

# How to deter investors - Massmart/Walmart

At times in the competition appeal court in Cape Town last week, the proceedings seemed like an exercise in futility.



Apart from the SA Commercial, Catering & Allied Workers Union, which had always wanted the merger between Walmart and Massmart to be stopped, it was common cause that the best the three government departments involved could hope for - they are economic development, trade & industry, and agriculture, forestry & fisheries - was the imposition of additional conditions while the merger went ahead.

If Massmart CE Grant Pattison's comment on Twitter after the hearing was anything to go by, he too seemed rather bemused by the court proceedings. He tweeted: "Hearing complete. Back to implementing the merger, while we wait for the ruling ."

Cynicism aside, the stakes for competition law couldn't be higher. How the panel of three judges headed by Dennis Davis rules has implications not only for future mergers and acquisitions, but also for SA's image as a destination for foreign investment.

## How to create negative impressions

This view is shared by Derek Lotter, a partner at law firm Bowman Gilfillan: "This case has created negative perceptions about SA as an investment destination; many investors don't understand the nuances of our law and the procedures under way. From the outside, it seems as though government is opposed to foreign investment."

It could be argued that aspects of public interest as stipulated in section 12A (3) of the Competition Act need to be explored fully. However, it was widely believed that the conditions placed on Walmart, albeit voluntary, would have addressed many of these concerns.

After all, Walmart, the world's biggest retailer by sales, had agreed on a voluntary basis to establish a fund to the value of R100 million for the development of local manufacturers and suppliers in order to bring them up to international standards. It agreed there would be no retrenchments for at least two years, as well as accepting Saccawu's status as the retailer's largest staff representative. Surely these measures went far enough towards remedying any perceived harm?

## Tribunal's hearings 'procedurally unfair'?

Not according to Wim Trengove SC, who argued on behalf of the three government departments. Trengove said the competition tribunal had failed to place appropriate emphasis on the public-interest argument.

He insisted that the tribunal's conditional approval had to be set aside on the grounds, among other things, that the manner in which the tribunal conducted its hearings was "procedurally unfair". It failed to place the burden of proof of the positive impact of the deal on the merging parties; and instead of playing an inquisitory role, as required by the Competition Act, the tribunal wrongly saw itself as a referee among adversaries.

Another bone of contention was the tribunal's failure to force the merging parties to provide the ministers with certain documentation. Trengove said the ministers required information from the merging parties on the percentage split between the goods they would procure locally and internationally. The tribunal should have determined whether Walmart, after the merger, would be better placed to procure more cheaply abroad when compared with Massmart procuring locally. "It's the duty of the tribunal to conduct an inquiry which seeks to add clarity to this question, not merely to act as referee," Trengove said.

## So where's the evidence?

Jeremy Gauntlett SC and David Unterhalter SC, representing the merging parties, countered the arguments raised in both the appeal and the review application. "The merging parties cannot have an evidential burden unless the other parties have shown a prima facie case. To simply allege harm is not enough," said Unterhalter.

As to the demand by the ministers for the imposition of a specific local procurement quota, Unterhalter argued that the court could not through this merger seek to "remake the SA economy . where the manufacturing sector is vulnerable, it will continue to be vulnerable post this merger, and where it is strong, it will remain strong."

In February the competition commission found that the merger did not raise competition concerns and recommended to the tribunal that it be unconditionally approved. However, on the last day of the tribunal hearings in May, having received further information, the commission revised its position and recommended conditional approval of the deal.

During that six-day hearing Paul Kennedy SC, representing the union, argued against the merger on the grounds that Walmart's entry would result in job losses and a significant increase in imports. He also said, based on Walmart's anti-union reputation, that if the merger were approved, labour rights would be compromised.

## Ministers' motives under scrutiny

Unlike the position adopted by the ministers, Kennedy's argument before the appeal court was not for the possible imposition of additional conditions but for the outright prohibition of the merger on the grounds that it could not be justified on either competition or public-interest arguments. Ultimately, however, given that it was an appeal, Kennedy had to show the court that on the same available facts another body could have arrived at a different outcome.

Unlike the union's, the ministers' motives have come under scrutiny.

"I can understand the union's fighting the deal, but it's been strange to see government adopting a protectionist policy on this specific deal, while at the same time seeking to promote investment into the country. Whatever happens I don't think they'll come out unscathed," says Competition Law Group head Alexis Apostolidis.

At times the union's arguments complemented those of the ministers despite the fact that the two groups wanted very different things. However, when asked directly by Davis if the ministers wanted the merger prohibited, Trengove said no - with a caveat. He said government wanted to have the decision to approve the merger sent back to the tribunal under strict prescripts in order to have a thorough inquiry which would pass the test of fairness. In addition it should provide a

comprehensive assessment of the effects the deal would have on public welfare and pronounce on whether the remedies went far enough.

When the appeal court's ruling is handed down, foreign investors will, at the very least, gain an understanding of the hurdles they stand to face when considering investing in SA.

A fact not lost on Davis: "This is a very important case, the implications of which go far beyond this specific merger. It's vital that we get this right as it will set a precedent for competition jurisprudence."

Source: Financial Mail

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