CAC CASE NO: 111/CAC/Jul11

CASE NO CT CASE NO: 73/LM/Dec10

CC CASE NO: 2010Nov5445

IN THE COMPETITION APPEAL COURT

(REPUBLIC OF SOUTH AFRICA)

In the matter 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 HOLDINGS 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 (SASMMEF)	Seventh Respondent

In re:

WAL-MART STORES INC.	Acquiring Firm

And

MASSMART HOLDINGS LIMITED	Target Firm

SUPPORTING AFFIDAVIT

I, the undersigned,

HEATHER PAMELA MARY IRVINE

do hereby make oath and state that:

INTRODUCTION

1 I am the attorney of record of the applicants. I am in the employ of the law firm Norton Rose South Africa, which has its principal place of business at 15 Alice Lane, Sandton, Johannesburg.

2 The applicants have authorised me to bring this application and to make this affidavit on their behalf.

3 I attach marked **"H1"**, **"H2"** and **"H3"** respectively confirmatory affidavits deposed to by Professor Richard Michael Levin ("Levin"), the Director-General of the Department of Economic Development; Mr Lionel Victor October, Director-General of the Department of Trade and Industry; and Mr Langa Zita, the Director-General of the Department of Agriculture, Forestry and Fisheries.

4 The facts contained in this affidavit are, except where the contrary appears from the context, within my own personal knowledge and are both true and correct.

5 In this affidavit:

5.1 "*the merger*" means the merger between the third and fourth respondents;

5.2 "*the merger hearing*" means the hearing by the Competition Tribunal to consider the merger;

5.3 "*the discovery order*" means the order the Competition Tribunal made after the merger hearing on 25 March 2011, in the applicants' application against the merging parties for the discovery of certain documents;

5.4 "*the scheduling decisions*" mean the decisions of the Competition Tribunal made in the course of the merger hearing, to impose, adhere to and enforce its schedule of witnesses and timetable for the merger hearing; and

5.5 "*the merger approval*" means the decision of the Competition Tribunal made on 31 May 2011 to approve the merger with conditions.

5.6 A copy of the transcript of the merger hearing (conducted on 22 March 2011, on 25 May 2011, and on 9 to 13 May 2011 and on 16 May 2011) is attached to this affidavit, behind all the other attachments, and is marked **"H35"**.

THE PARTIES

6 The first applicant is the Minister of Economic Development, who is entitled in terms of section 18(1) (read with section 53(c)(iv)) of the Competition Act, no. 89 of 1998, to participate in intermediate or large merger proceedings in the public interest. On 24 February 2011, the Minister of Economic Development intervened in the proceedings in respect of the merger. The official headquarters and seat of the Department of Economic Development is at the DTI Campus, Block A, Third Floor, 77 Meintjies Street, Sunnyside, Pretoria.

7 The second applicant is the Minister of Trade and Industry, who together with the Minister of Economic Development, on 24 February 2011, intervened in the proceedings in respect of the merger. The official headquarters and seat of the Department of Trade and Industry is at the DTI Campus, Block A, Third Floor, 77 Meintjies Street, Sunnyside, Pretoria.

8 The third applicant is the Minister of Agriculture, Forestry and Fisheries, who on 25 February 2011 joined the Minister of Economic Development and the Minister

of Trade and Industry in intervening in the proceedings in respect of the merger. The official headquarters and seat of the Department of Agriculture, Forestry and Fisheries is Agriculture Place, Block B, First Floor, No14, 20 Beatrix Street, Arcadia, Pretoria.

9 While the Ministers of the respective Government departments bring this application in their official capacities, in the merger proceedings relevant to this application (and in the talks, inquiries and investigations that preceded the merger notification), officials of the departments acted for and on behalf of the Ministers.

10 The first respondent is the Competition Tribunal ("the Tribunal"), an organ of state established in terms of section 26 of the Competition Act, which has its principal place of business at Third Floor, Mulayo, the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

11 The second respondent is the Competition Commission ("the Commission"), an organ of state established in terms of section 19 of the Competition Act, which has its principal place of business at the Mulayo (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

12 The third respondent is Wal-Mart Stores Incorporated, a company duly registered and incorporated in accordance with the company laws of the United States of

America. The third respondent has its registered address at 702 SW 8th Street, Bentonville, Arkansas, United States of America.

13 The fourth respondent is Massmart Holdings Limited, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa. The fourth respondent has its registered address at 16 Peltier Drive, Sunninghill Extension 6, Sandton.

14 The fifth respondent is the South African Commercial, Catering and Allied Workers' Union ("SACCAWU"), a trade union duly registered in accordance with the Labour Relations Act, no. 66 of 1995. SACCAWU has its registered address at 11 Leyds Street, Braamfontein, Johannesburg.

15 The sixth respondent is the Southern African Clothing and Textile Workers' Union ("SACTWU"), a trade union duly registered in accordance with the provisions of the Labour Relations Act. SACTWU has its registered address at Industria House, 350 Victoria Road, Salt River.

16 The seventh respondent is the South African Small Medium and Micro Enterprises Forum (SASMMEF), an independent, public-benefit organisation. SASMMEF has its principal place of business at 31 Princess of Wales Terrace, Parktown, Johannesburg.

THE OBJECT OF THIS APPLICATION

17 This is an application brought in terms of section 61 of the Competition Act seeking the Competition Appeal Court ("the CAC") to:

17.1 review and set aside the merger approval;

17.2 *in the alternative to 17.1*, review and set aside the discovery order, the scheduling decisions and the merger approval;

17.3 remit the matter to the Competition Tribunal for reconsideration of the merger.

18 The applicants are advised that the discovery order and the scheduling decisions were not susceptible to review in the course of the merger hearing. In these circumstances, the applicants' remedy is to bring an application for the review of the merger approval on the ground of the irregularities committed by the Tribunal in making the discovery order and the scheduling decisions.

18.1 It is for this reason that the applicants apply in the first instance for the review of the merger approval on the grounds of the irregularities committed by the Tribunal in making the discovery order and the scheduling decisions.

18.2 However, to the extent that the applicants have been wrongly advised, *in the alternative* they ask for the review separately of the discovery order, the scheduling decisions and the merger approval.

19 In this affidavit, the applicants' grounds of review are set out. However, in terms of rule 23 of the Rules for the Conduct of Proceedings in the Competition Appeal Court, within ten business days after the Tribunal has made the record available to them, the applicants may amend, add to or vary the terms of this application, or supplement this affidavit by way of a further affidavit.

20 Accordingly, to the extent that the Tribunal will add to that component of the record which is already a matter of public record and readily accessible to the applicants, the applicants intend to avail them of this right and, accordingly, to the extent apposite and/or necessary, the grounds of review contained in this affidavit may in due course be supplemented.

21 On 27 June 2011, SACCAWU filed an appeal against the merger approval (under case number CAC CASE NO:110/CACJune11). I understand that a date has not yet been determined for the hearing of the appeal. Yet to the extent that it is practicable and in order to expedite the final resolution of the disputes relating to the merger, the applicants seek an order that this review application be heard in conjunction with the aforesaid appeal.

CONDONATION

22 The applicants are advised that the discovery order and the scheduling decision were not subject to review in the course of the merger proceedings. However, in the event that they are wrongly advised, they ask for condonation of their failure to apply for the review of the discovery order and the scheduling decisions within the prescribed time after those decisions were made.

23 Moreover, the applicants ask for condonation of their failure to bring their application for review within 15 days of the merger approval inasmuch as it is brought only within 15 days of receipt of the Tribunal's reasons.

SUMMARY POSITION

24 In sum, the applicants contend that:

24.1 The Tribunal erred in making the discovery order by failing to order the merging parties to discover all the documents sought by the applicants.

24.2 The Tribunal erred in making the scheduling decisions in that they precluded the parties who opposed the merger, or had otherwise intervened, including the applicants, from fully and properly ventilating their concerns and their submissions on the conditions to which any approval should be subject.

24.3 As a result of the Tribunal's errors in making the discovery order and the scheduling decisions, its approval of the merger and the conditions attached to it, are subject to review on the following grounds:

24.3.1 The merger hearing was unfair and not in accordance with the principles of natural justice as required by section 52(2)(a) of the Competition Act.

24.3.2 The merger hearing was procedurally unfair within the meaning of section 6(2)(c) of the Promotion of Administrative Justice Act, no. 3 of 2000 ("PAJA").

24.3.3 The Tribunal took into account irrelevant considerations and failed to take account of relevant considerations within the meaning of section 6(2)(e)(iii) of PAJA, in its approval of the merger and in its determination of the conditions attached to it.

24.3.4 The Tribunal's approval of the merger and its determination of the conditions attached to it were unreasonable within the meaning of section 6(2)(h) of PAJA.

THE FACTUAL BACKGROUND

25 The Economic Development Department ("the EDD") became aware of the proposed merger in the latter part of 2010.

26 Initial inquiries undertaken by the EDD (in light of section 12A(3) of the Competition Act) showed that the proposed merger raised substantial public-interest concerns which, in the estimation of the EDD, required urgent consideration:

26.1 Section 12A(3) identifies the specific public-interest grounds account of which must be taken in the case of a large merger. Section 12A(3) reads as follows:

> "*When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –*
>
> *(a) a particular industrial sector or region;*
>
> *(b) employment;*
>
> *(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and*

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

26.2 In broad terms, primary among the issues that raised concern within the EDD was the likelihood that the proposed merger would have a harmful impact on employment in local manufacturing industries and upon small businesses.

27 On 3 November 2010, Wal-Mart and Massmart submitted notice of a large merger to the Commission. Therein they advised the Commission of Wal-Mart's intention to acquire a majority stake in Massmart.

28 In the course of November and December 2010, an expert panel appointed by the Minister of the EDD conducted research into the implications of the proposed merger and, in January 2011, reported their findings to the Minister. The primary concerns the Minister had previously had were confirmed, namely that it was probable that owing to the size and international reach of Wal-Mart, employment, the welfare of local manufacturers and small businesses would be seriously affected.

29 Therefore, in January 2011, the EDD pursued contact with Wal-Mart and Massmart. This resulted in facilitated talks between Wal-Mart, Massmart and a number of trade unions.

30 Those stakeholders whose views had by then been solicited expressed concerns over the impact that the transaction might have on employment in the post-merger entity and on the employment conditions of its employees.

31 In accordance with section 14A(1) of the Competition Act, the Commission referred the notice to the Tribunal and to the Minister of Economic Development.

32 The Commission proceeded to consider the notification of the proposed merger.

33 Simultaneously, the EDD (and Government more broadly) continued its consideration of the public-interest issues raised by the proposed merger. Talks with Wal-Mart and Massmart continued. An expectation arose that the talks would produce an accord addressing the public-interest concerns and that the terms of such an accord would be communicated to the Tribunal.

34 On this basis, on 11 February 2011, in accordance with section 14A(1)(b) of the Competition Act, the Commission submitted a written recommendation (together with reasons) ("the recommendation report") to the Tribunal and to the Minister of Economic Development. Therein the Commission advised that the merger should be approved unconditionally. (I attach a copy of the recommendation report marked **"H5"**.)

35 The recommendation report was made before the talks between Wal-Mart, Massmart and the EDD had reached finality. The timeframe set by section 14A within which the Commission is to investigate a large merger had expired. (The timeframe had already been extended.)

36 The recommendation report was, however, clearly based on the expectation that the merging parties would agree to commitments to meet the public-interest concerns adequately.

37 Indeed, in the recommendation report, the Commission drew attention to the talks and to the expectation that they would produce an outcome which would allay the concerns over the public-interest issues. I excerpt the following passage from the recommendation report (found at pp 5 to 6 thereof):

> *"Given the significant public interest issues arising from this matter which includes employment concerns and procurement of local manufactured product the Commission considered making the above commitments a condition to the merger. It was brought to the Commission's attention that the merging parties were in discussions with various public interest organisations (in particular trade unions) with a process facilitated and initiated by the Economic Development Department which sought to clarify these exact public interest issues.*

It was further brought to the Commission's attention that the Economic Development Department had initiated discussions between Massmart and public interest organisations to address a number of public interest issues and clarify certain commitments made by the parties.

However, this process was not concluded at the time the Commission was required to submit its recommendation to the Competition Tribunal. The merging parties did not seek an extension in order to finalise these commitments. It is, however, apparent that such an agreement would be reached prior to the finalisation of the Competition Tribunal hearing.

Based on the outcome of these agreements the Competition Tribunal would have to consider whether it would make these agreements a condition to the merger in terms of section 12.

Considering the above undertaking the Commission found that it's on balance difficult in this regard to make an adverse recommendation to the proposed merger.

The Commission therefore recommends that the merger be approved without conditions."

38 However, despite the Commission's expectation, the talks failed to produce consensus.

38.1 At paragraph 31 of Levin's affidavit (**"H4"**), he stated the following:

> "*Since the Commission's recommendation that the merger be approved unconditionally, the EDD-facilitated negotiations have stalled. For whatever reason, the merging parties' stance on procurement has shown less flexibility since that favourable recommendation. It has now become apparent to the relevant Government Departments that there is only a small probability that a suitable agreement will be reached prior to the Tribunal hearing scheduled for 22 to 24 March 2011*."

39 Section 18(1) of the Competition Act provides that in order to make representations on any public-interest ground contained in section 12A(3) of the Competition Act, the Minister of Economic Development may participate as a party in any large merger proceedings before the Tribunal or the CAC. Accordingly, in light of the failure of the talks and the conduct of the merging parties in this regard (see paragraph 22 *et seq* of **"H4"**), the Minister of Economic Development elected to participate by relying on section 18(1).

40 On 24 February 2011, Levin directed a letter to the Tribunal indicating the intention of both the EDD and the Department of Trade and Industry ("the DTI") to intervene in the merger proceedings. (I attach a copy of this letter marked **"H6"**.)

41 In a letter of the same date, the Tribunal notified the parties to the merger proceedings of the intervention by the EDD and the DTI. The parties were

granted until the following day, 25 February 2011, to raise objections. (I attach a copy of this letter marked **"H7"**.)

42 No objections were raised to the participation by the Ministers of Economic Development and of Trade and Industry.

43 On 25 February 2011, the Department of Agriculture, Forestry and Fisheries became the third Government department to intervene in the proceedings.

44 On 28 February 2011, submissions (in the form of the affidavit deposed to by Levin and attached marked **"H4"**) were filed on behalf of the applicants.

44.1 At paragraph 9 of the affidavit, Levin stated the position of the applicants in summary form:

> "*This proposed merger raises very significant public interest issues. The Commission made its recommendation on the premise and expectation that the merging parties would make commitments with respect to those issues. The Commission anticipated that those commitments might be made a condition of any merger approval by the Tribunal. EDD has facilitated discussions with the merging parties in order to seek to arrive at agreements in this regard. However, it has now (at a very late stage) become apparent that the merging parties are delaying making binding commitments which address these issues. In the*

view of the relevant Government departments, it is self-evident that the question of whether any conditions should be imposed, and if so what those conditions should be, depends on the nature and extent of any commitments made by the merging parties with regard to public interest grounds set out in the Act, such as labour, procurement, food security, and BBBEE businesses."

44.2 Moreover, at paragraph 13 of **"H4"**, Levin stated as follows:

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

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

46 On 16 March 2011, the applicants dispatched a letter to the Tribunal indicating their intention to bring an urgent application for the postponement of the merger hearing. This was premised on the applicants' conviction that the merger involved complex issues that required meaningful engagement and proper ventilation. (I attach a copy of this letter marked **"H8"**.)

47 On 18 March 2011, the applicants duly filed notice of an application which would be moved on 22 March 2011 in terms of which the applicants sought *inter alia* the following relief:

47.1 A postponement of the merger hearing to 2 May 2011 *alternatively* to a date to be determined by the Tribunal or agreed between the parties; or *in the alternative*,

47.2

47.2.1 A postponement or adjournment of the merger hearing after such evidence is heard during the week of 22 to 25 March 2011 of the witnesses currently scheduled to give evidence; and

47.2.2 Permission for the applicants to file a witness or expert statement two weeks before the resumption of the merger

hearing on 2 May 2011, or such other later date as determined by the Tribunal or agreed between the parties; and

47.2.3 Permission for the applicants to lead evidence from any person who has given such a statement at the resumption of the hearing on 2 May 2011, or such other date as determined by the Tribunal or agreed between the parties;

47.2.4 Permission for the applicants to recall any such of the witnesses of the merging parties for cross-examination as may be necessary at the aforementioned resumption of the hearing (insofar as they have given evidence during the week of 22 to 25 March 2011);

47.3 An order compelling the merging parties to discover by 25 March 2011 the documents listed in an annexure to the notice of application marked **"NM1"**.

48 I attach the notice of application (together with its annexure **"NM1"**) marked **"H9"** and the founding affidavit deposed to by Levin and filed in support of this application marked **"H10"**.

49 On 22 March 2011, the merger hearing commenced.

50 At the start of the merger hearing, the members of the Tribunal panel, having considered the applicants' application for postponement (which, as stated above, contained a hearing timetable different to that directed after the pre-hearing conference), made the following proposal:

50.1 During the week of 22 March 2011, the factual witnesses of the merging parties and the trade unions, who were scheduled to give evidence, would indeed testify;

50.2 After such testimony had been heard, the hearing would adjourn to 9 and 10 May 2011 on which dates expert witnesses for the merging parties and for the applicants would testify;

50.3 The adjourned part of the hearing would be preceded by the filing of an expert report by the applicants; and

50.4 It was acknowledged by the Tribunal that the amended timetable it proposed would raise issues relating to discovery that would need to be resolved.

51 Shortly after this proposal was made, a brief adjournment was called, during which the chairperson of the Tribunal panel requested that counsel convene with the members of the Tribunal panel in an adjacent meeting room.

52 Upon recommencement of the hearing some half hour later, the chairperson of the Tribunal panel stated as follows (at pp 3 to 4 of the transcript):

> *"[W]e have just met with al the parties to get their response to our proposal and heard different views on the proposal, but we have, having heard them, decided that the manner in which we will proceed is that we will hear the factual evidence of the union witnesses and the merging parties other than the evidence of Mr Baker from RBB, who is the economist, during the remaining date of this week, that's up till Friday.*
>
> *We will then resume on the 9th of May and we will reserve the 9th and 10th and we will ask the parties just to hold the 11th open. On the 9th and 10th we will hear the economic evidence of Mr Baker and an economic expert to be called by the … three government departments."*

53 After about one or two short adjournments, counsel for the trade unions expressed their clients' dissatisfaction about certain features of the arrangement decided upon by the Tribunal panel for the further prosecution of the merger hearing. Notably, the high barrier set to recall factual witnesses troubled the trade unions, especially in light of the fact that the discovery sought by the applicants was likely to bring forth documents and information relevant to the labour issues with which they were concerned (see *inter alia* p 14 of the transcript). Counsel for the trade unions indicated that their instructions were to take the Tribunal's decision in

respect of the further conduct of the merger hearing on an urgent review to the CAC.

53.1 Accordingly, counsel for the trade unions moved an application for a stay of the merger hearing pending the outcome of the review application.

53.2 After hearing argument from the parties, the Tribunal granted a stay of the hearing until 9 May 2011.

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

54.1 It was agreed among the parties that by noon the following day (namely 23 March 2011) the applicants would produce a pared down or revised list of documents sought.

54.2 The merging parties would respond to this request by 10:00 on 24 March 2011. At p 33 of the transcript, the chairperson of the Tribunal panel directed that in the case of documents that the merging parties declined to discover, they would have to provide reasons for doing so.

54.3 Thereafter, to the extent necessary, the application would be argued on 25 March 2011.

54.4 I attach a copy of the applicants' revised list for discovery marked **"H11"** and a copy of the response of the merging parties marked **"H12"**.

55 Upon comparing **"H11"** and **"H12"**, the disjuncture between the documents the applicants sought and those which were discovered by the merging parties is all too plain.

55.1 In **"H11"**, the applicants sought 29 categories or items of documents or information which were carefully and intelligibly described and addressed to a number of themes or topics highly and obviously relevant to the merger.

55.2 In the great majority of items, it was also clear that the documents or information would have been readily to hand.

55.3 By way of **"H12"**, the merging parties offered an exceedingly sparse response.

55.4 Of the 29 main categories of documents requested by the applicants, the merging parties had responded to only 8 categories, in many cases evasively.

55.5 The merging parties gave a complete response to only 3 items.

56 What is more, while the chairperson of the Tribunal panel had directed that the merging parties provide reasons in the event that they refuse documents requested, the merging parties refrained from doing so. Accordingly, when the discovery application came to be argued on 25 March 2011, the applicants were at a distinct disadvantage.

57 At p 128 of the transcript, counsel for the applicants argued how this conduct on the part of the merging parties redounded to the detriment of the applicants:

> "*[I]t was entirely improper for our learned friends to come and tell us this morning for the first time the difficulty they had in relation to the list. [The chairperson of the Tribunal panel] had indicated that they should set up the reasons why they resisted. We pertinently said to them if you refuse or decline to give any document, please tell us the reasons and had they done so, we could have engaged more meaningfully with them this morning. If, and we do not accept or suggest that that is the case, if they had difficulty with certain documentation being overboard, we would have engaged with them in limiting that, but to make up*

> *your case as you go along in argument, for us to hear for the very first time why you object to certain documents being put up, we submit, is entirely unfair to this process. It doesn't help us to engage meaningfully with the difficulties that they have and therefore we are stuck with these broad statements from the bar, the origins of which we do not know …*"

58 In argument, counsel for the applicants revealed the attitude of the merging parties to be deeply uncooperative. He submitted *inter alia* that:

58.1 the response of the merging parties was meagre and superficial and ran counter to the direction given by the Tribunal on 22 March 2011;

58.2 while a few documents had been tendered by the merging parties, many of the items in the applicants' request were ignored, which was informed by the attitude of the merging parties that they were obliged to provide by way of discovery only that which was necessary to enable the applicants to deal with the contents of the RBB report;

58.3 the agreement in terms of which an expert report would be filed for the applicants – as well as the entitlement in terms of section 18(1) of the Act – presupposed that the applicants could participate fully as a party and that their expert would have the benefit of discovery to prepare his report properly;

58.4 it would be no right of participation in any meaningful sense if the applicants were limited to making broad submissions in argument and dealing with broad issues, and to responding to the RBB report without being able to test its factual underlay; and

58.5 there rested a duty on the merging parties to put up the information requested irrespective whether the applicants had requested it.

59 Owing to the fact that the merging parties responded in such an obviously inadequate way to **"H11"**, much of the merger hearing on 25 March 2011 was devoted to argument addressed to individual documents or categories of documents that the merging parties had refused or on which they simply remained silent.

59.1 In respect of items 2.8 and 4.4, which related to documents concerning distribution centres and which were entirely ignored in **"H12"**, counsel for the applicants stated at p 51 of the transcript: "*[T]he request … emanates from testing what is set out by both Mr Bond and Mr Pattison in each of their respective witness statements. They … refer to the global procurement network and capabilities of Wal-Mart and we want to establish exactly how extensive that network is, particularly as one of the themes here is that the merger and the benefit, which Massmart seeks to*

obtain from the transaction, is to benefit from Wal-Mart's procurement network."

59.2 Counsel for the applicants added at p 52 of the transcript: "*We submit that is information, which is highly critical and relevant to establishing the extent of that network and the extent to which Massmart will seek to benefit from that post merger and, as a result thereof, that that could result in a reduction of local supply.*"

59.3 In response to the aforesaid plainly sound reasoning, counsel for the merging parties appeared not to take the request seriously: "*Then we have in 2.8 … What do they want, the addresses of the offices, the number of offices, the number of typewriters, word processors, how many people are employed in dispatches?*"

60 The transcript of the merger hearing of 25 March 2011 indicates several such instances where the applicants mount a compelling case that certain documents are necessary to be discovered only to be ridiculed by the merging parties.

61 Plainly, this was a strategy on the part of the merging parties to seek to exclude the applicants from anything but nominal involvement in the merger hearing. Counsel for the merging parties submitted *inter alia* that:

61.1 the applicants had been permitted to participate only on a narrow basis;

61.2 the manner in which the factual witnesses were to be dealt with had been determined by the Tribunal and the participation of the applicants was limited to engagement with the RBB report filed by the merging parties' expert witness;

61.3 such engagement with the merging parties' expert witness entailed no more than the exchange of data which they had respectively assembled;

61.4 the request for discovery by the applicants constituted a trawl for evidence which might be appropriate in a court of law but was not appropriate in a merger proceedings;

61.5 discovery encompassed documents only and not underlying data; and

61.6 the inquiry into public-interest issues in the context of a merger demanded a broad-brush rather than a precise approach.

62 At various junctures, counsel for the applicants made an appeal to the Tribunal to refrain from acceding to the stance adopted by the emerging parties. At pp 114 to 115 of the transcript, he submitted the following:

> "*What we've heard from our learned friends for the merging parties is an approach which says we will stonewall the parties at every turn and prevent giving this Tribunal any assistance, which will help it decide very real and very important issues. We submit that you are not going to be misled by adopting that approach … To make that best decision, Chair, you will make sure that you have all of the facts that are relevant and this kind of approach, which says it's not according to the rules, which we've never quite heard what those rules are … You will take due cognisance of that fact that what we have here is a rushed process in considering what is probably one of the most important mergers that you have to consider.*"

63 At 17:15 on 25 March 2011, by way of electronic mail, the discovery order reached the applicants' attorneys of record. It was not accompanied by reasons, nor have reasons subsequently been provided. (I attach a copy of the Tribunal's discovery order marked **"H13"**.)

64 Accordingly, by way of the discovery order, the Tribunal directed the merging parties to make discovery of a very limited list of specified documents by 16:00 on 5 April 2011.

64.1 The discovery order was limited to the following items requested by the applicants:

64.1.1 The source documents, the underlying data that informed the source documents and any documents informing the methodology underpinning the claims in the witness statement of Mr Bond relating to local procurement in a number of jurisdictions (item 2.3);

64.1.2 The underlying data and measurement methodology informing figures 4 and 5 in the RBB report (item 2.6);

64.1.3 Copies of the ABRAS and AC Nielsen reports which inform footnotes 23 and 44 in the RBB report (item 2.12);

64.1.4 The documents listed in items 3.1, 3.2, 3.3, 3.5 and 3.6 relating to aspects of the orchestration of the proposed merger;

64.1.5 Any documentation supporting the claims in paragraph 6.8 of Pattison's witness statement relating to Massmart's local procurement strategy;

64.1.6 Any underlying documents supporting tables 7 and 8 contained in the RBB report; and

64.1.7 Presentations to *inter alia* retail analysts and asset managers on the proposed merger.

65 Below I return to the issue of the limited nature of the discovery order and the effect thereof upon the merger hearing.

THE SCHEDULE OF WITNESSES AND THE HEARING TIMETABLE

66 Having set out the factual background above, I now turn my attention to specific features of the way in which the Tribunal regulated the merger hearing.

67 As stated above, on 18 February 2011, the pre-hearing conference was held at the premises of the Tribunal. It was attended by representatives of:

67.1 the Commission;

67.2 the merging parties;

67.3 SACCAWU; and

67.4 SACTWU.

68 After the pre-hearing conference, the first respondent issued the following directives (which were conveyed to all the parties by way of a letter dated 18 February 2011, a copy of which is attached marked **"H14"**):

68.1 The merger hearing would take place from 22 to 24 March 2011;

68.2 SACCAWU would have to file the statements of its South African witnesses by 25 February 2011 and the statements of its international witnesses by 28 February 2011;

68.3 If any other trade union wished to make a submission or submit a witness statement to the Tribunal, this would have to be done by 25 February 2011;

68.4 Upon filing such witness statements, the trade unions would also have to indicate what remedy the Tribunal was to impose on the merger;

68.5 The merging parties were to respond to the trade unions' witness statements by 7 March 2011;

68.6 By 9 March 2011, the merging parties, the Commission and the trade unions were to submit a summary to the Tribunal of what they considered

the key issues that arose from the evidence submitted (in the witness statements, as stated above);

68.7 Witness statements were to be submitted only of those witnesses who would be available to testify *viva voce* at the hearing;

68.8 Witness statements were to be sufficiently detailed so that no witness would have to be led in chief;

68.9 On 14 March 2011, the Tribunal would indicate to the parties from which witnesses (from among the witness statements submitted) it wished to hear *viva voce* evidence during the hearing; and

68.10 On 14 March 2011, the Tribunal would also indicate how the three dates set aside for the hearing were to be divided among the participating parties.

69 As far as I have been able to ascertain, no minute (other than **"H14"**) was kept of the pre-hearing conference. However, I understand that at the pre-hearing conference, the representatives of the trade unions raised the concerns of their clients over the difficulties they would experience in attempting to ventilate the complex public-interest issues raised by the merger. In particular, they had the following concerns:

69.1 The schedule was unduly constrained; and

69.2 The process was unfair in terms of which the Tribunal would limit the witnesses (from among those submitting witness statements) who would be invited to give *viva voce* evidence.

70 On 24 February 2011, the EDD and the DTI intervened in the merger proceedings and on the same date, the Tribunal dispatched a letter (**"H7"**) to all the parties, informing them of the intervention.

71 In this letter, the Tribunal indicated that it had made the following directives:

71.1 if the applicants wished to submit new information not yet in the record, they were to do so by no later than 28 February 2011; and

71.2 if the applicants wished to make submissions only on the existing record (as supplemented by any witness statements filed by other parties), they were to do so by 9 March 2011.

72 On or about 25 February 2011, the trade unions filed three witness statements of South African witnesses. On or about 28 February 2011, the trade unions filed a further ten witness statements of foreign witnesses.

73 On 28 February 2011, Levin's affidavit on behalf of the applicants was filed. (See attachment **"H4"**.)

74 In an e-mail message dated 11 March 2011 (attached marked **"H15"**) sent to the parties by Rietsie Badenhorst, the case manager of the Tribunal, it was indicated that

> "*[t]he Tribunal, in looking at the witness list and even after shortening the witness list considerable* [sic]*, also calculated that we might need four days to hear evidence. We therefore suggest that we hear evidence from 22 March to 25 March 2011 and then set aside another day for argument.*"

75 Moreover, Badenhorst wrote as follows:

> "*We have also drawn up the following tentative list of witnesses that we would want to call:*
>
> - *For the merging parties: Bond, Layton, Pattison and Baker (RBB)*
> - *For SACCAWU: Mbongwe, Lichtenstein, Alvarez and Scassera*
> - *SACTWU: Vlok*

- *South African Small Medium and Micro Enterprises Forum: Khaas but making a submission only, no evidence*

- *EDD: will be confirmed at a later stage*

We will also be requesting Shoprite/Checkers to speak to their letter to the Commission, see record page 3719."

76 Thus the Tribunal decided to whittle down the list of witnesses to the bare minimum. Of the thirteen witness statements filed by SACCAWU only four were selected to give *viva voce* evidence.

77 In light of the undeniable importance of the proposed merger, I respectfully submit that this decision to limit to such an extent the number of factual witnesses called on behalf of the trade unions reflects a process that unduly preferred expedition over other fundamental considerations, not least the provisions of section 12A(1) of the Competition Act.

78 Subsequently, on 14 March 2011, a letter was sent to Badenhorst by the attorneys of record of Wal-Mart (attached marked **"H16"**) in response to the aforesaid e-mail of 11 March 2011, in which *inter alia* the following was said:

"*The merging parties respectfully submit that merger investigations and decisions need to be dealt with expeditiously*

by the competition authorities. This is not only to ensure certainty for the merging parties (including stakeholders such as employees and stakeholders), but also to safeguard the integrity of the merger control process and the standing of the competition authorities.

In this regard, we note that the adjudication for the current transaction has already been the subject of numerous delays, including two extensions granted to the Competition Commission … in respect of its investigation; a period of approximately five weeks between the date of the Commission's referral and the set down of the matter; and the participation by numerous interested parties, many of which have questionable (if any) locus standi *to do so, in the Tribunal hearing.*

We point out that the clear direction of the Tribunal at the pre-hearing conference accepted a procedure that accommodated the completion of the hearing within three days. This was extended by a further day after the employee trade union filed numerous witness statements, many of which are repetitive and/or irrelevant as they do not in our submission elucidate the issues that the Tribunal wishes to consider. The merging parties remain of the view that three days are adequate for the hearing. In so far as the Tribunal has extended this to a fourth day, the merging parties believe that there will be enough time for argument within the allocated four days."

79 On 14 March 2011, the attorneys of record of the applicants directed a letter to the Tribunal (attached marked **"H17")** in response to the aforementioned letter of

Wal-Mart indicating *inter alia* that (owing to reasons apparent from Levin's affidavit **"H4"**) the applicants had not been in a position to supplement said affidavit by way of any witness statements by 9 March 2011. The letter proceeded to state:

> "*For purposes of clarity and avoidance of doubt, we nevertheless emphasize that the relevant Government Departments will be participating, through their legal representatives, at the hearing scheduled for 22 to 25 March 2011, and have engaged counsel to this end. As parties to the proceedings, the relevant Government Departments will, where appropriate, seek to exercise their right of cross-examination, and their right to make representations on legal and/or factual issues. As mentioned in Professor Levin's affidavit, the relevant Government Departments also reserve their rights to seek leave to lead any evidence if they are in a position to do so, or to request a postponement or adjournment of the proceedings to permit any issues or aspects to be canvassed in greater detail, not least owing to the inability to have dealt comprehensively with issues beforehand, such inability arising from a misapprehension of the likelihood of the arrangements foreshadowed in the Commission's approval being put in place.*"

80 Moreover, in this letter, the following was stated:

> "*[T]he Tribunal's suggestion that evidence be lead from 22 March through 25 March 2011 (with argument to be heard at a later date), and the response today by the attorneys for the merging parties both refer. In this regard:*
>
> > *Whilst the relevant Government Departments appreciate that the merging parties naturally are anxious to have the process expedited, doubtless the Tribunal will itself appreciate the gravity of the crucial issues traversed above, and will regulate its own procedure (as it is empowered to do) so as to ensure a full and detailed ventilation of all the important factors bearing on this transaction, the more so where the Commission's unconditional approval of the transaction was based expressly on an expectation which has not come to fruition. In short, expedition should not trump full and proper consideration of the issues.*"

81 Thus, the applicants put on record their attitude to the Tribunal's proposed schedule for the merger hearing and to the efforts by the merging parties plainly to prioritise expedition at the expense of a detailed and thorough treatment by the Tribunal of the very serious and complex issues raised by the merger. The applicants' stance can be summarised as follows. The applicants:

81.1 did not consider the timetable as cast in stone;

81.2 considered the timetable subject to the overriding discretion of the Tribunal to regulate its own process;

81.3 considered the central priority in the prosecution of the merger hearing that a full and detailed ventilation be secured of all the important factors bearing on the merger; and

81.4 regarded this central priority all the more important in light of the fact that a fundamental assumption underpinning the Commission's approval of the merger had fallen away.

82 In a subsequent letter, dated 16 March 2011 (attached marked **"H8"**), the attorneys of record of the applicants responded to a number of letters that had circulated between the parties in the previous days (attached marked **"H18"**). Therein it was stated that the applicants would bring an urgent application for the postponement of the merger hearing.

83 On 17 March 2011, Badenhorst directed a letter to the parties to which was attached a timetable determined by the Tribunal for the hearing commencing on 22 March 2011. (I attach a copy of this letter and the timetable marked **"H19"**.)

83.1 In this letter, Badenhorst stated: "Please find attached a timetable setting out the time that the Tribunal has allocated for cross examination and re-examination of witnesses. These are our own estimates …"

84 When (as described above) on 22 March 2011 the merger hearing was adjourned to 9 May 2011, the limited timetable envisaged by **"H19"** was substantially maintained. (See attached the later timetables sent to the parties on 19 April 2011 and 3 May 2011 respectively marked **"H20"** and **"H21"**.)

85 On 29 April 2011, the attorneys of record of the applicants directed a letter to the parties (marked **"H22"**) in which the request was made for the applicants' counsel to be granted time at the merger hearing to put questions to the factual witnesses for the trade unions.

85.1 This request was premised upon the realisation on the part of the applicants that the time allotted to them under the hearing timetable of 19 April 2011 (**"H19"**) would prove far too limited for the complex public-interest issues to be addressed properly.

85.2 The attorneys of record for Wal-Mart refused to accede to this request (see letter attached **"H23"**).

85.3 In a subsequent letter dated 4 May 2011 (written after the timetable of 3 May 2011 had been issued), the applicants emphasised that the trade unions witnesses would clearly be able to provide valuable factual evidence to support the testimony of the applicants' expert witness. (I attach a copy of this letter marked **"H24"**.)

85.4 Subsequently, on 5 May 2011, the attorneys of record of Massmart also refused to agree to the applicants' request. (I attach a copy of this letter marked **"H25"**.)

85.5 On 5 May 2011 (notwithstanding the timetable that had been finalised and circulated on 3 May 2011 (**"H21"**)), the Tribunal gave a directive that while the applicants' counsel would be entitled to put questions to the union witnesses, the time thus used would be subtracted from the total time allotted for the intervening parties. (I attach a copy of this directive marked **"H26"**.)

86 Accordingly, it is clear that in the period before the start of the merger hearing on 9 May 2011, the applicants harboured and voiced deep-seated concerns over the extremely constrained timetable which, in the applicants' estimation, threatened to scupper their efforts to engage with the serious public-interest issues surrounding the merger in a way that would be effective and would assist the Tribunal in reaching a decision in the national interest.

87 Moreover, during the merger hearing which commenced on 9 May 2011, the timetable and the limited time it afforded the intervening parties *inter alia* properly to cross-examine the witnesses for the merging parties was throughout to the fore.

88 The transcript of the hearings reveals that no consensus had at any point been reached on the proposed timetable.

88.1 In fact, the transcript indicates that during the course of the hearing, counsel for the applicants and for the trade unions respectively envisaged having the decision over the timetable on taken on review.

89 In this regard, I refer to annexure **"H27"** which is a collection of excerpts from the transcript of the merger hearing of 22 March 2011, of 25 March 2011 and of the merger hearing commencing on 9 May 2011. These excerpts from the transcript demonstrate *inter alia* that:

89.1 The limited time allocated for the intervening parties to cross-examine the witnesses for the merging parties seriously impeded the efficacy of their attempts to bring relevant evidence before the Tribunal;

89.2 At various junctures counsel had to curtail their cross-examination or had to elect to dispense with covering areas of importance; and

89.3 The ability of counsel for the intervening parties to undertake cross-examination was curtailed to such an extent that a serious question arises over the procedural fairness of conducting the hearing in accordance with the timetable.

90 In sum, upon a careful perusal of the excerpts contained in **"H27",** it is submitted that the limited timetable imposed by the Tribunal rendered it impossible for the important issues underlying the merger to be ventilated.

91 The extremely constrained timetable compounded the impact of the Tribunal's limiting of the number of witnesses to give *viva voce* evidence.

92 Accordingly, in consequence of the scheduling decisions, the Tribunal regulated the merger hearing in a manner that was fundamentally unfair to those parties which sought to address the complex public-interest concerns contained in section 12A(1) of the Act and to fashion precise and appropriate conditions to propose to the Tribunal as a response to the merger.

COMPROMISED DISCOVERY

93 Moreover, as set out above, the discovery order (**"H13"**) was limited to a narrow range of documents. Only eleven of the items in the applicants' revised list

(**"H11"**) presented to the merging parties on 23 March 2011 were ordered to be discovered.

93.1 This was so despite the fact that the Tribunal clearly rejected the argument advanced by the merging parties that in merger proceedings discovery could not go beyond actual documents and thus encompass underlying data. That this was the stance of the Tribunal is clear from *inter alia* paragraph 1.1 of the discovery order.

93.2 However, despite in theory allowing latitude in respect of this issue, the Tribunal inexplicably omitted to compel the discovery of various crucial items which it knew or must have known were fundamental to a proper ventilation of the central concerns which had caused the applicants to intervene.

94 The most important of the items excluded from the discovery order were items 2.5; 2.7; 2.8; 3.4; 4.4 and 5.1 in **"H11"**.

95 Items 2.5, 2.7 and 3.4 dealt with issues relating to labour:

95.1 Item 2.5 entailed documents concerning labour conditions in Chile (which was put up as a comparator in the RBB report) which were easy to source;

95.2 Item 2.7 related to documents concerning labour conditions in all the countries in which Wal-Mart has a presence, and equally comprised documents readily obtainable; and

95.3 Item 3.4 related to documents concerning labour issues in Massmart itself and were also readily obtainable.

96 The documents sought under items 2.5; 2.7 and 3.4 were undeniably of crucial importance in the merger proceedings. In fact, this is conceded in the RBB report (attached marked **"H28"** at pp 5 to 6), which acknowledges that the poor reputation of Wal-Mart on labour questions worldwide might justifiably give rise to concern over the proposed merger.

96.1 The documents under item 2.5 were necessary to test the statements made by Ostalé in his witness statement (see attached **"H29"**).

96.2 The merging parties had proffered Chile as an example of the impact of Wal-Mart's entry into a market on public-interest issues. Yet, at the same time, the merging parties chose to be selective on what evidence they presented. Accordingly, obtaining further information on Wal-Mart's labour practices in Chile was critical to assess the public-interest effects in the merging parties' comparator. As it turned out, this exercise

proved to be impossible for the applicants because of the absence of discovery on item 2.5.

96.3 Moreover, the only way to obtain hard facts on the labour issues raised by the merger and the concerns created by Wal-Mart's widely-held reputation was for the Tribunal to secure the information sought under item 2.7.

96.4 The documents sought under item 3.4 were crucial in order to understand Massmart's likely post-merger conduct. These documents were necessary to determine Wal-Mart's intentions in respect of labour in South Africa.

97 It bears repetition that the documents sought under items 2.5, 2.7 and 3.4 were by no means onerous to collect and to present to the Tribunal.

98 Moreover, while local procurement was the central issue of concern for the applicants, it was by no means their sole concern. (Counsel for the applicants made this plain at p 51 of the transcript of the merger hearing of 25 March 2011.)

99 The documents sought under item 2.8 related to the global procurement network and capabilities of Wal-Mart, to which reference was made in both the witness statements of Bond and Pattison (at paragraph 91 of Bond's statement (**"H30"**)

and at paragraph 4.5 of Pattison's (**"H31"**)) and indeed in much public documentation of Wal-Mart. This issue was plainly central to the applicants' decision to intervene.

99.1 Moreover, given the nature of Wal-Mart's sophisticated operations, this information would have been readily available.

100 At p 6 of the RBB response (included in **"H28"**), the merging parties' expert witness, Simon Baker, proceeded to criticise the Genesis report of James Hodge, the expert for the applicants (**"H32"**), for its dearth of "supporting evidence" or "sources cited".

101 At p 6, the RBB report proceeded to say:

> "*Genesis has had to make highly tenuous theoretical linkages between the synergies concerned and the alleged displacement of domestic supply to support its case.*"

102 Access to the information sought under item 2.8 was thus imperative to gain a thorough and practical understanding of the procurement capabilities and infrastructure emanating from the Wal-Mart global procurement network. Only with the benefit of this information would it be possible to understand properly the causal relationship between the global procurement network and the much-vaunted lower prices of Wal-Mart.

103 A central contention in the case mounted by the merging parties was that Wal-Mart's procurement network afforded it the ability to obtain lower prices internationally. By juxtaposing the picture of Wal-Mart's ability to source internationally with that of Massmart, it would have been possible for the applicants to gauge to what extent the post-merger entity would be in a position to import significantly larger quantities relative to pre-merger Massmart.

104 Together with the documentation sought under item 2.8, the documents under item 4.4 were fundamental to gain an understanding of how the merger might affect the likelihood that Massmart would increase direct imports post-merger. This was so since the data sought under item 4.4 would (together with that under 2.8) enable a comparison of the infrastructure facilitating importation that was available to Massmart pre-merger to the infrastructure to which it would have access through Wal-Mart.

105 Lastly, the information under item 5.1 was (like that sought under 2.8 and 4.4) circumscribed and easily obtainable. Access to this information would have indicated the extent to which the post-merger entity would be able to use the Wal-Mart network to obtain products more cheaply that the pre-merger entity. This would have enabled a realistic and accurate quantification of local procurement displacement in consequence of the merger. Only with access to the information sought under item 5.1 would a thorough, detailed comparison have been possible

of the relative prices of products sourced by Massmart from local producers and their equivalents that might be sourced from Wal-Mart's global suppliers. The sample of data sought under item 5.1 would have been the only viable means by which it might be determined the extent to which a switch would take place post-merger in favour of greater imports.

106 It is, moreover, notable that during argument in the discovery application on 25 March 2011, the chairperson of the Tribunal panel appeared to concede the importance of the information sought under item 5.1 (see p 102 of the transcript):

> "*Can I go back to 5.1, because that seems to be an exercise that is highly pertinent to some of the issues that I think Mr Baker has raised? Now you're saying that this information can't be found, and Mr Baker has obviously been given some information which he finds in the tables, I think 7 and 8. So it's not clear to me why … I know there's a debate around locally produced and we can hear Mr Bhana on that, but assuming that one even adopted his definition of that or they said, look, we purchased this from Tiger Brands and you can take your own view as to whether it's local or not, because we can't tell you anything more. We purchased this from this client.*"

107 A conspectus of the documentation sought under items 2.8, 4.4 and 5.1 tends to the following conclusions:

107.1 These three items were undeniably necessary if the applicants were to be in a position effectively to address the concern most important to them;

107.2 The documentation was easily accessible; and

107.3 Without the documents sought under these three items, it was a foregone conclusion that the exercise to determine a somewhat precise quantification of import substitution would be rendered wholly impossible.

108 Thus, in simple terms, through circumscribing the process of discovery, the Tribunal limited the documentation before it and available to the applicants and their expert witness, Hodge, thereby rendering it impossible for the applicants properly to make their case.

108.1 Without access to all the necessary and relevant documentation sought by the applicants, they were as a matter of course unable adequately to substantiate and motivate before the Tribunal the seriousness and likelihood of the public-interest concerns which had precipitated their intervention in the first place or to fashion appropriate and effective conditions to address those concerns if the merger were to be approved.

108.2 That this was a crucial factor in the merger hearing which fundamentally and irremediably tainted the process before the Tribunal appears in the transcript of the merger hearing and in the Tribunal's reasons. In what follows, I set out what I mean by this.

109 At the outset, it bears emphasis that the question of the scope and ambit of discovery was a central concern of the applicants and was accordingly argued in some detail by their counsel on 25 March 2011. At no point could the Tribunal have been unaware of the importance of the need for critical documentary evidence to be discovered.

110 At p 45 of the transcript of the hearing held on 25 March 2011, counsel for the applicants articulated the following fundamental point of principle:

> *"As part of the investigation and decision you make, you are entitled to have all the information before you, whether the Commission calls for that information or not. So, it's no answer to say, well, the record is complete and that's the end of the story."*

111 What emerges from the above *dictum* is that the merger proceedings had quite plainly undergone a *volte-face* in consequence of the intervention of the applicants (and the other intervening parties). While the Commission had approved the merger without having had access to a substantial amount of relevant material, the intervention by the applicants forced the Tribunal to take cognisance of the

documentation the applicants sought to have discovered. In fact, in final argument before the Tribunal, on 16 May 2011, the Commission itself in fact admitted that new information before the Tribunal had induced it to change its assessment of the merger.

112 At a later stage in the proceedings on 25 March 2011, counsel for the merging parties attacked aspects of the applicants' request for information as being vague, overbroad and opportunistic.

112.1 At p 85 of the transcript, counsel for the merging parties, stated:

> *"Then in 2.1 they say* 'any and all complaints, orders, judgements, awards and decisions in respect of Wal-Mart's activities relevant to competition matters in any and all countries for the past three years.*' So this means any activities relevant to competition matters, I mean not just in the economies in which Wal-Mart has invested, but presumably anywhere they might buy things, they want this, in any and all countries for the past three years. It is so vague, broad and hard to understand what is actually being considered. … It is simply not possible. I mean, imagine practically speaking how you would do this. I have no conceptions ..."*

112.2 To this critique, counsel for the applicants responded as follows (at pp 85 to 86):

> *"Chair, we don't want to be obstructive, but these are typically the kinds of reasons that should have been put in terms of your directive. If we're now going to go on hearing evidence at length from the bar, my learned friend Mr Unterhalter must be sworn in to testify to any of this, none of which we've been appraised of, despite a pure resistance..."*

112.3 Plainly, therefore, at least as early as the discovery application of 25 March 2011, the applicants raised their concerns about the nature of the discovery process and the danger that the manner in which it was directed by the Tribunal might lead to inequities in the process.

113 Moreover, at a later juncture in the merger hearing on 25 March 2011, counsel for the applicants encapsulated the fundamental importance of the discovery process in the following way (see pp 116 to 117 of the transcript):

> *"[I]f there is some doubt that information [requested to discover] should be put up, you will err on the side of providing that information rather than keeping it out, because at the end of the day there's got to be confidence in the process and that confidence cannot be generated where we know that there is information that can be obtained but is being withheld, simply because we are told the boat has gone or government is not playing by rules. So, well aware of your duty, your statutory duties under Section 16(2) of the Act, you are entitled to call for any of this information in your own right, whether it emanates as a discovery request from us or anybody else, and this is something that you will take into account."*

114 This was much more than a merely academic account of the role of discovery by the applicants. It served as:

114.1 a clear caution to the Tribunal of the importance for it to conduct discovery in the fairest way possible, which would entail the Tribunal erring on the side of including rather than excluding documents;

114.2 a statement of the fundamental importance to intervening parties like the applicants of having proper discovery, in the absence of which they would not be in a position to proceed their case beyond broad supposition; and

114.3 a reminder of the irrefutable importance that a body such as the Tribunal be placed in the best position possible to decide on issues of importance like the public-interest issues raised by the applicants.

115 At paragraph 1 of the Genesis Report (attached marked **"H32")** Hodge stated that he was retained "to assess the public interest impact of the acquisition of control of Massmart … by Wal-Mart … and the submissions by the merging parties' economists, RBB Economics." However, Hodge could not properly fulfil this task owing to the nature of the discovery ordered by the Tribunal.

116 At paragraph 102 of the Genesis Report, Hodge stated:

> "*The merging parties make a number of claims about potential public interest benefits from the transaction that they would seek to weigh up against the public interest concerns raised. However, in no instance have such benefits been quantified or verified.*"

117 Moreover, notably, in his testimony before the Tribunal on 13 May 2011, Hodge also expressed his misgivings about the discovery process that had been conducted by the Tribunal (see p 827 of the transcript):

> *"I think initially we felt we could assess this and in the discovery process we looked for information for wages and union membership and degree of full time and casual across these countries that Wal-Mart is active in, but we weren't granted that discoveries and the merging parties fought that. So, we were not able to independently assess this component, but certainly that is the view of the factual witnesses that have come here."*

118 He also stated (see p 896 of the transcript):

> *"We don't have more information only the merging parties have more information. And I think what was clear at the beginning of these proceedings is that we asked for quite extensive discovery to precisely look at prices and compare across products, but that wasn't granted us."*

119 Against the background of the serious concerns raised on behalf of the applicants – both while the discovery application was being argued and in the course of the testimony of Hodge – the ambivalent and internally contradictory attitude of the Tribunal to the testimony of Hodge, the mainstay of the applicants' case, appears especially untenable.

120 Upon a careful reading of the Tribunal's reasons (see the reasons attached marked **"H33"** (together with the CT10 certificate and the order of 31 May 2011)), it becomes all too clear that the expert testimony provided by Hodge on behalf of the applicants was on the whole considered by the Tribunal to be of significant value. Most notably, the Tribunal accepted as cogent and compelling his testimony concerning the harm that Wal-Mart's global procurement strategies would bring were they to be brought to bear upon South Africa.

121 That this is so appears from the Tribunal's dismissal of the relevant components of the testimony of Baker.

121.1 A prime illustration of the Tribunal's attitude toward Baker's position in respect of Wal-Mart's global procurement strategy is to be found at paragraphs 79 and 80 of the Tribunal's reasons. I cite the relevant part:

> *"Baker also made an attempt to show that Massmart at present is not heavily reliant on imports. This exercise was to prove unreliable, given that Massmart's main defence against*

> *procurement conditions was to assert the impossibility of determining the extent of local manufacture in the products that they sell. If Massmart cannot perform this exercise credibly, neither can Baker. Baker is not able to say much about a very important question in this merger."*

122 However, despite the Tribunal's markedly favourable attitude to Hodge's testimony, as valuable and helpful, it was constrained to concede that the nature and scope of the discovery order it handed down on 25 March 2011 served – in respect of specific items – to limit the ability of Hodge to advance evidence upon which the Tribunal could rest its findings.

123 Specifically, in respect of a question central to the concerns of the applicants – namely the extent to which Wal-Mart's global procurement network and logistical capabilities would serve to increase imports into South Africa post-merger – the Tribunal made the following important and deeply revelatory observation at paragraph 80 of its reasons:

> *"Hodge had wanted to [answer this question], but when he asked for the data to do this exercise in a discovery application, the merging parties raised insuperable difficulties, contending it would lead to indeterminate collateral issues. We accepted this at the time and did not compel this information. It is highly probable that if Massmart was procuring at prices near to those of Wal-Mart, this exercise – entirely within the knowledge of the merging parties – would have been done. Is it likely that the two*

firms did not at some time, over their lengthy contact, not explore this possibility?"

124 This *dictum* quite clearly indicates the following:

124.1 A question utterly fundamental to the resolution of the public-interest concerns with which the Tribunal was engaged was rendered essentially beyond the reach of the expert witness on behalf of the applicants, who in other respects was considered by the Tribunal to be exemplary and whose testimony was regarded as useful;

124.2 The reason for the inability of Hodge to address this question meaningfully was the fact that the merging parties had at the time of the discovery application raised difficulties which, it is at least implied, were later shown to be baseless;

124.3 The Tribunal had at the time of the discovery application accepted the reasons advanced by the merging parties for their refusal to discover the documents in question;

124.4 Had the Tribunal been blessed with the wisdom of hindsight at the time of the discovery application, a different decision in respect of the discovery of the documents in questions would have been made;

124.5 Without seeking to apportion responsibility for this state of affairs, it is quite plain from the passage cited above that the process set in train by the discovery order of 25 March 2011 was by the Tribunal's own admission in fundamental respects procedurally compromised;

124.6 In sum, without the documents sought by the applicants under items 2.5; 2.7; 2.8; 3.4; 4.4 and 5.1, it was impossible for them to mount a cogent case either on the labour question or on the issue of local procurement.

125 The contradictory critique of Hodge's testimony by the Tribunal must be construed against the background of this admission by the Tribunal of procedural impropriety on its part. At various junctures in its reasons, the Tribunal criticised Hodge on the basis that of his findings rested upon assumptions rather than upon facts.

125.1 A notable illustration of this criticism of Hodge's testimony relates to the much-contested question of the role and purpose of the so-called Wal-Mart toolkits. While the Tribunal found the applicants' version the more plausible one, it nonetheless refrained from accepting Hodge's position since it was based on assumptions. I quote from paragraph 84 of the Tribunal's reasons:

> *"On this aspect the intervenors have the more likely version. Imports of goods will increase because Walmart's superior buying power and logistics will allow for this. What is however not clear is its extent. Here it is where the intervenors have to make assumptions and run into difficulties."*

125.2 It is clear from this passage that the Tribunal:

125.2.1 found the version of the merging parties – namely that the toolkits played no important role and that imports were not a bulwark of the Wal-Mart model – essentially untenable;

125.2.2 considered the position of the applicants plausible – namely that the toolkits fitted into a broader picture of imports being fundamental to the global success of Wal-Mart;

125.2.3 eventually rejected the testimony of the applicants' expert, however plausible it might have been, because of his inability precisely to quantify the extent to which imports were likely to increase post-merger.

126 Moreover, the Tribunal's reasons reveal that the absence of specific data (which was sought by the applicants through its discovery request process) also thwarted Hodge's attempt to frame workable conditions that might be imposed on the

merger were it to be approved. (See attached marked **"H34"** the note on conditions of the applicants submitted to the Tribunal during argument on 16 May 2011.)

127 At paragraph 100 *et seq* of the reasons, the following is held:

> "*This is the context in which we must consider the conditions proposed by the intervenors in relation to the domestic procurement concern. We have noted already the extent of this concern is by no means clear and in its most articulate form in Hodge's report, relies on a number of unproven assumptions …*
>
> *The principle behind the suggested proposed procurement conditions is to hold Massmart to its existing volume of local procurement for a period of time …*
>
> *Thus one would need to determine what Massmart's local procurement level is pre-merger and then hold it to this level for some period going forward. This all sounds fine at the level of principle, but as we shall see founders, when we get to the level of detail.*"

128 While Hodge's attempt to fashion workable local procurement conditions were subjected to wider criticism in the reasons, it is clear that one of the central deficiencies ascribed to it was its lack of detail or specificity. Quite plainly, were Hodge to have had access to the documents pertaining to procurement sought by

the applicants in discovery, a good measure of the Tribunal's concerns about his proffered conditions might have been allayed.

129 In short, the ability of the applicants to quantify, for example, import rise and consequent employment losses was severely compromised by the discovery order. In turn, this hamstrung the applicants as they sought to craft appropriate remedies to mitigate these likely results of the merger.

130 At base, it cannot be denied – and the Tribunal indeed admits so – that any inability suffered by Hodge to present precise data to the Tribunal was in consequence of the absence of relevant documentary evidence. It is equally plain that such absence is to be traced directly back to the discovery order handed down by the Tribunal on 25 March 2011.

131 Accordingly, an essentially illogical and irrational argument runs through the Tribunal's reasons. While on the one hand advancing the notion that the testimony of Hodge was useful and helpful, on the other hand the Tribunal indicates that Hodge was never in any position to present evidence sufficiently precise so as to be capable of convincing the Tribunal of the seriously-held concerns of the applicants.

132 Despite its words of praise, however, in its reasons, the Tribunal fundamentally criticised Hodge for making assumptions on the basis of incomplete information.

133 It is respectfully submitted that therefore the process of discovery was flawed in *inter alia* the following respects:

133.1 Despite counsel for the applicants at the very outset urging the Tribunal to bear its statutory duties in mind and to compel the widest discovery reasonably possible, in the face of compelling evidence and argument to the contrary, the Tribunal refrained from doing so.

133.2 In consequence, before the start of the hearing of 9 May 2011, the Tribunal had essentially disabled the applicants from fulfilling the role to which they are under section 18 of the Competition Act wholly entitled.

133.3 Accordingly, however much the Tribunal might have referred to certain procedural benefits that had allegedly accrued to the intervening parties, to the extent that the applicants were disabled from fulfilling the role they sought to and were entitled to perform, the entire process relying upon the discovery order was at its very heart irrational and unreasonable.

THE GROUNDS OF REVIEW

134 Accordingly, the applicants contend that:

134.1 The Tribunal erred in making the discovery order by failing to order the merging parties to discover the entire list of documents sought by the applicants.

134.2 The Tribunal erred in making the scheduling decisions in that it precluded the interveners from fully and properly ventilating their concerns and their submissions on the conditions to which any approval should be subject.

134.3 In consequence of the errors by the Tribunal in making the discovery order and the scheduling decisions, its approval of the merger and the conditions attached to it, are subject to review on the following grounds:

134.3.1 The merger hearing was unfair and not in accordance with the principles of natural justice as required by section 52(2)(a) of the Competition Act.

134.3.2 The merger hearing was procedurally unfair as envisaged by section 6(2)(c) of PAJA.

134.3.3 The Tribunal took into account irrelevant considerations and failed to take account of relevant considerations within the

meaning of section 6(2)(e)(iii) of PAJA, in its approval of the merger and in its determination of the conditions attached to it.

134.3.4 The Tribunal's approval of the merger and its determination of the conditions attached to it were unreasonable within the meaning of section 6(2)(h) of PAJA.

CONCLUSION

135 I respectfully submit grounds have been made out for the relief sought in the notice of motion to which this affidavit is attached.

WHEREFORE the applicants pray for relief as set out in the notice of motion.

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HEATHER PAMELA MARY IRVINE

SIGNED and SWORN to before me at on this the _____ day of JULY 2010 by the deponent who has acknowledged that he knows and understands

the contents of this affidavit; that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience.

_____

COMMISSIONER OF OATHS

Full names:

Address:

Capacity: