

**COMPETITION LAW: THE LEGAL PRECEDENT OF THE WAL-MART
CASE ON COMPETITION LAW DEVELOPMENTS IN NAMIBIA**

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Abstract

This dissertation paper is based on the decision of the Wal-Mart cases in respect to competition law, mergers and acquisition in Namibia. Owing to the fact that Namibian law is mostly derived from South African law, the exploration and analysis will be based on both Wal-Mart cases in Namibia and South Africa in respect of the subject matter with specific particularity on the significance of the court's judgment to competition law development in Namibia.

The paper will also contain an exposition of the High Court and Supreme Court's judgment in Namibia as well as the judgment of the South African Court on the same subject respectively. This is aimed at providing an in-depth understanding of the approaches taken by the two courts with respect to mergers and also to derive guidelines from the interpretation of the court in South Africa owing to the fact that the court in South Africa has successfully and efficiently dealt with the same issues many times compared to the Namibian courts. The guidelines that will be looked at will be based on how the courts in Namibia and South Africa have applied and interpreted the provisions within the Act pertaining to statutory granting or refusal of mergers in the sphere of competition law with specific reference to the question of public interest. An analysis on the respective judgments will be provided. In the final, a conclusion will be drawn and recommendations made on the way forward for the Namibian courts. That is, whether or not to adopt the interpretation, application and approach used by the

South African courts when determining the question of mergers intertwined with the question of public interest.

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Contents	
Abstract	2
Acknowledgments	4
Chapter 1	7
General expose and background to the study	7
1.1 Introduction.....	7
1.2 Background to the study	7
1.3 Statement of the problem.....	9
1.4 Research Objectives.....	10
1.5 Research Questions.....	10
1.6 Purpose and importance of the Study	11
1.7 Research methodology.....	12
1.8 Limitations of the Study.....	14
1.9 Literature Review.....	14
1.9.1 What is a Merger?.....	14
1.9.2 Literature on mergers in general	14
1.9.3 Literature about Wal-Mart.....	17
1.9.4 Specific literature on Wal-Mart in South Africa.....	20
1.9.5 Definition of key terms in this study.....	21
1.10 Division of Study	22
Chapter 2	24
General overview of Competition Law in Namibia	24
2.1 Introduction.....	24
2.2 The Namibian Economy in perspective.....	24
2.3 Investment and regulatory institutions involved.....	25
2.4 Competition Law in general.....	27
2.5 The Namibian Competition Act 3 of 2003	28
2.5.1 General.....	29
2.5.2 Historical Background on Competition Law in Namibia	30
2.5.3 Salient features of the Act.....	31
2.5.4 The regulation and control of Mergers under the Act.....	32
2.6 The Ministerial Review process.....	35
2.7 Conclusion	37
Chapter 3	39
Case Study: Wal-Mart//Massmart Case in Namibia	39
3.1 Introduction.....	39
3.2 Factual background to the Wal-Mart case in Namibia	39
3.3 The Commission’s determination	41
3.4 Concerns of interest groups	42
3.5 Driving towards litigation: Contestations and further developments	43
3.6 The litigation.....	44
3.6.1 Preliminary reflections.....	44
3.6.2 On the merits.....	44
3.7 Supreme Court Judgment - Namibia.....	47
3.7.1 Preliminary and procedural aspects	47
3.7.2 On the merits.....	50

3.8 The Minister’s determination after the Supreme Court Judgment.....	53
3.9 Wal-Mart Case- South Africa	54
3.10 Public Interest considerations	57
3.11 Conclusion	60
Overall Analysis and Discussion.....	61
4.1 Introduction.....	61
4.2 General considerations.....	61
4.3 Divergence and convergence	62
4.4 Implications for the economy and national growth	65
4.5 The fear of the death of the local entrepreneurships.....	67
4.6 Analysing further developments in Namibia	69
4.7 Implications of the South African Wal-Mart Cases for Namibia	70
4.8 Conclusion	72
Chapter 5	74
Recommendations and Conclusions.....	74
5.1 Introduction.....	74
5.2 Recommendations and conclusions	74
5.3 Conclusion	77
6. Bibliography	79
Cases	81
Statutes.....	82

Chapter 1

General expose and background to the study

1.1 Introduction

This chapter deals with introductory issues. Distinctively the chapter drapes the background to the study, provides a delineation of the problems to be tackled in the dissertation and the methodology followed in the research process. It is through the statement of the problem that the objectives of the study are derived and it is through the objectives that a turn of phrase of the research problems is had. These aspects of this dissertation call for a rationalisation of the research hence this chapter also shows the purpose, import and significance of the research.

Once the problems have been exposed and questions posed, an apt methodology was selected. This chapter thus proceeds to give the *raison d'être* and advantages for the employ of such methodology. Each methodology and instruments used has its own problems or weaknesses, thus it is the idea of this chapter to also show the flaws or research confines under the subject matter being considered.

In addition and very important, this chapter also provides some succinct literature review. The literature available is narrow especially in the Namibian context because not much has been written on the subject compared to South Africa because competition law is a relatively new concept. However, it gives a general depiction of what some authors have put on the table which might be of bearing or swaying nature to the dynamics and various multi-disciplinary and multi-dimensional twists in the Wal-Mart case under consideration.

1.2 Background to the study

The fact that business organisations expand their activities across the globe brings with it some challenges to various actors in the global economy both at micro and macro levels. One of the most challenging parts is when multinational corporations expand their business activities across borders. Most research

findings have established that by going on an international scale organisations benefit by expanding their markets and profit margins. It is such driving factors that propelled companies like Wal-Mart to expand its business across the African continent and that did not come without challenges and one of such challenges is competition to local business enterprises as this dissertation will show.

Hyslop¹ defines competition law as the rules and regulations put in place by a country's local government to guide the operations of international business investors against the exploitation of local companies. This is done to ensure equality and fairness in business.

Part of the reasons that made Wal-Mart to invest in Africa include the fact that the local business markets in Wal-Mart's countries of operation were saturated thus the need for it to find new market, its baseline survey indicated the possibilities of bigger markets in Africa and finally it was driven by the external and interior urge for the new business opportunities that would be created. This then found Wal-Mart setting its investment foot in Namibia in the process. Wal-Mart has found itself embroiled in legal battles as it tries to penetrate the African markets; hence the seminal case in Namibia which forms the crux of this dissertation.

The Wal-Mart case² in Namibia and South Africa indicates that any company aiming at expanding across its continent of operation need to conduct a thorough market segmentation research. As Thorpe³ explains, a few exploration studies have reasoned that retailers can minimise the risks of venturing into new markets by carefully selecting their target markets from the social, geographical and development aspects. Further when expansion of global enterprises happens that is when the concept of competition law is widely applied.

¹ M Hyslop *Obstructive marketing: Restricting distribution of products and services in the age of asymmetric warfare* (2014). Gower Publishing New York.

² *Wal-Mart/Massmart holdings Wal-Mart stores Inc v Chairperson of the Namibian Competition Commission and others* (A 61/2011)[2011] NAHC 126 (28 April 2011)

³ J Thorpe *Power, rights, and inclusive markets* (2013) Oxfam GB for Oxfam International.

1.3 Statement of the problem

Despite having a Competition Act in force to regulate competition in the market, the competitors in Namibia are still not on an equal footing. The multi-national corporations are much more powerful than the local corporations. They can out-manoeuvre the local corporations in competition. This is owed to the fact that Wal-Mart has all the necessary resources e.g. advanced technology to market itself through its supply chain, expertise as well as capital to enable it to expand its business across the world. This outplays local businesses as they might not have the same resources and skills available to them compared to Wal-Mart. The Wal-Mart case has created a precedent that had never been in existence before in the country under a very young regulatory framework. It is important to consider the implications of this case as decided by both the High Court and the Supreme Court of Namibia.

Protecting the interest of the consumers i.e. consumer welfare and public interest and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important objectives of competition law. The current law contains these elements but it must also be noted that competition law is closely connected with law on deregulation of access to markets, state aids and subsidies, the privatisation of state owned assets and the establishment of independent sector regulators. The question arises whether these seemingly conflicting interests were adequately balanced by both or either of the courts when they decided the Wal-Mart case.

Further, in recent decades, Competition law has been viewed as a way to provide better public service. Robert Bork has argued that competition laws can produce adverse effects when they reduce competition by protecting inefficient competitors and when costs of legal intervention are greater than benefits for the consumers. The question then arises in regards to the Ministerial review process in the Competition Act. The Act puts enough safeguards against anti-competitive mergers like the Massmart/Wal-Mart merger. Further one would wonder why the process should wholly lie in the hands of a political appointee ultimately if there is an independent

body to deal with the matter under a statute. These questions boil down to the ultimate enquiry: How/what has the legal precedent of the Wal-Mart case paved in the history of competition law in Namibia?

1.4 Research Objectives

The major objectives of this research include the following:

- To identify the approach adopted by the courts in Namibia when dealing with mergers in comparison to the judgment and or approach taken by the South African court in a similar Wal-Mart case
- To highlight why one of the approaches adopted by one of the two courts is preferred over the other based on the facts and issues that were place before the courts.
- To highlight the provisions of sections 49 of the Namibia Competition Act and argue whether the procedural step provided therein is appropriate in decision making in the context of competition regulation in the country.
- To examine how and what the legal precedent of the Wal-Mart case has paved in the history of competition law in Namibia.

1.5 Research Questions

From the foregoing objectives the following research questions can be formulated and have to be answered through a methodology chosen below;

- What are the approaches used by the Namibian courts when dealing with mergers as compared to similar approaches taken by the South African court in a Wal-Mart case?
- Why was one approach preferred over the other in these cases?
- What are the provisions and impacts of s49 of the Namibia Competition Act in decision making?
- How/what has the legal precedent of the Wal-Mart case paved in the history of competition law in Namibia

1.6 Purpose and importance of the Study

It must be noted that the concept of mergers has gained serious attention and momentum in Namibia over the past three years since the inception and the saga that was fuelled by the merger/takeover of the multi-million dollar company Wal-Mart of some of its supply chain companies in Namibia. The Wal-Mart case in Namibia left such a great significance and legal precedent regarding mergers, the role and importance of competition law and the Competition Commission of Namibia (NaCC) in its endeavour to implement and enforce the competition law in the Republic. To this end the dissertation seeks to explore the current legal provisions that regulate mergers/acquisitions in Namibia in light of the Competition Act 3 of 2003 [„the Act“].

The purpose of this dissertation is not to analyse which judgment was the better judgment but to show why one of the approaches adopted by one of the two courts is or would be more preferred over the other based on the facts and issues that were place before the courts. Further the paper will also delve into the provisions of s49 of the Act which provides for the Ministerial review process in terms of the Namibian Competition Act. It will examine whether or not such procedural step is appropriate and necessary or not in terms of the NaCC decision making powers.

In addition, this paper will examine the legal precedent that the Wal-Mart case has paved in the history of competition law in Namibia. Finally, conclusions will be drawn and recommendations made on the current merger situation in Namibia as derived from the approaches adopted by the courts in Namibia and South Africa respectively.

A case study will be done on the judgments of the High Court and Supreme Court in the case of *Wal-Mart/Massmart holdings Wal-Mart stores Inc v Chairperson of the Namibian Competition Commission and others*⁴ which is the only prominent Namibian case that has ever dealt with the issue of mergers of an international magnitude and the concept of public interest.

⁴ (A 61/2011)[2011] NAHC 126 (28 April 2011).

This study is important as it will show and analyse the approach of interpretation and application of the law adopted by the courts in Namibia when dealing with mergers. This will be done in comparison to the judgment and or approach taken by the South African court in a similar Wal-Mart case which dealt with issues of the same nature. The purpose of this is to enable the Namibian courts to be able to use the discretion vested in them in light of the ability to make judgments that are not only just but which also include and embrace the concept of public interest. This can only be achieved by carrying out an analysis of the provisions of the Act and judgments respectively so as to determine whether the courts are at par in their interpretations and applications of the relevant sections or whether they can borrow from each other in order to give the provisions the true and proper meaning as envisaged and intended by the legislature.

1.7 Research methodology

The research questions above have to be answered through a well-chosen methodology. In research there are two general methods used, which are quantitative and qualitative methods. According to Bjokluind and Paulson,⁵ the quantitative method is used in studies where information aims to measure and score statistical processes as well as numerical observations. The exercise of mathematical models is frequently used in quantitative methods. Information and data used is not affected by the researcher's subjective values and influences. Qualitative methods on the other hand are used when the research aims to create a deeper understanding and a more detailed analysis of specific phenomena such as competition in the commercial world, which is the objective of this study.

Further qualitative method is a relatively more in-depth research method because during this method, reliability is difficult to ensure due to personality and communication barriers. The method which was used in this research was the qualitative methods were data was collected through largely desk research.

In the light of the foregoing methodology, it should be observed that Namibian courts usually have recourse to international law, including jurisprudence of municipal

⁵ Bjokluind and Paulson *Rural Banking Strategies. Swedish Publishers* (2003) Sweden.

jurisdictions with similar constitutional models as persuasive aid in the interpretation of statutory law. Therefore South African case law is referred to, taking into consideration the fact that the Competition law legislation applicable in South Africa is very similar to the Competition Act applicable in Namibia.

Furthermore, this study also uses the case study technique under the same qualitative methodology. According to Stakes:

*'the sole criterion for selecting cases for a case study should be the opportunity to learn, and where multiple cases are involved, it is referred to as a collective study. It appears that these five strategies and/or traditions of qualitative research are selected due to the fact that they have proven themselves beyond reasonable doubt as representative of common practice in different disciplines in qualitative inquiry.'*⁶

Therefore the Wal-Mart case is analysed in the context and imperatives of this methodology. The Wal-Mart case seems to be the representative of many issues arising in global competition laws as we note that Wal-Mart is involved in many competition disputes across the world with similar issues being addressed by the courts in these various countries.

The eventual result expected by researcher was a more systematic explanation or even a conceptual framework or general understanding of the effects of the Wal-Mart case to the legal precedent of Namibian Competition Law in general and what recommendations can be developed out of the result of the answers to the research questions.

The research methodology employed for achieving the above task has to cater for the dialectical nature of critical research. One way of doing this is action research, which is a common methodology that involves the researcher into the actual business of obtaining and producing data amenable to better understanding and change.⁷ The practical engagement of a researcher in Competition law led to a situation whereby the researcher was herself involved in data collection and analysis in order to make conclusions as to the effects of the approved merger between Massmart and Wal-Mart and upon those conclusions make possible recommendations.

⁶ R Stake *The Art of Case Study Research* (1995) Thousand Oaks Sage.

⁷ Lincoln and Guba, 2000 *supra*; MQ Patton, *op cit* D Smith, (1997) *op cit* pp.75-80.

1.8 Limitations of the Study

The research study is limited to the different literature gathered through only desk research. This study did not perform rigorous mathematical analysis meaning that the qualitative method was followed. Restriction to qualitative exploratory research is:

- The interpretation of findings and analysis is based on judgment.
- The ability to generalise results is limited.

1.9 Literature Review

1.9.1 What is a Merger?

Before going into academic definitions of mergers, it is trite to consider the definition of this central concept as defined in the Act. In terms of section 42 of the Act, a merger is something that occurs through a stock or asset purchase of one firm by another. Specifically, „a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.“⁸ In terms of section 1 an undertaking means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.“

A combination of these definitions is very important because it characterises the nature of the transaction between Massmart and Wal-Mart which gave rise to the High and Supreme Court cases which are dealt with in detail in Chapter 3 below.

1.9.2 Literature on mergers in general

It is well documented in mainstream competition law literature that these studies are driven by an interest to inform competition policy or to understand why so many mergers do not fulfil their promises.⁹ Managers usually claim synergies of various sorts

⁸ Section 42(1) of the Act.

⁹ N Schulz Review of the literature on the impact of mergers on innovation March (2007) University of Wuerzburg.

as their reason to merge with another company. In as far as such synergies save economic resources mergers would not be subject to criticism from a welfare point of view. Antitrust concerns aim at the consequences of a merger for market power. At least the competition between the merging parties can be expected to diminish or even to disappear. Therefore according to Schulz „it can be safely assumed that prices would increase for this reason *cet. par.* and thus welfare would decrease. Of course, for a full picture the potential advantages of synergies in costs (the efficiency defence) have to be weighed against the danger of increased prices.“¹⁰

Farrell and Shapiro¹¹ provide an analysis which shows that a merger can only be welfare enhancing if it triggers substantial cost reductions. This result can in their analysis also be expressed as a function concentration ratio. Under the hypothesis that mergers are only achieved if profits rise, this boils down to a threshold value of concentration. If the concentration of a merger is below this threshold a merger is welfare increasing.

A seminal work by Elhauge and Geradin¹² shows that with markets becoming increasingly global, mergers requiring approval in several jurisdictions, and businesses expanding their operations across the borders and continents, competition has truly become a global phenomenon. This book further shows that competition law is not only about law but also about economics and other related disciplines in the social sciences as well hence it's useful to the study of the strategies of corporations such as Wal-Mart which form the crux of this study. The book is useful in so far as it provides a comparative analysis of competition law across many jurisdictions in the world hence its title.

Another interesting reading is one by Kolev, Haleblian, and McNamara.¹³ This book provides a useful expose of the development of competition law through the ages. It

¹⁰ Ibid. see also Schulz, N. (2003): *Wettbewerbspolitik*, Mohr Siebeck

¹¹ J Farrell and C Shapiro Horizontal mergers, *American Economic Review*, (1990) 80, pp.107-126

¹² E Elhauge and D Geradin *Global Competition Law and Economics* Hart Publishing. Hart Publications. New York.

¹³ K Kolev J Haleblian G McNamara *The Handbook of Mergers and Acquisitions. History, Antecedents, Consequences, and Future Directions* Oxford Press. Oxford.

shows how global corporations have rushed for markets and how that rush has created friction leading to them looking for partnerships thus mergers in order to overtake the other into tapping new markets. This book is very useful in so far as it provides us with a general insight on how corporations such as Wal-Mart have come to the point of looking for markets in Africa after failures in other markets such as Europe. This again gives us insights on the differing cultures of the world and how they affect global competition.

Ismail, et al¹⁴, synthesize and analyse prior literature of mergers and acquisitions and its effects on the financial performance in an attempt to determine factors that might influence post-mergers and acquisitions performance. The main conclusion of the author is that there are inconclusive results among studies on the literature, where, corporate performance is improved in some cases but not in others. Although this paper looks at both legal and economic perspectives, it sheds light on the economics that be-ly the two judgements in the High Court and the Supreme Court of Namibia. The economic factors highlighted in this paper are reflected in the general fears expressed in the media in Namibia during the period when the Wal-Mart case was being heard in the two courts mentioned above.

The media perceptions and the general fears in Namibia are summed up in a thought-provoking piece by Jauch who in his article, published in one of Namibia's leading newspaper said that there are so many reasons why Namibians should be concerned by the Wal-Mart merger with Massmart. The author generates fear when he says;

„Wal-Mart's entry into Namibia ... will have similar consequences to those experienced by other countries in recent years. The retail giant might offer goods at lower prices and lure consumers with slogans such as 'low prices will give people a raise every time they shop with us'. The real price, however, will be paid by the workers employed by Wal-Mart and its suppliers. They will be confronted with extreme pressures and be forced to accept working conditions that will not allow them to meet even their most basic needs. Namibia's former Ramatex workers have experienced this first-hand!“¹⁵

¹⁴ TH Ismail, AA Abdou and R Magdy Review of Literature Linking Corporate Performance to Mergers and Acquisitions *The Review of Financial and Accounting Studies*, No. 1, 2011 Available at SSRN: <http://ssrn.com/abstract=1335509> Last accessed 23 August 2014.

¹⁵ H Jauch. „The Wal-Mart take-over, many reasons to be concerned.“ *The Namibian*, 9 August 2011.

According to the author „Wal-Mart's track record clearly indicates that the retail giant is not concerned about local development needs and thus it would be naive to believe that its behaviour in Namibia and South Africa would be different.“¹⁶ As a recommendation the author takes a negative swipe at Wal-Mart and urges: „the time has come to learn from history, to become selective when dealing with investments and to implement a development strategy that delivers social benefits such as overcoming poverty, meeting basic needs and creating decent jobs. Wal-Mart has nothing to offer in this regard.“¹⁷

From the above it is reasonable to argue that Wal-Mart may appear as the best corporation in providing low priced goods; however its entrance in Namibia like many others countries will be no different because the workers are bound to suffer the same fate in terms of working conditions and low salaries. Competition law can serve as an excellent intermediary to curb some of these abuses by imposing condition to mergers when approving them that best fit the circumstances presented and in doing so promote development of the local small and medium enterprises which is the tenor of competition law. The provision of low prices is no doubt geared towards consumer welfare, however this should not be looked at blindly because it is on the basis of low prices and transfer pricing through its supply chains that Wal-Mart renders the local small and medium enterprises anti-competitive. Although Wal-Mart can justify its entrance in a country's market on this ground, it also provides a test to the limits of competition law which does not only include lower prices but involves factors of public interests which serves as a determining factor for justifying its entrance in a particular market or not.

1.9.3 Literature about Wal-Mart

There is plenty of literature that gives information about Wal-Mart. Shevel, reported that Wal-Mart is the world's biggest retailer.¹⁸ The author goes on to say that this corporation is also the largest private employer and makes sales in excess of three billion dollars each week.¹⁹ In the Supreme Court of Namibia per O'Regan AJA,

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ Shevel, *The Sunday Times*, 22 May 2011

¹⁹ A Shevel Wal-Mart a test case in battle of ideologies *Sunday Times: Business Times* (2011-A) May 22, 2011-a.

described Wal-Mart in the following terms: “Wal-Mart Stores Incorporated is a company incorporated in the state of Arkansas in the United States of America. It is apparently the world’s largest company, in terms of revenue, with annual revenue estimated at US\$408 billion, larger than the gross domestic product of most of the countries in the world.”²⁰

This resonates well with further statistics by Shevel who further states that Wal-Mart's sales are equivalent in size to the world’s 23rd largest economy, Norway, “and exceeds the GDP of South Africa.”²¹ These revenues emanate from the diversified retail base of Wal-Mart as it sales food, clothing, tools, electrical, and even cars.²² The Competition Appeal Court of South Africa summarised Wal-Mart in similar terms and added:

„It is the largest retailer in the world. Its operations include three retail formats in the form of discount stores, super centres which contain products such as bakery goods, meat and dairy products, fresh produce, dry goods and staples, beverages, deli food, frozen food, canned and packaged goods, condiments and spices, household appliances and apparel and general merchandise, and finally neighbourhood markets which sell a variety products that are also offered by its super centres. It also owns a chain of warehouse stores called Sam’s Club which sell groceries and general merchandise, often in bulk.”²³

It can be inferred from the above that Wal-Mart is the most successful and richest corporation. According to the Trade Intelligence, Wal-Mart Trade Profile Report of 2010 Wal-Mart, “became the first trillion dollar company in the world”²⁴ The Deputy Organising Director for Global Strategies - United Food and Commercial Workers Union (UFCW) did not mince his words in expressing how big this corporation is and how rich the owners are. In an interview he said:

„the six members of the Walton family, heirs to the company ... are worth approximately US\$ 92 billion – that’s ninety two BILLION dollars – BILLION with a “B” – a capital “B”. ... This figure,

²⁰ Namibian Competition Commission and Another v Wal-Mart Stores Incorporated (SA 41/2011) [2011] NASC 11 (4 November 2011) para 2.

²¹ Shevel op cit.

²² D.Yoffie Wal-Mart *Harvard Business School* (2005) 14 April 2005 *Harvard Business School*

²³ *The Minister of Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries v The Competition Tribunal, the Competition Commission, Wal-Mart Stores Inc, Massmart Holdings Ltd, SACCAWU, SACTWU and SASMMEF* case number 110/CAC/Jun11 and 111/CAC/Jun11 para 5

²⁴ Trade Intelligence Wal-Mart Trade Profile Report (2010) at p29. [hereinafter the South African *Wal-Mart Case*]

based on 2007 statistics, is equal to the combined wealth of about 35 million American families, which equates to about 30 percent of the population.²⁵

Wal-Mart has had some problems with unions across the world in various countries in which it operates and that includes in Namibia. The situation in Namibia and the litigation that Wal-Mart was involved in is summarised and analysed in the subsequent chapters below this will not be dealt with here. The South African situation will also not be dealt with here for it is also considered as a comparative case below. The table below is extracted from the South African Wal-Mart Case²⁶ and shows some of the unions.

Argentina	Federación Argentina de Empleados de Comercio Servicios (FAECYS)
Brazil	Sindicato dos Comerciá de São Paulo (SECSP)
Canada	United Food and Commercial Workers International Union (UFCW)
China	All-China Federation of Trade Unions (ACFTU)
Germany	Vereinte Dienstleistungsgewerkschaft (ver.di)
Great Britain	GMB: Britain's Geneal Union
Japan)	Federation of Seiyu Workers Union (SWU)
Korea	Korean Federation of Private Service Workers (KPSU)

²⁵ K Alexander „Challenges and Opportunities: The Wal-Mart Effect In South Africa“ a Research Report Submitted to the Department of Sociology, School of Social Sciences, Faculty Humanities, University of the Witwatersrand, In Partial Fulfilment of The Requirements for The Degree of Master Of Sociology By Coursework and Research Report 15 February 2012.

²⁶ South African *Wal Mart* Case op cit para 132.

Given its scale of operations and size, Wal-Mart's business operations have been the subject of considerable scrutiny and public controversy. The major controversy has been evidenced by its disputes with Unions.²⁷ Wal-Mart shuts down plants and stores where unionisation rights are won; it hires and fires workers at will, forces the lowest echelon of worker to work overtime without pay and is reported to have sexist gender policies in which only men are promoted.²⁸

Further, according to Jauch, „Wal-Mart has a long-standing and well-documented history of union-bashing and driving down employment conditions of its staff.“²⁹ The author reports that in the US alone, there are 15 rulings against the company by the National Labour Relations Board. In Mexico, a Supreme Court ruling compared the Wal-Mart labour practices to the corrupt and repressive conditions that Mexico had experienced under its dictator Parfirio Diaz.³⁰

According to Jauch practices such as cutting wages and employment benefits, blatant gender discrimination, preventing staff from joining trade unions, dismissing union activists and paying staff in coupons (which can only be used in Wal-Mart stores) are part of the company's operations. A report released in 2007 by Human Rights Watch stated that although Wal-Mart was not the only bad employer, the company „stands out for the sheer magnitude and aggressiveness of its anti-union apparatus“³¹.

1.9.4 Specific literature on Wal-Mart in South Africa

There is a research report by Kelly Alexander from the University of Witwatersrand which specifically deals with the effects of Wal-Mart on the South African economy. There are some legal aspects dealt within this interesting, useful and indeed relevant piece. Specifically the Report is titled: „Challenges and Opportunities:

²⁷ COSATU. (2011-C). Wal-Mart deal not in the best interests of SA. In *COSATU Today: COSATU Press Statements*. <http://www.cosatu.org.za/docs/pr/2011/pr0719.html> Accessed 14/01/2012.

²⁸ Wal-Mart Watch Report, 2007-a

²⁹ H Jauch. „The Wal-Mart take-over, many reasons to be concerned.“ *The Namibian*, 9 August 2011.

³⁰ Ibid

³¹ Ibid

The Wal-Mart Effect In South Africa.” This report as summarised in its abstract aimed at investigating the potential effect that Wal-Mart will have on labour, the local economy and consumers in South Africa. This was done in the broader context of neo-liberal globalisation. Albeit briefly the author critically analyses the stakeholders’ engagement around the issues of Wal-Mart’s arrival and the role of the state, the resistance by local and international trade unions, the detrimental effects on the local and informal economies, the failure of the South African macro-economic policy environment and the positive effect that Wal-Mart will have on consumers. The author finds that:

„Although Wal-Mart’s arrival could exacerbate this, it simultaneously provides a springboard for resistance and a unique opportunity to rethink the policy framework of the country. In a country with high levels of poverty, Wal-Mart may force local retailers to become increasingly competitive and to provide goods to consumers at a lower cost which is obviously something that will benefit local consumers.”³²

One other key finding by the author was that “Wal-Mart’s strength is in its systems and processes which is something that could benefit South African companies as they learn from the giant retailer.”³³ As a recommendation therefore the author reiterates that Wal-Mart’s entry into South Africa will have to be carefully managed and monitored to ensure the maximum benefit for all stakeholders, and to limit the adverse effects of the retail giant.³⁴

The findings of this seminal report are very important for they can be transplanted to Namibia. However some careful transplantation should be taken into consideration because the Wal-Mart issue in this paper is taken as a labour issue as opposed to a competition issue which later is the case in Namibia. The report remains informative and relevant piece as the two countries have similar economic characteristics and share a common politico-legal and social history.

1.9.5 Definition of key terms in this study

The various definitions of terms that will be used in this study have been summarised in table 1 as below.

³² K Alexander 2012 op cit p4

³³ Ibid p9

³⁴ ibid

Research Term	Operational Definition in this study
Undertaking	In this study, undertakings will be used to imply the various business activities which have an effect on competition.
Goods	In this particular study, good will refer to the various commodities that are processes by manufacturing companies and packaged for distribution in the market for consumption.
Competition Regulation	Competition regulation in this context will involve the control of abuse of dominance, anti-competitive agreements and anti-competitive mergers & acquisitions, using provisions of competition law.

Table 1: Table of definition of research terms

1.10 Division of Study

The study consists of five chapters. This Chapter has dealt with aspects such as the statement of the problem which is to be solved by carrying out in the forthcoming chapters, justificatory grounds for conducting this research, the methodology that will be employed in finding solutions to the problem and finally the research question that will act as a guideline of the issues to be tackled throughout the paper.

Chapter two will provide a micro overview of the Competition Act in Namibia; this will include an analysis of the provisions dealing with mergers contained in the Act. This chapter will also consist of an analysis of the ministerial review procedure in terms of section 49 of the Act and state whether or not such procedural step is necessary for the purpose of merger control.

Chapter three will tackle the problem. This chapter will deal with the analysis of the Wal-Mart judgment in the High and Supreme Court of Namibia as well as an exposition and analysis of the Wal-Mart judgment by the South African court.

It will further deal with the question of public interest in relation to competition law mergers.

Chapter four will contain an overall analysis and discussion of the effects the Namibia judgment in the Wal-Mart case has had on the development of mergers (competition law) in Namibia; whether it hinders or enhances such development.

Chapter five is the final part of the research paper and it will deal with recommendations and conclusions.

Chapter 2

General overview of Competition Law in Namibia

2.1 Introduction

Competition laws of each country differ and contain some unique elements designed to suit the jurisdiction they apply to. However these specific laws may have some similarities or may have elements borrowed from other countries hence some comparisons may be made based on what was borrowed, what is similar and or what is based on international best practices.

This Chapter provides a general overview of Competition law in Namibia. The overview will include an analysis of the provisions dealing with mergers contained in the Act. The expose of the salient principles in the Act may whenever necessary be done from a comparative perspective especially with the South African laws.

This chapter will also consist of an analysis of the ministerial review procedure in terms of section 49 in the Act. This expose will help one understand the positions of the courts in the Wal-Mart case analysed in Chapter 3 below. Further it will help one understand the answers to the question whether or not such procedural step is necessary for the purpose of merger control under the Act in Namibia. Ultimately the answers will inform some analysis to the Supreme Court judgement and the recommendations made in Chapter 5 below.

This Chapter will start from the general to the particular. Specifically the chapter will consider the Namibian economy first which informs the investment and competition laws relevant to this dissertation. It then considers the general aspects of competition law and then specifics of Namibian competition laws.

2.2 The Namibian Economy in perspective

Namibia is located in the South Western part of the African continent. Its land area is 752,614 km², with a population of 2.2 million people as per Census conducted in 2010. It achieved its independence from South Africa in 1990. This made it the last Southern African country to become independent from foreign

occupation. Henceforward, the country has been striving to find its footing, and to be on the same socio-economic pedestal as its neighbours. The colonial system was characterized by racial and ethnic segregation. As such, the Namibian economy is one of contrast.

Generally, Namibia is a small economy characterized by a large and non-tradable sector, and an export oriented primary sector, fisheries, agriculture and mining. Mining is the most important economic contributor, with about 25% of the country's revenue.

Namibia's economy is closely tied with that of South Africa due to their shared history. One of the least populated countries in the world; it enjoys a good political, economic and social environment. Agriculture, tourism, and the mining industry form the basis of the country's economy. As at 2010, its GDP was \$ 16.19 Billion; while its real GDP growth rate was 7%.

Competition law in Namibia is an integral part of the overall macroeconomic policies of Namibia. It does not only complement the development of the white paper on industrial policy in 1992 but also supports the export processing zone (EPZ) Act 9 of 1995, the enactment of a small and medium enterprises (SME) policy in 1996 as well as the drafting of the transformation and Economic and social Framework (TESEF) and the foreign investment Act of 27 of 1990.

2.3 Investment and regulatory institutions involved

Namibia is a country that is highly dependent on Foreign Investment. Great effort has therefore been exerted in the direction of making the Namibian economy attractive to foreign investment. This is the rationale of the Foreign Investment Act. The process of regulating competition in Namibia is overseen by the Namibian Competition Act³⁵. This particular Act led to the establishment of the Namibia Competition Commission (NaCC) which has jurisdiction over all financial divisions of the nation.

³⁵ Government Gazette, Ministry of Justice, Namibia Financial Institutions Supervisory Authority (NAMFISA) Act, 3 of 2001.

Notwithstanding the Commission as a controller, Namibia has a few different statutes legislating the regulation of specific divisions. Through these statutes, organisations were secured to control these segments including the National Bank of Namibia commonly abbreviated as (BoN), the Namibian Financial Institutions Supervisory Authority (NAMFISA), the Communication Regulatory Authority of Namibia (CRAN) and the Namibia Ports Authority (Namport) are examples of such institutions.³⁶

Area controllers then again are concerned with the specialised and financial issues inside and amongst the organisations in their particular divisions. The BoN for example directs business banks through the control of least saves to be kept. It likewise manages passage into the managing an account area by guaranteeing that banks that want to enter the business meet the base capital necessity.

The Commission manages competition through merger and procurement control. It limits the ill-use of strength by firms and different sorts of prohibitive business drills. The Commission consequently takes a dynamic part evaluating merger and procurement suggestions by firms and supporting just those which are not liable to be impeding to competition in the particular markets. It additionally guarantees that prohibitive business practices, for example, cartels and development are checked and in situations where it is found to exist, the organisations mindful are subjected to revenge.

NAMFISA has specific regulations, for example, that of recommending to firms what bit of any arranged financing to put resources into the nearby economy before contributing abroad. CRAN has a few regulations set up, for example, those relating to the exchange of control, duty of TV licenses, endorsing interconnection rates and assignment of range³⁷. Namport is in charge of controlling the development of products or travellers inside the ports, managing access to the ports and recommending levies for the procurement of port administrations.

³⁶ HS Harris & American Bar Association. Competition laws outside the United States (2001) Chicago, I II Section of Antitrust Law American Bar Association.

³⁷ Fordham Competition Law Institute, 2014 op cit.

All these administrative capacities are plainly specialised with the exception of where part controllers are given competition capacities. In spite of their distinctive targets and the diverse strategies to achieving those goals notwithstanding, what competition powers and division controllers have as something to be shared is the objective of ensuring and improving social and financial welfare. Neither of the two substitutes for the other because there is a specific requirement for both.

2.4 Competition Law in general

Researchers have noted that most developing countries are faced with difficult situations in regards to their plan of strategy. It is worth noting that this is not a problem which is selective to competition law in that, hyper globalisation and its impetus of developing countries into straight coat model of the worldwide economy have a tendency to influence the power of the country state. Thus, this confines the extent of national self-sufficiency in the plan and execution of financial and social strategy and correspondingly affecting on the impact of majority rule government over the developing of the national financial course as observed by Fishman³⁸.

Before venturing into the specifics of Namibian competition law in detail, it is important to share the reasons for the need of competition law in the first place, as highlighted in the table below³⁹.

³⁸ C Fishman. *The Wal-Mart effect: How the world's most powerful company really Works and how it's transdeveloping the American economy* (2006) New York The Penguin Press.

³⁹ A Kumar2006 „Relationship between Competition Authority and Sectoral Regulator“ Presentation made at SAFIR Workshop, Lahore, 25-26 March 2006 Available at http://www.competition-commission-india.nic.in/speeches_articles_presentations/9-PPT_Lahore_06.pdf accessed on 25 August 2014.

Why have competition law?	Why have sectoral regulators?
Promotes efficiency	These prevent inefficient use of resources and protect consumers
Encourages innovation	Technical expertise necessary to determine access, maintain standards, ensure safety and determine tariffs (especially for merit goods)
Ensures abundant availability of goods and services of acceptable quality at affordable price. Offers wider choice to consumers	
Preserves economic and political democracy	

Source: Kumar (2006)

Figure 1: Importance of Competition Law

In developing countries like Namibia, financial development is essential for financial and social development including through competition law. In South Africa, the enactment looked to present indigenous contemplations. The South African Competition Act incorporates an open investment provision which, contingent on the certainties, may trump customary competition contemplations. This procurement takes after s2 of the Act which sets out the goals and conditions separated from customary contemplations of value, amount and buyer decision this confers the Act to push small and medium size South African business and also vocation and territorial development⁴⁰

In some of the most recent analysis of competition law in developing countries, researchers have recommended that South Africa resisted limitations that influence, for instance, its kindred African countries, is in a more good position to protect itself against world restrictions as a result of its more created economy and vital essentialness as an entryway to the mainland.

2.5 The Namibian Competition Act 3 of 2003

For a developing country such as Namibia, competition law is important in increasing competitive markets, increasing firm level efficiency and international

⁴⁰ Harris & American Bar Association, (2001) op cit.

competitiveness.⁴¹ To this end the Competition Act was passed. This part will now consider this Act in general. Some specific aspects will be covered in the proceeding sections.

2.5.1 General

Competition law in Namibia is an integral part of the overall macroeconomic policies of Namibia. For a developing country such as Namibia, competition law is important in increasing competitive markets, increasing firm level efficiency and international competitiveness.⁴²

Competition law in Namibia forms a significant part of economic reforms aimed at addressing the countries historical structure and the enhancement of broad based economic growth and development. The task of promoting competitive market conditions through investigations, prosecution of anti-competitive activities, review and approval of merger and exemption applications, rests in the Namibian Competition Commission (NaCC), which is created by the state for the implementation of the Competition Act 2 of 2003.

Like any other competition law, Namibia's competition law also covers the three major areas of competition namely, anti- competitive behaviour and agreements, anti-competitive mergers and abuse of dominance. The Competition Act of Namibia also includes provisions of public interest on protecting consumers by safeguarding competitive prices and product choices, promoting employment and advancing the social and economic welfare of Namibians. Another feature peculiar to the Namibia's competition law is the special requirements of its economy such as the protection and promotion of small undertakings and promoting the greater spread of ownership to previously disadvantaged people.

⁴¹ B Dundee, „Are merger conditions a viable instrument to achieve non-economic goals in developing countries“ (2012) www.comp.co.za

⁴² B Dundee Article: Are merger conditions a viable instrument to achieve non-economic goals in developing countries. (2012) Available at, www.comp.co.za, Accessed on 25th August 2014.

However it must be stated that the Namibia Competition Act shows particular similarity with the South African Competition Act 98 of 1998 in the inclusion of public interest objectives as part of the assessment of competition issues. The discretionary component for determining whether a merger is required for non- economic objectives is under the authority of the independent Namibia Competition Commission.

2.5.2 Historical Background on Competition Law in Namibia

Before Namibia gained independence in 1990, issues of competition concern was regulated by the Regulations of Monopolistic Conditions Amendment Act 14 of 1958. After independence, this law ceased to apply in Namibia. The Namibian Government, aided by the European Union commissioned a study leading to the drafting of a Competition Bill in 1996.⁴³

The government soon after established the steering Advisory Committee on competition tasked to discuss the Bill with all stakeholders⁴⁴. The resultant Competition Act was signed by the president of the Republic of Namibia on 3rd April 2003. However the Act only came in to operation on 3rd March 2008 following the determination of the Minister of Trade and Industry and by the publication of a notice in the Government Gazette in terms of s70 (1) of the Act.

It is through the inception of the Competition Act in the country that saw the regulation of competition law issues officially become a reality in Namibia as an independent nation. This is a reflection of the governments continued commitment in ensuring a fair and competitive trading environment in the economy.

The task of promoting competitive market conditions through investigations, prosecution of anti-competitive activities, review and approval of mergers and exemption applications, rests in the NaCC, which is created by the state for the implementation of the Act. This requires tremendous handwork, commitment and dedication from the NaCC as it faces daunting challenges in its task to enforce

⁴³ Government Gazette, Ministry of Justice, Nampost Act, 2 of 1994

⁴⁴ Competition regimes in the world-A Civil Society Report.

this piece of legislation and the Wal-Mart case which forms the crux of this dissertation is one such indicator of the challenges facing the nation.

2.5.3 Salient features of the Act

As noted above the Act resembles in many aspects the South African competition law which was passed in 1998, as the inspirations flowed from the models and patterns of the latter⁴⁵

The Act consists of a combination of efficiency objectives and retributive objectives as applied in s47 (d)-(h) of the Act. The first set of objectives is pure competition policy objectives and the second are pure industrial policy objectives. Further the Act covers all economic activity in Namibia. The overall purpose of the Competition Act is to promote and maintain competition. Section 2 of the Act provides that the purpose of the Competition Act is to enhance the promotion and safeguarding of competition in Namibia in order to:

- (a) Promote efficiency, adaptability and development of the Namibian economy;
- (b) Provide consumers with competitive process and product choices;
- (c) Promote employment and advance social and economic welfare of Namibians;
- (d) Expand opportunities for Namibian participation in the world markets whilst recognizing the role of foreign competition in Namibia ;
- (e) Ensuring that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- (f) Promote greater spread of ownership stakes of historically disadvantaged persons.

There exists an implied purpose of the Act in terms of the prohibition of anti-competitive practices and abuse of dominance as these two prohibitions are not enumerated in s2 of the Act. Moreover, the Act is applicable to all economic activities within Namibia or having an effect in Namibia. Thus, it is the nature of

⁴⁵ Ibid.

the economic activity concerned and not the status of the operation of the form of intervention that indicates how competition rules apply. The Act binds the state insofar as the state is engaged in trade or business for the production, supply or distribution of goods or the provision of any service, but the state is not subject to criminal liability.

The Act also applies to activities of statutory bodies, except insofar as those activities are authorized by any law.⁴⁶ The Competition Act does not define “economic activity” and there is currently no precedent on how this phrase should be interpreted⁴⁷. Furthermore, s4 of the Act provides that the jurisdiction of the NaCC only extends to the borders of Namibia and not beyond, subject only to the Constitution of the Republic and the law.

In addition, competition law is aimed at encouraging the process of competition in order to promote the efficient use of resources while protecting the freedom and economic action of various market players⁴⁸.

2.5.4 The regulation and control of Mergers under the Act

Below is a consideration of the current law and provisions that regulate mergers/acquisitions in Namibia in light of the Competition Act 3 of 2003. A case study will be done in the following chapter on how this law applies and how strong or weak it is considering the judgments of the High Court and Supreme Court in the case of *Wal-Mart/Massmart Holdings Wal-Mart Stores Inc v Chairperson of The Namibian Competition Commission And Others*⁴⁹ which is the only prominent Namibian case that has ever dealt with the issue of mergers.

The NaCC has made significant progress in fulfilling its mandate over the past two years, particularly in the field of merger control. One of the main challenges faced by business wanting to expand operations through Africa is monitoring and complying with various competition law developments which are

⁴⁶ See section 3(3) of the Act.

⁴⁷ Ibid.

⁴⁸ UNTAD, 2009 op cit.

⁴⁹ See supra.

taking place in a number of jurisdictions⁵⁰, Namibia is no exception. The NaCC has already reviewed 200 mergers in a variety of sectors since it was established, including mining, banking and finance, cementitious products, retail and hardware sectors⁵¹.

As under the South African competition law regime, the Namibian Act also contains merger regulation provisions. The terms merger and acquisitions refers to the aspect of corporate finance strategy and management dealing with the merging and acquiring of different companies as well as assets⁵². Even though sometimes these terms are often used in a synonymous fashion, they slightly mean different things. An acquisition or takeover is the buying of one company by another, this entails the purchasing of a smaller company by a larger firm.

On the other hand a merger happens when two firms agree to go forward as a single new company rather than remaining a separately owned and operated company⁵³. For the purposes of the Competition Act of Namibia mergers and acquisitions are called „mergers“, as the term „mergers“ is used in a broad sense covering combinations of enterprises in various forms.

Chapter 4 of the Act deals with the concept of mergers, regulation and control. In terms of s42 (1) of the Act a merger is defined as follows: “a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking”. In addition s42 (2) provides that a merger may be achieved in any manner including:

- (a) A purchase or lease of shares, an interest, or assets of the other undertaking in question: or
- (b) Amalgamation or other combination with the other undertaking.

⁵⁰ H Jauch. „The Wal-Mart take-over, many reasons to be concerned.“ *The Namibian*, 9 August 2011.

⁵¹ N Rose Antitrust, Competition and Regulatory Bulletin, (2013). Norton Rose

⁵² Based on definitions from Wikipedia, the free encyclopedia at <http://en.wikipedia.org/wiki/mergers> as on 05 April 2007.

⁵³ Ibid.

Moreover, s42 (3) defines the control of mergers and owing to the wording of the section, a person controls an undertaking if that person:

- (a) beneficially owns more than one half of the issued share capital of the undertaking;
- (b) he is entitled to vote a majority of the votes that may be cast at a general meeting of the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- (c) is able to appoint or to veto appointment, of a majority of the directors of the undertaking;
- (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act 61 of 1973;
- (e) in the case of an undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of the undertaking being a close corporation, owns the majority of the members interests or controls directly or has the right to control the majority of the members interests or control directly or has the right to control the majority of members votes in the close corporation; or
- (g) any benefits likely to be derived
- (h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.
- (i) From the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

Section 45 of the Act provides that, the NaCC is required to consider and make a determination in relation to a proposed merger within thirty days after the date on which it receives the merger notification. The merger examination period may however be extended if the NaCC requires further information for its examination, or if a conference is required in relation to the proposed merger. In making a determination in relation to a proposed merger the NaCC may in terms of s47 (1) of the Act either:

- a) give approval for the implementation of the merger; or
- b) decline to give approval for the implementation of the merger.

The NaCC can also approve mergers with certain conditions aimed at alleviating or lessening the identified competition concerns in the transaction, or increase the transactions public interest benefits. The Commission uses first, the substantive test in the examination of mergers considering the prevention of lessening competition in the relevant market or the restriction of trade or provisions of any service, or the endangering of the continuity of supplies or services in Namibia.

Secondly the NaCC may prohibit a notified concentration if it is to be expected that it creates or strengthen a dominant position unless the undertaking concerned provide evidence that the concentration will lead to an improvement of the conditions of competition on the markets as stipulated in 47 (b). Thirdly public interests considerations in merger examination are also provided for in the Act.

2.6 The Ministerial Review process

The Minister of Trade and Industry can in terms of s49 of the Act review the NaCC's decision on a merger, on application by the party to the merger. Section 49 stipulates the following: (1) Not later than 30 days after notice is given by the Commission in the *Gazette* in terms of s47(7) of the determination made by the Commission in relation to a proposed merger, a party to the merger may make

application to the Minister, in the form determined by the Minister, to review the NaCC's decision.

Subsection (2) (a) requires the Minister to publish by notice in the Gazette within 3 days after receiving an application in terms of subsection (1), giving notice of the application for a review; and (b) invite interested parties to make submissions to the Minister in regard to any matter to be reviewed within the time and manner stipulated in the notice. Subsection (3) states that within 4 months after the date that an application for review was made, the Minister must make a determination either:

- a) overturning the decision of the Commission;
- b) amending the decision of the Commission by ordering restrictions or including conditions; or
- c) confirming the decision of the Commission.

The Minister must give notice of the determination made by the him in relation to the review to the NaCC and to the parties involved in the proposed merger, in writing; and by notice in the *Gazette*; as well as issue written reasons for that determination to the Commission and the parties involved⁵⁴. The Minister may determine the procedure for a review in terms of this section⁵⁵

Two applications for the Minister's review of NaCC's decision on mergers were made since its inception. Both applications involved the Commission's conditional approval of the transactions. One was the Wal-Mart Store/Mass Holdings merger. As an administrative decision making body, the NaCC, in the exercise of its functions, must comply with the principles of administrative justice which advocates for the duty to act reasonably and fairly and for the provision of reasons for making a decision.⁵⁶

⁵⁴ Sections 49(4) (a) (i) and (ii) of the Act.

⁵⁵ Section 49 (5) of the Act.

⁵⁶ Article 18 of the Constitution of Namibia

The control and merger regulation provisions apply to every proposed merger, unless they fall within a class which the Minister of Trade and Industry with the concurrence of the NaCC has determined to exclude from the merger provisions of the Namibia Competition Act⁵⁷. For almost five years and until recently, the Minister has failed to publish such notice. Therefore no financial thresholds for compulsory merger notifications in Namibia had been prescribed, resulting in all mergers within and involving Namibian entities, or those which had an effect within Namibia, having to be notified to the NaCC⁵⁸.

However, on 24th of December 2012, the thresholds were finally published⁵⁹. The following is to be notified to the NaCC;

- a) The targets turnover or assets in Namibia must exceed 10 million Namibian dollars and;
- b) The combination turnover or assets of the target and acquiring of firms must exceed 20 million Namibian dollars.

Both thresholds must be met for mandatory notification and a merger may not be implemented in Namibia until it has been approved by the Competition Commission in terms of the Act. This process can take more than three months to complete, or even longer if reviews and appeals are launched.

2.7 Conclusion

This Chapter has provided a general overview of Competition law in Namibia. It showed the Namibian economy as generally a small economy then considered the general aspects of competition law and then specifics of Namibian competition laws. The general purpose of the chapter was to put the reader in perspective in regards to the country and the major law that applies to the issues addressed in this dissertation. To this end the Chapter also had to mention some comparable laws such as the Competition Act of South Africa.

⁵⁷ Section 43 of the Act.

⁵⁸ Section 44 of the Act.

⁵⁹ Government Notices Number 306 and 307 of 24th December 2012.

Relevant to the Wal-Mart case this Chapter also provided an overview of the ministerial review procedure in terms of section 49 of the Act. In order to help one understand the answers to the question whether or not such procedural step is necessary for the purpose of merger control under the Act in Namibia.

Chapter 3

Case Study: Wal-Mart//Massmart Case in Namibia

3.1 Introduction

As noted above the concept of mergers has gained serious attention and momentum in Namibia over the past three years since the inception and the saga that was fuelled by the merger/takeover of the multi-million dollar company Wal-Mart of some of its supply chain companies in Namibia. The Wal-Mart case in Namibia left such a great significant legal precedent regarding mergers, the role and importance of competition law and the Competition Commission of Namibia (NaCC) in its endeavour to implement and enforce the competition law in the Republic.

This chapter analyses the Wal-Mart case in Namibia. It also has a section on some comparative cases in South Africa. Specifically the Chapter has three major parts: the first part will deal with the analysis of the Wal-Mart judgment in the High and Supreme Court of Namibia. The second part will contain an analysis of the Wal-Mart judgment by the South African courts. The third part gives a general expose of the role of public interest in relation to competition law and mergers.

3.2 Factual background to the Wal-Mart case in Namibia

In November 2010, the Namibian Competition Commission received notification of the proposed acquisition of Massmart Holdings Limited in terms of s44 (1)⁶⁰ of the Act. The proposed acquisition included its subsidiary in Namibia, Massmart. In essence, the proposed transaction would result in the acquisition of sole control over the Massmart

⁶⁰This section provides as follows:

„Notice to be given to Commission of proposed merger

(1) Where a merger is proposed each of the undertakings involved must notify the Commission of the proposal in the prescribed manner.

(2) If, after receipt of a notification in terms of subsection (1), the Commission is of the opinion that in order to consider the proposed merger it requires further information, it may, within 30 days of the date of receipt of the notification, request such further information in writing from any one or more of the undertakings concerned.”

by Wal-Mart, or wholly owned entity controlled by it. More particularly, the proposed merger comprised a firm intention by Wal-Mart to offer to acquire 51% of the ordinary share capital in the Massmart 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. The transaction was clearly a merger as defined in terms of s42 of the Act, as explained above and was, thus, notifiable to the Commission.

At the time the merger transaction straddled fourteen different countries. It entailed applications to five national competition regulators and had been approved in Tanzania, Malawi, Swaziland and Zambia. It was at the time the subject matter of a pending procedure before the South African Competition Tribunal was on going, a case that will be analysed below as well.

It was 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. Wal-Mart accordingly contended 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.

Further Wal-Mart and Massmart submitted that the proposed transaction would have no negative effect on employment as there would be no job losses, redundancies or retrenchments, following the implementation of the merger, but made no binding commitments to that effect. In addition, competitors⁶¹ in the relevant market did not express any concerns over the transaction.

⁶¹ Competitors in the wholesale market such as Woerman Brock, Metro Hyper, Metro cash and carry and others.

3.3 The Commission's determination

The Commission's evaluation of the proposed transaction found that since Wal-Mart had no operations in Namibia at the time, there was no competitive overlap between the activities of the merging parties. Therefore 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. The merger was approved with the following conditions:

- a) „the merger should allow for local participation in accordance with section 2(f) of the Competition Act, 2003.
- b) that there should be no employment losses as a result of the merger.
- c) that the merger should not create harmful effects on competition that may give rise to risk of the market becoming foreclosed to competitors, especially for small and medium enterprises (SME'S).
- d) finally, the approval of the Minister of Trade and Industry is required in terms of section 3(4) of the Foreign Investment Act no 27 of 1990, since the transaction was a retail business transaction⁶².

⁶²*Wall mart/Massmart holdings Wal-Mart stores Inc v Chairperson of the Namibian Competition Commission and others* (A 61/2011)[2011] NAHC 126 (28 April 2011) section 3(4) of the Foreign Investment Act provides as follows:

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.

(5) Any law relating to natural resources or any licence or other authorisation granted under such a law conferring rights for the exploitation of such resources may provide for

This was done in the form of a notice of determination contemplated by Form 41 of the Act (Notice 75). In the notice of determination, the NaCC 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.⁶³

3.4 Concerns of interest groups

Interest groups in wholesale industry were not happy about this approval though there were conditions to it thus; they submitted their concerns about the opening of Wal-Mart in Namibia. They communicated that this merger would likely price smaller undertakings out of the market. Further their concerns were levelled in terms of the growing retail and wholesale industry that would be closed down, consequently leading to thousands of Namibians being retrenched in the near future.

To assist these businesses and any potential suppliers who would be interested in supplying goods and services to the merged entity, they suggested that the merging parties could consider putting in place a supply development fund to develop a local supply chain for their operations in Namibia. To this end, no specific information has been provided regarding the operation mechanism or

the granting or enjoyment of such rights to or by Namibians on terms more favourable than those applicable to foreign nationals.

⁶³ The reasons for the conditions were the following:

- 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.

logistics as to how the fund will be operated, regulated and managed or what its targets were.

3.5 Driving towards litigation: Contestations and further developments

Wal-Mart contended that all four conditions are unauthorised by law and are invalid and also contended that Notice 75 under which the fourth bulleted condition was made, is likewise unauthorised and invalid. Following the receipt of the determination, Wal-Mart submitted a request in terms of s49⁶⁴ of the Act to the Minister asking the Minister 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.

Wal-Mart also noted that the conditions had not been canvassed with the merging parties before they were imposed and asserted that if the merging parties had been given an opportunity to respond to the proposed conditions, they would have pointed out that the vague terms of the conditions would lead to difficulties that should be avoided.

Wal-Mart further 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. (This informs why the South African case is relevant to this dissertation. According to Wal-Mart once that approval had been obtained, the merging parties would then be entitled to implement the merger at the holding company level. This would indirectly affect the control of the fourth respondent's Namibian subsidiaries. In this sense it would accordingly be necessary to avoid any breach of Namibian laws by having the review resolved in advance of the merger.⁶⁵

⁶⁴ In terms of ss (1) of this section „[n]ot later than 30 days after notice is given by the Commission in the Gazette in terms of section 47(7) of the determination made by the Commission in relation to a proposed merger, a party to the merger may make application to the Minister, in the form determined by the Minister, to review the Commission's decision.“

⁶⁵ Wal-Mart case para10.

In response, the Minister considered himself unable to accede to this request by 18 March 2011. Wal-Mart was aggrieved. This was against the expectations of Wal-Mart thus they found a reason to approach the High Court on an urgent basis.

3.6 The litigation

3.6.1 Preliminary reflections

After the Minister refused or found himself unable to accede to the requests by Wal-Mart, the latter then approached the High 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. The Chairperson of the Commission did not oppose the proceedings but deposed to an affidavit on behalf of the Commission. The Minister opposed the relief sought.

There were various preliminary issues regarding the urgency of the matter and exhaustion of internal remedies which the High Court dealt with at length. They are not so important to this dissertation save to say that The High Court pronounced itself first, on the issue of exhausting the internal remedies provided for in terms of s49 of the Act. Section 49 of the Act prescribes the ministerial review procedure before seeking an order that the conditions imposed when a merger is approved be invalid. The High Court ruled that Wal-Mart should have exhausted the s49 ministerial review procedures before seeking an order that the conditions imposed when the merger was approved were invalid. It accordingly ruled that the ministerial review should have preceded the application to the court.

3.6.2 On the merits

On consideration of the merits the High Court found that Notice 75 was invalid on two grounds: first, that in paragraph (a) of the Notice, the Minister conferred upon himself the power to permit foreign nationals to engage in the retail industry, a „dispensing“ power that was *ultra vires* the powers granted to him by section 3(4)⁶⁶ of the

⁶⁶ The Foreign Investment Act 27 of 1990 s (3) (3). This section provides:

No foreign national engaged in 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 a

Foreign Investment Act. Secondly, that the retail industry is not an industry engaged „in the provision of services or the production of goods“ within the meaning of section 3(4) of the Act which are the only industries in respect of which the Minister may issue a notice.

The Court added that, in any event, the proposed merger did not fall within the prohibition of Notice 75, as in purchasing the shares in Massmart; Wal-Mart did not „become engaged in businesses“ within the meaning of the prohibition. The High Court also noted that because paragraph (a) of Notice 75 was invalid, the fourth condition imposed by the Commission was also invalid, in that it required Wal-Mart to obtain the permission of the Minister to engage in the retail business.

The High Court then considered the validity of the other three conditions imposed by the Commission. It declared each of them to be invalid. It held that the first condition which required the merger to „allow for local participation in accordance with section 2(f) of the Act“ was in conflict with section 3(3) of the Foreign Investment Act, which provides that no foreign national „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“. The Court held in addition that the condition was arbitrary and vague in its formulation. It also noted that because the merging parties have not been given notice of the Commission’s intention to impose the condition, the fairness of the procedure followed by the Commission was flawed.

The High Court ruled that where the need existed for a condition to be imposed, prior notification of the intention to do so is a requisite, on the basis that the omission constituted a procedural defect which impacted on the fairness of the procedure followed by the Commission. In terms of the vagueness of the condition,

shareholder or as a partner in such a business or for the transfer of such business to the government or any Namibian. Provided that it may be a condition of any license or other authorization to or any agreement with 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 right“

the court ruled that the Commission should define when and how the condition should be met, as well as establish a reasonable apprehension before requiring rectification thereof can be approved⁶⁷. To this the High Court said:

„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.“⁶⁸

The court mentioned that this condition was also rightly challenged because of the vague and uncertain terms in which it has been cast. It did not specify when and how the conditions should be met.⁶⁹ In the opinion of the Court and relying on the case of *Van Eck NO and Van Rensburg NO v Etna Stores*,⁷⁰ the court concluded that the conditions imposed would need to relate to the competitive outcome of the proposed merger.⁷¹

With regard to the second condition, that the merger should not result in job losses, it held that there was no rational connection between the reason given for the condition and the terms of the condition and that it was accordingly invalid. According to the court, the reason did not remotely rationally relate to the absolute prohibition provided in the condition. The High Court concluded thus that the condition is hopelessly unsustainable and it is unsurprising that the Commission had not placed any argument or material before the Court to support this (and the other conditions).⁷²

With regard to the third condition, that the merger should not create harmful effects on small and medium enterprises especially, the Court held that the condition was again not rationally related to the reasons given for it. The Court also held that the terms of the condition were impermissibly vague.

⁶⁷ B Dundee. (2012) op cit.

⁶⁸ Para 14

⁶⁹ Para 50

⁷⁰ 1947(2) SA 984

⁷¹ see also the case of *University of Cape Town v the Ministers of Education and Culture* 1988(3) SA 203

(C)

⁷² See para 53 of the judgment

The significance of the High Court Ruling on this issue is that the Commission had no power to impose the first condition and that the condition is not conferred by s2 (f) of the Act. A closer look at the section gives the impression that the section itself does not contain such power, but merely an express reference to the purpose sought to be attained.⁷³

The High Court accordingly declared both Notice 75 and the four conditions imposed by the Commission in respect of its approval of the proposed merger to be invalid.

3.7 Supreme Court Judgment - Namibia

The Commission and the Minister were not happy with the judgment, so they both noted appeals against the judgment and orders of the High Court. After the appeals had been noted, Wal-Mart undertook to arrange the preparation of the appeal record in order to ensure the matter be dealt with expeditiously.

3.7.1 Preliminary and procedural aspects

There were two issues on appeal emanating from the High Court's decision: the first concerned the validity of Notice 75, and the second concerned the validity of the four conditions imposed by the Competition Commission. The Supreme Court's judgment first dealt with the validity of Notice 75, which this dissertation will not delve into detail, as the court of appeal confirmed the order of invalidity of the notice made by the High Court on the basis that the Notice 75 is *ultra vires* in terms of its empowering section. Specifically the Court said:

„For all the above reasons, it seems to me that the phrase “provision of services” in section 3(4) of the Foreign Investment Act cannot be interpreted as the appellants suggest to include any business that supplies the needs of others, including retail businesses. The “provision of services” therefore does not include within its scope those businesses that are engaged in the business of selling goods as opposed to rendering services. Accordingly, paragraph (a) of Notice 75 is *ultra vires* the terms of its empowering section, and the order of invalidity made by the High Court in this regard must stand. In the light of this conclusion, it is not necessary to consider the other bases upon which Wal-Mart argued that Notice 75 was invalid.“

This meant that the merger remains in place and the question that remained for determination was the validity of the conditions imposed to the merger.

⁷³ Ibid.

Secondly before considering whether the conditions imposed by the Commission were invalid, the court considered the question of ministerial review contemplated in s49 of the Act that has not run its course. On this note the court considered whether the High Court was correct in finding that Wal-Mart could seek to have the conditions imposed by the Commission set aside without first letting the ministerial review provided for in s49, which Wal-Mart itself had instituted, run its course? The court stated that, the requirement that the internal remedy provide effective redress is one that has been acknowledged by South African courts as well.⁷⁴

According to the Supreme Court determining whether an internal remedy provides effective redress requires a careful examination of the remedy provided in the statute in the light of the relief sought in the litigation. Here, the relevant relief sought is a declaration that the four conditions imposed by the Commission on its approval of the merger were invalid.⁷⁵ The nature of this relief would be relevant in determining whether Wal-Mart should have exhausted the ministerial review process before approaching the High Court.

It went on to say that the three conditions sought to address one or other of the statutory purposes set out in s2 and s47 of the Act. The first condition addresses the goal set out in s2 (f) of the Act, the second, the goal set out in s2(c), and the considerations identified in s47 (2) (e); and the third, the goal in s2 (e) and the considerations in s47 (2) (f).

According to the court all relevant factors it considered suggest that the ministerial review process will often provide effective relief, and relief more extensive than that which a reviewing court may provide. Accordingly, a court will rarely permit a party to approach it for relief before the review contemplated in section 49 is completed.

⁷⁴ See, for example, *Nichol and Another v Registrar of Pension Funds and Others*, cited above n 17, at para 18; the discussion in LG Baxter *Administrative Law* (1984) Juta at p721 and the references cited there; and the discussion in J Hoexter *Administrative Law in South Africa* (2007) Juta at p478 - 482.

⁷⁵ Para 47.

The court emphasized that the question in each case will be whether the review process will provide effective relief. To answer this question the courts mentioned two situations: The first will arise where the nub of the complaint raised goes to „the manner in which the balance between the competing concerns set out in section 2 and 47(2) of the Act has been struck by the Commission.“⁷⁶ The task of balancing the competing interests in the Act is not a task for which a court has any special competence or one that in the scheme of the Act is assigned to a court. To this end:

„It is a task reserved by the legislation first for the Commission and then for the Minister. Moreover, the Act confers the power upon the Minister to overturn or vary the decision of the Commission, a power that will not ordinarily be exercised by a court. In the circumstances, where the complaint raises the manner in which the considerations mentioned in section 2 and section 47(7) of the Act have been balanced in the decision, a court will require the ministerial review process to be exhausted before it will consider an application for relief.“⁷⁷

Secondly, a court will rarely permit a party to approach it for relief where the complaint is one that the Minister is empowered to resolve during the ministerial review process. The court thus emphasized: „the Act affords the Minister ample powers to alter the decision taken by the Commission in the light of the information placed before the Minister and ordinarily a court will require that the review process run its course.“

The court emphasised further that, whether the conditions formulated by the Commission promote these concerns in a rational and appropriate fashion is a question, in the first place, for the Minister. It is for the Minister to decide how the competing purposes identified in the Act should best be achieved. The decision of the Minister can however be reviewed and if the complaint does not relate to the manner in which the balancing exercise has been struck or one that the ministerial review cannot correct, then it may be an issue that a court will entertain before the review process is complete. The question in each case will be

⁷⁶ Para 53

⁷⁷ *ibid*

whether the ministerial review process provides effective relief to the litigant. Thus on this point the court said:

„One of the considerations as to whether the ministerial review is an effective remedy relates to the time that the ministerial review process will take. In this regard, it should be noted that the time periods set out in section 49 of the Act are maxima, not minima. The Minister must publish notice of the review in the Gazette within 30 days of receiving the review application. He may of course do it in a shorter period. Similarly, the Minister must determine the review within four months of the application having been lodged, but he may determine the review more quickly. Moreover, it is the Minister who determines the time limits within which interested parties must lodge their comments. These time limits are not set in the Act. In determining the appropriate time limit in each case, the Minister will take into account the statutory requirement that the review be determined within four months of the review application having been lodged, but also other considerations, including the question whether the relevant merger is one that requires an expeditious decision.”

Given this determination, the court did not see it trite to consider the fourth condition on the merits thus continued to pronounce itself on the remaining three conditions as challenged by Wal-Mart.

3.7.2 On the merits

The court then considered the challenge to the merits of the case and further opined that there may be merit in the claims of Wal-Mart, that the conditions are not as precisely formulated as they should be, or not closely connected to the reasons provided by the NaCC. However the court noted that it is only the Minister of Trade and Industry and not the courts that has to decide whether or not the conditions imposed by the NaCC are irrational, vague and or unconstitutional.

On the merits Wal-Mart had argued that the first condition that the merger allows for local participation in accordance with section 2(f) of the Act was unlawful on the ground that it was in conflict with section 3(3) of the Foreign Investment Act. It also argued that the condition was unlawful on the grounds that

it was vague, arbitrary and irrational.⁷⁸ The Commission responded that section 2(f) of the Act which provides that one of the purposes of the Act is “to promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons” authorises the terms of the condition.

Further Wal-Mart had challenged the second condition, which required that there be no employment losses as a result of the merger, on the ground that it was irrational and disproportionate. It also challenged the third condition, that there should be no harmful effects on competition, on the basis that it was irrational, vague and *ultra vires* the powers of the NaCC.

For the Supreme Court it was clear that these three conditions seek to address one or other of the statutory purposes set out in section 2 and section 47. The court said that the first condition addresses the goal set out in section 2(f) of the Act, the second, the goal set out in section 2(c), and the considerations identified in section 47(2)(e); and the third, the goal in section 2(e) and the considerations in section 47(2)(f). The court divorced itself from making a pronouncement and said:

„Whether the conditions formulated by the Commission promote these concerns in a rational and appropriate fashion is a question, in the first place, for the Minister. It is for the Minister to decide how the competing purposes identified in the Act should best be achieved. It may be that there is merit in the claims of Wal-Mart that the conditions are not as precisely formulated as they should be, or not closely connected to the reasons provided by the Commission, but these are matters we need not, and do not, decide in this judgment. For even if Wal-Mart is correct in these submissions, it does not follow that it is appropriate for Wal-Mart to bypass the section 49 procedure where these very issues can be considered by the Minister.”⁷⁹

According to the Supreme court therefore „[t]o permit Wal-Mart to challenge these conditions imposed by the Commission when it approved the merger transaction without first letting the section 49 review process run its course, would be to undermine the statutory scheme that empowers the Minister to review the

⁷⁸ Section 3(3) of the Foreign Investment Act provides that a foreigner engaged in business activities in Namibia, shall not be required “to provide for the participation” of the Namibian government or any Namibian citizen as a shareholder or partner in such business.

⁷⁹ Para 58

Commission's decision on the merger."⁸⁰ In the view of the court procedurally if, once the Minister has concluded the review, Wal-Mart considers that any conditions that have been stipulated are irrational or vague or unlawful, it may then challenge those conditions.

The court further noted that the time periods provided in section 49 are maximum time periods, which may be shortened by the Minister where circumstances require.⁸¹ Further given the provisions of section 49(2) of the Act, which require the Minister to give interested parties an opportunity to comment on the proposed merger, ten days was indeed an impractically short period.⁸² The reasoning is that

„As the Competition Act makes plain, mergers can have many public policy implications that need to be considered prior to their being approved. In addition, there may be a range of interested parties who may wish to be heard on the implications of the merger. Parties to proposed merger transactions need to accept that compliance with national competition processes is required. It should be noted that at the time of writing this judgment, the South African approval that Wal-Mart expected to be finalized by May 2010, has still not finally been obtained.“

In conclusion the Supreme Court set aside the order made by the High court declaring the conditions imposed by the NaCC in approving the merger, to be unlawful and invalid and held in addition that the matter be revert to the Minister of Trade and Industry to proceed with the review process. The court specifically said:

„In conclusion, the appellants' arguments that Wal-Mart should have exhausted the section 49 ministerial review procedure before seeking an order that the conditions imposed by the Commission when it approved the merger succeeds. The order made by the High Court declaring the conditions to be unlawful and invalid will therefore be set aside. The ministerial review should therefore proceed. Because of the time that this litigation has taken, the time limits stipulated in section 40 of the Act have expired, and it will be appropriate for this Court to declare that the review will be deemed to have been launched on the date that judgment is handed down in this matter.“

The court asserted that if once the Minister has concluded the review, and Wal-Mart considers that any conditions that have been stipulated are irrational or vague or unlawful, only than may it challenge those conditions. It may well be, however,

⁸⁰ *ibid*

⁸¹ Para 59

⁸² *ibid*

that any complaints Wal-Mart has about the imposed conditions are resolved during the review process, the court concluded.

3.8 The Minister's determination after the Supreme Court Judgment

After the decision of the Supreme Court the Minister of Trade and Industry had to comply with the decision of the said court to revise the conditions and make a determination as to which conditions exactly should apply to the merger between Massmart and Wal-Mart. This determination was made by the Minister on 2 April 2012.⁸³ In his determination the Minister confirmed the decision of the NaCC which approved the merger of Wal-Mart Stores Incorporated and Massmart Holdings Limited and imposed conditions. The conditions included that:

- The Merged Entity must ensure that there are no retrenchments, based on the Merged Entity's operational requirements in Namibia, resulting from the transaction, for a period of two years from the effective date of the transaction⁸⁴
- The Merged Entity must honour existing labour agreements and must continue to recognise representative trade unions in Namibia to represent the bargaining units, for a period of two years from the effective date of the Transaction.⁸⁵
- The Merged Entity must consult with the Minister of Trade and Industry with regard to the establishment of a programme of activities for domestic supplier development which the Merged Entity must implement. The Merged Entity must obtain the approval of the Minister of Trade and Industry for such programme within 12 months of the date of this determination⁸⁶

⁸³ Government Gazette Number No. 4918 Government Notice Number 94 Notice of determination by Minister in relation to review of decision of Namibian Competition Commission in relation to the proposed merger: Wal-Mart Stores Incorporated // Massmart Holdings Limited 2 April 2012.

⁸⁴ Ibid para 4.2

⁸⁵ Ibid para 4.3

⁸⁶ Ibid para 4.3

The Minister also sought to comply with the principles of natural justice by giving reasons for the determination and conditions imposed. The given reasons⁸⁷ are very important and included that:

- a) The conditions originally imposed by the Competition Commission were considered by the High Court not to be specific.
- b) Submissions made by the parties to the review by the Minister and the public, both written and oral, during the opportunities provided for such submissions to be made, were taken into account in the formulation of the conditions attached to the approval of the merger.
- c) The provisions of the Act, in particular sections 2 and 47(2), were taken into account in making the determination in terms of section 49(3) of the Act.
- d) The conditions attached to the approval of the merger by the Minister were imposed taking into account public interest considerations relating to potential risks to Namibia's economy and industrialization, employment as well as the growth of the small and medium enterprise sector. The Minister in this regard considered that the conditions strike an appropriate balance between the potential economic benefits of the merger and public interest considerations.
- e) The Minister noted that while conditions attached to the approval of a merger were important to safeguard the public interest, the Act provided for substantive remedies over the entire duration of operations of the Merged Entity in Namibia, concerning potential restrictive practices and or abuse of dominance.
- f) The Minister noted that the merger approval in terms of the Act, whether conditional or unconditional, does not substitute for or affect any other law, any permission required under any other law, or the requirement for compliance with any other law.

3.9 Wal-Mart Case- South Africa

The role of the South African Competition Act⁸⁸ requires the Competition Commission to investigate not only whether the proposed transaction will result in a

⁸⁷ Ibid para 5 (a) – (f)

substantial lessening or prevention of competition in South Africa, but also whether it will impact negatively on various public interest matters.

These „public interest“ matters are the effect that the merger will have on employment or a particular industrial sector or region; the ability of small businesses or firms controlled by historically disadvantaged people to become competitive and the ability of national industries to compete in international markets. In the Wal-Mart case in South Africa, which is summarised below, the Competition Appeal court specifically said the following:

„[T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular“⁸⁹

In recent years, the South Africa Competition Commission has placed more emphasis on the „public interest“ aspects of its jurisdiction and conditions intended to address the impact of proposed mergers on employment in South Africa such as moratoria on retrenchments have been imposed in a significant number of transactions.

The scope of the South African Competition Commission“s power to protect the public interest was the subject matter of a protracted litigation in the recent major merger in which the international food retailing giant Wal-Mart acquired the Southern African supermarket chain Massmart. The merger did not raise any competition concerns, because the acquirer was a new entrant into South Africa and its market. Accordingly the South African Competition Commission recommended that the transaction be approved without any conditions.

Wal-Mart has three retail formats in the form of discount stores, supercentres as well as neighbourhood markets. In addition, the company has a chain of warehouse stores called Sam“s club, which sells groceries and general

⁸⁸ Competition Act 89 of 1998.

⁸⁹ H Jauch (2011) op cit.

merchandise mostly in bulk. Internationally at the time of the transaction, Wal-Mart operated in 15 countries⁹⁰. The primary target firm in the case was Massmart Holdings (Massmart).

A company incorporated under the company laws of the Republic of South Africa and listed on the Johannesburg Stock Exchange (JSE). Massmart had an excess of 10 subsidiaries in South Africa and around the African continent. Massmart is a wholesaler and retail of grocery products, liquor and general merchandise sold in its four divisions⁹¹.

In 2012 the South African Tribunal approved the merger between Wal-Mart and Massmart. The Tribunal had approved the merger with several conditions namely: the establishment of a supplier development fund, no retrenchments for 2 years and the employment preference for 503 workers who had been retrenched by Massmart in 2010. These retrenchments were widely seen as a “preparatory step” for the Wal-Mart take-over.

The trade unions and the government ministries challenged the Wal-Mart take-over in the Competition Tribunal and raised concerns of public interest. The three government ministries argued that Wal-Mart would significantly increase imports, particularly from low-cost Asian countries and thereby harm small South African suppliers. Trade Unions also raised the concern that Wal-Mart would discourage union participation in the Massmart stores, and offer less favourable conditions of employment to workers in the Massmart stores.

To this, the Competition Appeal court ruled that the public interest factors could relate to the direct and specific risks arising out of the merger for local production and employment and could be a substitute for, or even a significant component of, broader industrial policy. The court referred to various sections of the Act and in one of the paragraphs said:

„Given Wal-Mart’s size and expertise...the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to

⁹⁰ Including Mexico, Puerto Rico, Argentina, Brazil, Costa Rico, El Salvador, China, Japan, Guatemala, Honduras, Nicaragua, Chile, the United Kingdom and China.

⁹¹ Mass discounters, Mass Warehouse, Mass build and Mass cash.

prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12 A must form part of the considerations which this Court is required to be taken into account in considering a merger of this nature... This flows from the model of competition law chosen by the legislature and in particular as set out in s 12 A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court when faced with the inquiry as to whether a merger should be approved”.

Accordingly, the court approved a requirement that the merged company contribute to local suppliers development fund to encourage small and medium sized enterprises affected by the merger, but not on a scale that would be tantamount to the merged company having to subsidize its competitors. The court further held that the merged companies should reinstate the 503 employees that were previously retrenched by Wal-Mart and in addition that there should not be any employment losses for a period of two years.

The Tribunal also emphasized the issue of maintenance of employment and ordered that the merged entity must when employment opportunities become available, give preference to the 503 employees who were retrenched in June 2010. However, the Competition Appeal court ordered that these employees must be reinstated as it found that the retrenchment of these workers was sufficiently related to the merger. Other employment related conditions imposed by the court included a moratorium on retrenchments based on the merged entity's operational requirements for a period of two years and that the merged entity must honour existing labour agreements and current practice of bargaining with SACCAWU (the largest representative union)

3.10 Public Interest considerations

In Namibia, the Competition Commission has an unfettered discretion to consider any public interest factor that is necessary when it looks into issues concerning merger investigations.⁹² In terms of section 47(2). „The NaCC may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger. Public interest

⁹² See s47 (2). The Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger.

factors including maintaining or promoting exports, „promoting stability“ (albeit only in industries designated by the relevant minister), and even „obtaining a benefit for the public“, can also be used to justify an exemption for otherwise anti-competitive agreements.⁹³ While „public interest“ is also cited as a potential basis for interim relief in the context of investigations into anti-competitive agreements or abuses of dominance, no specific factors are mentioned⁹⁴

The Act contain general provisions on public interest and specifically states that its purpose is to “enhance the promotion and safeguarding of competition in Namibia”. This is a public interest, provision. According to Hantke-Domas public interest in the legal context has more to do with the realisation of political and moral values. It is this concept of public interest that informs the decision-makers on how to decide disputes where there is a conflict.⁹⁵ The “values” articulated in the Competition Act are to be found not only in the broadly worded preamble and purpose sections of the legislation but also in specific sections within the statute. The author further argues that judicial interpretation of public interest in this context: „constitutes a limitation of the legal scope of government's intervention in the economy, and provides the judiciary with a rhetorical base for resolving questions of political economy.“

The Act also provides for the consideration by the NaCC of “public interest” factors in addition to the impact of the merger on competition in Namibia, in order to protect both Namibian consumers as well as small and medium local enterprises. This includes the impact of a merger or acquisition on the promotion of employment and the promotion of a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

⁹³ See s28 (3) of the Act.

⁹⁴ See s39 of the Act

⁹⁵ M Hante-Domas „The Public Interest Theory of Regulation: Non Existence or Misinterpretation?“ (2003) 15 (2) European Journal of Law and Economics. See also W Bosh off D Dingley & J Dingley. The Economics of Public Interest Provisions in South African Competition Policy (2012) Available at <http://www.compcom.co.za/assets/Uploads/events/Sixth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-3/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> accessed on 28 August 2014.

The Tribunal, per David Lewis stated, however, that he was „quite comfortable with the requirement that we must balance competition and public interest considerations“. Further that although:

„[I]t makes for complex decision making...real politiek, at least, dictates that we do not insist on eliminating either the "political economy" or distributional objectives or "the pure economy" or allocative efficiency objectives. The trick is reconciling them in practice, and this in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of policy and regulation“

Although Lewis advocated a process of reconciliation, early decision making by the Competition Tribunal appeared to indicate that where a public interest consideration was the bailiwick of another governmental agency, the role of the competition authorities should be secondary to those agencies and statutes.⁹⁶

The NaCC is therefore required to investigate effects of a merger that go beyond the realm of purely competition concerns and economic principles. These public interest factors have proven crucial in some recent high-profile cases in Namibia⁹⁷. It is however not hindered from considering other pieces of legislation before considering public interest issues. This takes us to the reasoning of the South African Competition Tribunal in the case of *Distillers Corporation (SA) and Stellenbosch Farmers Winery Group* SACT, 2003 where the Tribunal said:

„where there are other appropriate legislative instruments to redress the public interest, we must be cognisant of them in determining what is left for us to do before we can consider whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial.“⁹⁸

Indeed, although it is correct to make these arguments, adopting a deferential approach does not mean a hands-off approach. The Act gives one a discretion which must be exercised where appropriate. The approach set out in the Act indicates that one may view public interest through a competition prism hence the Act and public

⁹⁶ D Lewis, „The Political Economy of Antitrust“ presentation made at the Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy, October 25 and 26, 2001, at 4 as quoted in W Boshoff, et al op cit

⁹⁷ Norton Rose. (2013) op cit.

⁹⁸ at para 237:

interest are fused into one when it comes to certain cases for the former embodies the latter.⁹⁹

3.11 Conclusion

This Chapter has indicated that the Wal-Mart case in Namibia left such a great significant legal precedent regarding mergers, the role and importance of competition law and the Competition Commission of Namibia (NaCC) in its endeavour to implement and enforce the competition law in the Republic.

The case is a microcosm as it shows that the expansion of businesses across the borders brings with it complex aspects of mergers and competitions laws. The mergers of international and local business operators are not just an economic or business issue but it also includes welfare and public interest issue that needs a balancing exercise. The balancing exercise is best achieved through political offices but if one is aggrieved he/she can still approach the judiciary for remedies. The essence of this case is that competition law is at the core of the development of every economy and the general populace. It can be deduced that the court in South Africa is more pro-active, efficient and assertive in making decisions and independently imposing conditions in merger related issues of competition law especially those involving issues of public interest as compared to Namibia where there courts remain silent and reluctant to do so. In my view the former approach is more commendable where the concern is one of public interest, this is so because the South African Act does not spell out clearly what is intended by the legislature and left the issues for determination by courts.

⁹⁹ See the reasoning in the case of *Metropolitan Holdings/Momentum Group* (SACT, 2010), para 110

Chapter 4

Overall Analysis and Discussion

4.1 Introduction

This Chapter contains an overall analysis and discussion, of the effects the Namibia judgment in the Wal-Mart case has on the development of mergers (competition law) in Namibia. It analyses the question whether it hinders or enhances such development.

4.2 General considerations

Before going deeper into the analysis, it must be mentioned that both judgments analysed above shared the same issue of concern that is the consideration of public interests in relation to mergers. When looking at the concerns raised by the courts an interesting fact of competition policy followed by corporations from developed nations and those from the developing world comes to light. Two primary schools of thought as they surface in the studies of competition law emerge here: the first one is the view from US policymakers that the major aim of competition policy is to achieve maximum efficiency. This is clear as we understand that large corporations such as Wal-Mart are based on policies that focus on consumer welfare with the maintenance of competitive markets as their goal.¹⁰⁰

The judgements also show that the Namibian Act has certain non-competition provisions. As has been noted above, the Namibian Act has specific public interest goals incorporated in it and the courts noted this point. This tells one why the courts have to balance various interests and the NaCC enjoined to balance various conflicting interests under the Act itself. When this happens the regulation of competition is considered an instrument for economic development

¹⁰⁰ A Jones and B Sufrin „EC Competition Law: Text, Cases and Materials“ London Oxford University Press at p3. See also V Chetty. The Place of Public Interest in South Africa’s Competition Legislation Some Implications for International Antitrust Convergence (2001) Edward Nathan (Proprietary) Limited Johannesburg South Africa.

which seeks to correct the socio-economic imbalances of a particular country as a result of its peculiar history and development.¹⁰¹

4.3 Divergence and convergence

It must be mentioned however that although the two Namibian courts were faced with the same legal issue in the same case they diverged in their findings and in the manner of dealing with issues of public interest more specifically in terms of the conditions to be imposed to the merger. The two courts had a different approach and outcome.

Against the background of the High Court judgment on the conditions imposed in the Wal-Mart case the following inferences can be drawn: firstly that the NaCC should avoid conflict with the provisions of enacted laws, in particular, it should exclude as a condition, the participation of the government or a Namibian citizen as a shareholder or partner in an envisaged business, unless such relates to natural resources as provided for in the provisions of s3 (3) of the Foreign Investment Act¹⁰².

Secondly, the ground of arbitrariness, vagueness and irrationality can be remedied if the NaCC identifies and communicates its intention to impose the condition, and its inclusion of Namibians who were previously disadvantaged provided that a reasonable apprehension exists that the merger parties may not be committed to this goal. By doing so the NaCC would avoid being challenged on the ground of procedural fairness. With regards to the constitutionality of the Competition Act on local people as referred to in s2 (f) and s47 (2) (f), s47 (2) sets out matters that the NaCC may consider when making a determination whether to approve or decline to approve a proposed merger¹⁰³.

These sections are valid and constitutional, in that they are not in variance with the provisions of the Constitution, save for stating that these sections do not require the NaCC to impose a condition on merger parties to provide for local

¹⁰¹ V Chetty (2001) op cit

¹⁰² Ibid.

¹⁰³ Ibid

participation, as shareholder or partner in business or to transfer business to previously disadvantaged persons, as a condition for granting approval for a proposed merger. Rather the NaCC under the provisions of the Act can acquire additional information from the merger parties when making a determination and this information can be used to ensure that ownership stakes of historically disadvantaged persons are promoted for example, requirements to furnish affirmative action compliance certificates¹⁰⁴.

While confirming the approval of the merger the Supreme Court opted not to pronounce itself on the conditions imposed to the merger by NaCC and which conditions were subsequently invalidated by the High Court of Namibia before, instead the Supreme Court referred the matter back to the Minister of Trade and Industry for the compliance of the ministerial review procedure of such conditions mostly on the basis of administrative procedure and to somewhat extend public interest. This meant that the merger remained valid and in action subject to the ministerial review of the conditions.

In comparison the South African court not only confirmed all the conditions to the merger as were set down by Competition Tribunal but the court even went further and ordered that not only did Wal-Mart have to give priority to employees that were previously retrenched but that Wal-Mart now had to reinstate all the 503 employees that previously lost their employment. In addition the court ordered that Wal-Mart had to provide a fund worth R200 million to assist with the development and streamlining of the small and medium enterprises in South Africa.

It is safe to state that the South African court by pronouncing itself and imposing further conditions on the proposed merger in fact exercised the discretion inherent in its jurisdiction and in so doing upholding the notion of public interest.

This point holds as we understand that the duty rests on the court to determine when to and when not to exercise such discretion and in this instance one can hail the South African court for doing so on the basis that by imposing the

¹⁰⁴ Ibid.

conditions the court did not only protect public interest, the rights of the end consumer but also protected the interests and rights of small medium enterprisers in South Africa, taking in to consideration the impact the merger would have had on both the South African local businesses and consumers.

What stands out from the foregoing is the ability of the court to strike a balance between competing interests of social and economic welfare of the consumers and businesses on the one hand and competition issues on the other and still be able to make a decision that is aimed at safeguarding these equally important interests. This explains why the South African Court in the Wal-Mart/Massmart case said:

„[W]hat weight is to be given to the factors set out in s 12 A (3) in order to determine whether these should trump a finding based on more traditional considerations of consumer welfare as captured in s 12 A (2)?” 57 and “An engagement with an exercise of proportionality is then required to determine how to balance the competing arguments. While this exercise may, by its nature and for the reasons set out above, never be precise, it is what the Act appears to require in respect of mergers” and later “[A] proportionality exercise requires evidence which would enable the exercise, justify the calculation which flows there from and permit a balance to be struck between the competing issues of consumer welfare, employment and small business”¹⁰⁵

In Namibia it must be noted that, the benefit of previously disadvantaged people and the promotion of local businesses is reminiscent of this and both cases on the Wal-Mart show this as decided under the governing competition laws analysed above.¹⁰⁶ In South Africa the case of *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*,¹⁰⁷ is seminal. The Tribunal said:

„The Commission’s role is to promote and protect competition and a specified public interest. It is not to second – guess the commercial decisions of precisely that element of the public that it is enjoined to defend, particularly where no threat to competition is entailed The Competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous

¹⁰⁵ Wal-Mart/Massmart Inc v The South African Competition Commission.

¹⁰⁶ See the Wal-Mart cases in both Namibia and South Africa. See also L Reyburn op cit at 3-39 to 3-45 and N Chabane. An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa” Paper presented at the Trade and Industrial Policy Strategies (TIPS) Annual Forum 2003. Cape Town: Development Policy Research Project, University of Cape Town, (2003) available at http://www.tips.org.za/events/event_details/paper/forum2003 Accessed on 12 August 2014.

¹⁰⁷ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (Case No: 66/LM/Oct01)

manner, lest they damage precisely those interests that they ostensibly seek to protect.”

Further it is indicative of the independence and transparency of the court to adjudicate matters and bring them to a speedy finality, without fear and free from any implied internal or external influence or interference. The same cannot be said with the current situation in Namibia.

The above holds as we understand that firstly, the High Court of Namibia confirmed the merger and invalidated all the conditions. On appeal the Supreme Court confirmed the High Court’s ruling in respect of the merger however overturned it’s ruling invalidating the conditions to the merger.

Secondly the Supreme Court held that the matter should be referred back to the Minister for review of such conditions before the courts can be approached for further recourse. The court stressed the importance of complying and exhausting available internal remedies of recourse before taking the matter to court, stating that to bypass such procedure would undermine the review powers vested in the Minister.

4.4 Implications for the economy and national growth

Even though the Supreme Court of Namibia had the discretion to confirm or block the conditions to the merger it opted not to exercise its discretion in this case. Whether this was the best or preferred approach in terms of public interest and the effects the merger had on small and medium enterprises in Namibia, is arguable on the basis that a Minister is a politician who may well be exposed to external or internal factors such as corruption, undue influence, malpractices, political considerations etc, which might have an influence on his decision.

The Minister is no doubt a person of integrity and should be impartial when making decisions, however one should not lose sight of the fact that the element of biasness does exist even in the most minimal possibility. This should not be taken lightly. It is my argument that it was pre-mature for the court to have the matter referred back to the Minister’s office for review of such conditions based on a

procedural technicality where the benefit is greater than the harm caused on public interest grounds. It is sometimes important to consider how a merger would benefit the nation than being sensational about public interest. As the representative of Wal-Mart said in his testimony in the Wal-Mart case in South Africa:

„[O]ne would expect the best of the small South African suppliers to have opportunities to export via the Wal-Mart network of stores elsewhere in the world.” and “Suppliers have the opportunity to extend their reach considerably by being part of Wal-Mart’s global supplier family”¹⁰⁸

In this context a merger can present an opportunity for the growth of local small businesses. This is the meaning and or implication of this testimony. Therefore these considerations were not taken into consideration or at least they were overshadowed by the perceived monopoly of the global giant that Wal-Mart is compared to local investors.

On the flip side one can advance an argument that there is no written law in Namibia that procedural adherence supersedes issues of public interest where the rights of the people or businesses are most likely to be affected by the activation of the merger, if anything the idea of administrative justice is more inclined and geared to protect and advance the principle of public interest by ensuring fairness and giving a voice to the voiceless.

Further, when a court makes a decision it sets a precedent and to a certain extend indirectly makes law. Although the Act provides for the review process by the Minister, the Supreme Court being the highest court of the land has by virtue of its jurisdiction the power and ability to deviate from the provision of the Act provided it gives reasons for such variation. In light of the issues the court was faced with, it was clear that the issues went deeper and beyond competition law. Therefore it would have been appropriate, justifiable and more assistive if the Supreme Court pronounced itself on the conditions that were imposed on the merger. In so doing the court could have set a precedent and a potential direction on how to handle matters of a similar nature in future rather than referring the matter for ministerial review.

This clearly shows that even where there exists a great likelihood of severe harm to social and economic welfare and public interest, the Namibian court held as

¹⁰⁸ *Minister of Economic Development et al and Wal-Mart Stores Inc. et al* case no 110/CAC/Jul11

its objective procedural adherence above all, even at the expense of the above factors. This may explain why the Supreme Court said:

[T]he range of considerations set out in both section 2 and section 47(2) make plain that the decision whether to approve a proposed merger involves questions relating to the promotion and safeguarding of competition in Namibia, as the title of the Act suggests, but also other public interest considerations relating to the promotion of employment opportunities, the protection and promotion of small and medium-sized enterprises and the expansion of the participation of historically disadvantaged people in the Namibian economy. The decision is one that requires “an equilibrium to be struck between a range of competing interests or considerations.”¹⁰⁹ Precisely how these differing goals should be balanced within the framework of the Act in relation to each proposed merger is a question that both the Commission and the Minister will have to address in the exercise of their statutory powers. This is a decision that the Act specifically assigns first to the Commission and then to the Minister. As the Commission is an institution specially constituted to consider competition matters, and the Minister bears both constitutional and democratic responsibility for trade and industry, these are assignments that should not lightly be bypassed.”

The question of independence of the court in pronouncing itself in this particular matter remains both a challenge and arguable.

As we have seen, the South African court has opted to use its discretion, and pronounced itself and imposed a condition which was best suited in light of the facts that were placed before it. Whether the conditions, so imposed where the most preferred, is not the point of contention of this dissertation but the ability and independence of the court to exercise the discretion vested in it to bring a matter to finality on the ground of public interest. This is something the Namibia court can learn and borrow from the South African judgment.

4.5 The fear of the death of the local entrepreneurships

There is a general fear that when a giant foreign investor is allowed to operate in the country the local economy will suffer in the form of retrenchment of workers and closure of small enterprises. This fear was evidenced in both the Supreme Court and High Court arguments. This fear is apparent and indeed has some factual backing. Whether it would happen in Namibia or not is not apparent though because no such

¹⁰⁹ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 48.

huge investment or merger has ever been experienced in the country under the current legal regime.

The fear also comes from the general feeling that the foreign investor will favour foreign produced products and not locally produced goods. This will mean that local producers will lose the market because the biggest supplier is sourcing stock or products elsewhere. This was unacceptable to the Unions and some sectors of the government which promote the “Buy Namibia” slogan. This has to be understood in the context of the *Edcon/Dawn* case of South Africa where it the Tribunal said:

„Firstly a condition of that sort goes to the very heart of anti-trust’s concern with the welfare of consumers. If Edcon favours international over domestic suppliers it is presumably because the company believes that it can procure higher quality and/or lower priced merchandise on the international market. As long as the retail market is competitive – and our view is that, residual anxieties surrounding what appears to be a creeping pattern of acquisitions aside, the clothing retail segment remains competitive – then a significant part of the benefits of these lower prices and superior quality commodities must be passed on to consumers, including working people. While we agree with SACTWU that this is cold comfort to those whose inability to find employment condemns them to very low levels of consumption, there is considerable evidence to suggest that the past 20 years have witnessed a significant growth in the purchasing power of previously disadvantaged consumers. Nor is this phenomenon only discernible in the form of the super rich – of greater significance is the rise of a mass middle and lower-middle class of consumers. This is clearly the outcome of a great many factors but there is no gainsaying the role played by lower interest rates and product prices over the period.”

Therefore increased competition through mergers and acquisitions can lead to increased buying power of the consumers especially the low income consumers and that includes lowly paid workers.

Wal-Mart is the biggest retailer in the world. It has the largest global value chain in the world owing to the fact that it has its operations in 15 different countries around the world as stated before. This operations gives Wal-Mart the advantage of sourcing goods from anywhere in the world from the countries in its supply chain to any country in the world and still be able to sell these good on a low price. With the support of a good value chain, Wal-Mart has the power, resources and ability to expand its supply chain to any country around the world through mergers with local businesses of the intended country. Namibia and South Africa became part of this global value chain with the entrance of Wal-Mart in the two countries.

However, the idea of globalisation is one that goes deeper, for it can present both risks and opportunities to the local businesses and or development. With such a large supply

chain, Wal-Mart has a score up against the local business in terms of importing goods and low pricing of goods. This can hurt the local businesses that do not have the resources, capacities, machinery and finance to compete at the level that Wal-Mart is competing. This can run the local business out of business in the long run as a result of their anti-competitiveness in the markets. At the same time it also presents opportunities like employment, low priced goods or allows local businesses to develop.

The risks and opportunities involved can be increased or reduced by the courts through the imposition of condition on mergers aimed at promoting the intended opportunities and reducing the risks involved. The law can only be effective through implementation by the courts or by reviewing the current law so that the Competition Commission is vested with full power to deal with all matters relating to competition law, this means foregoing and abandoning the ministerial review process because a minister being a politician is not the right vehicle to deal with matters of this nature.

4.6 Analysing further developments in Namibia

At the time of writing this dissertation the Minister of Trade and Industry has reviewed and has confirmed the conditions in terms of the gazette published¹¹⁰. The conditions included that there would not be any retrenchment for two years, there should be recognition of existing labour agreements and representative trade unions, and there should be a programme for the development of domestic supplier activities.

It is yet not confirmed whether Wal-Mart accepted the conditions or intends to appeal against these conditions. It is most likely that Wal-Mart will appeal against the conditions given the status quo of the case.

If Wal-Mart appeals, this will be understood because conditions to a merger or a take-over issue are not necessarily a wheel towards local industry development. This was recognized in the *Edcon/Dawn* case where the Tribunal said:

[E]xpressed otherwise this issue is not merger specific. SACTWU's concerns about cheaper imports cannot be cured by the imposition of a merger condition on a single firm. It is a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments."¹¹¹

¹¹⁰ Government Notices Number 4918 of 2nd April 2012.

¹¹¹ *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd* case no 21/LM/Mar 05 para 31.

In terms of the Act the NaCC is empowered to regulate all issues of competition concern in the Republic. However, what is clear from the Wal-Mart saga in Namibia is that even though the NaCC has all these great powers vested in it by virtue of the enabling statute, The NaCC appears to be a watch dog with no teeth at all because whatever decision or condition it imposes on any merger is subject to the final review by the Minister of Trade and Industry. Thus, it is the Minister who holds the ultimate power to oversee and make the final decision of either confirming, amending or to refuse any conditions that the NaCC may have proposed.

The NaCC is presumably an independent body in terms of the Act but the transparency of such independence is not evident in light of cases dealt with by the NaCC so far. It is my opinion that to subject the NaCC to the Minister of Trade and Industry for any decision of competition concern is not viable and detracts from its independence. Owing to the fact that the Minister is a political appointee he may be inclined to serve both government and party interests. The procedural step provided for in s49 is not only unnecessary but it creates a delay and a conflict in the decision making process between the NaCC and the Minister.

An argument can be advanced that the NaCC should stand as a completely independent body that is tasked to determine and make decisions of competition concern solely. In the event that any party is dissatisfied with a decision taken by the NaCC, the only step and further recourse should be an appeal against decision in a court of law instead of ministerial review.

4.7 Implications of the South African Wal-Mart Cases for Namibia

Similar to what other countries have experienced in recent years, Wal-Mart's entry into the South African economy will have no big different consequences for Namibia. The retail giant might offer goods at lower cost or prices and lure consumers to shop with them but it is no doubt that Wal-Mart's employees and its suppliers will be the ones to experience the harsh reality of paying the real price as an indirect consequence of the merger. They will be faced with extreme pressures and be forced to accept working conditions that will not allow them to

even meet their basic needs. Namibia has witnessed first-hand experience with Namibia's former Ramatex workers¹¹². Namibia has seen how Ramatex workers were treated, not only did they work long hours (overtime) without pay, workers could barely live on the small salaries they were earning and the working conditions were not conducive. The union complaint about the Ramatex situation but despite negotiations the corporation refused to increase workers salaries or change their working hours and improve their working conditions. This led to the eventual shutting down of its operation in Namibia.

From a development perspective, there are many questions to be asked: are some conditions like those placed on Wal-Mart in the South Africa enough to prevent such destructive consequences? Will Wal-Mart ever source from local suppliers? Are our laws sufficient to prevent the abuse of workers and environment by corporate giants? Can Namibian laws safeguard the interests of small, local businesses and workers while playing according to the rules of a ruthless global economy?¹¹³

Wal-Mart's track record clearly indicates that the retail giant is not concerned with local development needs and thus it would be naïve to believe that its behaviour in Namibia and South Africa would be different. The time has come to learn from history, to become selective when dealing with investments and to implement a development strategy that delivers social benefits such as overcoming poverty, unemployment and meeting the basic needs of the people. Wal-Mart has nothing to offer in this regard.¹¹⁴ Competition law can play a major role here as an intermediary by embracing the principle of public interests through the imposition of conditions on mergers when approving them. The conditions that can be imposed can range from the working conditions of workers, loss of jobs and minimum remuneration etc.

On the other hand dealing with public interest issues and striking a balance between the social and economic welfare of the people is a complex matter and a

¹¹² H Jauch., „The Wal-Mart take-over, many reasons to be concerned.“ *The Namibian*, 9 August 2011.

¹¹³ Ibid.

¹¹⁴ Ibid.

challenge both on the competition authorities and the on the courts. Thus in the *Wal-Mart/Massmart* case the Competition Appeal Court of South Africa said:

[T]here is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue of an embrace of the goals of a free market and effective competition together with uniquely South African elements....the legislature imposed ambitious goals upon the competition authorities created in terms of the Act. Within the context of the present dispute, this ambition is further captured in s12 A which mandates an enquiry into substantial public interest grounds¹¹⁵

As there are always competing interests or rights that are equally important, the determination of these rights can be more detrimental than beneficial many a times. However it may be argued whether it is really the court's jurisdiction to determine industrial policy matters that are not entirely the subject of competition law.

4.8 Conclusion

This Chapter has provided an overall analysis and discussion, of the effects the Namibia judgment in the Wal-Mart case has on the development of mergers (competition law) in Namibia. It analysed the question whether it hinders or enhances such development.

Both judgments of the High and Supreme Court have been analysed and it has been shown that they shared the same issue of concern that is the consideration of public interests in relation mergers. When looking at the concerns raised by the courts there is an interesting revelation of competition policy followed by those corporations from developed nations and those from the developing world. In applying the Act to the complex issues involved in competition law the courts have to balance various interests and the NaCC is enjoined to balance various conflicting interests under the Act itself. The Chapter has shown that when mergers take place the regulation of competition is considered an instrument for economic development which seeks to correct the socio-economic imbalances of a particular country as a result of its peculiar history and development.

¹¹⁵ *Minister of Economic Development et al and Wal-Mart Stores Inc. et al* case no 110/CAC/Jul11 para 98.

Under the Act, procedurally, the Minister when exercising his statutory powers will have to consider the principles of natural justice as well. The decision is one that requires equilibrium to be struck between a range of competing interests or considerations. This informs why the Supreme Court referred the matter back to the Minister of Trade and Industry for the compliance of the review procedure of such conditions by the Minister on the basis of administrative procedure and to somewhat extend public interest. This meant that the merger remained valid and in action subject to the ministerial review of the conditions.

Chapter 5

Recommendations and Conclusions

5.1 Introduction

This Chapter considers the above analysis and preliminary conclusions made. It draws the final conclusions with specific reference to the research questions mentioned in Chapter one above. It is based on those conclusions that recommendations are made.

5.2 Recommendations and conclusions

One may answer the questions by Jauch in the affirmative, that our laws are not sufficient to prevent the abuse of workers and the environment by corporate giants. That our laws are not sharp enough to safeguard the interests of small, local businesses and workers, if the institutions tasked to protect their rights play according to the rules of a ruthless global economy. Therefore, there is a need for law reform to strengthen these laws and move with global trends affecting competition law.

Borrowing from the remarks of The former Minister of Trade and Industry in Namibia Dr. Hage Gaingob in response to the court's judgment, "*the judgement has far more reaching implications for the future economic development of Namibia, and in particular the need for empowerment of the Namibians, whom the then apartheid South African administration have severely disadvantaged...*" He further stated that "*the law needs to be contextualized for the greater public good other than a strict technical interpretation thereof*"¹¹⁶.

It follows that there exists a lacuna in the Namibian competition law that needs closing. This clearly calls for review or reform of the Act especially s2 which deals with the powers of the NaCC and s49 which provides for ministerial review of decisions made by the NaCC. As a result of the ambiguous framing of some

¹¹⁶ H Jauch (2011) op cit.

parts of the Act, it has become immensely difficult for the NaCC to implement and enforce the Act properly.

To amplify the above point, it is important to note that the Commission itself is actually aware of the weaknesses it faces. The NaCC in its call for proposals for the review of the Act noted following:

„Developments and changes in the fields of competition economics, law and policy, as well as the market dynamics are such that they render some of the provisions of the Act obsolete or out of touch with the public interests developments of the Namibian economy. Further, the coverage and scope of the Act needs a thorough review taking into account best practice developments internationally and regionally on the substantive provisions of the Act“.

Challenges in the implementation of some of the provisions of the Act are evidently visible in the work of the two core divisions of the Commission, namely the Restrictive Business Practices (“RBP”) division which is responsible for the implementation of Chapter 3 of the Act and the Mergers and Acquisitions (“M&A”) division which is responsible for the implementation of Chapter 4 of the Act. Further, the judicial provisions in Chapter 5 and 6 also need to be aligned to the legal developments concerning the mandate of the Competition Commission.¹¹⁷

It is further recommended that the Act of Namibia be reviewed; specifically s2 must be drafted in such a way that it gives the NaCC full independence in all its operations and the sole mandate to make decisions in all matters of competition concern. In addition s49 which currently calls for the ministerial review process is an unnecessary step, which must be done away with completely. It does not only create delays, uncertainty and conflict in decision making powers between the two institutions but it also hinders on the independence of the NaCC, its confidence and ability to make decisions.

It must be noted that even in free market economies, mergers and acquisitions have been recognized as not always being beneficial to the country’s social and economic development. In Canada, for example, the takeover bid by BHP Bilton for Potash Corp was blocked by the government because it was seen as holding no benefits for the country¹¹⁸. Likewise, the Australian government blocked the Singapore Stock Exchange from taking over the Australian Stock

¹¹⁷ Namibia Competition Commission. Request for Proposals: Review of the Namibian Competition Act (2 of 2003) and the Rules Made Thereunder (2008). Available at http://www.nacc.com.na/cms_documents/b0f_review_of_the_namibian_competition_act.pdf last accessed 27 August 2014 p2.

¹¹⁸ H Jauch (2011) op cit.

Exchange. The Indian government is legally empowered to issue policy directives to the country's Competition Commission to safeguard public interests. Thus placing conditions on mergers and blocking them altogether is a common practice to safeguard social and economic interests against rampant global capitalism and the large corporations that drives it¹¹⁹.

It can thus be concluded that the Wal-Mart merger situation in Namibia has not brought any feasible benefits to the country's economy, social well-being and the local businesses that can be witnessed today. The NaCC should not be poised to give in to pressures from corporate giants and should not be inclined to grant all mergers if they do not yield any benefits for the country, its people and its economy as well as promote development of the small and medium businesses. The determination should be made based on the question whether such merger will be beneficial to the country's social and economic welfare or whether such merger is viable and justifiable on public interest grounds. Where one of these questions is answered in the negative than such bid must be blocked or refused. Finally, perhaps it is also recommendable that government be legally empowered by legislation as in India, to issue policy directives to the NaCC to safeguard public interest where and when the need arises. Perhaps it is also reasonable to argue that, the time has come for the Namibia to establish an independent court that only deal with matters of competition concern like it is the case in South Africa.

Further, it must be noted that any merger in general will have detrimental effect on some SMEs in Namibia hence the need for some concerted and systematic evaluation of the relevant effects of the merger before approval. The Supreme Court had to refer the matter back to the minister because looking at the situation there was not such evidence or evaluation on the ground.

It is also important to note that the two judgement illustrate that the courts and other institutions are having difficulties in dealing with large corporations which come from outside to invest. Therefore it is a question of both competition and investment laws. To this end it is recommended that a balance between

¹¹⁹ Ibid.

economic efficiency and equity be struck in both investment and competition laws. The OECD says something for South Africa in this context:

„[P]olicies of equity and distribution as well as efficiency, and [that] they clearly incorporate goals and ideals for competition law derived from the early ANC positions and the stakeholder debate... recognising the problem of inefficiency and waste, but connects these too with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit to all South Africans.“

The Wal-Mart case in Namibia calls for the same imperative in Namibia and this OECD recommendation is very relevant since Namibia and South Africa have a shared history. The effects of Wal-Mart in South Africa can also be felt in Namibia and worse still when Wal-Mart has been allowed to have a direct stake in the Namibian economy.

5.3 Conclusion

This Chapter has provided an overall analysis and discussion of the effects the Namibian judgment in the Wal-Mart case has on the development of mergers (competition law) in Namibia. It analysed the question whether it hinders or enhances such development.

Both judgments of the High and Supreme Court have been analysed and it has been shown that they shared the same issue of concern that is the consideration of public interests in relation to mergers. When looking at the concerns raised by the courts there is an interesting revelation of competition policy followed by corporations from developed nations and those from the developing world. In applying the Act to the complex issues involved in competition law, the courts therefore have to balance various interests and the Competition Commission is also enjoined to balance various conflicting interests under the Act itself. The Chapter has shown that when mergers take place the regulation of competition is considered an instrument for economic development which seeks to correct the socio-economic imbalances of a particular country as a result of its peculiar history and development.

Under the Act, procedurally, the Minister in the exercise of his statutory powers will have to address and consider the principles of natural justice as well. The decision is one that requires equilibrium to be struck between a range of competing interests or considerations. This informs why the Supreme Court referred the matter back to the Minister of Trade and Industry for the compliance of the review procedure of such conditions by the Minister on the basis mostly of administrative procedure and to somewhat extend public interest. This meant that the merger remained valid and in action subject to the ministerial review of the conditions.

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