Wal-Mart merger to set precedent in SA law

By Paul Vecchiatto

21 Oct 2011

The R16.5 billion merger between giant US retailer Wal-Mart and Massmart would set a precedent in SA's competition and commercial law, said Judge Dennis Davis.

Thursday was the first day of hearings by the Competition Appeals Court into the decision by the Competition Tribunal to approve the merger.

Approved in May after a five days hearing, Wal-Mart now owns 51% of Massmart.

Minister of Economic Development Ebrahim Patel along with Trade & Industry Minister Rob Davies and Agriculture, Forestry and Fisheries Minister Tina Joemat-Petterson want the decision reviewed as they believe the Competition Tribunal did not have all the facts at its disposal, that there was a huge public interest factor in terms of potential job losses through import substitution of local products, and that the conditions set were not stringent enough.

Among the conditions set by the Competition Tribunal was the creation of a R100 million supplier fund and that retrenchments would be put on hold for at least two years by the merged company.

The minsters' argument was that they wanted far more stringent conditions placed on the merger and that the fund was an arbitrary amount accepted by the tribunal without all the facts at its finger-tips. They were not applying for the merger to be overturned.

Trade union the SA Commercial Catering and Allied Workers Union (Saccawu) are applying to the court to have the merger approval dismissed altogether. Its side of the case is due to be heard on the second day of the hearings, Friday, October 21.

The first day began with some minor drama when Davis dismissed Wal-Mart's opening gambit, by requesting that the three ministers' case be dismissed, ruling that it must be heard.

Arguments led by State Council Wim Trengove on behalf of the three ministers revolved around Wal-Mart/Massmart's not supplying information needed to determine the long-term effect of the merger.

This information, in particular, related to what price Wal-Mart could get certain products at overseas compared to sourcing them from local suppliers.

He also argued that the time allocated and the scheduling of the hearings left little opportunity for all the merits of the case to be heard in full.

James Gauntlett, the state council, on behalf of Wal-Mart/Massmart countered those arguments saying that the issue of import substitution was explored during the Competition Tribunal's hearings and that Massmart CEO Grant Pattison had testified that the companies did not keep or have that kind of information.

Gauntlett argued that the Competition Commission could not make a finding on unsubstantiated factors, but only on the short-term merits of the case, and so approved the merger.

"There was no evidence that there was a hidden treasure trove of evidence; no hidden list either. (What was evidenced at the Competition Tribunal)... was either disbelieved or accepted. Was the tribunal derelict in not saying that this is where we have capacity to probe further? Only if it could be shown that there was a reasonable prospect that the evidence could be obtained," Gauntlett said.

He then argued that the ministers had plenty of time to argue that the hearings schedules were too limited.

"You have to raise it at the time and not put in in the bank to see how the case will turn out," Guantlett said.

Trengove later countered the effect on import substitution by saying: "Why do they quibble about what is locally produced and what is not? That is an exercise that Massmart or every equivalent business must do every day when they decide to procure locally or abroad."

On length of the tribunal hearings issue, state council, Patric Mtshaulana, arguing on behalf of the Competition Commission said the three ministers' legal representatives had agreed to the length and schedule at the time.

Matshaulana said the ministers had known in March what the schedule for the hearings were and they could have objected then, and as a last resort they could have launched an urgent application for an extension during the hearings.

At the end of the day Davis commented that an equivalent competition case in Australia had taken 20 days, but he also accepted the argument that the Competition Commission had a very full diary.

Davis said the drafters of the Competition Act probably did not envisage a situation where public interest, that of the benefit to consumers by such a larger merger, versus that of jobs lost, would ever arise.