South Africa in context

<table>
<thead>
<tr>
<th>South African Population</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>African</td>
<td>80,7%</td>
</tr>
<tr>
<td>Coloured</td>
<td>8,8%</td>
</tr>
<tr>
<td>Indian/Asian</td>
<td>2,5%</td>
</tr>
<tr>
<td>White</td>
<td>8,1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>55 908 900</strong></td>
</tr>
</tbody>
</table>


### Size of the Economy

**GDP 2015:**

US $314,6 billion

Source: World Bank Group

South Africa, Gross Domestic Product

### Unemployment Rate

**July – September 2016:** 27.1%


### Average Annual Household Income

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>African</td>
<td>US $ 6928</td>
</tr>
<tr>
<td>Coloured</td>
<td>US $ 12873</td>
</tr>
<tr>
<td>Indian/Asian</td>
<td>US $ 20240</td>
</tr>
<tr>
<td>White</td>
<td>US $ 33118</td>
</tr>
</tbody>
</table>


### Gini Coefficient

**2011:** 63.38

Source: World Bank Development Indicators

### GDP growth

**2015:** 1.3%

Source: World Bank Group

South Africa, Gross Domestic Product
History and context: the time before South Africa’s modern competition law

• South Africa’s historic economic policies included state ownership, protection, racial discrimination and import substitution
  • Very strong and racially based industrial policy, coupled with some government sanctioned cartels e.g. cement, liquor, agricultural products
  • Racial discrimination kept labour costs down – majority of population with limited education and skills, job reservation
  • A variety of measures were combined to ensure that blacks were not in business
    • Land was reserved for white ownership (white farmers and businesses were given preferences in subsidies and support programs)
    • Black business were outside the formal economy

• For much of the past century, the economy was controlled by a few diversified conglomerates
  • The conglomerates were largely owned by a few wealthy white families, e.g.
    • The Oppenheimers (De Beers and Anglo American Corporation), with businesses in gold, diamond and other minerals
    • The Rupperts (Rembrandt Group) with business in finance, tobacco and luxury goods

• Strategic industries such as steel, energy and telecoms were run by the state owned enterprises

• Against this background of high concentration, protection and government direction, the first competition statute – Regulation of Monopolistic Conditions Act – was adopted in 1955
History and context: the 1955 Act and the 1979 Act

- The 1955 competition law was underdeveloped, it had no teeth
  - It did not prohibit anticompetitive conduct and did not cover mergers
  - Was administered by a Board of Trade, which had virtually no powers
  - The law provided for an administrative process to examine cases and recommend action, with the standard of analysis being simply “public interest”
  - At most the Minister could proclaim that certain conduct was criminally prohibited, which action was done only once (over 20 years and 18 investigations) in respect of resale price maintenance

- The 1955 Act was replaced by the Maintenance and protection of Competition Act of 1979, which established a Competition Board and conferred merger authority to the Board
  - It largely resembled the 1955 Act, its substantive standard was the undefined “public interest” with a special court to hear appeals (but never actually did)
  - Hardcore cartels were specified as a violation in 1986, violations were treated as crimes, however, there were no prosecutions (except for one negotiated guilty plea)
  - Mergers were secretive and were invariably approved – up until the end of Apartheid

- Then, a new era began with the election of the first democratic government in South Africa in 1994

- The 1979 Act was replaced by the Competition Act of 1998

- Competition reforms part of a the overall democratisation project
- Competition reforms outcome of negotiation between government, business and labour
The Competition Act of 1998: the preamble

• The preamble recites the salient background facts and the motivations of the law:

“PREAMBLE
The people of South Africa recognise:
That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.
That the economy must be open to greater ownership by a greater number of South Africans.
That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy.
That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans...”

• States that “the economy must be open to greater ownership by a greater number of South Africans” thus capturing concerns about equity and justice
• Describes restrictions on free competition as “unjust” rather than as “inefficient”
• Does recognise the problem of inefficiency, and notes that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that “an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans
The Competition Act of 1998: the goals

- The primary, general purpose, to “promote and maintain competition,” is supplemented by six particular sets of goals:
  - To ensure that small and medium sized enterprises have an equitable opportunity to participate in the economy.
  - To promote efficiency, adaptability and development of the economy.
  - To promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.
  - To provide consumers with competitive prices and product choices.
  - To promote employment and to advance the social and economic welfare.
  - To expand opportunities for South African participation in world markets.
The Competition Act of 1998: some of the prohibitions

• Some of the principal prohibitions in the Competition Act are the following:

  • Sections 4 and 5 prohibit agreements and decisions that constitute restrictive practices
    • Hard core cartels and minimum resale price maintenance are prohibited per se
    • Other agreements are prohibited if they have the effect of substantially preventing or lessening competition

  • Under Section 12, the Commission may grant an exemption for certain specified public interests:
    • promoting exports
    • promoting the ability of small businesses or those controlled by historically disadvantaged persons to become competitive
    • change in productive capacity necessary to stop decline in an industry
    • economic stability of an industry designated by the minister

  • Sections 7 and 8 define dominance and prohibit abuse of a dominant position. A firm is dominant if it has at least 45% of the market
    • A number of prohibitions are listed in section 8, including excessive pricing to the detriment of consumers, refusing to give a competitor access to an essential facility when it is economically feasible to do so, inducing a supplier or customer not to deal with a competitor, selling below average variable costs,…

  • Section 9 prohibits price discrimination by a dominant firm if it is likely to have the effect of substantially preventing or lessening competition, unless it is cost-justified or in response to changing market conditions
The Competition Act of 1998: some of the prohibitions ...

• Some of the principal prohibitions in the Competitions are the following:

  • Section 12(a) prohibits mergers likely to substantially prevent or lessen competition unless outweighed by efficiency gain or justified on certain public interest grounds

  • The public interest grounds are specified as the effect on:
    • a particular industrial sector or region,
    • employment
    • ability of small businesses or firms controlled by historically disadvantaged persons to become competitive
    • ability of national industries to compete internationally.
The Competition Act of 1998: the institutions

• The Competition Act sets up three institutions, to be directly involved in its application
  • The Competition Commission (“Commission”)
  • The Competition Tribunal (“Tribunal”)
  • The Competition Appeal Court (“CAC”)

CAC
{Reviews Tribunal decisions}

Tribunal
{Adjudicates and reviews Commission decisions}

Commission
{Investigates and prosecutes}
What has been the record?

• In enforcing competition law, the Commission has prioritized certain sectors (e.g., food & agro-processing, healthcare, construction & infrastructure, energy and intermediate industrial products) and types of conduct (e.g., cartels)

• Cartels benefited from prioritization
  • Aided by the corporate leniency programme (“CLP”) which provides for immunity on basis of first through the door

• The **Commission** has been very successful in uncovering and prosecution cartels
  • Bread
  • Milling – flour, maize meal
  • Eggs
  • Edible fats and oils
  • Construction
  • Fertilizer
  • cement

• Won confidence of the public – but also calls for more severe punishment and personal responsibility
• From April 2016 cartel conduct has been criminalized
Cartel Case Study (the bread cartel)

• The uncovering of the bread cartel followed from information from a bread distributor who received notices that prices were going to increase at the same time and amount with apparent trigger.

• He approached the Commission, which investigated and found that the 4 bread/milling companies were fixing the price of bread.
  • Premier Foods, one of the baking/milling companies, applied for and got leniency from the Commission.
  • In view of Premier Foods’s revelations, co-conspirators Tiger Brands and Foodcorp confessed, entered into settlement.
  • One firm, Pioneer Foods, lost the case before the Tribunal in contested proceedings.

• The Commission investigation of the bread cartel uncovered further cartels in the value chain and related products by the same firms - flour (input into a staple food, bread) and maize meal (a staple food).

• Commission also found that cartel reinforced regional dominance through predatory pricing.
  • Introduction of fighter brand sold below average variable costs to drive a smaller bakery out of the market.

• The bread cartel yielded the highest penalties at the time and led to an unprecedented publicity of competition law in South Africa.

• Remedies included margin reduction and creation of a fund to sponsor entry into markets where damage was caused.
Cartels (the bread cartel)
Cartels

AN ACT OF KINDNESS ON MANDELA DAY

GIVE GOVERNMENT CORRUPTION A BREAK...

...AND GIVE THE STAGE TO THE PRIVATE SECTOR!

CONSTRUCTION INDUSTRY
In February 2016, a World Bank report showed that competition policy in South Africa has brought substantial benefits to households, especially the poor. By tackling cartels in the wheat, maize, poultry and pharmaceuticals markets — goods that amount to just over 15% of consumption basket of the poor in South Africa —.

Estimated that **these actions have reduced overall poverty by at least 0.40 percentage points.**

**Some 202,000 individuals were made better off** and lifted above the poverty line through lower prices that followed the action taken against these four cartels.

The **savings put an additional 1.6% back into the pockets of the poorest 10 percent of the income spectrum** by raising their disposable income.
Abuse of dominance and excessive pricing

• There have been several important excessive pricing cases in South Africa
• The first was the Hazel Tau case, concerned excessive pricing of the cocktail of drugs (patented drugs) needed by individuals with HIV/AIDS in the midst of the horrific epidemic, along with refusal of access to an allegedly essential facility
• The price of the cocktail was more than twice above costs, and was prohibitive to those who needed the drugs to save their lives

  • Neither the Tribunal nor the CAC ever had the chance to hear the case and grapple with the legal questions and possible duties because, when required to open their books to reveal their costs, the pharmaceutical companies (GlaxoSmithKline and Boehringer International) settled

• GlaxoSmithKline and Boehringer International agreed to:
  1. grant licences to generic manufacturers;
  2. permit the licensee’s to export the relevant ARV medicines to sub-Saharan African countries;
  3. where the licensee did not have manufacturing capability in South Africa, permit the importation of the ARV medicines for distribution in South Africa only, provided all the regulatory approvals were obtained;
  4. permit licensees to combine the relevant ARV’s with other ARV medicines; and
  5. not require royalties in excess of 5% of the net sales of the relevant ARV’s.

• Upon settlement, prices fell some about 50% others 68%
Abuse of dominance and excessive pricing

- Two more recent cases (AMSA and Sasol) focus on excessive pricing in key industrial inputs

  - Both AMSA and Sasol enjoy monopoly positions in strategic input product markets, but did not earn the monopoly, it was handed to them by the State
    - Sasol is the petrochemicals company producing polymers partly as a by-product of coal to liquids technology
    - AMSA a steal monopoly with access to iron ore at lower and lower cost

  - There are no easy prospects of eroding their monopoly positions and there concerns about their pricing being excessive

  - In the Sasol case, tried for years to prosecute but failed
    - = input exported, finished products imported which results in job losses

  - In the AMSA case, tried case lost
    - = cartel cases against AMSA offered a second bite, the recent settlement with AMSA helped = regulation / price caps

  - The AMSA and Sasol cases represent a lost opportunity because of the importance of polymers and steel for job creation and industrialization

- The key challenge relates to the definition of excessive pricing

- Calls for a re-look at the abuse of dominance provisions especially the definition of excessive pricing in light of the objective of wanting to promote SMEs and industrialization
Abuse of dominance and exclusionary practices

- Exclusionary practices by a dominant firm prevent entry ad expansion of rivals and limit access to the economy

- For example Nationwide Poles, owned by Mr. Foot, was a small producer of poles for grape vines, which were weatherproofed by wood preservatives
- His supplier of the preservative, creosote, was Sasol, a dominant firm

- Sasol denied Mr. Foot the discount on a necessary input that it gave to his big competitors
  - With the discount, Mr. Foot and other small firms like him could compete
  - Without it, they would be forced to leave, or not enter, the market
  - The price difference was admittedly not cost-justified

- **The Tribunal** ruled for Mr. Foot
- **The CAC** said no, Mr. Foot had to show harm to competition
  - The higher price to Mr. Foot may have been unfair, but it was not shown to be anticompetitive in terms of making any difference on the market

- But the Competition Act is clearly concerned with promoting market access for SMEs, an important mechanism by which it seeks to do so is by ensuring ‘equitable treatment’
Abuse of dominance and exclusionary practices

- Telecoms – formerly state owned fixed line monopoly excluded rivals in the downstream internet services
- Media – one of the members of a national oligopoly abused its position through predatory pricing in community newspapers through predatory pricing – introduction of a fighter brand
- Senwes – exclusion through margin squeeze in grain storage
- Airlines – state owned airline introduced incentives inducing travel agents not to deal with rivals
- Fertilizer - Sasol dominant upstream favored its downstream retailers over rivals
- Poultry – exclusive dealing over parent stock that excluded rivals at different levels
Selected case law: mergers and public interest

- Perhaps the most celebrated merger case involving public interest is the Wal-Mart acquisition of Massmart

- **The Commission** found that the merger posed no competition problems and approved the merger
  - Wal-Mart previously had no presence in South Africa

Environment prior to entry

- Worlds largest corporation, revenue larger than SA GDP
- About three times bigger than the closet retail rival
- History of a bad relationship with trade unions
- Controversy over its effect on local communities
- Entry preceded by retrenchments at the target firm
- Poor Engagement with stakeholders upon entry
- Government growth path sets employment targets
- Merger marked Wal-Mart’s first entry into Africa
- Formal market – four supermarkets groups with 65% of market
- Most with global expansion ambitions, especially into Africa
- Business model most similar to Wal-Mart and one of the most profitable
Selected case law: mergers and public interest

Response from GVT
• Government concerned that Wal-Mart will use its global reach to source products globally, displacing local manufacturers and jobs
• Set up a panel to assess the impact
• Tried to negotiate a ‘Social Accord’ with Wal-Mart covering local procurement and labour issues
• Wal-Mart objected to being subjected to local procurement requirements on discriminatory basis
• When negotiations failed, government belatedly intervened in the proceedings before the Tribunal, joining trade unions

Response from Walmart
• Argued that its entry will bring prices down
• Denied that it had a global sourcing strategy – argued that its strength lied in leveraging on its logistics efficiencies
• Argued that conditions on local supplies will offend WTO commitments and stifle competition
• Wal-Mart proposed a package of remedies, most importantly including an investment of about US$10 million to enhance the capacity of the small suppliers so they could potentially become part of the Wal-Mart value chain, as well as acceptance of the current union agreements
Selected case law: mergers and public interest

The Tribunal

• The Tribunal accepted that imports were likely to increase, but whatever losses will would be outweighed by consumer benefits of lower prices

• Accepted and confirmed merging party's offer to create a supplier development fund - will alleviate whatever concerns might be there

• The Tribunal took a narrow view of its jurisdiction over “public interest,” stating:
  • “Our job in merger control is not to make the world a better place, only to prevent it from becoming worse as a result of a transaction.”

• The Tribunal examined the adequacy of the package in view of the public interests raised and found the package adequate and approved the merger with conditions
Selected case law: mergers and public interest

• But the complaining stakeholders were not satisfied, they wanted more
• the Ministers filed a petition for review
• the union appealed

The CAC
• The CAC permitted the merger and affirmed many of the Tribunal’s conditions
  • but it reversed as to retrenchments (requiring that the 503 workers laid off in early stages of the merger negotiations be rehired)
  • and most notably it reversed as to the sufficiency of the investment fund.

• It ordered a study and found the promised fund insufficient to build capacity of the small suppliers

• It doubled the amount to be placed in the fund, made the fund a mandate rather than a voluntary undertaking and set up a process and procedure for stakeholders’ administration of the fund
The Future

1. The relevance of competition policy in the ongoing transformation of the South Africa
   • Can it address cartelization + monopolization as gate keeper to economic participation
   • Can it contribute to reduction of inequality
   • General feeling that corporations have been punished, but questions about deterrence effect
   • Introduction of criminalization with huge impact on the CLP program

2. With South Africa entering a competitive phase electoral politics – what chance for populism?
   • With no change in market structure since democracy and rising inequality, social justice on the agenda
   • Competition policy popular, its use likely to be further extended to constrain power of corporates
   • 1994 consensus brokered by Nelsom Mandela no longer holds

3. With growing protectionism and anti-establishment sentiments in the West – what response can we expect from the countries of the South
The Future

• The South African competition system has matured into one of the most outstanding and even path breaking in the developing world

• The language of the Competition Act and jurisprudence of Tribunal and the CAC are ahead of the curve

• South Africa’s experience and experiment with competition law provides a road map in the world of integrating equity, justice and efficiency

• Judge Dennis Davis made the following remarks at last year annual competition conference in South Africa:
  
  “...In key areas of cartel regulation, abuse of dominance and merger control, a developing jurisprudence has taken place which, notwithstanding some of the errors that have been committed in the past (not least of all by the Competition Appeal Court), it is possible that both from the perspective of economic growth and greater equality, competition policy and law can play a significant effect.”

• Professor Eleanor Fox, correctly points out ... “if the institutions of competition law and policy are not for the outsider; for the people without connections and privilege; who is”

• No future for competition policy in the developing world if it has no role in reducing inequality – the future we wanted is now