



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP034Jun15/EXC239Mar17
CRP034Jun15/EXC240Mar17
CRP034Jun15/EXC241Mar17

In the exception applications of:

SHOPRITE CHECKERS PROPRIETARY LIMITED	First Excipient
PICK 'N PAY RETAILERS PROPRIETARY LIMITED	Second Excipient
SPAR GROUP LIMITED	Third Excipient

and

MASSMART HOLDINGS LIMITED	Respondent
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In re the matter between:

MASSMART HOLDINGS LIMITED	Applicant
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and

SHOPRITE CHECKERS PROPRIETARY LIMITED	First Respondent
PICK 'N PAY RETAILERS PROPRIETARY LIMITED	Second Respondent
SPAR GROUP LIMITED	Third Respondent
SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION	Fourth Respondent

Panel	: Norman Manoim (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Anton Roskam (Tribunal Member)
Heard on	: 19 September 2017
Reasons Issued on	: 13 February 2018

Reasons for Decision

Introduction

- [1] In a complaint referral pending before us, the applicant, Massmart Holdings Ltd ("Massmart"), a retailer of fresh groceries, alleges that three of its rivals have exclusive leases with the landlords of shopping malls nationwide. The applicant alleges that these leases constitute a restrictive vertical practice prohibited in terms of section 5(1) of the Act, because they exclude it from competing in the relevant markets. The respondent retailers allege that the complaint is excipiable on several grounds and should be dismissed. It is the latter objection of the respondents that we have to decide in the present matter.

The parties

- [2] Massmart is the holding company of a group of companies whose activities range from wholesaling to retail of general merchandise. The group trades through various divisions, but only one, Game, is pertinent to this case. Game is a retailer of general merchandise and groceries and has stores located nationwide.¹
- [3] Three of the respondents in this case, Shoprite Checkers Proprietary Limited ("Shoprite"), the first respondent, Pick n Pay Retailers Proprietary Limited ("Pick n Pay"), the second respondent, and Spar Group Limited ("Spar"), the third respondent, are retailers of, *inter alia*, groceries. They each have a national presence, and it is common cause, are rivals of Massmart in the grocery retail market. Each has filed an exception. The fourth respondent is the South African Property Owners Association ("SAPOA") a non-profit association, representing its members, who are the landlords in the commercial property market. SAPOA is cited according to Massmart because its members have an interest in the matter and the relief sought in the proceeding. SAPOA briefed attorneys to keep a watching brief but did not otherwise participate in the proceedings.
- [4] This is not the first time that that Massmart has had to respond to exceptions in this case. Massmart first brought a referral in June 2015. That referral was the subject of a number of exceptions and an application to stay the proceedings. The exceptions were mostly upheld, whereas the application to stay proceedings was dismissed by us on 01

¹ We will for the purpose of this case refer to Massmart, since it is the applicant, but where it is relevant to refer to Game, we do so. This is also the approach adopted by all the parties in this case. See Massmart Complaint Referral at paragraph 4.3. Note as well we refer to the parties as they are described in the complaint referral and not as the excipients and Massmart as the respondent as they are described in the several exception applications.

September 2016.² The present referral is a complete rewrite of the first referral and seeks to be responsive to the exceptions that were upheld. In these reasons we have to consider whether Massmart has met these objections. It asserts it has; the respondents assert otherwise and seek the dismissal of the referral.

Background

- [5] On 31 October 2014, Massmart brought a complaint to the Competition Commission ("Commission") alleging that exclusive leases between the respective respondents and their landlords, who own shopping malls, were anticompetitive. The Commission non-referred the complaint on 12 May 2015, citing as its reason for this that it had taken a decision to conduct a market inquiry into the grocery retail sector. Massmart then brought a referral itself to the Tribunal in June 2015 ("the first referral").
- [6] The respondents all brought exceptions. The referral and the exceptions are all described in our earlier decision and need not be repeated again here. In the first referral Massmart alleged that the conduct of the respondents amounted to both an abuse of dominance in terms of section 8 and a contravention of section 5(1) of the Competition Act, No. 89 of 1998 ("the Act").³ The present referral is confined to section 5(1).

The Referral

- [7] In the referral Massmart seeks an order interdicting the respondents from:
- "...enforcing, or invoking with respect to the Applicant, and whether directly against the Applicant or against the relevant landlord, any provision in any lease agreement in terms of which any of the First to Third Respondents acquires or is granted the exclusive entitlement to trade in fresh grocery products, including fresh fruit, vegetables, meat, dairy, and bakery products ("fresh groceries") now or in the future at a store located in a shopping mall."*⁴
- [8] Massmart also seeks a declaratory order that the respondents have contravened section 5(1) of the Act.

² Shoprite Checkers and Two Others and Massmart Holdings Limited CRP034Jun15/EXC088Jul15; CRP034Jun15/EXC107Aug15; CRP034Jun15/EXC109Aug15; CRP034Jun15/STA204Dec15.

³ During the course of argument on the exceptions to the first referral, Massmart through its counsel abandoned its reliance on section 8.

⁴ Massmart complaint referral, notice of motion, paragraph 1.

[9] Section 5(1) states as follows:

"An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological or other pro-competitive, gain resulting from that agreement outweighs that effect."

[10] The agreements that form the centrepiece of Massmart's case are the leases between the respondents and their landlords in the respective shopping malls. These leases, whilst varying in their terms, have as an essential feature, a term preventing or restricting the landlord from allowing any other tenant in the mall from selling fresh grocery products. Included in the definition of fresh grocery products are fresh fruit and vegetables, meat, dairy and bakery products.⁵ (As a shorthand from now on we will refer to these products as "fresh").

[11] Sometimes there is an exception to the restriction mapped out for one of the other respondents, another competitor or for a smaller player.⁶ For instance Cape Gate's lease with Shoprite carves out an exception to the restriction in favour of Pick 'n Pay and Woolworths.⁷ Others have a term requiring the landlord to obtain the consent of the respondent retailer to allow that rival to sell fresh in the mall.

[12] However, Massmart alleges they have as a common feature that they grant a measure of protection from competition to the respondents in the supply of groceries in these shopping malls.⁸ Thus, the vertical feature of this arrangement comprises the landlords in an upstream market for the supply of retail space in shopping malls suitable for the sale of both fresh and non-perishable groceries and the downstream market for retail of the same products by stores located in shopping malls.⁹

[13] Massmart locates Game as a customer of the landlord suppliers in the upstream market and a competitor of the other respondents in the downstream market.

⁵ See Notice of Motion prayer 1. See also Referral paragraph 18.1. In paragraph 18.1 the term non-perishable products is also used.

⁶ Massmart classifies these lease exclusivities as individual, joint, complete or partial. See referral paragraph 53.

⁷ Referral paragraph 52.1.2. Pick n Pay's lease with the Cape Gate also has a carve-out for Shoprite, but although concluded later, contains no reference to Woolworths. Annexure FA3, Record page 70, paragraph 10. Also referred to is Pick n Pay's lease in the Highveld Mall which has a carve-out for Woolworths. (52.2.2)

⁸ Referral paragraph 20.

⁹ Referral paragraphs 18.1-18.2

- [14] The agreement, Massmart alleges, leads to anticompetitive effects in this downstream market. The effects are not only their impact on price competition because of the exclusion of competitors, but also on consumer choice; what it terms an “*alternative shopping experience*”. These anticompetitive effects are felt by consumers.¹⁰ However, Massmart also claims the anticompetitive effect is felt by suppliers. With restrictions removed, Massmart claims that the growth of Game would reduce the respondents buying power and incentivise suppliers to invest in new products and innovation.¹¹
- [15] Game puts forward the following facts as to the extent of its exclusion. It has 119 stores of which 102 are in malls in which at least one of the respondents is present. Of these 102 stores, it seems that they know of 53 that are subject to exclusive leases. There is also one it concedes does not contain a restrictive lease.¹² This leaves 48 stores for which the position is unknown to Massmart. However, it says that Game’s experience here is that the respondents have sought to enforce exclusivity even where there is no lease provision that they could rely on to assert this right.¹³
- [16] Massmart, however, is unable to present a clear picture of how many such leases have been enforced or invoked against it and by whom. Indeed, it readily concedes that it does not presently have all the information:
- “Game is currently unable conclusively to confirm the existence, nature or duration of all the relevant exclusivities in the respondents’ leases since it is not privy to the lease agreements held by the respondent retailers.”¹⁴*
- [17] Game, it says, is unable to obtain this information prior to the referral.
- [18] But it states that even when exclusionary lease terms have not been enforced, the threat of enforcement in the future discentivises Game from a further roll-out of its fresh offering.¹⁵

¹⁰ Referral paragraph 83. Massmart describes this effects as on price, quality, range and service.

¹¹ Referral paragraph 86.

¹² Referral paragraph 55.5. This is in Kokstad where Spar is the landlord and confirms there is no exclusivity.

¹³ It gives as one example of this a letter from the landlord of a mall in King Williamstown which states that its lease with Shoprite Checkers does not permit it to let Game introduce fresh on its premises. Referral paragraph 55.4 read with annexure F 11 Record page 313.

¹⁴ Referral paragraph 56

¹⁵ Referral paragraph 25. Massmart alleges that Pick n Pay’s legal department in its eagerness to enforce its exclusivities wrote threatening letters to landlords about Game selling fresh including in two malls where Game does not have a presence. See referral paragraph 55.2

- [19] Massmart also asserts that the leases are often of "... *extreme longevity*." As examples, it cites Pick 'n Pay's lease in the Midlands Mall where the lease has a duration of 30 years from 2003 and in Cape Gate, the Shoprite lease has a duration of 12 years with options to renew for two periods of five years each. Massmart appears to contend that the exclusivity provisions run concurrently with the terms of the leases.¹⁶
- [20] The leases in this case are between the respective landlords and the three retailer respondents. Enforcing the terms of exclusivity, according to Massmart, could come either from the retailer respondents directly or from the landlords of their own accord or from pressure on them from the respondents to do so. Hence the relief is framed in the terms it is, interdicting the respondents from the "...*enforcement, threatened enforcement and invocation*" of the exclusionary lease terms.
- [21] Since all three respondents are cited in the same matter, despite this being a section 5(1), and not a section 4(1) case, Massmart explains that the conduct has a cumulative effect. But sensitive to the fact that this cumulative effect was a subject that was controversial in respect of the first referral, it tries to explain that the cumulative effect is not relied on to make out the case for anticompetitive effects. Its section 5(1) case is an individual case against each respondent. The cumulative effect is relied on only because it serves to exacerbate the anticompetitive effect.
- [22] Massmart in its concluding paragraph explains it in this way:

"Every instance of such enforcement, threatened enforcement or invocation, as against Game, by any respondent retailer of any such exclusivity has this anticompetitive effect. However, without derogating from the assertion that the enforcement of exclusivities by any one of the respondents is sufficient to render the anticompetitive harm complained of it is worth noting that the exclusivities in the instant case also operate cumulatively, such that the effect is all the more acute given that Game faces the problem of exclusivity enforcement not in relation to one competitor only but each of the three largest national retail chains. This of course compounds the effect as Game and Massmart thus has very little room to manoeuvre. In the instant case, the extent of this inhibition is substantial, and extends across a material portion

¹⁶ Massmart does not say this expressly. It says the leases have this duration and the leases contain exclusivities. See referral paragraph 59.

of Game's footprint – exacerbating the lessening and prevention of competition that single instances of hampering this peculiar threat would entail.”¹⁷

The exceptions

[23] All three retailer respondents filed exceptions. Shoprite, whilst filing an exception, also filed an answering affidavit. For the purpose of deciding this matter, we will not consider that answer but approach the exceptions in the normal manner and decide the matter on the facts set out in the referral on the assumption that they can be proven.

[24] There is a degree of overlap in the exceptions so we can set them out briefly as follows:

(a) Massmart's referral is not sufficiently aligned to its complaint and thus constitutes a new referral in violation of the so-called referral rule.

[25] This exception, raised by two of the respondents (Shoprite and Spar) can be dealt with shortly. Deciding this point requires us to compare the terms of the complaint to the new referral. We do not have the complaint in the papers so we cannot decide this issue without substantial unfairness to Massmart.

(b) Failure to join the relevant landlords

[26] All the respondents have taken the point that the relief is not competent if the landlords are not joined since the relief impacts on them. Massmart argues that the way in which the relief is formulated impacts on the respondents, not the landlords and hence joinder is not necessary. In any event it argues that the landlords' industry association, the South African Property Association (SAPA), has been cited in the proceedings as the fourth respondent and it has not opposed, opting to abide.

[27] We do not need to decide this point before we conclude on the others. If the point is good, we would allow Massmart to join the landlords. It does not on its own constitute a basis for dismissing the referral.

¹⁷ Referral, paragraph 93.

(c) Relief not competent in law

- [28] Pick 'n Pay argued that the relief sought was not competent in law as the respondents could not enforce the terms of a lease against Massmart, only the respective landlords could. This defence was based on a recent Constitutional Court decision *Massstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* (CCT242/15) [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC) where the court refused to grant an interdict that Pick 'n Pay had sought to enforce against Massmart and Game in respect of the Cape Gate shopping centre on the basis of the delict of unfair competition. The Court held that this remedy was not available to Pick 'n Pay, as it was not a party to the lease with Game.
- [29] Massmart's response was that the Constitutional Court had decided a narrow point of unfair competition that did not resolve the apprehension it held regarding enforcement of the exclusivity provisions for competition law purposes.
- [30] Again, this is not a point we need to decide because Massmart still has to deal with the hurdles raised by the remaining exceptions.

(d) Failure to make out a cause of action

- [31] Although articulated in different ways, this was the central argument in all the exceptions. The argument here is that the referral does not make out a cause of action in respect of section 5(1), the only section of the Act that Massmart now relies on.

(e) Lacks pleading of sufficient material facts

- [32] The respondents allege that the upstream and downstream markets lack specificity. Further, that allegations of an anticompetitive effect are insufficiently pleaded.
- [33] We will deal with both these latter points (d) and (e) in our analysis that follows.

Analysis

- [34] In our decision in relation to the first referral, we identified several problems facing Massmart. The first was that market definitions were insufficiently clear. The second was that for theory of harm to exist under section 5(1), it needed to disclose an infringement of section 5(1).¹⁸
- [35] The respondents argue that Massmart has still not cured these deficiencies. We go on to consider whether this is the case. First, we consider if Massmart has made out a case in terms of section 5(1) following what we term a conventional approach to vertical restrictive practice analysis. Then we go on to consider whether Massmart makes out a case following what it terms its unique competitive threat approach. This approach, as we understand Massmart's argument, requires us to consider the subjective competitive threat posed by Game as an entrant as a counterfactual to the status quo.

Conventional approach to section 5(1) analysis

- [36] In order to bring its case under section 5(1) that makes out a cause of action, Massmart needs to allege the following:
- Who the parties to the vertical relationship are;
 - What the challenged agreement is; and
 - That the agreement has an anticompetitive effect in a market.
- [37] Massmart succeeds in establishing the first two elements. The question is whether it has pleaded sufficient facts to establish a case against each respondent in respect of the third.
- [38] Although we have not considered the issue of what a substantial prevention or lessening of competition means for the purpose of section 5(1), the approach taken in the SAA¹⁹ case is apposite here, even though that matter concerned a section 8 contravention. Textually, the language of section 8 differs from that in section 5(1) – the test under section 8 is an '*anticompetitive effect*'. The language of section 5(1) refers to '*...substantially preventing or lessening of competition*'. From an economic perspective the tests used to identify these effects would be the same. Both are premised on effects and allow a defence

¹⁸Shoprite Checkers and Two Others and Massmart Holdings Limited CRP034Jun15/EXC088Jul15; CRP034Jun15/EXC107Aug15; CRP034Jun15/EXC109Aug15; CRP034Jun15/STA204Dec15 at paragraphs 37-47.

¹⁹ Competition Commission v South African Airways (Pty)Ltd Case number 18/CR/Mar01.

of pro-competitive justification that is textually identical. It would be incongruous if the tests for harm differed, but the tests for justification are identical. Hence, the approach taken in SAA is instructive here.

- [39] In SAA, we held that there were two ways in which an anticompetitive effect could be demonstrated:

*"If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain."*²⁰

- [40] We examine the referral to see if either form of anticompetitive effect is made out.
- [41] The theory of harm advanced in this case is that the challenged lease terms exclude rivals of the respondent from the downstream market for the retail of fresh in shopping malls. Both upstream and downstream markets are premised on the mall as the subject of the contestation. In the upstream, landlords are suppliers of malls that are suitable for the retail of fresh. In the downstream, the respondents provide goods in the form of fresh to consumers from malls. In the upstream, the geographic market is national. Nationally landlords supply mall space to those who wish to compete in the downstream. In the upstream market the mall is the product being supplied to those who wish to compete in the downstream. But in the downstream market the mall constitutes the boundary of the geographic market where the product – fresh - can be supplied to consumers.
- [42] The US scholar Phillip Areeda, in his well-known treatise, points out that it is not necessary for the upstream and downstream market to have the same geographic dimension. He

²⁰ *Competition Commission v South African Airways (Pty) Ltd* Case number 18/CR/Mar01 at paragraph 132.

accepts that an upstream market may be national but the effects may be felt downstream in local markets.²¹

- [43] If the mall constitutes the downstream market, then an agreement that excludes competitors from competing in it to sell fresh, would seem, *prima facie*, exclusionary.
- [44] If this is the case, one might conclude that Massmart has made out a cause of action for the respondents to answer.
- [45] But although Massmart asserts that the mall is its candidate for the geographic market, it fails to make the necessary factual allegations to justify this. (Note that in our first Massmart decision we indicated that a complainant must do more than allege what the market is. It must allege at least why it is.)²²
- [46] At best, Massmart relies for this proposition on generalised contentions made by some of the respondents in submissions to an ongoing retail market inquiry being undertaken at the time of this hearing by the Competition Commission.²³ It quotes passages from submissions made to the enquiry by the respondents and other retailers, where these retailers emphasise the strategic need to have access to retail space in malls.
- [47] However, none of the extracts relied on are pertinent to supporting the mall as the relevant market definition or at best, are peripheral to this issue. The extract from Spar is simply descriptive of where its stores are located. The extract from Pick 'n Pay's submission is a defence to why spaza shops are not realistic competitors to national chains and hence exclusionary lease terms do not impact on them. The extract from Woolworths in Massmart's own summation identifies "... the 'type of shopping centre in which the store is located' as having an important influence on the catchment area of stores".²⁴

²¹P. Areeda and H.Hovenkamp, *Fundamentals of Antitrust Law, Fourth Edition*, paragraph 1802d page 65. "When exclusive dealing is considered as a "foreclosure offence", it ordinarily becomes necessary to examine market power or share at both of the two market levels involved. Importantly, the geographic boundaries of the two markets are not necessarily the same..."

²² *Shoprite Checkers and Two Others and Massmart Holdings Limited* CRP034Jun15/EXC088Jul15; CRP034Jun15/EXC107Aug15; CRP034Jun15/EXC109Aug15; CRP034Jun15/STA204Dec15 at paragraphs 37.

²³ It is known as the Grocery Retail Sector Market Inquiry. See referral paragraph 36 onwards.

²⁴ Referral paragraph 36.3

[48] The most that can be said for these contentions is that they do not negate the idea that location in malls is commercially advantageous for large retailers of fresh. However, they do nothing to help advance a case for why they should be regarded as the relevant market

[49] Indeed, Massmart appears to concede as much, as appears from the following paragraph in the referral:

*"At this stage of the proceedings, Massmart does not have access to all the information that would enable it to confirm or finesse the precise boundaries of the relevant product market, such as store-level information on the respondent retailers' sales over time (which would allow interrogation of, among other things, the influence of product range on substitution), or the extent to which the respondent retailers' real estate departments consider locations outside shopping malls to be suitable."*²⁵

[50] But why does Massmart need to rely on what the respondents' retail estate departments' state, in order to make its own case? If it has similar people available to it in its real estate department, why weren't these views put up?²⁶

[51] Were Massmart's ambitions more modest, it would have taken a single mall or a smaller universe of malls with an exclusionary lease and explained why it was not practical for competitors to find suitable alternative retail space to compete for those consumers. But Massmart has not done that. It has made the same allegation against all the respondents in respect of each space it regards as a mall, wherever situated, from small towns to large cities.

[52] All in all there may be 102 of them, or maybe more, (as Game is not presumably in the sum total of all malls for which such leases exist) or maybe less, as it is only presently certain of exclusionary lease terms in 43 of them. What the referral seems to take for granted is that all these malls in respect of all the respondents must have the same characteristic as the single mall example we consider above. Why this is so is not explained beyond the generalised submissions made to the retail market enquiry.

²⁵ Referral paragraph 37.

²⁶ See record page 250 paragraph 40. In a decision on an interdict brought in KZN High Court by Spar the judgment quotes an earlier judgement which refers to a Ms Gounder, described as a senior property manager at Massmart.

[53] Thus, to the extent that the case for Massmart rests on there being a primary downstream market candidate constituted by the boundaries of the mall, this case has not been sufficiently pleaded.

[54] But justification of its choice of market definition is not the only problem with the case advanced by Massmart. Even if its market definition is considered to be adequately pleaded (which we do not consider it has), the complainant needs to establish how much of the candidate market or markets are foreclosed by the restraint in issue.

[55] The conventional approach to analysing evidence of foreclosure by an exclusionary vertical arrangement is succinctly expressed by Areeda as follows:

*"In sum, the preconditions for competitive harm are (a) exclusive dealing or similar arrangements covering a significant portion of the downstream market (b) entry barriers or equivalent impediments making it difficult for rivals or potential rivals in the upstream market to obtain efficient access to the downstream market and (c) resulting prolongation of the dominant firm's ability of earn monopoly profits in the downstream market."*²⁷(Our emphasis)

[56] The pre-condition suggested in (a) viz. that the exclusive dealing covers a "significant portion of the downstream market" is also well accepted in the European Commission's Guidelines on Vertical restraints. Here it is noted that the Block Exemption Regulation exists to cover situations where the relevant market share of the supplier and buyer, each, do not exceed a 30% threshold.²⁸

[57] What both approaches illustrate is that, to make a case for exclusion by a restraint, some dimension of foreclosure should be alleged. Whilst our Act is not prescriptive of what the extent of foreclosure needs to be or conversely, as in Europe, what a safe harbour would be, that does not exempt the pleader from making some case out on extent.

[58] Since the anticompetitive effect occurs in the downstream market, we must ask what case Massmart has made for the extent of foreclosure in that market.

²⁷ P. Areeda and H.Hovenkamp, *Fundamentals of Antitrust Law, Fourth Edition*, paragraph 1802b page 64" (This is stated in a section is dealing with minimum condition for competitive harm in a Chapter on Exclusive dealing and related practices.)

²⁸ See European Union Guidelines on Vertical Restraints paragraph 110(2)

[59] Let us start first with what Massmart offered as its alternative candidate for the downstream market. Offering an alternative market definition is not in itself problematic, as a market definition is a conclusion based on certain facts and conclusions might differ. However, the alternative is described as a market for fresh that is "...not limited to stores in shopping malls."

[60] Defining a market not by what it is, but what it is not, constitutes vague and embarrassing pleading. If respondents do not know where the complainant maintains the boundaries lie, how do they meet a case based on exclusion? Depending on what radius from the mall is selected, some may have rival stores located within them, others may not. The exception taken to this alternative market definition is well- founded.

[61] This leaves us to consider the primary candidate for the downstream local market which is defined as the shopping mall. Here there can be no complaint about the precision of the boundaries.

[62] But Massmart then goes on to say that:

*"In either case, the downstream market has both local and national dimensions. However, Massmart submits that it is the national dimension of competition that is of the most relevance for this referral."*²⁹

[63] Quite what Massmart means by this dual set of dimensions is confusing.

[64] If the market definition is the mall, it seems what Massmart is saying is that if there is exclusivity, then, in that local market, there is absolute foreclosure – only the respondent firm is able to compete. However it does not say so expressly nor why the market should be limited in every case of a mall in this way. Certainly no facts are put up. The most, as we noted earlier, is its reliance on the submissions to the market enquiry.³⁰

[65] Second, annexure FA8 to the Referral which lists all those malls in which Game is located, indicates that in 31 of these malls at least two of the respondents are present. If the case is that there is total foreclosure, this thesis would seem to be undermined by the presence

²⁹ Referral paragraph 18.1.

³⁰ Referral paragraph 36.

of at least two rivals in the same mall. Nor does it allege that even where only one of the respondents is present that there is not another non-respondent competitor having a presence. We know from the referral that Woolworths, which is not a respondent in this complaint, is alleged to have a presence in "shopping centres".³¹ The fact that Game is excluded from malls does not equate to an exclusion of competition if another rival is present. Section 5(1) requires proof of a substantial prevention or lessening of competition in a market. Mere proof of exclusion of a particular competitor does not suffice.

- [66] Thus, to the extent that Massmart relies on two candidate markets for its downstream market, both are deficient. The alternative market definition lacks precision and there is no allegation as to the extent of foreclosure. The primary candidate, the mall, may have geographical precision, but why it should be so is not sufficiently motivated, and it too, lacks any allegations as to the extent of foreclosure, unless one presumes that each respondent in a mall is a monopoly, but that case too, is not made out.
- [67] That leaves us to consider, still following the conventional approach, the "*national dimension case*", which Massmart emphasises as the "*more relevant*". We understand this case as follows.
- [68] Although customers for fresh may shop in some local market, as they presumably do not travel great distances to shop for fresh, this demand at the local level does not constitute the significant competitive constraint. Rather, because the respondents are national chains, which have national chains of supply and advertise prices on a national basis, the constraint each poses on the other comes about from this national competition.³² By extension, to the extent that Game is foreclosed nationally from having an equivalent footprint to offer its fresh, because it cannot use its presence in malls to do so, the competitive threat it would pose is thus constrained and *a fortiori* there is a substantial prevention or lessening of competition.
- [69] However, if this national dimension of competition exists, then it must follow that all three respondents (unless acting collusively) must constrain one another. Nor may they be the only firms with a national footprint in fresh.³³ On this national market definition Game does

³¹ Referral paragraph 36.3. Also the Cape Gate lease for Shoprite Checkers provides for exclusivity for Shoprite Checkers but exempts Pick n Pay and Woolworths from the exclusivity.

³² These allegations are set out in the Referral from paragraph 40.2 to 43.

³³ The referral notes the presence of Woolworths for instance. See paragraph 41.5 to 41.6

not explain why the challenged lease provisions *a fortiori* create a substantial prevention or lessening of competition.

- [70] It needs to explain why, notwithstanding what may be its exclusion from, or the attenuation of its presence in this national market, there is still a substantial prevention or lessening of competition. Nor does Massmart at the national level give any indication of the extent of market foreclosure. We know only of the extent of Game's presence in malls (102) and, with considerably less certainty, from how many it may have been excluded (43). We thus don't know how many malls suitable for fresh are available nationally and hence the salience of Game's exclusion from 43 of them.

Conclusion

- [71] Thus on a conventional approach, Massmart's referral fails in two respects raised in the exceptions. The requirement to plead a clear market definition has not been met in respect of the alternative candidate market. In respect of the two primary markets the locally defined mall market and the national market for the retail of fresh in malls, no allegations as to why these constitute the boundaries of the relevant market have been adequately made out. Finally, as far as a cause of action is concerned, in none of the three markets, has the requirement of the extent of foreclosure been pleaded and hence, based on SAA, the inference of an anticompetitive effect.
- [72] A complainant needs to allege more than the existence of a contractual restraint. As the Competition Appeal Court noted recently in the SAB³⁴ case, where one of the aspects of the Commission's case concerned an exclusive territory division a supplier had with its distributors which it alleged contravened section 5(1):

*"The core problem with the evidence provided by the Commission is that it was based on the argument that any restraint necessarily constrains competition. There was no significant attempt to illustrate how the effects of this alleged restraint would substantially lessen or prevent competition in that market."*³⁵

³⁴ *Competition Commission v South African Breweries Limited and Others* Case No. 129/CAC/Apr14.

³⁵ *Competition Commission v South African Breweries Limited and Others* Case No. 129/CAC/Apr14 at paragraph 59.

The unique case analysis

- [73] The two tests for consumer harm set out in the SAA case were harm to consumer welfare and foreclosure to the market of rivals. The conventional analysis is premised on the latter of these two. The unique case focuses on the former i.e. effect on consumer welfare.
- [74] Massmart placed most of the emphasis of its case in pleading this unique threat theory of harm. Translated into the SAA case test, this means a case premised on harm to consumer welfare.
- [75] We have previously held that actual evidence of harm to consumer welfare would suffice even where market definition may be imprecise.³⁶ This is because market definition serves as a proxy for market power, not evidence of it. Thus, direct evidence of harm to consumers is more probative than proxy evidence.
- [76] Thus, in approaching the manner in which the unique case is pleaded, we ask whether Massmart has sufficiently pleaded consumer harm. If it has, this would meet the criticisms made earlier of its failure to adequately plead market definition and extent of foreclosure.
- [77] Let us examine what it puts up as the unique competitive threat case.
- [78] Massmart wants to be able to turn its Game stores, with their present favourable locations in malls, into vendors of fresh. It wants to be able to do this at all its stores so that it acquires a national footprint and a reputation for selling fresh at every outlet. If it can, it says it will constitute a formidable competitor to the three respondents.
- [79] Absent these restrictions, it will have the benefit of both economies of scale and scope.³⁷ The strength of its brand in general merchandise and the backing of the financial muscle of the Massmart group add to its competitive threat. This exemplifies its uniqueness. It also alleges it has, what it terms, "...substantial ubiquity". This is because it is already located in 102 malls and has a national footprint on a par with the three respondents.

³⁶See at paragraph 45 of *National Association of Pharmaceutical Wholesalers & Others and Glaxo Wellcome (Pty) Ltd & Others* Case No. 68/IR/Jun00 "Section 4 and 5 claims do not require a prior identification of the relevant market – that is, the relevant market can be read back, as it were, from evidence of the anti-competitive practice, thus sidestepping the formalism inherent in efforts at a prior identification of the market" – referring to *Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd & Others* Case No. 98/IR/Dec00

³⁷Economies of scope arise as the seller of general merchandise can increase its offer and hence its competitiveness by giving the consumer the convenience of a one stop shop.

- [80] Massmart could have demonstrated consumer harm by adopting the following approach: In malls where it already sells without restriction, consumer welfare has been enhanced by way of improved competitive outcomes - price and non-price. This could be by way of reference to its own offering, as compared to that of the respective respondent located in that mall, or a comparison of the effects on that respondent in a contested mall, compared to one where a respondent is not contested by a Game fresh offering.³⁸
- [81] But Massmart has not done so. In the only evidence of this in the record, a judgement in respect of an interdict brought against Massmart by Spar in 2014 in the KwaZulu-Natal High Court, the court papers suggest that Massmart was anxious to show that it did not constitute a threat to the incumbent, as its offering was going to be modest.³⁹
- [82] In the referral in this case the most that Massmart suggests, by way of specifics, is what its future aim is:

"Game's aim is to be at least 2-5% cheaper than comparative retailers for food (perishable or non-perishable)".⁴⁰

- [83] But that is not evidence that the restraint presently harms consumer welfare. Rather, it is evidence of future ambition to improve consumer welfare.
- [84] Put differently, it is a case of what 'might be', not 'what is'. But a case under section 5(1) requires a showing of an existing substantial lessening of competition. Hypothetically, any market may experience improved competitive outcomes by the addition of more competitors, but that does not obviate the necessity for a complainant to plead facts to show that there exists in a market, by virtue of a challenged agreement, an existing substantial prevention or lessening of competition. Massmart's confident assertion of the first proposition does not, *a fortiori*, establish the existence of the second.

³⁸This is the approach that was taken by the U.S Federal Trade Commission in obtaining an order blocking a merger between two giant stationery retail chains. The FTC led evidence that showed that in local markets where both firms had a presence prices were lower than they were in markets where only one had a presence. See Gellhorn et al *Antitrust Law and Economics in a Nutshell*, Fifth Edition, pages 455 and 460, discussing evidence in *FTC v Staples, Inc.* 970 F Supp. 1066 (D.D.C. 1997)

³⁹ See *Spar v Synergy et al* decision Case number 802/2014. The relevant extract is at page 252 of the record, where the court "summarise the contents of an email from Ms Gounder a Massmart employee where she states: "... the current allocation of such goods in the Game range would be a floor area of 99.2 square metres, 'hardly a threat one would say to a 3500 square metre to 5500 square meter supermarket anchor' ".

⁴⁰ Referral paragraph 62.2.

- [85] Furthermore, competition law is premised on the exclusion of competition as an objective fact, not the exclusion of a particular competitor. Massmart's focus and its relief in this case focuses on Game as a specific competitor. To quote Areeda again:

*"The concern of antitrust laws is with injury to competition which generally means injury resulting in lower output and higher prices in a properly defined market. A foreclosure injury to a private firm occurs when that firm is denied access to a market that could presumably be open absent the challenged restraint. But ... this private injury might not result even from an exclusive dealing covering a significant share of the market. Further even when this private injury does occur, it may not be injury to competition."*⁴¹

- [86] Competition law does not look at effects subjectively from the vantage point of a particular firm, but objectively from the vantage point of a hypothetical competitor. Certainly the former helps inform the latter, but it is not a substitute for it.

Conclusion

- [87] We thus find that Massmart has failed to make out a case following either approach. Massmart does acknowledge that it had difficulties in getting facts. Massmart's solution to the problem is to assert that after discovery has taken place, it will be in a better position to expand its case. While later discovery might provide some additional evidence to Massmart to prove its case, it cannot be relied on to make a case not made out in the referral.
- [88] The other problem for Massmart is that its business case has driven its competition case and not *vice versa*.
- [89] A case under section 4(1) against all three respondents or against one of them in terms of section 8 might have been better suited to the macroscopic approach to the facts that Massmart had adopted in the referral. A microscopic one may have served it better in terms of the allegations it needed to plead to make out a case in terms of section 5(1).

⁴¹ Areeda, Treatise, paragraph 1802(b), page 62.

[90] We find that the new referral does not deal with the core problems associated with the first referral. The referral makes out no cause of action in terms of section 5(1) and is vague and embarrassing.

[91] Accordingly, the exceptions are upheld.

Should Massmart be given another opportunity to amend its referral?

[92] Massmart has been given an extensive amount of time to remedy the problems identified with the first referral. In our order following the first round of exceptions, we gave Massmart 40 business days to file a supplementary affidavit and we then extended this period twice, by 10 business days and then by a further 3 business days. It mentioned in its application for extension that its legal team needed more time to consult with managers on the ground.⁴² No doubt they did so. If the information was there to be had, it would have used it. There is therefore little point in prolonging this matter further and burdening the respondents with costs.

[93] Therefore, the referral is dismissed.

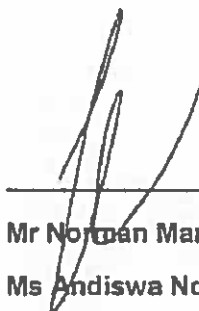
Costs

[94] Costs will follow cause, so accordingly the first to third respondents are each entitled to their costs. Spar had sought the costs of three counsel and pointed out that Massmart had used three counsel. This is correct, but Massmart had to take on three contenders, whilst Spar was faced with one. We do not think that this case merits the respondents getting more than the costs of two counsel each.

⁴²*Massmart Holdings Limited and Shoprite Checkers Proprietary Limited* CRP034Jun15/CON211Nov16 at paragraph 41.

ORDER

1. The exceptions of the first to third respondents are upheld;
2. The referral is dismissed; and
3. Massmart is to pay the costs of the first to the third respondents, including the costs occasioned by the employment of two counsel.



Mr Norman Manoim

Ms Andiswa Ndoni and Mr Anton Roskam concurring

13 February 2018

DATE

Case Manager:	Kameel Pancham
For the Applicant:	F Snyckers SC, MM Le Roux, VS Bruinders instructed by Cliffe Dekker Hofmeyr
For the First Respondent:	L Kuschke SC, MJ Engelbrecht instructed by Werksmans Attorneys
For the Second Respondent:	DN Unterhalter SC, GD Marriot instructed by Nortons Inc.
For the Third Respondent:	A Annandale SC, M du Plessis and A Coutsooudis instructed by Garlicke and Bousfield