PUBLIC INTEREST FACTORS AND THE JURISDICTION OF COMPETITION AUTHORITIES IN MERGERS: THE CONSIDERATION OF EMPLOYMENT UNDER SECTION 12A OF THE COMPETITION ACT OF 1998 IN SOUTH AFRICA

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TABLE OF CONTENTS

ABSTRACT

Competition law does not exist in a vacuum. It is interdependent with society and the well-being of individuals inter alia. Under Apartheid in South Africa, there was weak competition legislation with no public interest doctrine which contributed to unfairness to individuals in the employment field. This allowed for monopolisation, skewed concentration of wealth and unfair employment practices. In the Constitutional era in South Africa, legislation was developed which checked the historic disadvantages under Apartheid. This paper focuses on s 12A*(3)* of the Competition Act 89 of 1998 as it aims to redress employment unfairness in the context of mergers where a public interest assessment is first conducted. Employment conditions are used to cushion the negative effects that mergers may pose when they occur, specifically a moratorium on retrenchments for a specified period of time. This ensures that employees have better prospects of retention or re-employment once retrenched. This enforces the concept of job security.

In light of the above, this paper explores the exercise of judicial power of competition authorities in making decisions on employment matters where relevant precedent and the public interest guidelines are analysed. It is found that competition authorities do have the required expertise to decide on employment in mergers. The process as it stands is time-efficient and cost-effective. Further, this paper explores whether competition authorities are effectively utilising the public interest guidelines on employment published by the Competition Commission. It is found from precedent-analyses that public interest guidelines have not consistently been used meticulously. The guidelines should be codified, especially the provision for effective consultation. Lastly, this paper explores whether competition authorities are misusing their judicial power and overstep their expertise into the labour realm. Hence it considers relevant Constitutional Court cases. It is found that competition authorities do not misuse their judicial power or step beyond their expertise and that the Constitutional Court gives a more generous, purposive and inclusive interpretation to the Competition Act 89 of 1998 which still allows for due deference between competition authorities in the Competition Commission, the Competition Tribunal and the Competition Appeal Court.

I INTRODUCTION

South Africa has a rich history embedded with racial segregation. Unfairness surrounding economic and corporate life in South Africa provided an 'imperative for radical change for the distribution of control of economic wealth that was loosely envisaged by those determined to consign apartheid to history's ash heap'.[1]

A well-established trade union, the Congress of South African Trade Unions ('COSATU') fought against unfair employment and the radical ideals of Apartheid. The National Economic Development and Labour Council ('NEDLAC') has similar objectives. The state consults NEDLAC in seeking consensus on policy and legislative matters affecting socio-economic decisions and equality.[2] NEDLAC and COSATU were both involved in competition issues and developing appropriate competition law to rectify the unfairness and inequalities of the past, and crucially, the employment inequality.[3]

The darkness of employment inequality in South Africa's history has been removed, for the most part, by the Constitution of the Republic of South Africa, 1996 ('Constitution') and the Competition Act 89 of 1998 ('Act'). Competition law assists in growing a competitive economy which fulfils legal, economic and societal goals in its attempt to align competition law with fair employment, trade and industrial policy.[4] Unfortunately, despite the enactment of the Act, there is still storminess surrounding the enforcement of competition law as it is relatively novel and has taken 'root in very infertile soil'.[5] Further, there is an apparent overlap in competition and labour which are distinct areas of law – in mergers there is a public interest consideration which pertains to employment.

It follows that since the public interest employment consideration in merger transactions is labour related, the powers of competition authorities may be misused as they may not necessarily be adept in deciding labour related matters. In this paper, three identified areas of concern will be assessed. First, do competition authorities have the

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[1] David Lewis *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2012) 5.
[2] Eleanor M Fox 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41(2) *Harvard International Law Journal* 583.
[3] Ibid at 9.
[4] Ibid at 26; Balthasar Strunz *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (2018) 3.
[5] Op cit note 1 at 2-4.

judicial power to make decisions on employment matters? Secondly, have the public interest guidelines ('guidelines')[6] effectively assisted competition authorities in deciding employment related merger transactions? In assessing the effectiveness of the guidelines, cases before and after the adoption of the guidelines will be analysed. Thirdly, are competition authorities misusing their judicial power and overstepping their expertise where on employment related issues they should defer to labour authorities, the companies themselves or the courts to resolve? In order to assess this aspect, Constitutional Court ('CC') cases will be analysed. This paper will then conclude by emphasising the significance of employment and possible improvement of decisive aspects of competition law in South Africa.

II MERGERS AND EMPLOYMENT IN SOUTH AFRICA

Mergers are one of the three competition areas of significant concern along with abuse of dominance and cartel conduct.[7] A merger occurs when 'two or more firms which previously operated independently of one another, combine in such a manner that their decision-making is unified'.[8] There are three types of mergers: horizontal, vertical and conglomerate.[9] Public interest considerations under s 12A*(3)* of the Act apply to all three types of mergers. When one observes the purposes of the Act in conjunction with the guidelines, it is clear that the Act seeks primarily to develop the economy and promote employment. The intention of the Act is emphasised in s 12A*(3)* carrying the purposes of the Act into its merger provisions.

There are two aspects as per s 12A of the Act to approve a merger. First, is the merger likely to substantially prevent or lessen competition? Secondly, can the merger be justified on substantial public interest grounds as per s 12A*(3)* of the Act? This paper focuses on the second aspect and more particularly the employment public interest consideration.

A merger may arise where one firm is struggling to be profitable, thus another enterprising firm would acquire the failing firm. This prevents the first firm from closing

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[6] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 GN 309 *GG* 40039 of 2 June 2016.
[7] Luke Kelly, David Unterhalter and Isabel Goodman et al *Principles of Competition Law in South Africa* (2016) 5.
[8] Ibid at 160.
[9] Ibid at 161-2.

entirely. However, employees may become redundant as there may be an overlap of skills and not enough labour to engage all the employees from the pre-merged firms; thus, many are likely to be retrenched. This process invokes s 12A*(3)*(b) of the Act. Due to these retrenchments, poverty and poor economic growth may result. For these reasons, employment is the main driving public interest consideration in South Africa. Thus, employment conditions are prominent in merger transactions, especially employment moratoriums and limitations on merger-specific retrenchments. The conditions aim to ensure that employees are not unavoidably disadvantaged and are able to find suitable employment after retrenchment.[10]

Although this assists with employee job security, it may be seen as a possible drawback as it serves as a quick fix for merger approval due to post-merger poor monitoring.[11] However, this is eliminated by parties who have an interest and will report a possible breach of condition to the Competition Commission ('Commission').[12]

Employment can have a multiplier effect on the economy: if there is more employment, buying power increases, together with the standard of living; thus, poverty is eradicated gradually. Additionally, more employment generates more taxes enabling government to ensure social upliftment. However, relying on competition policy solely is inadequate and inappropriate; competition policy cannot achieve the objectives of labour and employment without the help of other policies and laws.[13]

Despite the above, the Act aims to minimise the negative effects of mergers by providing for the assessment of public interest considerations before a merger is approved as per s 12A of the Act. These are non-economic objectives that aim to protect the vulnerable in society.

III SECTION 12A OF THE COMPETITION ACT: PUBLIC INTEREST

The Act is 'secondary only with regard to public interest as it only takes care of residual public interest which is not catered for by other policy instruments'.[14] Section 12A of the

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[10] James Hodge and Sthabiso Mkwanazi *We need to talk about conditions: The challenge of conditions for merger control in South Africa* (unpublished paper on file with author, Economic Research Bureau of the Competition Commission of South Africa, 2020) 8; op cit note 4 at 371.
[11] Ibid.
[12] Ibid.
[13] Minette Neuhoff, Marylla Govender and Martin Versfeld et al *A Practical Guide to the South African Competition Act* 2 ed (2017) 9.
[14] Op cit note 4 at 370.

Act is 'complemented by consumer welfare'[15] and aims to redress 'dual legacies of an uncompetitive, concentrated economy, and a country replete with socio-economic inequalities'.[16] Socio-economic welfare of South Africans is a key component in considering public interest with particular emphasis on employment as more than 37.15 per cent of merger conditions were employment-related in the last fifteen years.[17] Public interest conditions are imposed in order to cushion the negative effects of mergers even though the conditions may be burdensome to the acquiring firm.[18] Significantly, the employment consideration under s 12A*(3)* of the Act aims to protect post-merger levels of employment, not wages, working conditions or collective bargaining which are beyond the scope of this section.[19] These aspects beyond the scope of competition law fall directly under labour legislation.[20]

(a) Interpretation

Public interest considerations can salvage an anticompetitive merger or it can lead to a prohibition of a pro-competitive merger. Thus, *Harmony / Goldfields* suggests that public interest can have both 'adverse or benign effects'.[21] Public interest is considered regardless of the competition assessment; the use of 'otherwise' in s 12A*(1)*(b) of the Act indicates that the evaluation of public interest must occur regardless of the competition analysis being positive or negative.[22] This was considered in *Anglo American / Kumba Resources* where the Competition Tribunal ('CT') stated that 'otherwise' means that the evaluation of public interest must still be considered by the CT and 'the public interest component can operate either to sanitise an anticompetitive merger or to impugn a merger found not to be anticompetitive'.[23]

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[15] Ibid at 371.
[16] Kasturi Moodaliyar and Simon Roberts *The development of competition law and economics in South Africa* (2012) 3.
[17] Op cit note 10 at 3.
[18] Op cit note 4 at 332.
[19] Op cit note 7 at 215.
[20] Basic Conditions of Employment Act 75 of 1997; Labour Relations Act 66 of 1995.
[21] *Harmony Gold Mining Company Ltd / Goldfields Ltd* CT Case no. 93/LM/Nov04, 18 May 2005 para 54; op cit note 16 at 7.
[22] Ibid; James Hodge, Sha'ista Goga and Tshepiso Moahloli 'Public interest provisions in the South African Competition Act: A Critical Review' in *Competition Policy, Law and Economics Conference* (2009) 8.
[23] *Anglo American Holdings Ltd / Kumba Resources Ltd, with the Industrial Development Corporation intervening* CT Case no. 46/LM/Jun02, 9 April 2003 para 138; supra note 21 para 45.

Additionally, public interest needs to be substantial. There is no definition or guidance in the Act relating to public interest as confirmed in *Distillers / Stellenbosch Winery* where the CT stated that 'the legislation offers no yardstick'.[24] This causes difficulty as there are no indicators or restraints besides the considerations set out in s 12A*(3)* of the Act which may provide meaning and context to the term public interest.

Due to the uncertainty regarding 'substantial' the CT's main concern is 'residual public interest', as per *Distillers / Stellenbosch Winery*, or that part that is not susceptible to or better able to be dealt with better by another law, is substantial'.[25] In *Shell / Tepco* the CT noted that where there is legislation in place for example the Employment Equity Act the public interest component becomes secondary.[26] In *Distillers / Stellenbosch Winery* the CT agreed that Parliament has enacted legislation specifically dealing with s 12A*(3)* inclusive of employment. The competition authorities would only intervene where 'merger-specific losses are so adverse that no other law or regulator could remedy them'.[27] This was further considered in *Metropolitan / Momentum* where the ideology was refined. In this case, a labour tribunal under the Labour Relations Act 66 of 1995 ('LRA') was not positioned as was necessary to assess public interest in the same manner as the CT.[28]

Ordinarily, labour authorities would be better suited and resourced to deal with public interest matters concerning employment but competition law assesses public interest pre-merger whereas labour authorities assess mergers post-merger: the CT does not ask the prior question – should the merger have been permitted in the first place – which gave rise to the subsequent operational circumstances.[29] Thus, both authorities have different perspectives as argued in *Metropolitan / Momentum* and will be shown below. Ultimately, legislation should play a framework-like role rather than intrude and duplicate the duties of the regulators possibly creating uncertainty.[30]

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[24] *Distillers Corporation (SA) Ltd / Stellenbosch Farmers Winery Group Ltd* CT Case no. 08/LM/Feb02, 19 April 2001 para 236; op cit note 16 at 8.
[25] Ibid.
[26] *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* CT Case no. 66/LM/Oct01, 22 February 2002; ibid; Employment Equity Act 55 of 1998.
[27] Supra note 24 para 238; ibid.
[28] Op cit note 16 at 9.
[29] *Metropolitan Holdings Ltd / Momentum Group Ltd* CT Case no. 41/LM/Jul10, 9 December 2010 para 111.
[30] Simbarashe Tavuyanago 'Public Interest Considerations and their Impact on Merger Regulation in South Africa' (2015) 15(7) *Global Journal of Human-Social Science: Economic* 28; ibid.

(b) Assessment of interpretation

It is evident that mergers are not decided on public interest considerations alone and accordingly, public interest cannot have a decisive influence in its own capacity. Nevertheless, the CT has been consistent with the legislative intention of including public interest in the Act. First, as David Lewis states, developing countries must first establish credibility of public interest as it is essential to serve the purpose of competition enforcement; it is lost if public interest dominates most decisions or is ignored entirely.[31] Secondly, as competition law would 'in and of itself be in the public interest' realm, it is served by competition law and direct consideration in merger transactions is secondary.[32] Thirdly, *Walmart / Massmart* suggests that in no case did public interest condemn any unproblematic merger and rescue it on public interest grounds; but this does not allude to a benchmark.[33] Fourthly, precedent evidences that the CTs have worked around substantial public interest concerns, positively contributing towards the development of the public interest assessment – the broad approach adopted is sound.[34]

The concept of residual public interest is not stated in the Act or the guidelines but it is developed by the CT through precedent. However, a policy tool would be more effective and specific; it is clear that public interest should always be considered and that it should be substantive.[35] There is a chance that public interest may fall through the cracks with the residual approach, thus *Metropolitan / Momentum* suggests that legislation should be looked at carefully and competition authorities should consider legislation more closely to ensure that certain aspects are not merely excluded.[36] Legislation and the public interest component of the Act should be 'mutually supporting' not excluding or 'contradictory' since they should be in line with economic and social policy.[37]

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[31] Op cit note 16 at 10.
[32] Ibid.
[33] *Walmart Stores Inc / Massmart Holdings Ltd* CT Case no.73/LM/Dec10, 29 June 2011; ibid.
[34] Ibid at 11.
[35] Ibid.
[36] Ibid.
[37] Ibid at 12.

(c) Shift in public interest

Government objectives ordinarily will shift over time and public interest objectives may also shift; competition authorities are put in a negative position with respect to their credibility and political standing.[38] Should competition authorities sway more toward government objectives or to competition objectives? Competition authorities would need to find a balance between the two and fulfil both objectives as depicted in *Walmart / Massmart* – adjust and broaden the interpretation of the employment public interest consideration.[39]

IV PUBLIC INTEREST GUIDELINES

Due to the uncertainty and lack of guidance in interpretation of s 12A*(3)* of the Act, the Commission published guidelines in order to clarify and assist in merger assessments. They are not binding but are useful as the Commission is broadening its view on how the Act should be interpreted and applied.[40] The guidelines ensure that a proper analysis is conducted where adequate information is presented before the CT in order to make a decision. Also, they ensure that employees are provided with full and complete information to facilitate consultation on all material issues. Previously, insufficient information was provided resulting in deficiencies and delays which hindered determining the public interest effect post-merger.[41]

At face value, theoretically, the guidelines did provide clarity but it may not be specifically referred to in precedent. The power ultimately is with the competition authorities. They may disregard the guidelines and decide on merger transactions at their own discretion. As a result, it is important to consider transformation of the guidelines into legislation, making it obligatory so that it becomes binding and is used consistently in all merger transactions and not only in certain instances where the competition authorities arbitrarily use the guidelines. However, this would reduce flexibility and creativity of competition authorities as they would be confined to the processes and

[38] Ibid at 13.
[39] Ibid at 14; supra note 33.
[40] Competition Act 89 of 1998 s 79.
[41] Op cit note 6 s 3.5.

considerations prescribed by the guidelines. Bearing in mind that competition authorities are autonomous and are accorded due deference, this may not become a major concern.

V TRADE UNIONS, LABOUR LAW AND COMPETITION LAW

In the labour realm, where there are employees there are usually trade unions which represent the employees. Trade unions are a crucial element in South Africa as they enable employees to have a voice in the workplace, in this case with regard to merger transactions. Further, trade unions aim to 'maintain and improve the conditions' of employees[42] by contributing to revolutionary social change with the purpose of promoting economic, social and political interests of employees.[43]

From a labour perspective, the LRA prescribes conditions in order to meet fair dismissals for operational reasons but this is not the exclusive source.[44] It is possible for two rights to arise from the same set of facts and also for two causes of action to exist.[45] The LRA provides a framework for employees, trade unions and employers to bargain collectively in order to resolve mutual interests.[46] Further, the LRA promotes joint-decision making and sets the stage for fair conduct in consultations and negotiations.[47] Retrenchments are dismissals for operational requirements under the LRA – the employer's operational requirements are the trigger. A fair process must be followed and the employer must show sufficient cause for the dismissal.[48] The consultation element of the procedure is crucial; if consultation does not occur or does occur but at the incorrect time, the employer may be held procedurally liable for the irregularity.[49] This consultation element should be mandatory in merger transactions as stated in the case analysis below.

It is clear that competition authorities are secondary to employment legislation as they exercise a deferential approach to labour issues even though there is a gradual development of retrenchment principles that do mirror the substantive and procedural

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[42] Mpfariseni Budeli 'Trade Unionism and Politics in Africa: The South African experience' (2012) *XLV CILSA* 455.
[43] Ibid at 456.
[44] Retha Beerman 'The Road to Double Regulation Paved with Good Intentions: An Analysis of the Interplay between the Labour Relations Act and the Competition Act Regulation of Retrenchments' (2015) 36 *ILJ* 1963.
[45] Ibid at 1695.
[46] Ibid.
[47] Ibid at 1696.
[48] Ibid at 1697.
[49] Ibid at 1700.

requirements as per the LRA.[50] The interests of the employer and the legal entity are evaluated differently as retrenchments do not necessarily occur in the same context.[51] It seems that the competition analysis has a wider scope; the merger is assessed in other aspects that has an effect on a particular industry or region and not only on employment, whereas with labour law the analysis is specific to individual business retrenchments.[52]

There are difficulties faced by competition authorities. These include, first, a consultation duty and secondly, detailed disclosures in decision making that are required under the Act.[53] There is lack of clarity in the guidelines, and the CTs do not provide sufficient guidance. This is where the guidelines and/or case law can be developed in allowing for more effective guidance and direction.

Further, there is a distinction between the two regulators. The interpretation of public interest considerations under the Act invokes a strong instrument for trade unions to object to mergers. Employees are in a stronger position to question the employer's motives before competition authorities in comparison to what is provided for under the LRA.[54] Thus, the power of trade unions come through clearly and they are able to influence the merger transaction, whereas under the LRA they have no right to such influence.

VI JUDICIAL POWER OF COMPETITION AUTHORITIES

With the Act came a new era of independence that was being ushered in; the Minister of Trade and Industry ('Minister') did not make any attempts to intervene in the decision-making process.[55] The separation of investigation from adjudication and independence entailed freedom from political override as will be seen below.[56] Independent decision-making power of competition authorities is the most important feature under the Act. However, 'regulatory independence is not always the hallmark of South Africa's democratic order'.[57]

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[50] Ibid at 1714.
[51] Ibid.
[52] Ibid.
[53] Ibid at 1715.
[54] Ibid at 1717.
[55] Op cit note 1 at 23.
[56] Ibid at 29.
[57] Ibid at 38.

When assessing the judicial power of competition authorities, it is crucial to bear in mind that the public interest considerations in the Act have led to criticism as to whether the Act is the appropriate vehicle for implementing this policy. Quoting the competition authorities Reekie suggests that they are well-advised not to pursue the mandate in an overzealous manner and should adhere to the principle of subsidiarity.[58] At this point it is plausible to state that competition authorities do have judicial power to decide on labour matters, as seen in case law and the powers of the Commission, CT and Competition Appeal Court ('CAC') explained below.

(a) Competition Commission

The Commission is the investigatory and prosecutorial body which exercises jurisdiction throughout the Republic. It aims to 'increase market transparency and public awareness of the Act'.[59] The Commission does have its own independence where it is only subject to the Constitution and the law.[60] The commissioner is appointed by the Minister and is not voted in democratically which may give rise to favouritism and nepotism. Given this extent of control by the Minister, Reekie's criticism of the scope for flexible interpretation and subjectivity of judgement seems justified.[61] Thus, bias and any zealousness of the commissioner and the Minister may become a concern.[62] Given the Bill of Rights s 9(2) stipulation, the overzealousness may lead to undue interpretive bias or subjectivity by competition authorities. This prospect is not remote. For example, a Cabinet Minister, commissioner, tribunal or judge committed to black consciousness principles will likely be influenced by the Africanist principle of destroying colonialism and white monopoly capital in order to enable economic transformation.[63] However, this is not plausible in every instance.

The Commission is not a commission of record; perhaps it should be as it may be useful for the CT to re-visit the matter where the Commission may have deemed a certain aspect irrelevant whereas the CT may deem it necessary. Nevertheless, the Commission

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[58] Op cit note 13 at 9; supra note 26.
[59] Ibid at 15.
[60] Supra note 40 s 20(1).
[61] Op cit note 13 at 9.
[62] Supra note 40 ss 26,28,34,19,21,23 and 23.
[63] Sanele Sibanda 'Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stell LR* 492.

makes recommendations to the CT. The CT then assesses the recommendations and makes a decision. This process does not ensure that all the material information is given to the CT; information that may not seem relevant or necessary to the Commission is left out. This will be analysed below as a possible drawback.

(b) Competition Tribunal

The CT is an adjudicative body that exercises jurisdiction throughout the Republic. It is a tribunal of record and is independent from the Commission.[64] The CT is tasked with assessing and adjudicating referrals from the Commission and complaints of prohibited conduct.[65] Where the Commission elects to prosecute conduct, it is brought before the CT and if not, complainants may approach the CT in their own capacity for interim relief.

(c) Competition Appeal Court

The CAC is a body that hears appeals from decisions in the CT and is a court contemplated in s 166(e) of the Constitution which holds a similar status to the High Court and is also a court of record.[66] The CAC may review any CT decision and its decision is final, other than a consent order, interlocutory or interim decision that may be taken on appeal.[67] The CAC may also confirm, amend or set aside any decision brought from the CT or remit a matter to the CT.[68]

VII ASSESSING THE JUDICIAL POWER OF COMPETITION AUTHORITIES BEFORE AND AFTER THE GUIDELINES

As stated above, the independence of competition authorities and the principle of subsidiarity allows the judicial authorities discretion to approve or disapprove merger transactions in a manner which they deem fit. The employment consideration is rationalised by duplication of facilities and a higher weighting is given to those who are relatively immobile and unskilled than to those who could reasonably find alternative

[64] Deon Prins and Pieter Koornhof 'Assessing the nature of competition law enforcement in South Africa' (2014) 18 *Law, Democracy and Development* 140; op cit note 13 at 17.
[65] Ibid.
[66] Supra note 40 s 36.
[67] Ibid s 37(1).
[68] Ibid s 37(2).

employment.[69] At the core of negotiation are employers and labour governed by the LRA. The CT is tasked with encouraging the merging parties and the employee representatives to use the LRA provisions and agree on employment implications. This may become a rubber stamp process as once a merger condition is approved by the CT, there may be a labour law contravention.[70] Due to independence and subsidiarity, a labour matter can be brought to the Labour Court ('LC') on the same facts that were brought to competition authorities.

Through the analysis of *Metropolitan / Momentum*, before the guidelines and *AMCU / Competition Tribunal of South Africa*, after the guidelines, the judicial power and expertise of competition authorities will be assessed including whether the guidelines have changed the exercise of judicial power. The analysis will show that competition authorities do have the required expertise and judicial power to decide on merger transactions. Further, it will show that the guidelines have been used implicitly to some extent but not meticulously.

(a) Metropolitan / Momentum (2010)

Metropolitan Holdings Limited ('Metropolitan') is the acquiring firm and Momentum Group Limited ('Momentum') is the target firm. Metropolitan and Momentum can operate in separate, different target markets[71] and complement each other post-merger. This would allow for cost synergies, growth opportunities and economies of scale through the combination of target markets and resources.[72]

(i) Public interest consideration of employment

There is no competition concern with the relevant markets but there are concerns with the public interest considerations specifically dealing with employment as there would be 1000 retrenchments post-merger.[73] The National Education, Health and Allied Workers' Union ('NEHAWU') representing some of the affected employees opposed the remedy

[69] Op cit note 1 at 117.
[70] Ibid at 118.
[71] Supra note 29 para 5.
[72] Ibid para 5-6.
[73] Ibid para 61.

given as it claimed that the parties were unable to justify the number of retrenchments.[74] The merger was approved with a moratorium on retrenchments for two years but the moratorium did not apply to senior management.[75]

The case set out s 12A of the Act, stating that the CT must consider the effect on public interest even if the merger is not likely to substantially prevent or lessen competition.[76] *Harmony / Goldfields* suggests that the merging parties are not required to positively justify the merger on public interest grounds but it does not deal with the evidential burden.[77] In *Metropolitan / Momentum*, it has been decided that the evidential burden shifts to the merging parties once the merger is deemed unjustifiable on substantial public interest grounds.[78] This is not unfair as the merging parties should be able to discharge the burden since they should have valid reasons for their proposed transaction.[79]

Two criteria must be met to satisfy the evidential burden. When analysing the two-step test and the guidelines, it is significant to note that this two-step test has been followed even after the guidelines have been published. It is clear that the two-step test has been incorporated into the guidelines under s 8.1.4.*2* (a) and (b). Nevertheless, this test is still referenced as the *Metropolitan / Momentum* test. The guidelines go one step further and analyse 'whether the merging parties have provided full and complete information to the Commission and sufficient information to the employees to enable them to consult fully on all issues'.[80] This is a significant addition and in line with the labour law consultation process, specifically dealing with retrenchments, or as per labour legislation dismissal based on operational requirements. Thus, there is a connection between competition law and labour law more clearly with regard to consultation with all parties affected by the merger transaction. This is a noteworthy improvement. Although this is provided for under s 12A of the Act,[81] the guidelines shed more clarity on the matter of consultation.

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[74] Ibid para 61-3.
[75] Ibid para 64.1-3.
[76] Ibid para 67.
[77] Supra note 21; ibid para 68.
[78] Ibid.
[79] Ibid.
[80] Op cit note 6 s 22.
[81] Yasmin Carrim and Ndumiso Ndlovu *Handbook of Case Law: The Competition Tribunal's guide to select cases decided from 1999 to 2019* 2019/2020 ed (2020) 38.

First, 'a rational process has been followed to arrive at the determination of the number of jobs lost i.e., that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected'.[82] Secondly, 'the public interest preventing employment loss is balanced by an equally weighty but countervailing public interest, justifying the job loss and which is cognisable under the Act'.[83] The Act distinguishes a public interest and a private interest. Private interests of shareholders are balanced against public interests in preventing employment loss, in this case.[84] The test requires a balancing act between efficiency and public interest in this instance.

A gain to shareholders only will not be regarded as a countervailing interest as it accrues solely to a private interest.[85] However, if there were no public interest grounds, a private interest would suffice.[86] The Act is silent on whether the gains to shareholders would be purely private as a result of job reduction as per public interest. It seems that the guidelines have not considered this aspect – possibly an oversight by the Commission. Following from this, s 12A of the Act seems to portray that private efficiency gains are taken into account for the countervailing loss to competition but not the public interest loss.[87]

The Commission provided for a 'hope but not a guarantee of redeployment within the merged firm or its business partners and allowed for a retaining allowance of up to R10000 provided the employee fell within a certain category' (less skilled workers).[88] NEHAWU countered that 661 out of 1000 employees would not qualify for the retaining allowance; these employees were not solvable by natural attrition and retirement.[89]

The case noted that a more considered approach is required when looking at public interest grounds.[90] I think a more considered approach would be that in the guidelines even though there are loopholes.[91] The cost reduction in this merger seems to invoke private interests to drive the shareholder constituency; this cannot satisfy the public interest consideration as discussed above. Thus, the merging parties have failed to

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[82] Supra note 29 para 70.
[83] Ibid.
[84] Ibid para 75.
[85] Ibid para 71.
[86] Ibid para 72.
[87] Ibid.
[88] Ibid para 81.
[89] Ibid para 83-90.
[90] Ibid para 92.
[91] Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (2020) 10.3.

demonstrate a rational connection between the efficiencies claimed and job losses; even if they have, they have not successfully raised any public interest that would justify job loss.[92] Further, assumptions were made on past merger integration experience; there is no way to confirm the reliability of the metric in order to predict employment outcomes.[93] The more considered approach needed is one that rectifies these shortfalls and loopholes in case law as well as the guidelines.

(ii) Conditions imposed by the Competition Commission

The merging parties were clearly 'sanguine' about employment loss but became pessimistic when faced with opposition from NEHAWU – this weakens the credibility of the merging parties when assessing the rational connection.[94] The conditions discussed above dealing with retrenchments and retaining allowances remain inadequate.[95] The expectation of future job opportunities is unenforceable and unspecific – not a meaningful condition.[96] Additionally, there was no evidence pertaining to the number of retrenchments that were arrived at and whether the employees had been consulted, offered re-training or re-skilling.[97] Conditions should be specific, time-specified and certain so that employees are aware of their position in the merged entity and are able to search for future prospects timeously and effectively. This is crucial to enable employees to move forward and seek other opportunities.

(iii) Consultation of affected parties

Where there is proper negotiation between the affected parties to a merger transaction, the CT is more accepting of the merger; the arguments presented by the merging parties are not second guessed.[98] In *Metropolitan / Momentum*, there is no evidence of any agreement or presence of the trade union in consultation or negotiation. This is a red flag. Communication is not equivalent to negotiation; informing the affected parties of the

[92] Supra note 29 para 100.
[93] Ibid para 91.
[94] Ibid para 99.
[95] Ibid para 102.
[96] Ibid.
[97] Ibid para 103.
[98] Ibid para 104.

transaction does not equate to negotiation.[99] Further, the employees have not been given meaningful information[100] as suggested by the guidelines. If affected parties, especially employees and trade unions, have not been supplied with meaningful information, meaningful consultation cannot occur as only those parties who have all the required information are advantaged. This is a crucial downfall by the merging parties in *Metropolitan / Momentum* and should not be allowed because it disadvantages both the merging parties and the employees.

A counter-argument that can be raised in the instance of consultation relates to the process being time-consuming and requiring additional effort by the merging parties. However, it allows for a fair representation of employees and could potentially count in their favour if they are on a level playing field relative to other parties to the merger transaction. Ultimately, consultation is beneficial and should be mandatory.

(iv) Deferential approach exercised by competition authorities

Metropolitan / Momentum reiterates that a deferential approach should be adopted when dealing with labour issues; and competition authorities should not interfere as 'it is at most secondary to other statutory and regulatory instruments'.[101] This was also suggested in *Shell / Tepco*: 'the competition authorities, however well-intentioned are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect'.[102] However, 'adopting a deferential approach does not mean a hands-off approach' as the Act does give competition authorities appropriate discretion.[103]

Even though a deferential approach is exercised by competition authorities, if employees and/or trade unions are not satisfied with the retrenchment, a claim can be brought before the LC. The competition process and the labour process are separate even though the labour-related aspect can assist in the competition analysis because the assessment views labour-related issues through a competition prism.[104] Thus, the

[99] Ibid para 105.
[100] Ibid.
[101] Ibid para 109.
[102] Ibid; supra note 26 para 58.
[103] Ibid para 110.
[104] Ibid.

competition authorities have the power to make assessments on employment even though they may not be labour experts as such in the labour law realm. Further, the competition analysis and labour analysis have different focal points and different roles[105] – the two regulators, according to their legislative powers do not infringe or overstep each other in performing their analysis for their specific purpose, thus the assessments cannot result in a clash.

(v) Sufficiency of conditions

Even though conditions serve as a safeguard when mergers are approved, it is important not to overburden the merging parties where they are unable to enjoy all the benefits of the merger. When conditions are imposed, one should consider whether they impose an undue burden on the firm post-merger. The moratorium on all merger retrenchments except senior employees for two years is differentiated both by time and category of employee.[106] Senior employees are most likely to obtain new employment; thus, they do not need to be protected as much compared to lower-skilled employees.[107] This permits hierarchical differentiation in the firm. The condition does not exclude voluntary retrenchments or other incentives for resignation.[108] The certainty in the categories of employees and the time period is commendable[109] and is a remarkable exercise of judicial power of competition authorities in the labour realm, for the reasons stated above.

The conditions imposed do not fully mitigate employment effects and the merger may still have an adverse impact on the firm post-merger.[110] A matter arising out of an adverse impact is whether the merger should have been prohibited. However, in this case, the conditions remedy any discrepancies and counter the negative impact on the merger, thus resulting in an approval.[111] Ultimately, the adverse effect on employment can be remedied by the conditions imposed in this case along with the variations which provide increased certainty and clarity regarding retrenchments.[112] In the same breath, with

[105] Ibid para 111.
[106] Ibid para 113.
[107] Ibid.
[108] Ibid para 114.
[109] *Industrial Development Corporation SOC Ltd / Celrose (Pty) Ltd* CT Case no. 271/LM/Mar19, 11 April 2019.
[110] Supra note 29 para 115.
[111] Ibid para 117.
[112] Ibid para 121-2.

retrenchments, it is necessary to specify the meaning of retrenchments and those who are subject to merger retrenchments and not as defined in the LRA as a dismissal based on operational requirements.[113] The meaning and purpose must be defined for the efficiency of the specific merger and what it means for the parties affected. The approval of the merger with conditions falls squarely within the judicial power of competition authorities.

The significant events and considerations in *Metropolitan / Momentum* discussed above show that competition authorities do have the required expertise and judicial power to decide on merger transactions. However, the CT observation that the Commission is not a court of record emphasises the risk that, because of its virtually absolute power in it not providing all material information and engaging proper consultation, it is necessary for the guidelines to make these functions mandatory.

Nevertheless, *AMCU / Competition Tribunal of South Africa* is analysed below to show whether there is a change in the exercise of judicial power by competition authorities due to the introduction of the guidelines.

(b) AMCU / Competition Tribunal of South Africa (Sibanye Gold) (2019)

Davis JP cautions that 'courts should not play dice with the welfare of workers, particularly in a country with notorious levels of unemployment'.[114] The public interest consideration of employment should be 'uppermost in the mind of the court'.[115] This case concerns 32000 employees' jobs that are at risk due to a merger transaction.[116]

The merger would allow for synergies between assets and opportunities for development as Lonmin has been beset by debt structure, capital constraints and liquidity concerns.[117] The CT approved the merger subject to certain conditions. Lonmin anticipated 12459 retrenchments in order to continue operations but Sibanye anticipated 13344 retrenchments, of which 885 being merger-specific.[118] The Commission stated that

[113] Ibid para 127.
[114] *Association of Mineworkers and Construction Union and Another / Competition Tribunal of South Africa and Others* CAC Case no. 169/CAC/Dec18, 17 May 2019 para 1.
[115] Ibid.
[116] Ibid.
[117] Ibid para 3.
[118] Ibid para 8.

3188 were merger specific while the Association of Mineworkers and Construction Union ('AMCU') questioned whether 12459 or 13344 were merger-specific.[119]

If the merger were not implemented, Lonmin would lose 32000 jobs thus the countervailing public interest position is not more beneficial.[120] The CT adopted a balanced approach where all retrenchments at Lonmin would be prohibited for six months and further job saving measures were put in place by conditions being imposed, but this was dependent on the realisation of certain prices and mining costs; the conditions were uncertain with sufficient probability that they might not actually materialise.[121] When the conditions do not materialise it simply relieves the merging parties of the condition imposed. Hence, it does not remedy the effects of the merger – it does not fulfil its purpose.

The case was brought on appeal by AMCU as they believed that the effect on employment was not adequately assessed; AMCU wanted disapproval of the merger or to invoke more advantageous conditions.[122] Thus, the appeal focused on the appropriateness of the conditions imposed. AMCU raised two concerns. First, whether the retrenchments were merger-specific and secondly, the inadequacy of the six month moratorium on retrenchments.[123] Also, the conditions were fraught with caveats and were vague in its application. Practically, this is not plausible and the competition authorities should go a step further to protect employees – even though competition authorities may be au fait with labour matters, they should apply their minds to ensure fairness when assessing the public interest consideration of employment.

There are three separate, related inquiries under s 12A of the Act.[124] First, the competition authorities 'must determine whether or not the merger is likely to substantially prevent or lessen competition' with regard to s 12A*(1)* of the Act.[125] Secondly, the competition authorities 'must assess the strength of competition in the relevant market and the probability that the firms in the market after the merger will behave competitively or co-operatively' taking into account factors listed under s 12A*(2)*

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[119] Ibid.
[120] Ibid para 10.
[121] Ibid para 11.
[122] Ibid para 17.
[123] Ibid.
[124] Ibid para 25.
[125] *Mediclinic Southern Africa (Pty) Ltd and Another / Competition Commission* CAC Case no. 172/CAC/Feb19, 6 February 2020; supra note 40 s 12A*(1)*.

of the Act.[126] Thirdly, the competition authorities 'must consider the effect that the merger will have on public interest grounds' under s 12A*(3)* of the Act.[127]

(i) Competition assessment

In *AMCU / Competition Tribunal of South Africa* the *Minister of Economic Development and Others / Wal-Mart Stores and Others* and *Metropolitan / Momentum* was consulted.[128] In *Metropolitan / Momentum* the CT applied the test to the loss of employment in a merger where the merging parties had an evidential burden to prove that public interest considerations were not being violated.[129] The two-step test developed in *Metropolitan / Momentum* was used to assess rational process and countervailing public interest.[130] This test was codified into the guidelines, however the guidelines took the test one step further as discussed above in the analysis of *Metropolitan / Momentum*. This illustrates that there is no change in the exercise of judicial power by competition authorities after the guidelines; precedent is still preferred and used.

The nub of the matter in this case refers to the amount of retrenchments that are classified as being merger specific and the employment consideration. The CT distinguished between merger specific employment loss and operational employment loss; operational employment loss being classified as non-merger job loss.[131]Further, in *Minister of Economic Development / Wal-Mart Stores* the CAC contended that a 'retrenchment which takes place shortly before the merger, if consummated, may raise questions as to whether the decision forms part of the broad merger decision making process', thus, if sufficiently closely related to the merger, the merging parties must justify the decision to retrench.[132] Once the Commission assessed the plans, it concluded that 3189 retrenchments were merger-specific.[133]

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[126] Ibid s 12A*(2)*.
[127] Supra note 114 para 25; ibid s 12A*(3)*.
[128] Ibid para 27; *Minister of Economic Development and Others / Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) / Wal-Mart Stores Inc and Another* CAC Case no. 110/CAC/Jul11, 111/CAC/Jul11, 9 March 2012.
[129] Ibid para 28.
[130] Ibid.
[131] *BB Investment Company (Pty) Ltd / Adcock Ingram Holdings (Pty) Ltd* CT Case no. 2/LM/Apr14, 19 August 2014; ibid para 36.
[132] Ibid para 37; supra note 128.
[133] Ibid para 39.

With respect to rationality, the retrenchments were rationally based on Lonmin's financial position and restructuring in order to save the company from business rescue.[134] The CAC believed that Lonmin was not sustainable to ensure long term stability and the cost reductions were not sufficient.[135]

(ii) Weighing the loss of employment considerations

The CAC then looked at the countervailing interest: the 'proper counterfactual'[136] – what is the position if the merger does not occur? There is a risk of 32000 job losses which is significantly higher than job losses if the merger does occur – the merger would save more jobs and employ more individuals in the process.[137] The court concluded that the number of job losses post-merger was rational and was balanced by public interest considerations as it saves the majority of Lonmin's workforce.[138]

(iii) Conditions imposed

Mr Puckrin who appeared for AMCU, criticised the condition relating to profitability and cost: if it fails the merging parties are automatically relieved. He suggested that another alternative be considered since the condition as it stands may 'never come to fruition'.[139] However the CT imposed this uncertain condition and the consultation party in order to fulfil this condition was not before the CAC.[140] Thus it fell outside the control of the merging parties.[141] It becomes difficult, the CAC has no basis to interfere with the condition as it does not have control, and the parties are not before the CAC.[142] This is a noteworthy deference exercised by the competition authorities demonstrating that competition authorities do act within their powers and do not step over other regulators or aspects where they have no jurisdiction or control.

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[134] Ibid para 41.
[135] Ibid para 42.
[136] Ibid para 44.
[137] Ibid para 48.
[138] Ibid para 57.
[139] Ibid para 60.
[140] Ibid para 61.
[141] Ibid.
[142] Ibid.

This case shows that even though competition authorities may be alerted to certain loopholes or uncertainties they are unable to rectify them if it is not within their powers. In that instance, they would rather exercise deference. Further, *Metropolitan / Momentum* was still referred to. It may have been used implicitly where the CAC took the counterfactual into account as well as made a determination on the number of retrenchments being merger-specific as is required by the guidelines. It is clear that, after the introduction of the guidelines, the judicial power of the competition authorities payed due deference to the spirit of the guidelines.

(c) Usage of the guidelines

From the cases analysed above, the guidelines may have been used not explicitly but implicitly. Nevertheless, the guidelines do not demand compulsory use but are merely a guideline which aims to assist competition authorities in deciding on public interest issues in competition matters, as well as lay out the approach that the Commission is likely to follow and information that may be required when assessing s 12A*(3)* of the Act.[143] It can be seen from the cases above that precedent is still followed. This is adequate and acceptable, as precedent should be given more weight compared to guidelines which are not binding on competition authorities. However, where precedent falls short the guidelines should be used in conjunction with precedent, as discussed, specifically on the issue of consultation, as per s 8.1.4.*2*(c) of the guidelines. Thus, codification of precedent is evident in the guidelines with additional safeguards that are not in precedent.

In my considered view, the guidelines have not been given the strict attention that was anticipated when they were formulated by the Commission and that competition authorities were already rooted in their method of analysis but possibly adapted it to some extent when the guidelines were published. The guidelines are not followed rigorously by each competition authority but that regard is had to the objective, purpose and aim of the guidelines when decisions are made.[144] The guidelines should be codified to ensure that competition authorities undertake, consistent with precedent, a thorough competitive analysis. This would allow for more certainty in the public interest consideration of employment and with conditions that may be imposed on mergers.

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[143] Op cit note 6 s 4.1.
[144] Supra note 29 para 99; supra note 114 para 37 and 48; ibid ss 22 and 8.1.2.

VIII POSSIBLE MISUSE OF JUDICIAL POWER BY COMPETITION AUTHORITIES

(a) Observations from the Constitutional Court

Ordinarily, cases are brought before the CC where there are discrepancies in interpretation of the Constitution or legislation; in this case, the Act. The CC has a decisive role to play in competition law to enable a substantive, authoritative interpretation of the judicial powers of competition authorities. To shed light on this aspect, I will analyse CC cases and although they do not deal with mergers, they aid in analysis regarding the proper use or misuse of judicial power of competition authorities.

The *Competition Commission of South Africa v Media 24 (Pty) Limited*[145] case provided four diverse judgments making it complex and unclear to discern its holding relating to the appropriate forum to hear appeals in competition matters.[146] As discussed above, competition authorities are able to decide on labour matters but they are also better qualified to adjudicate economic issues in competition matters better than the courts.[147] The CAC has exclusive and final jurisdiction but the CC also has jurisdiction to hear a matter of general public importance with leave from the CC.[148] Thus, the CC will likely consider an application by the Commission for leave to appeal in the absence of leave from the CAC – direct appeal.[149] The grave socio-economic factors involved in competition matters make it likely that the CC will find jurisdiction to adjudicate on them.[150] Although the CC cases below do not deal with labour matters they are highly relevant to show the supervisory role of the CC in competition matters which may also include labour matters.

In the cases below, the CC granted leave to appeal since each involved matters of general public importance, interests of the public, far-reaching implications and

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[145] *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (5) SA 598 (CC).
[146] Candice Slump 'When does the Constitutional Court have jurisdiction to hear competition law appeals?' (2020) 604 *De Rebus* 19-20.
[147] Ibid at 18.
[148] Ibid at 18-9; Supra note 40 s 63(2).
[149] Ibid at 19; supra note 145 para 51.
[150] Ibid at 22.

reasonable prospects of success.[151] Overall, the CC allowed for an inclusive, generous approach in interpretation, according with the Constitution and the spirit of the Act.

(i) Competition Commission of South Africa v Senwes Limited (2012)

In the *Competition Commission of South Africa v Senwes Limited* ('*Senwes Limited*'), the focus was on anticompetitive conduct which falls within abuse of dominance. This case was brought before the CC because the Supreme Court of Appeal ('SCA') set aside the ruling of the CT finding that Senwes had contravened s 8(c) of the Act by engaging in a margin squeeze.[152] The crux of the matter was the nature and scope conferred on the CT by the Act, when deciding whether the complaint which didn't form part of the referral can be assessed by the CT.[153] This was mentioned previously in this paper as being a drawback.

The Commission challenged the SCA finding that the referral did not cover the complaint relating to s 8(c) of the Act.[154] This calls for the proper interpretation of the Act. Ordinarily, complaints of anti-competitive behaviour are investigated by the Commission before they are referred to the CT, as per s 50 of the Act, if there were no prohibited practice or abuse, the complaint is not referred to the CT – the process ends.[155]

Jafta J opined that the SCA erred when it 'held that the CT considered a complaint which was not covered by the referral' but rather the error was in labelling the conduct as a margin squeeze.[156] The SCA took the view that the CT is a creature of statute, does not have any inherent powers and held that the hearing is subject to the limitation on matters set out in the referral.[157] The referral sets boundaries for the CT.[158] However, the provision states that the CT 'must conduct a hearing into every matter referred to it, but this does not necessarily mean that the CT has no power to entertain a matter not included in the referral'.[159] Thus, the CT is not restricted to the complaint brought to its attention;

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[151] Supra note 145 para 51-5.
[152] *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC) para 11.
[153] Ibid para 13.
[154] Ibid para 21.
[155] Ibid para 22.
[156] Ibid para 39.
[157] Ibid para 46.
[158] Ibid.
[159] Ibid para 48; supra note 40 s 52.

it can hear other aspects of relevance.[160] This authorises the CT to adopt an inquisitorial approach to its hearings.[161]

It is inevitable that this judgment creates uncertainty with regard to the scope and possible charges which a CT may consider.[162] However, charges are no longer limited to those listed in the referral but further charges which are brought to the surface on evidence presented to the CT. *Senwes Limited* remains binding in law and it holds out hope for successful appeals.

In my considered view, it is crucial for each competition authority to understand its powers and functions and to exercise them accordingly. This case implies that the powers should not be given a strict, literal interpretation but rather a functional, purposive and wide one. The CT uses an inquisitorial approach but if the CT is limited or restricted by the referral from the Commission, a thorough inquisitorial approach is not enabled and is undermined.[163] It is evident that the CC did not accept the margin squeeze and that the CT did not overstep or misuse its judicial powers because it was empowered to assess and analyse aspects in the competition complaint besides the referral from the Commission. Significantly, interpretation may vary, but it is crucial to revisit the purposes and objectives of the Act. Oversight by the Commission is effectively eliminated by the CT which however serves as a crucial safety net for the Commission. If the employment consideration was overlooked by the Commission, the CT would be able to explore this aspect and decide on it accordingly.

(ii) Competition Commission of South Africa v Pioneer Hi-Bred International Incorporated (2013)

The crux of the matter in this case lies with whether the CAC has the power to award costs against the Commission on appeal, and in relation to CT proceedings.[164] Ordinarily, competition authorities exercise a ‘degree of autonomy and institutional independence

[160] Ibid.
[161] Ibid para 50.
[162] *Competition Commission of South Africa v Yara South Africa (Pty) Ltd and Others* 2012 (9) BCLR 923 (CC) para 25.
[163] Supra note 152 para 50.
[164] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* 2014 (2) SA 480 (CC) para 2 and 11.

which is consonant with responsibilities'.[165] The Commissioner investigates the proposed merger which is mostly speculative and value-laden.[166] This gives rise to different views. Thus it is an inherent risk in the Act.[167] Nevertheless, it is crucial to allow the Commission 'sufficient institutional autonomy in reaching honest and independent decisions'.[168]

Section 61(2) of the Act gives the CAC the power to award costs against any party in the hearing, however this must be in line with law and fairness which qualifies the CAC's power.[169] The Commission would participate in the CAC proceedings in order to defend public interest aims and to assist the CAC in attaining a balanced perspective.[170]

When the CAC disagrees with the Commission it does not necessarily justify an adverse cost order.[171] Rather the CAC should be sensitive to and should create sufficient space for the Commission to exercise its duties in the way that it deems fit.[172] Deference must be shown at each level where each competition authority can exercise their powers without fear, favour or prejudice.[173] The mere 'zealous defence cannot expose the Commission to an adverse cost order'[174] – this depends on the facts of each case and whether the Commission was found to be 'unreasonable, frivolous or vexatious'.[175]

Section 57 of the Act allows the CT powers to award costs, and each party in proceedings before the CT must pay its own costs. The term 'party' cannot exclude the Commission.[176] The CAC held that if the legislature intended that the Commission can be liable for its own penal costs, the Act would have stated so; because it did not, it is plausible that it is what the legislature so intended.[177] In revisiting the purposes of the Act, the public interest considerations would rarely be raised by the opposing party at the CT stage; but the defence of public interest and the Commission's decision-making

[165] Ibid para 16.
[166] Ibid para 18.
[167] Ibid para 18.
[168] Ibid.
[169] Ibid para 20.
[170] Ibid para 23.
[171] Ibid para 27.
[172] Ibid.
[173] Ibid.
[174] Ibid para 28.
[175] Ibid.
[176] Ibid para 31.
[177] Ibid para 36.

independence allows for the preservation of the own costs rule in the CT.[178] Thus, the CT and CAC is limited in awarding costs in relation to CT proceedings.[179]

This ensures that competition authorities do not overstep each other and exercise their powers with due deference. The CC identifies and rectifies any misuse or overstepping of judicial power in interpreting the Act. Significantly, each level of competition authority is autonomous and they should not usurp each other's powers at different stages.

(iii) Competition Commission of South Africa v Hosken Consolidated Investments Limited (2019)

In this case the dispute relates to the control element of mergers. Hosken Consolidated Investments Limited ('HCI') wanted to increase its shareholding in Tsogo Sun Holdings Limited ('Tsogo') to more than 50 per cent. It is evident that HCI already exerted de facto control over Tsogo in 2014 where a merger occurred, as per s 12(2)*(g)* of the Act.[180]

In 2017, HCI acquired de jure control of Tsogo as per s 12(2)*(a)* of the Act. Even though in theory, it may not be legally necessary to notify the Commission since HCI had figuratively already crossed the Rubicon,[181] it is necessary as a 'matter of courtesy and interest of transparency' because the increase in control involved internal re-structuring which may invoke public interest considerations.[182]

The main issue is twofold: whether the competition authorities took this increase in control into consideration in 2014 when the merger was notified; if they did, there would be no reason to do so in 2017 and whether it was appropriate for the CT to grant a declaratory order.[183] The lapse of time is significant as there is a change in circumstance as well as market structure. Once de facto control is acquired and notified, the parties do not need to seek further control notification.[184] Thus, there is no interpretation issue in notification; the competition authorities exercised their powers accordingly. The

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[178] Ibid para 40.
[179] Ibid para 43.
[180] *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* 2019 (3) SA 1 (CC) para 1.
[181] *Ethos Private Equity Fund IV / The Tsebo Outsourcing Group (Pty) Ltd* CT Case no. 30/LM/Jun03, 3 October 2003.
[182] Supra note 180 para 12-3.
[183] Ibid para 30.
[184] Ibid para 28.

Commission was of the view that the proposed merger in 2017 is considered a new merger as there may be additional public interest issues that should be considered, namely retrenchments.[185] I agree with this position from a practical perspective.

The CT had declined to assume jurisdiction to issue a declaratory order as its jurisdiction is triggered by transactions notified to the Commission.[186] The proposed transaction was not notified, thus the CT lacked the jurisdiction to grant declaratory relief. However, the CAC concluded that ss 27(1) and 58 are wide enough to include a declaratory order and the CT has assumed jurisdiction and has granted it.[187] It was also stated that it would be incomprehensible to accept that the CT has the power to declare a transaction a merger but assert that the CT does not have the power to issue a declaratory order.[188]

Significantly, even though s 12(2)*(a)* of the Act is the bright line provision, sub-sections (b) – (g) are also trigger events, thus sufficiently wide to allow for investigation by the Commission.[189] As above, the CC is mandated to interpret the Act, so if the legislature intended notification when the form of control changed, it would have been explicit in the Act.[190] However, the bright line approach should not restrict the Commission in its investigation where it may not be privy to information or where it suspects potential irregularity[191] during the lapse of time between the two mergers, namely 2014 to 2017. It means that the merging parties may not need to notify but it does not mean that the Commission cannot investigate further, if it deems it fit.[192]

In light of the above, it is apparent that the CT does have the power to be approached directly without notification by the Commission and that the CT has the power to issue a declaratory order.[193]

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[185] Ibid para 19.
[186] Ibid para 22; supra note 40 ss 21 and 58.
[187] Ibid para 26.
[188] Ibid.
[189] Ibid para 47.
[190] Ibid para 54.
[191] Ibid para 58.
[192] Ibid para 59.
[193] Supra note 40 s 27(1)*(d)*.

(b) General observations

Even though it may seem that competition authorities are deciding on labour related issues which may be better suited to be decided by labour authorities in the LC, competition authorities are better equipped and skilled to decide on the effect on employment and economic matters in merger transactions.[194] Bearing in mind the South African dispensation, this competition authority function seems the most efficient, cost-effective and timely arrangement.

However, I believe that if labour experts in merger transactions are chosen to serve on the panel, labour matters will be infused with additional perspectives. Competition authorities have been dealing with labour matters for several years and have proven to have got it correct rather than incorrect for the most part. If a change were to be made it may disturb and cause an imbalance in the smooth functioning of the competition and labour authorities respectively. This may also overburden the labour authorities.

The competition authorities have not misused their judicial powers and in certain instances it may be necessary to go beyond what is literally provided for in the Act and use judicial powers purposively.

IX CONCLUSION

The public interest consideration of employment serves a significant purpose in our economy and in eradicating the scourge of unemployment which South Africa faces. Therefore, it is necessary to give it the attention it merits to ensure that both economic and non-economic goals of competition law are achieved.

From the cases above, it is clear that competition authorities do have the expertise in deciding labour matters in merger transactions. However, precedent is followed rather than using precedent and the guidelines to ensure a more equitable, efficient outcome. Transformation is demanded by the Constitution and by the Act, so the strategic usage of the guidelines should be encouraged. Given the virtually absolute power of the Commission and the possibility of its power-overreach, the guidelines should be codified, particularly concerning provision of all necessary information and substantive consultations by the Commission. Training in the teleological interpretation and

[194] Op cit note 146 at 18-9.

application of the guidelines in merger transactions and public interest considerations should be ongoing and updating.

In the same breath, competition authorities are exercising their powers within their mandate and where there are discrepancies regarding interpretation it is brought before the CC. As seen in the cases above, competition authorities should be accorded due deference and should be able to exercise their powers purposively in line with the Act and the Constitution. The CC elaborates the interpretation of the Act and is binding; thus, the competition authorities have not misused their judicial power in any regard.

The impact of the year-old Covid-19 pandemic was too recent to be grasped, hence it was not considered in this paper. Nor had the Act contemplated any pandemic of this magnitude and all-embracing socio-economic devastation. The scale of rampant unemployment and business closures demands Cabinet's collective inter-ministerial reconstructive action. However, the Commission's responsibility for, inter alia, mergers, preservation of job security and mitigation of unemployment remains, except with the urgent imperative that its discharge be charactorised by greater sensitivity, dynamic insight and strategic vision.

In keeping with the spirit and objects of the Constitution, the Act and the guidelines, the competition authorities can enable South Africa to promote social justice and non-economic goals such as the preservation of employment which will be conducive to a competitive economy and mitigate the destructive effects of unemployment, and in this way contribute to South Africa's social and economic transformative goals.

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