REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Reportable

CASE NO: 110/CAC/Jul11

111/CAC/Jun11

In the matter between:-

THE MINISTER OF ECONOMIC DEVELOPMENT	First Applicant
THE MINISTER OF TRADE AND INDUSTRY	Second Applicant
THE MINISTER OF AGRICULTURE AND FISHERIES	Third Applicant

and

THE COMPETITION TRIBUNAL	First Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent
WAL-MART STORES INC.	Third Respondent
MASSMART HOLDINGS LIMITED	Fourth Respondent
SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION (SACCAWU) & OTHERS	Fifth Respondent
SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION (SACTWU)	Sixth Respondent
THE SOUTH AFRICAN SMALL BUSINESS AND MICRO ENTERPRISES FORUM (SASMMEF)	Seventh Respondent

And in the matter between

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION (SACCAWU) Appellant

and

WAL-MART STORES INC. First Respondent

MASSMART HOLDINGS LIMITED Second Respondent

JUDGMENT : 9 March 2012

DAVIS JP and ZONDI JA:

Introduction

[1] On 31 May 2011 the Competition Tribunal ('Tribunal') conditionally approved the merger between first and second respondents. The Tribunal found that the merger raised no competition concerns although it did raise certain public interest concerns which could, however, be adequately remedied by the imposition of conditions which had initially been submitted as undertakings by the merging parties (being first and second respondents) and which were then made part of the order granted by the Tribunal.

[2] As they appear in the order, these conditions were the following:

> "1.1 *The merged entity must ensure that there are no retrenchments based on the merged entity's operational*

requirements, in South Africa, resulting from the merger, for a period of two (2) years from the effective date of the transaction. For the sake of clarity, retrenchments do not include voluntary separation agreements or voluntary early retirement packages, and reasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 1995, as amended.

1.2 The merged entity must, when employment opportunities become available within the merged entity, give preference to the re-employment of the 503 employees that were retrenched during June 2010 and must take into account those employees' years of service in the Massmart Group.

1.3 The merged entity must honour existing labour agreements and must continue to honour the current practice of the Massmart Group not to challenge SACCAWU's current position, as the largest representative union within the merged entity, to represent the bargaining units, for at least three (3) years from the effective date of the transaction.

1.4 The merged entity must establish a programme aimed exclusively at the development of local South African suppliers, including SMMEs, funded in a fixed amount of R

> *100 million to be contributed by the merged entity and expended within three (3) years from the effective date of this order. The programme will be administered by the merged entity, advised by a committee established by it and on which representatives of trade unions, business including SMMEs, and the government will be invited to serve. The merged entity must report back to the Competition Commission annually, within one month of the anniversary of the effective date, about its progress. In addition the merged entity must establish a training programme to train local South African suppliers on how to do business with the merged entity and with Wal-Mart.*

[3] In the proceedings before the Tribunal, three groups of intervening parties participated: certain trade unions, being SACCAWU, NUMSA and FAWU as well as SACTWU and the Labour Research Services ('the unions'), the Minister of Economic Development, the Minister of Trade and Industry and the Minister of Agriculture, Forestry and Fisheries ("the Ministers") as well as the South African Small Medium and Micro Enterprises Forum.

[4] Of all of these parties, only SACCAWU appealed the decision of the Tribunal. The Ministers brought a review against the proceedings which took place before the Tribunal, based on the essential contention that the parties did not have a fair hearing before the Tribunal. Accordingly, if this court is to find in their favour, they contend that the decision of the Tribunal should be set aside and the matter should be referred back to Tribunal without the merits being determined on appeal. The Ministers contend that, only if they were to fail in their review application, would it be appropriate for this court to hear and determine the merits of the dispute.

The essential nature of the dispute

[5] The primary acquiring firm, being first respondent ('Wal-Mart') is a company incorporated and listed on the New York Stock Exchange. It is the largest retailer in the world. Its operations include three retail formats in the form of discount stores, super centres which contain products such as bakery goods, meat and dairy products, fresh produce, dry goods and staples, beverages, deli food, frozen food, canned and packaged goods, condiments and spices, household appliances and apparel and general merchandise, and finally neighbourhood markets which sell a variety products that are also offered by its super centres. It also owns a chain of warehouse stores called Sam's Club which sell groceries and general merchandise, often in bulk.

[6] Wal-Mart operates in fifteen different countries, including Mexico, Chile and the United Kingdom, the experience of all three of which have featured prominently in the evidence presented to the Tribunal. Prior to the merger, Wal-Mart had a very limited interest in the South African market. That interest operates through an entity, ASDA Group Limited, which controls International Produce Limited ('IPL') and which in turn is controlled by Wal-Mart. IPL does not directly or indirectly control any other firm but purchases fresh fruit produce in South Africa for the export market. It appears that none of these products are then resold into the South African market.

[7] Given its scale of operations and size, Wal-Mart's business operations have been the subject of considerable scrutiny and public controversy. As an example of the different perspectives on Wal-Mart's impact upon lower income consumers (who form a crucial element of the analysis in this case) contrast Richard Epstein 2007 (39) *Connecticut Law Review* 1287 with Katherine Silgaugh 2007 (39) *Connecticut Law Review* 1713. This public debate about Wal-Mart notwithstanding, it is important to emphasise at the outset that this Court can only and must assess the arguments by the intervening parties through the prism of the evidence and materials which formed part of the record before the Tribunal.

[8] Second respondent ('Massmart') is a company incorporated under the laws of the Republic of South Africa and is listed on the Johannesburg Securities Exchange. It controls in excess of ten subsidiaries which operate both within South Africa and in other parts of the African continent. It is both a wholesaler and retailer of grocery products, liquor and general merchandise. It has four divisions namely Massdiscounters, Masswarehouse, Massbuild and Masscash. The Massdiscounters division trades under the name of Game and Dion Wired. Game offers a wide range of general merchandise and non-perishable groceries to customers in the [1]LSM 5-10 category both throughout South Africa and Sub-Saharan Africa. Masswarehouse consists of the Makro chain of large wholesale outlets which offer a broad range of food, liquor and general merchandise to commercial affiliated resellers within the LSM 6-10+ group. Massbuild comprises Builders Warehouse, Builders Express and Builders Trade Depot chains which sell hardware and home improvement / DIY and building materials, generally to consumer in the LSM 6-10+ group. The Massmart food and grocery business focuses on low end customers predominantly at the wholesale level and through its Masscash division, where it sells directly to customers. These sales take place predominantly to consumers in the LSM 2-7 categories. The stores include Buy-Rite, Sunshine, Mikeva, Cambridge, DF Astor, Savemoor and Score.

[9] On 27 September 2010, Massmart announced that Wal-Mart intended to

1 LSM or Living Standard Measurement is a tool used to measure the South African market according to their living standards. LSM 1 being the lowest and 10 being the highest. www.saarf.co.za

acquire a controlling interest in Massmart by virtue of an acquisition of 51% of the ordinary share capital of Massmart. It is this transaction which gave rise to the hearings before the Tribunal during May 2011 and which culminated in the decision of the Tribunal, its reasons being given on 29 June 2011.

The Tribunal's reasons for approving the transaction

[10] In the light of the complex range of disputes canvassed by the Tribunal, it is necessary to deal fully with the Tribunal's reasoning before proceeding to the review and the appeal. In summary, the Tribunal held that it was common cause that the merger did not raise any competition concerns, in that Wal-Mart did not compete with Massmart in South Africa and its only presence in this country was its procurement arm of IPL which did no more than purchase South African produce for an export market. Accordingly, the Tribunal found that the transaction did not prevent or lessen competition in any of the markets in which Massmart operated.

[11] The entire dispute therefore turned on what was described by the Tribunal as 'one of the unusual features' of the Competition Act 89 of 1998 ("the Act"), that is the public interest concerns as set out in s 12 A of the Act. In particular, s 12 A (3) read together with s 12 A (1) provides that the initial consideration of the

merger must consist of an examination of whether the merger is likely to substantially prevent or lessen competition by an examination of the factors set out in s 12 A (2). Once that enquiry has been completed, and if it then appears that the merger is likely to substantially prevent or lessen competition, a determination must be made whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than the losses and thus offset the effects of the prevention or lessening of competition that has already been found to exists pursuant to the initial enquiry. Further, and irrespective of the findings in relation to these considerations, the Competition Commission or Tribunal must consider whether the merger can or cannot be justified on substantial public interest grounds.

[12] In summary, the provisions of s 12 A envisage three separate but interrelated inquiries, namely

1. Whether or not the merger is likely to substantially prevent or lessen competition;

2. If the result of this inquiry is in the affirmative, whether technological, efficiency or other pro-competitive gains will trump the initial conclusion so reached in stage 1 together, with the further consideration based on substantial public interest grounds, which in

turn, could justify permitting or refusing the merger; and

3. Notwithstanding the outcome of the enquiries in 1 or 2, the determination of whether the merger can or cannot be justified on substantial public interest grounds.

The legislature sets out specific public interest grounds in s 12 A (3):

"(*3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*

a) a particular industrial sector or region;

b) employment;

c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

d) the ability of national industries to compete in international markets."

[13] On the basis of the approach adopted by the Tribunal, the essential enquiry in the present case focussed on the effects set out in sub paragraphs (a) (b) and (c) of s 12 A (3).

[14] In its engagement with these factors, the Tribunal confirmed its finding in its earlier decision in **Harmony Gold Mining Company Limited v Goldfields Limited** CT case 93/LM/Nov 04 at para 76:

> "*This prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence section 12 A makes use of the term "justified" in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusions."*

[15] On the basis of this approach to the relevant public interest considerations, the Tribunal examined the specific public interest concerns which were raised in the evidence. The unions expressed great concern about the possibility of a

reduction of employment following the merger; in particular they found that the statement of Massmart's CEO Mr Grant Pattison on 28 October 2010, namely that Massmart saw '*no anticipated reduction in the employees in the short term and store level employees should increase at the same rate as space growth of 20% over the next three years'*, and further '*we believe the Group is correctly sized for the current economic conditions and barring any further economic contraction, have no intention or plans to reduce our workforce, rather we are expecting our store employees to grow by approximately 20% over the next three years as we expand* ' to amount to nothing more than speculation. In particular, SACCAWU contended in a summary of evidence to be presented by Mr Noel Mbongwe that:

> "2.9 *Wal-Mart's harmful effects on the conditions of workers in the retail sector and its suppliers are well-documented and have resulted in it being repeatedly sanctioned by regulators in the markets in which it operates.*
>
> *2.10. In short, SACCAWU would not hold the same attitude to the proposed merger if the primary acquiring firm were another international retailer*."

[16] The Tribunal found that, given the ambitions of Massmart to expand, the merger may well expedite expansion and new jobs would be likely to be created

more quickly. Hence it concluded:

> "*On balance, retrenchments are, post-merger, a possibility, but the more likely scenario is that either the workforce size will remain constant or will expand*."

[17] Whatever the disputes between the commitments of the merging parties and the concerns expressed by the unions, the Tribunal was satisfied with the undertakings given by the merging parties that there would be no retrenchments based on the merged entity's operational requirements in South Africa, resulting from the merger, for a period of two years from the effective date of the transaction, were sufficient to meet any objection that could justifiably have been raised on the available evidence.

Reinstatement of retrenched employees

[18] SACCAWU contended that 574 workers had been dismissed prior to the merger but that, on the evidence, these retrenchments had been effected in anticipation of the merger. SACCAWU contended that the Tribunal should impose a condition which would order reinstatement or reemployment of all these affected employees, the alternative being that the dismissed employees should be

the first to be hired as employment opportunities arose within the Massmart group.

[19] The Tribunal found that the retrenchments could not be linked to the merger in terms of the evidence which had been presented. However, an undertaking to give preferential employment opportunities to 503 workers, (there is a dispute about the number of affected employees to which reference will be made later) has 'been prudently made, but absent the showing of merger specificity cannot be expected to have been made an immediate offer of reinstatement'.

Collective Bargaining

[20] A number of issues were raised by the unions under this rubric, although it appears that, when argued before the Tribunal, two central conditions were proposed, namely that Massmart become the subject of a closed shop agreement and that there be group centralised bargaining to streamline labour relations and reduce the comparative advantage enjoyed by Massmart from the present set of collective agreements spread across its divisions. In summary, it was argued that the present asymmetry in the bargaining relationships between Massmart and SACCAWU allowed the former to enjoy a centralised overview of the organisation

that would inform its collective bargaining strategy, while SACCAWU's members were separated into different operational silos within the Massmart organisation.

[21] The Tribunal found that the evidence indicated that Massmart's approach to both centralised collective bargaining and the closed shop constituted a policy which had been developed before the merger and that, accordingly, there was no evidence to suggest that this policy had been formulated in conjunction with Wal-Mart. For these reasons, the Tribunal found that the creation of what would be an additional right not presently enjoyed by the unions was neither merger specific nor appropriately connected to the limited public interest mandate contained in s 12 A (3).

Procurement

[22] This issue prompted the leading of a considerable amount of evidence, the core of which will be analysed presently. Suffice at this point to note that, on the basis of this evidence, the argument was raised both by the Ministers and the unions that the result of the merger would be a significant shift in purchasing away from South African manufacturers towards foreign low costs Asian producers, which would in turn have a significant impact upon small and medium sized businesses within South Africa and a further consequent loss of jobs.

[23] Having analysed this evidence, the Tribunal concluded that, notwithstanding a legitimate concern which had been raised with regard to the effect of the merger upon local producers and jobs, the possible consequent job losses had to be weighed 'against the consumer interest in lower prices and job creation at Massmart. Since the evidence is that the likely consumers, who will benefit most from the lower prices associated with the merger, are low income consumers and those consumers without any means of support of their own, thus the poorest of South Africans, the public interest in lower prices is no less compelling'.

[24] The Tribunal then turned to the conditions which had been sought by the unions, in particular certain procurement conditions. The Tribunal found that in order to impose procurement conditions, there would be a need to determine the local procurement levels of Massmart pre-merger and then hold it to this level for some period in the future. It held that 'this all sounds fine at the level of principle, but… founders when we get to the level of detail'.

[25] The Tribunal further held that it would be extremely difficult to establish the amount of locally produced product supplied which is actually produced locally. Further, there was no rational basis for determining the period in which the

procurement conditions should operate. In addition, the proposed conditions, in the Tribunal's view, would create an unjustified symmetry; that is the merged entity would be the only firm subjected to this restriction, while its rivals would be free to procure globally. In addition, the procurement condition would be impermissible as it would render the country in breach of trade obligations under several international trade agreements to which South Africa was a party.

[26] In the result, the Tribunal found that the remedies proposed by the unions were far too complex and imprecise. It held that the proposal of the merging parties to establish a programme aimed exclusively at the development of local South African supplies, including small and medium size enterprises and funded in the fixed amount of R 100 million to be contributed by the merged entity over a three year period, was both appropriate, proportional and enforceable.

[27] Within the context of the factual matrix and the Tribunal's decision, it is now possible to deal first with the review brought by the Ministers.

The Review

[28] The essential bases of the Ministers' application are firstly, that the Tribunal erred in making a discovery order by failing to order the merging parties to

discover all the documents sought by the Ministers which, in their view, turned out to be material to the determination and secondly, that the Tribunal erred in making scheduling decisions in that they precluded the parties, which opposed the merger, from fully and properly ventilating their concerns as well as making submissions on the conditions to which any approval should be subject.

[29] The Ministers contended that, as the merger hearing progressed, the Tribunal remained rigidly committed to its scheduling decisions, whereas it had a discretion under section 55 of the Act to amend scheduling decisions in favour of a fair and proper ventilation of the important public-interest issues raised before it. They contend that the Tribunal's reviewable errors in making the discovery order and the scheduling decisions rendered its approval of the merger and the conditions attached to it subject to being set aside on various reviewable grounds.

[30] This application is opposed by the Commission and the merging parties on various grounds. The Commission's opposition to the relief sought by the Ministers is only confined to an attack on the exercise of the Tribunal's discretion in the making of scheduling decisions. It contends that the grounds upon which the Ministers rely in bringing the review application will, if upheld, have unintended negative consequences for the future regulation and adjudication of mergers. The Commission argues that the Tribunal's ability to control and regulate its

proceedings in ensuring that they are concluded as expeditiously as possible will be seriously compromised. It points out that the commercial and economic environments change very quickly and it would be undesirable for the efficiency of the economy for merger regulation and adjudication to be unduly protracted. It is the Commission's case that, on the facts, the scheduling decisions were fair and in accordance with section 52 (2) (a) of the Act.

[31] The merging parties oppose the review on three grounds. Firstly, they submit that the Ministers have not made out any case for the setting aside of the scheduling decisions, discovery order or the merger approval. Secondly, the Ministers have expressly or by their conduct waived whatever rights they may have had to set aside the discovery order and scheduling decisions on review. Thirdly, they argue that, on the facts, there is no basis for concluding that the Tribunal, in making the scheduling and discovery decisions, exercised its right to control its own process unreasonably, irrationally or unlawfully.

The Nature of the proceedings

[32] The Ministers have emphasised that they have brought an application for review and not an appeal. But, as correctly pointed out by Mr Gauntlett who appeared together with Mr Unterhalter, Mr Wilson and Mr Pelser on behalf of the merging parties, the case which the Ministers make out in their founding affidavits appears to be more of an appeal. The Ministers contend that the Tribunal "*erred*"

in making its discovery order and scheduling decisions. The merging parties contend that the use of this term by the Ministers tends to blur the distinction between appeals and reviews which is well entrenched in our law. (**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC) at 513 C-D; **TWK Agriculture Limited v The Competition Commission and Others** Case No.: 67/CAC/Jan07; **A.C. Whitcher (Pty) Ltd v The Competition Commission and Others** Case No.: 84/CAC/Jan09)).

[33] It is consequently as well to make clear what test is required in this form of application. As the Supreme Court of Appeal has held:

> "*In a review the question is not whether the decision is capable of being justified... but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion.*"

(**Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA** 2007 (1) SA 576 (SCA) para 31).

[34] As far as the relief is concerned, the distinction between an appeal and review is also of significance. In the event of an appeal being successful, the Court would be empowered to set aside the decision and replace it with its own. However, a Court, in upholding a review, would be loath to substitute its own decision for that of the decision-maker. Instead, the Court would set aside the

decision and refer it back to the decision-maker, unless the circumstances justified a departure from the general rule (*Johannesburg City Council v Administrator, Transvaal* 1962 (2) SA 72 (T) at 76 D-H).

[35] The persuasive arguments raised about the Ministers' seeking, in substance, to appeal the Tribunal's decision notwithstanding, if regard is had to the conspectus of the Ministers' evidence contained in the review supplementary and replying affidavits and the relief they seek, then it is clear that, in substance, they contend that the Tribunal acted unreasonably and/or irrationally in making the discovery order and the scheduling decisions. They thus seek an order, *inter alia*, reviewing and setting aside the impugned decisions and referring the matter back to the Tribunal for reconsideration which is a review-related relief. In the circumstances, we will approach the matter on the basis that a proper case for the review has been made.

[36] Accordingly it is necessary to recapitulate on certain of the key facts giving rise to this review application. Pursuant to the announcement by Massmart of Wal-Mart's intention to acquire 51% of the ordinary share capital of Massmart, on 3 November 2010, the merging parties submitted a notice of a large merger to the Commission in which they notified the Commission of Wal-Mart's intention to acquire a majority stake in Massmart.

[37] The Department of Economic Development ('the Department') thereupon appointed an expert panel to conduct research into the implications of the proposed merger. The expert panel reported its findings to the Minister of the Economic Development, in which it confirmed that it was probable that, owing to size and international exposure of Wal-Mart, employment, the welfare of local manufacturers and small business would be seriously affected.

[38] In January 2011, the Department contacted the merging parties, which contact resulted in facilitated talks between the merging parties and a number of trade unions. Various stakeholders, whose views had by then been solicited, expressed concerns over the impact of the transaction on employment in the post-merger entity, as well as on the employment conditions of existing employees.

[39] In the meantime, the Commission referred the notice of the merger to the Tribunal and to the Minister of Economic Development in accordance with s 14 A (1) of the Act. The Commission then proceeded to consider the notification of the proposed merger.

[40] The Department continued its consideration of the public-interest issues raised by the proposed merger and continued talking with the merging parties. It alleges that it expected that the talks would produce an accord, which would

address the public-interest concerns and that the terms of such an accord would be communicated to the Tribunal.

[41] On 11 February 2011, the Commission, in terms of section 14 (1) (b) of the Act, recommended to the Tribunal and to the Minister of Economic Development that the merger be approved unconditionally. This recommendation came before the talks between the merging parties and the Department had been finalised and just before the time frames set by section 14 A of the Act had expired.

[42] In its recommendation, the Commission indicated that it was aware of negotiations that were taking place between the Department and the merging parties. It went on to indicate that, as no party had applied for an extension of the investigation period in order to finalise those negotiations, it would recommend that the merger be approved without any conditions but stated that, if the discussions were to lead to some agreements between the parties, it would leave it to the Tribunal to consider whether those agreements would form part of the conditions of the merger in terms of section 12 A of the Act.

[43] The Commission rejects the suggestion by the Department that its recommendation was arrived at on the expectation that the merging parties would agree to commitments to meet the public-interest concerns adequately. It alleges

that it regarded its task as completed at the time it compiled its report. It says it mentioned the fact that there were negotiations between the Department and the merging parties simply because it did not want to close the door to the possibility of conditions being imposed by agreement between the parties.

[44] There is however no factual support for the Commission's denial. In its report, it points out that it made its recommendation with full knowledge of the discussions which were taking place between the Department and the merging parties and with the expectation that "*an agreement would be reached prior to the finalisation of the Tribunal hearing*". The Commission further says in its report "*based on the outcome of these agreements the Competition Tribunal would have to consider whether it would make these agreements a condition to the merger in terms of section 12*".

[45] Professor Richard Levin ("Levin") the Director-General in the Department alleges that, after the Commission had recommended an unconditional approval of the merger, the negotiations stalled and the merging parties' stance on procurement showed less flexibility. At that stage, it had become apparent to the Department that it was highly unlikely that a suitable agreement would be reached, prior to the hearing which was scheduled for 22 to 24 March 2011. Accordingly, in the light of these facts, the Minister of Economic Development elected to participate as a party in the merger proceedings before the Tribunal in

terms of section 18 (1) of the Act.

[46] Thus, on 25 February 2011, Levin sought and obtained from the Tribunal a right for the Departments of Economic Development and Trade and Industry to intervene as parties in the merger proceedings. The Department of Agriculture, Forestry and Fisheries also intervened in the proceedings.

[47] The bases upon which these Departments sought intervention are set out by Levin as follows:

> "*This proposed merger raises very significant public interest issues. The Commission made its recommendation on the premise and expectation that the merging parties would make commitments with respect to those issues. The Commission anticipated that those commitments might be made a condition of any merger approval by the Tribunal. EDD had facilitated discussions with the merging parties in order to seek to arrive at agreements in this regard. However, it had now (at a very late stage) become apparent that the merging parties are delaying making binding commitments which address these issues. In the view of the relevant Government departments, it is self-evident that the question of whether any conditions should be imposed and if so what those conditions should be, depends on the nature and extent of any commitments made by the merging parties with regard to public interest grounds set out in the Act,*

such as labour, procurement, food security, and BBBEE business."

[48] In justifying the reasons for the intervention by the Departments, Levin then says:

"*[In terms of section 12 A (3) and 18 of the Act] it is ... incumbent on EDD, in particular to ensure that all public interest dimensions of significant mergers are fully canvassed and considered prior to the merger being approved. EDD and the other Government Departments prefer to address concerns about public interest ramifications of mergers by facilitating dialogue between interested and affected parties, with a view to procuring any appropriate commitments from the merging parties, or addressing concerns of third parties in other ways. In other words, the relevant Government Departments prefer to safeguard the public interest without in every instance formally intervening in Commission investigations or Tribunal proceedings. However, where formal intervention is required, EDD and the other Government Departments are duty-bound to adopt that course."*

Levin points out that it is necessary to investigate whether a merger could be expected to have a notably deleterious effect on any sector or region, employment, smaller manufacturing suppliers ,particularly BBBEE manufacturing suppliers, who could be prejudiced by the merged entity preferring larger manufacturing suppliers with greater economies of scale, or relying to a greater extent on imports.

Scheduling decisions

[49] In terms of the directive which had been given by the Tribunal after a pre-hearing conference held on 18 February 2011, the merger hearing was scheduled to commence on 22 March 2011.

[50] On 16 March 2011, the Ministers addressed a letter to the Tribunal indicating their intention to bring an urgent application for the postponement of the merger hearing, as they were of the view that the merger involved complex issues that required meaningful engagement and proper ventilation. Hence they needed more time to prepare.

[51] On 18 March 2011, the Ministers duly filed a notice of an application to be heard on 22 March 2011, in terms of which the Ministers sought, *inter alia,* a postponement of the merger hearing to 2 May 2011, alternatively to a date to be determined by the Tribunal or agreed upon between the parties.

[52] At the commencement of the merger hearing on 22 March 2011, the Tribunal considered the Ministers' application for the postponement and suggested certain proposals regarding the manner in which the merger hearing

was to be conducted. After hearing the views of the parties regarding its proposals, the Tribunal decided to proceed with the merger hearing on the basis that it would hear the factual evidence of the unions' witnesses and the merging parties, excluding the expert economists in the week of 22 to 25 March 2011, and thereafter adjourn the hearing to 9, 10 and 11 May 2011, for the hearing of evidence of the various economic experts.

[53] After a couple of short adjournments, counsel for the unions expressed dissatisfaction about certain features of the arrangements decided upon by the Tribunal for the further prosecution of the merger hearing. Counsel for the unions indicated that their instructions were to take the Tribunal's decision in respect of the further conduct of the merger hearing on an urgent review to this Court. Accordingly, counsel for the unions moved an application for a stay of the merger hearing pending the outcome of the review application. After hearing argument of the parties, the Tribunal granted a stay of the hearing until 9 May 2011, but insofar as other procedural matters were concerned, the Tribunal said:

> "*In relation to other procedural matters that must be addressed, we are going to adjourn and have a prehearing timetable with all the parties. So, we would ask them to remain behind and we will address seeing that the hearing runs properly in the course of that week to finality and that we also address the issues of discovery and set timetables but we are not going to leave this process open-ended after we finish today...*
>
> *So, we will adjourn the matter until the 9th of May and we will now ask the*

parties to remain behind and we'll have a prehearing to talk about how we are going to give further directions in relation to the proceedings of that week now that is taking that turn and when we have final argument and also to regulate the outstanding discover application, which we understand the government departments want to bring. So, we can then adjourn, thank you."

[54] After the stay had been granted, in the course of the morning of 22 March 2011, a further pre-hearing conference was convened. One of the central issues addressed was the determination of a timetable, in terms of which the further discovery requested by the Ministers would be conducted.

[55] It was agreed among the parties that by noon on 23 March 2011, the Ministers would produce a revised list of documents sought and the merging parties would respond to the request by 10h00 on 24 March 2011, and that, if necessary, the discovery application would be argued on 25 March 2011.

[56] At that pre-trial conference, the new hearing dates of 9-13 May 2011 for evidence and 16 May 2011 for argument were proposed and agreed to by all the parties. In addition to these dates, the chairperson proposed a new order for the timetable and the allocation of time for cross examination which was agreed to by

all the parties.

Discovery

[57] As the limitations of the discovery process was central to this dispute, it is necessary to set out the revised list of items for discovery filed on behalf of the Ministers:

> *"**Revised items for discovery: Wal-Mart / Massmart merger***
>
> ***1. Definitions /clarification***
>
> *1.1 Any reference to Wal-Mart includes references to ASDA and all other subsidiaries of Wal-Mart.*
>
> *1.2 "Locally produced" is defined as products which involve local production and value-add (even if some components are imported in the process) and does not include products that are purely imported through locally-based agents. This is in contrast to the terminology used by the merging parties where 'local procurement' is defined to include both imports from local agents and locally produced products.*
>
> *1.3 "Correspondence" includes all hardcopy and email correspondence.*
>
> ***2. Documents in respect of Wal-Mart's global operations***
>
> *2.1 Any and all complaints, orders, judgments awards and decisions in respect of Wal-Mart's activities relevant to competition matters*

in any and all countries for the past 3 years.

2.2 *Copies of judgments on all court proceedings referred to in affidavits, including those dealing with race and gender, as detailed in paragraph 68, 69 and 70 to 80 of the Witness Statement by Bond.*

2.3 *All documents relating to its claims, measurements of and methodology in support of Wal-Mart's contentions on local procurement in Mexico, Brazil, India, Chile and USA; including the complete underlying data and measurement methodology in respect of the claims made in para 32.1 of Bond's statement. To the extent that the claims of 'locally sourced' includes products imported through local agents (as per the parties definition of 'local procurement'), then in addition the provision of data for each of the countries cited in para 32.1 in respect of the proportion of products that are locally produced (as per the definition above). Further, provide a breakdown for each of the following major categories; general merchandise, perishable grocery products, non-perishable grocery products and non-edible grocery products.*

2.4 *Data (and the underlying methodology) in respect of the proportion of purchases by D&S in Chile that are locally produced (as defined above for 2008, 2009 and 2010 rather than the locally produced definition and data as used in RBB table 10. Further,*

provide a breakdown for each of the following major categories: general merchandise, perishable grocery products, non-perishable grocery products and non-edible grocery products.

2.5 In respect of D&S in Chile, documents containing data for the past three years on:

2.5.1 employment;

2.5.2 the split in employment between full-time and part-time employees, and

2.5.3 annual increases in wages and benefits for full-time and part-time employees, d) union membership in total and membership of the company-wide union (as alleged by Claudio Alvarez) specifically.

2.6 In respect of D&S in Chile, the underlying data and measurement methodology in respect of the claims made by RBB and Layton concerning the JBP programme.

2.7 In respect of all countries in which Wal-Mart operates, documents relating to a benchmarking of Wal-Mart against the industry for:

2.7.1 the split in employment between full-time and part-time employees;

2.7.2 wages and benefits for full-time and part-time employees, and

2.7.3 union membership.

2.8 Both Bond and Pattison refer to the global procurement network and capabilities of Wal-Mart in their Witness Statements. Provide documentation indicating details of the current offices, distribution centres, assets and personnel of Wal-Mart that are utilised in this global procurement network for each country from which Wal-Mart sources globally. Also provide the total value of products shipped annually from each of these countries that Wal-Mart sources globally, and a breakdown of value by broad product category, namely general merchandise, perishable grocery products, non-perishable grocery products and non-edible grocery products.

2.9 The "UK grocery report" as referred to in the RBB report:

2.10 Reports, analysis and other documentation which support the claims made about Brazil in footnote 6 on page 15 of the RBB report that:

"...[P]rior to its acquisition by Wal-Mart in 2004, prices at the Brazilian retailer Bompreço were [CONFIDENTIAL]% higher than the market for a basket of 3,000 top-selling items. However, an equivalent basket of items in Bompreço is now [CONFIDENTIAL] % lower than the market average. Similary, prior to its acquisition by Wal-Mart in 2005, prices at Brazilian retailer Sonae were

around [CONFIDENTIAL]% lower than the market average, but are now around [CONFIDENTIAL]% lower."

2.11 *Reports, analysis and other documentation which support the claims made about Mexico in footnote 6 on page 15 of the RBB report that:*

"Another example is Mexico where prices at Wal-Mart stores are currently [CONFIDENTIAL]% lower than the market..."

2.12 *Copies of the ABRAS and AC Nielsen reports which support the claims made in footnote 23 on page 44 of the RBB report that:*

" In Brazil the three major retailers account for only 39% of Grocery sales, while in Argentine the top four grocery retailers' account for 65% of the market"

2.13 *Representations and objections to Wal-Mart's entry into Germany and copies of all minutes of board and management meetings relating to its decision to exit from the German market.*

2.14 *The total number of individual cases brought against Wal-Mart relating to any matter involving employment matters, including discrimination, dismissal, victimisation, retrenchment and non-appointment. Including the number of persons in total affected by such cases, for the period 2000 to 2010, in all countries in (sic) operates in and in each the US, Brazil, Chile, Mexico, India and China as detailed in paragraphs 28 and 67 of the Witness*

Statement by Bond.

3. <u>Wal-Mart documents in respect of the merger transaction</u>

3.1 All correspondence (including documents exchanged) and minutes of meetings between the merging parties between February 2009 (when the reciprocal confidentiality undertaking was signed) and 26 September 2010 (when the indicative offer was made).

3.2 All Wal-Mart documents and reports generated in the evaluation of Massmart as a potential acquisition / target.

3.3 All Wal-Mart documents dealing with proposals for increasing efficiencies and/or lowering prices and/or increasing market share of Massmart post acquisition.

3.4 All Wal-Mart documents dealing with labour issues in respect of Massmart and/or South Africa including any evaluation of current labour laws, current labour practices at Massmart and any proposed strategy in respect of labour relations post acquisition since February 2009.

3.5 All Board minutes, management minutes, notes and transcripts of Wal-Mart relating to its strategy on or entry into South Africa and or African market and or bid for Massmart as detailed in paragraphs 7, 8, 19, and 44 to 48 of the Witness Statement by Bond.

3.6 The Massmart Due Diligence report done by Wal-Mart, following the indicative offer of 26 September 2010.

4. Massmart documents

4.1 Any documents evidencing and or in support of Massmart's approach to procurement and procurement philosophy as detailed in paragraph 6 of the Witness Statement by Pattison. Without limiting the generality of the above any documents evidencing and or support of the 'variety of sources' that Massmart envisages to procure supplies from and any and all market research documents in support of Massmart's procurement philosophy.

4.2 Any documents evidencing and or in support of Massmart's local procurement strategy as detailed in paragraph 6.8 of the Witness Statement by Pattison.

4.3 Any Massmart Procurement Department (or relevant department that conducts procurement) documents that detail the imported good strategy of Massmart.

4.4 Provide details of the current offices, distribution centres, assets and personnel of Massmart that are utilised for direct imports to South Africa (including such items located abroad).

4.5 Provide further information in respect of Massmart development and use of suppliers in particular SMME and historically disadvantaged suppliers (Pattison statement para 6.14 – 6.17).

4.6 A document providing the breakdown of sales, direct imports and local content by major sub-categories of the product categories listed in tables 7 and 8 of the RBB report (e.g. provide such details for the major sub-categories of non-edible groceries).

4.7 The Massmart Strategy Document 2010 regarding home improvement shares in South Africa (see table 5, page 13 of the RBB report).

4.8 Presentations to retail analysts, presentations to asset managers, presentations to shareholders, presentations to the Massmart senior management team and presentations to the Massmart board on the proposed acquisition of Massmart by Wal-Mart.

5. <u>Data from both merging parties</u>

5.1 For the top and bottom 10 locally produced products by Rand value purchased by Massmart in 2010 in each of the categories listed in tables 7 and 8 of the RBB report, the ex-factory price (ex VAT) paid by Massmart to the local producer and the likely lowest delivered price to South Africa (provide the ex-factory price and likely per unit transport costs to South Africa) from Wal-Mart's global suppliers."

[58] In response thereto, the merging parties tendered documents sought in

paragraphs 2.4; 2.6; 2.9 to 2.12; 4.1; 4.6 and 4.7 of the discovery but refused to disclose the balance of the documents so sought. The documents tendered, as set out in paragraphs 2.4, 2.6, 2.10 – 2.12 and 4.1 were made, subject to the Ministers providing appropriate confidentiality undertakings.

[59] The Ministers proceeded with their application for discovery on 25 March 2011, due to the fact that, in their view, the documents discovered by the merging parties were inadequate. After hearing argument by the parties, the Tribunal, by way of a discovery order, directed the merging parties to make discovery of some of the documents identified by the Ministers. The Tribunal did not provide reasons for the discovery order. It only did so on 15 August 2011.

[60] In determining whether or not discovery of the documents sought by the Ministers should be ordered, the Tribunal adopted the test, the nature of which is captured in para 8 of its ruling as follows:

> "*Two factors distinguish an approach to discovery in such an application from one in more conventional adversarial litigation. In the first place the public interest canvas is much broader than it would be in conventional litigation, where the factual dispute in issue more narrowly frames the issues. But whilst the canvas is narrower in conventional litigation, individual documents are more significant, because so much turns on the resolution of specific factual disputes to which the documents sought may*

be relevant. In public interest disputes potentially many issues can be said to be relevant. Since relevance is the usual filter for assessing discovery claims, it is less useful to the adjudicator in such cases in determining what documents ought to be produced. But whilst more documents might be deemed relevant in a public interest case, at the same time the probative value of individual documents is less compelling than in conventional litigation, if their focus is too microscopic. Therefore to avoid an overwhelming number of documents being required for production we must consider other filters in addition to relevance to determine an application."

[61] The Tribunal went on to say at para 9:

"While documents might be, arguably, relevant to a microscopic issue, we ask if they are relevant to better informing us on macroscopic issues. Even if they may relate to macroscopic issues, we have to weigh the value of the information yielded to the process, against the burden to the party required to produce it. Where the yield is minimal or uncertain, but the burden great, this would favour denying production."

[62] Having outlined its approach to the discovery application, the Tribunal proceeded to consider item by item documents requested by the Ministers. It refused to order discovery of the documents sought in items 2.5 and 2.14 of the request on two grounds, firstly, that Ministers are not best placed to deal with Wal-Mart's direct relationships with its employees. In its view, this issue was not

pertinent to the primary issue on which the Ministers sought to intervene, namely the effect of the merged firm's post-merger procurement policy on the South African manufacturing sector and producers. The Tribunal pointed out that the Ministers were concerned that Wal-Mart's assumed superior purchasing powers and logistics in international markets may lead to a displacement of local suppliers by way of imported goods with a consequent employment loss in South Africa. It reasoned that the relationship between the merged firm and its employees was an issue which was adequately represented in the proceedings by SACCAWU, which is the union currently recognised by Massmart in its various divisions. In turn, SACCAWU was supported by an international Trade Union solidarity movement which, it could be assumed, possessed direct knowledge of Wal-Mart's labour practices in other countries.

[63] The second reason advanced by the Tribunal for refusing discovery was that it was unlikely that the request, as formulated, would provide it with any useful information for the purposes of determination, particularly regarding Wal-Mart's relationship with its employees. It said this information was microscopic but not macroscopic. It went on to observe:

> "*How much information would represent a trend for us to take note of is not clear nor does the government, which seeks this information, seem to know. Granted we will hear of numerous cases of labour disputes, but we do not know if they represent a generalised trend, are conclusive (as is typical of many disputes of this kind, many may not be resolved, other may*

be settlements for which no admissions of wrong doing are made) or are historic."

[64] The Tribunal also refused to order discovery of item 2.3, essentially on the grounds that the basis of the request, being the determination of local producers was extremely complex, particularly with regard to the determination of local production and the further difficulty of the comparison being applicable to the present dispute and hence its probative value.

[65] With regard to information sought in items 5.1, 2.8 and 4.5, the Tribunal similarly refused to order its disclosure on the ground that it was not sure if the request could be complied with and, even if it could, whether the probative value of this complex undertaking was worth the considerable effort, which undertaking would have further delayed the hearing of the merger. The Tribunal also refused to order discovery of information in item 2.13 relating to Wal-Mart's entry into Germany on the ground that it was not pertinent to any of the public interest issues that the Ministers wished to raise in the merger.

Legal Principles

[66] The test to be applied in this matter is whether the Tribunal's discovery order and scheduling decisions are decisions which a reasonable decision maker

could not make. It is trite that once it is found not to be reasonable, the decision can be reviewed and set aside. (**Sidumo & Another v Rustenburg Platinum Mines Ltd & Others** [2007] 12 BLLR 1097 (CC)). Prior to **Sidumo**, in the **Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)** 2006 (2) SA 311 (CC) at paragraph 511 Ngcobo J (as he then was) had this to say in connection with the test to be applied by a reviewing Court in applications for review:

> *"There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decisionmaker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decisionmaker."*

[67] It is not without significance that the Ministers did not contend that the merger not be approved. Their entire argument concerned the appropriate conditions that they consider would, in their view, safeguard the public interest as defined. It is within this context that they contend that the Tribunal failed the standard of the reasonable decision maker.

Submissions of the Parties in relation to the Review

[68] As noted above, the Minister of Economic Development sought to participate in the merger proceedings in the public interest in terms of section 18 (1) read with s 53 (c) (iv) of the Act, which he contends he was unable to advance because of the discovery order and scheduling decisions made by the Tribunal. The Ministers advanced four grounds upon which they contend that the approval of the merger should be reviewed and set aside. Firstly, they contend that the Tribunal erred in making the discovery order by failing to order the merging parties to discover all the documents which they had sought, which, as it turned out from the Tribunal's reasons for their decision, were wholly material.

[69] Secondly, the Ministers contend that the Tribunal erred in making the scheduling decisions in that the effect of the latter was to preclude the parties, which opposed the merger (or had otherwise intervened, including the applicants), from fully and properly ventilating their concerns as well as making submissions on the conditions to which any approval should be subject.

[70] Thirdly, they argue that, as the merger hearing progressed, the Tribunal remained rigidly committed to the scheduling decisions, whereas it had the discretion under section 55 of the Act to amend its schedule in favour of a fair and proper ventilation of the important public-interest issues before it. Fourthly, they contend that the Tribunal's refusal to separate out the questions of the merits and

of the conditions, as the applicants requested in chambers before the commencement of the hearing on 9 May 2011, constituted an irregularity.

[71] The Ministers accordingly submit that the Tribunal's reviewable errors in making the discovery order and the scheduling decisions rendered its approval of the merger and the conditions attached to it subject to being set aside on the following grounds:

1. The merger hearing was inherently unfair and not in accordance with the principles of natural justice as required by s 52 (2) (a) of the Competition Act.
2. The merger hearing was procedurally unfair within the meaning of s 6 (2) (c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
3. The Tribunal took into account irrelevant considerations and failed to take account of relevant considerations within the meaning of s 6 (2) (e) (iii) of PAJA, in its approval of the merger and in its determination of the conditions attached to it.
4. The Tribunal's approval of the merger and its determination of the conditions attached to it were unreasonable within the meaning of s 6 (2) (h) of PAJA.

[72] Mr Trengove, who appeared together with Mr Bhana and Mr Meiring, on

behalf of the Ministers submitted that, since the merger holds a significant impact for employment and imports of goods, it was important for the Tribunal to obtain more evidence to establish the extent of the increase of imports and the consequent effect on employment. He contended that, reasonably employed, the discovery order and the scheduling decisions were important tools with which the Tribunal could have ensured that significantly more facts were placed before it and more time was permitted for a full and fair ventilation of the issues. He further submitted the unfair restrictions resulting from the discovery order and the scheduling decisions made it impossible for the Minister of Economic Development to fulfill his role under section 18 of the Act. Hence, because of the nature of the discovery order and the scheduling decisions, the Ministers were seriously and unfairly prejudiced in demonstrating the extent of increased imports as a result of the merger and its measureable effect on employment.

[73] In response to the Ministers' submissions in relation to the scheduling decisions, Mr Mtshaulana who appeared with Mr Ngcancisa for the Commission, submitted that the Tribunal did not act unfairly or unreasonably in making the scheduling decisions. He advanced two grounds in support of this submission. First, he argued that the Tribunal has the right to regulate and control its proceedings. In developing this argument, he contended with reference to the provisions of sections 52 (1), 52 (2) (a) and 55 (1) of the Act, that it was clear that the legislature had made a deliberate policy choice to grant the Tribunal a significantly wide discretion and latitude to determine the conduct of its own

proceedings.

[74] In particular, he pointed out that s 52 (1) requires the Tribunal to "*conduct a hearing, subject to its rules, into every matter referred to it*" in terms of this Act and that, in terms of s 52 (2), it must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice and may do so informally or in an inquisitorial manner. He argued that s 55 (1) which deals with the rules of procedure goes further by allowing the Tribunal member presiding at the hearing to determine any manner of procedure of the hearing.

[75] In short, the Commission contends that it is clear from the provisions of these sections, that the purpose of the Act is to ensure that the Tribunal plays an active role in its proceedings to ensure that they are conducted as expeditiously as possible and in accordance with principles of natural justice. In the context of merger transactions, which are by their nature time sensitive and often time-bound, the Tribunal is expected to make a determination as expeditiously as possible.

[76] In support of his submission that the Tribunal has the right to control and regulate its proceedings, Mr Mtshaulana referred to the judgment of this Court in **Caxton & CTP Publishers & Printers (Pty) Ltd v Naspers Ltd & Others** [2007]

JOL 208286 (CAC) (case no 72/CAC/Aug 2007) in which the Tribunal's right to exercise control over the proceedings was emphasised. In justifying the Tribunal's scheduling decisions, Mr Mtshaulana submitted that they were necessary to limit repetitious cross-examination which would have unnecessarily prolonged the proceedings.

[77] Further, the Commission argues that, if the courts were to interfere excessively with the discretion of the Tribunal to control and regulate its own proceedings, in particular to make scheduling decisions, the Tribunal's ability to regulate and control its proceedings would be adversely affected.

[78] While the Tribunal has the right to regulate and control its proceedings in order to ensure that they are concluded as expeditiously as possible, the Tribunal is bound, in the exercise of its right, to observe carefully the principles of natural justice which, in the context of the present matter, requires the Tribunal to act fairly in affording the Ministers the opportunity of a fair hearing. The necessity for the Tribunal to conclude its proceedings as expeditiously as possible cannot trump this duty to act fairly.

[79] Thus the question for determination is whether the approach to the discovery and the scheduling decisions adopted by the Tribunal, in the exercise of

its discretion under section 55 of the Act, was unreasonable; that is, as Mr Trengove contended, it failed to conduct the proceedings so that it could make an informed decision as to the likely consequences of the merger, such failure being sourced in its discovery and scheduling decisions.

[80] It does not appear that the Tribunal's ruling was cast in legal stone. Thus, if it turned out during the course of the hearing that the Ministers' ability to present their public interest-based case was severely compromised because of limitations imposed by the discovery order and scheduling decisions, the Ministers could have brought their concerns to the attention of the Tribunal which, in the exercise of its discretion to regulate and control the proceedings, and in the consideration of fairness, would have been required to evaluate the Ministers' concerns. There is no evidence from the record which suggests that this course of action was ever considered by the Ministers. The letter (H17 to the founding affidavit) upon which the Ministers rely for their denial that they agreed to the proposed timetable, does not advance their case. In paragraph 6.5 of this letter it is recorded that "*the relevant Government Departments, otherwise are happy with the Tribunal's suggestion*" which is set out in paragraph 6 of the same letter namely that evidence be led from 22 March through 25 March 2011, (with argument to be heard at a later date). In any event, this letter was written before the hearing of the merger was postponed on 22 March 2011 to 9 May 2011, and it related to the Tribunal's initial directive.

[81] Acting in terms of s 55 of the Act, on 22 March 2011, the chairperson of the Tribunal proposed a new order in respect of the timetable and how time allocated was to be utilised. Counsel for the Ministers' response to the suggestion was qualified. His attitude was that the Ministers' position was that they never accepted the timetable but they were forced to deal with it. He went on to say "*and that is why we set out our position, but that can be dealt with at a future date if need be*". At best for the Ministers, this is an ambivalent response.

[82] In an attempt to neutralise the effect of this response to the proposed timetable, the Ministers, in their replying affidavit, point out the scheduling decisions took place on 22 March 2011, some days before the discovery hearing was conducted and before the Ministers would know its outcome. They argue that the positive stance which was expressed on their behalf was premised upon the mistaken assumption that full discovery would, in all likelihood, be granted and before they appreciated the prejudicial impact the discovery order would have on their ability to present their case.

[83] The Ministers' explanation stands to be rejected for two reasons. Firstly, had the Ministers felt so strongly about the Tribunal's scheduling decisions they could have communicated this attitude to the Tribunal. There is no evidence to suggest that the Tribunal was made aware that its scheduling decisions

undermined their ability to advance their "public interest" case and made it impossible for them adequately to address the question of appropriate conditions that might be imposed upon the merger in order to alleviate public interest concerns. Secondly, the Ministers could then have taken the scheduling decisions and discovery order on review. The fact that the Tribunal's scheduling decisions and discovery order were but the first step in a multi stage process does not mean that an aggrieved party had to wait for the final step, namely merger approval before it can take action for review. An aggrieved party should not have to wait for a final step before taking an action on the preliminary decision in circumstances where the preliminary decision has serious consequences such as where it lays the necessary foundation for a possible decision which may have grave results (**Earthlife Africa (CT) v DG: Department of Environmental Affairs & Tourism** 2005 (3) SA 156 (CPD) paragraph 35-36).

[84] In the circumstances, the contention that the Tribunal's scheduling decisions were unreasonable must be rejected. It cannot be said that the Tribunal's discovery order and scheduling decisions are decisions which a reasonable decision-maker, faced with the need to make both a fair and expeditious decision, could not have so made.

[85] This finding does not mean that the Tribunal could not have used its inquisitorial powers to gain further information or that the scheduling

arrangements did not cause some difficulty. Indeed, at least part of the problem with merger hearings is that it appears that the Tribunal may adopt too passive an approach to the inquiry, arguably not giving sufficient effect to the provisions of s 52 which, at the very least, allows the Tribunal to employ an informal or inquisitorial form of hearing. Thus, by ensuring that the key issues are defined as early as possible by the Tribunal, and that the parties are then immediately appraised thereof, the inquisitorial or informal form of hearing provided for in the Act , could ensure a far more satisfactory balance between expedition and natural justice. An adversarial form of hearing may prove both more helpful to the Tribunal and more conducive to the principles of natural justice in cases dealing with restrictive practices. But merger hearings are different. Here the Tribunal is mandated to engage in a statutorily defined inquiry, as opposed to a determination of a breach of a provision of the Act. This form of inquiry is therefore different to a determination about restrictive practices as defined in the Act. Merger herrings, the object of which is to determine whether a merger can be approved, should not be stultified by an excess of formalism or of procedures best suited to a trial. This observation is offered as guidance for the future. In this case however, the issue is not whether this court would have acted differently to the Tribunal or whether the latter's decisions were unquestionably correct. The test turns rather on the standard of the reasonable decision maker, with limited resources, an extensive work load and the need to bring certainty to a dispute concerning large merger.

[86] Mr Trengove referred to a multitude of examples to illustrate the consequences of the Tribunal's misdirected approach to discovery. Thus he referred to the Tribunal's dismissal of the relevant parts of the testimony of Baker. A good illustration of the Tribunal's attitude toward Baker's position is the following:

> "*Baker also made an attempt to show that Massmart at present is not heavily reliant on imports. This exercise was to prove unreliable, given that Massmart's main defence against procurement conditions was to assert the impossibility of determining the extent of local manufacture in the products that they sell. If Massmart cannot perform this exercise credibly, neither can Baker. Baker is not able to say much about a very important question in this merger*."

Mr Trengove further noted that, in spite of the Tribunal's favourable attitude to Hodge's testimony, it conceded that the discovery order constrained Hodge's ability to provide evidence on which the Tribunal could rest its findings.

[87] Specifically regarding Wal-Mart's global procurement network and how its logistical capabilities might heighten imports into South Africa, the Tribunal made the following observation:

> "*Hodge had wanted to [answer this question], but when he asked for the data to do this exercise in a discovery application, the merging parties raised insuperable difficulties, contending it would lead to indeterminate collateral issues. We accepted this at the time and did not compel this*

information. It is highly probable that if Massmart was procuring at prices near to those of Wal-Mart, this exercise – entirely within the knowledge of the merging parties - would have been done. Is It likely that the two firms did not at some time, over their lengthy contact, not explore this possibility?"

The Tribunal thus demonstrated that a question central to the public-interest concerns was taken beyond the reach of Hodge. In Mr Trengove's view, this constituted a fine illustration, from the mouth of the Tribunal itself, of how the Tribunal materially misdirected itself in not compelling the discovery of this information.

[88] Within the context of these submissions it is again necessary to take account of the applicable test to be applied in such an application. It is correct, as Mr Trengove submitted that the competition authorities, including the Tribunal, must seek to obtain proper information from the merging parties so that it can make an informed decision as to the likely consequences of a merger. Manifestly the only basis upon which the Tribunal can appraise whether undertakings made by the merging parties or conditions otherwise proposed or ventilated are 'sufficient' or 'adequate' is upon a thorough consideration of facts disclosed to it by way of evidence.

[89] Again the question arises: What would be the approach adopted by a

reasonable decision maker in these specific circumstances? In this connection the following observation of the authors of De Smith's Judicial Review (6th ed) at 11 – 686 is salutary:

> "*Whether a court carries out substantive review of a decision by reference to the concept of unreasonableness or proportionality, two questions arise: To what extent should the courts allow a degree of latitude or leeway to the decision-maker? And to what extent should it be uniform? The answers to these questions depend in large part on the respective constitutional roles of the court and the primary decision-maker (the impugned public authority), but also on practical considerations. The willingness of the courts to invalidate a decision on the ground that it is unreasonable or disproportionate will be influenced in past by the administrative scheme under review; the subject matter of the decision; the importance of the countervailing rights or interest and the extent of the interference with the right of interest. Indeed the intensity of review will differ, for the reason that 'in public law, context is all'. The threshold of intervention is particularly influenced by the respective institutional competence of the decision-maker and the court.*" See also **Foodcorp v Deputy Director General, Department of Environment Affairs and Tourism** 2006 (2) SA 191 (SCA) at para 12.

[90] It was, in our view, not unreasonable for the Tribunal, faced with its own constraints and the competing claims made in this case, to have structured the

hearing and the discovery of documents as it so did in order to meet its obligations under s 12 A. It carefully weighed what evidence was necessary for its inquiry and the time which it could reasonably expend in this process. To a large extent, the Ministers seek to buttress their arguments by way of an *ex post facto* examination of the consequences of a decision taken by the Tribunal which is mandated to arrive at a decision about a merger and thus act as a decision maker and not as a trial court within the context of a merger. An examination of the Tribunal's reasons for its discovery decisions reveals that it carefully justified why it considered a number of the requests to be unnecessary in order to make a decision. In short, the Tribunal may have acted imperfectly but not unreasonably.

The appeal

[91] SACCAWU based the foundation of its appeal upon a criticism of the normative approach adopted by the Tribunal to the application of the Act. Thus, it contends that the approach adopted by the Tribunal and further contended for by the merging parties ignored the express language of the Act. It argues that the South African competition regime is concerned with economic or market power, its creation, extension, distribution and (ab)use, and that the entry of a firm with the scale of operations and consequent economic power of Wal-Mart into the South African economy will disrupt the competitive equilibrium and processes in the retail sector, as well as alter competition for suppliers in the retail supply chain.

[92] SACCAWU therefore contends that the merging parties' uncritical adoption of the perspective of a consumer welfare standard ignores its explicit rejection by the Act. SACCAWU suggests that s 12 A enjoins the competition authorities to take account of factors which do not play a role in terms of the consumer welfare approach to competition policy. In this connection, reference was made to David Lewis *Global Competition: Law Makers and Globalisation* (2011) and the perspective which extends beyond that of a narrow consumer welfare standard as contended for by Eleanor Fox *Poverty and Markets* (March 2009). See also Wolfgang Kerber . Should competition law promote efficiency? In Drex/Idot and Moneger (eds) Economic Theory and *Competition Law* (2009). In citing these authorities, we did not take SACCAWU to be arguing in favour of a total welfare standard which would take account only of consumer and producer surplus, but rather that the Act supported a more nuanced test than that of a consumer welfare standard.

[93] Mr Kennedy, who appeared together with Ms Le Roux on behalf of SACCAWU, contended that a new paradigm was established in terms of the Act, particularly as a result of s 12 A (1) and (3). The articulated public interest concerns incorporated a legislative commitment to a competitive process which seeks to correct socio-economic disadvantage and distortion which arose as result of South Africa's discriminatory past. Accordingly, competition law and policy, as set out in the Act, includes instruments for South Africa's economic

development and compliment other policy instruments, including trade and industrial policy. In short, s 12 A makes it clear that the analysis, as required by the Act, enjoins the competition authority to undertake an examination of factors beyond standard questions of a contemplated transaction's impact on price and output.

[94] Mr Kennedy contended that it therefore followed that South African competition authorities are required to examine the merger in terms of the following considerations:

1. Whether an increase in import competition would take place in the market because local suppliers cannot compete with the prices of imported goods and thus sustain their businesses, which, in turn, would result in job losses, a closure of small and medium size businesses and a concomitant impediment upon the development of local business.

2. Whether barriers to entry will be raised, given that it would be increasingly difficult to attain the scale which would be necessary to compete against Wal-Mart.

3. An increased concentration of the market as smaller enterprises fails

in the retail sector and its supply chain.

4. An increase in countervailing power in the market, to such an extent that this would act to the detriment of small and medium sized enterprises.

5. A reduction of growth, innovation and product differentiation as the relevant sector contracted.

6. A removal of effective competition and homogenisation of the sector.

[95] For these reasons, Mr Kennedy was extremely critical of the approach adopted by the Tribunal to considerations of public interest in terms of s 12 A (2) read with s 12 A (3). The Tribunal had confirmed its earlier approach as set out in **Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd** (CD 66/LM/Oct 06), that it ought to show deference to other regulators in dealing with questions which were contained in the public interest considerations because its role was 'secondary to the statutory and regulatory instruments'. (para 58) Furthermore, criticism was raised by SACCAWU of the approach set out in the Tribunal's decision in **Harmony Gold Mining Company Limited** case *supra* para 76, namely that 'the public interest conclusion is justified in relation to a prior competition conclusion.'

[96] Mr Kennedy submitted that s 12 A imposed clear obligations upon the Tribunal to consider the effect that the merger would have on the specific public interest considerations as tabulated in the section. These could not be relegated into considerations of a secondary order by use of a theory of deference to other regulatory authorities. Furthermore, the clear wording of s 12 A indicated that a tiered approach to the inquiry was required, as has been set out earlier in this judgment.

[97] While the Tribunal's decision and SACCAWU's argument appear to make common cause that public interest considerations are both part of the overall inquiry into competition concerns, the Act would appear to enjoin the Tribunal to initially examine the transaction within a traditional consumer welfare standard and, thereafter, to test its initial finding further in terms of the broader inquiry as mandated in terms of s 12 A (2) read with s 12 A (3). In other words, having examined whether the merger is likely to substantially prevent or lessen competition by a consideration of factors set out in s 12 A (2), a further inquiry must then take place in terms of a justification on the substantial public interest grounds as set out in subsection (3).

[98] Viewed holistically, there is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue of an embrace of the goals of a free market and effective competition together with an incorporation of uniquely South African elements, including the need to address our exclusionary past, which need is reflected expressly in the preamble together with s 2 of the Act, the legislature imposed ambitious goals upon the competition authorities created in terms of the Act. Within the context of the present dispute, this ambition is further captured in s 12 A which mandates an enquiry into substantial public interest grounds.

[99] Correctly, Mr Unterhalter contended on behalf of the merging parties, that the adoption of a standard other than that of consumer welfare would significantly complicate the implementation of the Act, particularly owing to the complexity of the economic calculation of total welfare of a particular transaction, particularly if total welfare extended beyond an exclusive calculation of consumer and producer surplus alone. His point is well illustrated by Professor Robert Lawrence, albeit within a different context, ((2011) **Foreign Affairs** 169):

> "*For the past 50 years technological development has helped productivity grow more rapidly in manufacturing than in the rest of the economy. On the one hand, this growth could lead to less employment, since it allows*

the production of a given quantity of goods with fewer workers. On the other hand, it results in cheaper products, creating an incentive for consumers to buy more goods which could increase employment. Yet in practice, the consumer response to cheaper goods has been insufficient to offset the job losses associated with higher productivity. Just as rapid productivity, growth and agriculture has led to fewer jobs on farms, rapid productivity growth in manufacturing has led to fewer jobs in factories."

An evaluation of whether societal welfare, as envisaged in the Act increases in circumstances where the price of a product reduces to realise a benefit for consumers but takes place at the expense of job losses is extremely difficult to determine; even more so within the context of South African competition law and the scarce technical resources available to the competition authorities, let alone the broader economic tools available. Expressed differently, what weight is to be given to the factors set out in s 12 A (3) in order to determine whether these should trump a finding based on more traditional considerations of consumer welfare as captured in s 12 A (2)?

[100] This question does, within the context of the dispute and the wording of the Act as employed in the preamble, read together with sections 2 and 12 A require an answer. From the structure of s 12 A, the Tribunal or this court may be faced with arguments that go to consumer welfare and those that then extend to

employment and the interest of small business. An engagement with an exercise of proportionality is then required to determine how to balance the competing arguments. While this exercise may, by its nature and for the reasons set out above, never be precise, it is what the Act appears to require in respect of mergers. *En passant*, this should not be interpreted to mean that the Act mandates a narrow view of consumer welfare determined exclusively in terms of affects upon price and output. However, a proportionality exercise requires evidence which would enable the exercise, justify the calculation which flows therefrom and permit a balance to be struck between the competing issues of consumer welfare employment and small business.

[101] The difficulty in engaging with this exercise in this case is revealed in the evidence which was presented in support of the opposition to the merger. The critical evidence in this connection was given by economist Mr James Hodge, who testified on behalf of the Ministers but whose evidence, in this appeal, has been used by SACCAWU to buttress its case. He conceded that:

> "*There can be little doubt that Wal-Mart has a size that affords it a global infrastructure that enables it to leverage that source products (sic) enable to bargain with suppliers and reach better product prices and although some of these in extent to which they exists may be sometimes disputed by the merging parties, I think the existence is in little doubt*."

Mr Hodge's key point in favour of a cautious approach to the proposed merger was that, even with a 1% change in procurement from domestic to imported goods, a loss of jobs will result; in his view, about 4000 jobs in the supply chain would take place by virtue of a 1% alteration in procurement in favour of imported products.

[102] In cross examination, Mr Hodge conceded that lower prices could obviously work to the benefit of consumers. His concern, as confirmed under cross examination, was 'whether those benefits should be ones at the expense of people who earn even less'; in particular, whether the consumer benefits which would be gained as a result of a transaction would be displaced by negative employment effects.

[103] In summary, the difficulty in engaging with a proportionality exercise which would favour appellants' case is illustrated by the concession made by Mr Hodge that, if there was, for example, a 5% reduction in prices resulting from the merger, on the current turnover of Massmart this would result in a benefit of approximately R 2.5 billion to consumers. Mr Hodge accepted that this would obviously constitute a real benefit for consumers. Thus, this benefit could result in an increase in expenditure which, on his working assumption, could in turn, increase

employment by approximately 20 000 jobs.

[104] Much of the debate between Mr Hodge and Mr Baker, the merging parties economist, turned on the question, which was considered to be of extreme importance to the merger by the Tribunal, namely can Wal-Mart post-merger source goods from overseas and in particular Asia more cheaply than can Massmart and if so will it? This question was deemed to hold the key to the determination of whether the potential losses which flowed from the merger, particularly when analysed in terms of factors set out in s 12 A (3) would outweigh the proclaimed consumer advantages of the merger. The Tribunal complained about an absence of more precise evidence, commenting, however, that 'it is highly probable that if Massmart was procuring at the prices near to those of Wal-Mart, this exercise – entirely within the knowledge of the merging parties – would have been done. Is it likely that the two firms did not at sometime over their lengthy contact, explore this possibility? Hence the Tribunal appeared sceptical of the claim that no change to procurement patterns would take place. However, in its view,

> "*The problem is that the concern raised in relation to local procurement/imports is also associated with important benefits for consumers. A possible loss of jobs in manufacturing of an uncertain extent must be weighed up against consumer interests in lower prices and*

job creation at Massmart. Since the evidence is that the likely consumers who will benefit most from the lower prices associated with the merger are low income consumers and those consumers without any means of support of their own, thus the poorest of South Africans, the public interest in lower prices is no less compelling."

[105] The determination of the trade-off between consumer benefits and job losses caused by increased importation of goods presently obtained in South Africa, was bedevilled by the lack of precise evidence. Thus, in his evidence, Mr Baker conceded that he was unable to testify on 'specific numbers' relating to increases in imports. Notwithstanding this observation, Mr Baker's essential argument was encapsulated in the following passage of testimony:

"*They (Wal-Mart) have a global procurement system in sourcing which enables them to report very efficiently. They also have a range of IP and other assets that they can deploy in domestic procurement which will make their procurement of domestic goods much more efficient. They are not as cheap as they are in the US just because they import cheaply. They import cheaply, but they procure domestically very efficiently as well*."

[106] In short, Mr Baker testified that Wal-Mart would not only introduce an efficient import infrastructure into South Africa but also an efficient domestic procurement infrastructure together with retailing techniques, stock management and 'full rates' which would ensure the achievement of lower prices. As he told the Tribunal:

> "*My understanding is often Wal-Mart doesn't get a big factory gate premium over other buyers, but it gets advantages from having a more efficient logistics chain. In other situations it may get a factory gate advantage, but I think it's important to dispel the idea that … which I think is the intuitive one when one comes to situations like this, Wal-Mart is very large, Wal-Mart goes to China, Wal-Mart get a factory gate price which is much much lower than everybody else. That's not my understanding of what happens. I may or may not get a lower price, but it gets significant benefits from being very efficient in the way that it handles goods.*"

[107] While the Tribunal was never the beneficiary of a comprehensive and coherent exposition of the implications of global value chain management, to an extent Mr Hodge conceded that it was within its superior global value chain management that Wal-Mart's ability to achieve its objective of ensuring lower prices could be located. Thus, Mr Hodge said:

> "*In terms of domestic supply I can think after almost a week of testimony I can think there can be little doubt that Wal-Mart has a size that affords it a global infrastructure that enables it to leverage and to source products, enables it to leverage and to source products, enables it to bargain with suppliers and reach better prices and although some of these in the extent in which they exist may be sometimes disputed by the merging parties, I think their existence there is in little doubt*."

Mr Hodge's argument however was that 'It would be a remarkable coincidence' if Wal-Mart only sourced globally through the supply chain which were currently employed by Massmart'. Thus, the unknown factor was whether the source of imports would be switched together with the further question of the extent to which the intensity of imports would be increased subsequent to the merger.

[108] Viewed accordingly, the evidence of both economic experts was predicated on a number of assumptions which need to be treated with considerable caution. Mr Hodge's model is predicated upon a 1% change in domestic procurement in favour of imports and its effect on employment. It was based on an assumption that the employment output elasticity equals 1 so that a 1% increase in output would inevitably lead to a 1% increase in employment. Similarly, Mr Baker's evidence was, to a considerable extent, based on that of Mr Pattison and Mr Bond, an executive vice president of Wal-Mart who had told him about the

Massmart and Wal-Mart operations rather than basing his testimony on any sustained empirical investigation. In addition, Mr Baker relied upon data gleaned from the Wal-Mart experience in Chile and the United Kingdom, the applicability of which to this merger, was hotly contested. Furthermore, Mr Baker conceded that he did not have information which would have allowed him to compare 10 'like for like products' of Wal-Mart and Massmart to assess the difference between Wal-Mart's factory prices and those of Massmart; and therefore the likelihood of shifts in procurement patterns and price reductions; hence his reliance on academic articles relating to Wal-Mart's record in Chile. In this connection, he emphasised that, in the six months before Wal-Mart's acquired DNS in Chile, the prices were approximately 1% below the market as a whole. After the acquisition by Wal-Mart, the prices reduced to 5% below the market average.

[109] A further piece of connected evidence was provided by Mr Gerhardus Ackerman of Shoprite/Checkers. In essence, he testified that, at present, there is a balance between the large competitors in the market in respect of both price levels and local procurement. In his view, Wal-Mart could substantially 'upset this balance'. However, it is not without significant that Mr Ackerman was not privy to information as to the decisions that the merging parties would take which could substantiate his claim or provide specifics in regard thereto.

[110] In summary, SACCAWU contends, that, given the wording of s 12 A, the Tribunal was required to determine whether a merger, even if pro-competitive, could be justified on public interest grounds. As the only countervailing public interest identified by the merging parties for consideration was the overall consumer welfare benefit flowing from a reduction of the price of products sold by Wal-Mart, this consideration, without more, could not outweigh the other interests which would be effected by the merger. For these reasons, SACCAWU contends that the only concrete benefit associated with the claimed potential to reduce prices for consumers cited in the merger filing which this Court could accept with confidence is that '*Massmart will have access to Wal-Mart's global procurement services through Wal-Mart's global procurement network'*, which, however, in its view is a proposed benefit that has considerable downside for the public interest.

[111] It further argued that, internally, Massmart acknowledges that the other cost advantages at Wal-Mart stem from non-unionisation, labour practices and bargaining power with suppliers. To the extent that consumer benefits flow from mere transfers from labour or suppliers, such efficiencies should not be recognised but raise substantial public interest issues.

Evaluation

[112] The arguments raised by SACCAWU against the merger were also used to justify the alternative prayer, namely the imposition of further conditions. The latter submissions must however await an evaluation of whether the Tribunal's approval of the merger should be set aside. This evaluation can only be undertaken after assessing the position of the *onus* required in terms of s 12 A and, further some practical resolution to the debate about the normative framework of the Act, as described.

[113] On a holistic reading of the Act, it is possible to contend, for example, that if it appears that a merger is not likely to substantially prevent or lessen competition, the relevant competition authority must, notwithstanding this finding, proceed to engage with the factors which make up the public interest enquiry. On one level, this appears to be an approach which is congruent with the wording of the section. Public interest grounds then stand to be examined separately in order to come to the final conclusion as to whether to permit the merger. In so doing, the Act provides no guidance to the weight to be placed on the factors set out in s 12 A (3) nor to the relationship between the traditional competition questions contained in s 12 A and the specific public interest grounds. By virtue of the fact however that public interest grounds are described as having to be 'substantial', the weight afforded to these grounds must be considerable, if the authority is to refuse the merger, in a case where there is no finding that the merger is likely to substantially

prevent or lessen competition. As already stated, this enquiry requires the production of evidence which can be utilised to do the relevant proportionality exercise.

[114] By contrast, the merging parties invited the court to adopt the principle that the relevant competition authority should, in the interests of 'consumers and society' err on the side of approving rather than preventing a merger. See Buttigieg **Competition Law Safeguarding the Consumer Interest: A Comparative analysis of US anti-trust and EC Competition** (2009) at 255 – 256. While such a presumption should not be adopted in an inflexible fashion, the wording of s 12 A would appear to indicate that, only upon the presence of clearly identified, substantial public interest grounds, should a merger, which would otherwise have no adverse competition consequences, be prohibited. Expressed in this manner, the two submissions are not necessarily at war with each other. Unless the effect upon public grounds, as set out in s 12 A (3) is shown to be substantial, the court cannot employ the public interest test to disallow the merger. Where the evidence shows that the merger may, on the probabilities, have a detrimental effect, for example, on employment or the ability of small and medium sized business to be competitive, the court will need to engage in the necessary balancing exercise which entails an embrace of, broadly, the normative framework advocated by SACCAWU, as qualified in this judgment.

[115] The evidence in this case thus becomes crucial as to the proper judicial engagement with the range of enquires envisaged in s 12 A. As is apparent from observations made earlier in this judgment, the intervening parties, admittedly, had some difficulty in obtaining the comprehensive picture which would have included the merging parties' proposals with regard to the ratio between domestic procurement and imports. This is somewhat surprising as it could have been expected that Wal-Mart had developed a series of business models in order to test the extent to which the considerable investment in Massmart would prove to be profitable. In turn, these ratios could then have been expected to have been employed to further examine the arguments about shifts towards imports.

[116] Nonetheless, even if all of this information had been made available, it would not have gainsaid the conclusion, based on uncontested evidence, that prices will be reduced to the benefit of consumers as a result of the merger. The legitimate criticism about insufficient evidence notwithstanding, it is clear from the record as a whole that consumer benefits will flow from this merger.

[117] It does not appear to be disputed either that there is the potential for small and medium sized South African suppliers to gain benefit from the presence of Wal-Mart and its unique access to global value supply chains. Mr Bond provided

unchallenged evidence in this connection:

> "*In fact, it seems likely that domestic suppliers will stand potentially to benefit from the transaction, for two reasons. First, as seen in the Massmart procurement data, the supply of food is generally an area where small local suppliers have considerable advantages over imports. As the transaction may be expected to allow Massmart to accelerate the development of its retail offer, including expanding the provision of perishable foodstuffs and private –label, one might expect the merger to offer more opportunities for small domestic suppliers of foodstuffs to expand their businesses, including as private-label suppliers, and to do so earlier than might otherwise have been the case. Second, to the extent that international trade in the goods concerned is feasible, it is a two-way street. Consequently, one would expect the best of the small South African suppliers to have opportunities to export via the Wal-Mart network of stores elsewhere in the world.*"

This claim follows that contained in his witness statement in which the following appears:

> "*Numerous studies in different markets around the world indicate that Wal-Mart's stores create opportunities for small and medium sized businesses, and that Wal-Mart is accordingly good for the local economy. Wal-Mart is committed to working with local businesses to build capability and*

opportunity. Suppliers have the opportunity to extend their reach considerably by being part of Wal-Mart's global supplier family."

[118] These positive factors would need to be weighed against any losses which will be experienced by small and medium sized businesses, as well as the consequences for employment, when the transaction is viewed holistically. But, as we have noted, in dealing with a standard that seeks to balance consumer and other forms of societal welfare as set out in the Act, it is highly unlikely that, even with further information as sought by the Ministers, a set of calculations could have been produced which would ultimately have justified the conclusion based on such a standard, that the merger should not have ben approved. The available evidence, together with inferences that could reasonably be drawn, particularly from uncontested evidence, supports this conclusion.

[119] One further example from the evidence must suffice to support the conclusion, that even on appellant's version, there was insufficient evidence to refuse the merger. In cross examination, Mr Hodge, who it should be noted, fulfilled the role of an expert witness in these kind of proceedings in exemplary fashion, was asked about the effect of a 5% reduction in prices resulting from the merger. He accepted that such a reduction and the concomitant saving on the

part of particularly relatively poor consumers, could result in an increase of 20 000 jobs. In other words, when both sides of the transaction were measured, there was no clear evidential basis by which the probabilities could be configured to disturb the Tribunal's primary findings.

[120] In summary, the evidence, as made available to the Tribunal and which forms the record placed before this court, cannot justify the conclusion that the public interest considerations raised by the appellant would so trump the benefits which, it is common cause, will flow to consumers, to sustain a decision that the merger should be prohibited.

[121] This conclusion does not necessarily result in a finding that no conditions should be imposed, insofar as this transaction is concerned. To this enquiry, we shall return. But it is first necessary to examine certain other issues raised by SACCAWU.

Employment rights

[122] SACCAWU sought the intervention of this court in order to protect its members against the adverse effects of what it termed 'the Wal-Mart model' on employment levels, particularly terms and conditions of employment and the organisational rights of workers within the merged firm. It conceded that the conditions imposed by the Tribunal, to which reference has already been made, had gone some way towards achieving the protection of workers. However, Mr Kennedy contended that more was required to protect the union structurally against what he termed 'Wal-Mart's anti-union stance'. Further, SACCAWU contended that 574 workers had already been retrenched by Massmart, all of whom must be reinstated by the merged firm, as opposed to having been given 'preferential status' in the event of 'uncertain' future recruitment, as provided for in a condition approved by the Tribunal.

[123] SACCAWU contended that there was compelling evidence relating to Wal-Mart's practice and policies concerning workers; in particular empirical evidence of the adverse impact of Wal-Mart's employment practices and policies and wages and other terms and conditions of employment. In its view, Wal-Mart had ruthlessly pursued a labour relations strategy which was designed to prevent the unionisation of its workers. It had done so successfully that 1.3 million out of 2.1 million of its workers in the United States of America were not unionised. This had resulted in wage levels of Wal-Mart employees being 12.4% less than for workers employed by other retailers. According to SACCAWU, the merging

parties, in their evidence before the Tribunal, had provided no firm and enforceable commitments regarding labour and employment issues but merely required the Tribunal to accept their 'bold denials or say-so' that 'Wal-Mart's global reputation for poor labour relations' would not be imported into South Africa through the merger.

[124] In this connection, SACCAWU relied upon the report prepared by Mr Hodge in which he acknowledged that scope existed for the merging parties to downgrade the terms and conditions of employees without violating the applicable labour laws or bargaining agreements and therefore without recourse to the union or its members.

[125] By contrast, the merging parties relied on evidence from Chile, where Wal-Mart had recognised a range of trade unions. In his evidence, Mr Ostale, the Chief Executive Officer of Wal-Mart Chile, testified that prior to Wal-Mart's acquisition of a similar business in Chile, D&S, there were 55 separate unions which had been recognised by the Labour Bureau Authorities in Chile. Following Wal-Mart's acquisition of D&S, the number of unions grew so that there are now 82 unions, representing 61% of all workers in all areas of the country, which were so recognised. Mr Ostale testified further that by December 2010, there were 94

union contracts, in effect regulating the contractual conditions of 21 000 employees of Wal-Mart. On the strength of Mr Ostale's evidence, the merging parties sought to contradict the evidence of the union's witness Mr Alvarez, namely that Wal-Mart had a policy or carried out any action, direct or indirect, which was aimed at preventing or restricting unionisation or union activities in Chile.

[126] Mr Kenneth Jacobs, the chair of the University of California Berkeley's Centre for Labour Research and Education, testified on behalf of the unions that Wal-Mart's expansion into a country did not increase a number of total retail work hours but displaced existing jobs as opposed to increasing total employment. He contended that in the United States, if there was a control for differences in geographical location, Wal-Mart workers earned approximately 12.4% less than retail workers as a whole and 14.5% less than workers in large retail chains in general. In addition, Wal-Mart workers were less likely to have employee sponsored health benefits. He cited two studies which showed that Wal-Mart's entry into a metropolitan area reduces both average and aggregate retail earnings through a substitution of lower paying Wal-Mart jobs for higher paying retail jobs and a competitive effect of other retailers reducing wages in order to compete with Wal-Mart.

[127] Mr Gauntlett, on behalf of the merging parties, hotly contested the accuracy

and utility of Jacobs' evidence and suggested that Mr Jacobs' testimony was informed not by fact but by a strong predisposition. In his view, Mr Jacobs sought out evidence to support an *a priori* position, yet had not verified his claims on the veracity of the evidence upon he sought to rely. For example, Mr Jacobs had cited a complaint in a class action suit, referred to during the hearing as the Jane Doe case. That case had been dismissed on exception by the Ninth Circuit Court of Appeals, without any evidence having been led. Mr Jacobs accepted this fact during cross-examination and conceded that he had incorrectly referred to this complaint in his affidavit, in circumstances when, at the time when he had prepared the document there was already a published decision dealing with the complaint.

[128] Whatever the criticisms of Mr Jacobs' testimony, there is additional evidence which was provided by the unions to support the ultimate conclusions which it urged the Tribunal to accept. The witness statement of Annette Bernhardt, Co-Director of the National Employment Law Project in the United States of America, provided an overview of employment cases involving Wal-Mart which pointed towards 'a structural systemic underpayment of employees'. This criticism of Wal-Mart's employment practices was also supported by a statement of Professor Nelson Lichtenstein, professor of history at the University of California (Santa Barbara) concerning systematic anti-union strategies adopted by Wal-Mart in the US.

[129] Independent support for these concerns regarding Wal-Mart's employment policy are also to be found in aspects of the recent decision of the United States Supreme Court in **Wal-Mart Stores Inc. v Dukes** *et al* (20 June 2011). In this case, a class of some 1.5 million female employees sought judgment against Wal-Mart for injunctive and declaratory relief, punitive damages and back pay because of alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claimed that management had exercised a discretion over pay and promotion that was disproportionately in favour of men, which had an unlawful disparate impact on female employees and further that Wal-Mart had failed to curb the managerial authority which had been given rise to this disparate discriminatory treatment.

[130] While the majority of the Supreme Court found in favour of Wal-Mart, holding that the applicable procedural rule can only apply when a single injunction or declaratory judgment would provide relief to each member of the class and did not authorise class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant four members of the court held otherwise. In the minority judgment (supported by three other justices) Ginsberg J cites:

> "*Plaintiffs evidence including 'class members tales of their own experiences (which) suggest that gender bias suffused Wal-Mart's company culture… [t]he plaintiffs presented an expert's appraisal to show that the pay and promotion disparity at Wal-Mart can be explained only be gender discrimination and not … natural variables*.'

Although this case, the largest class action brought in the United States of America, ended with a finding that the plaintiff class could not be certified, a reading, particularly of the minority judgment of Ginsberg J, as to the evidence that would have been raised had the class been certified, raises similar concerns to those which were articulated by those witnesses who testified on behalf of the unions before the Tribunal. For a detailed examination of the **Dukes** decision see Judith Resnick 2011(125) *Harvard Law Review* 79

[131] The question which must now be answered in the present case is whether the concerns articulated and which are based on comparative evidence are sufficient to justify the remedies sought by SACCAWU; in particular the imposition of group centralised bargaining and the creation of a closed or agency shop arrangement at the merged firm.

[132] Apart from the negative evidence, which has already been noted, there was positive evidence presented which illustrates that Wal-Mart has operated in

unionising environments. Thus, Brenner Eidlin and Candele "Global Companies – Global Unions – Global research - Global Campaigns" (2006) at 46 write:

> "*In the case of Argentina, Brazil, Germany, Great Britain, and Japan, unionisation has been the result of Wal-Mart purchasing an already-unionised domestic retailer, thus inheriting the company's bargaining units. Countries such as Germany and Great Britain have national labour laws that require a degree of worker representation or adherence to sectoral collective bargaining agreements. Additionally, after initially claiming they were exempt from national regulations, Wal-Mart announced in 2004 that it would allow unions at its stores in China. Wal-Mart stores in Mexico also come under collective bargaining agreements. And at their August 2005 convention in Chicago, UNI Commerce, the global labour federation for retail workers, announced a major campaign to organise Wal-Mart workers in South Korea.*

Unions at Wal-Mart Outside the United States	
Argentina	Federación Argentina de Empleados de Comerio y Servicios (FAECYS)
Brazil	Sindicato dos Comerciá de São Paulo (SECSP)
Canada	United Food and Commercial Workers International Union (UFCW)
China	All-China Federation of Trade Unions (ACFTU)
Germany	Vereinte Dienstleistungsgewerkschaft (ver.di)
Great Britain	GMB: Britain's Geneal Union
Japan	Federation of Seiyu Workers Union (SWU)
Korea	Korean Federation of Private Service Workers (KPSU)

Although unions have a nominally substantial presence in Wal-Mart's

international operations, it is important to note that the organisation, scope, and effectiveness of union representation vary from country to country. Unions in some countries, such as GMB in Great Britain and particular ver.di in Germany, have shown considerable resolve in standing up to Wal-Mart, and have engaged in various types of job actions and legal fights. As ASDA, the unions have shop stewards, but no collective bargaining agreements. In Brazil, Wal-Mart reached agreement with unions on some works' rights issues. At the other end of the spectrum, unions in China are known more for their role in enforcing government policy than in representing workers, and Mexican unions are notorious for being little more than protection rackets, offering "sweetheart contracts' with few representation rights for workers in exchange for employer payoffs. Nevertheless, the presence of unions and collective bargaining arrangements in these countries would seem to provide possible leverage for efforts to unionise Wal-Mart's North American operations."

[133] This evidence needs to be read together with the active presence of a union (SACCAWU) in the Massmart enterprise and the existence of a body of existing labour legislation, in particular the Labour Relations Act 66 of 1995, which affords both unions and individual employees a range of rights which, in turn, are supervised by a set of specialised bodies, including the Labour Court and the Labour Appeal Court.

[134] There is also evidential support for the contention that Massmart had adopted an attitude, prior to the merger, that it would not support centralised bargaining nor a closed shop; in other words, Massmart's attitude to SACCAWU's demands had been formulated long before the merger.

[135] SACCAWU, however, contends that, given the general record of Wal-Mart towards labour rights, these protections are necessary. To an extent, the Tribunal recognised that Wal-Mart executives had, albeit cryptically, expressed concern about the present structure relating to labour relations in Massmart. In a due diligence report dealing with "HR" of 29 October 2010 the following appeared:

> "*High levels of labour/associates in stores. The clarity of this position is clouded by the use of vendor colleagues, 'brand associate advisors' and other third-party employees (e.g. Decorland). There is an opportunity to reduce cost and drive productivity. The solution or alternatives to mitigate risk in this report is to 'review required structures, remove third-party labour where appropriate (seeking margin reduction where appropriate), establish a new model, amend contract if necessary, introduce an automated scheduling system*."

Similarly, under '*outstanding issues relating to an absence of supporting documentation to verify unionised staff*', the following comment appears in the same document: 'Risk High – Statistics needed to be provided unionism is a risk to the transaction and accurate information is essential.' SACCAWU thus argues that, given Wal-Mart's anti-union stance in the USA, the observations contained in this 'HR' document justifies its case for additional protection.

[136] But is it the role of competition law to provide the specific safeguards sought by SACCAWU? Viewed within the prevailing analytical discourse of labour law, SACCAWU has raised a series of disputes of interest which must ultimately be determined by way of an exercise of collective power. The conceptual distinction between interest and rights disputes is fundamental to existing South African labour law. The law deals with rights and not interests, which are to be resolved by the exercise of collective power. The negative evidence concerning the 'Wal-Mart model' notwithstanding, this principle should still apply within the context of the merger, even when the considerations of s 12 A (3) read together with the balance of s 12 A are taken into account. In terms of the conditions set out in the Tribunal's order, no retrenchments for operational reasons can take place for two years and SACCAWU's current position in Massmart is guaranteed for 3 years. Beyond these protections, SACCAWU must use either its bargaining power or, where applicable, rights guaranteed to workers under existing labour law, to protect its members. In summary, it is not the role of

competition law to provide legal protections to potential disputes of interest which stand to be resolved by the exercise of collective power. To the extent that the merging parties would seek to erode union or employee rights guaranteed under existing law, these will be protected by the labour courts, which are set up to deal with disputes of rights.

The 574 workers

[137] SACCAWU contends that 574 workers, who were retrenched, including those who worked for Game in Nelspruit and others who worked for regional distribution centres took place in anticipation of the merger. While there is no direct evidence in point, SACCAWU contends that the only reasonable inference to be drawn is that, given the timing of the retrenchment viewed within the process of merger negotiations, these retrenchments are merger related.

[138] The merging parties contend however that the decision to implement the regional distribution structures, which gave rise to the retrenchment of 503 employees at Game was made in 2002, while the decision to build a particular distribution centre which led to these retrenchments was made in 2008. Accordingly, the merging parties contend that these decisions were made well before any suggestion of the merger with Wal-Mart. The merging parties contend, by way of the evidence of Mr Bond, that Wal-Mart only decided that

Massmart was its target firm in June or July 2010, after meetings with potential targets, one of which was another South African retailer. Further, the merging parties argue that as only 503 employees were retrenched out of a total compliment of 26 500, it is highly unlikely that Massmart retrenched to make its organisation a 'sweeter prospect' for acquisition than its rivals.

[139] This argument was, in effect, accepted by the Tribunal. The Tribunal held that the burden of justifying a merger specific retrenchment fell upon the merging parties but, in this case, the retrenchments had taken place prior to the merger. Accordingly, it held that the unions would have needed to show that the retrenchments were merger specific. Only upon this finding being made, would the burden of justification have shifted to the merging parties. The Tribunal found further that Massmart gave plausible reasons for the retrenchments that were not merger specific. Consequently, there was no basis to grant the relief sought by the unions based upon the facts which had been presented to the Tribunal.

[140] Curiously, the passage which the Tribunal employed from its own decision in **Metropolitan Holdings Limited v Momentum Group Limited** (decision of the Competition Tribunal of 9 December 2010) to justify its finding does not entirely support the approach that it appears to have now adopted. Thus, in paragraph 51

of its determination in this dispute, it relies on paragraph 68 of the Metropolitan decision. Paragraphs 68 and 69 of that decision read thus:

> *"[68] In Harmony Goldfields we held that the merging parties are not required to affirmatively justify a merger on public interest grounds. What we did not decide in that case is whether once a substantial public interest ground has been raised whether the merging parties face an evidential burden of justification. In this case we have decided that they do. Once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it.*
>
> *[69] Thus, if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made. This is not an unfair burden given that only the merging parties can answer this question.*"

An examination of this reasoning does not automatically support the argument that, because the retrenchment took place prior to the merger, it cannot be merger specific, a conclusion which was central to its finding in the present case. A retrenchment, which takes place shortly before the merger is consummated may

raise questions as to whether this decision forms part of the broad merger decision making process and would, accordingly, be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision.

[141] The present case luminously illustrates this proposition. Mr Gauntlett submitted that the decision to implement the regional distribution structures was taken in 2002 and the later decision to build particular distribution structures in 2008 showed clearly that the retrenchments had little to do with the negotiations concerning the merger. Notwithstanding these submissions, the fact remained that Massmart retrenched 503 workers in June 2010, almost two years after its decision to build the particular distribution centre and eight years after the so-called 'initial decision' to retrench. To argue, as Mr Gauntlett sought, to do, that 'the dye was cast' insofar as these workers were concerned as from 2002 and that consequently the actual implementation had nothing to do with the merger, at best for the merging parties, raises questions as to whether there was not a clear linkage between the merger and these retrenchments.

[142] It thus became important for the merging parties to show that the decision to merge had occurred late in 2010 in order to rebut the negative inference. Mr Pattison testified that merger negotiations had 'only picked up momentum in late September 2010', thereby contending that the decision to engage in the merger

was way beyond the date upon which the retrenchment decisions had been taken. In cross-examination by Mr Kennedy, Mr Pattison had considerable difficulty in justifying this claim. It was clear from documentation generated from meetings of Massmart's board, that talks had taken place between the merging parties as from 2009. Mr Pattison was forced to concede that discussions had been requested from Wal-Mart in December 2008. Similarly, he was compelled to accept that in November 2009, Wal-Mart had indicated in a document that, in 2010, there was a possible acquisition in South Africa.

[143] Mr Pattison encountered a further problem in denying the proposition put to him by Mr Kennedy that the 'strategy of Massmart at this time, going back particularly around 2009 was to manoeuvre your business into a situation which would be good for business in your view overall, but one of the factors you were alive to and influenced by was the potential acquisition by Wal-Mart'. Mr Kennedy referred Mr Pattison to a document dated 15 December 2009. The following passage of his exchange with Mr Kennedy is significant:

> "*The very first passage under the heading 'introduction' "In preparing for a potential offer by Wal-Mart, Massmart has requested Deutsche Bank to give consideration to the possible form of Walter's offer investment strategy, offer mechanics and key execution considerations from a structural, legal and regulatory perspective.'*

This document contains details relating to this very issue. Are you seriously standing by your evidence that in 2009 there weren't serious discussions between Wal-Mart and Massmart with regard to the acquisition by Wal-Mart, which is referred to here as Walter, not so?

MR PATTISON: I absolutely stand by that and perhaps I can help you with your confusion. I think you are getting confused between our preparations for a potential entry of Wal-Mart into Africa, which again I would be remiss in not appointing advisors to prepare me for that and necessarily me having discussions with Wal-Mart. It was clear because of announcements in the press that Wal-Mart was now considering a target. It was very important for me to have the information at my hands about how that might happen, both with me and the other potential targets and to get advice on Wal-Mart's history on acquiring other companies in other countries. So, we did. We appointed, I can't remember the exact date, but somewhere in 2009 I think we appointed our advisors, Deutsche, to consider any potential implications and later we appointed our advisors called Saks (?) to prepare us, as the document says, for a potential offer."

Similarly, Mr Pattison was confronted with a Wal-Mart document which clearly indicated that by May 2010 'Massmart is now an exclusive target and valuation to be finalised.' His answers to these questions failed to explain the obvious: that, in 2009 Massmart was, at the very least, focussed upon a possible merger with Wal-Mart.

[144] The doubts surrounding this version were fortified by Mr Pattison having informed the Department of Economic Development in October 2010 that a restructuring had taken into account 'the Wal-Mart approach' to operational issues which manifestly, given the Wal-Mart model, even as evidenced on the due diligence and Project Memphis reports, would have included issues of employment.

[145] Whether, as Mr Bond testified, the amount of time and effort spent on the retrenchment question demonstrated 'that the retrenchments did not make Massmart a more attractive proposition' is hardly sufficient, without more, to rebut the inference that there was a relationship between Massmart's attempt to prune the workforce, even if it was only in one area of its operation and the negotiations which ultimately culminated in the merger with a company (Wal-Mart) which would understandably have been particularly concerned about employment costs.

[146] There is the further issue about the 71 additional employees who were retrenched at Makro Silver Lakes (this is in addition to those at Game Nelspruit). In its initial papers, SACCAWU accepted that 503 employees had been retrenched. However in closing argument, Mr Kennedy informed the Tribunal the he was 'instructed' that the figure was 574. It does appear that the additional

employees were retrenched at Makro Silver Lakes, following agreement on a 40 hour working week. According to the merging parties, the employees relied on the agreement, the result of which was that Makro was forced to retrench these workers. Without more evidence, it is difficult to conclude that these additional workers fall within the same framework of a merger related analysis as do the 503 employees to which reference has already been made.

The Tribunal's order

[147] At the hearing, the merging parties proposed what was referred to by the Tribunal as an 'investment remedy'. In terms thereof, they committed themselves to spending R100 million over three years through the establishment of a programme aimed at the development of local suppliers, including SMMEs. The programme, although it would be administered by the merged entities, would be advised by a committee comprising representatives of the trade unions, business including SMMEs. Government would also be invited to serve on this committee.

[148] The Tribunal accepted the proposal and made it part of its order. Unfortunately, as it appears from its determination, it did so without any sustained engagement as to how the remedy would operate, whether an amount of R 100 million was excessive or too little and, further, what effect the proposal would have

in dealing with the concern that, at the very least, post the merger there would be some substitution of local procurement for import. The merging parties' proposal received no more than three paragraphs of explanation in the determination of the Tribunal. Accordingly, in our view, there was an inadequate interrogation of this proposal in relation to the arguments that have been put up by the intervening parties concerning the possible problem of increased procurement by way of imports and, in turn, the potential for a negative effect upon the South African economy, in terms of factors which fell within the scope of s 12 A (3); in particular the effect on small producers, as it emerged from the evidence, and employment.

[149] Mr Trengove therefore argued that the Tribunal had misdirected itself by considering, 'entirely in a vacuum', whether the remedy proposed by the merging parties was adequate and thus reached a determination in this regard on no discernible basis. The Tribunal simply concluded that the sum of R100m is "large" for a private company. From its reasoning, there appears to have been no attempt on the Tribunal's part to gauge what might be an appropriate and proportionate remedy, despite the Tribunal holding "[t]he approach we have taken is to examine the undertakings and the evidence to which they are responsive to see whether they are adequate. In Mr Trengove's view, in the light of the dearth of evidence placed before the Tribunal in this connection this statement could be never anything more than lip service to the notion of proportionality, as applied in this judgment.

[150] Both Mr Trengove and Mr Kennedy observed that the Tribunal had been the beneficiary of a series of alternative proposals put up by the intervening parties. Mr Trengove contended that the Tribunal had failed to engage at all with the remedies which had been proposed by the Ministers. In summary, the Ministers had provided two separate options. In option A, they contended for a baseline proportion for domestic procurement as a percentage of total procurement that would prevent the erosion of the domestic supplier base. This baseline was related to individual categories of goods so as to ensure that more vulnerable supplier sectors would not be undermined while total domestic procurement remain constant.

[151] In terms of option B, a supplier fund would be set up to advance the competitiveness of domestic suppliers which would include a baseline level of domestic procurement (in Rand value) to prevent the merger from affecting domestic employment in the supply chain. Its application to individual sectors would then have protected more vulnerable sectors. According to Mr Trengove, the Ministers' option B would be broadly similar to the one adopted by the Tribunal but it would have been 'more realistic' and proportionate, in that it would have been based upon a capital amount of R 500 million.

[152] In its submissions, SACCAWU sought to have two related conditions imposed which, in its view, would protect and enhance small and medium sized businesses and stimulate the competitiveness of firms in the supply chain. The first condition would be to increase the amount of investment in supply development to at least R 500 million and refine and target the fund to specific sectors or industries, possibly focussing on private or own label project expansion. The purpose and mandate of the fund would be defined in order to enhance Wal-Mart's expertise in improving or creating supply chain efficiency and by increasing its independence and effectiveness by ensuring that it was controlled and managed by a public entity, such as the IDC, which, in its view, had the expertise and experience to manage such a project. The second condition, which SACCAWU advocated, was that the merged firm be prevented from spending less than its current procurement on a Rand value basis for a specific period of time, which could set a floor for domestic procurement.

[153] The Tribunal rejected conditions relating to procurement. It held that, given the nature of the business of Massmart which supplied a wide range of goods from basic groceries to consumer electronics, it would be extremely difficult to determine the precise nature of a local manufacturing content of products, even if SACCAWU's solution was adopted to deem any specific product one of local

origin, if more than 50% of its value was locally produced. In its view, this would create an excessive dependence on suppliers to verify local content.

Evaluation

[154] That there is insufficient evidence to refuse the approval of the merger does not mean that the case made out by the intervening parties stands to be rejected completely and hence the concerns raised regarding the effect of the merger on small and medium sized producers and employment have no justification. The fact that conditions were imposed by the Tribunal, no matter the criticism of its reasoning, is reflective of this concern. Manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation. But the public interest concerns set out in s 12 A demands that this court gives tangible effect to the legislative ambition.

[155] Within this context a key issue with regard to this merger and its effect on both the South African consumer and small producer turns on an understanding of the development of global value chains, viewed within the broader context of economic globalisation. Only within this framework can the effect on South African small and medium sized business be adequately assessed. Although these issues were canvassed in some of the evidence, in particular the testimony of Messrs Hodge and Baker as well as the evidence of Mr Pattison in which he provided an explanation of the large retailing business, it is regrettable that an insufficient interrogation of the implications of this context took place. This

exercise would greatly have assisted this Court to tease out the comprehensive implications of the development of global value chains and the consequences of the introduction of the Wal-Mart model into South Africa.

[156] It is thus necessary to examine this issue. For the purpose of this judgment, the definition of a value chain offered by Raphael Kaplinsky and Mike Morris *A handbook for value chain research* (2004) must suffice:

> "*The value chain describes the full range of activity which are required to bring a product of service from conception to the different phases of production (involving a combination of physical transformation and the input of various producers services) delivery to final consumers and final disposal after use*."

Kaplinsky and Morris provide an example of the furniture industry to illustrate the implications of their proposed definition:

> "*This would involve the provision of seed inputs, chemicals equipment and water for the forestry sector, for logs which are then cut and transported to the sawmill sector which obtains its primary inputs from the machinery sector. From there sawn timber moves to the furniture manufacturers who, in turn, obtain inputs from the machinery, adhesives and paint industries*

and also draw on design and branding skills from the service sector. Depending on which market is served, the furniture passes through various intermediary stages until it reaches the final customer who after use consigns the furniture for recycling."

[157] Viewed within the context of this example, a global buyer value chain concerns an industry in which a large retailer, marketer and branded manufacturer will play a pivotal role in setting up decentralised production networks in a variety of exporting countries which would typically be located in the developing world, Kaplinsky and Morris note:

"*This pattern of trade led industrialisation has become common in labour intensive, consumer goods industries such as garments, footwear, toys, housewares, consumer electronics and a variety of hands crafts. Production is generally carried out by tiered networks of third world contractors that make finished goods for foreign buyers. The specifications are supplied by the large retailer or marketers that order the goods*."

For a further useful discussion see Victor Fung "Global Supply Chains - Past Developments, Emerging Trends" (2011) and in respect of the future of international competition and the consolidation of global value chains, Gary Gereffi 'Global value chains and international competitions' 2011 (56) *The*

Antitrust Bulletin 37.

[158] Even this brief reference to the nature of global value chains reveals that the introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular.

[159] Wal-Mart's own evidence, for example, as set out in Mr Baker's report, suggests that Wal-Mart are not unaware of the challenges facing small and medium sized indigenous producers which flow from globalization in general and global value chains in particular. Thus, Mr Baker made much of Wal-Mart's pride in its record in Chile, where it sought to improve the productive abilities of its supply relationships by introducing the supply of programme known as the Joint Business Plan. To quote from Mr Baker's report:

"*In 2009, 19 suppliers, accounting for around 46% of the D&S business*

were invited to join the plan. In 2010, this was extended to 44 suppliers accounting for 58% of its sales, and in 2011 it will be further extended to cover 54 suppliers making 63% of sales. The impact of the JBP on the sales of those suppliers included in the programme can be seen in Figure 4 …

Figure 4 shows that in all but one month of 2010, suppliers within the JBP programme saw their sales rise at a faster rate than those of non-JBP suppliers, even though non-JBP on the profits of those suppliers included in the programme can be seen in Figure 5…

As can be seen, the profits of suppliers included within the JBP grew at a faster rate than the profits of those suppliers that were not part of the scheme. Moreover, by splitting the JBP suppliers into those supplying on behalf of multinationals and those supplying locally produced goods, it becomes evident that local suppliers benefited to an even greater degree than did the local representatives of the multinationals in their profit growth."

Mr Baker also referred to Wal-Mart's allegiance with a group of small farmers in central Chile which culminated in a program, the aim of which was 'to establish strategic alliances with small suppliers, focussing on specific products and the timing of the harvesting of those products'. The evidence of Mr Bond, cited earlier, is equally reflective of this position.

[160] Returning to the implications for South African business, in Wal-Mart's due diligence process and valuation model, it identified a range of synergies which flowed from the merger amounting to a significant sum in enterprise value enhancement. Of this figure, 80% of the gross figure was categorised as merchandising, including improved supplier terms, exit strategy, aged inventory management, margin enhancement in top categories, development of private labels and direct imports. Benefits from logistics amounted to more than 20% of the gross figure which included DC productivity, inventory management, the development of regional distribution centres, imports flow and supplier collaboration.

[161] These figures indicate that there will be some shift away from local producers to direct and indirect imports. There will also be benefits for the merged entity from the broader access which Massmart will now enjoy to Wal-Mart's management of global supply chains and which will create a significant value enhancement.

[162] Some of these developments will unquestionably impact upon small and

medium sized businesses in South Africa, whose interests are protected in terms of s 12 A (3). Given Wal-Mart's size and expertise and its express claim, made by its witnesses before the Tribunal , no doubt with justification, for improving the position of suppliers in Chile, for example, the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12 A must form part of the considerations which this Court is required to be taken into account in considering a merger of this nature.

[163] This flows from the model for competition law chosen by the legislature and in particular as set out in s 12 A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court, when faced with the inquiry as to whether a merger should be approved.

[164] In summary, the concern that Wal-Mart's coordinated global purchasing operation and superior infrastructure for exploiting global value chains will result in the importation of consumer goods, thereby harming domestic producers, which harm will exceed the benefits of cheaper products for local consumers, cannot, on the basis of the available evidence, particularly that of the intervening parties, justify the prohibition of the merger. But that does not lead to the conclusion that

the Act justifies a blanket approval. The solution to the possible threats of greater imports and therefore detrimental consequences for local manufacturers is not, in our view, to impose a domestic content requirement. The Tribunal has shown the difficulties which such a proposal would create. Further, a blanket procurement quota can give rise to distortions both between the merged firm and other large firms in the market and in respect of manipulation of the product mix in order to circumvent the designated procurement levels. It may also facilitate forms of price collusion. For these reasons, the Tribunal's rejection of the proposals for import restrictions cannot be disturbed on appeal.

[165] The problem however with the existing conditions as approved by the Tribunal is that they reflect an offer made by the merging parties which was accepted by the Tribunal, without sufficient interrogation as to precisely how the programme would be implemented and the consequences for dealing with the potential difficulties which may be encountered by local manufacturers, the effects on employment and the ability of small and medium sized businesses to operate within a competitive global environment, as outlined in this judgment.

[166] During argument, Mr Unterhalter was pressed by the Court as to exactly how the proposed fund would work in practice. He was unable to provide any details, save to contend that it was possible for a study to be commissioned to investigate the parameters, in terms of which such a fund would work to the benefit of those parties who might be detrimentally affected by this merger. The answer cannot simply be to increase the capital sum from R 100 million to R 500

million. This is to ask the court to shoot into the evidential dark. On the evidence available, this Court has no idea as to whether a sum of more or less than R 100 million is required nor how effective the fund may prove to be.

[167] A study which would investigate the implications of this merger for small and medium size businesses and which would be able to offer guidance as to the proper content for the framework in which a fund could operate to the benefit of these entities within the South African economy, would greatly assist the court in being able to frame the precise conditions within which the proposed fund would operate and, in turn, would give rise to an adequate mandate for the fund to assist small and medium sized business.

[168] To this end therefore, a variation of the proposal put up by the merging parties is justified. The merging parties suggested that the programme could benefit from the advice given by a committee which would comprise representatives of trade unions business and in particular small, medium size enterprises together with government. Before accepting this vague condition set out by the Tribunal without any significant considerations of the benefits that it might achieve, it would be preferable if a committee comprising of an expert chosen by SACCAWU, another by Wal-Mart and a third by government be invited

to produce a report within three months of the delivery of this judgment which would then allow this court to develop an investment remedy which is both rational, justifiable in terms of the evidence provided, as well as in terms of the challenges with which the South African economy is confronted as a result of this merger and the legitimate concerns which follow from the provisions of s 12 A (1) read with (3), in particular the future of small and medium sized producers.

[169] The parties would in turn, be entitled to place further affidavits before this court, following upon the report, in order to assist the Court in framing the precise nature of this particular condition. There is, of course, the option of referring the matter back to the Tribunal which could hold further hearings and gather evidence before reformulating this condition. We are cognisant of the time already taken to resolve the disputes concerning this merger and the need to bring this matter to finality as expeditiously as possible.

[170] For these reasons, a dialogic model in which this court can engage with the parties to resolve the outstanding disputes is, in our view, suitable for adjudication in these kind of matters and thus justifies an order that the court benefit from expert advice, further responses from the parties, all of which must be made available in the shortest possible time.

[171] Given this component of our proposed order, it is unnecessary, at this stage to engage with the interesting arguments raised in respect of conditions and relevant provisions of international law, particularly GATT.

Costs

[172] As a result of the nature of this case and the outcome, there will be no order as to costs in respect of the appeal.

The order

1. The review application is dismissed with costs, including the costs of two counsel.

2. The appeal is upheld in part. Accordingly, the decision of the Tribunal of 31 May 2011 is set aside and replaced with the following:

2.1 The merger between Wal-Mart Stores Inc. and Massmart Holdings Limited in terms of s 16 (2) (b) of the Competition Act 1998 is approved subject to the following conditions.

2.1.1 The merged entity must ensure that there are no retrenchments based on the merged entity's operational requirements in South Africa, resulting from the merger, for a period of two (2) years from the effective date of the transaction. For the sake of clarity, retrenchments do not include voluntary separation agreements or voluntary early retirement packages, and reasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act, 1995, as amended.

2.1.2 The merged entity is required to reinstate the 503 employees who were retrenched in 2009 and June 2010 and must take account of these employees' years of service in the Massmart Group.

2.1.3 The merged entity must honour existing labour agreements and must continue to honour the current practice of the Massmart Group not to challenge SACCAWU's current position, as the largest representative union within the merged entity, to represent the bargaining units, for at least three (3) years from the affected date of the transaction.

2.1.4 The merged entity must commission a study to determine the most appropriate means together with the mechanism by

which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby. The study shall be conducted by three experts, one to be appointed by SACCAWU, another by the merging parties and a third by the three government Ministers. These experts must be appointed within one month of the delivery of this judgment. The study must be completed within three months of the delivery of this judgment. The report shall then be made available to the merging and intervening parties who shall have a further month after submission therefor, to submit any affidavit evidence which they wish to place before this Court, of which account must be taken in the formulation of the condition as to the programme to be established for the development of local South African suppliers. In particular, the study shall canvass the best means by which South African small and medium sized suppliers can participate in Wal-Mart's global value chain training programmes that might be established to train local South African suppliers on how to conduct business with the merged entity and Wal-Mart and the costs which would reasonably be incurred in so far as the development of such a programmes is concerned. The costs of this study shall be paid for by the merging parties.

3. There is no order as to costs.

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DAVIS JP

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ZONDI JA

MAILULA JA concurred