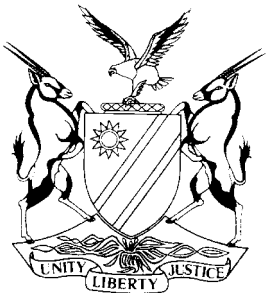

CASE NO.: A 61/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WAL-MART STORES INCORPORATED **APPLICANT**

and

THE CHAIRPERSON OF THE NAMIBIAN COMPETITION COMMISSION **1ST RESPONDENT**

THE NAMIBIAN COMPETITION COMMISSION **2ND RESPONDENT**

THE MINISTER OF TRADE AND INDUSTRY **3RD RESPONDENT**

MASSMART HOLDINGS LIMITED **4TH RESPONDENT**

CORAM: **MULLER, J** *et* **SMUTS, J**

Heard on: 6 April 2011

Delivered on: 28 April 2011

JUDGMENT

Smuts, J [1] This application concerns the validity of four conditions imposed by the Competition Commission ("the Commission"), the second respondent in this application, upon the intended merger between the applicant and the fourth respondent.

[2] The applicant is a United States company and has approached this court on an urgent basis to declare those four conditions and Government Notice 75 of 2010, made under the Foreign Investments Act, 27 of 1990 ("FIA") to be invalid.

[3] This application arises in the following way. On 26 November 2010 the applicant and the fourth respondent notified the Commission of a proposed merger. This was done in terms of s 44(1) of the Competition Act, 2 of 2003 ("the Act"). The applicant and fourth respondent supplemented their merger notification with subsequent correspondence directed to the Commission by its legal practitioners of record. The features of the merger are not in issue. I thus only need to refer to them in brief outline.

[4] The applicant operates retail stores in various countries globally. Its operations are organised in three divisions. These are Wal-Mart Stores US, Sam's Club and Wal-Mart International. The applicant does not currently conduct any business in Namibia. Nor does it sell any merchandise to or from Namibia.

[5] The fourth respondent is a South African entity. It is a retailer and wholesaler of grocery products, liquor and general merchandise. It controls five entities in Namibia. Two of these are dormant. The active subsidiaries are Game Discount World (Namibia (Pty) Ltd, Windhoek Cash and Carry (Pty) Ltd and CCW Namibia Properties (Pty) Ltd. The dormant entities are Macro Namibia (Pty) Ltd and Shield Buying and Distribution (Pty) Ltd (formerly Masstrade Namibia (Pty) Ltd). The applicant and fourth respondent propose to effect their merger by way of a scheme of arrangement under s 311 of the South African Companies Act, 61 of 1973. The proposed merger comprises a firm intention by the applicant to offer to acquire 51% of the ordinary share capital in the fourth respondent by way of a scheme of arrangement. It would follow that the change of ownership and control pursuant to the proposed merger would occur at the ultimate holding company level in South Africa. The ownership structure of the fourth respondent's Namibian entities would not immediately change – except for the substitution of the applicant for the fourth respondent as an ultimate (and indirect) holding company of the Namibian entities.

[6] It is not disputed that there would be no competitive overlap between the activities of the two merging parties within Namibia and thus no accretion in market shares and no increased concentration in any market in Namibia as a consequence of the merger. The applicant accordingly contended in its founding affidavit that there would be no public interest concerns and that the applicant foresees that it would be able to create **"significant incremental value"** in the fourth respondent's business operations in Namibia. The terms of the merger and the subsequent documentation provided to the Commission are voluminous. The Court was not however called upon to consider the documentation for the reasons which become clear in this judgment.

[7] After informal engagements in December 2010 and the supplying of additional information to the Commission, it indicated that it considered that the FIA and Notice 75 issued under it would apply to the proposed merger. As a

consequence of this indication, the applicant's legal practitioners addressed a letter on 15 December 2010 to the Minister of Trade and Industry (the third respondent) regarding the possible application of s 3(4) of the FIA. It was contended in the letter that s 3(4) did not apply by reason of the fact that the proposed merger entailed the direct acquisition by a foreign firm (the applicant) of another foreign firm and did not contemplate setting up any business in Namibia.

[8] The merger transaction straddles fourteen different countries. It has entailed applications to five national competition regulators and has been approved in Tanzania, Malawi, Swaziland and Zambia. It is currently the subject matter of a pending procedure before the South African Competition Tribunal. The Commission by way of a letter dated 9 February 2011 through its Chairperson informed the merging parties that it had approved the proposed merger subject to four conditions. This was in the form of a notice of determination contemplated by Form 41 of the Act. In the notice of determination, the Commission not only set out its conditions in paragraph 3, but also in paragraph 4 provided the reasons for the imposition of the conditions, as it is required by the Act to do so. The full text of the notice, including the conditions and reasons, is as follows:

> ***"PROPOSED MERGER NOTICE-MASSMART HOLDINGS LIMITED // WAL-MART INCORPORATED CASE NO: 2010OCT0052MER***
>
> 1. *The Commission has received notification of the abovementioned proposed merger on the 26th November 2010.*
> 2. *Please note that the Commission has approved the proposed merger with conditions.*
> 3. *The conditional approval of the proposed merger is subject to the conditions listed below:*
>   - *the merger should allow for local participation in accordance with section 2(f) of the Competition Act, 2003, in order to promote a*

greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

- *there should not be employment loses (sic) as a result of the merger.*
- *the merger should not create harmful effects on competition that may give rise to risk of market becoming foreclosed to competitors, especially SMEs (sic).*
- *that this being a retail business transaction, the approval of the Minister of Trade and Industry is required in terms of Section 3(4) of the Foreign Investment Act, 1990 (Act No. 27 of 1990).*

4. *The reasons for the conditional approval of the proposed merger are as follows:*
    - *Commission has regards to the purpose of the Competition Act, 2003, and would like to encourage for the attainment of the objectives of the Act, especially, to give effect to section 2(f) of the Act (sic).*
    - *in most instances, mergers results in some workers losing their jobs. Commission encourages that retrenchments relating to this transaction be minimized so as not exacerbate the already unacceptable unemployment situation in the country.*
    - *the merger should not affect negatively the ability of small undertakings in Namibia to compete in the local market, nor should it lead to foreclosure of these undertakings.*
5. *The Commission has the authority in terms of section 48(1) of the Act revoke a decision approving the implementation of a proposed merger if:*

(a) *the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or*

(b) *any condition attached to the approval of the merger that is material to the implementation is not complied with".*

[9] The applicant contends that all four conditions are unauthorised by law and are invalid and also contends that Notice 75 under which the fourth bulleted condition was made, is likewise unauthorised and invalid.

[10] Following the receipt of the determination, the applicant on 8 March 2011 submitted a request in terms of s 49 of the Act to the Minister asking him to review the Commission's decision to approve the merger subject to the conditions on an urgent basis and to determine that the conditions are unenforceable and should be deleted. The applicant requested the Minister to proceed with the review on an urgent basis and to deal with the matter within 10 (ten) days and by 18 March 2011. The urgency was requested because approval was expected by the South African Competition Tribunal on or around 8 April 2011. Once that approval had been obtained, then the merging parties would be entitled to implement the merger at the holding company level. This would indirectly affect the control of the fourth respondent's Namibian subsidiaries. It would accordingly be necessary to avoid any breach of Namibian laws by having the review resolved in advance of the merger. In response, the Minister considered himself unable to accede to this request by 18 March 2011, as is confirmed in his answering affidavit.

[11] The applicant then approached this Court on an urgent basis for an order declaring Notice 75 to be unauthorised by law and invalid and declaring the four conditions imposed by the Commission to be invalid.

[12] The Chairperson of the Commission (first respondent) does not oppose these proceedings but has deposed to an affidavit on behalf of the Commission which does. The Minister likewise opposes the relief sought.

[13] In its opposition, the Commission merely raises two preliminary points. These are to dispute the urgency of the application and to contend that the matter is not ripe for hearing by reason of the failure on the part of the applicant to exhaust the internal remedy of the statutory review which it had directed to the Minister.

[14] The Minister's opposition is also based upon preliminary points. Firstly a point of non-joinder was taken in respect of the fourth respondent's subsidiaries in Namibia. This point fell away after letters were produced in reply from each of the subsidiaries confirming that they did not want to be joined. It is accordingly not necessary to deal with this issue although this point would not appear to be any basis to it. It is not at all clear to me quite how it can be contended that subsidiaries of a merging party would have a direct and substantial interest in the validity of conditions imposed on a merger of this nature and need to be joined.

[15] The Minister also took the point of urgency. This point is based upon two premises. It was firstly contended that there was an absence of any urgency at all at the outset and secondly that, in any event, any initial urgency was subsequently lost by virtue of the developments before the South African Competition Tribunal. The Minister attached media reports to his affidavit which stated that the proceedings before the Tribunal were postponed to mid May 2011.

[16] A third procedural defence of lack of authority was taken in the answering affidavit. But this point was also addressed in reply and was no longer persisted with in argument.

[17] The fourth procedural defence raised by the Minister was initially broader but subsequently became confined to the application being premature by reason of the failure to exhaust internal remedies. It was initially contended by the Minister that this Court did not have jurisdiction by virtue of the domestic remedy provided by s 49 of the Act. This point was also not rightly persisted with in argument. The Minister did however contend that the applicant is required to exhaust its domestic remedy in s 49 and that this application was premature for that reason.

[18] Neither opposing respondent has pleaded over on the merits. The Minister indicated that Notice 75 was not invalid for reasons which were to be advanced in legal argument on his behalf. But shortly before the matter was called, written argument on behalf of the Minister was confined to the procedural points. Counsel for the Minister was however given an opportunity to provide written argument subsequent to the hearing to address the validity or otherwise of Notice 75 and the applicant was provided the opportunity to file argument subsequently to address the further argument in that regard. The Minister availed himself of that opportunity and further argument was filed subsequent to the hearing to which the applicant has responded.

[19] I turn now to the remaining procedural issues of urgency and exhaustion of the domestic remedy before turning to the merits of the application.

Urgency

[20] As I have already pointed out, the Commission was approached in November 2010 under s 44(1) of the Act. The Competition authorities in Zambia, Swaziland, Tanzania and Malawi had already and unconditionally approved the transaction by 22 December 2010. The Commission provided its approval, subject to conditions, on 9 February 2011.

[21] The applicant contended that the urgency arose from the fact that the primary transaction – the acquisition of direct control over the fourth respondent by the applicant – was expected to be approved by the South African Competition Tribunal by about 8 April 2011. The Minister contended that this was based upon an assumption which turned out to be incorrect. He did so with reference to the media reports I have referred to. But those media reports themselves refer to a **"dramatic last minute move"** resulting in the postponement which, according to those reports, was unexpected. In the replying affidavit, the applicant's South Africa attorney explains the procedures

before the South African Competition Tribunal and the basis for referring to the 8 April 2011 date in the founding affidavit.

[22] The adjourned hearing before that Tribunal has been set for 9 to 16 May 2011. The ruling of that Tribunal is, according to the applicant's South African attorney, expected within a week or ten days thereafter. It follows that this matter would need to be resolved by that time given the nature of the merger transaction. Even if the compressed deadlines set by the applicant with reference to a date of hearing on 6 April 2011 turned out to be shorter than required, it would seem that the matter would still need to be determined by mid May 2011 or shortly thereafter. This could not be achieved by bringing an application in the ordinary course. It was accepted by the parties that an application in the ordinary course would only come to Court towards the end of the year at the earliest or possibly in the first term of 2012.

[23] The issues raised by the applicant would need the matter to be resolved well before any set down, which would be obtained if it were to proceed in the normal course. The question then arises as to whether that the applicant has been dilatory or delayed in the bringing of this application and has justified the abridged time periods in the notice of motion. In my view the applicant cannot be faulted with regard to the bringing of this application as one of urgency and with reference to the time limits used, taking into account the fact that the applicant is a company in the United States engaging American legal representatives and attorneys in South Africa, and the scope and ambit of this application in the context of the merger in different jurisdictions and the need to properly research the matter before launching this application.

[24] Mr Botes also contended on behalf of the Minister that the applicant's urgency was self-created. He pointed out that it took the applicant 29 days to file its internal review to the Minister and 10 further days to bring this application. He questioned the genuineness of the review before the Minister and submitted that

it would appear to be a strategy to proceed to Court after the Commission's decision of 9 February 2011 and that mere lip service was paid to the s 49 remedy. He submitted that the application was thus not urgent and should be struck from the roll.

[25] Mr Khoza for the Commission also submitted that the matter was not inherently urgent. He submitted that the applicant had waited until the last minute to bring the application. Had it moved promptly, it would have given the Minister enough time to consider the internal review. He also raised the issue, foreshadowed in the second respondent's answering affidavit, that it had not sufficient time to place the record of its decision making before Court and contended that it should be entitled to do so. Mr Gauntlett however countered that the Commission had almost all the papers by 25 November 2010 already. He also pointed out that the Minister would have been aware of the main legal issues by 11 March 2011. He pointed out that the changed circumstances of the hearing before the South African Competition Tribunal could only give rise to an amended notice of motion and that the matter in any event remained urgent by virtue of the fact that the Tribunal would give a ruling shortly after 15 May 2011 – long before the matter would be enrolled in the normal course.

[26] As to the changed circumstances before the Tribunal, I asked Mr Botes when the matter would be heard if it should not be heard on the date of hearing and asked if he contended that it should be heard in the ordinary course. He eventually submitted that it should be struck or indefinitely postponed and then be heard in the ordinary course. But this would leave the applicant remediless in the sense that its operations could be visited with illegality if the conditions remained. It needed clarity on these issues once the merger would be approved in South Africa. Implicit in Mr Botes' argument is that there would not be urgency in commercial matters of this nature, and that they should be heard in the ordinary course. This is not correct. This Court has on numerous occasions held

that commercial urgency also justifies the use of urgent procedures in following well known South African authority to that effect: [1]

> *"The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorney in fact decided to set the matter down on a Tuesday when the Chamber Court was in any event in session during the Court recess to dispose of unopposed applications.*
>
> *In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question."*

This case has been cited with approval by this Court. [2]

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[1] Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd 1982(3) SA 582 (W) at 586 F-G

[2] *Shehama v Inspector General Namibian Police* 2006(1) NR 106 (HC)

Clear Channel Independent Advertising Namibia (Pty) Ltd v Transnamib Holdings Ltd 2006(1) NR 121 (HC)

Old Mutual Life Assurance Co Namibia Ltd v Old Mutual Namibia Staff Pension Fund 2006(1) NR 211 (HC).

Mulopo v Minister of Home Affairs 2004 NR 164 (HC).

Bergmann v Commercial Bank of Namibia Ltd 2001 NR 48 (HC).

Swanepoel v Minister of Home Affairs 2000 NR 93 (HC) at 95 A-C.

Einbeck v Inspector General of the Namibian Police 1995 (NR) 13 (HC) at 20 C-D and by the Full Bnech in Mweb Namibia (Pty) Ltd v Telecomon Namibia Limited and Others Case No (P) A 91/2007, delivered in

[27] Once it had been established that the applicant could not be afforded redress in the normal course – as it certainly has been – the applicant would need to justify the urgency with which it has proceeded by not creating its own urgency and affording reasonable time periods for the respondents to answer and prepare.

[28] In the circumstances, I cannot find that the applicant has unduly delayed or created its own urgency in bringing this application. The time taken to file the internal review and bring the application cannot in all the circumstances be faulted. The respondents have also not identified specific factual issues which they would want to place before court relating to the Legal questions raised by the applications.

[29] In the exercise of my discretion, I would grant condonation to the applicant for bringing this application as one of urgency under Rule 6(12).

Premature / exhaustion of statutory remedy

[30] There would appear to be two components to the argument raised on behalf of the Minister in support of the contention that the application is premature. Firstly, Mr Botes argues that the internal remedy should have been exhausted. In the second instance, he contends that the application is premature in the sense that the applicant possesses a mere contingent right as it would not yet know what would happen before the South African Tribunal in mid May 2011. He accordingly submitted that the applicant has not established its right to approach the Court for the relief set out in the notice of motion for this reason.

31.07.2007

See also:*Bandle Investments v Registrar of Deeds* 2001(2) SA 203 (SE) at 213 which has also been followed by this Court.

[31] Mr Gauntlett on the other submitted that the application was not based upon the assertion of a mere speculative contingent right. He pointed out that should the South African Tribunal approve the merger, then the applicant would be in conflict with the law of Namibia if it were to proceed with the merger in the absence of the order sought by it in these proceedings. The approach of the applicant was thus routed in the doctrine of legality and its entitlement under Article 18 to have conditions which it contends to be invalid, removed. He referred to the authorities dealing with declaratory orders to the effect that these can be sought in respect of contingent rights. He did so with reference to the specific wording of s 16 of the High Court Act [3] which refers to this court's jurisdiction to determine *"any existing, future or contingent right"* and the interpretation placed upon this phrase used in the same context in earlier legislation in *Ex parte Nell* [4]. These submissions are well founded. It is clear that the issues raised in this application are not hypothetical or academic. They are real in the sense that the applicant would be in conflict with Namibian legislation if the conditions were not to be set aside and the approval granted for the merger in South Africa. The declaratory order sought would also be binding upon the parties. Clearly the applicant is in the circumstances entitled to have its potential liability determined.

[32] As to the point taken by the Commission and the Minister that the internal remedy provided by s 49 would need to be exhausted prior to the applicant approaching the Court, Mr Gauntlett referred to the recent decision of this Court in *National Union of Namibian Workers v Naholo.* [5] In that judgment, the Court, with respect, correctly set out and applied the authorities on the exhaustion of domestic remedies. Tötemeyer AJ held that the real enquiry was to give a proper interpretation to the provisions in the statute providing for the domestic remedy in order to establish whether a party was first required to exhaust the internal

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[3] Act 16 of 1990
[4] 1963(1) SA 754 (A)
[5] 2006(2) NR 659

procedure before approaching this Court. He held that the mere fact that the legislature had provided an extra judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies. He concluded that only where the statutory provision, properly construed, requires the exhaustion of an internal remedy first, it would defer the jurisdiction of the High Court until the internal appeal remedy is exhausted.

[33] In that matter, Tötemeyer AJ found that a construction requiring the exhaustion of internal remedies before approaching the Court could not be arrived at. He did so for essentially two reasons. He firstly found that the wording of the statutory provision did not support such a construction. He found that the language did not expressly state that the appeal would defer access to this Court. Secondly, he held because of the time duration involved in exercising the internal appeal process that the applicant would then be rendered practically remediless if he were to pursue it. This approach is not only consistent with authorities but is, with respect, sound and is also in accordance with the approach adopted in English public law, as was pointed out by Mr Gauntlett. He did so with reference to *Leech v Deputy Governor of Parkhurst Prison* [6].

[34] At the hearing Mr Botes indicated that the Minister no longer contended that s 49 ousted the jurisdiction of the Court, but rather contended that the remedy in s 49 was a true remedy and should be exhausted. He pointed out that it could involve a rehearing and was of a wider ambit than a hearing before Court. He also referred to the know-how of the Minister who would be in a better position than the Court to impose other conditions, if need be. Mr Gauntlett however submitted that the remedy was not effective.

[35] It would seem to me that both of the factors referred to by Tötemeyer AJ would apply in this matter. In the first instance, s 49 provides that an applicant

[6] [1988] AC 533 (HL) at 580 C-D

"may" approach the Minister for a reconsideration of the Commission's decision. The mandatory verb which would otherwise be used in the form of **"must"** or **"shall"** would be indicative of the requirement of exhausting a process. But the legislature chose not to provide for that. This would also accord with the presumption against ousting the jurisdiction of the Courts. It also cannot be contended that the exhaustion of the internal remedy is by necessary implication. This would not accord with the test for implying words in a statute as enunciated in *Rennie NO v Gordon NO* [7]. But Mr Gauntlett furthermore submitted that the remedy itself is not effective as he would not be able to provide the applicant with an effective redress. [8] He referred to the Minister's acceptance of the correct test being whether the statutory remedy is a **"true remedy under the circumstances"** as was also submitted by Mr Botes. Mr Botes submitted that the remedy in s 49 was a true remedy in the circumstances. That is in fact the test – the remedy must be an effective and real remedy. The Minister's approach however demonstrates that the domestic remedy in s 49 is not a true remedy in the circumstances. Although he was alerted to the issues which gave rise to the exercise of the remedy on 15 December 2010, it would seem from his answering affidavit that nothing further has been done by the Minister to advance the remedy. He has not referred to any steps taken by him, contemplated by s 49. Nor is it indicated that he is about to do so. Instead, he has indicated that, because s 49 requires that the review is to be completed within four months, that it would take that long for the review to be finalised. Mr Gauntlett also submitted that the Minister had disqualified himself to determine the review by expressing his contempt for the applicant's position. (When dismissing an approach of the applicant *"with the contempt it deserves"* in his answering affidavit.) He submitted that, by doing so, he had evidenced that he does not keep an open mind which would not render the domestic remedy in law as a viable one.

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[7] 1988(1) SA 1 (A) at 22 E-F.
[8] Nichol v The Registrar of Pension Funds 2008(1) SA 383 (SCA) at par [18].

[36] There are yet further reasons why the remedy would not be real, as was also advanced by Mr Gauntlett. Most importantly, the Minister could not be a judge in his own cause. One of the conditions relates to the legality of Notice 75. The Minister had himself issued Notice 75 and would not be competent to consider its validity. Once he cannot consider the validity of one of the conditions – as is plainly the case with reference to the fourth condition based upon Notice 75 – then it cannot be contended that some of the issues should be determined by him and that the Court should determine the others.

[37] A further important factor also stressed by Mr Gauntlett, and with which I agree, is that the issues raised by the challenge to the conditions all essentially involve questions of law. They concern the facial validity of the Government Notice and whether it is authorised by s 3(3) of the FIA. They also concern the facial validity of the conditions with reference to the Act and whether they are rationally connected to the reasons which are provided for them.

[38] It follows that s 49 does not in my view constitute an internal remedy which requires exhaustion. Even if it were to do so, it is clear to me that the current circumstances justify a departure from that principle.

[39] It accordingly follows that this point of exhaustion of internal remedies raised by both the Commission and the Minister must fail. I turn now to the merits.

Merits

[40] I have already pointed out that neither the Commission nor the Minister has pleaded over on the merits. The Minister did however contend that the

validity of Notice 75 would be addressed in argument. As I have said, his counsel was provided with the opportunity of making submissions as to its validity and did so. That issue will be first dealt with as it concerns the separate declaratory relief directed at setting aside the notice as well as the fourth condition imposed by the Commission.

Notice 75

[41] This notice provides:

"SPECIFICATIONS OF BUSINESSES AND CATEGORIES OF BUSINESSES PROVIDING SERVICES OR GOODS WHICH CAN BE PROVIDED ADEQUATELY BY NAMIBIANS: FOREIGN INVESTMENT ACT, 1990

Under section 3(4) of the Foreign Investment Act, 1990 (Act No. 27 of 1990), I specify the following businesses and categories of businesses as businesses and categories of businesses which, in my opinion, are engaged primarily in the provision of services or goods which can be provided adequately by Namibians –

(a) retail businesses, unless a foreign national who intends setting up any form of retailing business of any size in Namibia, has first sought and obtained the permission of the Minister of Trade and Industry;

(b) public transport services (taxi and shuttle services within and between towns); and

(c) hair salon, hair dressing, and beauty treatment services.

With effect from the date of publication of this notice in the Gazette, no foreign national shall, subject to section 7(3) of that Act, through the investment of

foreign assets, become engaged in or be permitted to become engaged in any business so specified or falling within the category of business so specified."

[42] The legislative authority for the invocation of this notice is 3(4) of the FIA. This sub-section provides:

> *"3(4) The Minister may, by notice in the Gazette, specify any business or category of business which, in the Minister's opinion, is engaged primarily in the provision of services or the production of goods which can be provided or produced adequately by Namibians, and, with effect from the date of such notice, no foreign national shall, subject to the provisions of section 7(3), through the investment of foreign assets, become engaged in or be permitted to become engaged in any business so specified or falling within any category of business so specified."*

[43] The applicant challenges Notice 75 on the basis that it is not authorised by s 3(4) in a number different respects. The first is that the Minister has sought to confer upon himself a dispensing power – to depart from the prohibition which is to be created under s 3(4) in his own discretion. It is correctly pointed out that s 3(4) does not confer such a power upon the Minister to do so. On the contrary, it rather prohibits foreign nationals from becoming engaged in a specified *"business or category of business"*. In the absence of such power, the Minister would not be authorised to confer upon himself the dispensing power he has sought to do in the notice. For this reason alone, the prohibition embodied in paragraph (a) of the Notice is unauthorised and invalid. Significantly, the Minister has not sought to do so in respect of the categories referred to paragraphs (b) and (c) of the notice.

[44] Paragraph (a) would also be liable to be struck as being *ultra vires* and unauthorised by virtue of the fact that retail businesses do not entail *"the provision of services or the production of goods"* in any proper sense. In the

supplementary written argument provided, the Minister presses for an extensive meaning to these terms. But that would not be in keeping with the context in which the terms are used and when considering that the provision is for a restriction upon the common law and now constitutionally protected right to carry on a business, occupation or trade. Paragraph (a) is unlike the other two categories referred to in paragraphs (b) and (c) which plainly entail the provision of services.

[45] It is not necessary to dealt with the third basis for impugning Notice 75 raised by the applicant, namely that s 67 of the Act requires that any regulatory authority must first negotiate an agreement with the Commission to exercise jurisdiction in respect of any public regulation of conduct regulated in terms of Chapters 3 or 4 of the Act. It would follow that paragraph (a) in the Government Notice is declared invalid and of no force and effect. It would not be necessary to set aside the entire notice by reason of the fact that paragraph (a) is severable from the rest of the notice.

[46] It would also follow that the fourth condition imposed by the Commission is invalid. There is however a further reason for the invalidity of the imposition of that condition – in addition to the invalidity of paragraph (a) of the notice. The FIA and Notice 75 in any event do not apply. By buying shares in Massmart, the applicant does not *become engaged in businesses"* which are already conducted by the entities in Namibia already listed. The merging parties would not be involved in **"setting up"** a retailing business. The Commission would appear to have overlooked the true nature of the transaction and that a foreign company ("Massmart) is already doing business through its subsidiaries in Namibia. The imposition of this condition, already fatally flawed, is beset by yet a further problem and that relates to the failure to give a reason for its imposition.

First condition: compulsory involvement of non-parties to the merger

[47] This is the first condition listed by the Commission. It is impugned in the founding affidavit on a number of grounds. In the first instance, it is challenged because it is in direct conflict with s 3(3) of the FIA. This sub-section provides:

> *"(3) No foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to provide for the participation of the Government or any Namibian as shareholder or as partner in such business, or for the transfer of such business to the Government or any Namibian: Provided that it may be a condition of any licence or other authorisation to or any agreement with a foreign national for the grant of rights over natural resources that the Government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights."*

[48] Given the conflict with this section, the imposition of the condition is invalid for this reason alone. But it is likewise beset with other difficulties which would also lead to its invalidity. It would in the context of this merger be arbitrary and irrational. The Commission has stated no basis to apprehend that the merging parties who would not be committed to benefiting Namibians who were previously disadvantaged. The founding affidavit with reference to the merger documentation and correspondence refers to the commitment of the parties to empowerment.

[49] There is however further difficulty in this regard and that relates to the failure on the part of the Commission to notify the merging parties of the intention to impose such a condition. By failing to do so, the fairness of the procedure followed by the Commission is flawed.

[50] This condition was also rightly challenged because of the vague and uncertain terms in which it has been cast. It does not specify when and how the conditions should be met. It was also correctly pointed out by the applicant that

the purposes clause of the Act – s 2(f) – relied upon by the Commission for the imposition of this condition does not in fact confer upon the Commission the power to impose such a condition. The power to do so would need to be included in the powers of the Commission in s 47. No such power has been conferred. There is yet a further difficulty for this condition. Mr Gauntlett correctly submitted that the introductory portion of s 47(2) requires that conditions imposed would need to relate to the competitive outcome of the proposed merger.[9]

[51] This condition is clearly unauthorised and is invalid.

Second condition: no employment losses

[52] The second condition listed by the Commission is that there can be no employment losses as a consequence of a merger. The reason provided by the Commission for this condition is very poorly formulated. It is quoted above. Quite apart from the grammatical errors, it simply does not support the absolute terms of the condition. It merely refers to **"mergers results** (*sic*) **in workers losing jobs and that the Commission encourages retrenchments being minimized so as not** (*sic*) **exacerbate the high employment levels in Namibia**.

[53] There is manifestly no rational connection between the reason and the absolute term provided by the condition of no employment losses whatsoever. The reason thus does not remotely rationally relate to the absolute prohibition provided in the condition. It is hopelessly unsustainable and it is unsurprising that the Commission has not placed any argument or material before the Court to support this (and the other conditions). The fact that the Chairperson of the Commission indirectly seems to distance himself from the reasons provided by

[9] Van Eck NO and Van Rensburg NO v Etna Stores 1947(2) SA 984
University of Cape Town v the Ministers of Education and Culture 1988(3) SA 203 (C) (full bench)

stating that they represent an attempt by **"the Secretariat to simply capture the determination and summarise to the best of their ability the reasons for the decisions we took"**, cannot avail the Commission or its Chairperson. The Act in s 47 requires the Commission to provide written reasons. The reasons themselves were provided under the hand of the Chairperson himself who stated that he was **"authorised to sign on behalf of the Commission"** in providing those reasons. The Commission is plainly bound by those reasons which in the case of this condition are entirely ineffective. Significantly, and despite the statement of the Chairperson, no further matter was placed before the Court in opposition to this application with reference to this condition – or the other conditions.

Third condition: no harmful effects in competition

[54] This condition, set out earlier, is that the merger should not create harmful effects on competition that may give rise to the risk of the market becoming foreclosed to competitors, especially small and medium enterprises ("SME's). This condition was likewise challenged on the ground that the reason given for it is not rationally connected to the condition actually imposed. The reason provided for this condition, is that the merger should not **"affect negatively the ability of small undertakings in Namibia to compete in the local market, nor should it lead to foreclosure of these undertakings."** I agree with the applicant's approach that the reason given is not rationally connected to the condition which was then imposed.

[55] A second ground for invalidity raised by the applicant is that what would constitute the **"risk"** referred to in the condition and when it would **"arise"** would fail the test for impermissible vagueness indicated in *Affordable Medicines Trust*

v Minister of Health [10]. I agree with the submission that the condition is impermissibly vague.

[56] The applicant also challenges the vagueness of the term **"harmful effects on competition"** as it is stated without any reference to the specified anti-competitive conduct defined in the Act itself. There would also appear to be merit in this complaint as a merging party would need to be informed as to the anti-competitive conduct defined in the Act which could amount to the harmful effects upon competition. Given the other two sound reasons for the invalidity of this condition, I do not propose to further deal with this aspect.

Conclusion

[57] In the result, I am satisfied that the applicant has made out a case for this application to be heard as one of urgency and I grant condonation to do so in the exercise of my discretion.

[58] I am further satisfied that paragraph (a) of Notice 75 is unauthorised and invalid and is to be struck.

[59] It further follows that the declaratory order sought in paragraph 3 of the notice of motion should be granted. This is to the effect that the conditions imposed by the Competition Commission in its approval of the proposed merger between the applicant and fourth respondent are declared to be invalid.

[60] I further direct that the second and third respondents pay the applicant's costs jointly and severally, the one paying the other to be absolved. These costs are to include the costs occasioned by the employment of two instructed counsel and one instructing counsel.

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[10] 2006(3) SA 247 (CC) at par 108.
Minister of Health v New Clicks 2006(2) 311 (CC) at 404 B-E.
R v Supra 198958(1) 474 (T)
Helgeson v South African Medical and Dental Council 1962(1) 800 (N).

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SMUTS, J

I Agree

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MULLER , J

ON BEHALF OF THE APPLICANT:	**ADV JJ GAUNTLETT SC,**
	and with him,
	MR F PELSER
INSTRUCTED BY:	**LORENTZANGULA INC**
ON BEHALF OF THE FIRST AND SECOND RESPONDENTS:	**ADV M KHOZA SC**
INSTRUCTED BY:	**CONRADIE & DAMASEB**
ON BEHALF OF THE THIRD RESPONDENT:	**ADV LC BOTES**
INSTRUCTED BY:	**THE GOVERNMENT ATTORNEY**