REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO.
110/CAC/Jun11

111/CAC/Jul11

THE MINISTER OF ECONOMIC DEVELOPMENT	**First Applicant**
THE MINISTER OF TRADE & INDUSTRY	**Second Applicant**
THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES	**Third Applicant**

and

THE COMPETITION TRIBUNAL	**First Respondent**
THE COMPETITION COMMISSION	**Second Respondent**
WAL-MART STORES INC.	**Third Respondent**
MASSMART HOLDINGS LTD	**Fourth Respondent**
SACCAWU & OTHERS	**Fifth Respondent**
SACTWU	**Sixth Respondent**
SASMMEF	**Seventh Respondent**

And in the matter between:

SACCAWU	**Applicant**

and

MASSMART HOLDINGS LIMITED	**Target Firm**

JUDGMENT: 09 October 2012

THE COURT

Introduction

[1] Pursuant to an order of 09 March 2012, this Court ordered that third and fourth respondent ('the merged entity')commission a study "to determine the most appropriate means together with a mechanism by which local South African suppliers may

be empowered to respond to the challenges posed by the merger and thus benefit thereby. In particular, the study shall canvass the best means by which South African small and medium size suppliers can participate in the 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 insofar as the development of such a programme is concerned."

[2] The Courtrequired the study to be compiled by three experts. Each of the parties, being the first second and third applicants ('the ministers'), the fifth respondent ('the union') and the merged entity was empowered to appoint one expert to the panel. These individuals would then act as independent experts, accountable to the Court. The mergedentity appointed Professor Mike Morris, the ministers, Professor Joseph Stiglitz and the union, Mr James Hodge who constituted the expert panel. On 09 June 2012, two expert reports were filed, one by Professor Morris and the other authored jointly by Professor Stiglitz and Mr Hodge.

[3] The Court also ordered "the report shall then be made available to the merging and intervening parties who should have a further month after submission thereof, to submit any affidavit evidence which they wish to place before this Court, on which account must be taken in the formulation of the conditions as to the programme to be established for the development of local South African suppliers." Pursuant thereto, the two reports were made available to the merged entity, the ministers and the union. Comprehensive affidavits have now been filed by all three parties in response to these reports.In

addition , the Ministers filed reports from Dr Ha Joon Chang and Prof James Heintz. The court is indebted to the experts and the parties for the assistance in formulating the outstanding condition.

The purpose of the report

[4] At the hearing before the Competition Tribunal, ('the Tribunal') the merged entity proposed what was referred to by the Tribunal as 'an investment remedy'. In terms thereof, the merged entity committed itself to spending R 100 million over three years through the establishment of a programme aimed at the development of local suppliers, including small, micro and medium sized enterprises (SMME's). The programme, although it would be administered by the merged entity, would be advised by a committee comprising representatives of the trade unions and business including SMME's. The government would also be invited to serve on this committee.

[5] Without any apparent interrogation of the nature, scope or implications of this proposal,the Tribunal incorporated it into its order. As a result of the Tribunal's failure to so engage, the Court felt itself compelled to issue an order which directed the commission of a report. The purpose of the report and hence the order became the subject of a difference of opinion between Morris and Stiglitz and Hodge. Morris contended that the intention of the Court and, hence the scope of the report, was to restrict the application of any conditions to be imposed to benefit local small and medium sized suppliers and toentrance their effective participation in the merged

entity's global and domestic value chains. In his view, large South African owned enterprises stood to be excluded from consideration. Further, the programme could not be expected to encompass all of the merged entity's small and medium sized suppliers, as this would be extremely expensive, both in terms of financial and managerial resources and hence would constitute the imposition of an unreasonable set of conditions.

[6] By contrast,Stiglitz and Hodge contend, in the light of their reading of the Tribunal and this Court's rulings, that the object of the fund is to respond to the threats of the loss of employment and sales by local suppliers including SMME's, through their potential displacement by way of imported goods. Stiglitz and Hodge argue that, from a public policy perspective, it is important to minimise "the downside risk of loss of employment, from domestic producers facing new competition from Wal-Mart's global supply chain and seizing fully the upside potential from full integration of local producers into Wal-Mart's global supply chain." In their view, this objective could be achieved by (a) empowering existing local suppliers to Massmart to meet this challenge; and (b) identifying opportunities for local firms to expand sales and employment through integration into Wal-Mart's global supply chain. Accordingly, recipients from the fund should be both existing and potential Massmart suppliers.

[7] They contend further that recipientsof the fund should not be limited to SMME's or businesses owned by historically disadvantaged persons, although a focus upon such business may be given greater emphasis by the fund. Recipients should be producers of traded goods, being goods that might reasonably not be

procured locally out of necessity or which could be supplied into the merged entity's global supply chain. Further, recipients should be producers of products that are primarily of South African origin or, alternatively, are fabricated from a manufacturing process that takes place primarily in South African with substantial South African "value add".

[8] Stiglitz and Hodge recommended that the fund should be centred around doing what the merged entity would not, on its own, have an incentive to so do ('the additionality principle'). Hence,recipients should, in no manner, be restricted from supplying retailers other than the merged entity, whether locally or globally. Mr Mowzer, the acting Director General of the first applicant , in support of theStiglitz/Hodge report contends in his affidavit on behalf of the Ministers, that the public interest inquiry could not be restricted to SMME's in that employment was a self standing consideration as provided in s12A(3) .Echoing the Stiglitz/Hodge report , he avers that a critical concern must be the minimisation of the downside risk of loss of employment from domestic producers facing the challenges posed by the Walmart global value chain .

[9] The debate about the purpose and scope of the fund thus became a source for the key disagreements between the experts, which will be canvassed presently.

The public interest enquiry

[10] In order to resolve the debate about the purpose and scope of this enquiry, it is necessary to return to the architecture of the Competition Act 89 of 1998 ('the Act') and, in particular, to s 12 A (3), which sets out the public interest grounds relevant to a consideration of a merger such as the present transaction.

[11] This section provides as follows:

> *"(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*."

[12] The introduction of a public interest provision raises the question of the relationship between industrial policy and competition law. Although this relationship informs much of the present dispute, it is a debate which is not restricted to South Africa, in that, in many jurisdictions, a perceived failure of free markets and a reconsideration of government intervention into the economy has, within this specific context, among others, highlighted a 'great ideological divide' within the competition regulatory community. See Damien Geradin and IanisGirgenson'*Industrial Policy*

and European Merger Control – A Reassessment' 2011 International Anti-Trust Law and Policy 353.

[13] Industrial policy is considered to hold both horizontal and vertical implications. According to Geradin and Girgenson at 354 – 355:

> "Industrial policies can be "horizontal" (general) or "vertical" (selective). Horizontal policies are devised to influence the entire economy, e.g. to promote innovation on knowledge sharing. There is usually a strong relationship between the State's horizontal industrial policy and its macroeconomic agenda (i.e., monetary, fiscal and exchange rate policies). Vertical policies aim to support specific sectors, industries or companies. Given their selectivity, they often distort competition and discriminate between market operators by "picking winners and saving losers." Critics of industrial policy usually attack vertical measures.
>
> Industrial policy instruments can be split into two broad categories: structural and monetary. Monetary measures involve a transfer of funds from the government to companies and include various forms of subsidies (direct payments, bail-outs, loans at reduced interest rates, tax breaks, debt write-offs, etc.). Structural measures do not involve a transfer of funds; they include tariff and non-tariff barriers to trade, regulatory measures and government policies promoting "national champions."

Even this brief detour into the terrain of industrial policy should prompt caution in respect of competition law being employed as a surrogate for a coherentindustrial policy which by its very nature involves a series of polycentric decisions ill suitedto judicial interventions.Similarly, the challenges posed to the South African economy by globalisation as highlighted by the implications of this transaction, namely an

adequate response to the consequences for South African suppliers of the impact of global value chains, cannot be addressed comprehensively through the Act in general or s 12 A (3) in particular.

[14] In his report, Morris highlights the implications of global value chains thus:

> "This deepening of globalisationis not unique to South Africa, or indeed to its retail sector. It is a process which many other economies have gone through over the past four decades, resulting in a variety of outcomes. In some countries, deepening globalisation has had negative impacts on domestic producers who are unable to compete with imports and either experience a loss of markets or are forced into competitive low technology / low wage niches in their value chains in order to compete. This is the downside of globalisation. In other cases – and China, Korea, Taiwan and Singapore are notable examples – globalisation has helped to underwrite very rapid growth, not just in output but also in employment. This is the upside of globalisation.
>
> The potential gains from globalisation result in changes in economic specialisation. Whilst some suppliers who had hitherto operated in a relatively protected national market will suffer from a loss of demand as imports eat into their markets, other suppliers who are able to reorient their operations to feed into much larger global markets are potentially able to see a major growth in output and employment. One of the key problems this raises for economic management is that this adjustment in specialisation may not always be achieved by all the existing firms in the supply chain but instead be reaped by new suppliers able to access global value chains.
>
> It is thus abundantly clear that globalisation represents both a threat and opportunity. The task of all stakeholders with an interest in local growth and development is to

ensure that the "wins" exceed the losses. In the context of an economy with high levels of exclusion and unemployment, there is an added task of ensuring that these "wins' percolate widely through the economy. Consequently in this current era, the issue that all countries face is not whether to participate in the global economy, but how to do so in a way which maximises the growth and development gains. In turn, converting the whether into the how is a reflection of the scale, institutional capacity, resource allocation, and nature of responses of key stakeholders, particularly those in the corporate and the state sectors, and in respect of maintaining social pressure, broad coalitions and civil society."

Stiglitz and Hodge summarize this problem as follows:

> "From a public policy perspective, what is important is minimising the downside risk of loss of employment from domestic producers facing new competition for Wal-Mart's global supply chain, and seizing fully the upside potential from full integration of local producers into Wal-Mart's global supply chain."

In our view, s 12 A (3) should not be seen as a substitute for or evena significant component of a comprehensive policy designed by the State to deal with the challenges which globalisation in general and global value chains in particular pose for the domestic economy. The public interest factors in s 12 A (3) are intended, in this case, to deal with the direct and specific risks posed by the present merger to local producers and employment, as a result of the introduction of Wal-Mart's global supply chain into the South African economy. That both the Ministers and the union have raised many legitimate concerns of a fundamental and systematic nature cannot be gainsaid. But competition law is not the mechanism to respond comprehensively thereto, save where s 12 A(3) so provides. While employment is expressly articulated in the Act as a separate public interest concern , it cannot ,

in our view, be used to argue in favour of this Court developing a comprehensive industrial policy to respond to the legitimate concerns posed by global value chains , highlighted so luminously by this merger.

[15] This excursus into industrial policy and the role of s 12 A (3) can now be applied to the present dispute. To recapitulate: this Court found that, on the available evidence, the merged entity will reduce prices in the relevant market and that, further, there was no evidential basis to refuse the merger. It accepted, given the likelihood of an increase in cheaper imports,that there would be some displacement of local producers and a consequent detrimental effect on this sector and on employment. But essential to the finding of the Court was the holding that the 'harm' was less than the 'gain'. Expressed differently,the greater the imports and hence the greater the gain in lower prices, the more the potential for harm in terms of the consequences on local producers. The condition relating to the fund is imposed to minimise the 'harm' so as to ensure, even after a finding of a net gain, that this harm could be further reduced.

[16] Hence the debate concerning a condition turns on a reduction of harm or risk thereof so to achieve a maximisation of welfare caused by the merger. Thatbecomes the role of s 12 A (3), once the merger cannot be prohibited but the Court considers that potential for harm remains alegitimate concern. For this reason, having already accepted that there was no basis to find against the merger, the legitimate concerns raised by the intervening parties must be assessed in terms of risks to employment and the potential compromise of the ability of small

businesses or firms controlled or owned by historically disadvantaged persons.That the South African economy needs to rise to the challenges posed by globalisation which, in this context , are prompted particularly by the vertical disintegration of multinational corporations and the concomitant increase in industrial manufacturing and service capacity in many parts of the developing world is confirmed clearly in both reports . To the extent , that policy is required to deal with these challenges , s12A(3) can assist to deal with downside risks and seek to exploit the possibilities posed by upside risks created by the merger but the broader problems set out in the Stiglitz/Hodge report must wait far more comprehensive policy initiatives.

[17] It therefore follows that the purpose of the commission of this report was not to ensure that the entire merger be reconsidered by this court but rather that, within these relatively narrow confines of s 12 A (3), the court was to be guided towards the imposition of a condition which would maximise the promotion of the objectives of the legislation; hence the scope of the enquiry is circumscribed. From its wording , it is clear that section 12 A (3) is fundamentally concerned, within this context, with small businesses or those controlled or owned by historically disadvantaged persons and the desire that they become competitive. To the extent that there is any doubt, recourse to s 2 of the Act, the purpose provision,provides an illumination. It states, inter alia, that the purpose of this Act is to promote and maintain competition in the Republic in order (e) to ensure that small and medium size enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

[18] Implicit in the Stiglitz / Hodge report is the argument that questions of employment and the promotion thereof should not only be restricted to small business but also to the promotion or protection of large business which may be under threat as a consequence of the present merger. However, within the context of the present dispute, the focus throughout the proceedings has been on the most appropriate institutional intervention to develop the capabilities of local, small and medium sized suppliers to enable the latter to take maximum advantage of opportunities to participate in the global value chain of the merged entity. In this way, the protection and promotion of these businessesmay be enhanced together witha minimisation of risks to employment. In part, this Court had already taken heed of the express public interest consideration with regard to employment, when it ordered the reinstatement of more than 500 employees.

[19] To argue however that any private entity, no matter its size, should be the target of a conditionwhich amounts to a comprehensive response to the challenges of globalisation in the context of global value chains amounts to an expansion of the scope of the public interest enquiry beyond that which must have been intended. In our view, it is impermissible to employ a concern about employment, as Stiglitz and Hodge do so expansively, to promote the interests of large South African enterprises. This extends the public interest enquiry beyond that which is justifiable ad indeed feasible,once the Act is read as a whole.It must also be remembered that the merged entity is not dominant in the relevant markets and that its competitors are large, extremely well resourced firms with global chain footprints of their own.

[20] To summarise: the purpose of a condition is to ensure that a programme may be developed and adequately funded to empower localSMME's which may be effected by this merger to take advantage of the global chain of the merged entity, thereby promoting the purpose of s 12 A (3). That this merger has shone a light upon the perils and challenges posed to a developing country by global value chains should serve to promote a comprehensive national response to both the risks and opportunities.By contrast, the powers of this Courtare far more modest. They involve a consideration of the effects of the merger uponlocalproviders and consequentlyemploymentwithin the broader finding that this merger cannot be prohibited. To repeat, the purpose is to minimise risks that flow directly from the transaction and not to replace government's prerogative of formulating and developing comprehensive economic policies.

[21] From this approach, it follows that, were this court to impose conditions which would obligate the merged entity to promote the interests of competitors or to assistin the subsidisation of large, financially viable South African entities, not only would this be an act of discrimination against the merged entitybut it would representthe imposition of an obligation in favour of its own key competitors, large entities which are financially capable of developing their own initiatives to promote micro, small and medium sized local suppliers. In the affidavits of the intervening parties, plausible arguments are raised concerning an extension of the fund to firms that may not qualify as micro, small or medium sized enterprises but 'who could hardly be considered large' and which remain vulnerable to the possibility of import

substitution by the merged entity. To the extent, that these arguments must be weighed against the approach adopted to s 12 A (3), there is the added argument of a need to ensure that the fund achieves the best possible result to enhance welfare. Hence , in the context of the limited scope of s 12 A (3), the Court considers that the focus should be on the most vulnerable enterprises, particularly those referred to specifically in s 12 A(3).

[22] It is within this framework that we propose to analyse the two reports and the parties' responses thereto. In this connection, it is helpful to commence with an examination of the areas of consensus and disagreement between the experts, as usefully provided by Stiglitz and Hodge in their report.

The measures of agreement and disagreement between the experts

The objective of the fund

[23] The two reports concurred about the basic objective of the proposed fund which they saw as designed to ensure sustainable supply development, which, in turn, would incentivise Massmart to internalise its supply development by changing its procurement behaviour to focus on local products. The programme would enhance the ability of suppliers to participate within the merged entity's global supply chain and would not result in a squeeze uponwages or employment at supplier firms.

[24] To the extent that there were disagreements about the scope of the fund, as noted above, these followed from the approach to the scope of the court order. In the light of our approach to the nature of the s 12 A (3) enquiry, we find that the object of the fund should be to promote SMME's within the context of the global value chain of the merged entity. In the result, it follows that the fund, given that it is to be financed by a private entity, notwithstanding its size, should be both targeted and limited.

[25] In assessing the targets of the fund, it is important to emphasise that the success of supply chain development cannot equate to persuading the merged entity to be charitable to local suppliers nor to compel it to purchase from local suppliers, even where the latter transactions make no commercial or financial sense. The purpose of the fund is to ensure that targeted suppliers can be joined successfully to Walmart's global value chain. This can only occur if it can be demonstrated that there is a commercial advantage to local sourcing; hence if the fund can assist Massmart's organisation to understand the importance of the identification and construction of links to competent local suppliers and also the creation of additional incentives for buyers, purchasers, managers and plannerswithin the merged entity to assess their own success, the imposition of conditions will be more likely to promote the public interest concerns set out in s 12 A (3).

[26] In this regard, we consider thatMorris' proposal that the fund concentrate on three separate clusters is helpful in carving out a viable, yet sensibly circumscribed response. Thus, the condition could be targeted at the existing body of supplierswithin Massmart's supply chain, with the focus on the upgrading of

capabilities and access to markets, and on existing as well as potential suppliers which may fall outside the existing priority supply chain development sectors of Massmart. Finallythe fund should focus on the creation and facilitation of highly focussed clusters of micro enterprises which would be sourced overwhelmingly from disadvantaged communities and which , if Morris' proposal was followed , may provide Massmart with specific products in certain niche areas, such as horticulture, fresh and perishable foods and any other set of products which may be so identified, subject to an observation about tradables which we make later in this paragraph.In this case the objective is to:

(a) upgrade opportunities for innovative Massmart suppliers who fall outside of the priority sectors, and

(b) create a window for suppliers which are not yet in Massmart's supply chains seeking access to Wal-Mart's global supply chains and export opportunities in Africa; and

(c) ensure an opportunity for those local suppliers who find themselves delisted from Wal-Mart/Massmart's supply chains because of a shift towards to an imported product to understand their competitive deficiencies through a diagnostic, and thereby give them an opportunity to address their problems.

To return to the qualification :ThIS Court accepts the point made by Mr Mgongwe in his affidavit on behalf of the union, that an emphasis should be placed upon tradable goods, as non tradable goods such as fresh produce and services are less likely to be imported. The focus must be to encourage the merged entity to do that which it may not be incentivized to so do , and that is to use South African products

other than fresh produce which, in any event , it is likely to purchase The strength of this observation notwithstanding , we would not wish to exclude from consideration non tradables sourced from small and micro enterprises.

[27] Significantly, even in a report which argues for a broader constituency of beneficiaries, Stiglitz and Hodge concede while "[g]iven that the ultimate purpose of the fund is to provide support to current or potential suppliers to Massmart/Wal-Mart and ensure that they are integrated into the supply chain, Massmart will need to play the central role in project identification and implementation." The two experts go on to observe that it is likely that the buyers within the Massmart/Wal-Mart group will be "in the best position to identify areas of threat or opportunity for domestic suppliers" and further "the buyers themselves are also central to key decision points around supplier selection and contracting."

[28] It follows from these observations that the real success of this fund, in promoting the objectives of s 12 A (3), as we have outlined them, will depend on the understanding and acceptance by key executives within the merged entity of the clear commercial advantages which flow from the objectives of the fund in order to ensure that the latter maximises its objectives. The three defined targeted areas fall within the scope of the merged entity's business; hence its defined nature will be more likely to contribute to the necessary 'buy in' by the key executives within the merged entity.

The mechanism of the fund

[29] There is agreement between the experts that there should be a high level of public oversight and accountability, that oversight should not only be confined to financial reporting but there must be reports that analyse the impact and outcome of the fund,further that there must be a role for external advisors within the process and that there must be regular reporting to the relevant competition authorities.

[30] Morris contends that the critical issue of supply chain management and development process should solely fall within the merged entity's organisational remit. Thus, commercial decisions, many of which would be clearly confidential because they relate to operational supply chain decision making, the selection of appropriate suppliers,the designation of competent specialist service providers, should be decisions taken solely by the merged entity. However,Morris accepts that the broader public aims of the fund must be met and to this end proposes three levels of external reporting. Firstly, the appointment of external auditors will ensure that financial probity is satisfied, an expert reference group of external independent experts, appointed by Massmart, willplaya dual role of oversight to ensure that the detailed supply chains accorded with the architecture of the fund and possess the mandate of reporting on agreed outcomes. Finally, a general oversight will operate through the Competition authorities,which must receive regular reports from the independent expert reference group.

[31] Stiglitz and Hodge argue in favour of three levels of responsibility. Firstly, the identification and implementation of projects to assist and integrate suppliers will be the primary responsibility of Massmart. A fund administrator, including the managementand the disbursement of funds together with the controls of monitoring and reporting, should constitute the primary responsibility of an independent administrator. To this end, they recommend that the Industrial Development Corporation ('IDC') would "be the natural Fund administrator given it already has in place the appropriate systems to undertake these roles and may also be in a useful position to direct Massmart supplies to other government funded programmes to supplement any initiatives". However, in the final analysis, they contend that the appointment of the administrator should be in the discretionof an independent board which isto be constituted. Theboard becomes a third level of accountability. The board must report back to the Competition Commission and is to be accountable to the Commission for the fulfilment of the objectivesof the fund. In this design, the boardis a central component of the architecture of the fund, both with regard to decision making and the provision of oversight.

[32] Stiglitz and Hodge recommended that the composition of the board should be broad based, with representatives drawn fromlabour, government and industry. Decisions of the board should be taken by majority vote and, whatever its recommendations, the merged entity must only enjoy a minority stake on the board. Accordingly, they recommend that a seven person board should consist of two representatives of labour, two from government, one from Wal-Mart, one from South African supplies and an independent expert, charged explicitly with focussing on the

concerns of those not represented within government structures and with broader national interests.

[33] In our view, the organisational mechanisms should be made as simple and inexpensive as possible, without compromising the clear objective of the fund,namely the promotion of the purposes of s 12 A (3). Any debate about appropriate mechanisms for accountabilitymust take account of the provision that a conditional approval of a merger always remains subject to the continuingscrutiny, of the Competition Commission. Further, we have taken account of the organisational structure that the merged entity proposed to the Tribunal and which was, in turn, accepted by the latter in the formulation of its proposed condition.

[34] Of critical importance is that, if conditions are set for the approval of this merger,including the creation of a fund to promote public interest considerations, the Competition Commission would be empowered to receive regular reports about the progress of the fund and make a determination as to whether the manner in which the fund has operated complies with the condition imposed by this Court. That enquiry, in turn,may trigger the consequences set out in sections 15 to 17 of the Act regarding the revocation of a merger approval. For this reason, there is no need to develop further intricate governance structures,as the Act has created a mechanism for accountability which is far more powerful than that envisaged in the proposal placed before this Court by Stiglitz and Hodge.

[35] As already noted, the success of this fund will depend on the promotion of a 'buy in'from the merged entity.After taking careful of all these considerations, the structure which we propose will ensure that the merged entity, which ultimately funds this proposal, continues to own the supply chain management and development process,is enabled to promote its own commercial interests,at the same time as it contributes to the integration of South African SMME's enterprises into its global supply chain as part of its broader business interests. By allowing the executives of the merged entity to manage the fund, the integrity of the supply chain relationship between the merged entity and its suppliers is retained, information thereby procured will remain confidential and its business interestswill be protected.

[36] Given the public interest considerations as articulated in both reports, which must be promoted by the fund,and even taking account of the important question of confidentiality, there must be a considerable element of transparency and accountability in the scheme. Accordingly, external auditors must be appointed to ensure regular and meticulous financial compliance by the fund. Secondly,and following the merged party's own proposal to the Tribunal, an advisory group of experts should be appointed to fulfil two primary functions. In the first place, the advisory group should meet on a regular basis (a quarterly meeting appears to be appropriate although more regular meetings might be required as thefund begins to expand its activities) so that the experts can consult with executives of the merged entity to maximise the objectives of the fund. Furthermore, the advisory group must compile semi-annual reports to be made available to the Competition Commission, in order for the latter body to have the benefit of an independent assessment of the fund's operation and compliance with its objectives. In our view, the advisory body

should be independent of the merged entity and should not be controlled by it. To this end, the advisory body should be constituted of five experts, from which the merged entity shall be entitled to appoint two members and the South African government, through first to third applicants, the union(SACCAWU) and the seventh respondent (SASMMEF) each being entitled to appoint one member. Each appointee must be chosen for his/her expertise in the area of global value chains and/or retailing, small business development or any other field ancillary to these areas. In the final result, the Commission, as recipient of regular reports, will have an important role to play. To the extent that the intervening parties contend that from the commencement of the fund, a report should specify current procurement activities of the merged entity and the steps taken to ensure access to Wal-Mart's sourcing network, we would prefer, subject to the framework as provided in the order, to leave it to the Commission to fashion adequate benchmarks to determine whether the merged entity has promoted the core objectives of the fund,being that South African SMME's benefit from integration into the merged entity's supply chain,thereby ensuring that this sector remains competitive and hence viable, which, in turn,may enhance employment.

Funding

[37] Both reports conceded that the estimation of a monetary value for the fund was an extremely difficult exercise and that the amount required depended on the objectives to be promoted by the fund. There was an agreement that Massmart's internal expenses,in adapting its supply chain structure to 'incorporate better South African producers' should not be similarlyincluded. The costs associated with

Massmart's independent implementation of the promotion of the objectives of SMME's should also not be included.

[38] We were advised that, after delivery by the Tribunal of its judgment, the merged entity appointed a senior executive as its Group SupplierDevelopment Executive and tasked him to 'design, build and administer the Massmart supply development fund'. Within a period of six months, this fund initiated four substantial projects and two small training and auditing projects around simplifying and meeting standards for small suppliers". We were advised further that the predominant focus of this initiative was on the facilitation and support for small enterprises from disadvantaged communities and that the total amount, committed but not yet disbursed, was R 40.4 million. While this is a commendable initiative, it is one that the merged entity has taken outside of the framework of the imposition of this condition. Further, if account was taken thereof, it could result in inadequate funding for the proposed fund. Accordingly, this initiative, which we trust we be continued ,should not be taken into account in the formulation of the condition,notwithstanding the considerable amount of money spent thereon.

[39] Stiglitz and Hodge submit that R 100 million 'is plainly too little'. They refer to the amount committed already by Massmart (R 40. 4 million), that Technoserve which has advised Massmartin its direct farm initiative estimated the costs of the programme would be in the order of R 240 – R 440 million over a period of six years for it to be successful and this was merely for the development of fresh produce. The IDC estimated that the costs for jobs which have been created by it is in

therange of R 38 000 per job, in a few particularly labour intensive sectors, to a figure of R 178 000 per job among the broader set of economic sectors. The two experts thus consider that a far more substantial amount of money is required. Without any further apparent justification they conclude:

> "On the evidence we have it would seem that the fund would need to be many multiples of the proposed R 100 million, probably in the range of R 500 million to R2 billion over a period of five to ten years if it were to materially address the concerns of the Court and provides sufficient incentives to Massmart to implement a serious programme to empower local suppliers."

With respect to this conclusion, it appears to beno more than a 'guesstimate', without any clear justification, albeit that this Court appreciates the difficulty encountered in advising on a more specific and exact amount.

[40] Morris encountered similar difficulties in proposing a figure for the funding of this condition. He contends for the total allocation of R 46 – R 48 million for the establishment of three highly focussed supply chain development and capability building cluster programmes. Further, with an allocation of R 18 – R 20 million, existing suppliers outside the focus sectors, who qualify for assistance, could be provided with a diagnosis and further assistance. A further allocation of between R 28 – R 30 million over three years could assist with the micro and small farm / business clusters. Morris seeks to justify his calculations on the basis of interviews which he conducted with a number of specialist service providers involved in providing upgrade support to firms in horizontal capability building clusters, supply chain upgrading clusters and micro enterprise clusters in South Africa. In his view,

these estimates "are grounded on practical experiences elsewhere and form a solid basis upon which real decision making could start in respect of the development and roll out of the fund."

[41] Given that Stiglitz and Hodge based their guestimates on a design for a far more extensive ambitious set of proposals, which, in turn, we consider to fall outside ofthe parameters of the Act and the objectives of s 12 A (3), there is no justifiable basis for ordering a fund of between R 500 million to R 2 billion. Mr Mowzer seeks in his affidavit to justify the figure of R500m and certainly provides more financial information than appears in the Stiglitz/Hodge report .However most of this information relates to Walmart's ability to pay for a fund of R500m or more rather than why such an amount will be required to meet the specific needs of the fund.

[42] It is thusimportant to emphasise that the object of this fund is to ensure that the expertise of the merged entityis employed to ensure that small and medium sized local suppliersmay benefit from the global value chains which will become aneven greater part of South African economic reality, pursuant to this merger. In examining both reports, it is clear that much of the activity of the fund will be concerned with the impartingof skills as opposed to simple cash hand-outs. That is not to say that funding is not important. But as Stiglitz and Hodge note:

> "Supply-side support measures of the type envisaged by the court typically take a variety of forms depending on the nature of the problems faced by suppliers in

becoming competitive. By way of example only, these may include (but are not limited to):

1. Support in upgrading quality and implementing particular standards required by retailers.

2. Product re-design to meet the demand of consumers (and by implication retailers)

3. Upgrading of equipment to reduce cost and improve quality

4. Marketing support, including research into the needs of consumers and retailers

5. Support through an entire cluster of suppliers, including the suppliers of components or inputs to the final product supplier to the retailer.

6. Financing support in the form of low interest loans, interest rate support or credit."

Morris' description of the role of external specialised service providersalso illustrates the mix between skills and finance, which are needed to make a success of any such fund:

- Providing a diagnostic of each of these suppliers, as well as a benchmark against comparably competitive firms, with the aim of identifying weaknesses in operational performances. This involves providing the firm and Massmart with a detailed report specifying the problem areas and possible solutions. They can then begin to work together on the problem areas identified and find possible solutions.

- On the basis of identification of operational weakness, external service providers are called in to assist the firm fix the identified problems over a sustained period to time. Simply diagnosing operational problems in a supplier is no guarantee that the firm will take the necessary steps to remedy them. There need to be incentives that provide the firm with some form of assurance that expenditure on upgrading will be rewarded with sustained transactions in Massmart's supply chain. Hence, it requires a retailer driven process which both establishes its commitment to rewarding upgrading and the building of a long term obligational relationship with the supplier. This is the 'nuts of bolts' of upgrading and building competitive capabilities within the supplier firms.

These activities involve the sharing of skills together with a financial commitment. The evidence made available to this Court is indicative of the managerially intensive nature of supply chain development, which,to be effective,involves a detailed interaction between the buyers and producers, as well as close monitoring, information exchange,planning and specific interventions to assist the targeted firms in meeting the buyers requirements. This is very different, for example, to a fund primarily or exclusively focussed on the acquisition of large scale capital equipment.

[43] This makesthe quantification of the fund even more difficult. Where this Court agrees with Stiglitz and Hodge and the intervening parties is that a three year level of support may well be insufficient to address, even the narrowly defined objectives of the fund as set out, namely of significantly enhancing supply capacity of small and

medium size enterprises which, to any significant extent , have never been required to nor have been integrated into a global value supply chain. Accordingly,afive year duration for the fund is justified. As a result, andworking from Morris' figures, which appear to be a reasonably conservative estimate of what would be required to ensure progress in the three defined areas of fund activity, we consider that for a five year period a maximum amount of R 200 million should suffice. Morris had worked on an estimate of R 100 million for three years. Allowing for inflation and an extension of the period by two further years, R 200 million appears to us to be a figure that is sufficient to meet the objectives of the fund.

[44] We wish to emphasise that this is the maximum amount required from the merged entity. It may well be, given the kind of technical support and imparting of skills which is required to ensure the success of the fund,that not all of this money will be required over the five year period. With the assistance of an external auditor, an independent advisory group and the overall oversight of the Competition Commission, there will be sufficient transparency in the process to so determine. Hence, if the entire amount is not required to fulfil the clear objectives of the fund, then that, on its own, may not be fatalto themeeting of the condition we intend to impose.

[45] Expressed differently , the quantum is not the sole touchstone; integration of local SMSE's into the global value chain of Walmartis the core objective. However, the merged entity would havecommitted itself to R 240 million, inclusive of the amount that has already been spent, which we consider to be a considerable

financial obligation in order to ensure the implementation of the public interest objectives by a private organisation.

[46] With R 200 million as the maximum spend over a five year period, it may be that a maximum of R 40 million per year should be the mandated spend. We would however prefer to leave the question of theprecise sum of money to be spent annually to thedetermination of the structures that we recommend. In the imposition of this condition, we have sought to craft our order to accord with the objectives of s 12 A (3) as well as the fact that, even given its huge global presence, Wal-Mart, through the merged entity,enjoys no dominant share of the relevant South African market, and that its well resourced and large South African competitors are free to operate, without any such obligations to the producer community.

[47] We wish to emphasise that we are not unsympathetic to the overall proposal of Stiglitz and Hodge. Read together with the thoughtful and helpful affidavits deposed to on behalf of the intervening parties, we consider that these proposals provide a basis for a comprehensive and sustained policy in which government and a number of key organisations, including the merged entity, and itswell resourced and highly profitable competitors should play a key role. But that proposal is far too extensive for the specific purposes of s 12 A (3) as applied to this dispute. We have devised our order to provide the clear framework for the relevant condition, while affording the necessary flexibility for the merged entity and the advisory board to develop the necessary details.

[48] In the result, the following order is made which sets out the further condition which must be fulfilled by the merged entity pursuant to the approval which has already been granted for the merger in terms of the order of this Courtof 09 March 2012:

THE ORDER

[49] The merged entity is ordered to establish a Fund which shall comply with the following requirements.

The fund

1. Massmart shall within four monthsof this order establish a supplier-development fund. Massmart may determine the legal form of the fund but it must file the detailed structure that it proposes with the Competition Commission and deliver copies to the parties to this appeal within one month of the establishment of the fund.

The purpose of the fund

2. The overall purpose of the fund is to minimize the risks to micro, small and medium sized producers of South African products caused or which may be caused by Massmart's merger with Wal-Mart. In particular the Fund

should seek to incentivize the merged entity to purchase products from South African producers over and above the kinds of products that would in any event be so purchased.The fund is thus designed to assist:

2.1 existing and potential South African suppliers to Massmart; who fall both within and outside of Massmart's priority supply chain development; and

2.2 highly focussed clusters of micro enterprises to be created or which already exist in order to upgrade their capabilities and provide them with access to the merged entity's supply chain.

The fund board

3. The administration and management of the fund shall vest in the merged entity, which shall appoint the necessary administrators thereof.

Massmart's contributions

4. Massmart shall contribute a maximum amount of R 200 million to the fund over the duration of the fund which shall be for five years.

5. After consultation with the advisory board, Massmart shall determine the amounts to be expended in each year.

6. The fund shall use its resources to defray its own expenses and to reimburse Massmart's costs incurred in the implementation ofthe fund project in accordance with this order.

Advisory Board

7. An advisory board shall be constituted within four months of this order of;

   7.1 two representatives chosen by the merged entity

   7.2 one representative chosen by the Ministers (first to third applicants)

   7.3 one representative chosen by SACCWU

   7.4 one representative chosen by the SASMMEF.

8. The representatives must be chosen on the basis of expertise relating to the objective of the Fund, as set out in the judgment.

9. The advisory board shall meet as and when it so determines, save that in the first year of its existence, it must meet at least on a quarterly basis.

10. The advisory board shall:

   10.1 Consult with Massmart to determine the details of each designated class of beneficiaries as envisaged in paragraph 2.

   10.2 Advise Massmart as to the means and mechanisms to fulfil the objects of the fund.

   10.3 Produce an annual report on the activities of the fund and its assessment thereof which shall be submitted to the Competition Commission.

Fund Projects

11. Massmart shall design and propose projects, to the advisory board for its advice and recommendation. The advisory board may advise it to consider particular projects or projects of a particular kind, for design and proposal to the board.

12. The projects shall be designed to achieve the purpose of the fund in accordance with this order. The advisory board may recommend further project criteria and guidelines from time to time.

13. The following considerations shall be taken into account in the design and approval of projects:

    13.1 The producer's prospects of remaining or becoming long-term suppliers to Massmart, Wal-Mart or to both;

    13.2 The labour-intensity of the producer's South African operations;

    13.3 Whether the producer is a small-, micro- or medium-sized enterprise (SMME); and

    13.4 Whether the producer is owned by historically disadvantaged persons.

14. Massmart shall report annually to the Competition Commission regarding.

    14.1 The number of its South African suppliers drawn from the three categories set out in paragraph 2 and the value of its purchases from them;

    14.2 Changes in this component of its South African supplier base from previous years and the reasons for those changes, and

14.3 Its mix of suppliers by product categorywithin the three categories set out in paragraph 2.

14.4 These reports will be subject to the confidentiality provisions of s 44, 45 and 45 A of the Competition Act 89 of 1998 as amended.

15. Massmart, after consultation with the Advisory Board, shall appoint a firm of external auditors, which are not the external auditors of Massmart.

16. The auditors shall compile annual financial statements of the fund which shall be submitted to the Advisory Board and the Competition Commission.

DAVIS JP, MAILULA JA, ZONDI JA