

**IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)**

**CT CASE NO: 73/LM/Nov10
CC CASE NO: 2010NOV5445**

In the large merger between:

WAL-MART STORES INC

Primary Acquiring Firm

and

MASSMART HOLDINGS LIMITED

Primary Target Firm

SACCAWU'S SUMMARY OF EVIDENCE

SACCAWU intend to call **NOEL MDUDUZI MBONGWE** as a witness, who will give the following evidence in amplification of SACCAWU's representations filed with the Commission and incorporated herein by reference:

1. BACKGROUND

1.1.1 am the Deputy General Secretary of SACCAWU and have been employed with the union since 1992 and have held my current position since 1999. As a result, I have knowledge of the structure of and conditions within the retail and wholesale sector, as well as regarding the structure of and conditions within the supply chain to the retail and wholesale sector.

1.2. In addition, as a result of SACCAWU's participation in COSATU and its membership of international labour federations, I have knowledge of the broader economic and political context and the issues raised by the proposed merger between Wal-Mart and Massmart.

1.3. SACCAWU is affiliated to UNI Global and is a founding member of the Anti-Wal-Mart Coalition and makes its representations on behalf of those groups.

2. CONTEXT TO CONCERNS ABOUT THE PROPOSED MERGER

2.1. SACCAWU's opposition to the proposed merger must be understood and located within a broader economic, political and legal context.

2.2. First, SACCAWU understands that the Tribunal is required by the Competition Act to consider the competition and public interest effects of a proposed merger in terms of section 12A as part of its express broader mandate set out in the Act. This is not a narrow analysis limited to the firms who intend to merge. Rather, it is an analysis that must explicitly take into account the impact of the proposed merger on the issues of

2.2.1. Whether all South Africans will have an equal opportunity to participate fairly in the national economy;

2.2.2. Whether it achieves a more effective and efficient economy in South Africa;

- 2.2.3. Whether it will provide a market in which consumers will have access to, and can freely select, the quality and variety of goods and services they desire;
- 2.2.4. Whether it creates a greater capability and an environment for South Africans to compete effectively in international markets;
- 2.2.5. Whether it transfers economic ownership in keeping with the public interest;
- 2.2.6. Whether it promotes the efficiency, adaptability and development of the economy;
- 2.2.7. Whether it provides consumers with competitive prices and product choices;
- 2.2.8. Whether it promotes employment and advances the social and economic welfare of South Africans;
- 2.2.9. Whether it would expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- 2.2.10. Whether it would ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- 2.2.11. Whether it would promote a greater spread of ownership, in particular to increase the ownership stakes of _____ historically disadvantaged persons.

2.3. These issues cannot be avoided in this merger and it should not be treated as an ordinary case given the size, notorious business practices and foreseeable adverse impact of Wal-Mart's entry into South Africa on all of these goals that the Tribunal must promote in exercising its powers under the Act.

2.4. I have noted the statements by the merging parties in the press that the prohibition of the proposed merger would affect investor confidence in South Africa and discourage Foreign Direct Investment. However, the prohibition of the proposed merger, and SACCAWU's opposition to it, should not be understood as a sign that SACCAWU is against FDI. It welcomes responsible foreign investment in South Africa and supports economic development that could follow.

2.5. It does not, however, support Wal-Mart's investment in South Africa because of that firm's specific business model and practices, and their adverse consequences for South Africa's economy.

2.6. As set out below, the retail sector is important on its own but cannot be seen in isolation from its supply chain and the manufacturing, food, agriculture, agro-processing, clothing and textile, chemical and transport industries that are involved in the production of goods for sale through retail outlets. The retail sector acts as the intermediary or conduit between those productive sectors and the end-consumer.

2.7. Thus, the creation of enormous and unmatched countervailing power or buyer power as a result of the entry of the world's largest retailer into the South African retail sector will impact not only on Massmart's

competitors in the retail space, which include SMMEs and informal traders, but also reverberate up the supply chain.

2.8. This would have several harmful effects on both the retail sector as well as the suppliers to it. I understand that economists have studied this phenomenon and describe, among others, the waterbed effect, the spiral effect and the creation of monopsony or buyer power that follows the arrival of Wal-Mart's business practices and business model in a given market or sector.

2.9. In addition, Wal-Mart's harmful effects on the conditions of workers in the retail sector and at its suppliers is well-documented and has resulted in it being repeatedly sanctioned by regulators in the markets in which it operates.

2.10. In short, SACCAWU would not hold the same attitude to the proposed merger if the primary acquiring firm were another international retailer.

2.11. SACCAWU also notes the inherent contradiction in the merging parties' insistence that Massmart will continue to set the strategic direction and manage the business, while simultaneously trumpeting the merged entities' access to Wal-Mart's business model, practices, strategies and skills that they acknowledge the merged entity will access and utilize if the merger is approved.

2.12. Massmart selected and pursued Wal-Mart as its buyer and it must address the unique consequences that follow from that choice.

2.13. In light of this, SACCAWU doubts the effectiveness of any conditions that could be imposed on the proposed merger to address these concerns. The Commission and Tribunal would have to exercise great oversight and monitoring for years to come in order to ensure that the merged entity observed any conditions attached to the approval of the merger.

2.13.1. I address the issue of conditions below but note here as a threshold issue that the undertakings by the merging parties lack any meaningful detail and could not form the basis of enforceable conditions on the proposed merger.

2.13.2. In addition, SACCAWU's experience is that commitments such as these undertakings made by merging parties are discarded as soon as the Tribunal approves the merger. Unless they are detailed and enforceable conditions, no recourse then exists for SACCAWU to return to the Tribunal and attempt to enforce them.

2.14. I noted with concern the recent statements by Shoprite about the impact of the proposed merger on its own operations and those

of its competitors, as well as the likely and inevitable closure of South African suppliers.

2.14.1. Shoprite's CEO publicly acknowledged that retailers would be forced to import more products in order to compete with the merged entity and that local suppliers and manufacturers would fail as businesses as a direct consequence of Wal-Mart's entry.

2.14.2. This would result in the loss of further manufacturing capacity in South Africa, a sector that is already under significant strain, as explained to the Commission by NUMSA in its submissions.

2.14.3. Job losses would result at these firms.

2.14.4. These statements by Shoprite also made clear that these effects would be felt in the short term.

2.15. Therefore, the Tribunal must weigh the supposed value of Wal-Mart's investment in South Africa against its foreseeable and imminent adverse impact on jobs and conditions, not only in the retail sector but also in manufacturing and other sectors that feed into the supply chain to Massmart such as agriculture, agro-processing, chemicals, clothing and textiles.

2.16. South Africa would not be alone in refusing Wal-Mart entry into its economy because it would not serve national interests or

development goals, that the Act requires the competition authorities to advance.

2.16.1. Other governments, including Norway, Sweden and Holland, have disinvested from Wal-Mart because of the risk that they would be complicit in human rights violations if they did not.

2.16.2. International organisations such as Human Rights Watch and numerous academics and activists have reported on Wal-Mart's poor record as a global corporate citizen.

2.16.3. Even local authorities and municipalities have passed by-laws and regulations preventing Wal-Mart's expansion into their communities altogether, or insisting that it pay a living wage and provide benefits to its workers in stores located within their jurisdiction.

3. RETAIL SECTOR STRUCTURE AND CONDITIONS

3.1. Factors which determine competition in the retail sector include:

3.1.1. pricing – a product of scale and leverage in bargaining with suppliers and manufacturers;

3.1.2. geographical location;

3.1.3. product selection and quality;

- 3.1.4. retail services; and
- 3.1.5. the market structure generally.
- 3.2. The key issue to understanding why Wal-Mart's business model and practices will be so harmful to South Africa is that economy of scale is required for retailers to succeed in low margin, high volume sales that characterise the sector. This creates countervailing power against suppliers and leverages efficiencies in logistics, but also prevents or lessens competition in the sector.
- 3.3. The wholesale and retail sector is vast being the fourth largest contributor to South Africa's Gross Domestic Product and this contribution is in the region of 14%. There are 80,353 retailers and 33,427 wholesalers, 87% being small enterprises, while only 9.5% are medium and 4.5% large.
- 3.4. The sector employs about 3,020,666 people or 16.5% of the active workforce. Of these, 21% work in the formal sector and 47% in the informal sector. The sector accounts for just over 21% of formal employment trends and 47% of informal employment trends. In 2006, there was an average growth rate of 10.7% in the sector which, while reducing, is still currently set at 8.8%.
- 3.5. Jointly, the wholesale and retail sector and private households account for nearly two-thirds or 2.3 million workers in informal employment.

3.6. However, while the large retail chains control 80% of the market, there are 60,000 employers in the retail sector. SMMEs and informal traders constitute the bulk of the sector. The sector has approximately 800,000 jobs, but only 200,000 to 250, 000 of those are with the large chains. The remainder is in SMME and informal businesses.

3.6.1. While these enterprises are more vulnerable, they are also recognized as a path to job creation and to entrepreneurial economic development in South Africa's national economic policy.

3.6.2. These enterprises are customers of the larger retailers, but SACCAWU also highlights the plight of SMMEs that could be suppliers to the retail sector as important in any analysis of the sector and its supply chain.

3.6.3. Academic research and SACCAWU's own research supports this description of the sector.

3.6.4. As a result, the proposed merger's impact will not just be felt by large retailers who can adjust their business plans and import more product or extract cheaper prices from their suppliers in order to compete with the merged entity. It will also adversely affect SMME and informal retailers, as well as SMMEs that in turn supply the majority of the retail sector's outlets.

3.6.5. Given the fact that consumers shop for basically the same items at these stores, the large retailers do compete with these smaller

firms. For example, basic foodstuffs like milk and bread could be bought at a large supermarket, a corner café or from a street hawker just as easily for an individual consumer. All of these enterprises are therefore relevant in considering the proposed merger.

3.7. I have also seen recent statements by the Small Business Forum and other SMME groups expressing their concerns about the merger and SACCAWU supports these groups.

3.8. SACCAWU has observed the increase in insolvencies and liquidation of smaller and independent players, resulting in increased concentration in the market, in recent years.

3.8.1. The difficulty for most operators in the sector to access financing and credit on favourable terms means that the large retailers already enjoy a significant advantage. The costs that smaller operators must carry are greater than the larger firms. For example, wholesalers will not deliver to smaller firms, resulting in greater costs to obtain inventory than larger retailers, even after the difference in volumes is taken into account.

3.8.2. Thus, the majority of the retail sector struggles to survive, and the impact of the merger in communities served by these firms and reliant on them for jobs will be devastating.

3.9. Considering the sector through the lens of the SETAs makes clear the importance of SMMEs:

- 3.9.1. In 2007 there were 9, 540 companies within the wholesale and retail sector paying skills levies, of which 8, 269 have been identified as levy-paying SMMEs in the sector.
- 3.9.2. The NSDS II targets requires 60% of a medium firm's employment equity targets to be supported by skills development and at least 40% of small levy-paying firms are to be supported and the impact thereof measured.
- 3.10. SMMEs contribute more to job creation in developing countries than in industrialised countries, thus indicating that, while more informal businesses may exist within poorer provinces or countries, such enterprises may actually be contributing more to job creation than SMMEs situated in developed countries. The contribution of the SMMEs to job creation is of particular importance to the South African developing economy, given our high un- and under-employment rate.
- 3.11. 43% of South African SMMEs are wholesale and retail businesses and their growth and protection is an important goal in ensuring competitive conditions in the sector.
- 3.12. Another aspect to be considered is the impact of the proposed merger on the quality and nature of the jobs at large retailers like Massmart.
- 3.12.1. SACCAWU has seen a steady decline in the proportion of jobs that are full-time with benefits

and a rise in the number of vulnerable workers in casual or part-time jobs which are cheaper for these employers.

- 3.12.2. These jobs are not secure and even the introduction of the sectoral determination which compels some sick leave allowance and some UIF allocation has not addressed this insecurity. This is so because these conditions are still tied to the number of hours worked by a worker.
- 3.12.3. There are also limited training and promotional opportunities for casual and part-time workers.
- 3.12.4. Insufficient retirement benefits and unaffordable healthcare benefits also plague these workers.
- 3.12.5. At Massmart, about one third of the workforce is made up of flexitime workers. Their hours are not guaranteed and fluctuate by as much as 15 hours a week. For example, at Massdiscounters, approximately 6,000 out of approximately 10,000 workers are flexitimers.
- 3.12.6. In addition, Massmart has already further reduced its workforce by outsourcing services such as cleaning and security.

- 3.12.7. Massmart also uses labour brokers to staff its stores. For example, most cashiers at Makro are supplied by labour brokers.
- 3.12.8. Turnover is high among casual workers and therefore Massmart's wage bill is depressed while its full-time wage bill is a higher cost centre and likely target for cost cutting.
- 3.12.9. Massmart prizes flexibility from its workforce, but this results in lower wages and fewer benefits, training and promotional opportunities.
- 3.12.10. Given Wal-Mart's documented track record of paying depressed wages to its workers and shifting its payroll costs onto public assistance, SACCAWU is concerned that Massmart's workforce will suffer the real downward variation of its terms and conditions of employment after the merger as Wal-Mart pressures the local subsidiary to cut costs and extract greater productivity.
- 3.12.11. SACCAWU is not opposed to greater productivity from workers where it is achieved through training and technology, but not where it flows from the greater exploitation of workers in real terms.
- 3.13. Massmart's employment statistics, by division, are as follows:

DIVISION	2009 EMPLOYMENT LEVEL	2010 EMPLOYMENT LEVEL	DIFFERENCE
Massdiscounters	9 469	8 876	-593
Masswarehouse	2 805	2 644	-161
Massbuild	6 074	6 409	335
Masscash	5 931	8 395	2 464
TOTAL	24 279	26 324	2 045

3.14. These figures represent the number of full-time equivalents which includes all permanent employees and the permanent equivalent of temporary employees and contracted workers.

3.15. Of these, Massmart employs a high proportion of employees in non-standard forms of employment. The Massdiscounters divisions employed 3,514 permanent employees, just before the 2010 retrenchment exercise, whilst it employed 6,000 flexi-timers and 1,032 category A casuals. Employees in non-standard forms of employment constituted more than 66% of the total number of employees within the Company.

3.16. It should also be noted that the number of permanent employees was substantially reduced as a result of the 2010 retrenchment exercise which targeted permanent employees who are in the bargaining unit. The Company's annual report confirms that 504 employees were retrenched, within Massdiscounters, in 2010.

3.17. Retrenchments are the main cause of the decline in numbers within the Massdiscounters division whilst the acquisition of 19 stores within the Masscash Division is the main reason for an increase in the number of employees. It should however be noted that the company has since decided to close some stores within Masscash.

3.18. What this means in the context of the proposed merger is that there is a need to protect organizational rights at Massmart, address decent job creation in the retail sector and its supply chain as a part of SACCAWU's Decent Work Agenda which seeks:

3.18.1. An income which allows the working individual a good life;

3.18.2. Everybody has an equal chance to develop themselves at work, and discrimination does not occur;

3.18.3. There are proper and safe working conditions

3.18.4. Trade unions are allowed, and a real say in work related matters is in place; and

3.18.5. The creation of a state-supported social safety net for the sick, weak, elderly and for expecting women.

- 3.19. These issues also arise in COSATU's Growth Plan and the government's growth path policy.
- 3.20. I note that the merging parties claim that job creation will follow from the proposed merger.
- 3.20.1. What is not clear, however, is how this claim is reconciled with Massmart's strategy that its growth primarily will be by acquisition. It is unclear how many new jobs will actually be created by the proposed merger and how many will merely transfer to the Massmart payroll.
- 3.20.2. It is also not clear how many jobs will be created at suppliers to Massmart as a result of its growth and whether any jobs created will be at suppliers other than large firms such as Unilever, Tiger Brands and Pioneer Foods, rather than at SMMEs.
- 3.21. The fate of South Africa's consumer goods manufacturing industry lies in the hands of the retail sector because it is the conduit to end-consumers. This vulnerable sector has already seen job losses and faces considerable risk from imports. I understand that NUMSA made representations to the Commission in this regard and SACCAWU supports those representations.

3.22. In addition, as FAWU advised the Commission, the farming, agricultural and agro-processing sector is also highly vulnerable and reliant on the retail sector for its survival and growth.

3.23. Finally, those provinces in South Africa that are more rural and/or otherwise in need of development are often the homes of the SMMEs, informal traders and vulnerable suppliers to the retail sector.

3.24. A meaningful understanding of these broader issues is necessary in the Tribunal's analysis of both the competition and the public interest impact of the proposed merger, in light of the purposes of the Act.

4. PRE-MERGER RETRENCHMENTS AND POSITIONING OF MASSMART TO ATTRACT WAL-MART

4.1. As set out in SACCAWU's representations to the Commission which are not repeated here in the interests of brevity but which are incorporated by reference, Massmart engaged in a process of unilateral re-positioning of itself in recent years to make it more attractive to Wal-Mart for acquisition. This culminated in pre-merger retrenchments in 2010.

4.2. The falsity of Massmart's denial that this was its strategy is revealed in the recent statements of its CEO to the media about the history of the proposed merger. From these statements it is clear that:

- 4.2.1. The merging parties have had a relationship since 1990;
 - 4.2.2. Massmart indicated to Wal-Mart that it was available for acquisition years ago and confirmed that repeatedly;
 - 4.2.3. Since 2007 at the latest, Wal-Mart representatives visited South Africa with the intention of acquiring one of the major retailers;
 - 4.2.4. When the others rebuffed them or were otherwise deemed unsuitable by Wal-Mart, it targeted Massmart for acquisition;
 - 4.2.5. Massmart engaged in unilateral restructuring so as to make itself attractive to Wal-Mart, including by adopting new technology, expanding its grocery offering, the type of stores it acquired and the workforce policies it then adopted such as increasing outsourcing, flexitime and casualization;
 - 4.2.6. Massmart also changed its attitude to SACCAWU becoming more antagonistic, in line with Wal-Mart notorious anti-union business practices;
 - 4.2.7. Even if all of this were not to attract Wal-Mart's offer, it marked Massmart's commitment to introduce the Wal-Mart business model and its business practices into South Africa.
- 4.3. Massmart executives have been trained by Wal-Mart for years now and have adopted more of its policies and practices in recent years.
- 4.4. Massmart repeatedly denied to SACCAWU that it was in talks with Wal-Mart and dismissed the notion as media speculation.

4.5. Massmart's public statements about the history of the negotiations for the proposed merger now confirm that this was not true.

4.5.1. In a presentation in November 2010 to investors, analysts and media, Mark Lamberti, the founder, one-time CEO and now chairperson of Massmart states, on behalf of the Board, that "The relationship (with Wal-Mart) which commenced in 1990 has resulted in: exposure of many Massmart executives to aspects of Wal-Mart's operations & training, many shared retail principles & business values, mutual respect."¹

4.5.2. This is a far longer period than the date of introduction that the current Massmart CEO gave at a recent presentation at the Gordon Institute of Business Science (GIBS) in February 2011 when he stated that the relationship intensified from 2004 onwards.² After a causal meeting in 2004, Massmart executives began meeting with retired Wal-Mart executives from 2007 and rumours of Wal-Mart's interest in Africa began to surface in the market in 2008.

¹ Massmart presentation "Wal-Mart confirms intention to make a firm offer to acquire a controlling interest in Massmart: Presentation to Investors, Analysts and Media", 29 November 2010

² Moorad, Zeenat, 'Wal-Mart/Massmart - the makings of marriage', BusinessLIVE , 17 February 2011

4.5.3. Given Massmart's long-term strategy of seeking to be bought by a global retailer, and Wal-Mart preferably, Massmart took steps to enhance its chances of acquisition by the global giant.³

4.5.4. An *Economist* article notes, in the current issue, that "[t]en years ago Massmart, which is South Africa's leading wholesale warehouse business, decided that it needed a global partner. Wal-Mart began sniffing around South Africa three years ago, seeking a toehold on a continent where consumer spending power has risen sharply in the past decade. The obvious partner was Shoprite, Africa's biggest grocer. But Massmart increased its allure by rushing into the food-retailing business, and the gamble paid off."⁴

4.5.5. The long-stated intention of Massmart to be acquired by a global retailer was further confirmed by its CEO at the GIBS presentation where he stated that Massmart positioned itself to be bought by a global retailer in order to participate in the globalisation of retail: "...the first time [Wal-Mart] were here, I made it absolutely clear that we were available for sale."⁵

4.5.6. Massmart noted that "we clearly moved from a speculative environment to Wal-Mart is deciding whether it's coming into

³ Ibid. "It was our strategy to be bought by a global retailer; we didn't have to wonder about how we were going to deal with it, or whether our shareholders would like it, or whether management would come along. We sent them [Wal-Mart] a very clear message - if you want to chat to us we're ready and we had some good ideas," he added.

⁴ (http://www.economist.com/node/18185732?story_id=18185732&fsrc=rss)

⁵ Moorad, Zeenat, 'Wal-Mart/Massmart - the makings of marriage', BusinessLIVE , 17 February 2011

Africa...It was our strategy to be bought by a global retailer; we didn't have to wonder about how we were going to deal with it, or whether our shareholders would like it, or whether management would come along. We sent them [Wal-Mart] a very clear message - if you want to chat to us we're ready and we had some good ideas.”⁶

4.5.7. The pre-merger retrenchments, which began in January 2010, were therefore within the timeframe during which Massmart focussed on enhancing its appeal to Wal-Mart and cannot be separated from the proposed merger.

4.5.8. In addition, this choice of timing of the retrenchments by Massmart achieved two distinct and strategic goals:

4.5.8.1. It avoids section 12A scrutiny by the competition authorities of what would otherwise have been a planned future retrenchment with the negative implications for the public interest justification for the proposed merger that would have followed such a delay; and

4.5.8.2. It moves Massmart closer to its goal of being an attractive acquisition target to Wal-Mart.

4.6. The disingenuous and strategic way in which Massmart notified SACCAWU of the proposed merger only confirmed that it had not

⁶ GIBS presentation, BusinessLIVE, *ibid.*

been forthright and honest for years previously and intended to ignore its obligations to engage and consult with the union on such issues.

4.6.1. Despite rife media speculation, and SACCAWU's knowledge that statements had been made to Wal-Mart shareholders about its plans to acquire Massmart, Massmart denied that any offer was likely.

4.6.2. Its management then sent senior SACCAWU and COSATU leaders an SMS message just an hour or so before the offer was announced to the market and then claimed to have consulted with prominent union leadership, allegedly the SACCAWU President and COSATU General Secretary. Both refuted such an assertion as both dishonest and an undue attack on their integrity. This claim of consultation featured in media reports at the time as well as on Massmart's company notice boards that inform workers. This was intended to advance propaganda to the effect that workers were not involved and did not support SACCAWU's position on the proposed merger and its protests.

4.6.3. This was an attempt to antagonize Massmart workers and drive a wedge between union members and their leaders.

4.6.4. At the same GIBs presentation Massmart's CEO made several other unsubstantiated statements concerning workers at Massmart, their feelings concerning the deal with Wal-Mart and

their relationship to the union to which 38% of them⁷, according to Massmart's own figures, belong.

4.6.5. In the presentation he stated that "It really is an exciting time for employees. And just so you are absolutely clear, our employees aren't driving any protest: you'll see there has been no strikes, no protests; in fact I would suggest that they have gone as far as to tell the union not to get in the way. All good for our employees"⁸.

4.6.6. This antagonistic attitude confirms our fears that the Wal-Mart anti-union mindset has already tainted Massmart's management. Prior to 2007, when Wal-Mart began its investigation for an acquisition target in South Africa, there was a cordial relationship between SACCAWU and Massmart and agreements reached between them were followed.

4.6.7. However, since 2007, the relationship has been marked by increased animosity and Massmart's failure to follow agreed procedures.

4.6.7.1. For example, when Massmart introduced new technology in 2007/08, which is an issue affecting workers that should have been consulted on with SACCAWU in terms of the existing collective

⁷ Massmart Annual Report 2010 – again, this figure is different from the Commission's report which "the majority of Massmart's employees are unionized" - 38% is not a majority and it would be important to know where the Commission got its figures.

⁸ GIBS presentation, BusinessLIVE, *ibid*.

agreement, Massmart refused to consult ahead of its implementation.

4.6.7.2. In the retrenchments that followed, which flowed from this unilateral introduction of technology, Massmart failed to engage with SACCAWU again and went straight to the CCMA.

4.6.7.3. Another development worth noting was the agreement concluded by Massmart with certain workers in one of its stores in Nelspruit. This agreement was concluded outside of SACCAWU's representation of these workers. This desire to engage directly with workers and not recognize and work through collective and representative structures is akin to Wal-Mart's anti-union attitude where that firm values individual engagement with its workers rather with their representatives.

4.6.7.4. Further, despite Massmart (Makro) concluding the wage dispute settlement agreement with SACCAWU, that amongst other things abolished the unilaterally imposed 40-hour rolling week, thus agreeing to negotiate and conclude a job security, flexibility and mobility of labour agreement with SACCAWU, that regulates hours of work, Massmart again disregarded this agreement and

continued to impose a flexible working week/40-hour rolling week into the Makro Silver Lakes store and dismissed 71 SACCAWU members who complied with the strike settlement collective agreement. The 40-hour rolling week work pattern that Massmart was only a pilot at Silverlakes. But, even if true, it should have been introduced following engagements with SACCAWU.

4.6.7.5. SACCAWU also notes that the retrenchments that commenced in 2010 are part of a 3-year process of restructuring and retrenchment at Massmart. Massmart no doubt will claim that this process has nothing to do with the proposed merger, but this claim cannot be reconciled with the merging parties' undertakings that the proposed merger will only result in job creation.

4.6.7.6. Finally, this comports with increased antagonism from other retailers in their relationships with SACCAWU. The difference is that these other employers, unlike Massmart, acknowledged to SACCAWU that they had met with Wal-Mart at the US Embassy in Pretoria to explore acquisitions in South Africa. As a result, the large players in the retail sector are repositioning themselves ahead of

Wal-Mart's entry, regardless of who is the acquisition target. This repositioning is confirmed by, for example, Shoprite's recent statements.

4.6.7.7. One final aspect of Massmart's approach to the proposed merger that SACCAWU seeks to highlight is that it has used the Thutukani Empowerment Trust, of which eligible Massmart employees are beneficiaries, to claim employee support for the deal and not for SACCAWU's opposition to it. However, only full-time employees are eligible for participation in the Trust, an ever-declining number given Massmart's commitment to the casualization of its workforce and the recent retrenchments that targeted permanent employees.

4.6.7.8. All of these examples confirm Massmart's adoption of the Wal-Mart model.

5. SECTION 12A CONCERNS

5.1. SACCAWU believes that the proposed merger fails on both grounds of possible justification set out in section 12A and that the facts and likely effects of the proposed merger warrant its prohibition on both competition and public interest grounds.

5.2. With respect to competition concerns,

5.2.1. Given the retail sector structure and conditions, as well as those of its supply chain, the proposed merger would

- 5.2.1.1. Increase import competition in the market because local suppliers simply cannot compete with import pricing and sustain their businesses, which would result in job losses, the closure of SMMEs and the stalling of the transfer of ownership and economic development locally. Statements by Shoprite and the SMME organisations confirm this;
- 5.2.1.2. Raise the barriers to entry into the market given that it would become increasingly difficult to ever reach the scale necessary to compete against Wal-Mart;
- 5.2.1.3. Result in increased concentrations as smaller enterprises fail in the retail sector and its supply chain;
- 5.2.1.4. Increase countervailing power in the market to such a degree that it would be to the detriment of smaller enterprises and suppliers;
- 5.2.1.5. Reduce growth, innovation and product differentiation as the sector contracted; and
- 5.2.1.6. Remove effective competitors and homogenise the sector.

5.3. I am advised that these concerns are also addressed by SACCAWU's experts, as well as the other unions and SMME organisations that have made submissions to the Commission and will be addressed in SACCAWU's further submissions to the Tribunal and at the hearing of this matter.

5.4. On the basis of these concerns, the proposed merger cannot be justified and will substantially prevent or lessen competition. Any technology, efficiency or other pro-competitive gain identified by the merging parties cannot outweigh its anti-competitive effect.

5.5. With respect to public interest concerns,

5.5.1. The proposed merger will adversely affect both the retail sector as well as those industrial and economic sectors that are part of its supply chain;

5.5.2. In addition, all regions of South Africa will be adversely affected albeit for different reasons. For example, a small town dependent on employment at a local manufacturer who is forced to close its operations since its products are replaced by cheap imports will suffer;

5.5.3. Employment terms and conditions at Massmart itself, other retail employers and suppliers all will be adversely affected as all of these firms adjust their business plans to attempt to match Wal-Mart;

- 5.5.4. Job losses will result from the proposed merger – as retailers, SMMEs and informal jobs are lost, as well as at suppliers forced to close or scale back their levels of employment following Wal-Mart's entry;
- 5.5.5. Jobs will not be created as a net effect of the proposed merger and the merging parties have not clearly shown whether new jobs will be created, and, if so, how many, due to the proposed merger;
- 5.5.6. Small businesses will be unable to become competitive against Wal-Mart or its suppliers; and
- 5.5.7. The same holds true for firms controlled or owned by historically disadvantaged persons.
- 5.6. As with the competition concerns, I am advised that these concerns are addressed by SACCAWU's experts, as well as the other unions and SMME organisations that have made submissions to the Commission and will be addressed in SACCAWU's further submissions to the Tribunal and at the hearing of this matter.
- 5.7. The merging parties identified three benefits to the proposed merger,⁹ but each is speculative or demonstrably false:
- 5.7.1. Whether consumer welfare will be enhanced "*through wider range and choice and potentially lower prices which are possible through, inter alia, access to Wal-Mart's expertise and*

⁹ p 2558

procurement network” is disputed in light of the concerns listed above. These apparent benefits must be evaluated in terms of their cost and detrimental effect on the interests identified in section 12A;

5.7.2. The claim that the proposed merger will “*have a positive effect on employment in that the proposed transaction with, inter alia, assist Massmart in implementing its growth strategy even more effectively*” only prompts the questions around the number, nature and quality of jobs that will follow the proposed merger and whether the realization of these concerns will merely be accelerated by the proposed merger;

5.7.3. The claim that the proposed merger will “*generate up-stream benefits for local suppliers through enhanced local procurement for resale in South Africa and potentially abroad*” requires the merging parties to identify which local suppliers will benefit, acknowledge that it is likely to be limited to large dominant firms and justify that they should given such enhanced benefits in light of the Act’s commitment’s to SMMEs and broader economic development.

5.7.4. As set out in the report prepared by LRS, Massmart pays a higher and higher percentage of profits to shareholders as dividends while pay and working conditions remain less than optimal.

- 5.7.5. In the year that Massmart workers went on strike for a R460 increase in wages, Massmart paid a record R867 million in dividends to its shareholders.
- 5.7.6. The proportion of the wealth created applied to employee wages and salaries dropped dramatically in 2003 and has not recovered.
- 5.7.7. When compared to its competitors, Massmart distributes far less of its wealth to employees. In the same year Shoprite distributed 58% and Pick 'n Pay 65% of wealth created to employees as salaries, wages and other benefits.
- 5.8. SACCAWU is also concerned that the proposed merger will result in the redistribution or repatriation of wealth to foreign investors, to the detriment of South African interests. Given that the majority of Massmart's shareholders are foreign-based, its post-merger dividend stream will flow offshore in even greater amounts.
- 5.9. Finally, the proposed merger will not promote consumer welfare through wider choices over the long term.
- 5.9.1. Even if consumers benefit from lower prices, this will only be in the short term.
- 5.9.2. As the adverse effects of Wal-Mart's entry become apparent, there will be greater reliance on imports. This, coupled with the inevitable and foreseeable failure of both suppliers and competitors resulting in increased levels of concentration in the

retail sector and its supply chain, will mean that, ultimately, consumer choice will shrink.

5.9.3. In addition, lower prices are not guaranteed from the merged entity. Once its competitors have failed and its suppliers have succumbed to its enormous countervailing buyer power, the merged entity would have every incentive to then raise prices and extract rents from consumers.

5.9.4. No effective competition would exist to the merged entity.

5.9.5. These consumers would then have no alternatives and would have to endure higher prices.

5.10. I am advised that these issues will be addressed in SACCAWU's further submissions to the Tribunal and in the statements of its expert witnesses.

6. COMMISSION INVESTIGATION AND RESPONSE TO RECOMMENDATION

6.1. SACCAWU response to the Commission's conduct of its investigation and its recommendation is, I am advised, a matter for its further submissions and expert witnesses. I therefore merely note here that the Commission's investigation of the proposed merger was procedurally flawed in that it did not properly investigate the concerns raised to it from third parties, failed to investigate the viability of the vague undertakings made by the merging parties and did not engage

in logical or defensible reasoning and analysis in reaching its ultimate recommendation.

6.2. SACCAWU is further troubled by the Commission's abdication of its responsibilities in terms of the Act and its apparent unlawful delegation of those powers and responsibilities to a without prejudice, informal and ad hoc social dialogue facilitated by the Economic Development Department. SACCAWU did not inform the Commission of this process since its outcome is uncertain and unrelated to the merger proceedings before the Commission and Tribunal. That the Commission was advised something wholly different to this understanding, and relied on it as a basis to terminate its investigation and issue its recommendation, is of great concern to SACCAWU.

6.3. Finally, the legal status of the undertakings made by the merging parties and the Commission's acceptance and reliance on them is disputed by SACCAWU.

6.3.1. These undertakings are not binding on the merging parties;

6.3.2. Nor do they contain sufficient detail to meet any of the concerns identified by SACCAWU and other entities that engaged with the Commission during its investigation;

6.3.3. Nor do they ensure appropriate monitoring, oversight and enforcement mechanisms;

6.3.4. Nor is it clear whether Wal-Mart agrees to all of these undertakings, or only to some and what the status of those undertaken by Massmart alone will be if the merger is approved.

6.3.5. As a result, they are legally insignificant and unreliable.

7. REMEDY SOUGHT

7.1. SACCAWU accordingly opposes the proposed merger and seeks its prohibition by the Tribunal.

7.2. However, in the event that the Tribunal is inclined to approve the proposed merger and impose conditions on it, the following 15 demands have previously been communicated to the merging parties by SACCAWU as its demands in relation to the proposed merger:

- *There must not be cancellation of any existing agreements and down variation of terms and conditions of employment*
- *The terms and conditions of employment covered by existing agreements with SACCAWU must be extended to all Massmart operations throughout the continent where the same do not exist*
- *Massmart must reinstate all workers dismissed during the dispute as a result of the Company's unilateral breach and deliberate misinterpretation of the strike settlement, re-engineering and unilateral restructuring of the workplace*
- *There must be Group Centralised Bargaining*
- *There must be a close-shop agreement*

- *The Company must commit to closing the apartheid wage gap and other disparities across the group*
- *There must be effective integration of workers from all divisions and brands*
- *There must be no supply of labour broker workforce*
- *The Company must convert all casuals to full-time employment*
- *There must be Job creation*
- *There must be clear local procurement policies towards developing local agriculture, food processing and manufacturing, economies with clear decent work imperatives in job creation*
- *There must be adherence to local labour legislation and policies of Broad-Based Black Economic Empowerment, Employment Equity and skills development and training*
- *Wal-Mart must sign a Global Framework Agreement with UNI Global Union*
- *Wal-Mart must stop its opposition to the US Employee Free Choice Act*
- *Wal-Mart must commit to dealing with adverse employment conditions experienced by worker from their suppliers” (sic)*

7.3. SACCAWU proposes the following additional conditions for consideration by the Tribunal as the type of conditions that could address the concerns set out above and in the submissions made by the other parties that oppose the proposed merger. The precise detail and scope would have to be debated at the Tribunal hearing into the

proposed merger, but we offer them here for consideration ahead of those proceedings.

7.3.1. Conditions relating to limitations on the extent of foreign ownership or the form of foreign investment:

7.3.1.1. Our research reveals that other competition authorities impose conditions on mergers where one party is a foreign investor so as to retain local majority control. These type of conditions are aimed at capturing local economic development and benefit from the transaction, rather than unconstrained repatriation or redistribution of profits and proceeds offshore. They also appear to ensure that strategic control remains local in the belief that this will produce business practices that are in the local interest.

7.3.1.2. Examples of such conditions would be

7.3.1.2.1. That foreign companies enter market through franchising arrangements;

7.3.1.2.2. That foreign ownership in local companies be limited to 49% or even lower;

7.3.1.2.3. That foreign entries be restricted to joint ventures;

7.3.1.2.4. That the majority shares of joint ventures be locally owned;

7.3.1.2.5. That entry through partnership has limited timeframes on the life of the partnership.

7.3.1.3. SACCAWU recognizes that this type of condition may discourage foreign investment and that any such condition must be carefully crafted to meet the particular circumstances of an individual transaction. In this case, such conditions may not materially alter the strategy and business practices of the merged entity, but would address concerns about the repatriation of the majority of wealth created by the merged entity's operations to foreign investors.

7.3.2. Conditions relating to the known business practices of a prospective acquiring firm

7.3.2.1. Conditions that require prospective entrants to have an objectively positive global reputations on a range of issues including labour rights and employment creation, local procurement, development of local economies, training of local employees and effective integration of local suppliers into global supply chains would ensure

that firms with recognized good corporate citizenship are preferred as foreign investors in South Africa. Given the range of international reporting standards and levels of transparency in certain other countries, the historical business practices of firms could be ascertained. Those with systemically adverse findings about their business practices could be excluded. Such conditions align with global trends towards sustainable investment and corporate practice, as well as the newly adopted integrated reporting standards of the JSE.

7.3.2.2. Here, Wal-Mart's poor global reputation and sustained contravention of the law as repeatedly found by regulators and enforcement agencies in other jurisdiction should result in its exclusion.

7.3.3. Conditions relating to the scale of operations locally

7.3.3.1. Examples of such conditions would be limitations on the size and number of stores acquired, that foreign interest in certain lines of consumer goods be restricted to assist in enhancing local manufacturing development and that locally produced (not merely sourced) content must constitute a specified percentage, say 75%, of the product offerings.

7.3.3.2. This would address some of the concerns around the impact of Wal-Mart's entry on local suppliers and producers.

7.3.4. Conditions relating to consumer protection

7.3.4.1. Conditions such as that consumer protection mechanisms for the promotion of general consumer welfare be considered and that measures for minimizing product hazards, ensuring product safety and enhancing consumer education and participation of consumer bodies in the market address concerns about the cheap, lower quality products that inevitably flood stores when price, rather than quality, becomes the only determining factor for retail selection.

7.3.5. Conditions relating to broader economic strategies

7.3.5.1. Recognising the complementary role that competition policy plays to industrial, trade and economic development policy, conditions could acknowledge this broader framework and national imperatives. Examples of conditions that would require the competition authorities with other organs of government would be

- 7.3.5.1.1. That tariff restrictions or subsidies for competitors be considered;
- 7.3.5.1.2. That ownership that will enhance the export of locally manufactured goods be preferred;
- 7.3.5.1.3. That any new developments be assessed for environmental impact including limitations on floor space, transport access etc. involving different tiers of government within the context of the general developmental objectives;
- 7.3.5.1.4. That local development, integrated retail strategies and the diversity of use of retail spaces in the context of clean development etc. be preferred;
- 7.3.5.1.5. That the assessment of any retail development consider how much trade will be diverted from existing retail trade, the benefits for local economies and consumers, formal and structured consumer

representation and participation in all impact assessment processes;

7.3.5.1.6. That over-arching concerns of urban and rural development, property development, fair trading, economic efficiency, sustainable and responsible investment for the protection of the long-term interests of the South African people and the country be kept in mind.

7.4. SACCAWU acknowledges that not all of these could be imposed as specific conditions, but all should be explicitly considered and inform any analysis of possible conditions to the proposed merger.

7.5. Finally, SACCAWU would seek appropriate monitoring, oversight and enforcement mechanisms from the Tribunal to ensure that any conditions imposed are met by the merged entity.

7.5.1. Any conditions imposed must be sufficiently detailed and precise to ensure compliance. Clear reporting to the Commission must be required and enforcement mechanisms provided, such as recourse to the Tribunal.

7.5.2. Conditions must also be of sufficient duration to meaningfully influence the business practices of the merged entity. We note

that Massmart is engaged in a three-year strategic phase and any conditions should persist for at least that length of time.

7.5.3. Given the repositioning that is foreseeable in the retail sector and its supply chain in response to Wal-Mart's entry, longer-term oversight and monitoring will be needed. All of the adverse effects of the entry will not be manifest immediately, but will probably only start to become apparent in the longer term, approximately three to five years.

7.5.4. Conditions should also facilitate reporting and monitoring of the effect of Wal-Mart's entry on the broader retail sector and its supply chain and not focus exclusively on the merged entity's business.

8. ORAL EVIDENCE

8.1. In my oral evidence at the hearing I will elaborate on the facts and issues set out above.