EFFECTS OF EXCLUSIVE LEASE AGREEMENTS ON COMPETITION IN THE GROCERY RETAIL SECTOR IN SOUTH AFRICA

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws

by Coursework and Research Report

at the

University of the Witwatersrand, Johannesburg

BY

Mary Motlatji Ngcakani

Student number: 990863

Supervisor: Judge Dennis Martin Davis

Date: 28 February 2023

ABSTRACT

South Africa's grocery retail sector is highly concentrated and dominated by five national supermarket chains utilising exclusive lease agreements (ELAs) with shopping mall developers to entrench and maintain their dominance. Exclusivity provisions in ELAs prevent small and emerging retailers from growing and penetrating shopping malls. This conduct has been the subject of several complaints to the Competition Commission, which initiated and conducted a grocery retail market inquiry (GRMI). This research report evaluated the effects of ELAs on competition in the grocery retail sector in South Africa. Competition is regulated by the Competition Act 89 of 1988. Therefore, the use of ELAs was critically analysed through the lens of sections 8(1)(b) and 8(1)(c) of the Competition Act, which prohibit the abuse of dominance. The research report highlighted that the use of ELAs negatively impacts competition in the grocery retail sector in South Africa. The paper argues that instead of initiating the GRMI, the Competition Commission could have utilised the abuse of dominance provisions of the Competition Act to achieve a more equitable outcome that furthers the objectives of the Competition Act.

DECLARATION

I, MARY MOTLATJI NGCAKANI,

declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

Word Count: 10,000

SIGNATURE

28 February, 2023

DATE

ACKNOWLEDGEMENTS

First and foremost, I thank God for enabling me to complete this research successfully.

I would like to express my utmost gratitude to my supervisor Judge Dennis Martin Davis for his invaluable patience, encouragement, guidance, continuous support, and useful critiques for my research. I could not have taken this journey without his extensive knowledge and expertise which inspired me.

Words cannot express my gratitude to my husband, Anati, for the encouragement and believing in me since conception to birth of this research report. This endeavor would not have been possible without his immense greatest support.

My thanks and appreciation are due to my mom Nomsa Effie, for her endless prayers over my life and unwavering love. To my siblings Sarah and Kagiso, thank you for believing in me.

I am grateful to my writing consultant, Mr. Chapangara James Mugabe, for his editing help, thought provoking questions, suggestions, guidance, moral support, bouncing ideas and feedback sessions. In the process of writing this dissertation he became family.

I dedicate this dissertation to my son Oarabile Sivenkosi, who kept my spirits high during this process and unknowingly inspired me to complete my research. Thank you, my baby, for understanding my absence and when I could not play with you because I was preoccupied with this research report.

CONTENTS

I INTRODUCTION

(a) The use of exclusive lease agreements by retailers in South Africa

A few large retail supermarkets, known as national supermarket chains (NSCs),[1] dominate many malls and shopping centres throughout South Africa. These retailers utilise special lease agreements with mall developers to secure exclusive rights and powers in shopping mall space.[2] Exclusive lease agreements (ELAs) are thus contracts concluded between mall developers (the landlords) and NSCs (anchor tenants), granting anchor tenants exclusive rights within the shopping mall.[3] These exclusive rights include the power to determine which other retailers can enter and participate in the shopping malls and the types of products existing retailers are allowed to sell. ELAs further allow anchor tenants to dictate the size of space and location that competitive rivals can occupy in shopping malls. Because of this, independent retailers often struggle to secure shop space in these lucrative shopping malls.[4]

From a retailer's perspective, being in a shopping mall offers several advantages. First, shopping malls are a guaranteed drawcard for consumers as general shopping destinations.[5] Also, shopping malls provide a more consistent and predictable level of foot traffic, thereby reducing the level of risk for retailers and enabling them to plan their operations more effectively. Other advantages of locating in a shopping mall rather than having a standalone shop include that the pull of the mall helps attract consumers, which leads to very high volumes of customers who treat them as a one-stop shop.[6] Thus, when present in a shopping mall, independent retailers often do not need to aggressively market themselves as consumers are already drawn to the mall. Also, because of the convenience shopping malls offer consumers (such as safety, parking and operating hours), an independent retailer in a shopping mall enjoys distinct advantages over those outside the malls.[7,8]

---

[1] Competition Commission South Africa The grocery retail market inquiry: Final report, 2019.
[2] In this study the term 'shopping mall' also includes shopping centres.
[3] Alan Schapiro 'Exclusive Rights Clauses in Shopping Centre Leases' (1985) 24 *Alberta Law Review* 510.
[4] K Mercy Makhitha & Brian Soke 'Investigating the challenges for the development of independent retailers in South Africa' (2021) 10 *International Journal of Research in Business and Social Science (2147- 4478)* 16–26.
[5] Massmart Holdings Limited *Massmart Holdings Submissions to the Grocery Retail Sector Market Inquiry* (2016).
[6] Ibid.
[7] Makhitha & Soke, supra n 4; Maphelo Malgas & Wellington B Zondi 'Corrigendum: Challenges facing small business retailers in selected South African townships' (2021) 13 *Southern African Journal of Entrepreneurship and Small Business Management*.
[8] R Dube, S. & Das Nair 'Barriers to entry in grocery retail: FVC and the growing independents' (2016) February *CCRED Quartely Review* 7–8.

(b) Exclusive lease agreements and competition

From a competition perspective, ELAs can heighten barriers for emerging entrants to enter and participate in the grocery retail sector.[9] Using ELAs in shopping malls, anchor tenants can prevent rivals from locating in the same mall. Thus, they not only get to enjoy retail space in shopping malls to the exclusion of competitive rivals but may also hinder competition by preventing the entry of new participants and the growth of existing participants. Dobson refers to this type of conduct as a strategic barrier to entry.[10] In this way, these agreements facilitate anti-competitive behaviour by NSCs[11] by 'creating barriers for new entrants and limiting dynamism and new investments in grocery retailing'.[12]

Under South African law, competition is primarily governed by the Competition Act 89 of 1998 (the Competition Act). The Competition Act is transformative in nature and is aimed at aiding the transformation of the South African economy. The Competition Act has got four main objectives. First, to eradicate practices that result in the concentration of ownership and control within the economy.[13] Secondly, to promote full and free participation of all South Africans by providing equal opportunity to participate fairly within the national economy and provide consumers access to various choices regarding goods and services they desire.[14] Thirdly, to eliminate anti-competitive practices and unjust restrictions that serve as barriers to entry into various markets by new entrants.[15] Lastly, to 'promote a great spread of ownership, particularly to increase the ownership stakes of historically disadvantaged persons'.[16] Therefore, historically disadvantaged people, usually the proprietors of small independent retailers, need to gain access to shopping malls. Such access will enable them to participate in the grocery retail sector and afford consumers a wider variety of grocery options within the shopping malls.[17]

---

[9] Reena das Nair & Shingie Chisoro Dube Competition, barriers to entry and inclusive growth: Case study on Fruit and Veg City, 2015, 9/2015 at 5.
[10] P Dobson Structural issues in the groceries sector: Merger and regulatory issues. Background paper by the OECD Secretariat-Latin American Competition Forum, 2015, Session I-DAF/COMP/LACF.
[11] Ibid at 57.
[12] Thando Vilakazi, Sumayya Goga & Simon Roberts *Opening the South African Economy: Barriers to Entry and Competition* (2020) available at: https://search.ebscohost.com/login.aspx?direct=true&db=awn&AN=K-062021-000429&site=ehost-live&scope=site.
[13] The Competition Act as amended, s 2.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Thembalethu Buthelezi, Thando Mtani & Liberty Mncube 'The extent of market concentration in South Africa's product markets' *Journal of Antitrust Enforcement* (2019) 352–64.

Section 8(1)(c) of the Competition Act, which prohibits 'all exclusionary acts', is applicable to ELAs. Section 1 of the Competition Act defines 'an exclusionary act' as a practice that 'impedes or prevents a firm from entering, participating or expanding in a market'.[18] However, some exclusionary acts are permissible, but only if 'the anti-competitive effect of the complained act does not outweigh its technological, efficiency or other pro-competitive gains'.[19] It is clear from the wording of this provision that the onus to prove an exclusionary act falls upon the complainant to prove that the anti-competitive effect complained about outweighs its technological, efficiency or other pro-competitive gains.[20]

(c) Problem statement

The conclusion of ELAs between anchor tenants and mall developers gave rise to complaints to the Competition Commission (the Commission).[21] In October 2015, after receiving several complaints, the Commission established the Grocery Retail Market Inquiry (GRMI) to look into the impact of the conclusion of ELAs between mall developers and the NSCs on competition in the grocery retail sector.[22] The Commission released its report in November 2019, which found that ELAs undermined the Competition Act, created barriers to entry into the grocery retail sector and that there are no justifications to support the continued usage of such unfettered agreements.[23] The Commission applied the 'market inquiry' provision to come to this conclusion.[24] However, questions have been raised about whether the Commission's approach was correct and whether it accurately canvassed the impact of ELAs on competition in the grocery retail sector in South Africa.[25]

(d) Aims and objectives

Therefore, this research report aims to investigate the impact of ELAs on competition in the grocery retail sector in South Africa. In particular, the objectives of the research report are to:

---

[18] The Competition Act as amended *s* 1.
[19] The Competition Act as amended *s* 8(1)(c).
[20] Ibid.
[21] Competition Commission South Africa, supra n 1.
[22] Ibid.
[23] Ibid at 261.
[24] The Competition Act as amended *s* 43B.
[25] Roxanne Blumenthal *The Competition Commission's Non-Referral of Exclusivity Clauses in the Shopping Centre Lease Context: A Monumental Misjudgement: A Section 5(1) Analysis of Anticompetitiveness* (University of Cape Town, 2015).

(1) Provide a historical overview of how the big five rose to dominate the retail sector in South Africa.
(2) Critically analyse the purpose of the Competition Act, with a particular focus on facilitating healthy competition in the grocery retail sector.
(3) Analyse the use of ELAs in the grocery retail sector in South Africa.
(4) Discuss the application of section 8 ('abuse of dominance') provisions, particularly section 8(1)(b) (the essential facility doctrine) and section 8(1)(c) (exclusionary conduct).
(5) Make recommendations regarding the approach that the Competition Commission should take in regulating the use of ELAs.

(e) Report structure and outline

This research report is structured as follows. Section II describes the market structure and local market concentration within the South African retail sector and outlines how the five main supermarket chains came to dominate it. Section III analyses the transformative purpose of the Competition Act and how it can regulate the use of ELAs in the grocery retail sector. Section IV discusses the nature of ELAs, providing an example of their exclusionary provisions. Section V discusses the application of section 8 of the Competition Act in dealing with the problem of ELAs. This discussion takes place against the backdrop of the Commission's GRMI. The final section provides conclusions and recommendations.

II BACKGROUND TO THE SA GROCERY RETAIL SECTOR

(a) Apartheid and economic exclusion in the grocery retail sector

A few large monopolistic companies dominate the South African economy, resulting in low levels of competition.[26] This section provides an overview of the events that contributed to excessive economic concentration in the South African grocery retail sector. As noted by the World Bank, 'all countries are products of their history'.[27] The defining feature in South Africa's history is race-based social and economic exclusion. Colonialism, racism, apartheid and

[26] Carina Smit 'The Rationale for Competition Policy :A South African Perspective' *Biennial Economic Society of South Africa Conference, 7-9 September 2005* (2005) 1–32.
[27] Worldbank An incomplete transition: Overcoming the legacy of exclusion in South Africa, 2018 available at: http://documents.worldbank.org/curated/en/815401525706928690/pdf/WBG-South-Africa-Systematic-Country-Diagnostic-FINAL-for-board-SECPO-Edit-05032018.pdf. Accessed 30 November 2022.

segregation resulted in a distorted distribution of income and welfare in South Africa.[28] This economic system was characterised by excessive economic concentration and was supported by apartheid policies that distorted 'patterns of ownership and economic exclusion'.[29] For an extended period, the white minority leveraged their privileged position in politics and the economy to advance their own interests, leading to economic exploitation and systemic oppression of black individuals.[30]

The design of apartheid laws and racial discrimination policies ensured white-owned firms received subsidy preference and support programmes from the government while excluding black entrepreneurs from the formal economy.[31] Apartheid's segregation laws located black people in areas where they had access to very few economically viable opportunities.[32] Thus, these laws created barriers for black-owned firms and denied them the opportunity to participate equally in the formal economy with white firms. This inequality was preserved and perpetuated by enforced segregation.

(b) Post-apartheid SA and the domination of the 'big five'

Post-apartheid South Africa has more than 60 million people of different social and economic backgrounds. This diverse population is catered for by a similarly diverse grocery retail sector which comprises formal retail chain supermarkets, hybrid stores, small independent retailers and thousands of informal spaza shops.[33] Hybrid stores such as Makro act as both wholesalers and supermarkets.[34] The formal retail sector is dominated by five main national retail chains, namely, Pick n Pay (founded in 1967), Shoprite-Checkers (founded in 1979), SPAR, Woolworths and Massmart (51% owned by American corporate giant Walmart).[35] Before the fall of apartheid, most of these formal retailers were located and predominantly served major cities and upper-income white neighbourhoods.[36] On the other hand, black communities were largely served by smaller white or Indian-owned shops and black South African-owned spazas.

---

[28] African National Congress (ANC) 'The Reconstruction and Development Programme (RDP)', *A Policy Framework*, 1994.
[29] Economic Policy Division National Treasury Economic transformation, inclusive growth, and competitiveness: A contribution towards a growth agenda for the South African economy, 2019.
[30] African National Congress (ANC), supra n 28.
[31] Michael Wise 'Competition Law and Policy in South Africa' (2004) 5 *OECD Journal: Competition Law and Policy* 7–69.
[32] African National Congress (ANC), supra n 28.
[33] Maryla Masojada 'The South African retail landscape' *Marketing to South African Consumers* (2019) 87–110 available at: https://www.researchgate.net/publication/345626975.
[34] Ibid.
[35] Competition Commission South Africa, supra n 1.
[36] Masojada, supra n 33.

The fall of apartheid in 1994 and the lifting of trading restrictions between 1994 and 2008 saw formal retailers such as Shoprite and Pick n Pay also move into the townships.[37] This trend, coupled with the boom in the shopping centre and mall development, saw these formal retailers consolidate their hold on the grocery retail sector in South Africa. Whilst some of these supermarket chains have standalone stores, most are inside shopping centres and malls. [38] The movement of formal retailers into the townships negatively impacted the smaller independent retailers and informal retailers, such as spaza shops, who had limited capacity to compete with these established retail chains.[39]

The development of shopping malls also came with another development which is considered detrimental to the competitive abilities of small independent retailers. As mentioned above, most shopping mall developers enter into ELAs with large formal retailers. For mall developers, such agreements help secure a long-term income from leasing retail space and attract increased footfall.[40] However, as argued in this paper, ELAs have the net effect of hindering competition in the grocery retail sector. For this reason, the Government of South Africa enacted the Competition Act.

III THE PURPOSE OF THE COMPETITION ACT

(a) Legislative and policy background to the Competition Act

Several legislative developments preceded the enactment of the current Competition Act. South Africa's first competition policy, the Regulation of Monopolistic Conditions Act 25 of 1955, was repealed by the Maintenance and Promotion of Competition Act 96 of 1979.[41] However, both statutes did not provide for the prohibition of any anti-competitive practices or seek to address the excessive levels of economic concentration.[42] Thus, in 1992, the African National Congress (ANC) policy guidelines criticised the country's competition laws. The ANC sought to put in place a competition policy that would address 'the concentration of economic power in the few hands of a few conglomerates', as this would not be conducive to the attainment of

[37] Ibid.
[38] Ibid.
[39] Makhitha & Soke, supra n 4.
[40] AA Ligthelm 'The impact of shopping mall development on small township retailers' (2008) 11 *SAJEMS NS* 37–53.
[41] Deon Prins & Pieter Koornhof 'Assessing the nature of competition law enforcement in South Africa' (2014) 18 *Law, Democracy and Development* 136–63.
[42] David Lewis *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2013).

balanced economic development in the country.[43] The ANC proposed policies to break monopolies and end the white minority's stranglehold on the economy while promoting greater efficiency in the private sector.[44]

(b) The Competition Act

The Competition Act 89 of 1998 repealed the Maintenance and Promotion of Competition Act. The primary purpose of the Competition Act is to promote and maintain competition in South Africa.[45] This primary purpose is driven by six policy goals: efficiency and public interest. The public interest goals are: to provide fair and equal chances for (small, medium and micro-enterprises) SMMEs to participate in the economy. An additional goal is to increase the ownership share of historically disadvantaged persons to encourage broader ownership.[46] These goals align with the right to equality enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution). [47]

Section 9(2) of the Constitution authorises the State to enact legislation and other measures to achieve equality for historically disadvantaged persons. The Competition Act is such a measure. Two public interest goals in the Competition Act are (i) to provide opportunities for SMMEs to participate in the economy and (ii) to increase ownership stakes of historically disadvantaged persons.[48] These goals address the injustice caused and perpetuated by apartheid and other discriminatory practices that excluded black-owned firms from participating in the formal economy.[49] Furthermore, the goal to promote a wider spread of ownership to historically disadvantaged persons addresses the issue of the unequal distribution of wealth in South Africa.[50] Mogoeng CJ echoed this in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35, where he noted that,

> It is this indisputable reality and our shared commitment to ensuring that South Africa really does get to belong to all who live in it, that the constitutional imperatives, laid

[43] African National Congress ‘Ready to Govern: ANC Policy Guidelines for a Democratic South Africa’, 1992, available at: https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/ [last accessed 26 November 2022].
[44] Ibid.
[45] Preamble of the Competition Act as amended.
[46] The Competition Act as amended, s2.
[47] Section 9 of the Constitution.
[48] The Competition Act as amended, s2.
[49] Prins & Koornhof, supra n 41.
[50] Ibid.

out in the Preamble, to improve the quality of life of all citizens and free the potential of each are realised, that the likes of the Competition Act had to and got to see the light of day.[51]

Therefore, it is submitted in this paper that the equality mentioned in the Preamble of the Competition Act should be interpreted as equality of opportunity and inclusiveness of economic participation for all South Africans.

(c) Exclusive lease agreements impede the objectives of the Competition Act

The grocery retail sector allows emerging black firms and small, medium and micro-enterprises (SMMEs) to participate in the South African economy.[52] The Competition Commission also identified the grocery retail sector as one of the sectors which provided the greatest potential for expanding the participation of SMMEs in the South African economy. [53] Economists consider a robust and thriving SMME sector crucial for fostering economic dynamism, facilitating growth, and generating job opportunities in the economy.[54] SMMEs must be able to participate effectively in the economy and not just be temporary alternatives to employment.[55] The consumer benefits include competitive prices, greater product variety, and innovation. Thus, when competition in the grocery retail sector is impeded, the consumers are harmed due to the limited choice of products and alternative retail suppliers.[56]

Several factors impede the pursuit and achievement of the goals of competition laws in South Africa.[57] Amongst these is the widespread use of long-term ELAs by NSCs.[58] In this regard, the Competition Commission noted in the GRMI that 'long-term ELAs have created an environment in which there are limited opportunities for small and independent grocery retailers to enter the formal grocery retail sector'. [59] This impact of ELAs was particularly clear in shopping malls where the bulk of the formal grocery retailing business occurs. The

[51] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35.
[52] Economic Policy Division National Treasury, supra n 29.
[53] Competition Commission South Africa, supra n 1 at 22.
[54] Kim Kampel *Competition law and SMMEs: Exploring the competitor/ competition debate in a developing democracy*, 2004, at 109.
[55] Competition Commission South Africa, supra n 1 at 47.
[56] Ibid at 23.
[57] Worldbank, supra n 27.
[58] Competition Commission South Africa, supra n 1 at 22.
[59] Ibid at 23.

Competition Commission found that 'SMMEs face great challenges to enter higher value segments within the grocery retail sector, such as tenancy in a formal shopping mall'.[60]

Therefore, the potential role of SMMEs in the South African economy is impeded by, amongst other factors, the use of long-term ELAs by the NSCs.[61] ELAs created barriers for emerging grocery retailers to penetrate the formal grocery retail sector and impeded existing independent grocery retailers from participating fully and freely in shopping malls.[62] Thus, it is argued that the use of ELAs in shopping malls in the grocery retail sector impedes the realisation of the purpose of the Competition Act. The Preamble of the Competition Act recognises restrictions on free and full participation in the economy by all South Africans as unjust.[63] Removing or restricting the use of ELAs may, therefore, further the purpose of the Competition Act.[64]

IV NATURE AND ANALYSIS OF AN EXCLUSIVE LEASE AGREEMENT

(a) The nature of exclusive lease agreements

This section discusses the nature of ELAs and the role that financiers play in encouraging their use. Even though there is no specific definition for the term 'exclusive lease agreement' in the literature, ELAs are contracts of lease that contain one or more exclusive clauses. The purpose of such exclusive clauses would be to impose some limits on how a lessor can utilise some of their leasable space.[65] Such clauses' general terms and specific purposes differ from agreement to agreement. An example of a typical exclusivity clause of an ELA signed between one of the 'big five' formal retailers, Pick n Pay (Pty) Limited, and a mall developer is shown below.

> 'EXCLUSIVITIES AND LETTING RESTRICTIONS
>
> 10.1 Save for the Supermarket and Checkers, the lessor shall not permit the following businesses to be conducted in the shopping centre or on the property:
>
> 10.1.1 a hypermarket or supermarket; or
>
> 10.1.2 a store with either a single or several food departments, the aggregate square meterage of which exceeds 100 (one hundred) square metres; or
>
> 10.1.3 a cafe or delicatessen which sells fresh fish or meat; or

[60] Ibid at 46-47.
[61] Ibid.
[62] Ibid.
[63] Preamble of the Competition Act as amended.
[64] Competition Commission South Africa, supra n 1.
[65] Emanuel B Halper 'Supermarket Use and Exclusive Clauses' (2001) 30 *Hofstra Law Review* 297.

10.1.4 a grocery, fresh fish shop, butchery, bakery or fruit and vegetable shop.'[66]

The practice of including an exclusive clause in a lease agreement is prevalent between shopping mall developers and anchor tenants.[67] Exclusive clauses protect anchor tenants in a shopping mall against direct competition from their rivals[68] by governing the conduct of the mall developer pertaining to which competitor of the anchor tenants they are allowed to accommodate in a shopping mall. Exclusive clauses confer the anchor tenants full control and power to dictate to the mall developer the type of rivals that should be allowed or barred from operating in a shopping mall. An exclusive lease agreement can either be stringent or loose.

The consequence of stringent exclusive clauses is the exclusion of many potential tenants from the shopping mall. Under such a clause, the mall developer cannot lease the store space to rival competitors of an anchor tenant.[69] Pollack explains that a 'covenant may take a form of a sweeping against the 'same or similar' land of business or a business designated in a broad category'.[70] An example of a stringent exclusive clause would prohibit businesses such as supermarkets, bakeries, butcheries, delicatessens, pharmacies and liquor stores from operating in the same shopping mall as the anchor tenant.[71] On the other hand, a loose exclusive clause, also called a less sweeping covenant, limits the number of competitors or the size of the space that can be leased to them. A less sweeping covenant may also prohibit specific items of merchandise.[72]

(b) How ELAs are encouraged

Mall developers, financiers and anchor tenants are regarded as key participants in the development of a shopping mall.[73] The practice of including ELAs stems primarily from a landlord's need to secure the necessary funds to finance the construction of a shopping mall.[74] From the perspective of mall developers and financiers, anchor tenants provide a guaranteed

---

[66] *Pick ń Pay Retailers (Pty) Limited v Masstores (Pty) Limited and another* [2014] JOL 32403 (GP).
[67] *Spar Group Limited v Vresthena (Pty) Limited* (23149/2020) [2022] ZAGPPHC 854.
[68] Halper, supra n 65.
[69] Ibid.
[70] Benjamin Pollack at 389 cited in Blumenthal, supra n 25.
[71] Halper, supra n 65.
[72] Ibid.
[73] Competition Commission South Africa, supra n 1 at 127.
[74] Ahmore Burger-Smidt & Kriska-Leila Goolbjitth 'More Rumblings in the Retail Sector: Retail Sector to Be Rigorously Investigated with Renewed Vigour', *Legal Brief*, June 2015, available at: http://www.gov.za/speeches/minister-patel's-budget-vote-announces-r23bn-funding-black- [last accessed 28 January 2023].

income for a shopping mall,[75] which is necessary to secure finances from banks and other lenders.[76] Pollack argues that when developing and leasing out shopping mall space, the developer must secure and satisfy both financiers who provide the funds and anchor tenants who guarantee the cash flow required to pay the financiers. [77]

In one of their submissions to the GRMI, the South African Owners Association (SAPOA) indicated that

> financiers [require] property developers to secure an agreed minimum pre-let percentage before funds are disbursed under the loan agreement. Financiers seek comfort in a sustainable and secure rental income stream from reputable anchor tenants to constitute a substantial percentage of such pre-let. Financiers further require mall developers to secure at least 60-70% tenants, of which one must be an anchor tenant, preferably a national supermarket in a shopping mall's GLA, before a shopping mall construction commences. [78]

In response, financiers argued that, even though they prefer that developers secure anchor tenants, they do not prescribe to mall developers who these should be.[79] However, they preferred NSCs because they generate more traffic from shoppers and attract other line tenants. Therefore, having a national supermarket chain as an anchor tenant guarantees a developer a consistent and sustainable rental cash flow. In practice, financiers offer a 10-year loan to mall developers and assert that they do not require the conclusion of ELAs to disburse a loan to shopping mall developers.[80] However, to be able to put up security for the loan, mall developers are ‘forced’ to conclude long-term (usually 10-20 years) ELAs with NSCs.[81] This research report submits that, despite their denial, financiers effectively dictate to mall developers that they should secure anchor tenants, which in turn 'forces' mall developers to try and use ELAs to secure these long-term lease agreements. In some cases, financiers also dictate the location

---

[75] Competition Commission South Africa, supra n 1 at 127.
[76] Shingie Chisoro-Dube & Reena das Nair ‘Confronting entry barriers in South Africa’s grocery retail sector’ in Thando Vilakazi, Sumayya Goga & Simon Roberts (eds) *Opening the South African Economy: Barriers to Entry and Competition* (2020) available at: https://www.researchgate.net/publication/354294490. Accessed 23 February 2022.
[77] Benjamin Pollack at 379.
[78] Competition Commission South Africa, supra n 1 at 127.
[79] Ibid at 127.
[80] Ibid at 128.
[81] Ibid at 128.

of all tenants within a shopping mall to ensure that there are shops that create foot traffic throughout the entire shopping mall to avoid dead spots.[82]

National supermarket chains defended long-term ELAs, arguing that they must protect their investments in shopping malls and recoup the costs of opening and refurbishing the stores.[83] In addition, they also argued that their ability to attract foot traffic and other tenants to a shopping mall contributed to the success of shopping malls and that without them, these malls would likely fail.[84] Due to the combined pressure of making a shopping mall successful and meeting their financial obligations, mall developers often accede to the supermarkets' demands to conclude long-term ELAs. This paper submits that this practice is indicative of the NSCs' market power.[85]

(c) Problems with ELAs

1. Economic concentration, dominance and market power

While a market can be comprised of numerous small firms, it is possible for a handful of large firms to wield significant market power and dominate the industry.[86] When a few large firms dominate large sectors of the economy, that economy is deemed highly concentrated.[87] For instance, South Africa's grocery retail market is highly concentrated, wherein five NSCs hold approximately 90% of the market share nationally.[88] Market dominance is closely related to another concept called 'market power'. Section 1 of the Competition Act defines market power as 'the power of a firm to control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers or suppliers'.[89] In a perfect market, firms do not have sufficient market power to exclude competition.

However, in practice, large dominant firms have market power, which they use to their advantage to exclude and limit the participation of other players, particularly SMMEs, in the

---

[82] Ibid at 127.
[83] Ibid at 132.
[84] Ibid at 129.
[85] S Chisoro-Dube & R das Nair 'Confronting barriers in South Africa's Grocery retail sector chapter 4 in Opening the Economy at 64.
[86] Kim Kampel 'The role of South African competition law in supporting SMMEs' in Paul Cook, Raul Fabella & Cassey Lee (eds) *Competitive Advantage and Competition Policy in Developing Countries* (2007) available at: https://www.elgaronline.com/display/9781845426279.xml at 237, accessed 3 december 2022.
[87] Ibid at 241.
[88] Chisoro-Dube & das Nair, supra n 76.
[89] The Competition Act as amended 89 of 1998.

market.[90] Exclusionary acts need not be openly displayed but may even be done in a deceitful manner.[91] An example of an exclusionary act would be a prevalent strategic practice involving the conclusion of stringent ELAs between mall developers and NSCs restricting entry of independent retailers or specialty stores to participate in a shopping mall.

2. Barriers to entry

Consequently, these dominant firms are protected by high entry barriers and acquire so much market power that they could potentially exclude other participants, particularly smaller competitors, from participating in the same sector.[92] In South Africa, there has been an identifiable trend amongst large and dominating firms to retain their dominant market position.[93] Creating barriers to entry affords large firms with market power akin to a monopoly and is evidently in contravention of provisions prohibiting abuse of dominance.[94] Although various reasons are contributing to the failures of SMMEs, it is worth noting that highly concentrated markets impose significant restrictions upon SMMEs in terms of entrance into such markets, access to primary inputs and successful participation thereafter.[95]

3. Market foreclosure

Market foreclosure refers to a dominant firm's conduct that denies a competitor proper access to an essential good that the dominant firm produces or access to a market. [96] A foreclosure can occur when an essential input, such as infrastructure, used by a downstream industry, with the potential for competition, is controlled by a bottleneck. Companies with competitive segments that cannot access the input are referred to as being "squeezed" or experiencing secondary harm.[97] Examples of inputs deemed essential by antitrust authorities include a stadium, a railroad, a bridge, a station and a harbour.[98]

---

[90] Kampel, supra n 88 at 241.
[91] Ibid.
[92] Ibid.
[93] Kampel, supra n 54.
[94] Ibid.
[95] F Olawale & D Garwe 'Obstacles to the growth of new SMMEs in South Africa: A principal component analysis approach' (2010) 4 *African Journal of Business Management* 729–38.
[96] Patrick Rey & Jean Tirole 'Chapter 33 A Primer on Foreclosure' *Handbook of Industrial Organization* (2007) vol 32145–220.
[97] Herbert J Hovenkamp 'Unilateral refusals to deal, vertical integration and the essesntial facility doctrine' (2008) 08–31 *University of Iowa Legal Studies Research Paper*.
[98] Christopher M Seelen 'The essential facilities doctrine: What does it mean to be essential?' (1997) 80 *Marquette Law Review* 1117–1113.

'Firms may adopt certain types of exclusionary actions that have the effect of foreclosing certain upstream or downstream'.[99] In so doing, they aim to impede the expected development of more competitive results and bolster and maintain the firm's own market power. 'Foreclosure may represent a successful strategy to inhibit rivals and maintain market power'.[100] This research report submits that this practice unfairly excludes competitors and can potentially drive rivals out of the market, prevent them from expanding or prevent new entrants from entering the markets and exploiting consumers. For instance, existing SMMEs in shopping centres may exit as they cannot sell more or are not large enough to compete successfully.[101]

There is no direct foreclosure jurisprudence in the South African grocery retail sector. However, the Competition Tribunal dealt with the issue in the aviation industry in the case of *The Competition Commission v South African Airways (Pty) Ltd* (Case Number: 18/CR/Mar01) (hereinafter the *SAA* case). In this matter, South African Airways had implemented an incentives system that rewarded ticket sales agents lucratively above and beyond the ordinary commissions paid by other players in the aviation industry. The Competition Commission argued that this system incentivised ticket sales agents to sell SAA tickets at the expense of its rivals. As noted by the Competition Tribunal,

> The increased business that the scheme brings to SAA does not come so much out of new business, but rather at the expense of SAA's rivals who, because their compensation schemes are less lucrative, since they sell less tickets, will never be in a position to reward the agent in the way the SAA scheme does. Thus the agent earns more by selling its next ticket on an SAA flight than on a Nationwide flight.[102]

The Competition Tribunal thus concluded that the incentive scheme implemented by SAA amounted to a 'mechanism for inducing loyalty to the dominant carrier to the exclusion of its rivals.'[103] The Competition Tribunal also concluded that such conduct constituted 'prohibited conduct' under the Competition Act's abuse of dominance provisions.

[99] William S Comanor & Patrick Rey *Vertical Mergers and Market Foreclosure* JAI Press (2004) 445–58.
[100] Ibid.
[101] Hovenkamp, supra n 97.
[102] *The Competition Commission v South African Airways (Pty) Ltd* (Case number: 18/CR/Mar01) para 26.
[103] Ibid, para 256.

V APPLICATION OF THE ABUSE OF DOMINANCE PROVISIONS

(a) Overview of the abuse of dominance test

This section provides an overview of the abuse of dominance provisions of the Competition Act and their application to ELAs. The Competition Act does not prohibit firms from being dominant. However, dominant firms are not allowed to abuse their dominance. The first leg of investigating alleged abuse of dominance is, thus, determining whether the firm is indeed dominant.[104] According to section 7, a firm is dominant if (a) it has a 45% market share or (b) its market share is between 35-45% unless it can show that it does not have market power or its market share is less than 35% but enjoys market power.[105] Market power is defined as 'the power of a firm to control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers'.[106] For instance, Goodman et al. state that 'where a firm is able to unilaterally raise its prices without losing market share to its competitors, it will be regarded as having market power.'[107] Once shown to be dominant, a firm becomes subject to the prohibitions in sections 8 and 9 of the Competition Act.[108]

(b) How to determine contravention of section 8 of the Competition Act

When investigating whether certain conduct by a firm contravenes section 8 of the Competition Act, it is necessary to determine the following:

- whether the conduct as performed by a firm;[109]
- what the relevant market is;[110];
- the market definition;
- what the firm's market share; [111] and
- establish market power by invoking market shares as a crude proxy.[112]

Each one of these elements will be briefly discussed below.

---

[104] Section 7 of the Competition Act as amended. See also the SAA case at para 113-116.
[105] Competition Act as amended *s* 7.
[106] Competition Act as amended *s* 1.
[107] Isabel Goodman et al *Principles of Competition Law in South Africa* (2017).
[108] Ibid.
[109] Competition Act as amended, s7.
[110] Goodman et al, supra n 110, at 39.
[111] Ibid.
[112] Ibid

1. A firm

According to section 1 of the Competition Act, a 'firm' 'includes a person, partnership or a trust'.[113]

2. Identification of the relevant market

The process of identifying the relevant market involves two steps. The first step is defining a market based on the type and functions of the market in which the alleged dominant firm operates.[114] The second step considers two crucial dimensions: a product dimension and a geographic dimension. A product dimension involves products that compete sufficiently with one another that consumers will regard as substitutes for one another.[115] A geographic dimension concerns products that can compete sufficiently close with one another based on their geographical availability.[116] The relevant market enquiry requires the complainant and the alleged dominant firm to be active in the same market where their products compete sufficiently and are regarded by consumers as substitutable. The relevant market also includes locations where consumers can be reasonably expected to travel to find a suitable substitute product.

3. Market definition

Whilst the Competition Act does not define a market, Goodman et al. state that the starting point to defining a market is to define goods and services.[117] Section 1 of the Competition Act provides that goods and services may refer to particular goods and services. It also includes any other goods or services that can reasonably be substituted for them.[118] The concept of market definition, thus, concerns the degree of substitutability between products or services.[119] According to Kemp and Sutherland, substitutability refers to:

> 'the systemic way firms can maintain the price at which the product under investigation is sold. This will include all firms that supply a product sufficiently substitutable to constrain the pricing of the product under investigation ('the product market') that is

[113] Competition Act as amended.
[114] Goodman et al, supra n 107.
[115] Ibid.
[116] Ibid.
[117] Ibid at 51.
[118] Competition Act as amended.
[119] Goodman et al, supra n 110 at 51.

located in a region close enough to constrain the pricing of the product under investigation ('the geographic market')'.[120]

When consumers consider different goods or services interchangeable, these products are considered part of the same market. If two products are seen as substitutes, they will limit each other's sales. As a result, the producers of those products will have to be careful not to raise their prices too much since consumers may switch to the substitute product.[121] The European Commission's notice on market definition later confirmed that the focus of the market definition process concerns substitutability and interchangeability.[122]

4. *The hypothetical monopolist test*

The commonly used analytical framework to delineate markets is the "SNNP" test, which stands for a small but significant non-transitory increase in price.[123]. This test involves identifying the smallest possible set of goods or services within which a hypothetical monopolist could increase prices by a small but significant amount, usually ranging between 5% and 10%, while still being profitable and enduring. This set of goods or services is deemed the relevant market. [124]

The European Commission's market definition notice provides an example of the practical application of the SNNP test. This method involves assessing a merger between two soft drink bottlers, Firm A and Firm B, to determine whether their different soft drink flavours are in the same market and therefore compete with each other. To determine this, the SNNP test is applied by analysing whether consumers of Firm A's product would switch to Firm B's product if Firm A's price were to increase by a permanent 5% to 10%. If enough consumers were to switch to Firm B's product, such that Firm A's increase was not profitable, then the relevant market would include at least the products of both Firm A and Firm B. This analysis would need to be extended to other soft drink producers, such as Firm C and Firm D, until a

[120] In the competition law of South Africa at 7-19 [Issue 16]. Reprinted by permission of Lexis Nexis.
[121] Goodman et al, supra n 110 at 52.
[122] European Commission 'Notice on the Definition of the Relevant Market for Purposes of Community Competition Law; (97/c 372/03) Official Journal (372 09/12/1997 pp 0005-0013): [Online]. Available: http://www.eur_lex.europa.eu. Accessed 30 November 2022.
[123] Goodman et al., supra n 110 at 52.
[124] European Commission, supra n 128.

set of products is defined where a price increase would not lead to significant demand substitution. This set of products would then constitute the relevant market.[125]

Goodman et al. warn that the SNNP test should be applied cautiously to avoid incorrect conclusions. In an abuse of dominance case, the investigation focuses on whether the accused dominant firm has misused its market power. Therefore, competition authorities are concerned with identifying the cause of price increases. In such cases, defining the relevant market must start from the basis of normal competition. The SNNP test should use the competitive price as the starting point rather than artificially high prices that may have already been observed.[126]

5. Market power

Market power 'means the power of a firm to control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers and suppliers'.[127] Arguably, it acts independently where a firm can control prices or exclude rivals. This is because it could not control prices or exclude rivals if it faced competitive constraints on its behaviour.[128] The UK Competition Markets Authority (formerly the Office of Fair Trading) clarifies that market power is not solely about achieving profitable price increases.[129] In this regard, it states that market power can be defined as the capacity to profitably maintain prices above competitive levels or limit output or quality below competitive levels. An organisation possessing market power may also have the ability and motivation to impede the competitive process in other ways, such as by weakening the existing competition.[130]

(c) Section 8 abuse of dominance provisions

This research report is limited to two abuse acts prohibited by section 8 of the Competition Act: to 'refuse to give a competitor access to an essential facility when it is economically feasible to do so'[131] and 'engaging in an exclusionary act'.[132] This section attempts to show that

---

[125] Goodman et al, supra n 110 at 51-52.
[126] Ibid.
[127] Section 1 Competition Act as amended 89 of 1998 (as amended).
[128] Goodman et al, supra n 110 at 58.
[129] Office of Fair Trading Assessment of market power: Understanding competition law, 2004 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf.
[130] Goodman et al, supra n 107.
[131] Ignatius Lebogang Nkuna *Essential Facilities and Abuse of Dominance in South African Competition Law* (University of Pretoria, 2013).
[132] Ibid.

ELAs are a violation of sections 8(1)(b) and 8(1)(c), and, therefore, competition authorities can prosecute them under either one of these provisions.

1. Distinction between section 8(1)(b) and 8(1)(c)

Section 8 of the Competition Act contains two types of prohibitions: 'per se' and 'rule of reason'. ''Per se' prohibitions do not allow respondents the right to defend their alleged acts on technological, efficiency or pro-competitive grounds.'[133] Section 8(1)(b) of the Competition Act is considered a 'per se' prohibition. A 'per se' provision does not permit a dominant firm to deduce evidence to justify the prohibited conduct. The abovementioned provision places the onus on the complainant to prove that the alleged act resembles a violation of the same provision. Once that onus has been discharged, the respondent is barred from adducing evidence to justify its actions.

Section 8(1)(c) is considered a 'rule of reason'. A 'rule of reason' permits a dominant firm to escape liability for a prohibited act if it can show that the net effect of the conduct on competition in the relevant market is positive.[134] This means that the dominant firm can justify its conduct by adducing evidence showing that technological, efficiency and other pro-competitive gain outweigh the anti-competitive effect resulting from its conduct.

2. Refusing access to an essential facility

According to section 8(1)(b) of the Competition Act, 'it is prohibited for a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so'.[135] Section 2 of the Competition Act defines 'essential facility' as 'an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods and services to their consumers'.[136]

The essential facility doctrine is concerned with vertical integration. The essential facility doctrine concerns the existence of two markets: an upstream market and a downstream market.[137] An upstream market is a market in which the vertically integrated dominant firm

---

[133] Ibid.
[134] Ibid.
[135] Competition Act as amended 89 of 1998 (as amended).
[136] Competition Act as amended.
[137] Philip Sutherland & Katharine Kemp *Competition Law of South Africa* (2010) at 170.

owns or controls the essential facility. A downstream is a market where the competitor seeking access is competing.[138]

Hovenkamp explains the concept of vertically integrated markets, where a dominant firm in market #1 has a duty to share inputs with firms operating in market #2, which is upstream or downstream of market #1. If the facility in market #1 is deemed "essential", then refusal to share it creates a monopoly in market #2. Examples include a municipal sports stadium as an essential facility for running a basketball franchise or a hospital as an essential facility for surgical practice.[139]

According to Hovenkamp, in the context of vertically integrated firms, there is a concern that competition may be stifled if these firms decline to engage in transactions with firms seeking to participate in either the upstream or downstream market independently.[140] The author also cautions that not every owner of an "essential" vertically integrated input is necessarily subject to these concerns. For instance, a pipeline owner who only operates the pipeline but does not sell any gas would not fit into this scenario. If the pipeline owner refuses to engage in transactions with a firm for non-economic reasons, such as personal *animus*, the matter would fall under tort law rather than antitrust law[141]. On the other hand, if the pipeline owner's refusal is based on exclusive contracts with existing customers, the matter may be considered antitrust. However, it would then fall within the purview of vertical integration.[142] This example can be likened to the use of ELAs between shopping mall owners and NSCs, as evidenced in the exclusive clause extracted from *the Pick 'n Pay* case, as analysed in Section III of this research report. The conclusion of a lease agreement containing such exclusive clauses, which denies access to an essential facility, may be considered a violation of Section 8(1)(b) of the Competition Act.

3. *When can the doctrine of the essential facility be invoked?*

According to Ratner, the doctrine has taken various forms but applies when a firm or group of firms controls access to something 'essential' for competition in part of a particular market.[143]

---

[138] Ibid.
[139] Hovenkamp, supra n 97.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] James R Ratner 'Should there be an essential facility doctrine?' (1988) 21 *University of Califonia Davis Law Review* 327–82.

The essential facility concept has been invoked by international courts in various industries, including the following others: railroads, fruit and vegetable wholesaling, telecommunications and professional sport.[144] These courts have addressed the theory differently, with differing tests analysis and results.

In South Africa, there is no case that deals directly with the doctrine providing an appropriate essential facility analysis. In *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers*[145] (*Glaxo Wellcome*), the court provided a test to prove liability under the essential facility doctrine. The test is as follows:

1. The dominant firm concerned refuses to give the complainant access to an infrastructure or a resource;
2. The complainant and the dominant firm are competitors;
3. The infrastructure or resource concerned cannot reasonably be duplicated;
4. The complainant cannot reasonably provide goods or services to its competitors without access to the infrastructure or resources; and
5. It is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resources.[146]

According to *Glaxo Wellcome*, a facility is deemed essential if it satisfies the five elements contained in the test. However, the test does not describe the process for determining which facilities should be subject to the test. It merely establishes a threshold for liability.

According to Nunkoo, the practical application and analysis of the essential facilities doctrine include the following steps:

- Define the downstream market in order to establish whether the dominant firm and the firm seeking access are real competitors.

- Define the upstream market, thus the market in which the essential facility lies. This market must be reasonably defined considering supply and demand side substitutes.
- The firm operating in both markets must dominate the upstream market in which the competitor seeks access.
- There must be barriers to entry in this upstream market. If there are barriers to entry, competition can be enhanced by facilitating entry and innovation.

---

[144] See cases cited in *Glaxo Wellcome (PTY) Limited and Others v National Association of Pharmaceutical Wholesalers and Others Case No: 15/CAC/Feb02.*
[145] Ibid.
[146] Ibid para 57.

- Ownership or control over a 'facility': The 'monopolist' or dominant firm must have control over the facility.
- Essentiality of a facility: Access to the facility must be essential for the competitor to conduct business. [147]

A shopping mall can be argued to be an 'essential facility' by virtue of the concept definition provided in section 1 of the Competition Act. Infrastructure is defined as 'the basic and organisational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise'.[148] Therefore, control of such an essential facility will be determined by analysing an exclusive clause extracted from the *Pick ń Pay* case. This research report submits that ELAs grant NSCs control and power to refuse to grant access to independent retailers and specialty stores in shopping malls. They impede the realisation of sections 2 (e) and (f) of the Competition Act by preventing the entry of new entrants into the shopping mall.

(d) Practical application of section 8(1)(b) to ELAs

An example of an exclusive clause of an ELA concluded between a shopping mall developer/ owner, and an anchor tenant was provided in section (IV(a)) above. This ELA curtails the property rights of a shopping mall developer by limiting their control over the leasing of shop space in the mall. This ELA effectively grants anchor tenants full control over the shopping mall. The exclusionary provisions of the ELA prevent small independent businesses such as butcheries, bakeries, fruit and veg shops, and fresh fish shops from operating a store in the shopping mall. Therefore, anchor tenants use ELAs as strategic barriers to entry into the grocery retail sector, particularly in shopping malls. As Chisoro-Dube and das Nair state, since the entry of Fruit and Veg City (FVC) into the South African grocery retail sector in 1993, a limited number of other entrants have made it.[149]

The purpose of the dominance provision is to promote consumer welfare by providing an environment where SMMEs have an equitable opportunity to participate in the economy. Therefore section 8(1)(b) seeks to curtail dominant firms from maintaining and abusing their market power. Section 8(1)(c) of the Competition Act prohibits a dominant firm from engaging in an exclusionary act other than an act listed in paragraph (d) if the anti-competitive effect of

[147] Nunkoo "Policy and Research: Chapter 4 Essential Facilities Doctrine" *Competition News* Edition 9 at 22.
[148] Oxford online dictionary.
[149] Chisoro-Dube & das Nair, supra n 76, at 58.

that act outweighs its technological, efficiency or other pro-competitive gains.[150] An exclusionary act is 'an act that impedes or prevents a firm from entering and participating in or expanding within a market'.[151] Section 8(1)(c) is a catch-all prohibition, and it is designed to catch 'exclusionary acts' that do not fall within the ambit of the prohibitions contained in sections 8(a)(i) to (v).[152]

1. Burden of proof

Section 8(1)(c) of the Competition Act places the onus on the complainant to prove that a dominant firm has engaged in an 'exclusionary act' and that the conduct in question produces anti-competitive effects.[153] 'The complainant will be successful if the dominant firm fails to lead acceptable evidence of technological, efficiency or other pro-competitive gains.

The following steps can determine whether the act falls within the ambit of section 8(1)(c) of the Competition Act.

(1) Determine whether the act falls within the definition of an exclusionary act; and
(2) whether the act has anti-competitive effects.

In the *SAA* case, the Competition Tribunal held that an anti-competitive effect is present if the following is present:

- evidence of actual harm to consumer welfare; or
- if the exclusionary act is substantial in terms of its effect in foreclosing the market to rivals.

The Tribunal also held in *York Timbers v SA Forestry* that the element of anti-competitive effect required the complainant to demonstrate the respondent's 'market power has been created or extended in consequence of the alleged act'.[154] On appeal, the Competition Appeal Court reinforced the Tribunal's approach to anti-competitive effect, holding that the appellant had failed to show the necessary anti-competitive consequence since 'the act complained of has not

[150] Competition Act as amended.
[151] Competition Act as amended, *s* 1.
[152] Goodman et al, supra n 107.
[153] *Competition Commission v South African Airways (Pty) (Ltd)*, para 107-111 & 137; *York Timbers v SA Forestry* para 6.5 & 6.11.
[154] *York Timbers v SA Forestry* (Case Number: 15/IR/Feb01).

been shown to extend the market power of the responded in the capacity of competition with the appellant".[155]

2. Foreclosure and causation

According to the second limb of the *SAA* Test, even without direct evidence of consumer harm, the anti-competitive effect may be proved if the exclusionary act is substantial in foreclosing the market of rivals. In other words, on the Tribunal's reasoning, it is possible to infer anti-competitive effects where foreclosure can be demonstrated. In *SAA,* the respondent airline structured its commission agreements with travel agents in a way that induced them to sell SAA tickets instead of those from competitors.[156] The tribunal concluded that this anti-competitive behaviour negatively impacted the market structure, preventing rivals from growing and reinforcing SAA's dominant position. The exclusionary act was found to be significant in terms of blocking competitors from the market.'[157]

(e) The GRMI

1. Complaints about ELAs and the GRMI

After receiving numerous complaints about the use of the ELAs in the grocery retail sector in South Africa, the Competition Commission opted to conduct a Grocery Retail Market Inquiry (GRMI) in terms of s43B(2) of the Competition Act. The dual purpose of the GRMI was '(i) to understand how the grocery retail sector operates because the Commission had reason to believe that there exist features, or a combination of features, in the sector that may prevent, distort or restrict competition; and (ii) to achieve the purpose of the Act.'[158] It must be noted that the Competition Commission also had the option in terms of the Competition Act to investigate and refer these complaints to the Competition Tribunal.

The GRMI found, among other things, that the use of ELAs was widely prevalent in the grocery market sector. Shoprite Checkers, Spar and Pick n Pay had leases containing exclusivity provisions. Woolworths' leases did not contain explicit exclusivity but had provisions impacting letting and usage. It also found that ELAs distorted competition because

---

[155] *York Timbers Ltd v SA Forestry Ltd* (09/CAC/May01) [2001] ZACAC 3; [2001-2002] CPLR 94 (CAC) (18 September 2001).
[156] *SAA.*
[157] *Ibid.*
[158] *Competition Commission South Africa*, supra n 1 at 24.

they have substantially hindered the emergence of challenger retail chains and prevented economic participation by small independent retailers, including specialist retailers. The GRMI concluded that there was no justification for using long-term ELAs within shopping centres. The references put forward by the NSCs were not found to be credible.

2. GRMI Recommendations

In light of its findings, the Competition Commission recommended that NSCs stop implementing exclusivity provisions or similar clauses in lease agreements against SMMEs, specialty stores, and other grocery retailers. They also suggested that no new leases or extensions include these clauses and that exclusivity against other grocery retailers is phased out. The Competition Commission sought to secure voluntary compliance from NSCs within six months and recommended that, should compliance be obtained, the government introduce relevant legislation. Although litigation remains an option, voluntary compliance is encouraged since it can benefit consumers immediately.[159]

3. Compliance with the recommendations of the GRMI

Shoprite Checkers was the first national supermarket chain to seek to comply with the recommendations by entering into a consent agreement with the Competition Commission in October 2020.[160] According to this agreement, Shoprite Checkers agreed to cease enforcing ELAs against smaller retailers, not include exclusivity provisions in new leases, and not enforce exclusivity provisions against supermarkets in new lease extensions. The agreement also applied to their franchisees, and they undertook to amend existing franchise agreements within 12 months of the agreement to reflect this.

In June 2021, the Competition Commission entered another consent agreement with Pick n Pay.[161] The terms of this agreement included Pick n Pay undertaking that it would cease enforcing ELAs against SMMEs, specialty and limited line stores and historically disadvantaged persons' supermarkets. They have also agreed not to include exclusivity provisions in new supermarket leases, except in renewals of existing leases. Exclusivity provisions will not be enforced against any supermarkets after December 31 2026. Pick n Pay

[159] Ibid at 264.
[160] *Competition Commission of South Africa and Shoprite Checkers (Pty) Ltd* Case number: CO026May20.
[161] *Competition Commission of South Africa and Pick n Pay Retailers (Pty) Ltd* Case number: CO144Oct 20.

has also agreed to propose a supplement to the franchise agreement incorporating the provisions of the consent agreement.

Both agreements contained similar conditions imposed by the Competition Commission. For example, the Competition Commission agreed not to finalise or refer any pending complaints against either Shoprite Checkers or Pick n Pay to the Competition Tribunal.[162] However, immediate criticism against these agreements is apparent. The different timelines allowed to Shoprite-Checkers (immediate effect) and Pick n Pay, who got until 2026 to comply, are a cause for concern. Secondly, it is not apparent whether the other NSCs would also voluntarily subject themselves to similar agreements and whether such agreements would differ significantly or be substantially similar.

VI CONCLUSION AND RECOMMENDATIONS

This research report introduced the use of ELAs in the grocery retail sector in South Africa and how this has been fingered as a significant barrier to the participation of smaller independent retailers, especially in shopping malls. The study also traced the historical developments which led to the current state of the sector, which is highly concentrated and dominated by only five NSCs. The development and purpose of South Africa’s competition laws, especially the provisions dealing with dominance and the abuse of dominance, were then canvassed. An in-depth analysis of the possibility of using the abuse of dominance provisions in the Competition Act to regulate the use of (ELAs) followed. This approach was contrasted with the approach adopted by the Competition Commission of conducting a market inquiry.

The study confirmed that ELAs are widely utilised in the grocery retail sector. Most developers are ‘forced’ into including exclusivity clauses in lease agreements with NSCs to secure finances to fund mall developments. This way, they can guarantee the malls' cash flow and attraction to shoppers. However, the downside of these arrangements is they come at the cost of preventing smaller independent retailers from entering and participating in shopping malls. In other words, ELAs prevent competition.

One critical argument in this report is that the Competition Commission failed to refer the complaints about the use of ELAs to the Competition Tribunal, opting instead to conduct a GRMI. This paper argues that this was a grave mistake on the part of the Competition

[162] Ibid.

Commission, as evidenced by the limited effect of its recommendations. For example, the Commission recommended that the government develop legislation to regulate the conduct of NSCs using ELAs. This recommendation was unnecessary as such conduct could be successfully prosecuted under s 8(c) of the Competition Act.

South African law has no significant jurisprudence regarding the abuse of dominance in the grocery retail sector. The Competition Commission, therefore, missed an opportunity to help develop this area of law. The GRMI Final Report shows that the five NSCs have significant market power in South Africa's grocery retail sector. This power is evident from their influence over mall developers and their ability to exclude SMMEs and specialty stores from operating in the malls they have anchor tenancy. The Competition Commission also found that financial institutions promote this behaviour through the conditions they set for lending money to mall developers. Overall, the dominance of NSCs and their influence on mall development is a significant issue in the grocery retail sector in South Africa.

The Competition Commission also disregarded the foreclosing effect test established in the *SAA* case. Had it considered this case, it might have found the merits to establish that these ELAs contravened section 8(1)(b) and (1)(c) of the Act and such conduct could be policed under these provisions. The Competition Commission’s approach disregarded the fact that the NSCs had committed the prohibited conduct. Instead, they opted to conclude agreements wherein the perpetrators would voluntarily cease their impugned conduct. As noted above, only Shoprite-Checkers and Pick and Pay have volunteered to stop enforcing the provisions of ELAs. Even then, the terms of their agreements may be disagreeable to some. For example, Pick n Pay’s agreement with the Competition Commission gives them until 2026 to start effecting it, whilst Shoprite-Checkers’ agreement was ‘with immediate effect’ for some of the provisions and up to 2024 for the rest of the agreement. The fact that the Competition Commission gave firms with exclusivity provisions an opportunity to phase them out gradually means that the NSCs have a chance to continue engaging in the prohibited conduct resulting in a continuation of the distortion of competition.

Three counterarguments to these arguments could be raised. First, the challenge with the Competition Act is that Competition Commission must conduct a balancing exercise when dealing with these issues. The Competition Commission is required to intervene in ways that do not discourage investments. Secondly, phasing out exclusivity provisions affords NSCs that have entered new shopping malls to recoup their investments. Thirdly, the approach to phasing out exclusivity clauses has been used globally and found to be effective.

VII BIBLIOGRAPH

Legislation

Constitution of the Republic of South Africa, 1996.

The Competition Act (Act no. 89 of 1998).

Papers and reports

African National Congress (ANC). "The Reconstruction and Development Programme (RDP)." A Policy Framework, 1994.

African National Congress (ANC). "Ready to Govern: ANC Policy Guidelines for a Democratic South Africa," 1992. https://www.anc1912.org.za/policy-documents-1992-ready-to-govern-anc-policy-guidelines-for-a-democratic-south-africa/.

Competition Commission South Africa. "The Grocery Retail Market Inquiry: Final Report." Pretoria, 2019.

Dobson, P. "Structural Issues in the Groceries Sector: Merger and Regulatory Issues. Background Paper by the OECD Secretariat-Latin American Competition Forum," 2015.

Economic Policy Division National Treasury. "Economic Transformation, Inclusive Growth, and Competitiveness: A Contribution towards a Growth Agenda for the South African Economy." Pretoria, 2019.

Hovenkamp, Herbert J. "Unilateral Refusals to Deal, Vertical Integration and the Essential Facility Doctrine." *University of Iowa Legal Studies Research Paper* 08–31 (2008).

Kampel, Kim. "Competition Law and SMMEs: Exploring the Competitor/ Competition Debate in a Developing Democracy." Centre on Regulation and Competition. Centre on Regulation and Competition, 2004.

World Bank. "An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa," 2018. http://documents.worldbank.org/curated/en/815401525706928690/pdf/WBG-South-Africa-Systematic-Country-Diagnostic-FINAL-for-board-SECPO-Edit-05032018.pdf.

Cases

Glaxo Wellcome (PTY) Limited and Others v National Association of Pharmaceutical Wholesalers and Others. Case No: 15/CAC/Feb02.

Pick ń Pay Retailers (Pty) Limited v Masstores (Pty) Limited and another [2014] JOL 32403 (GP)

Spar Group Limited v Vresthena (Pty) Limited (23149/2020) [2022] ZAGPPHC 854.

The Competition Commission v South African Airways (Pty) Ltd (Case Number: 18/CR/Mar01).

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

Competition Commission of South Africa and Shoprite Checkers (Pty) Ltd Case number: CO026May20.

Competition Commission of South Africa and Pick n Pay Retailers (Pty) Ltd Case number: CO144Oct 20.

York Timbers v South African Forestry Company Limited (Case Number: 15/IR/Feb01).

York Timbers Ltd v SA Forestry Ltd (09/CAC/May 01) [2001] ZACAC 3; [2001-2002] CPLR 94 (CAC) (September 18 2001).

Books

Alan Schapiro *Exclusive Rights Clauses in Shopping Centre Leases*, 1986 vol XXIV.

Goodman, Isabel, Luke Kelly, Patrick Smith, Paula Youens, and David Unterhalter. *Principles of Competition Law in South Africa*. Oxford University Press, 2017.

Nair, Reena das, and Shingie Chisoro Dube. "Competition, Barriers to Entry and Inclusive Growth: Case Study on Fruit and Veg City." Johannesburg, 2015

Lewis, David. Enforcing Competition Rules in South Africa: Thieves at the Dinner Table. Enforcing Competition Rules in South Africa: Thieves at the Dinner Table. Cheltenham: Edward Elgar Publishing, 2013. https://doi.org/10.4337/9781781953754.

Sutherland, Philip, and Katharine Kemp. *Competition Law of South Africa* (Service Issue 15), 2010.

Vilakazi, Thando, Sumayya Goga, & Simon Roberts. *Opening the South African Economy: Barriers to Entry and Competition*. Edited by Thando Vilakazi, Sumayya Goga, and Simon Roberts. Cape Town: HSRC Press, 2020. https://search.ebscohost.com/login.aspx?direct=true&db=awn&AN=K-062021-000429&site=ehost-live&scope=site.

Book Chapter

Chisoro-Dube, Shingie, and Reena das Nair. "Confronting Entry Barriers in South Africa's Grocery Retail Sector." In *Opening the South African Economy: Barriers to Entry and Competition*, edited by Thando Vilakazi, Sumayya Goga, and Simon Roberts. Cape Town: HSRC Press, 2020. https://www.researchgate.net/publication/354294490.

Halper, Emanuel B. "The Role of South African Competition Law in Supporting SMMEs." In *Competitive Advantage and Competition Policy in Developing Countries*, edited by Paul Cook, Raul Fabella, and Cassey Lee. Edward Elgar Publishing, 2007. https://doi.org/10.4337/9781847205339.

Masojada, Maryla. "The South African Retail Landscape." In *Marketing to South African Consumers*, 87–110, 2019. https://www.researchgate.net/publication/345626975.

Smit, Carina. "The Rationale for Competition Policy : A South African Perspective." In *Biennial Economic Society of South Africa Conference*, 7-9 September 2005, 1–32. Durban, 2005.

Massmart Holdings Limited. "Massmart Holdings Submissions to the Grocery Retail Sector Market Inquiry," 2016.

Journal articles

Buthelezi, Thembalethu, Thando Mtani, and Liberty Mncube. "The Extent of Market Concentration in South Africa's Product Markets." *Journal of Antitrust Enforcement*, 7:352–64, 2019. https://doi.org/10.1093/jaenfo/jnz014.

Comanor, William S., and Patrick Rey. "Vertical Mergers and Market Foreclosure*." Research in Law and Economics*. JAI Press, 2004. https://doi.org/10.1016/S0193-5895(04)21008-9.

Dube, S. & Das Nair, R. "Barriers to Entry in Grocery Retail: FVC and the Growing Independents." *CCRED Quarterly Review* February (2016): 7–8.

Halper, Emanuel B. "Supermarket Use and Exclusive Clauses." *Hofstra Law Review* 30 (2001): 297.

Ligthelm, AA. "The Impact of Shopping Mall Development on Small Township Retailers." *SAJEMS NS* 11, no. 1 (2008): 37–53.

Makhitha, K Mercy, and Brian Soke. "Investigating the Challenges for the Development of Independent Retailers in South Africa." *International Journal of Research in Business and Social Science* (2147- 4478) 10, no. 7 (2021): 16–26. https://doi.org/10.20525/ijrbs.v10i7.1226.

Malgas, Maphelo, and Wellington B. Zondi. "Corrigendum: Challenges Facing Small Business Retailers in Selected South African Townships." *Southern African Journal of Entrepreneurship and Small Business Management* 13, no. 1 (2021). https://doi.org/10.4102/sajesbm.v13i1.457.

Olawale, F, and D. Garwe. "Obstacles to the Growth of New SMMEs in South Africa: A Principal Component Analysis Approach." *African Journal of Business Management* 4, no. 5 (2010): 729–38.

Prins, Deon, and Pieter Koornhof. "Assessing the Nature of Competition Law Enforcement in South Africa." *Law, Democracy and Development* 18 (2014): 136–63. https://doi.org/10.4314/ldd.v18i1.7.

Ratner, James R. "Should There Be an Essential Facility Doctrine?" *University of Califonia Davis Law Review* 21, no. 2 (1988): 327–82.

Schapiro, Alan. "Exclusive Rights Clauses in Shopping Centre Leases." *Alberta Law Review.* Vol. XXIV, 1986.

Seelen, Christopher M. "The Essential Facilities Doctrine: What Does It Mean to Be

Essential?" *Marquette Law Review* 80, no. 6 (1997): 1117–1113.

Wise, Michael. "Competition Law and Policy in South Africa." *OECD Journal: Competition Law and Policy* 5, no. 4 (2004): 7–69. https://doi.org/10.1787/clp-v5-art14-en.

Unpublished Theses

Blumenthal, Roxanne. "The Competition Commission's Non-Referral of Exclusivity Clauses in the Shopping Centre Lease Context: A Monumental Misjudgement: A Section 5(1) Analysis of Anticompetitiveness." University of Cape Town, 2015.

Nkuna, Ignatius Lebogang. "Essential Facilities and Abuse of Dominance in South African Competition Law." University of Pretoria, 2013.

Internet sources

Burger-Smidt, Ahmore, and Kriska-Leila Goolbjitth. "More Rumblings in the Retail Sector: Retail Sector to Be Rigorously Investigated with Renewed Vigour." *Legal Brief*, June 2015. http://www.gov.za/speeches/minister-patel's-budget-vote-announces-r23bn-funding-black-.

European Commission 'Notice on the Definition of the Relevant Market for Purposes of Community Competition Law; (97/c 372/03) Official Journal (372 09/12/1997 pp 0005-0013): [Online]. Available: http://www.eur_lex.europa.eu. Accessed November 30 2022.