

**IN THE COMPETITION APPEAL COURT
(REPUBLIC OF SOUTH AFRICA)**

In the large merger between:

WAL-MART STORES INC

Primary Acquiring Firm

and

MASSMART HOLDINGS LIMITED

Primary Target Firm

On appeal by

**SOUTH AFRICAN COMMERCIAL, CATERING
AND ALLIED WORKERS' UNION**

Appellant

**IN THE COMPETITION APPEAL COURT
(REPUBLIC OF SOUTH AFRICA)**

In the review between:

| | |
|--|--------------------|
| THE MINISTER OF ECONOMIC DEVELOPMENT | First Applicant |
| THE MINISTER OF TRADE AND INDUSTRY | Second Applicant |
| THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES | Third Applicant |
| And | |
| THE COMPETITION TRIBUNAL | First Respondent |
| THE COMPETITION COMMISSION OF SOUTH AFRICA | Second Respondent |
| WAL-MART STORES INC. | Third Respondent |
| MASSMART STORES LIMITED | Fourth Respondent |
| SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION (SACCAWU) & OTHERS | Fifth Respondent |
| SOUTHERN AFRICAN CLOTHING AND TEXTILE WORKERS' UNION (SACTWU) | Sixth Respondent |
| THE SOUTH AFRICAN SMALL MEDIUM AND MICRO ENTERPRISES FORUM (SA SMME FORUM) | Seventh Respondent |

HEADS OF ARGUMENT

FOR SACCAWU, COSATU, FAWU AND NUMSA

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INTRODUCTION AND STRUCTURE OF HEADS OF ARGUMENT

Introduction

1. This appeal is unprecedented and important not just for the fact of the size of investment constituting this merger but because it will determine the ambit of and approach to section 12A analysis of a proposed merger.¹ SACCAWU urges this Court to recognise and realise the transformational potential of section 12A in addressing the concerns arising from the implementation of the merger in the South African retail sector and its supply chain.
2. The retail sector facilitates interactions between producers or suppliers² and consumers or end-users. Understood in this way, it becomes clear why any analysis of the effects of the merger must consider both the retail sector and its suppliers.
3. The concerns raised by SACCAWU³ are unique and particular to Walmart and should not be understood as the unions participating in this matter being against desirable and responsible foreign direct investment in South Africa's retail sector and its supply chain industries.

¹ See Lynn witness statement page 2787, Sukthankar witness statement page 2798

² In this summary, the terms "supply chain" and "suppliers" are used to refer to producers or manufacturers of goods for sale in the retail sector. It also includes both large suppliers and SMMEs. And the "retail sector" includes large retailers as well as SMMEs and the informal retailers.

³ These submissions are filed on behalf of SACCAWU, and COSATU, FAWU and NUMSA, as well as the other members of the anti-Walmart coalition in opposition to the proposed merger between Walmart and Massmart. SACCAWU is a participant in these proceedings pursuant to section 17(1)(b).

4. *“Cross-border investment is widely viewed as beneficial for South Africa because of the expected [positive] impact on employment, productivity and growth, including the transfer of skills and technology from multinational parent to the host economy, spillovers through the creation of linkages with domestic [supplier] firms, and prospects for stronger integration with international markets.”*⁴

Absent these benefits of FDI, such as in the case of this proposed merger where the merging parties refuse to commit to ensuring these advantages are delivered to the host economy, the transaction should be prohibited absent conditions that harness the capabilities and expertise of Walmart for the benefit of workers, local suppliers, and to temper Walmart’s overwhelming power.

5. SACCAWU’s attitude to the proposed merger would be different were the primary acquiring firm not one with a deserved global notoriety for ignoring workers’ rights and undermining the terms and conditions of their employment, as well as sourcing extensively from low-cost producers, generally located in the East.

6. The arrival of ‘the Walmart model’ in South Africa raises numerous concerns about its adverse consequences and the diversity of the affected interests is reflected by the wide range of groups who

⁴National Treasury *A review framework for cross-border direct investment in South Africa* Discussion Document (February 2011) (last accessed 2 October 2011) (<http://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20crossborder%20direct%20investment%20in%20South%20Africa.pdf>) at p* 20

joined together to form the anti-Walmart coalition.⁵

6.1. All of SACCAWU's concerns about the merger must be understood in the broader social and economic context that includes (i) the current conditions in the South African retail sector⁶, food and retail supply chain⁷, manufacturing sector⁸, clothing and textiles sector⁹; (ii) the prevalence and vulnerability of small and informal retailers in South Africa¹⁰, small producers and suppliers¹¹; (iii) the vulnerable position of workers in the South African supply chain, agricultural, food- and agro- processing, clothing and textile, chemical, transport, manufacturing and retail sectors¹²; (iv) the national imperatives for economic growth and development as set out in the government's New Growth Plan and the Industrial Policy Action Plan¹³; (v) the body of evidence here regarding Walmart's consistent business model, business practices and their effects on the communities

⁵ Record page 1127

⁶ Mbongwe witness statement paras 3, 5 at pages 2842 and 2861

⁷ Vlok witness statement p 3083 at p 3084 – 3088 paras 9 - 11, annexure 1 p 3089; Masemola witness statement p 3063 at p 3065 – 3081 paras 3-15; Mbongwe witness statement p 2835 at pages 2842 and 2861 paras 3, 5

⁸ Mbongwe witness statement p 2835 at p 2842 and 2861 paras 3, 5

⁹ Vlok witness statement page 3083 at p 3084 – 3088 paras 9-11, annexure 1 p 3089; Mbongwe witness statement pages 2842 and 2861 paras 3, 5

¹⁰ Mbongwe witness statement pages 2842 and 2861 paras 3, 5

¹¹ Vlok witness statement pages 3084 – 3088 9-11, annexure 1 3089; Mbongwe witness statement p 2835 at p 2842 and 2861 paras 3, 5

¹² Masemola witness statement pages 3065 – 3067 para 3-4

¹³ Lynn witness statement page 2790 para 3; Mbongwe witness statement pages 2842 and 2861 paras 3, 5

and economic and industrial sectors affected¹⁴; (vi) Walmart's notorious anti-union attitude¹⁵; (vii) the increased reliance on imports that is likely to follow Walmart's entry into South Africa¹⁶; and (viii) the race-to-the-bottom on the terms and conditions of workers employment at retailers and suppliers that will follow Walmart's entry.¹⁷

7. The competition authorities must ensure that Walmart's unprecedented power and scale responsibly enters the South African labour, retail and supply chain markets and is made to benefit workers, suppliers and consumers.
8. Unfortunately, the parties to the hearing have not had the benefit of a thorough and rigorous investigation of the consequences of the proposed merger by the Commission. Instead, its initial unconditional approval of the proposed merger was the result of an investigation which stalled when the Commission was advised of the

¹⁴ Alvarez witness statement pages 2761 - 2769 paras 6-10; Bernhardt witness statement pages 2772 – 2776 paras 2.5-5.4; Jacobs witness statement pages 2780 – 2781 paras 3-4; Lichtenstein witness statement pages 2754 - 2764 paras 2.1, 3-8; Logan witness statement pages 2726 - 2730 paras 3-8; Luce witness statement pages 2828 – 2829 paras 2.5-2.9; Lynn witness statement page 2790 para 3; Nova witness statement pages 2808 - 2823 paras 3-7; Scasserra witness statement pages 2735 – 2740 paras 3-6

¹⁵ Jacobs witness statement page 2780 para 3; Lichtenstein witness statement page 2764 para 8; Logan witness statement page 2731 para 9; Lynn witness statement page 2790 para 3; Nova witness statement pages 2811 and 2823 paras 4, 7

¹⁶ Jacobs witness statement page 2780 para 3; Lichtenstein witness statement pages 2754 - 2762 paras 3-7; Lynn witness statement page 2790 para 3; Khaas witness statement page 3223 paras 6-11; Vlok witness statement pages 3084 - 3088 9-11, annexure 1

¹⁷ Jacobs witness statement page 2780 para 3; Lichtenstein witness statement pages 2754 - 2762 paras 3-7; Luce witness statement pages 2828 – 2829 paras 2.5-2.9; Lynn witness statement page 2790 para 3; Nova witness statement pages 2808 – 2823 paras 3-7

ad hoc parallel process facilitated by EDD which sought to bring the parties together to reach agreements that could be presented to the Tribunal as possible conditions to the approval of the transaction.¹⁸ That process has yielded no agreement. The Commission only belatedly supported limited labour conditions before the Tribunal, which alone do not adequately address or ameliorate all of the foreseeable harms.

9. This unfortunate fact is compounded by the Tribunal's denial of the Ministers' discovery request and the imposition of a truncated hearing that prevented the comprehensive and proper ventilation of the issues raised for consideration in this important matter. This is the subject of the Ministers' application to review and is addressed separately by SACCAWU below.

10. The inherently probabilistic nature of the section 12A consideration and the fact that every merger presents a unique factual matrix ensures that every notifiable merger is considered and determined on its own unique terms by the competition authorities. This Court's judgment will set the precedent for the correct approach to section 12A in future cases, but should not be hindered by exaggerated concern for the future ramifications of Walmart's treatment for other potential investors. Each firm that wishes to invest in South Africa

¹⁸ Commission's report pages 2304 - 2305

will be subject to scrutiny by the competition authorities, but no other firm presents the trackrecord and challenges of Walmart to South Africa's retail sector.

11. For this reason, SACCAWU persists in seeking the prohibition of the merger on the grounds that it cannot be justified on either competition or public interest grounds, given the nature and extent of harm to both that is inevitable and foreseeable.

12. In the event that this Court is minded to approve the merger, SACCAWU seeks to render enforceable the undertakings made by the merging parties regarding the merger's benefits and ensure its claimed benign nature. There can be no reasonable objection to measures designed to harness Walmart's power for the benefit of South African workers, suppliers and consumers. However, if such measures are unworkable or impossible, then, for that reason, the merger should be prohibited. This remains SACCAWU's preferred resolution of this appeal.

Structure of Heads of Argument

13. These Heads of Argument first address the jurisprudential question of the correct approach to section 12A and considerations of conditions to be attached to a merger approval, before addressing labour and supply chain issues in turn. Thereafter, the Ministers'

application for review is addressed and, finally, SACCAWU's relief and requested order is set out.

14. While cognisant of paragraph 4 of this Court's practice note, the nature of the issues appealed and the Tribunal's conduct of the hearings prevents SACCAWU from separately listing common cause and disputed facts, since the relevant factual record is largely undisputed; it is the inferences to be drawn from it that is disputed between the parties. Accordingly, a chronology of relevant and material facts is attached, as Annexure A.

APPROACH TO SECTION 12A AND CONDITIONS

Approach to section 12A

15. The Tribunal incorrectly and narrowly construed its jurisdiction and task in applying section 12A.¹⁹ Section 12A requires a consideration of two enquiries – whether a merger can be justified, first, on competition grounds and, second, on public interest grounds. The relationship between these two enquiries is addressed below, following consideration of their normative content.

¹⁹ Tribunal decision paras 32 to 38 at pages 14 - 15

Competition

16. The merger raises competition concerns that require its prohibition, *alternatively* the imposition of conditions to address and ameliorate these adverse effects.

17. The Tribunal found that the merger raised no competition issues (incorrectly stating this as being common cause between the parties). And the merging parties have characterised the competition concerns raised by SACCAWU as “non-standard” competition concerns,²⁰ a description embraced by SACCAWU given that the South African Competition Act itself is non-standard in its conception of both the competition process and the role of competition policy as an instrument for national economic development.

17.1. It is no answer to the express normative scheme of the Act²¹ to say that there is no product or geographic overlap between the operations of the merging parties and therefore that no competition concerns arise from the contemplated transaction.²² The merging parties’ joint competitiveness report summarises this standard

²⁰ RBB report p 2415

²¹ See Preamble, sections 1(2) and 2.

²² Record pages 8736 and 62

approach.²³

17.2. But this ignores the express language of the Act which makes plain that the South African competition regime is concerned with economic or market power, its creation, extension, distribution and (ab)use, and that the entry of a firm with the scale of operations and consequent power of Walmart into the South African economy will disrupt the competitive equilibrium and processes in the retail sector, as well as alter competitive conditions for suppliers in the retail supply chain.

17.3. Walmart enhances and creates Massmart's market power through its self-proclaimed expertise and capacity in logistics and supply chain efficiency. Sections 1(xiv) read with 7(c) define 'market power' so as to confirm the Act's preoccupation with the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers. This the merged firm unquestionably can do. Hence, the merging parties' incorrectly frame the debate about Walmart's power through their reliance on market shares and product category domination. Rather, section

²³ Record para 7.1 at page 120

12A(1) lists considerations which predict foreseeable, merger-specific and substantial anti-competitive effects of the proposed merger due to the identity of the acquiring firm.

17.4. The merging parties' adoption of the perspective of a narrow US-sourced consumer welfare standard ignores its explicit rejection by the Act. Section 12A statutorily enjoins the competition authorities to take account of factors which do not exist in this narrow view of competition and competition policy. The Act establishes a new paradigm²⁴ in which that view is of little utility to the purposive application of section 12A required when deciding the key issues in this matter.

18. The work of economist Wolfgang Kerber²⁵, building on that of JM Buchanan, described below, is a useful starting point. In summary, Kerber argues for what he calls 'constitutional economics', proposing

“another normative perspective based upon constitutional economics which may lead to a more differentiated normative

²⁴ See *Competition Law of South Africa* Sutherland p4-3; Fox, Sullivan and Peritz *US Antitrust in a global context* (2004) and Gerber *Competition law in 20th century Europe* (2001); *Efficiency, Poverty and Markets* Fox: presentation at University Paris Dauphine, 11 March 2009; see e.g. *Globalization and its Discontents* J Stiglitz (2003); *The Bottom Billion* P Collier (2008)

²⁵ Chapter 6 (“*should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law*”) in Drexl, Idot and Moneger (eds) *Economic Theory and Competition Law* (2009)

approach to competition law. Its basic idea is that the preferences of citizens should be the relevant normative criterion for appropriate decisions about the objectives of competition policy. This will lead to a different perspective on the questions of how, to what extent, and what kind of economic efficiency should be considered in the different realms of competition law. It might also allow for more consideration of normative issues currently emphasized primarily by legal scholars, such as protection of rights of market participants or concepts as 'competition on the merits'."

19. He assumes a Rawlsian original position and poses the question about what sort of policy and outcomes one would want to serve as competition law if one did not know whether one would be the beneficiaries or victims of its outcomes. He suggests that this thought experiment demonstrates how fulfillment of the Kaldor-Hicks criterion for efficiency, or utility, is deficient and unable to engage with these concerns. As he explains:

"in contrast to traditional welfare economics, Buchanan (as the most important representative of constitutional economics) argued that the decisive normative criterion is voluntary individual consent. By consenting to transactions or to mandatory rules of society, they reveal their preferences and legitimize contracts and mandatory rules. This notion is entirely compatible with notions of private autonomy and democracy, as developed in the Western legal tradition. Consent as normative criterion is very

close to the Pareto criterion, because if, as a result of policy, at least one person is better off and no one is worse off, then it can be suggested that all persons can agree on the measure. In contrast, the fulfillment of the Kaldor-Hicks criterion is not sufficient to lead to the consent of all persons involved, because there can be persons who will be worse off.”

20. As a result, recognition of a distributional or developmental imperative, rather than merely acceptance of a theoretical potential of compensation for any loss, follows when one considers the likely content of citizens' preferences, expressed through the work of the legislature.

21. Kerber develops the normative framework of constitutional economics as follows:

“What is the different perspective of this normative approach in comparison to a welfare economics approach? The decisive difference is that the preferences of citizens are viewed as the ultimate normative criterion.²⁶ They should decide on the question, to what extent allocative efficiency and/or dynamic efficiency should be strived for, to what extent competition law should protect consumers from exploitation or competitors from being hurt through predatory strategies and to what extent society is willing to sacrifice some ‘total welfare’ in order to prevent redistributions through market power...”

The constitutional economics approach to the goals of competition law is a purely economic one: it argues that market rules are ‘optimal’, if they correspond to their preferences (and

²⁶ Arguably expressed through their representatives in the legislature, and, hence, in the statutory formulation of the Act.

values)...

It can be suggested that citizens would appreciate both an efficient allocation of resources and the generation and spread of innovations, because it can be expected that both increase their wealth. This implies that static and dynamic efficiency are important and that any potential trade off between these two goals would be solved by the empirical question about the relative importance of static and dynamic efficiency for increasing the fulfillment of the citizens' preferences. Much more difficult is the question of whether the citizens would agree on an unconditional application of the total welfare standard (Kaldor-Hicks criterion). Restrictive agreements, mergers, and business behaviours of dominant firms would always be allowed if total welfare increases, irrespective of any redistributive effects between the involved firms, the competitors, the firms on up- or downstream markets, and the consumers. Firms and consumers would not be protected against redistributions through market power. Although the total welfare standard would ensure that 'victims' of market power or (total welfare increasing) predatory behaviour could be compensated, they would lose without having a claim for compensation. It is very doubtful, whether a sound argument can be made that, in the long run, all persons would win through the total welfare standard, because they can be both winners and losers in different situations...

The citizens of a society are not only consumers but also owners of production factors as, in particular, capital and labour, and are therefore interested in income from interests, wages, and profits. From the perspective of the interests of the citizens it is not obvious why competition policy should only take into account the welfare effects of mergers and business behaviours on the citizens as consumers but not the welfare effects on the same citizens as owners of firms and production factors...

Therefore the normative asymmetry which holds that competition law is only about the protection of the consumers' interests and that the interests of all other firms in the upstream markets are irrelevant, is hard to justify from a constitutional economics perspective.

...

Part of these preferences might refer to the wide-spread normative notion that the emergence of profits and losses in market competition should be linked somehow to firm

performance ('competition on the merits'). In any society citizens have more or less strong convictions about the question of whether the profits of firms or the income of others are justified. This is only partly a question of the 'inequality' of wealth distribution ('distributive justice') but reflects more the dimension of 'commutative justice'. To a large extent the answer depends upon whether firms deserve their profits or losses due to their good or bad performance. If firms have been able to incur large profits because they have carried out successful strategies, lobbied for protective measures or built up market power positions, then most citizens would view these profits as less justified than those which are the result of the innovation of new and better products or cost-decreasing production technologies. A logical consequence is that such considerations might be legitimate arguments in the discussion about the goals of competition policy from a constitutional economics perspective. "

22. This constitutional economics normative framework engages with the objectives or goals of the Act set out in its preamble and section 2. Put another way, this demonstrates how the following factors all point to the reframing suggested here: the policy concerns of the legislature in enacting the Act, the interest of adjudicators in fidelity to the Act and Constitution, and the external realities of South Africa's economy.
23. Our Act is unique amongst competition statutes for its explicit goals and express purposes. It embodies a legislative belief in the competitive process and market as a site to correct the socio-economic disadvantages and distortions arising from South Africa's skewed, discriminatory and unequal economic progression to date.

24. Competition law and policy as embodied in the Act are instruments for South Africa's economic development chosen by the legislature and exercised by the competition authorities. In this way, the Act seeks to complement economic development, trade and industrial policy instruments wielded by other institutions of the South African state.

25. Section 12A(2) makes plain that the analysis required to determine whether or not the merger is likely to substantially prevent or lessen competition, and the related question of the strength of competition in the relevant market, considers factors other than the standard narrow questions of the contemplated transaction's impact on price and output to which other competition authorities may limit themselves when engaged in merger control.

26. Moreover, the listed factors are not a closed or exclusive list – the Tribunal's task is to “assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market.” The listed factors are included in this consideration, but do not determine its scope.

27. However, even limiting oneself to those listed factors, and given the retail sector structure and conditions, as well as those of its supply chain, the merger will:

27.1. Increase import competition in the market because local suppliers simply cannot compete with import pricing and sustain their businesses, which would result in job losses, the closure of SMMEs and the stalling of the transfer of ownership and economic development locally. Evidence from Shoprite ²⁷ and submissions from the SMME organisations²⁸ confirm this;

27.2. Raise the barriers to entry into the market given that it would become increasingly difficult to ever reach the scale necessary to compete against Walmart;

27.3. Result in increased concentrations as smaller enterprises fail in the retail sector and its supply chain;

27.4. Increase countervailing power in the market to such a degree that it would be to the detriment of smaller enterprises and suppliers;

27.5. Reduce growth, innovation and product differentiation as

²⁷ Record page 4459; Transcript pages 3907-3946

²⁸ Khaas witness statement page 3222

the sector contracted; and

27.6. Remove effective competitors and homogenise the sector.²⁹

28. The merging parties not only adopt a narrow Chicago-school approach to competition concerns, but also question the competition authorities' role in promoting government policies designed to preserve and develop local manufacturing and jobs.

28.1. This role is not protectionism, but rather a dynamic approach which more heavily weighs the need to strengthen and incentivise local industries so that they become more efficient and competitive given the priority afforded to the welfare of certain members of our society by the legislature in section 12A(3). The Act explicitly weights jobs and economic opportunity for certain types of enterprises over lower prices for consumers.

28.2. Tellingly, foreseeable beneficial pricing effects of a merger are unmentioned in section 12A and they cannot be dispositive of whether a merger is justified or not.

²⁹ Mbongwe witness statement page 2862

29. To paraphrase the Tribunal's decision in *Trident Steel*³⁰, it remains for this Court not to debate the desirability of the approach to merger analysis in the statute but merely to determine how it should be applied here.

30. On the legislature's choice of competition policy to combat the inequalities of apartheid:

30.1. Lewis has noted the irony that "an ideological standpoint that may, in different circumstances, have sought to replace the market with the state, saw the introduction, in the form of antitrust, of a robust defence of the market as the chosen instrument to discipline the powerful concentrations of private power that had been the product of apartheid."³¹

31. As noted elsewhere, "*[t]he fight against exploitation by firms is seen by South Africans as an extension of the fight against poverty and inequality.*"³²

31.1. South Africa adopted the EU's concern for "*preventing the frustration of access and entry into markets and its understanding that harm to competition should include*

³⁰ *Trident Steel (Pty) Ltd and Dorbyl Limited* CT Case No 89/LM/Oct00 at para [48]

³¹ D Lewis *Global Competition: Law, Markets and Globalization* (August 18, 2011) (http://lawprofessors.typepad.com/antitrustprof_blog/2010/08/david-lewis-on-global-competition-law-markets-and-globalization.html)

³² Davis and Granville *South Africa: Competition Law System and the Country's Norms* (1 June 2011) Institute for International Law and Justice (NYU School of Law) Comparative Competition Law Institutions at page 3

harm to the competitive process” coupled with “a conscious response to unique South African issues such as employment and [BEE]. In many ways, South Africa’s approach to developing an appropriate regime for the country has been influential on the rest of the world. South Africa’s approach in this regard is seen as a model for new competition jurisdictions.”³³

31.2. In summary,

“In keeping with the political objectives of the government when competition law was placed on the agenda, [the Act] has an extensive (and ambitious) list of goals. It calls on the authorities to balance both traditional competition concerns with public interest objectives. The Act embraces the goals of creating a free market and effective competition, but also incorporates uniquely South African elements, including addressing its exclusionary past by promoting participation of all citizens in the economy and promoting the fair distribution of ownership and control of the markets amongst different racial groups. . . . Consistent with a rhetoric focused on equity, the preamble describes restrictions on competition as ‘unjust’ rather than inefficient....”³⁴

“. . . there is much work to be done to achieve the ambitious goals of South Africa’s competition policy – the creation of a system that encourages efficiency and innovation; that addresses the inequality pervasive in the economy; that is accessible to the poor; and at the same time protects core Constitutional values.”³⁵

³³ Davis and Granville at page 4

³⁴ Davis and Granville at page 6

³⁵ Davis and Granville at page 49; SACCAWU notes the relevance here of sections 18 (freedom of association) and 23 (labour relations) of the Constitution

32. Walmart's brand promise is to "*save people money so that they can live better*"³⁶, which only begs the questions presented for determination here: How? And who bears the costs? The merging parties claim that these savings will come from synergies, including import substitution (disintermediation³⁷) and logistics and supply chain efficiencies, but evidence also points to hopes of labour cost reductions and the negotiation of better supplier terms. The Genesis report³⁸ demonstrates how the Act weighs the interests of certain groups above others and favours certain distributional outcomes, and how Walmart's EDLP strategy will not redound to the benefit of those groups selected for preference by the Act.

33. However, unless minded to, this Court need not decide the nature and scope of the Act's normative framework for considering the merger's impact on competition in this respect because the self-same facts giving rise to competition concerns in this matter also produce the public interest concerns that were the focus of the hearing. Either analysis produces the correct conclusion that the merger cannot be justified in terms of section 12A of the Act and, consequently, should be prohibited, alternatively cannot be unconditionally approved by this Court.

³⁶ Bond witness statement para 21 at page 2647; Commission's recommendation pages 2321 - 2322

³⁷ Which begs a further question about how the merging parties can quantify disintermediation savings while simultaneously claiming an inability to identify product procurement that is likely to shift to imports.

³⁸ Genesis report page 3178

Public interest

34. Together with the understanding of section 12A(1) competition considerations set out above, section 12A(3) then identifies four areas of public interest that the competition authorities “must consider” but does not qualify the nature of the “effect that the merger will have on” these areas. Accordingly, SACCAWU submits in this regard that:

- 34.1. While the merger occurs in the retail sector, its effects are felt in both supply chain industries and in the supporting transport and logistics sector, as well as by small businesses or firms operating in those sectors controlled or owned by historically disadvantaged persons; and
- 34.2. The effect of the merger on employment includes its effect on the terms and conditions of employment and related issues such as the organisational rights of workers, and not solely the levels of employment in affected firms.
- 34.3. Accordingly, the scope of the concerns that must be considered in section 12A(3) determines the nature of the evidence required. Here the record is replete with valuable evidence on these issues.

35. However, there are three obstacles to determining the section 12A consideration here, namely:

- 35.1. The failure by the Commission fully to investigate the effects of the merger and the possibility of ameliorative conditions due to its reliance on the uncertain outcomes of the EDD-facilitated parallel process;
- 35.2. The denial by the Tribunal of requests for discovery related to the issues of comparative labour terms and conditions, wage levels and relevant procurement-related information from the merging parties; and
- 35.3. The merging parties' apparent strategy adopted at the hearing pursuant to which Walmart refused to provide meaningful detail on its plans and intentions post-merger on the basis that the local management of Massmart will retain authority to make such decisions despite Walmart assuming control of Massmart, and Massmart refused to provide evidence of its likely intentions claiming its inability to predict its actions post-merger and subsequent to consultation with Walmart.³⁹

³⁹ In addition, Walmart's witness disclaimed any knowledge of its US operations and, as a result, cannot credibly dispute or contradict the evidence in the record relating to its labour and employment practices.

36. On the full record, there is sufficient evidence to find that the merger probably will result in the harms identified and addressed below, and that such a conclusion would only be bolstered and confirmed were these obstacles to be removed by a favourable outcome to the Ministers' application for review.

37. The Tribunal also sought to avoid "the shop floor", but the appropriate exercise of a discretion to be exercised by the Tribunal in the public interest does not duplicate or usurp other agencies' jurisdiction and powers since the relief sought by SACCAWU here is addressed to structural not procedural concerns. Thus deference is, at best, a straw man argument and, at worst, a bad excuse for institutional inertia.

38. The Tribunal in this case repeats its earlier error in the *Shell/Tepco*⁴⁰ case by insisting that its role in protecting the public interest identified in the Act is "secondary to other statutory and regulatory instruments" and noted its reluctance to exercise its statutory powers, cautioning that "the competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect".⁴¹ This caution is not warranted here. And misunderstands the

⁴⁰ *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* Case No 66/LM/Oct01

⁴¹ *Shell/Tepco* at para [58]

relationship between the competition authorities' jurisdiction and mandate, and that of these other agencies or statutory regimes. Taking employment as an example, the former are under a statutory imperative to make structural interventions to protect employment conditions when necessary, while the latter are entrusted with the regulation and administration of ongoing employment relationships.

39. So too, this Court can reject the anticipated attempts by the merging parties to import the Tribunal's earlier pronouncements in *Tiger Brands/Ashton Canning* (that it was not an "enlarged welfare agency"⁴²) into this case.⁴³

Approach to onus

40. The Tribunal's decision and order⁴⁴ raises a related point on the approach to section 12A regarding which party bears the onus of justification under section 12A. In this regard, SACCAWU submits that:

40.1. The informal and inquisitorial nature of the Tribunal proceedings, conducted in accordance with the principles of

⁴² *Tiger Brands/The Canning Business of Ashton Canning Company* para 146

⁴³ Since in that case its concern there was the extension of the class of potential beneficiaries of a proposed re-training fund to include unemployed members of the community at large (including those without any connection to the target firm, even of attenuated seasonal employment)

⁴⁴ Tribunal decision and order pages 1 - 44

natural justice⁴⁵, do not relieve the merging parties of the obligation to justify their merger.

40.2. While undoubtedly the Commission plays a critical role in investigating the effects and concerns that foreseeably arise from a merger, it surely must be for the merging parties to justify a merger, and other participants at the Tribunal hearings cannot be criticised for a dearth of evidence that they can produce on a particular issue. Rather, the Commission and Tribunal should have exercised their considerable powers to obtain relevant evidence and information, whether from the merging parties or third parties, so as to ensure a complete record for consideration.

40.3. In its *Metropolitan* decision⁴⁶, the Tribunal addressed the question of which party bears the evidential burden of justification of a merger with identified adverse effects on the public interest, finding that:

“[i]n Harmony/Goldfields⁴⁷ we held that the merging parties are not required to affirmatively justify a merger on public

⁴⁵ Section 52(2)

⁴⁶ *Metropolitan Holdings Limited and Momentum Group Limited* CT Case No 41/LM/Jul10 at para [68]

⁴⁷ *Harmony Gold Mining Company Limited and Gold Fields Limited* CT Case No 93/LM/Nov04

interest grounds. What we did not decide in that case is whether once a substantial public interest ground has been raised whether the merging parties face an evidential burden of justification. In this case we have decided that they do. Once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it.”

40.4. The Tribunal⁴⁸ explained that the merging parties must demonstrate the rationality of their actions and that the public interest adversely affected is “balanced by an equally weighty, but countervailing public interest, justifying the [adverse effect] and which is cognisable under the Act.” These gains must be public, not private, in nature if used to justify an adverse public interest concern, and private gains can only justify adverse effects on competition.

“This is because the Act requires that a merger which has been justified on efficiency grounds should still be evaluated on the public interest grounds.”⁴⁹ “This interpretation is further supported by the balancing of “... the interests of workers, owners and consumers” that the preamble of the Act refers to. The preamble

⁴⁸ At paras [69-76]

⁴⁹ Section 12A(1)(a)(ii) and (b) of the Act

also refers to regulating ‘.... the transfer of economic ownership in keeping with the public interest.’⁵⁰

40.5. The Tribunal found that:

“[75] . . . the private interests of shareholders would have to yield to the weightier public interest in preventing employment loss as a result of the merger. This does not mean that there are no circumstances where efficiency gains, even if achieved through substantial job losses, could not be justified on public interest grounds, as opposed to purely private interest grounds. What might those grounds be? Firstly, section 12A(3) enumerates other public interest grounds, which as we pointed out in the Distell case, might lead to opposing conclusions.⁵¹ Thus an adverse effect on employment might in certain circumstances be justified e.g. keeping a factory open in a region to prevent an adverse effect on that region’s economy might require a substantial number of jobs to be lost.⁵² But sources of countervailing public interest need not be limited to those specifically mentioned in section 12A(3).”

(emphasis added)

40.6. In *Harmony/Goldfields*, the Tribunal found that the public interest inquiry is related to the prior competition inquiry:

“This prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition we, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down

⁵⁰ Refer to Preamble of the Act

⁵¹ *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd* CT Case No 08/LM/Feb02, para 214

⁵² Section 12A(3)(a)

on public interest grounds, but that does not mean that in coming to the conclusion on the latter, we will have no regard to the conclusion on the first. Hence section 12A makes use of the term “justified” in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.’⁵³

40.7. Accordingly, the merging parties must make a satisfactory evidential showing that rebuts the prima facie case made out by the other participants at the hearing against the merger’s justification on public interest grounds.

40.8. Here, the merger raises competition and public interest issues that are related. However, if this Court were minded to reject the competition issues raised by SACCAWU as a basis on which the merger cannot be justified, SACCAWU submits that the correct interpretation of section 12A nevertheless requires a pro-competitive merger to be justified on public interest grounds. This is the only sensible reading that can be given to the structure and plain language of section 12A.⁵⁴

40.9. The only countervailing public interest identified by the merging parties for consideration is the promised consumer

⁵³ *Harmony/Goldfields* at para 56 footnote 2

⁵⁴ See Sutherland and Kemp *Competition Law of South Africa* Chapter 10.11 Public Interest pages 10-93 to 10-100; *Shell/Tepco* at paras [37] and [38]

welfare benefit of Walmart's reputation for reducing the prices of the products it sells, a public interest that SACCAWU accepts is cognisable under the Act, but does not outweigh the other interests affected.

40.10. The Tribunal must determine if this potential benefit is outweighed by all of the public interest concerns identified by the other participants at the hearing. As set out below and in the Genesis report⁵⁵, however, the size and source of the welfare benefits claimed by the merging parties do not outweigh their cost and their incidence confirms that any consumer welfare gains cannot assist the merging parties in claiming the result of any assessment of welfare effects required of the Tribunal in terms of section 12A.

Issues for determination

41. In sum, the section 12A framework for merger control requires the relevant decision-maker to:

41.1. identify and evaluate the competition and public interest concerns that arise in both the retail sector and its supply chain;

41.2. specifically, consider the merger's effect on employment

⁵⁵ Genesis report page 3178

(both on levels of employment in the retail sector and supply chain and on organisational rights at the merged firm) and local suppliers (due to import substitution and other cost-reducing strategies);

- 41.3. determine whether the merger can or cannot be justified on competition and public interest grounds; and, finally,
- 41.4. consider whether any conditions should be imposed in the event of approval of a merger following each of these enquiries.

42. The outcome of such an enquiry here is that:

- 42.1. the merger should be prohibited outright since conditions are likely to be an ineffective prophylactic or constraint to the adverse effects of Walmart's power on processes of competition and the public interest.
- 42.2. Alternatively, if approved, as set out below, conditions must be imposed that address the pre-merger retrenchments, the impact of the merger on workers' conditions in the retail sector and its supply chain and local procurement requirements to protect SMMEs, economic development and local suppliers. All conditions must be detailed, of lengthy duration and include oversight, monitoring and

enforcement mechanisms.

42.3. The suite of conditions proposed below work in a complementary and mutually reinforcing manner and are the sole mechanism identified by SACCAWU to meet its concerns in the event that the Tribunal is minded to approve the merger. The proposed conditions would have to be imposed collectively since none alone can adequately address the concerns.

43. The Tribunal erroneously conceived of its role as merely to evaluate and adopt unaltered the undertakings offered by the merging parties.⁵⁶ Rather, the Tribunal should have made a finding on the likely adverse consequences of the merger. Then, in order to determine the appropriateness of prohibition, the Tribunal should have considered whether it could develop conditions to address those consequences and only then evaluated the merging parties' undertakings against those conditions. If no conditions are workable, effective or appropriate, then the merger must be prohibited.

44. In any event, all conditions considered for imposition on this transaction must have certain features to ensure that they are

⁵⁶ Tribunal decision at paras 37 to 38

effective in addressing the concerns of the parties before the Tribunal –

- 44.1. Conditions must be of a medium to long term duration since not all of the adverse effects of the merger will manifest in the short term. Massmart's own witness statement acknowledges that the "implementation of the proposed transaction will have no real impact on Massmart's projections for 2011"⁵⁷;
- 44.2. Conditions must be detailed and precisely define the obligations of the merged entity to avoid ambiguity and resultant evasion. The greater level of detail in Walmart's witness statements about its operations in other countries is sorely lacking from the witness statement of Massmart, or any other documents in the record, about the merged firm's South African and African plans;
- 44.3. Conditions must include monitoring and reporting mechanisms for the Commission and Tribunal to ensure meaningful oversight of the merger's implementation; and
- 44.4. Conditions must contain enforcement mechanisms to enable parties to have prompt, effective recourse to the

⁵⁷ Pattison witness statement page 2354 para 3.1.3

Commission or Tribunal in circumstances of alleged non-compliance by the merged entity.⁵⁸

ADVERSE IMPACT ON EMPLOYMENT

Structural conditions to protect employment rights

45. In summary, SACCAWU seeks an intervention from this Court which protects against the adverse effects of ‘the Walmart model’ on employment levels, terms and conditions, and the organisational rights of workers at the merged firm.⁵⁹ The conditions imposed by the Tribunal relating to labour go some way towards achieving this. But more is required to structurally protect SACCAWU from Walmart’s anti-union stance and thereby protect workers at the merged firm from the consequential downward variation of terms and conditions of employment.

46. In addition, the 574 workers already retrenched by Massmart must be reinstated by the merged firm, not merely given preferential status in uncertain future recruitment. This is addressed below in the section regarding pre-merger retrenchments.

⁵⁸ Lichtenstein witness statement pages 2766 – 2769 para 9; Lynn witness statement page 2799 para 4; Khaas witness statement page 3225 paras 18-19; Vlok witness statement page 3088 para 11, annexure 2 page 3130; Mbongwe witness statement pages 2869 – 2877 para 7

⁵⁹ Alvarez witness statement pages 2749 - 2752 paras 11-12; Nova witness statement pages 2823 – 2825 para 8; Masemola witness statement page 3082 para 16; Mbongwe witness statement page 2869 para 7; LRS witness statement pages 3036 - 3037

47. The economic expert employed by the merging parties never meaningfully addressed the labour and employment related concerns identified by SACCAWU.⁶⁰ Those submissions are dismissive, generalised and amount to the proposition that employment relationships are equilibrium outcomes and the incredible claim that there is no evidence of how Walmart's treatment of its employees differs from that of other retailers or how its expected aggression in these relationships will be disruptive of the relationship between SACCAWU and Massmart.

47.1. To the contrary, there is ample evidence of Walmart's practices and policies concerning its workers, as well as empirical evidence of the adverse impact of these practices and policies on wages and other terms and conditions of employment. Accordingly, it is established that Walmart ruthlessly pursues a labour relations strategy designed to prevent unionisation of its workers and has done so successfully for its 1.3 million workers (out of 2.1 million) located in the USA. This stands in contrast to other US retailers and has an impact on the wage levels of Walmart workers, who earn 12.4% less than workers for other retailers and this effect eventually spreads to other retailers.

⁶⁰ RBB report 2411; RBB Response to Genesis p 2532 at p 2550-2552, 2560

⁶¹ Workers in its UK-based store operations also enjoy no collective bargaining rights.⁶²

47.2. Neither Pattison nor Bond were authorised or able to contradict the evidence in the record of US employment policies and practices, and their bald and self-serving denials should be rejected.⁶³

48. The merging parties in their evidence at the hearing would provide no firm enforceable commitments regarding labour and employment issues and merely ask the Tribunal to accept their bald denials or say-so⁶⁴ that Walmart's global reputation for poor labour relations will not be imported into South Africa through the merger.⁶⁵

48.1. Walmart introduced a methodologically flawed study at the eleventh-hour at the hearing which has neither a credible evidentiary basis nor probative value given the myriad criticisms levelled at its underlying data and methodology by Jacobs⁶⁶ regarding the need for independent analysis and verification of the integrity of the data underpinning and methodology used to arrive at its surprising conclusion that

⁶¹ Transcript page 3860; Bernhardt witness statement page 2771; Jacobs witness statement page 2780

⁶² Transcript pages 3498 – 3511

⁶³ Transcript page 3358 at lines 4-18; page 3522 at lines 1-11

⁶⁴ Commission's report page 2304

⁶⁵ Transcript pages 3290 - 3292

⁶⁶ Ex E; transcript pages 3290 - 3292

Walmart wages are higher than those secured for workers under union contracts.

- 48.2. To highlight just one aspect of this study's flaws: it purports to compare starting wage rates at Walmart and under applicable union contracts in three urban areas in the USA. Leaving aside for now the other identified defects in the rates used, the study then compares maximum wage progressions that are at the discretion of Walmart store management and not guaranteed to any employee with wage progressions that are guaranteed by operation of seniority and continued tenure under the union agreements.
- 48.3. While it may be true that a worker at Walmart could earn up to the maximum identified, no data was provided to the Tribunal as to the number of Walmart's 1.3 million US-based employees (or even the number in the three urban areas identified) who actually have secured each and every one of these possible discretionary wage increases.
- 48.4. Without this data showing the distribution of Walmart workers along this possible wage progression, the comparison is of little utility and even less evidentiary weight. It certainly cannot be relied upon to support the

conclusion advanced by the merging parties that it shows real or actual wage progressions of Walmart workers in three locations when compared with those of union workers.

48.5. As a result, the Total Employment Opportunity document should be accorded no weight or consideration by this Court in favour of the evidence submitted by SACCAWU about the real erosion and denial of wages to retail workers as a result of Walmart's business model that requires labour cost reductions to subsidise the EDLP brand promise given the large contribution of the wage bill to Walmart's overall costs, like any other retailer.

49. The possible implementation of Walmart's approach at Massmart raises the issue of how the foreseeable risk that Walmart cuts and retards real wage growth in the retail sector as a product and necessary component of its business model should be evaluated in the South African labour market. SACCAWU submits that this risk is not remote and is not weakened by the existence or operation of local labour laws.

49.1. As set out in the Genesis report⁶⁷, scope exists for the merged entity to downgrade the terms and conditions of its

⁶⁷ Genesis report pages 3206 - 3212

workers without violating the applicable labour laws or collective bargaining agreements, and therefore without recourse by SACCAWU or workers.

49.2. Pattison confirmed that SACCAWU currently enjoys recognition within certain Massmart businesses even though its membership numbers fell below the statutory threshold for such recognition.⁶⁸ Despite its proffered condition to continue recognition, the merged firm could refuse to continue this arrangement without violating any legislative provision and this would result in the downward variation of the terms and conditions of employment for its workers stripped of collective bargaining rights.

49.3. Given the fact that labour costs are a large component of overall expenses in retail and therefore an obvious target for cost cutting, an area already identified by Walmart in its due diligence, the imposition of conditions to structurally guard against the downward variation of workers' terms and conditions of employment post-merger and following the expiration of existing collective bargaining agreements is appropriate and required in such circumstances. This is addressed below.

⁶⁸ Transcript pages 3290 - 3291

50. The merging parties make a related claim that the merger will create jobs but, tellingly, acknowledge that “[w]hilst it is premature to predict with any degree of certainty the degree to which the implementation of the proposed transaction will translate into actual job creation in South Africa, Walmart’s aforementioned track record, coupled with Massmart’s stated intention to expand within the South African retail market, are anticipated to have a positive impact on employment considerations (i.e. job creation).”⁶⁹

50.1. But if the merger is understood from the merging parties’ own submissions, Walmart’s investment will only “enable the merged entity to implement Massmart’s pre-existing expansion plans with more confidence and on an expedited basis as the merged entity will be able to draw on the skills, systems and processes already developed, tried and tested by Walmart”.

50.2. The pre-existing expansion plans, summarised as “expanding the Massmart business by approximately 20% over the next 3 years, building at least 3 new Distribution Centres and expanding into a number of African countries,” all, barring the construction of distribution centres, appear to be achieved through acquisition and not new store

⁶⁹ Record page 135

openings. It is therefore not clear precisely how many jobs the merger creates in the sector, as opposed to merely shifting those workers from their erstwhile employers to the Massmart payroll following acquisition.⁷⁰

50.3. In his 28 October 2010 response to enquiries from the Economic Development Department, Massmart's CEO stated that Massmart sees "no anticipated reduction in employees in the short term and store level employees should increase at the same rate as space growth of 20% over the next three years" (emphasis added).⁷¹ This is hardly sufficient commitment to job creation and amounts to nothing more than speculation.

51. At the conclusion of oral argument before the Tribunal, the merging parties tendered undertakings that subsequently became the conditions ordered by the Tribunal. However, these do not adequately address the foreseeable adverse effects of the merger on labour and employment. In this appeal, SACCAWU seeks two further conditions (and the modification of others, set out below):

51.1. The imposition of group centralised bargaining; and

⁷⁰ Record page 107; see, for example, Pattison witness statement page 2358 para 3.4 where Massmart's growth "story" is achieved through acquisition and it is unclear how many new stores are merely acquired and re-branded as one of the Massmart divisions, or whether these are stores that are newly built or developed.

⁷¹ Record page 219

51.2. The creation of a closed or agency shop arrangement at the merged firm.

52. The other demands made by SACCAWU, while important and pressing, could be the subject of future collective bargaining between the merged firm and union within an improved structured relationship.⁷²

Group centralised bargaining

53. Group centralised bargaining would enhance SACCAWU's bargaining power with the merged firm which is likely to deploy Walmart's sophisticated labour relations strategies for a union-free workplace with low cost labour.

53.1. The integration of the firms includes the transfer of knowledge and strategies on human resources, including presumably Walmart's expertise at union-busting, and the union's status and (troublingly) its tenure under collective bargaining and recognition agreements was a subject of deliberate enquiry by Walmart during its due diligence. This was a menacing sign in light of its track record of opposition to and avoidance of unions and collective bargaining

⁷² See Jacobs witness statement page 2780 para 3; Lichtenstein witness statement pages 2766 – 2769 at para 9; Logan witness statement pages 2726 - 2731 paras 3-9; Luce witness statement pages 2831 - 2834 paras 2.16-2.24; Mbongwe witness statement pages 2869 – 2877 at para 7; LRS witness statement pages 3036 - 3037, 16, 19-22, 25-27

agreements.

53.2. Assurances of strict compliance with applicable labour law would not prevent the degradation of the organisational rights and protections currently enjoyed by Massmart workers. This is so because the real conditions and rights of workers can be undermined by aggressive anti-union business practices that do not necessarily go all the way towards violating the LRA and because of the weakness of the labour inspectorate to monitor compliance (a subject of negotiation currently at Nedlac⁷³).

53.2.1. Walmart's systematic and deliberate violation of the applicable labour and employment laws, although denied by the company, is overwhelmingly evident in the USA and includes the theft of wages from its associates through systemic wage and hour violations, race and sex discrimination, immigration rights issues, disability rights issues and labour standards.⁷⁴ In addition, its adverse effect on wages and job creation has been established repeatedly.⁷⁵

⁷³ Mbongwe supplementary witness statement page 2878

⁷⁴ See Bernhardt witness statement pages 2773 - 2775, Logan witness statement pages 2726 - 2731, Luce witness statement pages 2829, Nova witness statement pages 2811 - 2818, Lichtenstein witness statement page 2764

⁷⁵ See Jacobs witness statement page 2780

53.2.2. Walmart's opposition to pending legislation in the USA designed to protect workers' rights to organise and freedom to associate in trade unions, the US Employee Free Choice Act, is the latest example of the firm's commitment to undermine unions.⁷⁶ While Walmart responds to the critics of its anti-union tactics by claiming to be a staunch proponent of freedom of association, its opposition to this piece of legislation reveals the company's true position of opposing the trade union movement with its claimed commitment to freedom of association as a poor disguise for this reality.

53.2.3. Walmart's interest during the due diligence undertaken into Massmart's operations in its high investment in labour, perceived overstaffing and perceived difficult labour relations all provide a credible basis to SACCAWU's fear that while Massmart post-merger will adhere to the bare minimum required of it as an employer, the real erosion of the rights of Massmart workers to unionise and collectively bargain will occur.

⁷⁶ SACCAWU acknowledges that this Court does not have jurisdiction to order such a condition, and included it in solidarity with Walmart's 1.3million US-based workers denied their right to organise.

53.2.4. The conditions proposed by SACCAWU for a closed shop at Massmart, coupled with group centralised bargaining, strengthen the partnership between organised labour and management on which the South African labour law regime rests. These proposed conditions are addressed below.

53.3. The only criticism levelled by the merging parties' economic expert at these arguments is to reduce company-union bargaining relationships to a simple mathematical model at odds with evidence that, in the same economic context, different firms can achieve different outcomes in their labour relations.⁷⁷ As a result, all that this Court is left with is the merging parties' denials and unenforceable undertakings that they will not engage in the erosion of these rights and conditions of workers if the merger is approved. This is insufficient to address the substantial public interest concerns identified by SACCAWU and meaningful enforceable conditions that structurally protect the collective rights of Massmart workers are required here.

53.3.1. Group centralised bargaining recognises that control of Massmart's Board rests with Walmart following the

⁷⁷ RBB response to Genesis p 2552

implementation of the merger (and the merged firm's likely centralised management and trading practices)⁷⁸ and Walmart's stated intention to consider standardising labour and management practices and procedures across the Massmart group of companies.⁷⁹

53.3.2. This would produce asymmetry in the bargaining relationship between Massmart management and SACCAWU in that the former would enjoy a centralised overview of the organisation that would inform its collective bargaining strategy, while the latter would remain blinkered in separate operational silos within the Massmart group of trading brands.

53.4. The public interest concerns raised by SACCAWU can only be adequately addressed with something more than the merging parties' undertaking to observe existing agreements.⁸⁰

53.5. Walmart's due diligence report on Massmart's operations indicates a determined strategy to amend labour contracts if necessary and "establish a new model" with respect to staffing and with an intention to reduce costs related to

⁷⁸ Record pages 7503 - 7504

⁷⁹ Record page 7624 (indicating that this would complicate integration with Walmart)

⁸⁰ SACCAWU supplementary summary of evidence annexures R to X record pages 2937 - 3029

labour.⁸¹ SACCAWU submits that the first signs of this new model have already been introduced by Massmart through its unilateral restructuring culminating in the 2010 retrenchments.

53.5.1. The conclusion of an agreement with the Massmart employees in the Nelspruit stores which by-passed the union which was then simultaneously engaged in national negotiations regarding retrenchments (and thereby undermined the organisational rights of those workers) is another example of the importation of the Walmart culture of anti-unionism into Massmart even ahead of the merger. So too the dismissal of workers at the Silver Lakes facility.⁸²

53.5.2. Pattison's testimony⁸³ that this was an error is insufficient to dispel this inference, particularly in light of the fact that he did nothing to correct the situation, such as cancelling or rescinding the agreement.

53.5.3. At the same time as the unilateral Nelspruit agreement was being concluded, the Massmart Board recorded

⁸¹ Record page 7812

⁸² Record page 6918, SACCAWU supplementary summary of evidence annexure F; record pages 3347 – 3350 and 3848 (regarding Silver Lakes)

⁸³ Record pages 3347 - 3352

that its relationship with SACCAWU had changed and deteriorated, providing credence to SACCAWU's identified concerns.⁸⁴

54. Probably correctly, the merging parties' experts, RBB, do not seek to defend Walmart's reputation on employment. As such, the only point made by RBB in respect of employment is that no justification beyond Walmart's more aggressive stance with unions is provided for why there should be any change in the factors that have resulted in the current bargaining equilibrium between Massmart and the unions. Whilst RBB argue this is unsatisfactory from an economist's perspective, this is to relegate economics, and more importantly firm behaviour, to a mechanical solution to mathematical optimisation equations.

55. The reality is that firm culture and strategy do influence these interactions with firms in the same industry and same country adopting very different labour relations models and/or business strategies (which in turn result in different cost models that may impact employment relations). For example, Walmart itself has chosen to compete in retail through its EDLP strategy which may necessitate shaving the significant cost drivers of the business, namely labour and the supply chain.

⁸⁴ Record page 6929

56. The inevitable shift in the merged firm's culture and strategies to mimic and adopt Walmart's labour relations policies and practices must be combatted at group level, with the structural shift to a centralised bargaining forum with SACCAWU.

Closed shop

57. The second additional condition sought by SACCAWU is the imposition of a closed shop⁸⁵ within the merged firm. This ensures and enhances the resources and capacity of the union to bargain with the merged firm. Coupled with group centralised bargaining, such a condition would safeguard against the downward variation of terms and conditions of employment and prevent the implementation of anti-union strategies.

58. Neither group centralised bargaining nor a closed shop will place a competitive constraint on the merged firm or produce unacceptable asymmetry between it and its competitors. Other large retailers currently bargain under such measures. The additional two conditions proposed by SACCAWU carry no cost or burden if the merging parties' undertakings and protestations about their attitude to labour relations are genuine and accepted in their letter and spirit.

⁸⁵ See section 25 of the Labour Relations Act 66 of 1995 where such an arrangement is regulated to protect and advance the socio-economic interests of employees.

Pre-merger retrenchment and retrenchment moratorium

59. The final aspect of the labour and employment concerns raised by the merger is the conditions related to the pre-merger retrenchments of workers for which SACCAWU seeks reinstatement or reemployment⁸⁶ and the terms of the retrenchment moratorium.

60. As a preliminary matter, it should be noted that these retrenchments are still under challenge by SACCAWU in the labour courts⁸⁷ and the matter has not yet been definitively resolved, as Massmart claims. Regardless of the outcome of that challenge, it is probable that the retrenchments were motivated, at least in part, by Massmart undertaking a unilateral restructuring as a part of its jostling for position as the primary target for acquisition by Walmart in South Africa.

61. The chronology (attached as Annexure A) of the relationship between the merging parties demonstrates that, from Massmart's perspective⁸⁸, its strategic orientation from at least February 2009 -- when it signed a confidentiality agreement with Walmart for the exchange of commercially sensitive information -- was to ensure its

⁸⁶ See section 193 of the Labour Relations Act 66 of 1995 where such remedies are described.

⁸⁷ SACCAWU supplementary summary of evidence annexures A, B, J

⁸⁸ SACCAWU submits that Walmart's view on the retrenchments and reengineering are irrelevant since they were not the employer at the time these decisions were made and these strategies adopted.

acquisition as the preferred target of an international retailer. Its reengineering and adoption of the Walmart model of distribution and targeting of workforce flexibility at the same time, which resulted in a total of 574 dismissals and the replacement of those workers with a greater number of labour broker-sourced non-full time equivalent positions, was in pursuit of this strategy.

62. Massmart was identified as a target for acquisition by Walmart in August 2009 and this possibility was prominent within strategic decisions by Massmart from then on, including motivating its shift into food retailing.⁸⁹ Emails exchanged between Walmart and Massmart ahead of the retrenchments reveal Walmart questioning Massmart's management on its decision not to focus its expansion plans on entry into the food retail market and Massmart identifies the streamlining and expansion of its operations as one that has the added attraction of mirroring the operations of global retailers, including Walmart, who might seek to enter South Africa.⁹⁰

63. In addition, the elimination of these full-time workers (who are union members) served the secondary purpose of weakening SACCAWU, since the replacement workers are not eligible for union membership.

⁸⁹ Record pages 5158, 5170, 5237, 5743, 6918, 8159, 8169 - 8170, 713, 256, 822; Annexure A Chronology

⁹⁰ Annexure A

64. The merging parties argue that the retrenchments were solely as a result of claims of overstaffing in regional distribution centres and store consolidation in Nelspruit, but this cannot be credited when the proper inferences are drawn from the evidence in the record of the deepening strategic relationship between the merging parties.⁹¹

65. This reengineering also demonstrates that Massmart operates strategically from a group perspective, and SACCAWU should meet its management for collective bargaining purposes at that same level. Group centralised bargaining would facilitate more meaningful dialogue between the parties, including around other issues highlighted by SACCAWU's position on the merger. For example, resolution concerning issues such as employment mobility and flexibility at Massmart, and the parity of compensation packages between divisions, is more likely at a group centralised bargaining forum rather than in negotiations in atomised, myopic business divisions.

66. As the Tribunal clearly laid out in the DCD/Globe Engineering decision⁹², the impact on labour that occurs directly as a result of the merger negotiation process is considered merger-specific and should be considered by the Tribunal in examining appropriate conditions to the merger itself.

⁹¹ Record pages 3307 – 3308 and 3310

⁹² *DCD Dorbyl (Pty) Ltd/Globe Engineering Works (Pty) Ltd* CT Case No 108/LM/Oct08

66.1. The evidence in the record confirms that

66.1.1. Massmart sought a relationship with Walmart since 1990 which deepened in February 2009 when the two firms executed a confidentiality agreement for no reason other than to explore the acquisition of Massmart by Walmart.⁹³

66.1.2. This two-year relationship prior to the announcement of any offer by Walmart for Massmart's business began with the reciprocal confidentiality undertaking signed on 2 February 2009⁹⁴ concluded because the merging parties "wish to explore the potential for a business relationship and for this reason will enter into informal discussions" and that "[a]s part of these discussions the [merging parties] may disclose certain of their confidential and proprietary information" "for the sole purpose of evaluating [confidential information] to determine their respective interests in a mutually attractive business arrangement".

66.1.3. Massmart was identified as a target for acquisition by Walmart in August 2009 and this possibility was

⁹³ Annexure A

⁹⁴ Annexure A

prominent within strategic decisions by Massmart from then on, including motivating its shift into food retailing.⁹⁵

66.1.4. Emails exchanged between Walmart and Massmart ahead of the retrenchments reveal Walmart questioning Massmart's management on its decision not to focus its expansion plans on entry into the food retail market and Massmart identifies this expansion of its operations as one that has the added attraction of mirroring the operations of global retailers, including Walmart, who might seek to enter South Africa.⁹⁶

66.1.5. The timeline established in the record of the merging parties' close relationship and Massmart's corporate decision to actively conduct its operations so as to attract an offer for purchase from Walmart make clear that the retrenchments are not disconnected from the merger, preparation for which was occurring at the same time.⁹⁷ It is simply incredible for Massmart to claim that its increasing scrutiny by Walmart from 2009 and throughout 2010 had no effect on its unilateral

⁹⁵ Record pages 5158, 5170, 5237, 5743, 6918, 8159, 8169 - 8170, 713, 256, 822

⁹⁶ Annexure A

⁹⁷ Mbongwe witness statement pages 2852 – 2861 at para 4; LRS witness statement pages 3030, 3033 – 3036 and 3051 - 3053

decision to restructure its Massdiscounters division in 2010.

66.1.6. Walmart's documents provide a complementary picture from 2009 until 2010 and are supportive of the inference that Massmart's management must have known it was a favoured target for acquisition and should continue to position itself accordingly in its confidential dealings with Walmart.⁹⁸

66.1.7. In a Board of Directors presentation on 25 September 2009, Massmart was recorded as a "priority target" in Walmart's international mergers and acquisitions strategy.⁹⁹

66.1.8. By 19 November 2009, Massmart was recorded as Walmart's "preferred partner."¹⁰⁰

66.1.9. By 3 March 2010, Walmart was "actively [pursuing] an acquisition in South Africa"¹⁰¹ with an "M&A meeting in late February" and "executive trip in March". The deal had also acquired a project name (Project Memphis)

⁹⁸ Record page 286; transcript pages 3324 - 3326

⁹⁹ Record page 297

¹⁰⁰ Record page 302

¹⁰¹ Record page 309

by this date.¹⁰²

66.1.10. The update of 2 June 2010 recorded that Project Memphis was progressing in that “Massmart CEO and CFO visited Bentonville and the UK in May”¹⁰³ and that on this visit these executives “reconfirmed [their] strong interest in a sale to [Walmart]”.¹⁰⁴ Walmart intended to “[c]omplete preliminary strategies for Real Estate and Black Economic Empowerment [and] confirm Massmart as [the] exclusive target, finalise valuation and submit non-binding offer”.¹⁰⁵

66.1.11. A tentative timeline was also established that sought completion of the transaction by the end of 2010.¹⁰⁶

66.1.12. In September 2010, Massmart was still Walmart’s priority and preferred target¹⁰⁷ which “has expressed strong interest in an acquisition by Walmart”¹⁰⁸ and earlier discussions with Massmart’s management regarding its price for acquisition are recorded.¹⁰⁹

66.1.13. Massmart’s internal documents show that its strategy,

¹⁰² Record page 310

¹⁰³ Record page 316

¹⁰⁴ Record page 318

¹⁰⁵ Record page 319

¹⁰⁶ Record page 320

¹⁰⁷ Record pages 330 and 333

¹⁰⁸ Record page 331

¹⁰⁹ Record page 333

by 15 April 2010, was to grow its food or grocery offering because, in part, “[a]ll the major global retailers who have the potential to enter Africa through acquisition have significant food retail businesses.”¹¹⁰

66.1.14. On 26 September 2010, indicative non-binding terms in respect of a potential offer for shareholding in Massmart was circulated ¹¹¹ which referred to “discussions between members of management” of the merging parties.

66.2. The chronology of the courtship of the merging parties is also set out in the numerous emails exchanged by them.¹¹² These confirm and provide an evidentiary basis for the contention by SACCAWU that Massmart’s management, while being aware that it was not yet the exclusive target of Walmart’s expansion and acquisition strategy into South Africa, knew that the group certainly was a preferred and priority target.

66.2.1. The testimony of Pattison that his visits to Walmart were in the ordinary course of business and akin to other visits with global retailers in other markets cannot

¹¹⁰ Record page 2692; transcript pages 3722 - 3723

¹¹¹ Record pp 2792-2803

¹¹² Record pages 4255 - 4276

be credited.¹¹³ This Court should find that there is indeed “causality” and not mere “correlation” between the retrenchments and the advancing of the merging parties’ acquisition negotiations.¹¹⁴

66.2.2. Evidence of the advanced preparation by Massmart for an acquisition offer from Walmart, such as instructing its deal advisors to prepare a valuation and transaction roadmap, confirms that this version should be rejected.¹¹⁵

66.3. Specifically, Walmart’s Mergers & Acquisitions Update of 3 June 2009 records that Massmart’s “management [is] actively seeking [a] strategic partner.”¹¹⁶

66.4. In an update dated 24 September 2009, Walmart recorded that it met with Massmart “as part of country visit in August.”¹¹⁷

66.5. In a Board of Directors presentation the following day, 25 September 2009, Massmart was recorded as a “priority target” in Walmart’s international mergers and acquisitions

¹¹³ Transcript pages 3319 - 3722, 3330 - 3333; Record page 5158

¹¹⁴ Transcript page 3329

¹¹⁵ Transcript page 3341 - 3346

¹¹⁶ Record p 2629

¹¹⁷ Record p 2636

strategy.¹¹⁸

66.6. By 19 November 2009, Massmart was recorded as Walmart's "preferred partner."¹¹⁹

66.7. By 3 March 2010, Walmart was "actively [pursuing] an acquisition in South Africa"¹²⁰ with an "M&A meeting in late February" and "executive trip in March". The deal had also acquired a project name (Project Memphis) by this date.¹²¹

66.8. The minutes of a Massmart Board meeting on 26 September 2010 records the growth of the relationship between the merging parties since 1990.¹²²

66.9. Massmart's 3 year strategy document for 2011 to 2013, dated May 2010¹²³, and, for example, Masscash's strategy document from that same strategic review period¹²⁴ makes clear that Massmart's growth will be through the acquisition of independent retailers with the sites, skills and sales desired - "we will pursue an acquisition strategy in order to gain critical mass quickly and acquire the retail skills needed. Thereafter we will commence an aggressive roll-

¹¹⁸ Record p 2647

¹¹⁹ Record page 2653

¹²⁰ Record page 2659

¹²¹ Record page 2660

¹²² Record page 2804

¹²³ Record pages 2807-28

¹²⁴ Record page 2829-2948

out programme using the regional support structures.”¹²⁵

66.10. This sampling of just some of the documents before the Tribunal demonstrates how Massmart has been positioning itself as a target for acquisition, and acquisition by Walmart in particular for many years, predating the 2010 retrenchments and unilateral restructuring.

66.10.1. The merging parties shared detailed, confidential and strategic information with each other with the aim of Walmart acquiring control of Massmart. This included information about the collective bargaining agreements in place with SACCAWU and, most disturbingly, their remaining effective term. The details of the future expiration of these agreements were specifically requested by Walmart.¹²⁶

67. Accordingly, the evidence shows that the 2010 retrenchments were part of this courtship process. The merging parties’ denial of this inference cannot be credited. Even taking the merging parties’ testimony at its height, all it establishes is that Walmart was considering other markets and other targets within the South African market and that the Massmart acquisition process only

¹²⁵ Record page 2838, 2939

¹²⁶ Annexure A

accelerated to a state of exclusivity in September 2010.¹²⁷ This does not reduce the reasonableness and probability of the inference that Massmart knew that it was a potential, even favoured, acquisition target, that its business was under scrutiny and that its unilateral restructuring would enhance its prospects of acquisition by Walmart.

67.1. The merging parties' response to EDD¹²⁸ confirms this. In that document, the merging parties attempt to divorce the restructuring and resultant retrenchments from the acquisition process, thereby achieving the distinct and strategic goal that cannot be countenanced by this Court, namely the avoidance of scrutiny by the competition authorities and circumvention of any likely prohibition of retrenchments following the anticipated approval of the merger.

67.2. These retrenchments also provide worrying confirmation that Walmart's anti-union attitude has already been adopted by Massmart¹²⁹ given that the retrenchments targeted full-time workers who are the group of workers who are eligible

¹²⁷ Transcript pages 3315-3320, 3335, 3337 - 3338. The disingenuous handling of the notification of SACCAWU and COSATU leaders of the merger exacerbates the incredibility of the merging parties' version. Transcript pages 3337 - 3341

¹²⁸ Record page 216

¹²⁹ Mbongwe supplementary witness statement and annexures p 2878

for union membership at Massmart.¹³⁰

68. To address this misconduct by Massmart, and its disingenuous handling of the union's notification of the merger,¹³¹ SACCAWU seeks the reinstatement or reemployment of all retrenched workers.

68.1. Pattison testified that the workers could not return to their employment at Massmart because there were different terms and conditions of employment in force across the Massmart group of companies and these individuals might not return to the same employment regime as they had occupied before their retrenchment.¹³²

68.2. When questioned about his willingness to merely offer employment on potentially different terms and conditions to the retrenched workers, without accepting any obligation to return them to work at Massmart on the same terms and conditions, but rather to leave it to those individuals to decide whether or not they would be willing to accept employment in such altered circumstances, Pattison simply refused to entertain this proposal without suitable explanation.¹³³

¹³⁰ Transcript pages 3848 - 3858; SACCAWU supplementary summary of evidence annexure A

¹³¹ Mbongwe witness statement pages 2852 – 2861 at para 4

¹³² Transcript pages 3308 - 3310

¹³³ Transcript pages 3307 - 3313

68.3. This refusal is all the more objectionable when one considers the merging parties' touting of Massmart's expansion plans over the next three years. Pattison confirmed that Massmart intended to grow its operations by 20% in space over the coming three years.¹³⁴

68.4. The merging parties have not adequately explained why the dismissed workers should not be reemployed in the positions that will be created by such growth. SACCAWU therefore seeks the restoration of these workers' employment at Massmart as a condition in the event that this Court approves the merger.¹³⁵

69. The Tribunal's current conditions must be strengthened and modified in two ways:

Reinstatement or reemployment of 574 workers

69.1. The accurate number of affected workers who were dismissed pre-merger is 574 not 503 and any relief must redound to all of these workers.

69.2. These workers should be reinstated or reemployed, and not merely afforded preferential status on future recruitment,

¹³⁴ Transcript pages 3296 - 3302

¹³⁵ Mbongwe witness statement pages 2852 – 2861 and 2869 - 2877 paras 4, 7

which is already a legal obligation imposed on the merging parties in terms of the LRA.

Retrenchment moratorium

69.3. The retrenchment moratorium condition cannot exclude unreasonable refusals to be redeployed since the Tribunal erroneously concluded that the likelihood of such redeployment occurring was less than in the *Metropolitan/Momentum* merger¹³⁶.

69.4. Given the dispersion of the merged firm's operations, such a carve-out from the relief sought by SACCAWU is unjustified and should be deleted from the condition.

70. SACCAWU submits that the merger adversely impacts on the supply chain industries and firms and that its prohibition, *alternatively* the imposition of appropriate conditions, is warranted on these grounds as well. Set out below are the adverse effects identified by SACCAWU on the supply chain industries and firms and proposed remedies to address these.

¹³⁶ *Metropolitan Holdings Limited and Momentum Group Limited* CT Case No 41/LM/Jul10

ADVERSE IMPACT ON THE SUPPLY CHAIN

71. SACCAWU is concerned with the effects of the merger on the supply chain to the merged firm since all of the competition and public interest concerns raised in these proceedings are rooted in the effects of Walmart's buying power and unique business model, which –

71.1. is monopsonistic in that it removes effective countervailing power from suppliers when negotiating price with the merged entity, even for a small proportion of a particular supplier's sales.¹³⁷ The merging parties acknowledge that "Walmart's size gives the company several advantages over smaller competitors, including bargaining power with the manufacturers and economies of scale in distribution systems"¹³⁸;

71.2. intervenes in the strategic business management of suppliers, forcing them to retrench workers, reduce wages, compromise product quality and safety, retards innovation and increases concentration in the retail sector and supply chain because smaller firms cannot compete and are

¹³⁷ Lichtenstein witness statement pages 2754 – 2761, paras 3-5; Lynn witness statement page 2787, para 2.2; Mbongwe witness statement pages 2861 – 2867, para 5

¹³⁸ Bond witness statement page 2701

forced to close as a result.¹³⁹ Massmart acknowledges that “[t]he proliferation of such warehouse and superstores [as operated by Walmart and its UK subsidiary ASDA] has contributed to the continuing disappearance of smaller, local grocery stores”¹⁴⁰;

71.3. creates the so-called waterbed effect in which suppliers are forced to charge other customers more in order to recover the costs of doing business with Walmart. This raises the input or inventory costs to Walmart’s retail competitors, makes import substitution more attractive and exacerbates the adverse effects these firms suffer from Walmart’s undercutting of their pricing in the retail space¹⁴¹; and

71.4. acknowledges that “another factor keeping the costs low at Walmart is its non-unionised labour. For [the] majority of supermarkets, labour (which constitutes 70% of overhead) is unionised.”¹⁴² This cost-saving device also undermines the organizational rights of workers.

72. The foreseeable effect of Walmart’s entry on competition in the

¹³⁹ Jacobs witness statement page 2780, para 3; Lichtenstein witness statement pages 2754 – 2761, paras 3-5; Lynn witness statement page 2787 para 2.2; Nova witness statement page 2808 – 2822, paras 3-6; Mbongwe witness statement pages 2861 – 2867, para 5

¹⁴⁰ Bond witness statement at page 2699

¹⁴¹ Lichtenstein witness statement pages 2754 – 2764, paras 3-7; Mbongwe witness statement pages 2861 – 2867, para 5

¹⁴² Bond witness statement page 2701

retail sector and its supply chain is a key issue to consider and determine. The experience of other countries¹⁴³ following Walmart's entry into their retail sector is telling in this regard.

73. The supply chain to the retail sector includes several distinct (and prioritised) sectors in the South African economy, including manufacturing, clothing and textile, agricultural, food- and agro-processing, paper, plastics and metal packaging and transport and logistics.

73.1. The supply chain includes large firms, such as the four large integrated food companies¹⁴⁴, who are likely to increase their reliance on imports in order to meet Walmart's price demands. These firms are also likely to close or reduce their productive capacity, with resultant retrenchment or downward variation in the terms and conditions of employment, as imports displace local production.¹⁴⁵

73.2. This effect is aggravated for SMME firms in the supply chain because of their inability to source goods globally at a

¹⁴³ Alvarez witness statement pages 2747 - 2752, paras 9-11; Bernhardt witness statement pages 2772 – 2776, paras 2.5-5.4; Jacobs witness statement page 2780 para 3; Lichtenstein witness statement pages 2754 – 2766, paras 3-8; Luce witness statement pages 2828 - 2829 paras 2.5-2.9; Lynn witness statement pages 2791 - 2793 para 3; Nova witness statement pages 2808 - 2823 paras 3-7

¹⁴⁴ Shoprite-Checkers, Pick 'n Pay, Woolworths and Spar

¹⁴⁵ Vlok witness statement pages 3084 - 3087 para 9, annexure 1; Scasserra witness statement pages 2736 - 2739 para 4; Mbongwe witness statement pages 2842 - 2852 para 3

competitive price and volume. This negative impact does not further the goals and purposes of the Act with respect to HDIs, transfer of ownership and economic development to benefit all South Africans.¹⁴⁶

74. Significantly, Massmart admits that “it is irrelevant to Massmart whether a particular product is locally manufactured, locally assembled with all or some foreign components or fully imported”¹⁴⁷.

74.1. While Massmart may be ambivalent and indifferent to the local supply chain, the Act requires that the the competition authorities be the very opposite, and actively consider the merger’s impact on local suppliers.

74.2. It is telling that the merging parties’ evidence is so lacking in both a willingness to consider conditions that could protect local suppliers, as well as any meaningful detail of the nature or scope of support that the merged entity could provide to these firms. This statement does not even clarify the nature or extent of Massmart’s current local procurement.

74.3. This opacity, if not obfuscation, appears to have

¹⁴⁶ Vlok witness statement pages 3084 - 3087 para 9, annexure 1; Mbongwe witness statement pages 2842 - 2852 para 3

¹⁴⁷ Pattison witness statement page 2364 para 6.3

characterised the merging parties' response to the Ministers' requests for information regarding local procurement as well.

74.4. Massmart's conclusion that any conditions regarding local procurement would place it at a competitive disadvantage cannot be adequately or properly assessed on the current record. The reluctance of the merging parties to place this information before the Tribunal, or provide it to the Ministers, seems to support only one conclusion – that it would not be helpful to the merging parties for this information to be scrutinised or analysed by these decision-makers. This is unfortunate since it hampers any meaningful section 12A analysis.

75. The Commission did not meaningfully consider the impact of the merger on the position of suppliers in its recommendation and report or the possibility of ameliorative conditions¹⁴⁸, such as those proposed to the Tribunal.¹⁴⁹

76. In addition, an understanding of the dynamics and conditions in the South African retail sector is relevant to assessing the strength of

¹⁴⁸ Vlok witness statement page 3083 paras 9-10, annexure 1; Scasserra witness statement p* 2733 paras 3-4; Mbongwe witness statement page 2835 para 6

¹⁴⁹ Mbongwe witness statement page 2835 para 7; LRS witness statement pp 7-8; Vlok witness statement p* 3083 para 11, annexure 2; Masemola witness statement page 3063 para 16; Mashilo witness statement paras 2-3; Khaas witness statement page 3222 paras 15-19; Levin witness statement paras 34-45

competition present in that market to counteract the effects of Walmart's power:

- 76.1. There are four large retailers who are likely competitors to the merged entity.¹⁵⁰ Not all of these target the same customers as the merged entity;
- 76.2. It is likely that these firms will adopt the self-same business models, and procurement practices (in particular to favour imports), in order to compete with the merged entity. This will result in increased pressure for cost cutting, both within their retail operations as well as on suppliers. It is foreseeable that this pressure comes with attendant job losses and the downward variation of terms and conditions of employment, as well as a negative impact on innovation, quality and safety of goods and increased costs for smaller retailers squeezed by the self-same suppliers while facing undercut prices in the retail space; and
- 76.3. The retail sector is likely to see increased concentration, a negative impact felt all the more keenly on the competitiveness of firms controlled or owned by historically disadvantaged persons. The Act's goals of the transfer of

¹⁵⁰ Masemola witness statement pages 3065 - 3082 paras 3-15; Mbongwe witness statement pages 2842 - 2852 para 3

ownership to such persons is undermined and barriers to entry are raised as global procurement and large scale purchases become the threshold requirement to enter and compete in the retail sector.

76.4. Smaller firms¹⁵¹ face a double threat –

76.4.1. At the retail level where they will be unable to match Walmart's pricing while maintaining their viability, which will result in the removal of these firms as competitors in the retail space, increasing retail concentration, reducing the competitiveness of HDI-controlled and -owned enterprises and retarding ownership transfer -- contrary to the purpose of Act and the goals of South African competition policy.

76.4.2. At the supplier level, these smaller retailers will likely face increased pricing or scarcity from suppliers attempting to recover their lost profits from Walmart sales.

76.5. The most vulnerable group of retailers, who are competitors of the merged entity on basic foodstuffs, is informal

¹⁵¹ Masemola witness statement pages 3065 - 3082 paras 3-15; Mbongwe witness statement pages 2842 - 2852 para 3

retailers¹⁵².

76.5.1. These entrepreneurs are recognised by the government's New Growth Path and IPAP2 policies as critical to the shift to a development-driven growth trend.¹⁵³

76.5.2. Informal retailers are often HDI-controlled – or –owned and their demise would undermine the Act's goals of enhancing the competitiveness of these enterprises and transferring ownership so as to reduce inequality.

77. Another related issue is the merged firm's aggressive promotion of private and own-label products alongside their branded equivalents, which is claimed to provide a higher margin stream of sales for the business and act as a source of countervailing power to the branded suppliers.¹⁵⁴

77.1. This is an opportunity for local suppliers to obtain the benefits of Walmart's experience and knowledge and enter the supply chain without concern for brand competition.

This type of growth provides the focus and scope of the

¹⁵² Mbongwe witness statement pages 2842 - 2852 para 3

¹⁵³ Mbongwe witness statement pages 2842 - 2852 paras 3, 5

¹⁵⁴ RBB report page 2430 para 4.3; Pattison witness statement page 2350 para 4.3 and page 2363 para 5.7; Transcript page 3388 111 lines 11-22; page 3636 357 lines 1-7; page 3606 lines 17-19 pages 2430 para 4.3; Pattison witness statement page 2350 para 4.3 and page 147 para 5.7; Transcript page 3388 lines 11-22; page 3636 lines 1-7; page 3606 lines 17-19

modified supplier development fund condition proposed and addressed below;

77.2. This also exploits the advantages of local supply conceded by the merging parties, namely that it makes “commercial sense” to procure locally¹⁵⁵;

77.3. Private and own-label provides an enhanced opportunity for smaller suppliers to grow on the back of Massmart private label volumes, without having to invest substantial amounts to develop, build and promote brands of their own, and without having to secure their own distribution networks.¹⁵⁶

78. The merging parties claim that the effectiveness and expeditiousness of Massmart’s expansion plans (including into private and own-label products) are likely to be significantly increased by the merger in that Massmart will be able to draw on Walmart’s significant global experience and capabilities in this field, in particular through a contribution to Massmart’s fresh produce merchandising and by sharing its cutting edge distribution and logistics capabilities with Massmart.¹⁵⁷

78.1. As set out in the Genesis report¹⁵⁸, the merging parties seek

¹⁵⁵ Pattison witness statement page 2350 para 6.8, 6.11; Transcript page 3382 lines 6-8

¹⁵⁶ RBB report page 2407 at page 2430 para 4.3; Transcript page 3414 lines 17 – page 3415 line 3

¹⁵⁷ Bond witness statement page 2639 par 54.2; Pattison witness statement page 2350 para 4.4

¹⁵⁸ pages 31-36

to argue that there are other benefits to the contemplated transaction that accrue to the advantage of the South African public interest, however these benefits are not merger-specific and this is not contested by RBB in its submissions.

78.2. The Tribunal has held on previous occasions¹⁵⁹ that if a merging party wishes to raise efficiencies in defence of a merger then these need to be merger-specific, quantifiable and verifiable¹⁶⁰ if they are to be accepted by the Tribunal in any weighing-up process undertaken by it in terms of section 12A. Whilst efficiencies and the standard for their acceptance is more commonly considered in the case of weighing up anti-competitive and pro-competitive effects, this standard remains relevant even in the weighing-up of public interest concerns and claimed gains. There is simply no reasonable rationale for accepting a lesser standard when the public interest concerns have been given such considerable weight in the Act by the legislature.

78.3. In addition, certain types of efficiencies are not considered

¹⁵⁹ *Trident Steel Limited and Dorbyl Limited* CT Case no 89/LM/Oct00

¹⁶⁰ *Ibid.* “The merging parties must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved, (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each efficiency would be merger specific. Efficiency claims will not be considered if they are vague and speculative or otherwise cannot be verified by reasonable means.”

under a total welfare approach. The Tribunal has held that mere transfers between other firms (e.g. suppliers) and the merging parties would not be considered¹⁶¹. Again, there is no reason that such a standard should not apply to similar transfers that impact on public interest, such as the transfers between labour and the merging parties here.

78.4. The merging parties' submissions on the benefits of the proposed transaction are vague and unsubstantiated, small by their own admission when considered in addition to the existing, non-merger specific expansion and efficiency driving strategy embarked upon by Massmart, and, where substantiated, are linked directly to the increase in imports which carries with it substantive public interest concerns.

78.5. The merger filing and subsequent communications by the merging parties purport to identify consumer benefits, worker benefits and supplier benefits. But, as discussed in the Genesis report¹⁶², these claimed benefits fail to identify the source of the efficiencies that should enable the reduction in prices, or to quantify how large these efficiencies will be.

¹⁶¹ Ibid

¹⁶² Genesis report at page 3213

- 78.5.1. The first and only concrete benefit associated with the claimed potential to reduce prices for consumers cited in the merger filing is that “Massmart will have access to Walmart’s global procurement services through Walmart’s global procurement network”¹⁶³, which is a proposed benefit that has considerable downside for the public interest.
- 78.5.2. Internally, Massmart itself acknowledges that the other cost advantages at Walmart stem from non-unionisation (labour practices) and bargaining power with suppliers. To the extent that consumer benefits come from mere transfers from labour or suppliers, then such efficiencies are not recognised by the Tribunal and further raise substantial public interest issues.
- 78.5.3. Aside from this concrete claim, all that is stated is that Massmart otherwise will have access to “Walmart capabilities and experience” which might enable Massmart to implement its existing strategy “more effectively and expeditiously”¹⁶⁴.

¹⁶³ Record page 121 at para 7.3.2 and page 133 at para 8.4.1

¹⁶⁴ Record page 121 at para 7.3.3

78.5.4. In their engagement with EDD¹⁶⁵ the same vague claim is made where, in respect of post-acquisition investment, Massmart make the claim that as a result of “access to Walmart collective skills and capabilities it would be reasonable to assume that Walmart would enable Massmart to deliver those plans with more confidence”.

78.5.5. Whilst there is some evidence of spreadsheet workings from Walmart on how sales and gross margins will be affected by direct imports, improved supplier terms and private label brands (mostly imported),¹⁶⁶ there is a telling absence of such workings for these other alleged benefits.

78.5.6. Not only are these extremely vague assertions, but the incremental benefit appears small even by the merging parties’ estimation. When asked of the expected efficiencies from the acquisition and how these will be achieved by EDD, Massmart states that there is “no reason to expect any changes other than a faster expansion” from the transaction.¹⁶⁷ The primary

¹⁶⁵ Letter dated 28 October 2010, dated 28 October 2010, record page 215

¹⁶⁶ Record page 8514 ; RBB report page 2407; record page 4392

¹⁶⁷ Letter dated 28 October 2010, Record page 215

conclusion from Pattison's evidence in his witness statement is simply that the benefit from the transaction will be a reduction in risk of failure in its expansion plans.¹⁶⁸

78.6. The conclusion must be that the real cost savings come from Walmart's bargaining power with suppliers, including its global sourcing network and associated labour practices, as Massmart itself identified in its review of retail formats.¹⁶⁹ This is the same conclusion that is drawn from SACCAWU's international witnesses that have studied the Walmart model in detail.

78.7. As Genesis explains in its report, aside from the size and source of consumer benefits claimed, their incidence is also ultimately relevant to any assessment of benefits and costs:

78.7.1. The vast majority of Massmart businesses service the higher LSM members of society who therefore will stand to gain disproportionately from any claimed consumer benefits. As outlined in the merger filing and Pattison's witness statement, Massdiscounters (Game and Dion Wired) serve LSM 5-10, Masswarehouse

¹⁶⁸ Pattison witness statement page 2350 para 4.5

¹⁶⁹ Record page 701

(Makro wholesale outlets) serves LSM 6-10+ and Massbuild (Builder's warehouse, Builders Express and Builder's Trade) serves LSM 6-10. Together these parts of the business constitute roughly R30bn in sales or 63.3% of total Massmart sales.

78.7.2. It is only the remaining 36.7% of Massmart which constitutes the Masscash business that serves the lower LSM categories. However, currently this is a predominately wholesale supplier to independent traders with a smaller retail element (which is set to expand) and it is acknowledged by Massmart that the wholesale business is unlikely to be materially affected by the Walmart acquisition¹⁷⁰.

78.8. The conclusion from this analysis is that whilst some lower income consumers may be impacted by the claimed benefits through the expansion plans of Massmart into food retail targeting LSM 2-6, any benefits from lower prices are likely to fall predominately to higher income consumers.

78.9. The merging parties make a number of additional claims about the benefit for Massmart employees, central amongst which is the growth of the company and associated

¹⁷⁰ Pattison witness statement page 2350 para 5.6

employment. However, it is apparent from the merging parties' own submissions that this potential benefit is not merger-specific because Massmart already has extensive expansion plans which it was acting on pre-merger and which are unchanged by the transaction.

78.10. The merging parties make a number of other claims such as Walmart's commitment to training which might benefit the workforce.¹⁷¹ However, such claims are vague and not quantified relative to Massmart's current commitment to workforce training. Nor is it substantiated whether available levels of training will in fact increase or will remain the same as under current Massmart management.

78.11. The distribution of claimed benefits and realised costs demonstrates a far more adverse effect on those members of society that the public interest provisions of the Act seek to protect. In terms of the potential beneficiaries of any claimed benefits made by the merging parties:

78.11.1. First, efficiency or cost savings are rarely fully passed onto consumers. This is also quite evident in this particular case through the workings spreadsheet of

¹⁷¹ Record page 133 para 9.1

Walmart¹⁷² that identifies increases in margins for the Massmart businesses through actions such as direct imports, improved supplier terms and own or private label brands. Some of these benefits clearly accrue to the shareholders of the business, including Walmart; and

78.11.2. Second, whilst Massmart does serve LSM2-10 consumers, the structure of its sales profile clearly indicates that the majority of sales are to LSM 5-10 who are already the more privileged members of society.

78.12. In terms of the potential losers from this merger, the Genesis report notes that:

78.12.1. First, the current (and future) employees of Massmart are likely to see an erosion of rights and wages/benefits. The average monthly wage for those employed in Massmart stores or its competitors was R2,755 placing the individuals occupying these jobs in the lower end of the LSM distribution.¹⁷³

¹⁷²Record page 8514

¹⁷³Statement by Labour Research Services, Record p 3030, and SAARF LSM demographics summary available at <http://www.saarf.co.za/>

78.12.2. The merging parties' attempts to denigrate the scheme of protection afforded by the Act to identified groups and interests should be dismissed. SACCAWU recognises that consumers would benefit from a reduction in prices, but the merging parties have failed to credibly show that this will follow from the implementation of the merger, from whence these reductions will come and that the concerns raised are baseless.

78.12.3. Second, with respect to the supply chain that is threatened, this similarly has a considerable concentration of lower paid and vulnerable employees and firms, in industries that have been identified as priorities for future labour-absorbing growth.

78.12.4. Further, the adverse effect of the use of Walmart's unprecedented countervailing power in the merged entity's dealings with its local suppliers raise concerns from the unions representing those workers.

78.13. SACTWU's witness statement¹⁷⁴ focuses on suppliers in the general merchandise category. This is potentially one of the most labour absorbing sectors in the economy and thus is a

¹⁷⁴ Vlok witness statement page 3083

priority focus of government.

78.13.1. Government has already demonstrated its commitment to supporting the clothing and textile industry with its controversial implementation of the Chinese quotas in 2007 when the clothing and textile industry was faltering under the barrage of cheap Chinese imports.

78.13.2. Government's stance portrayed the view that they regarded the survival of this industry and the jobs it provided as crucial to the country's development. SACTWU's supplementary representation outlines the profile of the workers in the clothing and textile industry. These are weekly-paid workers with at least five dependents earning on average R416.50 a week – very much low LSM. 66.7% of these workers are women and 94% are black representing the most vulnerable group in the nation.

78.13.3. Furthermore, the areas in which employees in the clothing and textile industry are employed are predominately in “non-metropolitan” geographic areas in South Africa – the precise areas which are being targeted by the New Growth Plan as areas for

economic development.

78.14. FAWU's witness statement¹⁷⁵ focuses on workers in the agricultural, food- and agro-processing sector. The New Growth Path recognises agriculture, food- and agro-processing and food products classified as manufactured goods, as sectors to be prioritized for job creation and economic growth. FAWU currently has 25 000 members in the primary agricultural sector (including fresh produce farmers or producers); 70 000 members in the food- and agro-processing and beverage manufacturing sectors; and additional members all through the value-chain. These are predominantly rural workers who have far more limited access to the Massmart/Walmart chain stores and are vulnerable to losing their jobs through forced cost reductions.

78.15. NUMSA's witness statement¹⁷⁶ and representations to the Commission during the course of its investigation similarly confirm the likelihood of job losses in local manufacturing, wage reduction and increase job insecurity for workers in the supply chain to Massmart.

¹⁷⁵ Masemola witness statement page 3063

¹⁷⁶ Mashilo witness statement page 3058

78.16. The analysis of the incidence of benefits and costs of the merger by Genesis demonstrates that those bearing the costs are predominately the more vulnerable individuals and industries whose interests have been given special weight and privilege under the Act, whilst the beneficiaries are largely individuals and industries that are not the focus of the Act's public interest provisions. This analysis was not upset by the merging parties at the hearing.

78.17. As such, under the standard for assessing benefits set by the Tribunal, the merger presents little firm evidence of substantial benefits being derived from the transaction that outweigh its costs to the vulnerable groups and interests identified in section 12A.

79. The Ministers' economic expert predicted 4,000 jobs lost if just 1% of the merged firm's procurement switched to imports.¹⁷⁷

80. RBB makes a number of criticisms of this estimation of job loss.¹⁷⁸

80.1. First, RBB argues the 1% number is not accurate but ignores that it was merely used to demonstrate the high loss of employment that even such a small shift to import procurement produces.

¹⁷⁷ Genesis report page 3201 para 2.4

¹⁷⁸ RBB response to Genesis at page 2550

80.2. Second, RBB argues that the weighting may overestimate the effect because food (which is more employment intensive) is given more weight yet it is likely to constitute less of imports. This observation is correct but this Court must note that RBB's own version also favourably assumes no food imports.

80.3. Third, the Ministers' expert acknowledged that upward bias was present but is small.

80.4. Fourth, RBB argues that the Social Accounting Matrix (SAM) and input-output tables are stylised and hence the predictions should be taken with caution. This is simply wrong. A SAM maps inputs and outputs by sector which is calibrated to the National Accounts and hence it can accurately calculate how many direct, but also indirect, jobs are involved in the output of any specific sector.

80.5. Finally, RBB seeks to argue that in the long run a number of other factors impact employment, when this has nothing to do with the short-term and forecasted impacts of the merger on employment.

81. None of these criticisms land a fatal blow to the Tribunal's correct conclusion that import substitution will occur. The only real debate

is around its extent. However, the two conditions proposed by SACCAWU ensure that, for the period of their duration (proposed to be at least 5 years), the overall South African supply chain will not see an erosion or decline in the Rand value of the merged firm's procurement spend, while enhancing their competitiveness through exposure to Walmart's competencies in supply chain development and enterprise management.

82. The following evidence clearly demonstrates that imports will increase:

82.1. The merger filing states that a buying efficiency benefit will accrue post-merger from global procurement services from Walmart's network of global procurement centres.¹⁷⁹

82.2. In response to a letter from EDD¹⁸⁰, Massmart states that a likely change in respect of product offering is that "Walmart will make available additional house brands that may be imported or sourced locally" and in respect of imports specifically, that "it is fair to state that direct imports will increase as private brands are increased and low value agents by-passed".

¹⁷⁹ Record page 2575 para 7.3.2.

¹⁸⁰ Record p 3578

82.3. The Walmart valuation model¹⁸¹ includes synergies stemming from increased direct imports. It also includes synergies from private label and improved supplier terms which may both involve imports. In a letter from the merging parties' attorneys on the supplier model,¹⁸² it is confirmed that the global sourcing toolkits will be utilised as indicated in the due diligence worksheets of Walmart¹⁸³, which indicates the valuation of Massmart includes enhanced private label, direct imports and enhanced supplier terms.

82.4. Walmart earns a fee for use of its global sourcing network of 5% on the Free On Board (FOB) price which gives Walmart an incentive to drive sourcing through its network¹⁸⁴.

83. The economic logic also clearly indicates that imports will increase regardless of the attempt by RBB to argue otherwise (a full critique of RBB logic is in the Genesis report and not replicated here):

83.1. As the single largest retailer globally, Walmart with sales of over \$400bn is many orders of magnitude larger than Massmart.¹⁸⁵ Walmart has multiple times more buyer power

¹⁸¹ Item 75 and 95 of the Discovery*

¹⁸² Record p 2470

¹⁸³ Record p 2496

¹⁸⁴ Item 43 of the discovery*

¹⁸⁵ Massmart total sales - Massmart Annual Report 2010. Record p 3355

than Massmart globally and hence should be able to negotiate better prices from suppliers in other countries.

83.2. Walmart has a global procurement network infrastructure that enables it to a) identify and source the cheapest products globally, and b) eliminate middlemen in the logistics chain. The extent of Walmart's global procurement network can be illustrated by its operations in Shenzhen. Walmart established a Global Procurement division (GP) in Shenzhen, China in 2002. This division is responsible for international procurement and employs approximately 1,400 employees working out of 28 offices in 24 countries. By 2010, it was estimated that the GP division would account for 30% of all Walmart's purchases.¹⁸⁶ The operation coordinates merchandise sourcing from more than 5,000 factories in 65 countries.¹⁸⁷ To reveal the extent of the magnitude of this, Shoprite currently employs 100 people to carry out its sourcing both internationally and nationally.

83.3. These factors must lower prices for imported goods and

¹⁸⁶ Brenner, A., B, Eidlin, L., Candaele. 2006. "Walmart Stores, Inc. A paper prepared for the International Conference: 'Global Companies-Global Unions-Global Research- Global Campaigns.'

¹⁸⁷ Ibid and these figures are for 2006 and have possibly increased substantially since. In fact, in a letter from EDD the figures are 1500 employees who source from 6000 factories. (Record 632 of the Witness Statements).

based on simple economic logic, lower prices from imports must result in some substitution of domestic goods. It is merely the extent of that substitution that is in question.

84. In response, RBB¹⁸⁸ plays down and tries to explain away internal documents that indicate an increase in imports post-merger, rather than properly conceding that imports will increase and contesting the extent and consequences of this increase. In this regard:

84.1. The primary theme from RBB is that the advantage for the merged firm is in disintermediation of import agents and nothing more. RBB is deliberately selective about what it responds to in the Genesis report, and more importantly, fails to avoid the conclusion that it is utterly implausible that Walmart's ability to get lower prices globally only results from disintermediation of import agents .

84.2. First, with no evidence whatsoever, RBB argues that the import impact will only be felt by a select group of purchases for a sub-set of products. It is not clear why this should be the case. The effect is potentially on all Massmart products.

84.3. Second, RBB argues that the inframarginal goods that are

¹⁸⁸ RBB report p 2407-2505; RBB (amendments and clarifications) p 2521-2531; RBB (response to Genesis) p 2532-2561; RBB (original report reflecting amendments and clarifications) p 2562-2638

likely to swing are those that are imported through intermediaries. Again, it is not clear why this need be the case. Whilst some of these may well be marginal it is not apparent why such goods should be the bulk or exclusive focus of shifts in procurement. It ultimately depends on a) how big will the price decrease be on a particular product and this will not be uniform across all products, and b) it also relies on some belief that any product close to the swing is already being imported – this is simply a very bold and baseless assumption.

84.4. Third, RBB criticises the logic of outside options impacting on domestic suppliers. However, this assumes the bargaining position always falls at the next best alternative for Massmart, when bargaining must also depend on what perceived outside options exist and how firms negotiate between the options of the buyer and seller. The merged firm has enormously enhanced (perceived and real) alternatives.

84.5. Finally, RBB seeks to point out potential contradictions around the extent to which competitors may respond to imports by Massmart depending on whether cost reductions are passed through to consumers or not. However, either

way it does not assist the merged firm: If there is no pass-through then there is no consumer benefit but less competitor response, and if there is pass-through then some competitor response could be anticipated.

85.RBB argues that the appropriate instrument to address supply chain concerns is industrial policy.

85.1. First, this ignores the Act's requirement that a transaction be independently justified in terms of the public interest, defined in section 12A(3).

85.2. Second, the analysis underpinning the economic policy of government is a concern that employment is not being created because consumption-led growth (often through imports) is hollowing out the domestic production capabilities of South Africa. Government is also concerned that South Africa is currently vulnerable to a surge in imports due to the overvalued exchange rate. It is for this reason that economic policy is being put in place to strengthen domestic production capabilities in order to make domestic manufacturing more resilient in the face of import competition and in particular future trade liberalisation events (such as the possible conclusion of the

Doha Round of WTO talks). The concern is that this specific merger transaction is akin to an abnormal trade liberalisation event at a point in time when economic policies are not yet in place or had the opportunity to make domestic manufacturing and agro-processing more resilient. Imposing conditions (or prohibition) would ensure that the proverbial horse has not bolted by the time such policies take effect.

86. Next, RBB argues that it is impractical to measure local content and hence conditions to address procurement are not implementable. This is argued on the basis of identifying the precise domestic value-add of every purchase by Massmart. However, local content provisions need not be that complex. For instance, if the specific level of local content is not at issue but merely whether a product has some domestic manufacturing or assembly, then measurement is considerably less complex. All one is measuring is the procurement value of products that fall into one of two categories. Determining the categories is also unlikely to be complex insofar as it is most likely to be relatively easy for Massmart to identify suppliers who are pure import agents (which it must do in any event in order to disintermediate), and for multi-product suppliers to inform Massmart which products they sell are pure imports.

Similarly, conditions in respect of small business or HDI firms only need identify the category of firm and then measure Massmart purchases from such firms.

87.A third criticism is that such a condition would impose an asymmetric constraint on Massmart that may have unintended and negative consequences for retail competition. Aside from the obvious observation that ultimately all merger conditions are asymmetric in nature, it is also apparent that a) it is not necessarily asymmetric in practice and b) there is unlikely to be any negative consequence for competition.

87.1. First, under the current local content of Massmart purchases, it is apparent that Massmart is competitive against the other retailers. In terms of the expansion plan, Massmart intends moving more into food which on its own evidence is almost exclusively domestically procured. As such, local content levels should not constrain the current or future expansion of Massmart. This applies equally to any condition against purchases from SMEs or HDI firms.

87.2. Second, it is the evidence of the merging parties that local content sourcing is highly unlikely to change post-merger and hence by implication they do not foresee a loss in

competitiveness as a result of continued local content sourcing to the same levels in future. It is also the evidence of the merging parties that they will seek to develop local suppliers for local sourcing and exports. As such, all that this condition does is provide a quantifiable and verifiable commitment to that vague undertaking.

87.3. Third, a condition that merely maintains a local content percentage in general or even at a product category level, actually provides enormous flexibility to the merging parties in terms of selecting which products to import and which to source domestically as each category contains literally thousands of products. As such, the merging parties can import products where there is scope for deep cost reductions and switch to domestic procurement where there is only a small benefit from current import practices. In essence, procurement that is more aligned with local comparative advantage. This will not constrain their ability to be agile and choose to respond to competition. Of course, the condition must be crafted so as to prevent expanded food procurement (which is predominantly locally supplied) from disguising the true extent of local procurement.

87.4. Fourth, whilst there is seemingly an asymmetry in imposing this condition on the merging parties, the fact is that without such a condition there will be asymmetry post-merger in the global sourcing potential of the merging parties relative to the current competitors. As such, the inability of the competitors to match such global sourcing means that they will remain in the current status quo (or import equilibrium) in which Massmart was already competitive.

87.5. Fifth, the time frame of any conditions will also impact on the extent to which these may have any constraining effect.

88. Tellingly, RBB has not responded at all to two attacks made in the Genesis report, namely on claimed supplier benefits and employment benefits, and can be assumed to have conceded these arguments.

88.1. RBB does focus on the claimed consumer price reduction effect, but only in order to state that others rely on this as a fact rather than providing any firm support for the conclusion that prices will necessarily decline. RBB also then provides a wholly unconvincing argument that the \$[. . .]m price leadership synergy¹⁸⁹ is the result on some multiple rounds of savings and virtuous cycle of increased

¹⁸⁹ Record page 4392

sales. This is simply an implausible story of how such a synergy is determined by Walmart.

89. Further, RBB takes issue with the distribution of gains. They argue that the increase in stores in the Cambridge format will bring more benefits to lower income consumers. However, it is apparent that many of the targeted savings from imports even on their own account are in general merchandise and at the existing store formats.

90. Finally, RBB argues that because there is no increase in sales volumes purchased from local producers there is no increase in bargaining power, and hence no pressure to increase imports by such suppliers or cut costs (including labour costs). However, there is both economic logic and evidentiary support for the argument that domestic suppliers may come under pressure to cut costs and possibly increase their own import content.

90.1. First, a large proportion of the expected synergies come from the renegotiation of supplier terms. There is no reason to believe this is purely international suppliers and not local suppliers (even if they are MNCs operating locally). It would therefore seem that RBB is contradicted by the actual evidence.

90.2. Second, logically Walmart should be able to leverage its global relationship with MNCs that operate in SA as well as other Walmart markets (eg Proctor and Gamble). This is also the opinion of Shoprite. The implication is that these suppliers will come under pressure to reduce prices which may result in the export of local jobs to meet such price requests.

90.3. Third, the existence of superior import options in general post-merger changes the bargaining dynamic with non-MNC domestic suppliers.

91. In conclusion regarding the effect on the supply chain, the only issue for possible debate is the extent and quantification, not likelihood, of the merged firm's shift to imports. The broader context to which is the contestability of the market by local suppliers where Walmart's arrival triggers import substitution by all retailers. It is trite to say that competition authorities protect competition not competitors, but this case demands that this Court give normative content to that goal, by ensuring the creation of a fair competitive process which, as envisaged by the legislature, is not judged on more than price and output considerations.

92. In *Edgars Consolidated Stores (Pty) Ltd/Rapid Dawn 123 (Pty) Ltd*¹⁹⁰, the Tribunal found that a non-merger specific decline in upstream suppliers cannot found relief in merger proceedings and that conditions aimed at curtailing a merged entity's ability to purchase imports was not practical in a competitive retail market. However, that matter is distinguishable from the instant case by the level of information provided and the merging parties' engagement there with the arguments made by SACTWU, as a result of which the former were able to show high levels of local procurement, made a commitment that it intended to continue its local procurement pattern and levels (even undertaking to expand the range of local suppliers to include those of the target firm), and demonstrated that the transaction would have a positive effect on local manufacturing since the target firm was less reliant on imports and benefits from its anticipated growth would enure to the benefit of these firms.¹⁹¹

92.1. The Tribunal in that case did reject "an obvious condition [which] would be one that sought to cap Edcon's purchase of imports, at least in the target firm" for two reasons – first, that "as long as the retail market is competitive . . . then a significant part of the benefits of these lower prices and

¹⁹⁰ [2005] 2 CPLR 457 (CT)

¹⁹¹ at para [27]

superior quality commodities must be passed on to consumers, including working people” and, second, that it could not impose such a condition on only one firm in the sector, since SACTWU’s concerns were not merger-specific¹⁹² However, here, there is doubt as to the distribution of any benefits and Walmart’s power and scale is merger specific.

93. Accordingly, SACCAWU seeks two related conditions to protect, enhance and stimulate the competitiveness of firms in the supply chain, set out below.

Modified supplier development fund

94. The first condition SACCAWU seeks is one that enhances the terms of the supplier development fund already imposed as a condition of merger approval in the following respects:

94.1. By increasing the amount of investment in supplier development to at least R500 million since R100 million is simply insufficient to make any meaningful impact¹⁹³ and the merging parties’ immense resources can justify an increase of at least this magnitude;

¹⁹² at paras [29] to [31]

¹⁹³ As stated in *Ashton Canning*: “as a contribution [to retraining retrenched workers], the avowed purpose of the scheme, it is as wanting in utility as it is in generosity” (para [148])

- 94.2. By refining and targeting the fund to specific sectors or industries, possibly focussing on private or own-label product expansion;
- 94.3. By defining its purpose and mandate in order to harness Walmart's expertise in enhancing and creating supply chain efficiencies; and
- 94.4. By enhancing its independence and effectiveness by ensuring it is controlled and managed by a public entity such as the IDC which has expertise and experience in such projects.
95. Such a condition, coupled with the procurement standstill addressed below, will create the optimal opportunity for domestic industry to optimally adjust their operations once exposed to the lessons arising from Walmart's practices and experience which is unprecedented in a South African context. The modified fund gives domestic firms the opportunity to transform and prove their competitiveness within a safe harbour for a number of years and incentivises the merged firm to pass on its knowledge and expertise to the firms in the domestic supply chain, comforted by the absence of an imminent threat of desertion by the merged firm.

96. The merged firm's growth plans for its own label and private label brands provide an acknowledged opportunity for local and section 12A(3) suppliers to benefit from the merger, while capturing the advantages of local supply conceded by merging parties in evidence, addressed above. Such development also presents an acknowledged export opportunity for local suppliers.¹⁹⁴

Procurement standstill

97. The second condition supported by SACCAWU is the proposal by the Ministers' expert that the merged firm be prevented from spending less than its current procurement by Rand value domestically for a period of time.

97.1. This sets an overall floor for domestic procurement (thereby ensuring no short-term backward slide).

97.2. It also has the advantage of enormous flexibility since the merged firm may determine in which product categories it chooses to procure locally.

97.3. It therefore proposes the second condition formulated by the Ministers and presented to the Tribunal for consideration, namely that the merging parties are obliged

¹⁹⁴ Bond witness statement 2639 para 86-87; RBB report page 2407 at page 2442 para 5.3.1; Transcript page 3383 lines 1-8

to ensure that the real Rand value ¹⁹⁵ of goods manufactured and assembled in South Africa ¹⁹⁶ per Massmart product category¹⁹⁷ does not decline for the next five years.

98. The merging parties disavow the merged firm's enhanced buying power at the factory gate (despite identifying a synergy in Walmart's due diligence report of improved supplier terms¹⁹⁸) -- despite the implausability of this denial, especially when read with the terms and incentives created by the sourcing toolkits made available to the merged firm.¹⁹⁹

99. In addition, the likelihood of shifts to imports is affected by suppliers' own alternatives that they can offer and Walmart's global sourcing capability radically shifts those alternatives for the merged firm's local suppliers. The standstill procurement condition proposed above therefore affords local suppliers an opportunity to investigate and add alternatives during a period of safety; and the

¹⁹⁵ The Rand value adjusted for inflation

¹⁹⁶ The full Rand value of products that have any local manufacturing or assembly are considered as local supply while products that are fully imported are not considered local supply

¹⁹⁷ Apparel, accessories and luxury goods; Consumer electronics; Household appliances; Homebuilding; Housewares and specialties; Leisure; Food products; Beverages; Packed food and meat; Non-edible groceries; Personal products; Tobacco. This ensures that the merged firm's expansion in food and groceries does not provide a convenient mechanism to report constant or increased local procurement while, in fact, reducing purchases in non-food product categories from local suppliers.

¹⁹⁸ Record p 4392

¹⁹⁹ Record p 8501-8513

modified supplier development fund enhances suppliers' capabilities in a complementary fashion.

100. Accordingly, since there is sufficient evidence in the record to currently predict the adverse consequences of the merger in the local supply chain harm, it should be prohibited, alternatively, approved subject to these two conditions.

THE MINISTERS' APPLICATION FOR REVIEW

101. Despite this submission, SACCAWU supports the Ministers' related application for review since the Tribunal's discovery and scheduling orders that are its subject prevented the development of a comprehensive evidentiary record on these questions of the merger's consequences on labour and local supply.

102. SACCAWU respectfully refers this Court to its answering affidavit filed in the review brought by Ministers for its submissions on the review. SACCAWU supports the application for review, but of course cannot take the legal arguments raised against it by the merging parties in their answering affidavit any further since it is not the applicant. In the event that this Court is minded to hear SACCAWU on these issues, submissions will be made at the oral argument of the review.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE SACCAWU prays for an order in the following terms:

1. That the appeal against the whole of the order and decision of the Tribunal under Tribunal Case No 73/LM/Nov10 is upheld;
2. That the Tribunal's order and decision is set aside;
3. That the Tribunal's order is replaced with an order in the following terms:
 - i. Prohibiting the proposed merger;
 - ii. *Alternatively*, approving the proposed merger subject to any conditions that are appropriate, effective, detailed and enforceable and to be determined by this honourable Court following its consideration of the proposed merger in terms of section 12A, as set out in Annexure B;
 - iii. *Alternatively*, amending the decision of the Tribunal by ordering or removing restrictions, or by including or deleting conditions, as set out in Annexure B.
 - iv. That the costs of this appeal are to be paid by the First and Second Respondents, jointly and severally (such costs to

include those consequent on the employment of two counsel), the one paying the others to be absolved.

P KENNEDY SC

MM LE ROUX

Chambers, Sandton

3 October 2011