainants at large, have built-in concessions which are designed to also assist smaller competitors and SMEs.

### **5.1 Complaints**

Alleged infringements of the Act may be brought at the behest of the Commission, or the SME-complainant itself by means of invoking the complaint procedures of the Act. The Commission, being the investigative body, is obliged to investigate all the complaints it receives. Much like a prosecutor in criminal proceedings, it will represent a complainant’s interests by bringing meritorious complaints before the Tribunal for hearing and adjudication. This is important since it means an SME complainant would be saved from incurring the costs of going it alone. Though a complaint may be rejected for lack of merit by the Commission (“non-referred”), the complainant still has an opportunity to pursue its complaint at the Tribunal, by initiating its own independent claim and pursuing the litigation process independently.

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<sup>25</sup> Under Section 9 dealing with price discrimination, it is necessary to prove both dominance and a substantial preventing or lessening of competition, amongst other factors.

## **5.2 Interim Relief Applications**

Most contraventions (of the Act) have an immediately adverse effect on SMEs, stifling their ability to compete fairly or gain access to markets. Complaints investigated by the Commission may take up to a year. The Act provides for complainants to apply for interim relief to the Tribunal directly, pending finalisation of the investigation by the Commission.<sup>26</sup> Interim relief applications in theory, would require less stringent proof than would be the case when the final complaint referral is heard<sup>27</sup>. Since private complainants can bring these applications to the Tribunal, they can potentially afford SMEs more expedient redress however, as discussed later, these applications carry their own risks and are frequently not deemed by SMEs to be worthwhile.

## **5.3 Settlements Procedures**

Settlement agreements or consent orders are a valuable means for complainants to achieve redress from a larger rival who is prepared to negotiate to avoid further cost, embarrassment and the inconvenience of enforcement procedures. Such agreements are negotiated at the Commission level and then endorsed by the Tribunal after a brief hearing. This has proved to be successful - a large proportion of complaints are settled. For instance, between 2000 and 2001, at least six consent orders involving SMEs were negotiated between the parties and endorsed by the Tribunal. Inducement on larger players to settle is therefore a valuable potential means by which the Act can assist to level the playing fields for SMEs. Therefore settlement agreements enable tangible benefits to flow to SMEs as a by-product of direct enforcement of the Act.

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<sup>26</sup> Interim relief orders are valid for a period of six months or until such time as the Commission's complaint referral has been heard, whichever is the earlier.

<sup>27</sup>This has been authoritatively laid down to be the same standard as that on a common law application for an interim interdict, namely - 'prima facie established though open to some doubt'. See York Timbers Limited and South African Forestry Company Limited 15/IR/Feb01. In respect of complaint referrals, the standard of proof is on a balance of probabilities, see section 68.

## **6. HOW SUCCESSFUL HAVE SMES BEEN?**

### **6.1 Analysis of SME-Related Prohibited Practice Cases**

At this stage it is important to draw a distinction between those cases lodged with the Commission for investigation and those which were proceeded with to the adjudication stage before the Tribunal.

#### ***6.1.1 SME Complaints Lodged at Commission***

Most of the prohibited practice complaints lodged with the Commission are by small businesses (Lebelo: 2001). In 2000, 61% of the total complaints received by the Commission related to abuse of dominance claims (Commission Annual Report: 2000)<sup>28</sup>. In 2001, the Commission reported that 72% of the prohibited practice cases filed with it were by SMEs. (Commission Annual Report: 2001) Anecdotal evidence from commission officials indicates that this was also the case between 2002-2003. The Commission has remarked that this high percentage of SME cases is indicative of the non-regulatory barriers that small firms face and the need to regulate the conduct of dominant firms in South Africa (2000 : 37)<sup>29</sup>.

#### ***6.1.2 SME Complaints Prosecuted at Tribunal***

Since all meritorious prohibited practice cases must be adjudicated by the Tribunal, it is possible to glean the number of successful SME-related matters referred by the Commission to the Tribunal, from Tribunal records. Accordingly, those cases initiated by SMEs and heard by the Tribunal on the merits over the last four years are examined below<sup>30</sup>.

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<sup>28</sup> The total number of complaints received was 122.

<sup>29</sup> The absence of comprehensive data with respect to SME complaints lodged with the Commission does not allow one to assess whether prohibited practices are being perpetrated against SMEs in specific sectors or not

<sup>30</sup> In other words, these are the matters that were initiated against larger competitors by an SME or individuals, who would fall into the category of an SME as defined in the Act. Only those substantive competition matters that were heard by the

**Table 2: PROHIBITED PRACTICES ADJUDICATED BEFORE TRIBUNAL<sup>31</sup>:**

**1999-2004**

	<b>PROHIBITED PRACTICES CASES GRANTED</b>	<b>PROHIBITED PRACTICES CASES REFUSED</b>	<b>TOTAL</b>
SME- Initiated Prohibited Practices	5	4	9
Non-SME Initiated Prohibited Practices	1	4	5
<b>TOTAL</b>	<b>6</b>	<b>8</b>	<b>14</b>

*Source: Data extracted from Competition Tribunal website and Annual Reports*

What is apparent is that in proportion to the number of complaints lodged by SMEs at the Commission, there have been relatively few complaints involving SMEs successfully prosecuted either by SMEs directly, or on their behalf by the Competition Commission before the Tribunal.<sup>32</sup> Though the table reflects that figures of prohibited practices referred to the Tribunal generally are low, it must be recalled that SME cases comprise the majority of complaints lodged at the Commission. Many SME complaints do not ever reach the Tribunal for adjudication, the majority are non-referred by the Commission for lack of merit or withdrawn. In 2002, approximately 14% of the complaints received by the Commission for investigation involved SMEs, historically disadvantaged individuals (“HDI”) or BEE entities. The Commission itself acknowledged that this figure in respect of SME complaints was low<sup>33</sup>. The table

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Tribunal and finalized, are considered. This table excludes those matters in respect of which Consent Papers were granted or which were withdrawn.

<sup>31</sup> These include both interim relief applications and complaint referrals.

<sup>32</sup> Of course, this could well reflect that the number of complaints lodged are frivolous but the fact that so many are lodged does serve as some indication that there is a need for competition protection in the first place. Anecdotal evidence from smaller competitors would confirm this.

<sup>33</sup> 2002-03 Competition Commission Annual Report p 16. This data refers to SME complaints that had sufficient merit to be referred to their enforcement division. Precise figures of the actual number of complaints lodged by SMEs with the Competition Commission for this year were unavailable

below reflects a breakdown of successful SME enforcement actions adjudicated by the Tribunal by section and type.

**Table 3: TYPES OF SUCCESSFUL SME PROHIBITED PRACTICE CASES BEFORE TRIBUNAL**

<i>Matter</i>	<i>Nature of Proceeding</i>	<i>Section of Act Infringed</i>	<i>Description of Anti-Competitive Conduct</i>	<i>Sector</i>
South African Raisins and Other v SAD Holdings Limited	Interim Relief	Section 8(d)(i)	Inducing supplier or customer not to deal with competitor	Agriculture
Cancun Trading No 24 CC v Seven-Eleven Corp SA	Interim Relief	Section 5(2) – outright prohibition	Resale Price Maintenance – outright prohibition	Retail Convenience
JJP Bezuidenhout v Patensie Sitrus Beherend Bpk	Interim Relief	Section 8(d)(i)	Inducing supplier or customer not to deal with competitor	Agriculture
Competition Commission v Patensie Beherend Bpk	Complaint Referral	Section 8(d)(i)	Inducing supplier or customer not to deal with competitor	Agriculture
Competition Commission v Federal Mogul Aftermarket	Complaint Referral	Section 5(2) – outright prohibition	Resale Price Maintenance – outright prohibition	Motor Vehicle Parts

*Source: Competition Tribunal Records*

In 5 years, there were two successful complaint referrals brought before the Competition Tribunal and both were initiated by SMEs. However, both complaints were prosecuted by the Competition Commission in response to a complaint lodged, not one complaint has been successfully prosecuted before the Tribunal by an SME directly.

As far as interim relief goes, three out of twelve applications were granted in favour of SMEs. As with direct complaint referrals, interim relief applications are brought by applicants directly, therefore are

funded and enforced by them without the help of the Commission. In the next section we deal with why the prosecution rate for SMEs for direct complaint referrals and interim relief applications is low<sup>34</sup>.

Of significance is that of the five prohibited practices successfully prosecuted by SMEs before the Tribunal, two restrictive practices succeeded on the basis of outright prohibitions (one complaint and one interim relief matter). Outright prohibitions are regarded as blatant competition transgressions, such as price fixing, resale price maintenance and market division. SMEs more readily succeeded in these cases because in such cases, experience has shown that the anti-competitive effects of this type of conduct are so well-established, the Act does not require the complainant to actually *prove* a substantial prevention or lessening of competition in a market.<sup>35</sup>

An example of the type of conduct that infringed one of the categories of outright prohibitions of the Act was evident in an interim relief case in the retail convenience store market. A group of SME franchisees succeeded in their complaint that the dominant franchisor was engaged in minimum resale price maintenance, in other words, engaging in conduct that obliged the franchisees to sell their merchandise at minimum prices set by it<sup>36</sup>. The effect was to severely constrain the ability of franchisees to compete in the relevant market on the basis of price. The offending franchisor was heavily fined as a result.

The other category of prohibited practice in respect of which SMEs typically succeed, are on the basis of the respondents abusing their dominant position. All of these dealt with infringements of section 8(d)(i), namely conduct that induced a supplier or customer to not deal with a competitor, which falls

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<sup>34</sup> Notwithstanding the allegedly lower burden of proof in interim relief cases.

<sup>35</sup> See *Federal Mogul and Cancun Trading* supra, a case in the vehicle parts distributorship market. This case also dealt with an infringement of section 5(2) of the Act.

<sup>36</sup> Cancun Trading No 24 CC and Seven-Eleven Corp SA -18/IR/Dec99

under the category of exclusionary conduct. Again, the overall number of abuse of dominance cases successfully prosecuted by SMEs in the competition authorities' 5 year history is relatively few, especially in view of the proportionately high number of abuse of dominance cases lodged with the Commission. One would expect more prosecutions under Chapter 2 of the Act generally, specifically because the Act was legislated to deal with the rigours of a highly concentrated market structure.

## **7. WHY ARE SO FEW SME CASES REFERRED OR PURSUED TO FINALITY?**

### **7.1. Practical Constraints**

Time constraints – Considerable resources, specifically those of the Commission, are expended on sifting out claims that simply cannot be sustained under the Competition Act. The Commission's resources are typically very stretched due to the volume of notifications received. SMEs usually cannot afford to wait the prescribed year period for the Competition Commission to investigate the complaint. Some SMEs complain that there is a culture at the Commission which doesn't fully appreciate their need for rapid responses. Though they can apply for interim relief, commission officials interviewed confirmed that despite the fact that SME cases almost always entail the real likelihood of the SME exiting the market pending finalisation of the investigation, there is a huge discrepancy in the number of SME cases they investigate and those in respect of which interim relief is applied for by SMEs.

Cost - SMEs decline to approach the Tribunal for interim relief due to the spectre of an adverse costs order against the SME if the matter is ultimately dismissed by the tribunal. Alternatively if the matter is proceeded with as a full-blown complaint, all too frequently SME's lack sufficient resources to employ sophisticated senior counsel or to pursue the matter to the adjudication stage and it is later withdrawn. The unattractiveness of pursuing a lengthy process that might not yield anything besides prohibitively high legal costs is a significant deterrent for SMEs. A well-resourced legal team can extend matters for

years on end, expending huge amounts, sums which SMEs can simply not sustain. Therefore most SMEs, in the absence of a certain outcome, display an unwillingness to commit the requisite funds to pursue the matter to finality.

**Accessibility** – Despite the existence of an informal structure and prosecutorial authority to support interest groups, this has not been the practical effect<sup>37</sup>. Intimidatory tactics are common, it is not unknown for large companies to boycott an SME's business as a direct result of their pursuing a complaint against them, or even as a result of their giving evidence against them. The upshot is that there have only been a handful of occasions on which SME groups have intervened or participated in merger or prohibited practice hearings before the Tribunal. In fact, there has been more representation by labour and empowerment groupings than by SMEs<sup>38</sup>. The competition authorities are therefore disadvantaged by not having the benefit of first-hand market-place information from independent trade associations to gain a true reflection of the dynamics of a particular market-place.

Moreover, legal practitioners take centre stage thanks to affluent larger companies. Competition law is regarded as highly specialised and SMEs are frequently unable to find legal representatives prepared to undertake a complex competition law case. Those existing legal specialists who usually act for large corporates, charge fees unaffordable for SMEs. The inaccessibility is exacerbated by the some lack of transparency around the procedural and substantive issues required to successfully prosecute SME complaints under the Act.

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<sup>37</sup> The Act provides for interested parties (including SME and other public interest stakeholders) to appear before the Tribunal by applying to participate to make representations in hearings into mergers and restrictive practices, where they feel their interests are likely to be (materially) affected. Section 53 of the Act and Tribunal Rule 46. In the Cancun Trading case mentioned above, 13 complainants, all franchisees of the respondent made a joint submission.

<sup>38</sup> This could also be attributable to the fact that SMEs are simply not informed of the merger in time to make representations. Several SMEs have indicated that they only heard about the proceedings after the fact, frequently in the press.

## 7.2. Lack of Merit

Where they are aware of the existence of the Act, many SMEs lack practical knowledge as to how the substantive provisions of the Act can be implemented. What is clear is that most SMEs share a consistent ignorance and paucity of familiarity and understanding of the competition authorities, their role and how the Act's procedures could be invoked to protect them. In particular, SME complainants frequently misunderstand the requirements of proof necessary to sustain a claim an anticompetitive conduct. Even if a larger player is perpetrating and anti-competitive practice against an SME, defective or incomplete filings ensure the case is thrown out. SMEs frequently frame their complaint as a commercial claim, based on personal or pecuniary harm suffered and neglect to focus on injury to competition in general. That is why civil, commercial disputes are often brought under the guise of competition complaints. Similarly, where they rely on abuse of dominance claims, SMEs frequently fall short of proving either dominance, or fail to build up a sufficient case to establish abusive conduct. In the South African context, many firms may be dominant in most sectors, but not all of them will be *abusing* their dominance, therefore these claims are difficult for an SME to prove and are treated with circumspection by the competition authorities. Large companies sometimes simply prefer to deal with similarly large customers or suppliers who are able to provide the requisite volumes to make doing business worthwhile. This phenomenon is perhaps more accentuated in South Africa as a result of the existence of highly concentrated market sectors.

Competition cases involve complex legal and economic arguments and are difficult to understand unless legally represented. Since many complaints of alleged anti-competitive conduct entail severe repercussions, including large fines and associated civil claims, stringent evidentiary requirements must support allegations of anti-competitive conduct. This is because the competition authorities are cognizant to adopt a hard line against the Act being invoked frivolously, as a bargaining or pressure

tactic by disgruntled competitors seeking to obtain undeserved concessions from larger rivals, which would impede the normal competitive workings of the market. They strive, as all new competition authorities do, for uniformity and certainty of legal rules in order to establish their legitimacy and consolidate a body of jurisprudence. Furthermore, adherence to legal rules is seen as crucial in order to bring certainty to business. Since inter-firm rivalry is generally beneficial to the consumer, it is not always easy to distinguish exclusionary conduct from beneficial competition and business need to know where they transcend this line.

### **7.3. The Tension between Competition Law and SME Interests**

Complaints relying on those sections of the Act wherein the SME must prove a substantial prevention or lessening of competition in a particular market are rarely successfully invoked by SMEs<sup>39</sup>. In any defined market, an SME will typically hold a market share of 10% or less, therefore there is unlikely to be a *substantial* prevention or lessening of competition if the SME exits the market.

The failure by SMEs to properly frame cases before the competition authorities reflects a fundamental tension between competing policy goals – protecting the consumer from high prices and limited product choice versus protecting the SME from competitors acting anti-competitively towards them. The competition authorities consistently look to discern a general anti-competitive effect on consumer welfare generally and not only in relation to one SME or group of SMEs. The mandated attention to SME interests in the Act creates a dilemma at Competition Law of which class of rights to protect at the expense of the other. Large firms have a real cost advantage over small firms which allows them to charge lower prices. (Roller et al: 1998) Efficiency considerations are firmly entrenched in many of the

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<sup>39</sup> Sections 4 (1) (a), 5(1) and 9 of the Act.

Act's provisions.<sup>40</sup> This means that certain classes of anti-competitive conduct can be "offset" if the respondent firm can prove any technology; efficiency or other pro competitive gain outweighing the anti-competitive effect of that conduct<sup>41</sup>. In other words, large integrated firms can legitimate their alleged anti-competitive conduct on the basis of so-called efficiency claims, because efficiency necessarily entails lower prices and consumer welfare is enhanced.

The application of this approach was illustrated in a recent case in the cigarette distribution industry. In 2002 a group of 11 cigarette wholesalers who distributed cigarettes on behalf of the dominant cigarette producer in the country, British American Tobacco ("BAT") applied for interim relief against BAT. BAT held 93% of the market, its nearest rival held only 4.6%. The SME distributors complained that in attempting to implement a new distribution agreement, BAT was making it impossible for them as small traders to remain and compete in the market. They alleged that insofar as BAT excluded the applicants from expanding in the market, they were abusing their dominant position. The Tribunal dismissed the application because, amongst other reasons, the distributors were not viable in any event and it was not clear that the new system would lead to a greater reduction of distributors than would the old system. Even if it would, evidence on how much the market would be foreclosed as a result, was lacking. BAT, the dominant firm, was not proved to be engaging in an exclusionary strategy<sup>42</sup>. In its judgment the Tribunal remarked that whilst markets function properly if they ensure competitive prices and services, they also function properly if they eliminate inefficient players.

## **8. SUCCESSFUL SME CASES**

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<sup>40</sup> This is because the DTI believed that a competition law focused on economic efficiency and applied by politically independent bodies was appropriate for South Africa's well-developed industrial and service sectors.(OECD report p 9).

<sup>41</sup> Specifically, in restrictive horizontal or vertical practice claims, with respect to certain classes of exclusionary acts under abuse of dominance.

<sup>42</sup> The distributors also relied on the allegation of resale price maintenance, namely that BAT was forcing them to resell their goods at the same price to retailers as the wholesale price that they paid. The Tribunal held that there was no evidence of resale price maintenance since there was nothing to prevent the distributors from discounting the wholesale price.

Does that mean that SMES are always denied relief if a larger competitor can prove efficiencies? What about those innovative SMEs that have the potential to generate greater cost savings and efficiencies who are frequently intimidated out of the market or simply denied entry to it by their rivals' anticompetitive conduct? Such firms are clearly not free-riders, nor inefficient, indeed it is these innovative and differentiated small firms that need to be protected from monopolistic heavy-weights, in the event of the latter engaging in deliberate anti-competitive tactics to attempt to eliminate them or completely bar their entry into the market.

There have been cases where pure competition principles and small business interests have converged. These are cases where the particular conduct resulted in both consumer welfare being undermined, whilst at the same time being exclusionary of competitors. Though responding parties almost always attempt to justify anti-competitive conduct on the basis of efficiency benefits, the competition authorities have been alive to the prospect of the efficiency defence being misappropriated as a justification for monopolization. In fact in several decisions, the Competition Tribunal have recognized that the possibility exists that large dominant firms are disincentivised from becoming more efficient, specifically because of an absence of competition in their particular sector.

For instance, in 2002, a complaint was successfully pursued by a citrus farmer against the local packing and distribution company, Patensie, a former co-operative, reconstituted into a company, of which the complainant farmer was a member.<sup>43</sup> The tribunal found that Patensie, through the provisions of its Articles of Association, was abusing its dominant position in the market for the packing and marketing of citrus fruit in the particular local region. Patensie's Articles of Association clearly provided that the

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<sup>43</sup> The Competition Commission and Patensie Citrus Beherend Beperk – 37/CR/Jun01. The case broadly concerned the interests of the entire value chain throughout the farming community, many of whom can be defined as SMEs in terms of the Act.

members/farmers, were obliged to deliver their entire output to Patensie for the purposes of packing and marketing. In other words, Patensie required its customers – who were also its members – to deal with it, or, conversely, ‘to not deal with a competitor’, namely other packing houses in the district, who offered more competitive terms.<sup>44</sup> The offending articles were declared invalid<sup>45</sup>.

This case clearly evidenced the strong exclusionary effect that the dominant firm’s conduct had on the particular market. Interestingly, another case concerning the agricultural market also dealt with an inducement by a dominant raisin processor, on certain “grapes-for-raisins” producers not to deliver their raisin production to the complainant raisin-processor.<sup>46</sup> This was condemned also on the basis that it was exclusionary of other competitors in the market. What is significant is that the Tribunal in this case dispelled the dominant firm’s efficiency claims, commenting that the efficiency claims of the dominant firm had to be shown to be particularly strong to offset the efficiency loss occasioned by its anti-competitive conduct.

What seems clear is that those cases where SMEs have more readily succeeded are where the SME can show that a dominant firm’s conduct is part of a blatant, over-arching strategy to exclude it and other competitors from the market, alternatively on the basis of those outright prohibitions or “per se” abuses where the SME need not prove a substantial lessening of competition in the market.

## **9. CONCLUSIONS**

Competition law can only facilitate access to markets but once there, South African SMEs still confront many obstacles, due to the legacy of an enduringly concentrated market structure. A prevailing culture

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<sup>44</sup> The relevant section of the Act is 8(d)(i).

<sup>45</sup> This case was recently upheld by the Competition Appeal Court.

of dominance where abusive conduct is accepted as normal business practice still endures. Certainly the low volume of abuse of dominance cases before the competition authorities suggest that this might be the case. Relaxation of market structures will evolve as big business adjusts to market liberalization and the inevitable relinquishing of power.

Notwithstanding these structural problems, the competition authorities are sufficiently empowered by the Act to accommodate concessions for SMEs and to interpret the goals of the Act in such a way as to develop a unique SME-related jurisprudence. Though many strict competition advocates might not approve of these policy goals, their incorporation in the Act serve to steer the minds of the competition authorities towards SME interests which enable them to be consistently mindful of and conscientised to the needs of smaller competitors. Where SME concerns have been aligned with black economic empowerment goals, they have a better opportunity of being advanced. However, the challenge remains to continue to make a concerted effort to avoid painting competition decisions with public interest idealisms where they are without substance, or risk sacrificing the legitimacy of the Act's goals.

By imposing merger conditions which have created a fair and level playing field for independent SMEs, as well as by outlawing exclusionary conduct, the competition authorities have protected the integrity of the competitive process and aimed to lower entry barriers. However thus far, the South African competition authorities have applied an orthodox competition-focussed approach. No decision has been taken solely in deference to small business concerns. These interests have instead been given effect to incidentally, in pursuance of pure competition goals.

In South Africa, the effect of abusive market conduct on small firms' ability to compete is less discernable and often disguised by monopolistic firms. It is precisely because the history of

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<sup>46</sup> South African Raisins (Pty) Ltd and Another and SAD Holdings Limited and Another– 04/IR/Oct99

monopolistic conduct in South Africa is so subtle, yet pervasive and entrenched, that SME claims of exclusion and harm will have to be rigorously interrogated by the competition authorities in the future. The question of where the line is drawn between abusive conduct and healthy competition will need to be addressed on a case by case basis in the context of each particular market sector. Therefore, while the Competition Act provides the architecture for protecting small business interests, the extent to which the competition authorities will specifically give effect to these issues will play out over time, as the competition authorities are challenged to test the limits of the Act in protecting innovative, differentiated SMEs in their own right.

## **10. RECOMMENDATIONS**

How can SME interests be more fully protected in the context of a highly concentrated market structure? The problems encountered by SMEs before the competition authorities are symptomatic of SMEs position in the economy at large. Competition policy can only assist SMEs within the framework of a broader, workable government policy vis-à-vis small business. The government's past SME policies have been criticized from various quarters for not delivering. Their inability to integrate SMEs has ensured they remain fragmented and disorganised. Plans are afoot to reformulate SME policy but it will take time before it is implemented. Fundamental issues need to be addressed such as access to resources and facilitating and incentivising SMEs' to mobilize themselves. A coherent policy that blends skills, development and finance for SMEs would empower and strengthen the position of SMEs generally in the economy that would enable them to compete effectively.

Fundamentally, at the level of the competition authorities, practical, procedural problems could be addressed to make the Competition Act more "user-friendly" and accessible for SMEs and to invite SME applications, rather than deter them. Most certainly competition authorities have to be wary of

making it more difficult for SMEs with inflexible, drawn out and cumbersome processes. Fast-tracking SME prohibited practice investigations, even if they at first glance seem to lack merit, is one option.

Since many issues arise from SME's ignorance around the Act and its provisions, the Commission must continue to play a central and vital advocacy role in delivering the Act to SMEs. This should extend to maintaining a separate record dedicated to SME cases, disseminating interpretive guidelines as well as case studies, indicating what factors the competition authorities typically take cognizance of. This would encourage certainty and clarity of the Competition Act's provisions and mechanisms and would undoubtedly spur SME involvement in both merger and enforcement matters and avoid creating a "pro-big business" culture.

Intimidation is another factor underestimated by the competition authorities. Insofar as this results in information about the competitive functioning of the market being withheld, it needs to be recognized that this conduct amounts to abuse and distortion of the competition act's processes. A policy which affords some protection to SME complainants wanting to give evidence or participate in merger or enforcement proceedings, free of threat, should be invoked. A good case can be made for lobbying for a victimization provision to be included in the Act. This should allow for equivocal, decisive and swift follow up recourse and would go a long way towards encouraging SMEs to participate in the process.

Fundamentally, the competition authorities need to encourage SME trade associations, as in other countries, to not only bring complaints on behalf of SMEs but also to ensure a presence in merger and restrictive practice hearings, thereby consolidating their might behind and raising the profile of individual SME complainants. The bringing of complaints by networks of SME organizations, would lend credence to and fortify allegations of harm to the competitive process. SMEs desperately require the ability to access and galvanize the requisite legal skills and financial resources, which assistance

should be comprehensive and sustained. The presence of this support would undoubtedly address many of the practical problems, obviate threats and intimidation, remove unreasonable time delays and relieve interpretation and evidentiary difficulties, ultimately making the Act more “user friendly” for SMEs.

No doubt all these issues will be addressed over time, as a body of jurisprudence is developed. A greater sensitivity to the needs of and constraints facing SMEs would go a long way towards assisting them. The challenge is to translate SME goals in the Act into meaningful practical reality. Sometimes however, it is useful to go back to those goals that were espoused in the beginning....

*It is important for the attainment of all the objectives of the new legislation that the Competition authorities retain a clear perspective on the various (and at times contradictory) interests at play within the broader business constituency. It is important that simple administrative procedures be adopted so that the Competition authority can be accessible to small and emerging businesses, it should not be a terrain for the assertion of big business interests. (Creamer: 1998)*

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