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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 73/LM/Dec10

In the matter between:

The Economic Development Department	1st Applicant
The Department of Trade and Industry	2nd Applicant
The Department of Agriculture, Forestry and Fisheries	3rd Applicant
And	
Wal-Mart Stores, Inc	1st Respondent
Massmart Holdings Ltd	2nd Respondent

In the merger between:

Walmart Stores Inc	Acquiring Firm
And	
Massmart Holdings Limited	Target firm

Panel	:	N Manoim (Presiding Member)
		Y Carrim (Tribunal Member)
		A Wessels (Tribunal Member)
Heard on	:	25 March 2011
Order issued on	:	25 March 2011
Reasons issued on	:	15 August 2011

Reasons: Discovery Application and pre-hearing directions

PART A

Discovery Reasons

Background

[1] This is an application for discovery brought by three of the intervenors in this merger. The merger is between Walmart Inc, an international retailer based in the United States of America and Massmart – a South African retailer. Walmart seeks to acquire a controlling stake in Massmart through an offer for 51% of its shares.

[2] The intervenors are three government departments represented by a single legal team. They are Economic Development Department, Department of Trade and Industry and the Department of Agriculture, Forestry and Fisheries. We will for convenience refer to them collectively as the government.

[3] The Competition Commission in its investigation obtained extensive documentation from the merging parties. Neither the Commission nor any of the other intervenors (several trade unions and a small business organisation) sought additional discovery. The government however was of the view that the discovery had been insufficient and so they sought additional discovery and information to brief their expert economist and to cross- examine the merging parties' witnesses.[1]

[4] The discovery application took place late in these proceedings. The merging parties were resistant to discovery at this late stage as they were concerned that it might delay conclusion of the proceedings. However, the merging parties were relying on evidence from an economist and the government was the only intervening party intending to call an expert economist. Since the debate on the economic issues would be important to any finding in this case,

[1] Counsel for the government intervenors stated that they were also seeking information. See transcript of discovery hearing dated 25 March 2011 at page 54.

we decided to permit the government to bring a discovery application, despite the lateness of the hour, and for this reason allowed it to be brought with less formality and within shorter filing periods than would usually be the case.

[5] The application took the form of a letter from the government requesting certain documents and a reply from the merging parties responding to the request.[2] Despite its expedition and lack of formality, we consider that in argument matters were sufficiently addressed in order for us to make a decision on the request.

[6] Rather than dealing with this request item by item, we will deal with them thematically as the parties did.

Broad approach

[7] This discovery application seeks documents and information relevant to public interest issues in terms of section 12A(3) of the Act. Self-evidently these relate to issues with a broad sweep.

[8] Two factors distinguish an approach to discovery in such an application from one in more conventional adversarial litigation. In the first place the public interest canvas is much broader than it would be in conventional litigation, where the factual dispute in issue more narrowly frames the issues. But whilst the canvas is narrower in conventional litigation, individual documents are more significant, because so much turns on the resolution of specific factual disputes to which the documents sought may be relevant. In public interest disputes potentially many issues can be said to be relevant. Since relevance is the usual filter for assessing discovery claims, it is less useful to the adjudicator in such cases in determining what documents ought to be produced. But whilst more documents might be deemed relevant in a public interest case, at the same time the probative value of individual documents is

[2] The request and the merging parties reply are set out as Annexures A and B. Our order which we gave on 25 March is annexure C.

less compelling than in conventional litigation, if their focus is too microscopic. Therefore to avoid an overwhelming number of documents being required for production we must consider other filters in addition to relevance to determine an application.

[9] This is the manner in which we have approached this decision. While documents might be, arguably, relevant to a microscopic issue, we ask if they are relevant to better informing us on macroscopic issues. Even if they may relate to macroscopic issues, we have to weigh the value of the information yielded to the process, against the burden to the party required to produce it. Where the yield is minimal or uncertain, but the burden great, this would favour denying production.

Items dealing with Walmart's relationship with its employees

[10] The government has sought several documents that deal with Walmart's relationships with its employees in particular disputes with employees. By way of example the intervenors seek in item 2.14:

> *"The total number of individual cases brought against Wal-Mart relating to any matter involving employment matters, including discrimination, dismissal, victimisation, retrenchment and non-appointment. Including the number of persons in total affected by such cases, for the period 2000 to 2010, in all countries it operates in and in each of the US, Brazil, Chile, Mexico, India and China as detailed in paragraph 28 and 67 of the Witness Statement by Bond."*

[11] The government also seeks documents pertinent to wage increases and the split in employment between full-time and part-time employees in Chile.[3]

[12] We have refused discovery of these items; there are two reasons for this.

[3] Item 2.5

[13] In the first place the government intervenors are not best placed to deal with Walmart's direct relationships with its employees. That issue is not pertinent to the primary issue on which they seek to intervene, which is the effect of the merged firm's post merger procurement policy on South African manufacturers and producers. In particular the government is concerned whether the effect of Walmart's assumed superior purchasing powers and logistics in international markets may lead to a displacement of local suppliers by imported goods with a consequent employment loss in South Africa.

[14] The relationship between the merged firm and its employees is an issue which is adequately represented in these hearings by one of the other intervenors the trade union South African Commercial, Catering and Allied Workers Union ('SACCAWU'), which is the union currently recognised by Massmart in its various divisions. Further, SACCAWU is supported in these proceedings by an international trade union solidarity movement which can be assumed to have direct knowledge of Walmart's labour practices in other countries. To the extent that there are issues pertinent to Walmart's labour practices they are better placed to bring these to the Tribunal's attention. [4]

[15] The widespread nature of the government's request suggests it has no *a priori* knowledge of these labour practices and is simply making a request on reading of the witness statements filed thus far, to see what they will yield.

[16] Secondly, Walmart points out that it employs 2,1 million workers in 15 countries, the likelihood, with such a large and widespread workforce that some conflict will have taken place between employer and employee, is irrefutable. The question then is what information would, given this vast and widespread workforce, prove informative to us in our consideration of this

[4] For instance, in Item 2.5 the Government is requesting employment information in respect of Chile, this is data that was presented in the witness statement of one of the witnesses called by SACCAWU, Alvarez, and not by the merging parties.

merger insofar as its impact in South Africa is concerned. It is unlikely that the request, as formulated, would provide us with any useful information for our purposes. It is microscopic not macroscopic. How much information would represent a trend for us to take note of is not clear nor does the government, which seeks this information, seem to know. Granted we will hear of numerous cases of labour disputes, but we do not know if they represent a generalised trend, are conclusive (as is typical of many disputes of this kind, many may not be resolved, others may be settlements for which no admissions of wrong doing are made) [5] or are historic.

[17] The burden on the merging parties to discover this material which we are told is not available to it centrally, will be extensive and will delay proceedings to review it. The burden and delay of its production seems to outweigh any possible utility in receiving the material.

Material related to Walmart's procurement

[18] More central to the issues that the government wishes to address are the procurement practices of Walmart. To this end they have requested a wide range of documents.

[19] Broadly the documents fall into two categories. Those that are relevant to Walmart's experience in other countries in which it trades and those relevant to a post merger scenario in South Africa.

[20] Some documents in respect of the international comparison, which relate to Chile have been tendered and we need not consider this request further.[6]

[21] One item, which refers to a buying program implemented by Walmart's subsidiary in Chile, known as the JBP, and which is relied upon in the merging

[5] Witness Statement of Andy Bond, Record page 33 of the Witness Statement and Statement of Issues Bundle
[6] Item 2.4

parties' witness statements, was partially tendered and we have ordered more specific production for the sake of certainty.[7]

[22] The remaining item in this category, item 2.3, is contested. In his witness statement Andy Bond, the only Walmart executive who will be testifying, claims that in Mexico, India and Chile, Walmart sourced more than 90% of its products locally.[8]

[23] In paragraph 2.3 of the request the government seeks documents that underpin this contention. We have no difficulty with that part of the request since it is Bond who makes this assertion and the government is entitled to see on what facts it is based.

[24] However the government request is more widely phrased than this. Although Bond makes the claim in respect of 'local procurement' the government wants to widen the request so that it differentiates between that which is 'locally sourced' and that which is 'locally produced'. In other words a product may be sourced locally, for instance through a locally based import agent, but may not be manufactured locally.

[25] What is meant by 'locally produced' is a subject of dispute between the government and Walmart. Some products are locally manufactured from locally sourced inputs – these, everyone agrees, would be defined as locally sourced.

[26] But many products do not fit neatly into this category. Sometimes local firms manufacture, but source some or all of their inputs from overseas. Still others comprise a portion of local and foreign manufacture. If one accepts that locally produced may include some portion of imported inputs, how does one weigh

[7] Item 2.6
[8] See Bond's witness statement paragraph 32.1.

the local added value to the value of the whole good? Nor is this proportion constant. An input for the same good may sometimes be locally sourced and at other times be produced from imported components.

[27] The government is alive to this difficulty and have attempted a definition of "locally produced" in their application. This definition states: *"Locally produced" is defined as products which involve local production and value-add (even if some components are imported in the process) and does not include products that are purely imported through locally based agents."*

[28] This definition is problematic as it does not define the extent of local content to the value of the whole good. The language used suggests it includes the T-shirt where only the label is sewed on locally, but the rest of the product is imported. Presumably the government does not have this category in mind as locally sourced, but this is the problem with the definition.

[29] The definition could of course be improved upon by deeming something 'locally produced' if the local value-add makes up some fixed percentage of the sale price. But that makes the exercise less reliable and more assumption based.

[30] But even if the problem of definition can be cured, which we suggest it cannot on the current definition, the greater problem is whether the merging parties can fairly be expected to produce such documentation. Walmart states that whilst it can evaluate local sourcing it cannot determine local production. It does not require this information from its suppliers. Indeed suppliers may not have this information since this requires them to drill down to source in an input value chain, something that they are not likely to do.

[31] There is nothing to gainsay what the merging parties say on this point about not having this information. No evidence in the record suggests they use local

production as a metric internally nor is it likely that they would be particularly interested in this information as retailers.

[32] We have thus confined the request in 2.3 to information that supports Bond's claim.

[33] The same problem of defining local production arises in respect of item 5.1.This request states:

> *"For the top and bottom 10 locally produced products by Rand value purchased by Massmart in 2010 in each of the categories listed in tables 7 and 8 of the RBB report, the ex-factory price (ex VAT) paid by Massmart to the local producer and the likely lowest delivered price to South Africa (provide the ex-factory price and likely per unit transport costs to South Africa) from Wal-Mart's global suppliers."*

[34] There are 15 categories listed in the two tables in the RBB report. This means that the exercise needs to be performed in respect of 300 products. Thus Massmart would first have to develop a guideline for what locally produced means and then determine which products from the 15 categories would fall into the top and bottom 10. This would mean examining considerably more products than the 300 required as they would have to eliminate any product not falling within the 'locally produced' definition. Massmart like Walmart says it does not make this classification of its suppliers nor does it know if they can do it themselves.

[35] Of course Massmart could put the burden of the task on suppliers who it thinks may fall into the category. This runs the risk that the information may be unreliable or deliberately distorted since suppliers may have an incentive to exaggerate local content if they suspect this may threaten future custom with Massmart. Then of course the practical problem is of how many firms need to

supply this information and in what time frame they can be expected to be given to produce this information.

[36] But nor is getting the information from the Walmart side free from problems, i.e. determining the likely lowest delivered price to South Africa from Walmart's global suppliers. Walmart is not presently supplying into South Africa so it is being asked to perform an exercise for which it has no present information. Of course it could state for what price it sources comparable goods and add on a hypothetical transport cost. But it argues that different goods are sourced sometimes from different countries depending on their destination. These goods are sourced in the currencies of the buying country adding to the complexity. Nor can pricing be assumed to be constant over time. Then there is the issue of whether we are comparing like goods. Is the South African locally produced good the same one as the one sourced from China which it is vulnerable to be displaced by? There *inter alia* may be appreciable quality differences.

[37] Assuming that all these logistics from both the Massmart and Walmart side could be resolved and we suspect not easily, is the exercise worth its return in effort? Apart from the fact that it is likely to be inaccurate and imprecise (the definitional problem) it is not explained why taking the top and bottom 10 purchases of Massmart and comparing them with the cost Walmart could import them into South Africa at, is a useful guide to measuring the potential displacement problem. We do not know for instance:

1) What level of difference in price is likely to influence the replacement of a local supplier with an importer;
2) Whether, even if there is a cheaper good that can be procured overseas that this will occur. Consumers may resist the replacement, imports may be logistically difficult, security of supply may be a consideration, to name but a few possibilities;

3) If we can assume substitution will take place, how and whether this translates into an adverse employment effect. Massmart is not a dominant procurer locally in most categories, on the evidence we have thus far; nor does it mean that cheaper sourcing via Walmart would lead inevitably to substitution. It arguably could simply improve Massmart's bargaining position with the local supplier as it has a credible threat to turn to an overseas supplier.

[38] Nor has the government explained how the analysis, if it was possible and yielded some robust conclusions, would translate into a possible remedy.

[39] For this reason we have refused this request. We are unsure if the request can be complied with and, even if it could, whether the probative value of the yield is worth the considerable effort in compiling it, which almost certainly would have delayed the hearing of this merger.

[40] Related to this request is another set of requests for documentation indicating the respective procurement capabilities of Walmart and Massmart. The object of this request, as we understand it, is to gauge the respective efficiencies of the procurement systems, so as to infer whether local procurement is likely to be displaced. It was not made clear why comparing the respective sizes of staff and assets of Massmart and Walmart's procurements (see item 2.8) would lead to an answer to this question. Whilst the number of offices and personnel can be provided, what does knowing this tell us? Doubtless that Walmart has a much bigger procurement operation than Massmart. But why do the number of staff it employs and their respective office spaces translate themselves into data from which one can infer a future displacement of imports for locally produced goods? Walmart sources internationally for a huge operation while Massmart sources for a much more modest one, operating in fewer countries. We would expect the latter to be

larger than the former, but this does not answer the displacement problem the government seeks to identify.

[41] The request is for information that is burdensome to collect and if collected of little probative value. Accordingly we refused it.

[42] The same applies to item 4.5, a request for Massmart to provide information on its use of suppliers in particular SMME and historically disadvantaged suppliers. Not only is this request imprecisely framed, but it suffers from the same problems of identifying source as did the 'locally produced' category.

[43] On the other hand we have allowed the request for item 4.2 which is a high level strategy document on local procurement strategy, on which Pattison relies in his witness statement. This is an example of a macroscopic rather than microscopic document.

Information on German operations

[44] In item 2.13 the government seeks: *"Representations and objections to Wal-Mart's entry into Germany and copies of all minutes of board and management meetings relating to its decision to exit from the German market."*

[45] Walmart it is common cause exited the German market after a few years of operation. Absent any further motivation it is unclear why this information is pertinent to any of the public interest issues that the government wishes to raise in this merger. The request is refused.

Documents whose production we ordered

[46] To the extent not already referred to above the documents whose production we have required relate to documents referred to in merging party witness statements either expressly or by implication or are high level strategy documents which are macroscopic in nature and whose production does not appear to be unduly burdensome.

General

[47] The final order is annexed hereto. This order, as noted above, was given on 25 March 2011. Our reasons have only been furnished now as they were not requested before.

PART B

Pre hearing directions reasons

[48] We have also been asked by the government intervenors to give reasons for what are described as 'scheduling decisions'. It is better to think of scheduling decisions as part of the pre-hearing directions of which they form part.

[49] Pre-hearing directions are case management issues and are not considered matters for which we are required to give reasons. The so-called scheduling decisions formed part of the pre-hearing directions in this case. At pre-hearings, issues are discussed with the parties attending, views are given and after hearing everyone present, directions are given by the presiding member. This is what has taken place in the present merger.

[50] The first pre-hearing took place on 18 February 2011 and present were representatives of the merging parties, some of the union intervenors and the Competition Commission. The government departments were not on record at that stage. The Economic Development Department (the "EDD"') however was sent notice of the pre-hearing, but it did not attend.

[51] Subsequent to this the EDD, in a letter on 24 February 2011, indicated that it wanted to make representations in respect of the transaction and the Chairperson of the Tribunal advised the Department, in light of the urgency of the matter, to submit new information not already on record by 28 February 2011 and to make further submissions by 9 March 2011.The department complied with this direction.

[52] The pre-hearing directions and related correspondence are part of the record and we make no further comment on them as they are self-explanatory.

[53] A second pre-hearing took place on 22 March 2011 after the hearing of the transaction was stayed on application by the union intervenors. The hearing was then converted to a pre-hearing and all the intervenors, including the government, were present.

[54] The only issue that requires comment from us, in view of the review, is the suggestion that proceedings were unfairly curtailed. Whilst it is correct that the Tribunal's directions imposed limitations on all parties, this was done in consultation with those who attended the respective pre-hearings, including the subsequent one held on 22 March 2011, and our impression is that no one present, at that stage, had any objection. The government was represented at this subsequent pre-hearing and actively took part in the discussions that informed our decision making. In fact, as the transcript shows, counsel for the government remarked: [9]

> Adv Bhana: *"Chair, what we've done with the witnesses is we've kept the existing timetable, subject to the following changes. Mr Baker of RBB we thought one hour for cross-examination may be too little and we've suggested 2.5 hours for cross-examination, 30 minutes re-examination. We've allowed the same period for the EDD expert, 2.5 hours for cross-*

[9] See transcript of 22 March on page 36.

examination and 30 minutes re-examination. Other than that, we think the order can be retained, except we perhaps can do the two experts at the end. So, we will just move Mr Baker and we think that fits comfortably in the 5-day timetable."

[55] Given the broad brush nature of the hearings, which we discussed earlier in our discovery reasons, we were of the view that curtailing proceedings would not detract from consideration of the key issues. Had proceedings been left open-ended and there was no curtailment of the number of witnesses to be led or cross-examination time, these proceedings could have been so prolonged as to be substantially unfair to the interests of the merging parties. The intervenors filed 17 witness statements, which together with the four of the merging parties totalled 21 statements. Had all these witnesses who gave statements been called to give oral testimony, with no limits imposed on cross-examination, the hearing would have required several weeks to conclude; instead it took 6 days. Limiting time focussed parties on the key issues and curtailed possible diversion into any number of potential collateral disputes, which would ultimately either not have been capable of resolution or necessary for us to reach a conclusion on for the purpose of considering the issues raised by the merger. Recall that the hearings were limited to the public interest considerations in terms of section 12A(3) as it was common cause that the merger raised no section 12A(2) issues .

History of the process

[56] We first consulted parties about the likely length of the hearings, the number of witnesses to be called and the likely nature of their evidence. Once in consultation we had determined the length of the hearing, we asked them to submit witness statements and thereafter we would indicate which witnesses we would like to hear oral testimony from. In the case of the merging parties, limited witnesses were offered and all were called.

[57] The intervenors provided 17 witness statements. No limitations were placed on the length of these statements so it was possible to ascertain the evidence the witness was likely to be able to give oral testimony on by perusing them. We indicated, after considering these statements, which witnesses we wanted to hear oral testimony from, based on the probative nature of their evidence and whether they could testify from their own knowledge or expertise or whether such knowledge was derivative. We also preferred witnesses who could testify to a broader range of issues as opposed to some who had a very narrow focus. By way of example the witness statements of Saccuwu's Mbongwe and Sactwu's Vlok were indicative of personal knowledge as opposed to some of the other union witnesses, and hence they were preferred for giving oral evidence.

[58] Although we limited the number of the union intervenors' foreign witnesses, they ultimately chose who should testify for them. Due to a change in hearing dates the overseas witness initially preferred by the unions' was not available and he was replaced by another foreign witness who had also given a witness statement. Similarly, the merging parties' initial foreign witness was not available and another was offered who could testify on the same issue, namely the Walmart/Chilean experience.[10]

[59] There was no curtailment of the number of government witnesses. They only sought to call an expert economist who was allowed to testify.

[60] Because we had to fit the hearing in the allocated number of days we had to ration the time allowed to the respective parties for oral testimony. We did so by preparing a draft schedule which indicated our assessment of how much time would be required for cross-examination and re-examination of witnesses. Because detailed witness statements were circulated in advance, witnesses were not lead in chief, with the exception of the two experts. We did however calculate the total time permitted to each side of the case i.e. those who supported the merger and those who opposed it. However the respective parties were free to

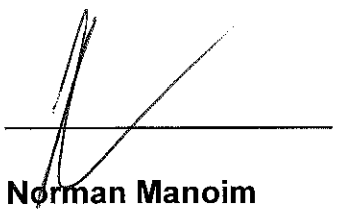
[10] For the unions, Nelson Lichtenstein was replaced by Kenneth Jacobs. For the merging parties Debra Layton was replaced by Enrique Ostale Cambiaso.

allocate this total time in any manner they felt appropriate and they were not bound to follow our recommendations as they appear in the schedules. Thus if we had recommended half an hour for cross examination per witness of a certain category in the schedule, the parties were free to re-allocate that time, so as to spend less time on one witness and more on another, provided that they did not exceed their sides total time. We allocated the total time on a basis that we felt was equitable, although it was not equal. The intervening parties were allocated approximately 2 hours more in total time than the merging parties.

[61] On the final day we heard argument and again total time was equitably allocated to those sides in favour and against the transaction, although we had to include time for two parties who had not lead or cross-examined witnesses, the Commission and the South African Small Medium and Micro Enterprises Forum, which represents small business organisations.

Conclusion

[62] Although the merger proceedings were curtailed in terms of our directions, this was done after consultation with all the parties involved in the process. Secondly, given the nature of the enquiry before us, which was limited to considering the impact of the merger on the public interest, curtailment of proceedings did not prejudice the proper consideration of issues.



15 August 2011

Norman Manoim **Date**

Concurring: Yasmin Carrim and Andreas Wessels

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For the merging parties:	D Unterhalter SC, assisted by J Wilson, G. Marriot, F. Pelser instructed by Webber Wentzel Bowens and Edward Nathan Sonnenburgs
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SACTWU:	P McNally SC instructed by Werksmans Attorneys.
SACCAWU:	P Kennedy SC assisted by M Le Roux, instructed by Cheadle Thompson & Haysom
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