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**A LEGAL AND COMPARATIVE ANALYSIS OF THE
INDEPENDENCE OF THE SWAZILAND COMPETITION
COMMISSION**

BY

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Thesis presented for the approval of senate in fulfillment of part of the requirements for the award of a Master of Laws Degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

Words: 25,960

Supervisor: Professor Dennis Davis – Judge President

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DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of a Master of Laws Degree dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ACKNOWLEDGEMENTS

I acknowledge with much gratitude the assistance and guidance extended by Judge Dennis Davis while I was preparing this work. It is those incisive comments that have helped me shape this research in the right direction. Thank you for taking your time in your already packed schedule to supervise my work. For that, I will forever be grateful. Thank you kindly.

To my wonderful family, thank you so much for allowing me to make my dream come true. Indeed, yet another dream has made its best to come true.

I would be amiss not to thank my colleagues at the University of Cape Town for giving me the support and encouragement to keep this project going until I had put together the last chapter. To all of you out there ‘Cheers’.

The biggest ‘thank you’ is reserved for my husband, for everything.

I salute everyone who contributed in his or her special way to this good course. I love you all and I am celebrating all of you with this achievement.

DEDICATION

To God Almighty

Dear God. It's me again, thank you for guiding me through and keeping me in good health while preparing this work.

LIST OF ABBREVIATIONS

CAC	Competition Appeal Court
EC	European Union
FTC	Federal Trade Commission
ICN	International Competition Network
IRA	Industrial Relations Act
EU	European Union
SACU	Southern African Customs Union
SA Commission	Competition Commission of South Africa
SA Act	Competition Act of South Africa
SADC	Southern African Development Community
Swazi Commission	Swaziland Competition Commission
SPTC	Swaziland Post and Telecommunications
US	United States of America

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CHAPTER ONE: INTRODUCTION

1. Background to research

Swaziland recently established a framework for enforcing competition law when it passed the Competition, Act 8 of 2007 (Swazi Competition Act).¹ The Act provides for the establishment of the Swaziland Competition Commission (Swazi Commission), a statutory body responsible for the administration and enforcement of the Competition Act.² One of its major objectives is to promote a secure and robust economic competition and consumer protection.³ Following its inception in 2007, the Swazi Commission has dealt with mergers and the question on the legality and enforcement of exclusionary clauses in contracts. These clauses are most prevalent in contracts for lease on property seeking to establish large shopping malls, as we shall see later from the case of *Pick`n Pay (Pty) Ltd v The Gables (Pty) Ltd*.⁴

The adoption of a comprehensive competition law framework by Swaziland is relatively a new phenomenon and like other developing countries, the Swaziland competition regime presents some institutional challenges. Some of these challenges relate to the institutional structure of the Commission and its independence. Whether the independence of the Commission can be guaranteed in view of the manner it is constructed as well as the relationship between the Swazi Commission and the courts and finally, the jurisdictional powers of the Commission in the execution of its duties and functions in terms of the Act. These challenges taken together have a potential of undermining the independence and effectiveness of the only institution that has the mandate to create and ensure free and transparent markets in the country.

This treatise seeks to analyse these challenges as presented by the Swaziland competition regime. A comparative analysis between Swaziland and the South African competition regime will be carried out in order to provide somewhat

¹ Swaziland Competition Act 8 of 2007, An Act to provide for the encouragement of Competition in the economy by controlling anti-competitive trade practices, mergers and acquisitions, protecting consumer welfare and providing for an institutional mechanism for implementing the objectives of the Act and other matters incidental thereto. Available at www.swazilii.org/sz/legislation/act/2007/8, accessed on 10 July 2014.

² Section 6 of the Swazi Competition Act.

³ The official newsletter for the Swaziland Competition Commission, April 2014, available at <http://www.compc.co.sz/images/newsletter.pdf> accessed on 15 August 2014.

⁴ *Pick`n Pay retailers (Pty) Limited v The Gables (Pty) Limited* case No: (1639/2012) [SZHC].

practical solutions to the challenges that Swaziland is confronted with. It is also aimed at setting out proposal for the reform of the competition framework of Swaziland to incorporate the bifurcated agency model as opposed to the integrated agency model it is currently structured on. Under the bifurcated agency model the Commission investigates all competition violations and then hand over the cases to a specialised tribunal for adjudication and enforcement.⁵ In the contrary the integrated agency model entails that the Commission investigates and make the first -level adjudication.⁶ The decision of the Commission can then be reviewed or appealed by the courts. This is the model adopted by Swaziland according to the Act.⁷

1.1 The need for the reform

It is recognised that competition law and policy has a crucial role to play in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance by the government.⁸ Competition law should create and maintain a free and competitive business environment in both the national product and geographic market, and leads to the enhancement of economic efficiency at the firm level and the economic welfare of consumers. In the South African context it has been observed that the fight against exploitative firms largely feeds to the fight against poverty and inequality.⁹ This view is in line with the objective of competition policy in many jurisdictions including Swaziland, which is the protection of consumer welfare.¹⁰ There is also consensus in the United States jurisprudence on this position as Fingleton and Nikpay points out that;

'It may seem somewhat unusual to a US audience that the underlying rationale of competition policy is still being debated in other jurisdictions...in the US the principal antitrust ideologies have, by in large, converged on the idea that the protection of

⁵ EM Fox and MJ Trebilcock *The Design of Competition Law Institutions: Global Norms, Local Choices* 1sted (2013) 5.

⁶ Ibid.

⁷ See in this respect Sections 13, 14 (6) and 40 of the Swazi Competition Act.

⁸ J Hurungo and M Tekere 'Multilateral Framework for Competition Policy; Where do Consumers Stand?' 10 April 2002, available at <http://www.Consumersinternational.org/news-and-media/resources-zone/multilateral-framework-for-competition-policy-where-do-african-consumers-stand/>, accessed on 29 August 2014.

⁹ Fox and Trebilcock op cit (n 5) 266.

¹⁰ See in this respect section 2 (b) and (c) of the Competition Act of South Africa,

consumer welfare is antitrust ultimate purpose.¹¹

Competition brings about efficiency through enhanced inter-firm rivalry, limiting anti-competitive behaviour in the market as well as prohibiting government-led market distortions.¹² The goal of competition policy should always be to benefit society as a whole by ensuring that economies work efficiently in permitting consumers to decide and communicate what products and services they want, and sellers to respond to their demands as competitively and inexpensively as possible being aided in whole by the legislations and institutions formed specifically for that purpose.¹³ Competition policy in the global world seeks to offset monopoly power and inefficient government regulation.¹⁴ Therefore, the regulatory body should appreciate the role that it can play in the promotion of a balanced competition policy which is favourable to both competitors and consumers.¹⁵

In view of this background, the prime purpose of this dissertation is to explore and analyse the Swaziland Competition framework in order to foster a way in which it can be improved to fully achieve these overarching objectives. To achieve this, the paper analyses three broad issues which relates to the independence of the Swazi Commission, the scope of its jurisdiction and the implementation of its decisions. It also investigates the role of the courts in the enforcement of competition law in the country. Finally, the paper explores areas which requires action and propose strategies that should be adopted and make the necessary proposals for institutional reform in order to promote a coherent and responsive competition regime.

¹¹ J Fingleton and A Nikpay 'Stimulating or Chilling Competition: International Antitrust Law and Policy' March 2009, available at http://www.jurispub.com/cart.php?m=product_details&p=9157, accessed on 18 August 2014.

¹² Hurungo and Tekere op cit (n 8).

¹³ Ibid.

¹⁴ DFID Competition Assessment Framework: 'An Operational guide for identifying barriers to competition in Developing Countries', January 2008, available at <http://www.oecd.org/daf/competition/reducingregulatoryrestrictionsoncompetition/46192459.pdf>, accessed on 16 August 2014.

¹⁵ Ibid.

1.2 Objectives of the paper

The paramount objective of this paper has already been placed on limelight above, however, it is necessary on this introductory chapter to highlight and demonstrate in details the three challenges which this paper seeks to address. In as much as Swaziland competition regime is still young, it is widely accepted that fair competition in markets is crucial for economic and social development, and for alleviating poverty.¹⁶

On the other hand, anti-competitive practices and policies are common, and their adverse effects include diminishing the opportunities for innovation and growth, and making consumers worse off.¹⁷ In that note, Swaziland as a developing country need to identify and address anti-competitive arrangements and practices in both the private and public spheres. The best way in which Swaziland can achieve this goal is by addressing issues that may impair the independence and effectiveness of the Swazi Commission. It is the objective of this research to highlight and analyse those challenges. The section below list and briefly explains the challenges which this dissertation seeks to address.

1.3 The Independence of the Swazi Commission

The Act stipulates that, ‘the Commission shall be independent from control of any person, including but not limited to any statutory body, government or any other entity in the discharge of its functions’.¹⁸ However, the composition of the Commission indicates the opposite; it cannot be entirely independent considering that a significant number of the representatives of the Commission are government officials appointed by the Minister.¹⁹ These representatives are nominated by their institutions or various ministries²⁰ and then appointed by the Minister.²¹ The Minister

¹⁶Ibid.

¹⁷ Ibid.

¹⁸ Section 7 of the Swazi Competition Act.

¹⁹ Section 8 (1) (a-i) of the Swazi Competition Act.

²⁰ Note that section 8 (1) provide for the list of Members of the Commission and these Members should come from various institutions and government ministries, viz; Ministry responsible for Enterprise, Finance, Economic Planning and Development, Swaziland Chamber of Commerce and Industry, Economics Association of Swaziland, Swaziland Consumers Association, Swaziland Institute of Accountants and Law Society of Swaziland.

²¹ Section 8 (2).

is also vested with the powers to appoint any other member by virtue of that person's knowledge of or experience in economics, industry, law, consumer affairs or the conduct of public affairs.²²

The structure of the Swaziland competition framework entails that a single agency, the Competition Commission undertakes the investigative,²³ enforcement,²⁴ and adjudicative functions on all matters arising from the Competition Act²⁵ and has the power to make decisions and provide remedies.²⁶ This is the essence of the Integrated Agency Model.²⁷ The Secretariat is the investigative arm of the Commission²⁸ and the Board adjudicates, this is the same entity (the Commission). We shall see later from the decision of the Supreme Court of Swaziland in which it interpreted section 40 of the Swazi Competition Act and subsequently declared that, decisions and orders of the Commission are only appealable to the High Court and no further remedy shall be available to an aggrieved party thereafter.²⁹

This form of an institution which is constituted by government officials was however, frowned upon by the World Bank in its report on building institutions for markets,³⁰ pointing among other reasons that it has the potential of undermining the independence of a Competition authority. The World Bank suggested in its report that the head of the competition authority should be appointed by a committee or parliament rather than by the President, Prime Minister or Minister, and that the competition authority should function independently from a government ministry and have its own budget.³¹ It further noted that the independence of competition authorities may be more important in developing countries than it is for industrialised countries, where transparency and the checks and balances that are put in place tends to protect the independence of the authority.³² Trebilcock and Iacobucci correctly articulated this point and had the following to say;

²² Section 8 (1) (i).

²³ Section 11 (2) (a).

²⁴ Section 14 (6).

²⁵ Section 13 (1).

²⁶ Section 11 (2) (b).

²⁷ Fox and Trebilcock op cit (n 5) 5.

²⁸ Section 18 of the Swazi Competition Act.

²⁹ *Eagles Nest v Swaziland Competition Commission* Case No: 1/2014 [SZSC] 39.

³⁰ The World Bank 'World Development Report: Building Institutions for Markets' 2002, at 142. available at <http://www.ctc-health.org.cn/file/2009083127.pdf>, accessed on 24 August 2014.

³¹ *Ibid.*

³² *Ibid.*

'It is difficult to defend institutional independence without some form of accountability, for instance with respect to appointments, budgetary allocations, financial expenditure performance review and periodic mandate'.³³

It is such challenges that this dissertation seeks to address in so far as the Independence of the Swaziland Competition regime is concerned. In doing so, a comparative perspective with the South African Competition Commission will be explored and it shall be argued that the structure of the Competition Commission of South Africa³⁴ is ideal for guaranteeing the independence of the Commission and should be followed by the Swazi Commission. This argument however, is not to suggest that competition agency designs should be seen as a one size fits all, but rather focusing on the model that can work in Swaziland while considering all the peripheral forces that can render the present structure of the Swazi Commission not independent and thus ineffective.

1.4 The enforcement of the Commission`s decisions

The Act provides no direct recourse to the courts except on the stage of appeal where the party is not satisfied with the Commission`s decision, in which case the matter will be referred to the Court.³⁵ The Act provides that the Commission shall have power to issue orders or directives it deems necessary to secure compliance with the Act or its decisions, and any person aggrieved by a decision of the Commission made under the Act or under any regulations may, within thirty days after the date on which a notice of that decision is served on that person appeal to the High Court.³⁶ This provision has the effect of rendering the Commission the final arbiter of all competition matters if the decision is not opposed or challenged by any of the parties involved on any ground that would necessarily give rise to an appeal.

It is therefore argued in this paper that this kind of competition regulation significantly deters the degree of responsiveness. This approach as adopted by the Commission, it will be argued that it is in conflict with the rule of natural justice and procedural fairness as it makes the Commission a judge in its own cause. The

³³ MJ Trebilcock and EM Iacobucci 'Designing Competition Law Institutions: Values, Structures and Mandate' (2010) 41 *Loyola University Chicago L J* at 457, available at <http://www.lawcommons.luc.edu/luclj/vol41/iss3/5>, accessed on 27 August 2014.

³⁴ Section 20 (1), (2) and (3) of the South African Competition Act No 89 of 1998.

³⁵ Section 40 of the Swazi Competition Act.

³⁶ *Ibid.*

opportunity to be heard by an impartial decision -maker forms the foundation for this rule.³⁷ This rule applies whenever the rights, legitimate expectation or property of the particular individual will be affected by the decision.

This paper will advocate for the South African approach in which the function of the Commission is mainly to investigate and refer matters to the Competition Tribunal for adjudication in which the Commission can also appear as a party,³⁸ not as a final arbiter of all the matters as in the case of the Swazi Commission. As to the enforcement of the decisions, the Competition Act of South Africa (SA Act) restrictively makes that the duty of the Competition Tribunal and not the Commission itself.³⁹

1.5 The extent of the Swazi Commission's decision making powers and its challenges to the regulation of competition in the country

In terms of the provisions of the Swazi Competition Act, the Commission has wide jurisdictional powers to carry out investigations either on its own initiative or at the request of any person to determine if an undertaking is engaged on any anti – competitive trade practices.⁴⁰ Depending on the findings, the Commission has the sole jurisdiction either to adjudicate or abandon the matter thus making a final determination of the matter, irrespective of whether that complaint was on its own instance or at the request of a complainant.

This approach has the greatest potential of giving rise to a conflict of interest when considering the composition of the Commission. It has the potential of over enforcement as well as under enforcement of competition in that, the Commission can be motivated by varying considerations and reasons to pursue other matters with less interest on some matters. Where the Commission for any reason is less interest in pursuing a particular case that can mean an end to it even where there is a genuine case of a violation.

³⁷ G Fick *Natural Justice; Principles and Practical Application* 2ed (1979) 26.

³⁸ Section 21 (1) (g) of the SA Act.

³⁹ Section 27 (c) of the SA Act, this provision is in line with the provisions in the long title of the SA Act.

⁴⁰ Section 11 (2) (a) of the Swazi Competition Act.

This is contrary to the South African situation where a complainant can refer a matter direct to the Tribunal in the event the Commission refuses to refer or deal with it.⁴¹ With such a large number of government affiliated enterprises in Swaziland and the significant number of government representatives in the Commission (threatening its independence), a conclusion that the Commission may be slow on taking complaints where these enterprises are involved is not too far-fetched. The structure of the Swazi Commission therefore has the potential of rendering the Commission ineffective in building free and transparent markets in the country hence, the investigation into the jurisdiction of the Commission is to expose these inefficiencies.

Complicating this problem further is the manner in which the Supreme Court in the *Eagles Nest* case⁴² interpreted section 40 of the Act as ousting its (Supreme Court) jurisdiction and limiting the High Court jurisdiction only to appeals. This means that a complainant cannot bring a complaint to the High Court as a court of first instance where the Commission refuses to consider that matter hence, the overarching implications of this set up is ineffective competition enforcement.

This paper therefore will propose that the extend of the Swazi Commission's jurisdiction should be as far as to allow it to investigate and evaluate alleged contravention of the Act, and if so necessary, refer the matter to an independent tribunal or court for adjudication. It will further propose an amendment to the Act to include provisions which will allow a complainant to bring a case to the High Court where the Commission has declined to take up or refer the matter as is the case in South Africa.⁴³ This is important in ensuring the effectiveness and independence of the Commission.

⁴¹ See in this respect the case of *Mittal Steel South Africa Ltd v Harmony Gold Mining Company Ltd (70/CAC) [2009] ZACAC*, where the Commission issued a notice of non – referral of the complaint and the complainant (Harmony Gold) relying on section 51 (1) of the SA Act, referred the matter to the Competition Tribunal. Available at <http://www.saflii.org/za/cases/ZACAC/2009/1.html> accessed on 21 September 2014.

⁴² See (n 28 above).

⁴³ See (n 40 above).

1.6 The comparative methodology

This study will make extensive use of the comparative method in order to achieve the following:

- i. Assess the competition framework of Swaziland against established principles for ensuring an independent and effective competition regime, as found in the vast literature on the design of competition law institutions in developing countries.
- ii. Examine legislative trend and principles from jurisdictions (but mainly South Africa) that favours the bifurcated agency model with the aim of recommending the incorporation of those principles into the Swaziland framework.

The selection of South Africa for purposes of the comparative analysis is based on two factors, *viz*, similarity of legal systems⁴⁴ and economic relations⁴⁵. As a result of the similarities of the legal systems of these two countries, it is no surprise that statutory enactments in Swaziland are to a very large extent a resemblance of the South African ones. Equally to that, Swaziland's major trading partner is South Africa. It is reported that about 90 per cent of imports into Swaziland are from South Africa and about 70 per cent of Swaziland's exports go into South Africa.⁴⁶ These scenarios make the need for convergence of competition enforcement between the two countries even more wanting.

⁴⁴ P Wood *Principles of International Insolvency 2ed* (2007) 18. The South African legal system is the same as that found in Swaziland, Botswana, Namibia, Lesotho and Zimbabwe, These countries have in their jurisdictions the mixed legal system known as the Roman Dutch Common law.

⁴⁵ These two countries are both members of the Southern Africa Customs Union (SACU) and a number of bilateral trade agreements established under the auspices of the Southern African Development Community (SADC).

⁴⁶ T Langa (CEO of the Competition Commission of Swaziland) '*Competition Law and Policy in Swaziland*': An address to the Small States Network on Economic Development in collaboration with the Competition Commission of Namibia, 26 July 2010, available at <http://www.ssned.org/file.aspx?f=405>, Accessed on 16 August 2014.

1.7 Outline of the Dissertation

This dissertation is divided into five chapters. Chapter one is the introductory chapter setting out the research questions, justification and methodology for the research. It also sets out the scope of this work.

In chapter two, a study of the legal framework for competition in Swaziland will be carried out to determine if the independence and effectiveness of the structure on its entirety can be defended. An in depth discussion of the relevance of the due process norms in the composition of the Swazi Commission will be articulated in this chapter.

Chapter three seeks to investigate the role of the courts in the national competition regulation framework, and the extent to which courts can interfere with the decisions and powers of the Commission. This chapter will focus mainly on the decision of the Supreme Court in the case between Eagles Nest and the Swazi Commission in which the court sought to limit the court's power in the determination of competition matter in the country. A critical analyses of the cases already dealt with by the Commission will be carried out in order to justify any finding.

Chapter four will provide a comparative perspective of the framework and competition practices between Swaziland and South Africa, with the main focus of the comparison being on the model for institutional design. This chapter will further serve as a reference for the proposal for redesigning the competition agency and amendment of the Act.

Chapter five will reflect the conclusion of the research most importantly lessons that can be learned from the comparative discourse and incorporated into the Swaziland framework, the limitations of the competition framework of Swaziland and the possible approaches that may be implored to address those limitations. This chapter will also provide recommendations on areas that require reform.

1.8 Conclusion

The aerial view of this dissertation has been laid out in this chapter illustrating the importance and the need for a proper design of a competition law

institution, especially in developing countries like Swaziland, and the challenges that can arise if institutions are not properly constituted. It has put into perspective the challenges that the competition framework of Swaziland suffers from and further highlighted the ideal model to be followed most importantly by developing countries, and Swaziland in this instance being one of those.

CHAPTER TWO: THE STRUCTURE, COMPOSITION AND INDEPENDENCE OF THE SWAZILAND COMPETITION COMMISSION

2. Introduction

It has already been highlighted in the introductory chapter that Swaziland has until recently not been enforcing competition law in the strict sense. The coming into force of the Competition Act in 2007 saw a renewed focus for competition regulation in the country. Like any other new initiative, it has its own challenges. This chapter provides a broad overview of the framework, structure and composition of the Competition Commission of Swaziland (Swazi Commission). It focuses primarily on the question of the independence of the Swazi Commission from political interference in view of the way the Commission is constituted. The procedure for the investigation and adjudication of competition complaints will be given more scrutiny in this chapter in order to determine whether the Commission is likely to be effective in the execution of its mandate.

As posited by other commentators,¹ the Swazi Commission have two overarching areas of responsibility in terms of the Act, *viz*, the investigation² and adjudication of complaints of prohibited practices, and the control of mergers.³ The Commission however, has another responsibility of advocacy under the Act,⁴ which at least has limited effect on the independence of the Commission compared to the former. Be that as it may, advocacy remains and should be an important aspect for the Commission as a new authority,⁵ especially in creating awareness within the business society on how to conduct business in a competitive way and not be caught off guard on competition violations, thus ensuring that a competition culture is accordingly developed within the Swaziland economic spheres. It is argued that

¹ M Brassey et al *Competition Law* 1ed (2002) 286, postulating that generally competition authorities have two broad areas of responsibilities, namely, investigation of complaint of prohibited practices and the control of mergers.

² Section 11(2) (a).

³ Section 11(2) (b).

⁴ Section 11(2) (d-g).

⁵ M Gal 'The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries' (2004) *New York University Law and Economics working Papers*. Paper 10 at 17, available at http://www.lsr.nellco.org/nyu_lewp/10, accessed on 20 September 2014.

competition advocacy, ie, those activities that are conducted by the competition authority which are related to the promotion of a competitive environment by means of non-enforcement are considered to be the most important task of competition agencies in developing countries.⁶ Fingleton and Nikpay correctly argue that prevention of harm through compliance is better than enforcement actions after harm has already been done, both in terms of the costs incurred by authorities and efficiency. As such, the business community should have the necessary knowledge and understanding of competition law and its obligations to ensure compliance.⁷ Advocacy can be effective in getting the local business community to appreciate that competition is not enmity but rivalry exhibited through legitimate and lawful means to the benefit not only of their businesses but the consumers and the industry at large through innovation and the provision of a wide range of choices and low prices.⁸

Previously, competition law concerns in the country were regulated through the rubrics of provisions found in the Fair Trading Act of 2001.⁹ Apart from regulating a host of trade related conduct, this Act sought to deal with the prohibition of false or misleading representation of the price of any goods or services.¹⁰ Clearly, such misrepresentation can be manifested in a number of ways including collusive conduct like cartels that have the effect of producing rather misleading prices in a particular market. This Act however, was barely invoked in addressing competition law issues in the country. This is attributed largely to the fact that it lacked the substantive provisions dealing directly with competition and did not create an enforcement mechanism, and as such no competition violations have been dealt with under this Act.

The lack of skilled competition law professionals in the country generally can also be cited as one of the constraints in enforcing the Fair Trading Act. To this end,

⁶ See Gal (n 5 above) at 17.

⁷ J Fingleton and A Nikpay 'Stimulating or Chilling Competition: International Antitrust Law and Policy' March 2009 at 17, available at http://www.jurispub.com/cart.php?m=product_details&p=9157, accessed on 18 August 2014.

⁸ M Dabbah 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33 (3) *World Competition*, 457- 475 at 462.

⁹ The generality of this Act is to provide a standard code of trading conduct and to prohibit certain conduct and practices in trade and matters incidental thereto. In terms of section 3, the Act has an extra territorial reach in that it applies to any person who, while doing business in Swaziland engages in any conduct outside Swaziland, to the extent that such conduct relates to the supply of good and services in Swaziland.

¹⁰ Section 7 (g) of the Fair Trading Act.

the International Competition Network report for capacity building and technical assistance for developing countries (ICN report) revealed that, in most jurisdictions training in competition law only start in the Commissions and not for instance, in universities.¹¹ This is the case even for Swaziland in that as of present the University of Swaziland, the only university in the country offering legal studies up to an undergraduate qualification (LLB) do not have competition law courses. Evidently, this left the country with very little or no pools of specialists to deal with competition violations save for those officials already hired by the Commission who would otherwise be trained internally by the Commission.

Subsequently, the coming into force of the Competition Act 8 of 2007 (Swazi Competition Act) saw the incorporation of some of the provisions of the Fair Trading Act that spoke to competition issues.¹² The Act further buttresses the point that any conduct that is prohibited in the Fair Trading Act remains prohibited in the Swazi Competition Act.¹³ Thus observed, the Swazi Competition Act seeks to provide a holistic approach in its framework (in the Swaziland context) with provisions for regulating competition conduct and practices in the country.

2.1 The framework for regulating and enforcing competition law in Swaziland

The competition law framework of Swaziland is made up of the Competition Act, the Competition Commission's Regulations of 2010, the Competition Commission and the High Court of Swaziland with original appellate jurisdiction (not as a specialised competition appeals court). The Competition Commission is a juristic person and exercises its duties and functions only in terms of the Act,¹⁴ and for proper execution of its duties the Commission is separated into two sections, *viz*, the Secretariat and the Board of Commissioners.

¹¹ Capacity Building and Technical Assistance: 'Building Credible Competition Authorities in Developing and Transition Countries': Report prepared by the International Competition Network Working Group on Capacity Building and Competition Policy Implementation, June 2003 at 43. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf>, accessed on 22 September 2014.

¹² Section 33 (1) of the Swazi Competition Act provides a host of provisions that constitute prohibited conduct under the Fair Trading Act.

¹³ Section 33(2).

¹⁴ Section 6 of the Swazi Competition Act.

The Secretariat is the investigative arm of the Commission,¹⁵ and the Board performs the adjudicative function. It is important to note for purposes of further discussion in this paper, the illusory nature of this division in the sense that practically the Secretariat and the Board is the same entity (the Commission). The decisions of the Commission can only be appealed at the High Court with original appellate jurisdiction and not as a specialized competition appeals court,¹⁶ and the decision of the High Court is final in respect of any matter brought to it under the Act.¹⁷ This is at least according to the unfortunate decision pronounced recently by the Supreme Court of Swaziland where it held that, in so far as section 40 of the Swazi Competition Act was concerned, no review lies in any court for any matter brought under the Act and no appeal lies in the Supreme Court on any decision of the High Court made under the Act.¹⁸

Accordingly, it follows from this brief discussion that the framework for enforcing competition law in Swaziland is informed by the integrated agency model. This model entails that the Commission within the authority undertakes investigations and thereafter makes the first-level adjudication.¹⁹ The decision of the Commission as already indicated can only be appealed at the High Court and the decision of the High court is final. Fox asserts that this model is not suitable for developing countries as it is limited by the fact that in most developing countries, courts have weak structures, not independent and to a large extent do not function efficiently.²⁰ As such, they lack the necessary expertise to deal with the complexities associated with these cases. Swaziland is obviously no exception to these challenges.

Recently, the dismissal of a High Court judge Thomas Masuku for a ruling he made that was later described by the Chief Justice as being insulting of the King raised questions about the independence of the courts in Swaziland. Subsequent to this, the Chief Justice issued a practice directive that prevented litigants from bringing matters to court where such matters directly or indirectly involve the King's Office and sought to invoke the provisions of section 11(a) of the Constitution of

¹⁵ Section 18 of the Swazi Competition Act.

¹⁶ Section 40.

¹⁷ Section 2 of the Act states that the 'court' shall mean the High Court of Swaziland.

¹⁸ *Eagles Nest v Swaziland Competition Commission (1/2014)* [SZSC] 39. See the summary of the case at page 1.

¹⁹ EM Fox and MJ Trebilcock *The Design of Competition Law Institutions: Global Norms, Local Choices* 1ed (2013) 5.

²⁰ *Ibid.*

Swaziland Act 1 of 2005. This section provides that, ‘the King and iNgwenyama shall be immune from suits or legal process in any case in respect of anything done or omitted to be done by him....’ It is noted however that the legal claims in issue here were in respect of clear breach of contract by some of the entities in which the King has an interest, and the service providers had a clear legal right of recourse to courts.²¹ This was viewed by the Law Society of Swaziland as a grave violation of the constitutional right of free access to justice and a threat to the independence of the courts in Swaziland. Further, the problems of the court’s inefficiencies as observed by Fox above are documented in the ICN report in which Jamaica firmly indicated the constraints she have in implementing competition law to which she stated that, ‘the judiciary is not conversant with competition law’.²²

2.2 The establishment and composition of the Swaziland Competition Commission

The Swazi Competition Act establishes a body called the Competition Commission,²³ which is composed of nine representatives.²⁴ Four of these are government officials from various government ministries, *viz*, Ministry for Finance, Economic Planning and Development , Enterprise²⁵ and an additional member appointed by the Minister for Enterprise²⁶ by virtue of that persons knowledge or experience in economics, industry, law, consumer affairs or the conduct of public affairs.²⁷ The remaining five members come from various stake holders which include the Swaziland Chamber of Commerce and Industry, Economics Association of Swaziland, Swaziland Consumer Association, Swaziland Institute of Accountants and the Law Society of Swaziland.²⁸ These members are nominated by their respective institutions and thereafter appointed by the Minister responsible for Enterprise.²⁹

²¹ See the High Court Practice Directive No: 4 of 2011, available at [http:// www.swazilii.org/practice-directive/2011/4](http://www.swazilii.org/practice-directive/2011/4), accessed on 18 September 2014.

²² ICN report op cit (n 11) 35.

²³ Section 6.

²⁴ Section 8 (1).

²⁵ Section 8 (1) (a), (b), (c).

²⁶ In terms of section 2 of the Act, ‘minister’ means the Minister for Enterprise.

²⁷ Section 8 (1) (i).

²⁸ Section 8 (1) (d), (e), (f), (g), (h).

²⁹ Section 8 (2).

The minister of enterprise is further mandated to appoint one of the members as chairperson of the Commission.³⁰ However, none of the government representatives shall be appointed as the chairperson or vice- chairperson.³¹ One can argue that the exclusion of the government representatives from being considered for the positions of chairperson and vice-chairperson was an effort to ensure and safeguard the independence of the Commission. It is evidently difficult to think of any other reason that can justify the exclusion. If such reasoning is sustainable, it can be argued therefore that it was foreseeable that the presence of such a significant number of government officials in the Commission might render it not independent from political interference, hence, the decision that at least they cannot be appointed to the positions of chairperson and vice- chair person respectively. Evidently, the fact that already four members of the Commission are government officials appointed by the minister suffices to render the Commission not independent, irrespective of whether they are appointed to these positions or not. This is one of the major challenges that the composition of the Commission poses.

2.2.1 The Secretariat of the Commission

As already mentioned earlier, the Secretariat is the investigative arm of the Commission. The Secretariat is composed of an executive director and other employees of the Commission.³² It should be noted at this point that even though the Act makes mention of the existence of a Secretariat that shall discharge the investigative function of the Commission,³³ the Act does not provide the procedure on how the Secretariat shall be established save to say that it should be composed of other employees of the Commission. It does not state the qualifications that these individuals should possess, how they should be appointed and their terms of reference. Further, it does not state the procedure on how they will conduct their business in the course of investigation.

The Act further provides that the Commission shall have the power to appoint any of its employees to be investigation officers and that they should carry out their

³⁰ Section 8 (3).

³¹ Section 8 (4).

³² Section 18.

³³ Section 11 (2) (a).

functions subject to the directions of the Commission.³⁴ It is not clear from the Act whether these investigation officers appointed in terms of this section shall be different from those established by section 18 (the Secretariat). From this point it appears that the constitution of the Swazi Commission is fragmented and not clear from the Act itself. Supposing the Act sought under section 38 to give the Commission the power to appoint investigating officers other than those constituting the Secretariat, it is not clear as to why and under what circumstances would the Commission want to do that.

The fear associated with this seemingly random exercise of the Commission's powers combined with the heavy presence of government officials in the Commission, is that it can have the effect of creating biases and undue influence in that the Commission can have the lee way of choosing people who will conduct investigations relating to particular complaints on the conduct of specific undertakings, thus compromising its independence. This fear is even more real when considering the significant number of state owned corporations and state affiliated monopolies in Swaziland. The case of Swazi MTN is a classical example. This company enjoys a total monopoly and exclusive trading privileges in Swaziland for the provision of mobile telephone network services since it started its operations in the country.

The monopoly accorded to Swazi MTN by the state effectively makes it the only mobile telephone network provider in the country to date, and as such, the company is exempt from the provisions of the Act in respect of other trade practices, ie (the monopoly practices).³⁵ The effect of this monopolistic nature of the industry is that it has always kept mobile call tariffs very high in Swaziland and has deprived the populace the benefits of competition which no doubt could have resulted in low tariff prices. Fox correctly articulates this position and points out that monopolies are created by the powerful in a country to protect their interest or friends at the grave prejudice to the general public and most importantly at the particular expense of the poor.³⁶ To illustrate this point further, she makes an example of a Mexican

³⁴ Section 38 (1) and (2).

³⁵ Section 3 (1) (a).

³⁶ EM Fox 'Economic Development, Poverty and Antitrust: The Other Path' (2007) 13 *South-western Journal of Law and Trade in the Americas* 101-125 at 113. Available at http://www.isr.nellco.org/nyu_lewp/102, accessed on 20 September 2014.

telecommunication corporation (Telmex) owned by a crony of presidents and thus granted a monopoly price for incoming cross-border communications.³⁷ She argues that this monopoly price was guaranteed at the expense of the poor Mexican migrant workers in the US upon whom logic detected that they will frequently need to make cross -border telephone calls to Mexico.³⁸ Further, the price monopoly deprived new entrants to the industry the opportunity to compete with Telmex on cross-border incoming calls.³⁹ To this end, she posits as follows;

'Not only do the poor suffer from prices that are too high, but they suffer from suppressed growth. The rest of the country suffered from Telmex favoured position. In a modern age when business need low-priced, high-quality telecommunications to compete in a global economy.... Any genuine effort to help the poor necessarily requires more healthy competition'.⁴⁰

Interestingly, this is exactly the position obtaining in Swaziland with regard to Swazi MTN where presently, relatives of 'highly prominent individuals' have been appointed into the MTN Board to represent the interests of an unidentified esteemed shareholder that owns 10 per cent share in the MTN stake.⁴¹ Subsequently, no amount of public out-cry has helped to address the high call tariffs imposed by Swazi MTN and evidently, as Fox laments above, the poor are the most affected by these high communications costs. The efforts made by Swaziland Post and Telecommunications Corporation (SPTC), a fixed line telephone service provider to enter into the mobile network services market was thwarted through fierce court battles and heavy political interference which eventually saw the Managing Director for SPTC being fired by the company Board.

It is important to note however, that the short lived participation of SPTC in the mobile network market saw some tremendous reduction of call tariffs and increased innovations by Swazi MTN in the form of MTN call free zones and call bonuses, which quickly disappeared after SPTC was removed from the market. There is no doubt that Swazi MTN was induced to introduce these innovations because of the participation of SPTC in the market as a competitor. This is evidently the essence of competition and the benefits that rivalry can bring. It is correct that competition has

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Princess Sikhanyiso for MTN Board, *Times of Swaziland*, 4 June 2012. Available at <http://www.times.co.sz/News/76158.html>, accessed on 19 September, 2014.

the benefit of stimulating innovation as competitors continuously strive to produce better products for the consumers at low prices.⁴²

The question that arises regarding these random appointments of investigators as seen above therefore, is whether these state proclaimed monopolies can be successfully investigated for anti-competitive conduct not necessarily proscribed by an Act of Parliament as stated by section 3 of the Swazi Competition Act. It is argued that, such considerations have the great potential of rendering the Commission ineffective and not independent in the discharge of its mandate. As the Commission stands, it does not appear that it has the necessary autonomy to deal for instance, with any competition matters arising from these entities without any interference.

The manner in which the Commission discharge its investigative function is such that, the Secretariat initiate investigations upon receiving a complaint or on its own initiative.⁴³ Upon the finalization of the investigation a report of the findings with recommendations is submitted to the Board stating the nature of the violation. If any violations of the Act have been uncovered the affected undertaking will be notified of the findings and will be invited to state its case before the Board. The decision –making procedure is however not spelt out clearly from the Act, save to state only that the Secretariat is the investigative arm of the Commission. The Swazi Competition Act does not state precisely as to how the adjudicative process shall be conducted, contrary to the competition framework of South Africa which clearly lays down the procedure to be adopted by the three institutions entrusted with implementing the Competition Act. The Swazi Competition Act only vaguely provides that the Commission can make its own rules of procedure.⁴⁴

A careful perusing of the Swazi Competition Act reveals that some of its provisions establish criminal sanctions for anti-competitive practices. Section 42 of the Act states as follows;

'Any person who contravenes or fails to comply with any provision of this Act, or any directive or order lawfully given, or any requirement lawfully imposed under the Act for which no penalty is provided..., commits an offence and shall on conviction be liable to a fine not exceeding E250, 000-00 or to imprisonment not exceeding five years or to both.'

⁴² R Wish and D Bailey *Competition Law* 7ed (2012) 4.

⁴³ Section 11 (2) (a) and (b).

⁴⁴ Section 14 (1).

It is not clear from the Act as to how will the Commission go about in enforcing these criminal sanctions. If one takes into consideration that the High Court only has appellate jurisdiction under the Act, this would mean that the Commission can impose fines and imprisonment sanctions as provided by section 35(1) (b) and 42 and thereafter have the decision appealed at the High Court. It would appear from this proposition that the Secretariat will double up as the prosecution before the Board in cases that will necessarily attract criminal sanctions as provided by these two provisions of the Act.⁴⁵ Whether the Secretariat has the required expertise and skills to discharge prosecutorial function that would eventually see the Board finding an accused person guilty of an offence that warrants imprisonment sanctions, is another issue that seems to have not been given proper consideration in the Act.

Another critical issue is the question of whether the power to impose criminal sanctions in the form of confinement can be bestowed an administrative body like the Commission. The Supreme Court does not appear to have given proper consideration of these issues when it interpreted section 40 of the Act as excluding the original jurisdiction of the High Court in the *Eagles Nest* decision. In light of this observation, it remains unclear as to how the Secretariat will go about in executing its prosecutorial duties under the Competition framework of Swaziland.

The members of the Secretariat represent a broad range of professional specialists which includes economists, accountants and lawyers (without any competition law background other than training received from the Commission). It has been noted however, that the Act is silent about the qualifications that are required from the officers that constitute the Secretariat. The effect of this is that if the Commission appoints employees who lack the necessary expertise and qualification to conduct these obviously complicated and scientific investigations, this could have the effect of rendering the Commission ineffective. Fox and Gal comment on this point and state that for an authority to be effective, both the decision-makers and investigators must possess the necessary skills and technical competence to analyse and apply the legal rules as necessitated by each case.⁴⁶ As

⁴⁵ Section 35 (1) (b) and 42.

⁴⁶ EM Fox and MS Gal 'Drafting Competition Law for Developing Jurisdictions: Learning From Experience' (2014) *LAW AND ECONOMICS RESEARCH PAPER SERIES*, WORKING PAPER NO: 41-11 at 12-13, available at <http://www.ssrn.com/abstract=2425329>, accessed on 30 September 2014.

such it is important for the Commission to appoint appropriately skilled and competent staff to ensure its effectiveness.

It has been suggested by the ICN in its capacity building report that secondment from experienced authorities is one expedient way of ensuring efficiency in newly established agencies.⁴⁷ This is one aspect that the Commission might want to consider if it were to be effective and coherent in the discharge of its functions under the Act, as such the need for skilled and competent staff cannot be underestimated. Professionalism has the effect of safeguarding officials generally from interference and undue influence that would otherwise characterise institutions that lack professional and skilled staff. To this end, it is reported that the United States Federal Trade Commission (FTC) and the Department of Justice Antitrust Division being the best established antitrust agencies in the world,⁴⁸ the FTC as of 2010 had more than 70 Ph.D. economists employed by the agency in the Bureau of Economist.⁴⁹ This is one other important aspect that the Swazi Commission might want to consider in order to bolster its effectiveness. It is well acknowledged though that the lack professional staff is not a problem unique to Swaziland, as the ICN report demonstrated that this is a challenge faced by most competition authorities in developing countries.⁵⁰

2.2.2 The Board of Commissioners – ‘The Commission’

It is in order to illuminate the point that unlike the specific establishment of the Secretariat (the investigative arm of the Commission) in the Act,⁵¹ there is no similar provision in respect of the establishment of the Board of Commissioners as the adjudicative body of the Commission. This exposition indeed supports the earlier observation that the division of the Commission is just an illusory one. It is evident though from the case of *Pick’n pay v The Gables* that the Board is the adjudicative body of the Commission.⁵² In this case the Commission’s Board of Commissioners

⁴⁷ ICN report op cit (n 11) 42.

⁴⁸ Fox and Trebilcock op cit (n 19) 364.

⁴⁹ Ibid.

⁵⁰ ICN report op cit (n 11) 41-42.

⁵¹ Section 18.

⁵² COMPETITION NEWS: The Official Newsletter of the Swaziland Competition Commission. Issue No: 4/2014 at 5. Available at www.compcoco.sz/images/newsletter.pdf, accessed on 24 September 2014.

decided that an exclusivity clause in a lease agreement between the parties that sought to exclude other supermarkets from competing with Pick'n Pay in the Gables shopping mall violated section 30 (1) of the Swazi Competition Act. The Board made the ruling after the Secretariat had conducted investigations into the arrangements under the lease and subsequently recommending that some clauses of the lease violated the provisions of the Act.

The Board of Commissioners is composed of the nine representatives of the Commission established under the Swazi Competition Act.⁵³ The procedure in the Board is that upon receiving a report from the Secretariat, the Board will constitute itself for purposes of making a determination on whether a violation of the Competition Act has been established. In doing so, it has the power to determine whether to hear oral evidence or not. In terms of the Competition Commission's Regulations Notice of 2010, once the Board has made a determination on whether or not to summon the parties for an oral hearing their decision is final.⁵⁴ In effect this means that the Board can make decisions with or without hearing oral evidence from the alleged violating party. It is not clear as to why would the Commission want to make a determination of a matter without giving the concerned parties the opportunity to state their case. As illustrated above, the decision of the Board in respect of any matter arising from the Act can be appealed only at the High Court and the decision of the High Court is final.

As already observed above that the Act creates both civil and criminal sanctions, it remains unclear whether the Board can impose confinement sanctions as envisaged by section 35 (1) (b) and 42 (1) in cases where the investigation reveals conduct that warrants the invocation of the provisions of these sections. The decision in *Eagle Nest* however, does not support a suggestion that the High Court can have both original and appellate jurisdiction in the event criminal conduct has been dictated by the Secretariat. These are the novel issues that the Supreme Court overlooked in its ruling of the *Eagles Nest* case. It does not appear that the court had clearly appreciated the fact that the Act creates both criminal and civil liabilities and thus the absurdity that has been created by the decision. These are some of the

⁵³ Section 8.

⁵⁴ Regulation 24 (5) and (6).

concerns that the Act does not clearly address and their effect is that the Commission will be seen not to be effective.

This position is different from the South African setting where the Competition Appeals Court and the Tribunal have the exclusive jurisdiction to determine whether any conduct is anti-competitive and as such in violation of the Competition Act of South Africa.⁵⁵ The South African Competition Commission has no power to intervene in such an inquiry save to investigate and refer its findings to the Tribunal and subsequently to the court for a determination. Further, neither the Commission nor the Tribunal or the Competition Appeals Court has the power under the South African competition framework to impose criminal sanctions. Once again, this scenario confirms the need for the separation of the adjudicative function from the Commission and having it placed either to the courts that have both civil and criminal jurisdiction. Alternatively, the Swazi Competition Act should clearly state the procedure to be adopted in the event criminal violations have been detected. In the present set up it remains to be seen how the Commission will deal with these issues when they eventually arise.

For the reasons noted above, it is correctly observed by some commentators, themselves being advisors of the FTC Commissioner, referring to the FTC decision-making process that, ‘to outsiders, the decision-making process at the Commission may seem like a black box’.⁵⁶ It is evident from the foregoing that this statement accurately describes the decision-making process of the Swazi Commission, it is truly a ‘black box’.

2.2.3 The implementation of competition law in Swaziland; is it an internal consideration?

In view of the foregoing, it is argued that the competition framework of Swaziland does not appear to be motivated or driven by clear internal goals⁵⁷ that would otherwise inform the correct design of an institution that can effectively address competition issues arising specifically in that country. It is not clear for example, the goal that Swaziland wanted to achieve by putting this legislation in

⁵⁵ Brassey et al op cit (n 1) 334.

⁵⁶ Fox and Trebilcock op cit (n 19) 347.

⁵⁷ D Zimmer *The Goal of Competition Law* (2012) 409.

place if other would be anti- competitive trade practices by entities, in particular the state owned corporations to whom the exemption does to a large extent applies, remained exempt from the operation of the Act.⁵⁸

The Act could have been an effective tool to dismantle, for instance, the monopoly enjoyed by Swazi MTN had it not been the fact that such trading privileges are deliberately excluded from the realms of the Act. It is perhaps correctly remarked that the State is in most of the times responsible for the distortion and restriction of competition, through legislative measures and regulations as seen in the Swazi Competition Act.⁵⁹ Thus, Fox correctly points out that legislation should respond to the challenges arising in a particular jurisdiction.⁶⁰

This move does not demonstrate a vested interest on the part of the state to effectively deal with competition issues in the country. As a large amount of the formal business in Swaziland is vested on the entities that are partly exempted (state owned corporations) and the government proclaimed monopolies, which is a common characteristic for developing countries in the words of Fox and Gal,⁶¹ there is a need therefore for bringing these entities wholly into the domain of the Act. Political will and support remains the most important aspect for the Commission to be effective in its mandate in this regard. Similarly, the competition advocacy mandate of the Commission can be useful here in making the government be aware and even recommend the removal of these restrictive regulations.⁶² If the Swaziland Government has no political drive to deal with the problems arising from these entities for the benefit of consumers, practically speaking then, there is no effective competition enforcement in Swaziland. Competition law should directly deal with state - owned enterprises that impede on competition (as seen above) and state officials that facilitate illegal cartels or bid rigging rings,⁶³ as we shall see immediately here-under the position in Swaziland in connection to this statement.

It is perhaps correctly argued by some writers that the sudden surge of competition authorities in developing countries is far from being the result of internal

⁵⁸ See section 3, read together with section 4 of the Swazi Competition Act.

⁵⁹ See Wish and Bailey (n 42 above) 3.

⁶⁰ Fox op cit (n 36) 101.

⁶¹ Fox and Gal op cit (n 46) 1.

⁶² Wish and Bailey op cit (n 42 above) 3.

⁶³ See Fox and Gal (n 46 above) 18.

considerations when viewed against the emergence and development of same in developed countries.⁶⁴ On this point, Zimmer postulates that the World Bank and the International Monetary Fund's (Bretton Woods Institutions) statement that developing countries have to privatize state owned entities, implement competition laws and liberalize their markets left them with no choice but to do so if they wanted to be considered for funding assistance by these two institutions.⁶⁵

The effect of this statement is that these institutions are the world's most powerful and influential sources of financial assistance for developing countries and would impose any condition upon them in order to receive financial assistance and developing countries will be bound to oblige. This point is supported by Fox and Gal who posits that, developing countries have adopted competitions laws in order to fulfil contractual requirements for financial benefits and trade preferences and as such, they argue that the World Bank stressed the adoption of competition law as a condition for the granting of loans to developing countries.⁶⁶

Margaret Lee shares the same sentiments in her work in which she examine the practice of regional integration in Africa, and in particular in the Southern African Development Community (SADC) region. She argues that the dependence on external financial assistance to fund regional initiatives give the funders the opportunity to determine and influence policies for developing countries.⁶⁷ She proceeds to quote observations of other commentators with respect to the adoption of market integration by African countries which are similar to Zimmer's and Fox with regards to the adoption of competition laws by developing countries and have the following to say;

*'One thing which at least seems to be obvious is that, actors in the South should think very carefully about the fruitfulness of following the blue print of the European Union or other regional schemes from the North. If regional organization is to play a real role in the economies of the South it has to be embedded into the real life context of these economies.'*⁶⁸

⁶⁴ Zimmer op cit (n 57) 409.

⁶⁵ Ibid.

⁶⁶ Fox and Gal op cit (n 46) 5.

⁶⁷ MC Lee 'REGIONALISM IN AFRICA: A PART OF THE PROBLEM OR A PART OF SOLUTION' (2002) 9 *Polis/R.C.S.P/C.P.S.R/ Numero Special 1-25 at 9*, available at <http://www.polis.sciencespobordeaux.fr/vol10ns/lee.pdf>, accessed on 21 September 2014.

⁶⁸ Ibid.

Another author quoted in Zimmer's work makes similar observations regarding the adoption of competition laws by developing countries and has the following to say;

*'The concept of economic freedom and free competition are not the result of an internal process in the South. They were introduced following a trajectory designed by the engineers of the economic freedom which are the World Bank and the International Monetary Fund.'*⁶⁹

If one holds this reasoning, it can be correctly argued then that the effect of these actions by the Bretton Woods Institutions and the western governments manifested themselves in the inconsiderate adoption of competition laws by developing countries without any meaningful and thorough thought process on the goals they sought to achieve. Ultimately Swaziland may have been compelled to put in place a framework that have no effect but only to be seen to have complied with the instructions of the west (developed countries) and the dictates of the Bretton Woods Institutions. This therefore, can partly explain the inefficiencies and contradictions witnessed in the Swaziland framework as discussed above.

Similarly, the adoption of market integration which is also argued not to be an original idea of developing countries in particular in the Southern African context largely explains the practice of the adoption of competition laws by African countries.⁷⁰ Lee notes that despite the complete failure of market integration in Africa, especially in the SADC region, 'it is implausible that African countries still believe that there is no alternative to market integration or, it is because market integration is imposed by the western governments and international financial institutions so as to enable them free access to the African markets.'⁷¹ Likewise, the west sought to ensure that by the time they expand into the African markets they will not be confronted with distorted markets as a result of anti-competitive practices due to lack of competition regulation and enforcement. Through competition laws the western countries are guaranteed of access to African markets that are free of anti-competitive practices and to this Zimmer correctly observes that;

⁶⁹ Zimmer op cit (n 57) 409-10.

⁷⁰ MC Lee 'DEVELOPMENT, COOPERATION AND INTEGRATION IN THE SADC REGION' (1999) 2 *Social Sciences and Humanities and Law & Management Research Journal, University of Mauritius* 29-61, available at <http://www.uom.ac.mu/proverci/researchjournal/Humanities>, vol2/Abstract/pdf lee pg. 29-61.pdf, accessed on 20 September 2014.

⁷¹ Lee op cit (n 70) 45.

*'Although it has been argued that enacting competition laws goes together with the liberalization process and would help developing countries protect their newly opened markets, this approach has always embodied a hidden objective of protecting competition which gives international undertakings enhanced access to the markets of developing countries.'*⁷²

As already mentioned earlier, it is evident from this statement that the enhanced access comes with the assurance that at least the western countries will not be confronted with distorted markets because the competition authorities of those country's markets would or should have dealt with those problems. The question that has been overlooked however, is whether these authorities do have the capabilities to deal with these competition problems in their jurisdictions. When taking into account the myriad challenges that developing country's competition authorities are grappling with (Swaziland inclusively), the answer might be in the negative. These challenges includes lack of expertise and skilled staff,⁷³ poorly resourced institutions,⁷⁴ ineffective judicial systems that are not conversant with competition law to say the least.⁷⁵ These are the issues that give a clear indication of whether an authority is or shall be effective or not. This is in line with the observation that numerous factors may have an impact on the capacity of an enforcement system to lead to correct decisions, and that the expertise of the persons involved and the resources available are such kind of factors.⁷⁶

The major weakness of the implementation of competition law in developing countries is that countries simply took legislation off the shelf from developed countries that was already designed to achieve specific objectives, interests and goals for those countries and sought to implement it in their jurisdictions.⁷⁷ This can partly explain the discrepancies observed in the Swaziland competition law framework this far, that Swaziland's most competition problems are in the state enterprises and monopolies which are to some extent exempt from this Act. The question then is

⁷² Zimmer op cit (n 57) 411.

⁷³ International Competition Network: 'Lessons to be Learnt from Experiences of Young Competition Agencies'. Report prepared by the Competition Policy Working Group, June 2006 at 27. Available at www.internationalcompetitionnetwork.org. accessed on 23 September 2014.

⁷⁴ Ibid.

⁷⁵ ICN report op cit (n 11) 35.

⁷⁶ W Wils 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition, Law and Economics Review* 201-224 at 12. Available at <http://www.ssrn.com/abstract=1319251> accessed on 20 September 2014.

⁷⁷ Zimmer op cit (n 57) 409-10.

what made Swaziland to adopt such a law if she did not want to deal with these problems and liberalize the markets, for instance?

Even though the Swazi Competition Act shows some convergence along the rules ensuring efficiency of markets and consumer protection in the country, practically, how is the consumer welfare protected when considering the issue of the monopoly enjoyed by Swazi MTN and the Swaziland Electricity Company which has always kept call and electricity tariffs sky rocketing? Obviously, these two scenarios do not ensure efficiency and consumer protection. Ottow correctly comments on this point by arguing that, ‘it is well- functioning markets that will provide the best guarantee that consumer’s interests will be properly saved’.⁷⁸ Markets can only function well if competition laws are properly drafted and enforced, and ensuring that the state does not impose anti-competitive regulation through trading privileges. Until such issues which are core to competition are dealt with in the Swazi Competition Act, the Commission will remain ineffective in enforcing competition law in the country and thus being reduced to an impotent institution.

Competition law, well adopted and modelled can and should protect both consumers and producers from anti-competitive conduct that have the potential to raise prices and costs while reducing production.⁷⁹ Consumers are the most affected from restricted competition as seen in the two examples above and worse still, the poor are the most affected. These sentiments were also shared by the South African Competition Tribunal in the *Competition Commission of South Africa v Pioneer Foods (Pty) Ltd* case,⁸⁰ where Pioneer Foods was found by the Competition Tribunal to have engaged in a bread cartel that fixed prices and divided markets. In condemning the conduct of Pioneer Foods the Tribunal emphasised that, ‘the offences in this particular case are even more repugnant because they affected the poorest of the poor, for whom standard bread was a staple’.⁸¹

⁷⁸ AT Ottow ‘EROSION OR INNOVATION? The Institutional Design of Competition Law Institutions – A Dutch Case Study’ (2014) 2 *Journal of Antitrust Enforcement* 25-43 at 39, available at <http://www.jantitrustenforcement-2014-Ottow-25-43.pdf>, accessed on 28 September 2014.

⁷⁹ Zimmer op cit (n 57) 446.

⁸⁰ The Competition Commission of South Africa v Pioneer Foods (Pty) Ltd Case No. 15/CR/Feb07, 50/CR/May 08. Available at <http://www.saflii.org/za/cases/ZACT/2010/9.html>, accessed on 26 September 2014.

⁸¹ See Pioneer Foods case (n 80 above) Para 158.

Similarly, the problems that the then Minister for Finance, Majozi Sithole pointed to be the cause of the corruption that saw the Swaziland Government losing E80 million every month,⁸² are all challenges that a properly adopted and effective competition enforcement can expose even though it cannot deal with.⁸³ Indeed, there is no doubt that effective competition enforcement through advocacy in this case could at least have exposed these anomalies in the government procurement system. It is noted however, that advocacy could have been of minimal effect in this case because the alleged corruption and anti-competitive practices were perpetrated by the same government officials that could have been trained on how to detect such prohibited practices in the tendering processes. The Minister as he then was and now Governor for the Central Bank of Swaziland, in his report addressed to Senate identified a number of anti – competitive conduct and corruption practices in the government procurement system that led to government losing this huge amount of money every month.

Amongst a host of corruption practices, he mentioned clear cartel conduct akin to that witnessed in the case of *Videx Wire Products (Pty) Ltd v The Competition Commission of South Africa*,⁸⁴ viz, collusion between suppliers and government officials to commit government without issuing proper purchase tenders, bid rigging, where deliberate limiting of tenders by government officials resulted in one supplier presenting different quotations in different company letter heads with inflated prices much higher than the market price. It was also discovered that suppliers were colluding amongst themselves to allocate and limit tenders by deliberately withholding bids for other tenders. Government officials issued tenders to non- existing companies resulting in non- delivery of goods while government

⁸² MINISTER LIFTS LID ON CORRUPTION, Swazi Observer, 10 October 2011, available at <http://swazimedia.blogspot.com/2011/10/minister-lifts-lid-on-corruption.html?m=1>, accessed on 28 September 2014.

⁸³ Zimmer op cit (n 57) 444-5.

⁸⁴ *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* CAC Case No: 124/ CAC Oct 12. In this case the Competition Appeal Court held that the suppliers had an overarching agreement that manifested itself in a form of a cartel (Para 71), where they would limit tenders and exchange price information (bid rigging) prior to the submission of the tender resulting in one supplier bidding with prices higher than the market price to the prejudice of the buyers, who in most cases were mining companies. It also became apparent as well that these suppliers would from time to time allocating markets amongst themselves by deliberately not submitting tenders with a specific company (Para 38).

paid for same, and colluding with suppliers to overcharge the government for the benefit of senior government officials.⁸⁵

One then can ask if such clear cartel conduct within the government procurement system, perpetrated obviously by senior government officials can be effectively dealt with when considering the significant number of government representatives in the Commission that threatens its independence. Ordinarily, competition authority's ability to be effective under conditions of corrupt governments that lack transparency and accountability is generally limited,⁸⁶ and the composition of the Competition Commission make the situation for Swaziland a more complicated one and that does not inspire any hope that the Commission can be effective in executing its mandate under the Act.

Evidently, these are the issues that the Commission is expected to be dealing with if it ought to be effective in enforcing sound competition practices and ridding the country of the blatant anti - competitive behaviour engaged at the state level. The most important cartel conduct for developing countries is bid rigging which have the devastating effects of increasing prices and reducing the quality for large government projects as seen in the example above.⁸⁷ It is such cartel conduct and corruption experienced at the government level that have threatened the economy in Swaziland recently, thus resulting in the country operating under a deficit. It therefore remains to be seen if the present competition framework of Swaziland will effectively deal with these problems.

2.3 The competition enforcement structure under the European Union and the US Federal Trade Commission

It is apposite at this juncture to briefly examine the competition enforcement structure and procedure under the European Union Commission (EU Commission) and the United States Federal Trade Commission (FTC), in order to appreciate the challenges associated with the model that has been adopted by Swaziland as

⁸⁵ Minister's report op cit (n 82).

⁸⁶ A Singh 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions' (2013) G-24 Discussion Paper Series 18 at 33, *OEDC Competition and Poverty Reduction*, DAF/COMP/GF/ (2013) 12. Available at http://www.unctad.org/en/docs/gdsmdpbg2418_en.pdf, accessed on 30 September 2014.

⁸⁷ Fox and Gal op cit (n 46) 26.

indicated above. Just like the FTC,⁸⁸ the institutional structure of the EU Commission's Directorate – General for Competition resembles that of the Swazi Commission in that it is also founded on the integrated agency model.⁸⁹ As such, comments have been made with regards to both the FTC and EU Commission's competition enforcement procedures that they act as a police, prosecutor and judge in the determination of allegations of anti- competitive practices and thus in conflict with the due process norms.⁹⁰

2.3.1 The European Commission's Directorate – General for Competition

The EU Commission's Directorate – General for Competition is entrusted with the responsibility of enforcing competition law within the Union. This is in terms of the European Community Treaty (EC Treaty).⁹¹ The Treaty through article 81 and 82 sets out wide ranging anti - competitive practices that are prohibited within the common market.⁹² The officials of the Commission's Directorate – General for Competition are responsible for the investigation of any violation of Articles 81 and 82 of the Treaty, under the authority of the Competition Commissioner who is also a member of the Commission.⁹³ The adjudication process is conducted by a hearing officer who also reports to the Competition Commissioner but not an official of the Directorate General for Competition.⁹⁴ The decisions of the Commission are subject both to appeal and review in the Court of First Instance and finally an appeal lies in the European Court of Justice only on points of law.⁹⁵ Notwithstanding however, the fact that the EU Commission is a team of technocrats in their respective fields, there are still concerns that this model poses threats to the rules of natural justice.⁹⁶ This is despite the wide ranging powers conferred on the Court of First Instance and the

⁸⁸ Fox and Trebilcock op cit (n 19) 348.

⁸⁹ Fox and Trebilcock op cit (n 19) 391.

⁹⁰ Ibid.

⁹¹ Wils op cit (n 76) 3.

⁹² Fox and Trebilcock op cit (n 19) 388.

⁹³ Wils op cit (n 76) 3.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Brassey et al op cit (n 1) 291, stating that it has been observed in the EU that the integration of these roles has been much criticized for the threat it poses to procedural fairness. There have been proposals from various national competition authorities for the establishment of an independent tribunal before which the EU Commission can appear as a prosecutor.

European Court of Justice respectively, to review and appeal the decisions of the Commission that have the potential to unfairly affect the rights and interests of individuals.⁹⁷

This is contrary to the situation arising in the Swaziland framework where presently the High Court has only appeal jurisdiction on all competition matters brought to it under the Act. It is therefore apparent that the courts in Swaziland have a very limited role to play in as far as interfering with the decisions of the Commission is concerned when compared to the powers conferred to the courts in the EU. Similarly, the EU Commission has no power to impose criminal sanctions.⁹⁸ It has been argued although that the heavy fines that the Commission can impose on offenders do constitute penalties of a criminal nature, but procedurally the Commission cannot determine criminal violations.⁹⁹ Again, this is distinct from the Swaziland situation where criminal liabilities have been created under the Swazi Competition Act without a clear structure on how the criminal provisions shall be enforced. This uncertainty has been further fuelled by the contradictory decision of the Supreme Court in the *Eagles Nest* case in which it limited the High Court Jurisdiction on competition matters only to appeals.¹⁰⁰

2.3.2 The United States Federal Trade Commission

The Federal Trade Commission is an independent regulatory Commission which is composed of five Commissioners and the chairperson of the Commission being appointed by the President.¹⁰¹ As already observed above that antitrust enforcement by the FTC follows the integrated agency model, the FTC Bureau of Competition and the Bureau of Economics are responsible for the investigation of competition violations under the statutes that the FTC enforces.¹⁰² These include the Clayton Act and the Federal Trade Commission's Act.¹⁰³ Similar to the Secretariat of the Swazi Commission, upon finalisation of the investigations the Bureau of Competition and Economics respectively present separate reports to the Commission

⁹⁷ Article 263 of the EC Treaty.

⁹⁸ Fox and Trebilcock (n 19 above) 412.

⁹⁹ Ibid.

¹⁰⁰ See *Eagle Nest* case (n 18 above).

¹⁰¹ Fox and Trebilcock op cit (n 19 above) 335.

¹⁰² Fox and Trebilcock op cit (n 19) 346.

¹⁰³ Fox and Trebilcock op cit (n 19) 341.

stating their findings and recommendations.¹⁰⁴ The alleged violating parties will be informed of the findings and thereafter called for a hearing before a Commissioner who will act as an Administrative Law Judge.¹⁰⁵ This Commissioner is also an employee of the Commission. The decisions of the Commission are subject to both appeal and review by the Federal Circuit Courts and a final appeal lies in the US Supreme Court.¹⁰⁶

It is not surprising however, that even in jurisdictions that have well-functioning and clearly independent and efficient court structures like the United States,¹⁰⁷ objections about the implications of the integrated agency model have been raised even though without any success. It has been argued that it raises serious concerns about the due process norms,¹⁰⁸ and rightly so. The challenge associated with this approach is clearly understood in the recent decision in *Federal Trade Commission v Inova and another*.¹⁰⁹ In *casu*, the FTC announced that it will oppose the proposed Inova Health Systems Foundation's acquisition of Prince William Hospital Foundation. The FTC further announced that it has appointed one of its Commissioners to preside over the administrative proceedings in this matter. It was argued by the FTC that the decision to designate this Commissioner as the Administrative Law Judge was based on his expertise and experience in complex competition matters. The respondents unsuccessfully sought to have the Commissioner recusing himself on the grounds that such a constitution of the Administrative Tribunal violated the due process norms. In refusing to recuse himself the Commissioner relied on an old dictum in *Federal Trade Commission v Tenneco, Inc.*,¹¹⁰ where the FTC itself recognized the uniqueness of its composition and confirming that over 25 years the FTC denied the recusal of the then-Commissioner Robert Pitofsky. The Commission held that;

'unassailable that the combined functions of investigator and decision - maker in the office of the Federal Trade Commission do not give rise to a denial of due process..., because the commissioners are purposefully appointed to terms

¹⁰⁴ Fox and Trebilcock (n 19 above) 346.

¹⁰⁵ *Ibid.*

¹⁰⁶ Fox and Trebilcock op cit (n 19) 351-352.

¹⁰⁷ Fox and Trebilcock (n 19 above) 5.

¹⁰⁸ Fox and Trebilcock (n 19 above) 348-9.

¹⁰⁹ Case no. 9326 of 2008. US. Before the Federal Trade Commission Office of J. Thomas Roche, available at <http://www.ftc.gov/opa/2008/05/inova.shtm>, accessed on 10 September 2014.

¹¹⁰ 96 F.T.C. 346 (1980).

sufficiently long enough to allow them to accumulate expertness in industries as well as in the law.¹¹¹

There is evidently a number of similar cases that sought to challenge the composition of the FTC even though unsuccessful due to the absence of any evidence indicating actual bias, as it was observed by the court in the case of *FTC v Cement Institute*.¹¹² This move serves to demonstrate only the frustration associated with this approach.¹¹³ The observation that these jurisdictions have the support of independent, well efficient and well- functioning courts structures with wide powers to safeguard their rights could not allay these fears.

As already noted above that the Swazi Competition Act establishes both civil and criminal violations, this position is distinguished from the FTC in which for instance, the FTC as an independent administrative agency cannot initiate criminal proceedings.¹¹⁴ Accordingly, the statutes that the FTC enforces as indicated above, have no provisions that create criminal sanctions'.¹¹⁵ The essence of this proposition is that the FTC which is a resemblance of the Swazi Commission in its construction has no jurisdiction or power under both Acts to determine criminal violations or initiate criminal proceedings.

Consequently, in the US it is noted that antitrust enforcement by the Department of Justice Antitrust Division favours the bifurcated judicial model, in that the Antitrust Division investigates and refer the case to the Federal District Court where a judge makes a determination whether there has been a violation of either the Sherman or Clayton Act respectively.¹¹⁶ Only the Federal Court has the power to impose criminal sanctions and the antitrust division assumes the role of prosecutor in the criminal proceedings.¹¹⁷ When considering the model adopted by the Antitrust Division, the inclusion of criminal sanctions in the Sherman Act makes perfect sense because the Division is bound to take all matters to court anyway. The same cannot

¹¹¹ Federal Trade Commission v Tenneco op cit (n 111) 3.

¹¹² 333 U.S 683 (1948).

¹¹³ This is clear from a host of cases which include the following recent US cases where the FTC successfully retained its adjudicative jurisdiction; *FTC v Whole foods Market, Inc.*, and *Wild Oats Markets, Inc.*, case no. 9324 (2007), *FTC v Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company and The Peoples Natural Gas Company*, case no. 9322 (2007), *FTC v Caroline State Board of Dentistry*, case no. 9311 (2003).

¹¹⁴ Fox and Trebilcock op cit (n 19) 341.

¹¹⁵ Ibid.

¹¹⁶ Fox and Trebilcock op cit (n 19) 333.

¹¹⁷ Fox and Trebilcock op cit (n 19) 334.

be said in respect of the Swazi Commission where the High Court has no jurisdiction to hear competition matters as a court of first instance.

The question that arises at this point is that if developed countries like the US and the EU can experience these challenges and concerns for instance, how much more with developing countries like Swaziland that are still grappling with challenges of independence of the court and the lack of capacity for the Commission to attract officials with the necessary skills and expertise to deal with such complex matters. The fact that even the courts in Swaziland do not have wide powers to scrutinize the decisions of the Commission coupled with the court's very limited exposure to competition law in general, further compounds these challenges.

2.4 The rules of natural justice versus the structure of the Swazi Commission

The incorporation of the integrated agency model as a foundation for enforcing competition law remains a hotly debated topic both by academics and courts in the jurisdictions that adopts this model.¹¹⁸ Such debates as seen above have arisen mostly in the US in respect of the FTC and the EU¹¹⁹ with regards to the European Commission as the body responsible for enforcing competition law provisions under the EC Treaty.

The crux of these debates borders largely on the compressing of the investigative and adjudicative functions in one entity as being against the rules of natural justice. It is argued that authorities incorporating this model are likely to suffer from prosecutorial bias or at least the appearance of it.¹²⁰ Wils observes however, that despite such objections being raised in the EU context they have always been unsuccessful¹²¹ and the same hold true in respect of the FTC in the US¹²². As alluded to earlier in this work, even though these objections have remained

¹¹⁸ Wils op cit (n 76) 8.

¹¹⁹ IS Forrester 'Due process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) *European Law Review* 817 at 4, available at http://www.asiaitalk.whitecase.com/Files/Publication/.../Article_Due_Process_in_EC_Competition_Cases.pdf, accessed on 29 September 2014.

¹²⁰ Wils op cit (n 76) 13.

¹²¹ Wils (n 76 above) 8.

¹²² See in this respect the cases recently contested cases against the FTC where this model was challenged for being in conflict with the due process norms, (n 114 above).

unsuccessful at least they save to demonstrate the level at which this model is considered to be at war with general principles that prohibit someone from being a judge in their own cause.

It has been argued that even an Act of Parliament made against natural justice principles as to make man a judge in his own cause is void in itself.¹²³ In the modern jurisprudence however, such limitation of parliament powers can no longer be sustained.¹²⁴ Jackson reiterates the point that it is still believed to be of a fundamental importance that judges and tribunals should be free from bias or the appearance of it.¹²⁵

Substantively, and in line with the concerns raised above, this discussion seeks to expose the challenges and frustration associated with this model as the justification for the reform of the Swaziland competition framework. In doing so, experiences from both the US and the EU will be highlighted. In view of the composition of the Swazi Commission which is composed of such a significant number of government officials, it is argued that such a composition will render it even more susceptible to political interference, influence and bias, hence the need for the adoption of the bifurcated agency model. This is important because in terms of the competition framework of Swaziland, this is the adjudicative body.

It has come to light that the procedure in the Commission is such that after the Secretariat has investigated a matter, it then submits a report to the Board stating the findings and recommendations. If the Secretariat concludes in the report that a violation of the Act has been discovered, effectively the Board has already been exposed to the facts of the matter such that it is inclined to find a violation when the matter is finally brought before it for adjudication. This is what Wils refers to as confirmation bias.¹²⁶ Similar observations have been raised in the EU Commission that once an opinion has been formed by the Commission it cannot be dislodged. This is because the natures of the investigation and prosecutorial function tends to, and correctly so, have bias in favour of finding a violation or securing a conviction once the matter is brought for adjudication.¹²⁷ It is true that such bias is of no moment

¹²³ P Jackson *Natural Justice* 2ed (1979) 29.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ The tendency to search for evidence which confirms rather than challenges one's belief, (n 77) 16.

¹²⁷ Wils *op cit* (n 76) 13.

where these processes are separated and independently of each other because the decision of a violation remains to be made by an independent body or the court anyway.¹²⁸

Subsequently, the EU has put in place extensive safeguards to ensure that the decision-making process is free from any procedural ills.¹²⁹ This was done after a study revealed that a large number of the cases decided by the EU Commission were set aside and quashed by the Court of First Instance on grounds of procedural unfairness.¹³⁰ Even though Wils down plays these findings and argues among other factors that this was the early stages of the newly established court,¹³¹ this serves to demonstrate the danger that this system can have and as such not an ideal model to be adopted by the Swazi Commission.

The major concern here is not that the composition of the competition authorities where the integrated agency model is adopted give rise to actual prejudice, but rather the appearance of it in the eyes of the lay person is the challenge, hence, the legal expression that ‘justice should not only be done but must manifestly and undoubtedly be seen to be done’.¹³² Where justice is not seen to be done notwithstanding the actual reality that it is done as is the case with the structure of the Swazi Commission, public confidence and assurance in the settlement of disputes by the Commission will be diminished. At this point it is in order to reiterate the comments quoted above about the FTC adjudication system that, ‘to outsiders, the decision-making process at the Commission may seem like a black box’.¹³³ Practically speaking the decision-making process of the Swazi Commission does seem like a ‘black box’.

2.5 Conclusion

This chapter has put into perspective the framework for implementing competition law in Swaziland, the composition of the Swazi Commission and the challenges that are associated with the present structure. The issues that make the

¹²⁸ Ibid.

¹²⁹ Wils op cit (n 76) 4.

¹³⁰ Wils (n 76 above) 14-5.

¹³¹ Ibid.

¹³² Jackson (n 123 above) 84.

¹³³ See (n 56 above).

Commission fail the independence test have been highlighted. It is clear from this discussion that the composition of the Commission especially the number of government representatives raises problems concerning its independence and reference has been made to the challenges that are potentially bound to arise as a result of the present structure.

The illusory nature in the separation of the adjudicative and investigative functions of the Commission and the dangers it may have on the effectiveness of the Commission has also been illuminated. Accordingly, all the concerns raised support the need for the re-construction of the Commission to ensure its independence and effectiveness.

The question of whether the Swazi Competition Act came about as a result of internal considerations has also been canvassed, as well as the reasons that necessitated that inquiry. These being most importantly, the manner in which the Act sought to exclude from its jurisdiction some conduct of entities that raises serious competition law issues in the country and the inefficiencies as seen from the Act itself.

Lastly, the problems raised by the adjudication system of the Commission has also been put into perspective especially the concern that it is in conflict with the general principles of natural justice as seen in the two jurisdictions that have been examined above. Finally, recommendations have been advanced on how some of these challenges can be remedied.

CHAPTER THREE: THE ROLE OF THE COURTS IN THE NATIONAL COMPETITION REGULATORY FRAMEWORK

3. Introduction

It has transpired from the discourse above that the Competition framework of Swaziland enjoins the High Court of Swaziland as an actor in the enforcement of competition law in the country.¹ This chapter analysis the role of the courts in the enforcement of competition law, it questions the relationship between the courts of Swaziland and the Competition Commission. It further investigates the court's role, extent of participation and the power to interfere with the decisions of the Commission.

In doing so, a critical analysis of the case of *Eagles Nest (Pty) Ltd v The Swaziland Competition Commission*² in which the Supreme Court of Swaziland has extensively dealt with the question of the jurisdiction of the courts under the Act will be carried out, with the aim of exposing the manner in which the Supreme Court in its interpretation of section 40 has limited the jurisdiction of the courts in dealing with competition matters in the country. Other decisions of the High Court made under the Act as of present will also be examined in order to ascertain if there is a reasonable justification for the Supreme Court to limit the jurisdiction of the courts in the manner it did. Further, an analysis will be made to ascertain if the limitation of the courts powers to intervene meaningfully in the decisions of the Commission will not have negative implications on the effective regulation of competition law and the development of competition jurisprudence in the country going forward.

It is foregone that if the Commission is to be effective in regulating competition matters in the country, its decisions must be subject to the vigorous scrutiny that the court structures would have provided had it not been for the limitation. Such scrutiny would have provided the necessary interrogation into the entire legal framework and all the issues arising therefrom, thus developing the jurisprudence of this newly introduced area of law in the country and equally making

¹ See in this respect Section 2 and 40 of the Swazi Competition Act.

² Case No: 1/2014 [2014] SZSC 39. Available at www.swazilii.org/sz/judgment/supreme-court/2014/39. Accessed on 02 October 2014.

the Commission more effective in executing its functions in the future. Further, such a limitation is bound to raise procedural problems in view of the fact observed above that the Act has provisions that give rise to the imposition of criminal sanctions including imprisonment terms and as such, it is not clear whether the Commission shall have the power to impose criminal sanctions in the form of confinements.

3.1 A debate on Section 40 of the Swazi Competition Act

It is common cause that section 40 of the Competition Act 8 of 2007 (Swazi Competition Act) spells out the procedure to be followed by any party who is aggrieved by the decisions of the Commission. This section also states the role of the court where a decision of the Commission has been brought before it and provides to that effect as follows;

'The Commission shall have the power to issue orders and directives it deems necessary to secure compliance with this Act or its decisions and any person aggrieved by the decision of the Commission made under this Act or under any regulations made hereunder may, within thirty days after the date on which a notice of that decision is served on that person, appeal to the court'.

At this earliest point, the following questions are apposite. Whether it could be concluded that the language of the statute under the above quoted section sought to oust the original and review jurisdiction of the High Court in competition matters in Swaziland? Alternatively, can this section be construed as ousting the jurisdiction of the Supreme Court from hearing appeals from the High Court in respect of matters arising from the Act? In trying to answer these questions one should first ascertain the attitude that has been adopted by the courts when interpreting provisions that sought to exclude or limit the jurisdiction of courts (ouster clauses).

Secondly, it will be appropriate to demonstrate how the language of the statute under this section fares with other statutory legislation in the country where Parliament intended to specifically exclude the original jurisdiction of the High Court. This notional journey is necessary in order to determine if it was indeed the intention of the legislature to limit the jurisdiction of the courts and confer exclusive jurisdiction to the Commission as the Supreme Court held, and as the Commission

itself alleged in the case of *Pick' n Pay Retailers (Pty) Ltd v The Gables (Pty) Ltd*³ and the *Eagles Nest* case⁴ respectively.

3.1.1 The universal approach adopted by courts when interpreting ouster clauses

Superior courts of record across nations have always put a strong emphasis on the fundamental duty placed upon courts to jealously guard its jurisdiction, except where that jurisdiction is ousted or limited by clear and unambiguous words of a statutory provision.⁵ In the case of *Goldsack v Shore*, the court declared that ‘...the court’s jurisdiction must not be taken to be excluded unless there is quite clear language in the Act alleged to have that effect’.⁶ This position of the law is clearly enunciated in the laws of England in the following words;

*‘The right of the subject to have access to the court may be taken by or restricted by statute but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least onerous meaning, unless clear words are used to justify such extension’.*⁷

What is striking in this statement is the emphasis that if a statute is interpreted to be limiting or ousting the jurisdiction of superior courts, it should clearly and plainly state to that effect. In essence this means that the provisions of the statute should convey such a message clearly on the face of it and such ouster should not be searched from the wording of the statutory provision. Similarly, if the provision is reasonably capable of having two differing meanings, superior courts have always cautioned themselves to adopt that meaning which preserves the ordinary jurisdiction of the courts.⁸ In *Big Games Parks Trust v Fikile Mbatha*,⁹ the court observed that if it is apparent from the language of the statute that the legislature intended to oust or restrict the jurisdiction of the court, then it is imperative for the court not to extend its jurisdiction beyond the limit that have been set by a clear provision of a statute.¹⁰

³ Case No: (1639/2012) 57 [SZHC], 12, Para 23-24. Available at www.swazilii.org/sz/judgment/high-court/2013/57. Accessed on 30 September 2014.

⁴ See the *Eagles Nest* case op cit (n 2) 22 Para 10.

⁵ Lord Mackay *Halsbury Laws of England* 5ed Vol 24 (2010) 352.

⁶ [1950] 1 ALL ER 276 at 277.

⁷ Lord Mackay (n 5 above) at 352.

⁸ *Anisminic Ltd v Foreign Competition Commission* [1969] 2 AC 147 at 170.

⁹ Case No: (2382/2009) [SZHC]. Available at www.swazilii.org, accessed on 02 October 2014.

¹⁰ Para 13.

In line with the observations made above, the court in the case of *Commissioner of Customs and Excise v Cure & Deeley Ltd* made the following remarks regarding the interpretation of statute provisions that seeks to exclude the jurisdiction of the courts;

'It is an important rule of interpretation of statute that a strong leaning exists against construing statute so as to oust or restrict the jurisdiction of the superior courts. It is also well known rule that a statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect'.¹¹

Similarly, South African jurisprudence seems to be in line with the position obtaining in England regarding the restriction of the inherent jurisdiction of superior courts. Over a long period of time, South African courts have recognised the common law presumption against construing a statute in such a way as to oust the court's jurisdiction.¹² As such, it is now trite that the 'jurisdiction of courts can only be excluded if that exclusion flows from express provisions or by necessary implication from the particular provisions under consideration, to the extent indicated expressly or by necessary implication'.¹³ In the case of *Welkom Village Management Board v Leteno*,¹⁴ the court had the following to say;

'When domestic remedies are provided by the terms of a statute, regulation..., it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the courts is thereby excluded or deferred'.¹⁵

This rule seems to suggest that even if a provision of a statute would appear to be excluding the jurisdiction of the court, it remain a duty for the courts to establish with certainty the extent to which that provision sought to or limit the court's jurisdiction and should not extend such a limitation more than what is intended by the provision itself. Accordingly, the Appellate Division in the case of *De Wet v Deetlefs*¹⁶ when reversing the decision of the court of first instance held that, 'It is well recognised rule in the interpretation of statute that in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature'. It is therefore clear from these principles that a statutory provision which

¹¹ [1961] 3 ALL ER 641.

¹² WA Joubert *The Law of South Africa* 2ed Vol 11 (2008) 489.

¹³ Ibid.

¹⁴ 1958 (1) SA 490 (A).

¹⁵ Para D.

¹⁶ 1928 AD 286 at 290.

ousts the jurisdiction of superior courts in certain matters must not be interpreted widely, but must be given a strict construction.

It is apt at this point to demonstrate the attitude and language of Parliament in Swaziland when seeking to extinguish the inherent jurisdiction of higher courts in a legislative enactment. In enacting laws, Parliament in Swaziland has indicated without any doubt the circumstances where the intention was to oust the inherent jurisdiction of superior courts of records in the country. The Industrial Relations Act 1 of 2000 (IRA) is one such example of an Act with a plain and unambiguous provision crafted in clear language that excluded the jurisdiction of the High Court from determining labour related matters, and conferring exclusive jurisdiction to the Industrial Court and the Industrial Court of Appeal respectively.¹⁷ To this effect, the IRA has the following provision;

'The court shall, subject to section 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any application, claim or infringement of any of the provisions of this , the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff association or between an employee's association, a trade union, a staff association, a federation and a member thereof'.¹⁸

Now, can it be said that section 40 of the Swazi Competition Act is such a provision that contain the language and meaning that was clearly intended to exclude the original jurisdiction of the High Court in the same way that section 8 (1) of the IRA did? Put differently, can it be argued that by section 40, the legislature clearly and plainly intended to exclude the original and review jurisdiction of the High Court as the Supreme Court held in the *Eagles Nest* case.¹⁹ It is reiterated here that the intention to oust the court's jurisdiction cannot be read or searched into a provision of a statute, rather the statute should plainly and clearly on the face of it state to that effect²⁰ and if the provision can be interpreted to have two meanings, that meaning which preserves the ordinary jurisdiction of the courts shall be adopted.²¹

¹⁷ In terms of section 2 of the IRA, the court means the 'Industrial Court' established in terms of section 6 of the Act.

¹⁸ Section 8 (1).

¹⁹ See the *Eagles Nest* case op cit (n 2) 47 at Para 18 -19.

²⁰ See the Commissioner of Customs case (n 11 above).

²¹ See the *Anisminic Ltd* case (n 8 above).

Accordingly, it is argued that section 40 does not by any means resemble the provision under section 8 (1) of the IRA and clearly the legislature did not convey such an intention in crafting this section. There is nothing in the provision that indicates that the legislature clearly intended to vest the Commission with exclusive jurisdiction in competition matters and thus limiting the jurisdiction of the High Court only to appeals. A holistic reading of the Act clearly does not support this conclusion. The only thing that section 40 did as the High Court observed was to direct that all decisions of the Commission are appealable to the High Court,²² and that does not mean that the High Court cannot hear matters as a court of first instance where for example, criminal violations have been detected by the Commission. In the case of *Swaziland Breweries v Constantine Ginindza*,²³ the Supreme Court commenting on section 8 (1) of the IRA had the following to say;

'The effect of the use of the word 'exclusive' in the section makes it plain in my view that the intention of the legislature in enacting section 8 (1) of the Act was to exclude the High Court jurisdiction in matters provided for under the Act and thus to confer 'exclusive jurisdiction in such matters on the Industrial Court'.²⁴

There is doubt if the above statement can be reiterated by the Supreme Court in respect of section 40, ie, that by section 40 alone the legislature intended to confer exclusive jurisdiction to the Commission. Evidently, by section 8 (1) of the IRA the jurisdiction of the High Court is expressed excluded and a complete adjudicative mechanism that specifically deals with labour issues is established in the Act through the provisions of section 6. On the contrary, no similar provision can be found in the Swazi Competition Act that would otherwise support the proposition that the Commission has exclusive powers to deal with competition matters in the exclusion of the High Court's original and review jurisdiction. If for instance, the Swazi Competition Act had a provision similar to section 6 of the IRA which established a competition court or tribunal and a competition appeal court, then a leaning towards interpreting section 40 as excluding the original and review jurisdiction of the High Court could have been justified in the circumstances.

²² See Pick 'n Pay case (n 3 above) 19 at Para 33.

²³ Supreme Court Appeal Case No: 33/06 (2006) [SZSC] 22. Available at www.swazilii.org/sz/judgment//2006/22-0, accessed on 28 October 2014.

²⁴ Ibid, Para 11.

It is fitting to refer in support of this reasoning, to the decision of Botha JA in *Paper Printing, Wood and Allied Workers` Union v Piennar*²⁵ where the court indicated that ‘the existence of specialist courts points to a legislative policy which recognises and give effect to the desirability, in the interest of administration of justice, of creating such structures to the exclusion of the ordinary courts’.²⁶ Clearly, without the establishment of similar structures in the Act, there is no reasonable justification as to why the legislature would have wanted to exclude the original and review jurisdiction of the High Court. It is common cause that Parliament can confer powers to an independent Tribunal or administrative body to exercise review function or grant other judicial remedies.²⁷

It is submitted however, that the independence and impartiality of the decision-making body should be beyond reproach and the decision making process should be conducted through public hearing and in a fair manner.²⁸ There is doubt if the Swazi Commission possesses the necessary independence and impartiality to fairly execute these functions when taking into account the way it is constituted. Accordingly, the High Court in *Pick ‘n Pay v The Gables* case correctly held that there is no provision in the Act that confers exclusive jurisdiction to the Commission with respect to all competition matters in the country or that extinguish the original jurisdiction of the High Court in relation to same.²⁹

In line and support of this argument, the provisions of the Constitution of Swaziland Act 1 of 2005³⁰ (Swazi Constitution) amplifies this position. The Swazi Constitution outlines the extent of the High Court jurisdiction and recognises the unlimited original, appellate and review jurisdiction of the court in both civil and criminal matters.³¹ Accordingly, section 151 (3) (a) states specifically that the High Court has no jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction notwithstanding the unlimited jurisdiction conferred to it by the Constitution. It is thus correctly held by the High Court that through the combined effect of section 8 (1) of the IRA section 151 (3) (a) of the Constitution, there is no

²⁵ 1993 (4) SA 621 (A) at 637.

²⁶ Ibid, Para A-B.

²⁷ C Hoexter Administrative Law in South Africa 2ed (2012) 591.

²⁸ Ibid.

²⁹ See *Pick’n Pay* case (n 3 above) 21 at Para 38 - 39.

³⁰ Available at www.swazilii.org/sz/legislation/act/2005/na, accessed on 02 October 2014.

³¹ Section 151 (1) and 152.

doubt that the legislature intended to exclude the jurisdiction of the High Court³² with regards to all labour issues arising either from the common law or any of the statutes mentioned in the provision. Regrettably, the same cannot be said with section 40 of the Swazi Competition Act.

The High Court had another occasion to deal with the issue of its jurisdiction under section 40 of the Act in the case of *Ngwane Mill (Pty) Ltd v Swaziland Competition Commission*.³³ It is noted with regret though the contradictory positions taken by the High Court in determining this issue. The decisions in this case (Ngwane Mills) and the *Eagles Nest* case³⁴ which eventually culminated in the decision of the Supreme Court were interestingly, made by the same judge of the High Court. In the *Ngwane Mills* case the Court held that the applicant (Ngwane Mills) lacked the necessary *locus standi* to bring an application to the court in which the applicant complained about the decision taken by the Commission to unconditionally approve a merger.

This was because the applicant (Ngwane Mills) was not a party to the Commission's proceedings and was never approved by the Commission as an intervening party in terms of the Competition Commission's Regulations Notice of 2010.³⁵ The court went on to state that even if the applicant was a party to the proceedings and sought to complain about the administrative process before the Commission, they ought to have brought a review of the Commission's decision.³⁶ This contradicts the same court's findings later in *Eagles Nest (Pty) Ltd v Swaziland Competition Commission* case,³⁷ where it subsequently held that decisions of the Commission can only be appealed to the High Court and in terms of section 40 of the Act, no review lies in the High Court in respect of any matter brought under the Act.³⁸ This is the decision that was later confirmed by the Supreme Court.

³² Pick 'n Pay case op cit (n 3) 22 at Para 40-42.

³³ Case No: (2589/11) [2012] SZHC 2. Available at www.swazilii.org/sz/judgment/2012/2-0, accessed on 15 October 2014.

³⁴ See the Eagle Nest case (n 2 above).

³⁵ Regulation 3 (1) (i) provides that an intervener is a person who has submitted a complaint against a merger in terms of section 11 (2) (b) of the Act and who has been recognized by the Commission as an intervener.

³⁶ Ngwane Mills case (n 33 above) 35 at Para 90.

³⁷ Case No: (1061/2013) [SZHC] 282.

³⁸ Ngwane Mills case (n 33 above) Para 41.

One cannot comprehend the reasons for the court having to enter different decisions on the same issue especially because the decisions in these two cases as mentioned earlier, were made by the same judge of the High Court. Subsequently, the High Court itself has had varying interpretations on the application of section 40 of the Swazi Competition Act even before the unfortunate decision of the Supreme Court.³⁹ This scenario may be understood to be confirming the observations made in the ICN report that courts in developing countries are not conversant with competition law as it was confirmed by Jamaica.⁴⁰ It is submitted with the greatest respect however, that the decision of the High Court in the *Pick 'n Pay* case⁴¹ that preserved the ordinary jurisdiction of the High Court seems to be in line with the spirit of the Act.

3.1.2 The implications of the criminal provisions in the Swaziland Competition Act

It has already been indicated in this work that some provisions of the Swazi Competition Act create criminal sanctions. In terms of the Act it is a criminal offence to effect a merger without the notification and authorisation by the Commission and upon conviction, the violating parties can be liable to a fine not exceeding E 250,000-00 or imprisonment to a term not exceeding five years or to both.⁴² Similarly, under section 42 (1) the Act provides that any person who fails to comply with any provision of the Act, any directive or lawful order given under the Act or any requirement lawfully imposed, is guilty of an offence and shall be liable to a fine not exceeding E 250,000-00 or to a term of imprisonment not exceeding five years or to both.⁴³ This provision applies to all sections of the Act in which no penalty is provided.⁴⁴

³⁹ See in this respect the following decisions of the High Court, Ngwane Mills case (n 33 above), *Pick'n Pay* case (n 3 above) and the *Eagles Nest* case (n 37 above).

⁴⁰ Capacity Building and Technical Assistance: *'Building Credible Competition Authorities in Developing and Transition Countries'*: Report prepared by the International Competition Network Working Group on Capacity Building and Competition Policy Implementation, June 2003 at 35. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf>, accessed on 22 September 2014.

⁴¹ *Ibid.*

⁴² Section 35 (1) (a) and (b).

⁴³ Section 42.

⁴⁴ *Ibid.*

Two inferences can be drawn from these two provisions. Firstly, if section 40 is correctly interpreted to be extinguishing the original jurisdiction of the High court as the Supreme Court did, then this mean that the Commission shall have exclusive jurisdiction to deal with criminal violations under the Act and impose criminal sanctions as it were, then have the decision appealed to the High Court. Secondly, if the Commission cannot initiate and adjudicate on criminal proceedings as it reasonably appears, then the Supreme Court erred in holding that the legislature by section 40 intended to exclude the original and review jurisdiction of the High Court in respect of all matters arising from the Swazi Competition Act. Pursuant to these two provisions, it cannot be correctly argued that the Commission by reason of section 40 alone is conferred with powers to exclusively enforce competition law in the country.

It is accordingly argued therefore, that a careful and holistic reading of the Act does not support the view point as expounded by the High Court and subsequently the Supreme Court in the *Eagles Nest* case, that the role of the courts in the enforcement of competition law in the country is only limited to appeal of the decisions of the Commission.⁴⁵ As such the provisions examined above presupposes that the High Court shall have the power to determine competition matters as a court of first instance in the event criminal violations are alleged, over and above its appellate jurisdiction. Even though the Commission has persistently argued that by section 40 the intention of the legislature was to ordain it with exclusive jurisdiction in all competition matters. There is no justification as to why the legislature would want to upset the legal order and confer powers to the Commission to determine criminal violations and impose criminal sanctions, if the Commission`s arguments are to be taken serious.

Equally, the fact that the High Court has no review powers under the Swazi Competition Act is also unfortunate. Judicial review is the process by which the High Court exercises it supervisory jurisdiction over the decisions and functions of tribunals and other bodies who carry out quasi- judicial functions.⁴⁶ The Commission can be classified as such a body that executes quasi- judicial function by virtue of its adjudicative powers under the Act and thus executing public law functions.

⁴⁵ *Eagles Nest* case op cit (n 2) 47 at Para 18-19.

⁴⁶ Lord Mackay *Halsbury Laws of England* 5ed Vol 61 (2010) 419.

Therefore, the purpose of judicial review is to ensure that individuals appearing before the authority are not treated unfairly and that the decision-making process is indeed lawful.⁴⁷ Similarly, if the authority derives its powers from a statute as the Commission does, then it is even more amenable to judicial review.⁴⁸ In essence, it is with the exercise of these statutory powers that judicial review is concerned with.⁴⁹

If judicial review is meant to ensure that decision-makers do not abused or exceed their statutory powers,⁵⁰ it is correctly argued therefore that the High Court⁵¹ and subsequently the Supreme Court erred in holding that by section 40 superior courts has no jurisdiction to exercise their supervisory powers over the decisions and functions of the Commission. In *R v Panel on Take –overs and Mergers, Ex parte Datafin p/c*,⁵² the court held that the duties of the Panel constituted a public duty and as such it was exercising public law functions when enforcing the City Code on Take - overs and Mergers and its rules. Although its powers were not derived from a statute, the decisions of the Panel were nonetheless subject to judicial review. Assuming again that it was the intention of the legislature to exclude the review jurisdiction of the High Court, it is not clear why would the legislature want to create a lacuna in the law and render the Commission (an administrative body) not subject to the supervisory jurisdiction of superior courts.

Accordingly, and in line with the decision in the *Anisminic* case,⁵³ if section 40 was such a provision that was capable of having two meanings, even though it does not appear to be so, then the Supreme Court should have adopted that meaning which preserved the ordinary jurisdiction of the High Court. Evidently, a prudent consideration of the implications of these two provisions favoured that approach.

⁴⁷ Ibid.

⁴⁸ Lord Mackay op cit (n 46) 425.

⁴⁹ Lord Mackay op cit (n 46) 427.

⁵⁰ Lord Mackay op cit (n 46) 422.

⁵¹ See the *Eagles Nest* case (n 37 above) Para 41.

⁵² [1987] 1 ALL ER 564.

⁵³ See the *Anisminic* case (n 8 above).

3.2 The effects of the scope of the Swazi Commission's decision making powers

In terms of the Swazi Competition Act, the Commission has the power to initiate investigations into any violation or it can do so at the request of any person.⁵⁴ The Commission also have wide powers to adjourn an investigation at any stage whether the investigation was on its own initiative or at the request of an independent complainant.⁵⁵ Unlike section 51 (1) of the Competition Act of South Africa (SA Act) which allows a complainant to refer a complaint to the Tribunal where the Commission has issued a notice of non-referral in response to a complaint, the Swazi Competition Act does not have a similar provision. Effectively, this means that if a complaint is lodged by a complainant and the Commission is of the view that it cannot initiate investigations into that complaint that could mean the end of the matter. This is so in view of the fact that the court has no jurisdiction to determine competition matters as a of court first instance as seen above.

In terms of regulation 3 (1) (e), a complainant means 'a person who has submitted a complaint in respect of an alleged anti-competitive trade practice in terms of section 11 (2) (a) of the Act'. The problem with this arrangement is that the Commission can decide to abandon or not take up a case even where there is a clear case of a violation and the complainant will never have another avenue to turn to for the matter to be dealt with accordingly. When considering the considerable number of state owned corporations and state affiliated monopolies in Swaziland, this move can give rise to problems of under enforcement of competition where these entities are involved. As indicated above, the Commission can either deliberately or mistakenly fail to condemn anti- competitive practices arising from these corporations even if there is a clear case of a violation. When taking into account the conditions in the Swaziland markets, ie, that the domestic market is largely encumbered by state owned enterprises and state affiliated monopolies, the risk of failing to punish anti -competitive conduct (under enforcement) by the Commission is high. This is referred to as the Type II Errors, where an authority for varying

⁵⁴ Section 11 (2) (a) and (b).

⁵⁵ Section 13 (1) (e).

reasons fails to condemn conduct that is otherwise anti-competitive and consequently causing chilling effects to competition.⁵⁶

Thus, it is correctly observed that ‘where there is a history of state ownership of enterprises, protected monopolies..., the risk and potential consequences of Type II Errors are high’.⁵⁷ The possibility for the markets to self-correct if anti-competitive conduct is left undetected is minimised by the existence of the competition unfriendly policies and regulations enforced at a state level⁵⁸ as already observed in the case of Swaziland.⁵⁹ Similarly, the heavy presence of government officials in the Commission further complicate this position as it can also give rise to a conflict of interest and biases where these entities are concerned thus trumping the whole purpose of putting this legislation in place. If this *status quo* is to be maintained, a high standard of transparency, independence and accountability should therefore be exercised by the Commission.

It is therefore recommended under these circumstances that the original jurisdiction of the High Court should have been maintained so that if the Commission for any reason decline to deal with a matter brought by an independent complainant, then the complainant can have the alternative to take the matter to court as it happened in the South African *Mittal Steel Company* case. In the absence of a competition tribunal that would otherwise discharge the adjudicative function, it is imperative that the court’s powers to determine competition matters at first instance should be restored. Equally, the Act should be amended to include provisions that will allow independent complainants to refer cases of violations to court where the Commission has declined to deal with the matter.

3.3 Conclusion

This chapter has provided a discourse on the role of the courts in the regulation and enforcement of competition in Swaziland. It transpired from this discussion that the courts have no meaningful role to play in enforcing competition in

⁵⁶ J Fingleton and A Nikpay ‘Stimulating or Chilling Competition: International Antitrust Law and Policy’ March 2009 at 3, available at http://www.jurispub.com/cart.php?m=product_details&p=9157, accessed on 18 August 2014.

⁵⁷ Fingleton and Nikpay op cit (n 56) 24.

⁵⁸ Ibid.

⁵⁹ Section 3 read with section 4 of the Swazi Competition Act.

the country and the court's reasoning that conferring courts with review jurisdiction to determine competition matters will cause chaos in the business community is unfounded. This section has also put into perspective the challenges associated with the limitation of the courts powers to determine competition matters.

It has been demonstrated how the limitation of the courts powers can have an effect on the effectiveness of the Commission as well as the development of competition law jurisprudence in the country generally. The fact that even the Commission itself does not have staff that is adequately trained in competition law further aggravates this situation. All these factors taken together will have the effect of rendering the Commission ineffective in the long run if not addressed. Preliminary recommendations to address these challenges have been put forward.

CHAPTER FOUR: A COMPARATIVE PERSPECTIVE OF COMPETITION LAW ENFORCEMENT UNDER THE SOUTH AFRICAN FRAMEWORK

4. Introduction

The previous two chapters have extensively scrutinised the law regulating competition in Swaziland. As seen in chapter two, the framework for enforcing competition in particular the composition of the Competition Commission has been analysed and the challenges posed by the present structure have been highlighted. Chapter three provided a critical evaluation of the role of the courts in the enforcement of competition law in the country. It transpired that the competition framework of Swaziland has limited the courts powers to participate meaningfully and effectively in the enforcement and regulation of competition in the country.

This chapter is aimed at providing a detailed comparative analysis of the framework for regulating and implementing competition law in South Africa. Most importantly it focuses on the model for institutional design of the South African regulatory and enforcement framework. A direct comparison of the South African Competition Act 89 of 1998 (SA Act) and the Swazi Competition Act will be conducted in order to identify the areas that may be recommended for incorporation into the Swazi framework as a basis for the reform of the Swazi design and equally making the Swazi Commission even more effective in the execution of its functions as enshrined in the Act.

This is in light of the fact that the Swazi Commission is relatively a new institution, as young as 2007; hence it is imperative that it models and aligns itself with the practices of those regimes in the region that have already tested their wings in flight. Thus, it is correctly posited that South African competition jurisprudence has already provided a compass for developing countries through its emergence as one of the most developed body of competition case law in the developing-

countries.¹ Accordingly, the South African framework presents the best modelling platform for Swaziland.

As mentioned in the introductory chapter, Swaziland and South Africa are major trading partners and as such there is a need for the convergence of their competition laws in order to establish a level of certainty in their enforcement practices. Such convergence can help in eliminating any contradictions and uncertainties regarding the application and enforcement of competition laws in the two jurisdictions. It can also help strengthen the trading relations that exist between the two countries in that corporations will know with certainty the competition laws prevailing in the country.

Such congruence of competition laws and its importance has also been emphasised by the International Competition Network (ICN) especially in cross-border mergers.² The ICN has recognised the need for an international institutional arrangement that can be adopted in order to bring coherence in the enforcement of cross-border mergers, thus reducing conflicts on the enforcement procedures between states.³ The African agenda for regional integration and the internationalisation of world markets also calls for the convergence of competition laws if internal markets are to reap the expected benefits.⁴ Countries should thrive to adopt similar competition law principles, and enforcement measures that have the effect of restricting or distorting competition must be applied in the same manner between member states in order to achieve a harmonised system of competition regulation.⁵

Similarly, both countries' legal systems are informed by the Roman-Dutch Common law system. As a result of this similarity it is not surprising that the statutory enactment in Swaziland, to a very large extent, resembles the South African one. As such, the convergence on this area of the law cannot be viewed as a

¹ EM Fox 'Competition, Development and Regional Integration: In Search for Competition Law Fit for Developing Countries' (2012) NYU Law and Economic Research Paper No: 11-04 at 13. Available at <http://ssrn.com/abstract=1761619>. Accessed on 20 November 2014.

² ICN: Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance, Substantial Market Power and State - Created Monopoly: Prepared by the Unilateral Conduct Working Group. Available at www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf, accessed on 11 February 2015.

³ ICN Report (n 2 above) 7.

⁴ ICN Report op cit (n 2) 19.

⁵ Ibid.

misnomer of the prevailing practice in the country in as far as legislative drafting is concerned.

To this end, it is correctly observed that there is no international law for competition; however, the convergence of the institutional design models and principles is fundamentally important in avoiding any uncertainty and ensure less confusing playing fields for cross border businesses.⁶ Evidently, this can prevent conflicts as each jurisdiction will be familiar and understand the enforcement procedures obtaining in the other jurisdiction.

4.1 The institutional design for regulating competition law in South Africa

It transpired from earlier discussions in this work that South Africa adopted the bifurcated agency/tribunal as the model for institutional design.⁷ This model entails that the competition authority, in the South African context, the Competition Commission investigates all violations of the Competition Act and thereafter refers the case to a specialised tribunal, the Competition Tribunal for adjudication.⁸ An appeal from the decisions of the Tribunal lies in the Competition Appeal Court (CAC) which is also a specialised court established in term of the SA Act.⁹ It is therefore evident that the framework for implementing competition law in South Africa is constituted by a significant number of structures all designed in a way that enables them to independently exercise their duties and functions. Thus, the South African enforcement structure is made up of the Competition Act 89 of 1998, and three institutions, *viz*, the Competition Commission, the Competition Tribunal and the Competition Appeal Court. These are the three institutions for competition regulation as provided by the SA Act.¹⁰

Before the coming into force of the Constitution Seventeenth Amendment Act of 2012 (Amendment Act), the Supreme Court of Appeal with its original appellate jurisdiction (not as a specialised supreme court) was also a player in the

⁶ See Fox (n 1 above) 8.

⁷ EM Fox and MJ Trebilcock *The Design of Competition Law Institutions: Global Norms, Local Choices* 1ed (2013) 5.

⁸ *Ibid.*

⁹ Section 36 (1).

¹⁰ Fox and Trebilcock *op cit* (n 7) 270.

regulatory framework such that an appeal from the decision of the CAC lied in the Supreme Court of Appeal and finally the Constitutional Court.¹¹ However, in terms of section 4 of the Amendment Act, the Supreme Court of Appeal has no jurisdiction to hear appeals in respect of a competition matter anymore. This in effect means that the CAC is now the final arbiter in all competition matters. There has been a concern that the South African enforcement structure had too many levels of appeal which in turn was detrimental to the proper regulation of competition in the country. This was mainly because of the delays involved while the matter was being taken through all the stages of appeal.¹² One can therefore submit that the amendment of the Constitution to exclude the Supreme Court of Appeal's jurisdiction in competition matters is intended at addressing these challenges.

Section 5 of the Amendment Act further states that the High Court of South Africa or any other court of a status similar to that of the High Court of South Africa may decide any constitutional matter except a matter that the Constitutional Court has agreed to hear directly in terms of section 167 (6) (a). Effectively, this means that the CAC, being a court with a status similar to that of the High Court of South Africa, now have the jurisdiction to determine the constitutionality of any matter brought to it in terms of the SA Act without necessarily referring the matter to the Constitutional Court for the determination of the constitutional question. Previously, the Constitutional Court had the sole jurisdiction to determine competition matters that raised constitutional questions as seen from the case of *Competition Commission of South Africa v Senwes Limited*.¹³

It was observed by the South African democratic government that the South African economy in the apartheid era was largely directed and protected by the government, as such markets were highly concentrated and the black majority was largely excluded from participating in the economic activities of the country.¹⁴ This was mainly caused by the fact that most of the large corporations were family owned

¹¹ Section 62 (4).

¹² Fox and Trebilcock op cit (n 7) 5.

¹³ Case CCT 61/11 [2012] ZACC 6.

¹⁴ Fox and Trebilcock (n 7 above) 267. See also the Preamble to the Competition Act of South Africa which records among other issues that the apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy... and unjust restriction of full and free participation in the economy by all South Africans.

and operated on a culture of cronyism that lacked accountability and transparency.¹⁵ In view thereof, it is apparent that the need for proper and effective competition regulation post-apartheid was crucial in order to allow the South African market structures to function properly and efficiently, and the only way to achieve that goal was to enforce a robust competition culture.

Similarly, the public interest consideration in mergers in the South African framework serves partly to safeguard and ensure that the previously disadvantaged are afforded an opportunity to effectively and meaningfully participate in the national economy of South Africa.¹⁶ It is aimed at ensuring amongst other issues that post-merger, small businesses controlled or owned by the previously disadvantaged persons remain competitive and that the proposed merger will not have negative effects on employment.¹⁷ The essence of the public interest doctrine was tested for the first time in South Africa in the case of *Minister of Economic Development and Others v Walmart Stores Inc and Another*.¹⁸ The CAC held in this case that the merger between Walmart and Massmart could not be justified on substantial public interest grounds mainly for two reasons. Firstly, it was observed by the court that the merger was the cause of the retrenchment of about 503 workers and as such the merged entity was to reinstate all the workers that were retrenched during the period preceding the merger and that no further retrenchments should be effected for a period of two years after the merger.

Further, the CAC ordered that the merged entity should commission a study to determine the most suitable way in which local South African suppliers in particular small and medium size suppliers can be empowered such that they can effectively conduct business with the merged entities thus benefitting from the national economy as well. Eventually, the merger was approved with the conditions that the two issues mentioned above were addressed by the merged entity. In view of the foregoing, it is clear therefore that the South African apartheid history largely contributed to the enormous checks and balances previously put in place under the South African framework as seen above.

¹⁵ J Schulschenk, Corporate Governance Report Programme: Interview Summary Report, August 2012 at 1. Available at www.up.ac.za/sitefiles/file/2013_alcrl_pdf. Accessed on 10 November 2014.

¹⁶ See in this respect section 12A (1) (ii) (b) and (3).

¹⁷ Section 21A (3) (b) and (c).

¹⁸ Case No: 110/11 CAC. Date of judgment: 09 March 2012.

4.1.1 The Competition Commission of South Africa

Under the South African framework, the SA Act establishes a body called the Competition Commission (SA Commission), which is a juristic person and exercises its powers only in terms of the SA Act.¹⁹ The SA Commission is the investigative authority.²⁰ It is entrusted with the duty to enforce the provisions of the SA Act and as such it investigates competition practices that are in conflict with the Act. The SA Commission can initiate investigations on its own or at the request of a complainant.²¹ The Tribunal can also refer any matter to the Commission for investigation.²² The Commission have one year to investigate all complaints referred to it and where a prohibited practice has been established, refer the matter to the Competition Tribunal for adjudication.²³ This period can be extended upon agreement between the Commission and the complainant in the case the matter was reported by a complainant,²⁴ alternatively, the Commission can apply to the Tribunal for an extension.²⁵

The only instance where the Commission is exempt from the statutory time limit is when the complaint has been initiated by the Commission itself.²⁶ In *Competition Commission v Clover Industries Ltd*,²⁷ the Competition Tribunal held that a complaint initiated by the Commission is not subject to the time limits as provided for by the Act. If the Commission decides not to refer the case to the Tribunal then a notice of non-referral must be served to the complainant, in which case the complainant has the right to refer the matter directly to the Competition Tribunal.²⁸

Similarly, if the Commission fails to refer the matter within the specified time period and does not request for an extension either from the complainant or the Tribunal it is taken that the Commission has issued a notice of non-referral and that

¹⁹ Section 19 (1).

²⁰ Section 21 (c).

²¹ M Neuhoff et al *A Practical Guide to the South African Competition Act (2006)* 241.

²² Section 21 (1) (i).

²³ Section 50 (2) (a).

²⁴ Section 50 (4) (a).

²⁵ Section 50 (4) (b).

²⁶ Fox and Trebilock (n 7 above) 284.

²⁷ Case No: 103/CR/Dec06 at Para 21.

²⁸ Section 51 (1).

have the effect of bringing the matter to finality in the case where the matter was initiated by the Commission. Where upon investigation a prohibited conduct is established, the Commission refers the matter to the Tribunal for adjudication and the Commission can appear before the Tribunal as a party.²⁹

It is noted that unlike the Swaziland framework, the South African structure provides a clear position on the manner in which the SA Commission should conduct itself in the execution of its investigative function in terms of the time frames. Under the Swaziland Competition Commission Regulations Notice of 2010, the Commission has ninety days to make a determination in respect of any alleged prohibited conduct which it either initiated or received as a complaint from a third party.³⁰ The Swazi Commission can upon notice to both the complainant and the undertaking that is the subject of the investigation extend the period provided for under sub-regulation (a) for another sixty days.³¹

Contrary to the South African position in which the SA Commission is not bound by any lapse of time where it has initiated the complaint, the Swazi Commission is equally time bound in accordance with the Act even where it has initiated the complaint.³² However, it is not provided in the Swazi Competition Act as to what should happen if the Commission exceed these time limits without notifying the other interested parties *viz*, the complainant and the entity under investigation. This question arose in the *Eagles Nest v The Competition Commission* case.³³ It was argued by the applicant that the Commission exceeded the investigation time period as provided for by the Swazi Competition Act. It transpired that the Commission exceeded the time limits as provided by the Act and neither notified the applicants, (respondents in the earlier proceedings) nor made an application to the court for such an extension. The applicant (Eagles Nest) sought an order declaring that the Commission was bound by the time frames as provided by the Swazi Competition Act and if it has to exceed that period, the Commission should have made an application to the court for such an extension.

²⁹ Section 21 (g).

³⁰ Regulation 14 (a).

³¹ Regulation 14 (b).

³² See Regulation 14 (n 11 above).

³³ Case No: 1/2014 [2014] SZSC 39. Available at www.swazilii.org/sz/judgment/supreme-court/2014/39. Accessed on 02 October 2014.

The Supreme Court however declined to make a determination on this issue and as such it remains unclear as to the right course to be taken where the Commission has exceeded the statutory time limits without having notified the affected parties. Under the South Africa law, the requirement that the complainant's consent must be obtained before the SA Commission can extend the investigation period was clearly made to protect the rights of the complainant.³⁴ This would make sure that the Commission does not engage in endless investigations to the prejudice of the complainant. This is particularly so in instances where the complaint was initiated by an independent complainant and not the Commission.

In order to protect the interest and rights of all parties that may be interested in the investigations of the Commission from time to time, it is submitted that the Swazi framework should incorporate provisions that will compel the Commission to make an application to the Court where there is a need for the time limit to be extended. Similarly, where the Swazi Commission has issued a notice not to pursue a complaint, the complainant must be allowed to refer the complaint directly to court. As of present, the Swazi Act does not provide any guidance on the position to be taken where the Commission has declined to pursue a particular matter. Further, the Swazi framework must include provisions that will mandate the Commission to refer all matters of criminal violation to court. This is the position in South Africa in respect of the provisions of the SA Act that attracts criminal sanctions.³⁵ To this end, the SA Act provides that the Magistrate Court has jurisdiction to impose any penalty provided for under the Act.³⁶

It is noted though that the Magistrate Court can only impose penalties in respect of those criminal offences that impede on the administration and enforcement of the Competition Act³⁷ and not administrative penalties which can only be imposed by the Tribunal and the Competition Appeal Court for a contravention of the substantive provisions of the Act.³⁸ In the case of *Federal Mogul Aftermarket Southern Africa (Pvt) Ltd v The Competition Commission*,³⁹ the CAC made a distinction between those provisions of the SA Act which attracts criminal sanctions

³⁴ Neuhoff et al (n 21 above) 244.

³⁵ Section 75.

³⁶ Section 75.

³⁷ Section 70.

³⁸ Neuhoff et al op cit (n 21 above) 294.

³⁹ Case No: 33/CAC/Sep03 at 37.

and those which are followed by administrative penalties and accordingly held that, the proceedings of the Tribunal which eventually lead to the imposition of the administrative penalty, are in their nature civil and not criminal.⁴⁰ As such, they do not constitute criminal proceedings as to warrant the invocation of the provisions of section 35 of the Constitution which regulates the procedure in respect of arrested, detained and accused persons as alleged by the appellant.

A criminal complaint therefore can be initiated by the Competition Commission which is the only body responsible for the administration and enforcement of the SA Act. The police are responsible for the investigation of all allegations of criminal violations under the Act and offenders are prosecuted by the National Prosecution Authority at the Magistrate Court.⁴¹ This is contrary to the Swaziland position where presently the Act does not give guidance on how the investigation and adjudication of criminal cases should be conducted, most importantly because the courts lack jurisdiction to hear competition cases as courts of first instance.

4.1.2 The Competition Tribunal

Here lies a major distinction with the South African law. Whereas the Swazi Commission undertakes both investigative and adjudicative function, under the South African framework, the Competition Tribunal (Tribunal) is the adjudicative body. The Tribunal is the court of first instance in all competition matters.⁴² It is therefore entrusted with the adjudication of all competition complaints brought to it by the Commission or individual complainants where the Commission had issued a notice of non-referral in terms of section 51(1) of the SA Act as seen above. It has the power to determine any matter brought to it under the Act and to order administrative penalties.⁴³ Thus, under the South African Competition framework, the adjudicative function is structurally independent from the investigation and enforcement function.⁴⁴

⁴⁰ Ibid.

⁴¹ Neuhoff et al op cit (n 21) 295.

⁴² Fox and Trebilcock op cit (n 7) 272.

⁴³ Section 27 (1).

⁴⁴ Fox and Trebilcock (n 7 above) 20.

The Tribunal also acts as an appeal body in respect of all the issues that the SA Commission has decision-making powers such as the approval of small and intermediate mergers and the granting of exemptions from the SA Act.⁴⁵ As mentioned earlier, the Tribunal can also refer any matter to the Commission for investigation.⁴⁶ As such, the Tribunal cannot make an order that purports to approve or prohibit a small or intermediate merger as a court of first instance,⁴⁷ but can only make an order as an appellate body in respect of a decision of the Commission. However, with regards to large mergers the Tribunal has the sole power to make a determination whether to approve or prohibit a large merger subject to the Commission's recommendations.⁴⁸

In the consideration of large mergers, the SA Commission upon receipt of a notice for a large merger must refer the notice to the Tribunal and to the Minister.⁴⁹ The SA Commission can only recommend to the Tribunal whether to authorise or prohibit the merger with or without conditions.⁵⁰ The SA Commission thus has no power under the Act either to approve or prohibit large mergers. However, the Tribunal also has no power under the Act to make a determination in respect of a large merger if that merger is subject to the jurisdiction of specific provisions of the Banks Act 94 of 1990 and the Co-operative Banks Act of 2007.⁵¹ This is regardless of whether the proposed merger raises competition issues or not.

The South African law on mergers is different from the position that obtains in Swaziland in that under the Swaziland framework there are not thresholds for mergers consideration. This in effect means that the Swazi Commission considers all mergers whether small, intermediate or large. This is attributed to the fact that the Swazi Commission is the only body responsible for enforcing competition. Similarly, under the SA Act it is only the Tribunal that can order administrative penalties and not the Commission as it is the case with the Swazi Commission.

⁴⁵ Ibid.

⁴⁶ Section 21 (1) (i).

⁴⁷ Section 18 (2).

⁴⁸ T Hartzenberg 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2005) 26 *Northwestern Journals of International Law and Business* 667 at 672. See also section 16 (2) of the SA Act.

⁴⁹ Section 14A (1) (a).

⁵⁰ Section 14A (1) (b).

⁵¹ Section 18 (2) (a).

It is evidently clear from the South African Framework that the structures put in place are each meant to ensure the independence and effectiveness of the institutions entrusted with the enforcement of a vibrant competition regulation in the country. Thus, it is submitted that the enforcement structure for Swaziland should also be reconsidered to include either a competition tribunal as an adjudicative body or alternatively, the Commission should investigate and refer matters to court. This can ensure the independence of the decision-making process of the Commission.

4.1.3 The Competition Appeal Court

The SA Act establishes a specialised court known as the Competition Appeal Court (CAC).⁵² The CAC is similar to the High Court in terms of status⁵³ but can hear only appeals brought to it in terms of the SA Act. The CAC is constituted by the Judge President and two other judges sitting together and each of whom must be a judge of the High Court.⁵⁴ All matters brought before the CAC must be heard by three judges except for cases of a procedural nature.

The CAC has appellate and review jurisdiction only and as such it can hear appeals from final decisions of the Tribunal and can review any decision of the Tribunal.⁵⁵ As already mentioned above, in terms of section 4 of the Amendment Act, the decision of the CAC is final and the Supreme Court of Appeal has no jurisdiction to determine an appeal in respect of a matter brought to the CAC in terms of the SA Act. Similarly, the decision of the CAC is final in all matters that the CAC has exclusive jurisdiction.⁵⁶ In terms of the SA Act, the CAC shares exclusive jurisdiction with the Competition Tribunal with regards to the application and interpretation of the provisions of chapter 2, 3 and 5 of the SA Act.⁵⁷ These chapters contain provisions dealing with prohibited practices, merger control as well as the investigation and adjudication procedures respectively.⁵⁸

⁵² Section 36 (1).

⁵³ Section 36 (1) (a).

⁵⁴ Section 36 (2) and (3) respectively.

⁵⁵ Section 37 (1) (a) and (b).

⁵⁶ Section 62 (3) (a).

⁵⁷ Section 62 (1) (a).

⁵⁸ See the Preamble of the SA Act.

The advantage of having a specialised court under the South African framework ensures a speedy resolution of all competition complaints that have to be referred to the court. It also ensures that competition matters are dealt with by judges that have the necessary expertise to deal with competition matters. This is contrary to the Swaziland position where the High Court sits as an appellate court in competition matters with its original jurisdiction and the judges hearing competition cases have no training in competition law. This is another factor that distinguishes the South African approach from the Swaziland one.

It is thus submitted that the Swazi framework should be re-designed in such a way that the High Court should have a specialised division that will deal specifically with competition matters. Such a move can also ensure that the judges handling competition matters are adequately trained, thus developing this new field of law in the country.

4.2 Conclusion

This chapter has provided a discussion of the enforcement structure under the South African framework and how it ensures the independence of each of the three institutions that have been established by the SA Act to regulate and enforce competition law in the Republic. The chapter has highlighted the major differences between the two frameworks and the advantages that are associated with the South African competition law design.

It is clear from the structure that each of the institutions is designed in such a way that it can effectively exercise its functions without any interference or prejudice and the independence of each of the institutions cannot be questioned. It is for the same reasons that the model adopted by South Africa is the ideal one for Swaziland for ensuring proper, effective and independent competition enforcement in the country.

CHAPTER FIVE: CONCLUSION

5. Introduction

Having conducted an extensive research on the legal framework for regulating and enforcing competition law in Swaziland in the preceding chapters, this chapter concludes the study and will provide some recommendations that may be considered and adopted in order to give greater effectiveness to the entire competition enforcement system in particular the Competition Commission of Swaziland. As mentioned earlier on that until 2007 there was no implementation of competition law in the country in the strict sense. The coming into force of the Competition Act in 2007 brought a direct focus for developing and enforcing a vibrant competition culture in the country.

This treatise provided an analysis on the composition of the Competition Commission with the aim of ascertaining whether the design of the Swaziland regime can render it independent and effective in enforcing competition law in the country. In doing so, a critical examination of the composition of the Swazi Commission was done.

The extent of the court's role and participation in competition matters generally was also explored and the degree at which the court's powers to deal with competition matters has been limited was questioned. This treatise further highlighted the challenges associated with the manner in which the court's powers over competition matters have been limited.

Finally, a comparative analysis on the enforcement structures and institutional design in other jurisdictions was conducted. An extensive comparative study of the South African competition law framework was done in order to justify the recommendation that the Swaziland Competition Commission should follow the bifurcated agency model as the basis for its design. As such, the purpose of the comparative study was to highlight the benefits associated with the design adopted by South Africa in particular the separation of the three institutions entrusted with the duty to effectively implement competition in the country. Most importantly, it was

observed that such separation is vital for ensuring and safe guarding the independence of the institutions.

The suggested recommendations are largely informed by the finding of the entire research. Most importantly, lessons that have been learned from the competition enforcement architecture of South Africa will form a major part of the aspects to be considered for the reform of the Swaziland regulatory framework.

5.1 The structure and composition of the Swaziland Competition Commission

It has been shown in the earlier analysis that the composition of the Swazi Commission militates against the independence of the Commission. It came out clear from this research that the manner in which the representatives of the Commission are appointed has a negative effect on the independence of the Commission. Likewise, it has been highlighted how the significant number of government officials in the representation of the Commission can render the Commission not independent. If the independence of the Swazi Commission cannot be assured, there is no doubt that the Commission cannot be effective in the execution of this very important mandate.

Developing countries like Swaziland do need a competition law framework that is competent enough to deal effectively with government imposed restrictions upon competition as seen in the case of Swaziland. This is one other way in which economic development and poverty alleviation can be guaranteed. Until such time that the competition framework of Swaziland is designed in a way that will seriously and effectively address the competition challenges that are presently obtaining in the country, the implementation of competition law will forever remain an exercise in futility.

The illusive separation of the Swazi Commission and the challenges it poses to the effective enforcement of competition has also been illuminated. It has been noted that this kind of institutional design has been criticised in the jurisdictions whose competition regimes are founded on it. As indicated in this work, such criticisms have arisen mostly in the United States of America with regards to the FTC and the European Commission of the European Union. It is for the same reasons

it has been argued in this work that this kind of a design is not suitable for Swaziland.

5.1.1 The role of national courts in enforcing competition law

The study has also examined the role of national courts in the enforcement of competition law in the country as shown above. It transpired from this work that the jurisdictional powers of the courts to meaningfully intervene and contribute to the development of this area of the law have been curtailed. The limitation created by the Supreme Court's interpretation of section 40 of the Swazi Competition Act as ousting the original jurisdiction of courts has been discussed, as well as the negative effects that this decision has suffered the implementation of competition in the country. The regrettable consequences of the decision in *Eagles Nest v The Swaziland Competition Commission* have been illuminated. Evidently, the court's reasoning that chaos in business dealings would result if ordinary courts were to determine competition matters as courts of first instance is not supported.¹

It is thus submitted that such reasoning is not in line with current trends when considering the enforcement of same in other jurisdictions. Evidently, it is the very same limitation of the court's jurisdiction that has caused chaos and confusion in the enforcement of the Act as seen above. The importance of the scrutiny that is provided by courts structures cannot be over emphasised and the South African framework is a classical example of how courts can contribute positively in developing good competition law principles.²

5.1.2 The findings of the comparative study

The comparative study looked primarily into the model for institutional design of the South African competition law framework. The aim of the examination of the model adopted by South Africa was to identify and compare its strengths and weaknesses with the model adopted by Swaziland and finally incorporate the findings as a basis for the reform of the Swaziland framework. It transpired that the

¹ Case No: 1061/2013 [SZHC] Para 44.

² See in this respects the approach developed by the CAC on the public interest consideration doctrine in the case between the *Minister of Economic Development v Walmart Stores Inc Case no: 110/CAC/Jul2011: 111/CAC/Jun11*.

South African Competition Act establishes three distinct institutions that are all designed in a way that allows them to independently exercise their functions in accordance with the SA Act. On the contrary, it has been demonstrated how the fusing of the investigative and adjudicative functions of the Commission can render it ineffective in the proper execution of its mandate.

The SA Commission constitutes the investigative body under the South African competition framework and it is independent and separate from the Competition Tribunal which is an adjudicative body. Similarly, the Competition Tribunal is independent from the Competition Appeal Court (CAC) in that in terms of the SA Act, the CAC can only hear appeals from the decisions of the Competition Tribunal hence, the CAC is a specialised appeal court and in terms of section 4 of the Amendment Act, its decisions are final.

5.2 Recommendations

First and foremost, there seems to be a need to reconsider the composition of the Competition Commission in order to ensure the independence of the Commission. The manner in which the representatives of the Commission are appointed should also be re-visited. The number of government representatives in the Commission should be reduced as this is the major issue that threatens the independence of the Commission. The Minister should be mandated to appoint two representatives as is the case with the South African Commission where the minister can only appoint the Commissioner and the Deputy Commissioner respectively,³ and the rest of the other staff is appointed by the Commissioner and are not necessarily government officials.

Similarly, the other representatives that are nominated from the other stakeholder institutions should be appointed by the Commissioner after being nominated by their respective institutions. This can minimise the amount of influence that may be imposed by the government upon the Commission. It has been demonstrated how such influence can be detrimental to the effectiveness of the Commission in particular where the conduct of the state owned corporations and government affiliated monopolies is in question. There is doubt if the Commission

³ See section 22 (1) and 23 (1) respectively.

can execute its mandate effectively and fairly under the present framework. Accordingly, it is recommended that the Minister responsible for Trade and Industry should appoint only two representatives, these being the Commissioner and the Deputy Commissioner.

Secondly, it also recommended that the Swazi Competition Act should incorporate provisions that will clearly outline the court's powers under the Act and extend the jurisdiction of the courts to include determining competition matters as courts of first instance. This can resolve the confusion that has been created by the decision of the Supreme Court where it has excluded the original jurisdiction of the courts in all competition matters, notwithstanding the fact that the Act establishes criminal sanctions which logically should be enforced by courts of law. This will render the Swaziland framework to be in line with international standards where for instance under the South African and the US frameworks, criminal competition violations are dealt with by courts of law as opposed to the Commission. Under the South African framework for instance, none of the institutions established can impose criminal sanctions. Alternatively, the Swazi Competition Act should be amended to clearly state the applicable procedure in the event criminal violations are established.

Thirdly, it is also imperative that the provisions that give immunity to the state owned corporations and government proclaimed monopolies should be expunged from the Act and these entities should not be exempted in any way from the full operation of the Act. This will help ensure that a strict competition culture is developed in the country and that the legislation can effectively respond to the present competition challenges. If anti- competitive practices by these entities are not addressed by the Act, there is no doubt that this will undermine the efforts made to enforce and develop a positive competition culture in the country generally.

Fourthly, the Swazi Competition Act should be amended to include provisions that will clearly state the procedure to be followed where the Commission have exceeded the stipulated time frame. Presently, the Swazi Competition Act only provides that the Commission can inform the entity under investigation if there is a need for the extension of the time limit.⁴ It is recommended that in the event the

⁴ See section 16 (2) of the Competition Commission Regulations of 2010.

Commission needs to extend the stipulated time limit, it has to make an application to court in order to avoid situations where the Commission will extend the stipulated time lines without notifying the other parties. The Act should also contain provisions that will stipulate the procedure in the event the matter is reported by an independent complainant. As of present the Act is silent on what should happen if the matter was reported by complainant and not initiated by the Commission.

Finally, the Swazi Competition Act should include provisions that will allow a complainant to refer a matter directly to Court in the event the Commission has refused to investigate or adjudicate on the matter for any reason. This will ensure proper regulation and that the Commission does not overlook matters that otherwise raise competition challenges.

It is thus hoped that the above mentioned recommendations can help the Commission in modelling the institutional design of the Swaziland framework to the right direction. It cannot be over emphasised that it is through a proper design of the competition enforcement structures that effective implementation of competition law can be achieved in the country.

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