

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No:110/CAC/June11

In the matter between:

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

Appellant

and

WAL-MART STORES INC

First Respondent

MASSMART HOLDINGS LIMITED

Second Respondent

SUPPLEMENTED NOTICE OF APPEAL

BE PLEASED TO TAKE NOTICE that the appellant, the South African Commercial, Catering and Allied Workers' Union ("SACCAWU"), which is a registered trade union at the primary target firm and a person required to be given notice of the proposed merger in terms of section 13A(2) of the Competition Act 89 of 1998 ("the Act") and which participated in the proceedings of the Competition Tribunal ("the Tribunal") noted an appeal to this honourable Court against the whole of the decision and order of the

Tribunal in case number 73/LM/Nov10, dated 31 May 2011, in a Notice of Appeal dated 27 June 2011. At that time, the Tribunal had not issued its reasons for its decision and order and did so on 29 June 2011. This notice is now supplemented to accord with Rule 16(3) of the Rules of this Court.

TAKE NOTICE FURTHER that this notice of appeal is filed in terms of section 17(1) read with section 37(1)(b) of the Act and rule 16 of the Rules of this honourable Court.

AMBIT OF THE APPEAL

- 1 The appeal is noted against all of the findings of fact and/or rulings of law by the Tribunal which form the basis for its 31 May 2011 order and are set out in its 29 June 2011 reasons, including the approval of the proposed merger and the imposition of the conditions set out therein.

GROUNDINGS OF APPEAL

- 2 In accordance with the requirements of Rule 16(3)(d), SACCAWU sets out below the grounds on which the appeal is noted, and the findings of fact and the rulings of law that are the subject of this appeal.
- 3 For the reasons that follow, SACCAWU respectfully submits that the following findings and/or rulings were incorrect in law and/or fact.
- 4 The Tribunal erred in fact when it found:
 - 4.1 That the proposed merger came about only on 24 September 2010 when the merging parties had signed a confidentiality agreement

and were exploring the possible acquisition since February 2009 at least (para [12]; footnote 3);

4.2 That the total number of retrenched workers was 503, instead of 574 (para [45]). In 2009 Massmart dismissed 71 employees following an attempt to compel employees to work a 41 hour 7 day rolling week contrary to an agreement entered into with the union which provides for the conclusion of a flexibility and mobility agreement. In 2010 a further 503 employees were retrenched at Massmart;

4.3 That Massmart retrenched workers in the regional distribution centres “as part of this re-engineering” because it “concluded that it needed fewer employees in these centres and so a number of them were retrenched” when the evidence in the record contradicts this and demonstrates that more workers, albeit not full-time permanent employees, were subsequently employed in these centres. This evidence is not “confusing” (para [47] to [48]);

4.4 That post merger domestic procurement was an issue mostly explored by the government team and the team representing SACTWU. SACCAWU raised this issue pertinently in its witness statement. Furthermore, NUMSA and FAWU raised this issue in their witness statements but because they were not called to give evidence at the hearing they were unable to explore the issue further. Also, the intervenors had agreed that SACTWU and the government team would deal with this issue while SACCAWU

focused on employment issues in order to comply with the Tribunal's directive in this regard;

4.5 That on 22 March 2011 "the unions were not ready to proceed and sought a postponement, which was granted" (para [127]). The postponement of the proceedings was actually the result of the recognised need for the Ministers who participated in the hearing to obtain discovery and prepare an expert report. Also, the unions were forced to apply for a stay of the proceedings in order to review the Tribunal's improper and inappropriate decisions regarding the time allocated to the parties and the manner of proceeding with the hearing.

5 The Tribunal erred in law when it found:

5.1 That the proposed merger raises no competition concerns as a result of the absence of overlap in operations between the merging parties in South Africa prior to the proposed merger (paras [26] to [27]);

5.2 That the proposed merger would not substantially prevent or lessen competition in any of the markets in which Massmart presently operates (para [27]);

5.2.1 The Tribunal should have properly applied the express language of the Act which makes clear that the South African statutory competition regime is concerned with economic or market power namely its creation, extension,

use and abuse. On a proper reading of the Act, the entry of a firm with the scale of operations and consequent market and buying power of Wal-Mart into the South African economy will disrupt the competitive process in the retail sector as well as alter conditions for suppliers in the retail supply chain;

- 5.3 That it is "unusual" that the public interest provisions of the Act could require the prohibition, or imposition of conditions on it if approved, of a proposed merger that may raise no competition concerns (para [28]);
- 5.4 That its jurisdiction should be narrowly constructed (paras [32] to [38]);
- 5.5 That the relationship between competition and public interest issues in merger control requires some linkage between the analysis of the two areas of concern (paras [32] to [38]);
- 5.6 That its "job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction" (para [32]);
- 5.7 That it is required to defer to other regulators in circumstances where a particular transaction requires consideration of issues relevant to that other regulator's jurisdiction and area of expertise (para [35]);

- 5.8 That the only issue for it to determine is “whether [the undertakings made by the merging parties] are sufficient” or “adequate” to address the public interest concerns (paras [37] to [38]);
- 5.9 That the retrenchment moratorium condition set out in para 1.1 of the Tribunal’s order is “similar to the one imposed . . . in the *Metropolitan* merger”¹ when it includes “unreasonable refusals to be redeployed” which properly should not be considered to be retrenchments (paras [42] to [43]);
- 5.10 That the approach to be adopted by the Tribunal was to evaluate the merging parties’ undertakings rather than to independently consider, apply its mind and determine whether conditions were appropriate and the content of such conditions, and then evaluate the merging parties’ undertakings in light of the determined conditions;
- 5.11 That the Tribunal needed to consider and make findings from the evidence before it regarding Wal-Mart’s anti-union stance, or “attitude to collective bargaining”, because “the undertakings made in this respect meet at least some of the core demands of the [other participants at the hearing]” (para 59);
- 5.12 That a condition establishing group centralised bargaining was unnecessary and inappropriate (paras [66] to [71]);

¹ *Metropolitan* 41/LM/Jul10

- 5.13 That a condition establishing a closed shop was unnecessary and inappropriate (paras [66] to [71]);
- 5.14 That the Tribunal would “forget [its] purpose as a competition regulator” if it stepped into “shop floor issues” (para [69]);
- 5.15 That “unlike the demand to protect existing labour rights which may well be merger specific, the creation of additional rights not presently enjoyed by unions is neither merger specific nor appropriately part of our limited public interest mandate in respect of effects on employment” (para [70]);
- 5.16 That “the merged firm, post merger, will not have market power in any relevant market in South Africa” (para [114]);
- 5.17 That “the major objective of competition regulation” in South Africa is “to secure lower prices” (para [115]);
- 5.18 That the proposed merger should be approved when it cannot be justified on public interest grounds as set out in section 12A(3);
- 5.18.1 The first of these is to consider the effect that the proposed merger will have on “*a particular industrial sector or region*”. Here, the evidence in the record supports the conclusion that the South African retail sector, as well as the various industrial sectors active in the retail supply chain, and the regions of South Africa where these sectors are present and active, would be adversely affected by the proposed merger. This adverse effect is largely the result

of the effects of the anticipated substitution by the merged entity of imports for local procurement.

5.18.2 The proposed merger similarly has adverse effects on employment, both in terms of the anticipated job losses that will result from it, as well as on the quality of jobs and the downward variation of terms and conditions of employment in both the retail sector and the supply chain;

5.18.3 So too, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive is undermined and adversely affected by the proposed merger;

5.18.4 Finally, the ability of national industries to compete in international markets is undermined as a result of the adverse impact of the proposed merger and the negative effect it has on South African industrial competitiveness;

5.19 That its approach to the consideration of the proposed merger was correct when it amounts to a misinterpretation and misapplication of section 12A to its analysis of the proposed merger;

5.19.1 The Tribunal erred by misinterpreting section 12A(1) and (2) narrowly so as to reach a conclusion that the proposed merger would not substantially lessen or prevent competition in the South African retail sector;

- 5.19.2 By misinterpreting and misapplying the enquiry into whether a proposed merger raises competition concerns in relation to the enquiry into whether it raises public interest concerns;
- 5.19.3 By misinterpreting its own jurisdiction and its powers and functions in terms of the Act, in light of its purposes and preamble;
- 5.19.4 By misconceiving the role of the participants at the hearing other than the merging parties and in its consideration of the evidence produced by those participants. Its deferral to the evidence supplied by the merging parties in the face of contradictory evidence in the record produced by the other participants, as well as its failure to consider that contradictory evidence, further compounded its error in interpreting and applying section 12A;
- 5.19.5 By misinterpreting and misunderstanding the relationship between competition policy and competition law; and competition policy and competition law on the one hand and industrial policy, trade policy and economic development policy on the other; between the competition authorities and other public institutions and regulators; and between competition law and regulation and other statutory schemes of regulation, most notably the institutions and statutory regime governing labour relations;

5.19.5.1 The Tribunal should have found that its duty and function was to interpret and apply section 12A in light of the Act's preamble and stated purposes set out in section 2 thereof;

5.19.5.2 The Tribunal further erred by adopting an incorrect approach to the section 12A analysis which can be summarised as identifying the harm or concern raised under section 12A(3) and then evaluating the undertakings proffered by the merging parties at oral argument to determine whether these suffice. The correct approach, and the approach required and mandated and contemplated by the Act, is for the Tribunal to consider and properly weigh all evidence presented to it and obtained by the Commission during its investigation and to then determine on a probabilistic enquiry the concerns or foreseeable harms or adverse consequences of a proposed merger. It must then determine whether there are conditions which could address these concerns and only then evaluate whether any voluntary undertakings made by the merging parties satisfactorily address the identified harms or concerns. In the event that the voluntary undertakings do not, then the conditions identified and developed by the Tribunal should be imposed.

Alternatively, if there are no conditions which can satisfactorily ameliorate the identified harm or concern the merger should be prohibited.

6 The Tribunal erred in fact and law when it found:

6.1 That the evidence contained in the witness statements filed and in the record of those witnesses who were not called to give oral evidence should be accorded less weight when it was the Tribunal's decision not to permit all witnesses for whom witness statements had been filed to testify and it gave a direction that the statements were to serve as evidence in chief (paras [19] to [21]);

6.2 That the Commission considered the transaction and recommended that it be approved without conditions when the Commission's report identifies significant public interest issues which arise from the proposed merger and the only reason given for the Commission's failure to properly consider and recommend conditions to the Tribunal was its (erroneous) understanding of the likely outcomes of a parallel informal process of engagement between the merging parties and SACCAWU, facilitated by the Economic Development Department (paras [22] to [24]);

6.3 That the Commission considered the transaction thoroughly when the investigation undertaken by the Commission was truncated and abbreviated as a result of its (erroneous) understanding of the likely outcomes of a parallel informal process of engagement between

the merging parties and SACCAWU, facilitated by the Economic Development Department (paras [24] to [25]; footnote 27);

6.4 That the documents produced in response to the Ministers' discovery requests were the only transaction specific documentation that could have been requested by the Commission had it conducted a thorough and proper investigation prior to submitting its report and recommendation to the Tribunal (footnote 27);

6.5 That it is common cause that the proposed merger raises no competition concerns as a result of the absence of overlap in operations between the merging parties in South Africa prior to the proposed merger (para [26]);

6.6 That the proposed merger raises no competition concerns as a result of the absence of overlap in operations between the merging parties in South Africa prior to the proposed merger (paras [26] to [27]);

6.7 That the proposed merger would not substantially prevent or lessen competition in any of the markets in which Massmart presently operates (para [27]);

6.8 That "the likelihood of merger specific retrenchments being disguised in the form of unreasonable redeployment is significantly less compelling than it was in *Metropolitan*" (para [43]);

- 6.9 That a two year moratorium on retrenchments is adequate (para [44]);
- 6.10 That the “probabilities [are] of job creation being more likely than job loss going forward” when there is evidence that “some divisions may be creating employment, while others may be contracting” (paras [40] to [44]);
- 6.11 That SACCAWU failed to show that the retrenchments were merger specific and that the merging parties had given plausible reasons for the retrenchments that are not merger specific (para [51]);
- 6.12 That the evidence regarding the nature of the relationship between the merging parties from February 2009, Massmart’s strategic decisions at the time and the denial of any connection between the proposed merger and the retrenchments by Massmart suffices to conclude that “there may have been coincidence between the retrenchments and the deliberations with Wal-Mart but no causality” (paras [51] to [53]);
- 6.13 That “the coincidence in timing of the deal’s imminence with the retrenchments is not strong enough to show its connection” (para [54]);
- 6.14 That there is no evidence that the retrenchments were motivated by Massmart’s desire to attract Wal-Mart’s acquisition offer or by its

adoption of the “Wal-Mart model” of distribution and staffing prior to the receipt of the offer (paras 55] to [56]);

6.15 That “it is likely that some mention of [the retrenchments] would be made . . . in Wal-Mart’s internal documents” and the absence thereof is dispositive and a basis to find that the retrenchments were not causally connected to the proposed merger (para [57]);

6.16 That the undertaking to prefer “the 503” was “prudently made” but that the merging parties “cannot be expected to [make] an immediate offer of reinstatement” since the retrenchments were not merger specific (para [58]);

6.17 That the undertakings made by the merging parties to honour existing labour agreements and not to challenge the status of SACCAWU within the merged entity should last for a period of three years (para 59)];

6.18 That the evidence in the record supports a finding that Wal-Mart is anti-union but that conditions are not required to protect the organisational rights of workers employed by the merged entity;

6.19 That “Wal-Mart’s attitude to labour relations is chameleon-like – it changes its colours to suit the immediate environment” and that the evidence of Scasserra supports a finding that Wal-Mart complied with labour law and regulations in Argentina (para [64]);

6.20 That the conditions in paragraph 1.3 of the Tribunal’s order appropriately meet the concern established by the evidence

regarding the probable and foreseeable attitude of Wal-Mart to collective bargaining in South Africa post-merger (of being “a company not well disposed to collective bargaining”) (para [65]);

6.21 That a condition establishing group centralised bargaining is unnecessary and inappropriate (paras [66] to [71]);

6.22 That a condition establishing a closed shop at the merged entity is unnecessary and inappropriate (paras [66] to [71]);

6.23 That Massmart’s resistance to group centralised bargaining and a closed shop prior to the proposed merger makes the imposition of conditions to that effect on the approval of the proposed merger unnecessary or inappropriate (paras [67] to [68]);

6.24 That imposing conditions relating to group centralised bargaining and a closed shop would be “the Tribunal [imposing] itself on labour issues that must be thrashed out at the bargaining table” (para [68]);

6.25 That “creating new rights is beyond [the Tribunal’s] competence” (para [68]);

6.26 That such an approach by the Tribunal would “risk upsetting the balance of the *quid pro quo* that accompanies the winning of collective bargaining rights” (para [68]);

6.27 That imposing conditions relating to group centralised bargaining and a closed shop would “create a precedent for intervening in

collective bargaining more intrusively than is prudent given [the Tribunal's] limited mandate" (para [69]);

6.28 That the conditions imposed by the Tribunal provide sufficient protection to union recognition to prevent the merged entity from engaging in the downward variation of terms and conditions of employment post-merger (para [71]);

6.29 That a condition to prevent the downward variation of terms and conditions of employment post-merger would amount to "setting levels of remuneration", be "disproportionate" and "an inappropriate interference with the process of collective bargaining" (para [71]);

6.30 That the "condition favoured by some of the intervenors is the imposition on the merged entity of an import quota" (para [75]);

6.31 That the discovery the Tribunal had denied to the participants in the hearing was relevant and material to the issue of assessing the public interest impact of the proposed merger, yet it did not take any steps to correct that deficiency in the evidence or record before it made its decision (para [80]);

6.32 That the Tribunal had to accept the assertion by the merging parties that they had not, and could not, determine procurement costs post merger (para [83]);

6.33 That imports of goods will increase because of "Wal-Mart's superior buying power and logistics" but that appropriate and necessary

conditions relating to local procurement were not to be ordered (para [84]);

6.34 That a condition addressing local procurement and job losses was not warranted because the participants at the hearing were unable to demonstrate the extent of import substitution with sufficient accuracy that is likely to occur post-merger when the merging parties should have been compelled to provide evidence so as to make this enquiry possible by the Tribunal (paras [84] and [89]);

6.35 That a condition addressing local procurement and job losses was not warranted despite finding that import substitution is likely to occur by the merged entity as well as its competitors (para [97]);

6.36 That suppliers could respond competitively to threats by retailers of a switch to imports and that this would result in greater retail competition post-merger and “ensure that the benefits of lower producer prices are passed on to consumers and not pocketed by retailers” (para [98]);

6.37 That there was uncertainty with respect to job losses in manufacturing but certainty as to a reduction in consumer prices post-merger (para [99]);

6.38 That the consumers who will benefit from claimed price reductions post-merger are the “poorest of South Africans” when the evidence in the record contradicts such a finding (para [99]);

- 6.39 That there will be potential employment generation effects of a potential increase in exports by South African producers post-merger, and therefore that this must be weighed against the imposition of a local procurement condition, when these potential effects are not merger-specific (and this conclusion was not challenged by the merging parties) (paras 88 and 100);
- 6.40 That the condition proposed by SACTWU is the “most considered . . . in that it had tried to meet some of the criticisms made by the merging parties” (para [101]);
- 6.41 That the condition to hold Massmart’s local procurement at its current levels for a period of time would be inappropriate and problematic to administer (paras [102] to [111]);
- 6.42 That such a condition may well violate international trade obligations of South Africa (para [112]);
- 6.43 That “the merged firm, post merger, will not have market power in any relevant market in South Africa” (para [114]);
- 6.44 That such a condition creates “an unjustified asymmetry” between the merged entity and its competitors (para [115]);
- 6.45 That the imposition of a local procurement condition would “affect the merged entity’s ability to provide customers with the lowest possible prices” (para [115]);

- 6.46 That such a condition would not be a “rational exercise of public power” and that “[o]ther policy instruments, not limited to firm specific application, would seem more apposite . . . than merger regulation” (para [116]);
- 6.47 That a local procurement condition is not “appropriate, proportional, rational or enforceable” (para [117]);
- 6.48 That an “investment remedy” is “more attractive than a quota” where “there will be some substitution of local procurement to imports post-merger, the extent of which is unknown” (para [118]) when it is, at minimum, the combination of a local procurement condition with a supplier development condition that most effectively addresses the public interest concerns identified;
- 6.49 That the condition set out in paragraph 1.4 of the Tribunal's order is appropriate, proper or adequately crafted to address the public interest concerns identified (paras [118] to [121]);
- 6.50 That there will be lower prices for consumers on the goods sold by the merged entity when this conclusion is based on the reputation of Wal-Mart elsewhere and no evidence was led before the Tribunal to identify or quantify this possible consequence of the proposed merger;
- 6.51 That there would be lower prices for consumers when Massmart is already a mass discounter and the merging parties failed to identify

what additional cost reductions would follow the implementation of the proposed merger;

6.52 That there is evidence, ignored by the Tribunal that, post-merger the margins enjoyed by the merged entity were expected to increase and it was apparent that full pass-through of savings to consumers would not occur;

6.53 That the so-called second round effects of the proposed merger applied equally to the job losses foreseeable in the retail sector supply chain. Instead, the Tribunal weighed the claimed consumer benefits and related second round effects without considering the adverse second round effects that are foreseeable in the supply chain.

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:

3.1. Prohibiting the proposed merger;

- 3.2. *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;
- 3.3. *Alternatively*, amending the decision of the Tribunal by ordering or removing restrictions, or by including or deleting conditions.
4. 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 other to be absolved.

DATED AT JOHANNESBURG ON THIS 27TH DAY OF JULY 2011



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