REPORTABLE

CASE NO.: SA 41/2011

IN SUPREME COURT OF NAMIBIA

In the matter between

NAMIBIAN COMPETITION COMMISSION	**FIRST APPELLANT**
MINISTER OF TRADE AND INDUSTRY	**SECOND APPELLANT**
and	
WAL-MART STORES INCORPORATED	**RESPONDENT**

CORAM:	Shivute CJ, Maritz JA *et* O'Regan AJA
Heard on:	18/10/2011
Delivered on:	4/11/2011

APPEAL JUDGMENT

O'REGAN AJA:

[1] This is an appeal against two declaratory orders made by the High Court.[1] The first order declared invalid paragraph (a) of Notice 75 of 2010,[2] issued by the Minister of Trade and Industry (the second appellant) and the second declared invalid four conditions imposed by the Namibian Competition

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[1] See *Wal-Mart Stores Incorporated v Chairperson of the Namibian Competition Commission and Others*, case no A61/2011, judgment of the High Court, dated 28 April 2011 (per Muller and Smuts JJ).

[2] Notice 75 of 2010 was issued on 29 March 2010 in terms of section 3(4) of the Foreign Investments Act, 27 of 1990 and published in Government Gazette No 4460 of 15 April 2010.

Commission (the first appellant) in its approval of a proposed merger between Wal-Mart Stores Incorporated (the respondent) and Massmart Holdings Ltd, a South African company that has five Namibian subsidiaries.

Factual Background

[2] 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. Wal-Mart is in the process of purchasing the majority shareholding in Massmart Holdings Ltd, a retailer and wholesaler of groceries, liquor and general merchandise. Massmart has holdings in several different southern African countries and the proposed merger required approval by competition regulators in South Africa, Namibia, Tanzania, Malawi, Swaziland and Zambia. Approval was obtained from the last four national regulators by the end of 2010. The merger will affect five Namibian companies, all subsidiaries of Massmart. Two of them are dormant. The active three are Game Discount World (Namibia) (Pty) Ltd, Windhoek Cash and Carry (Pty) Ltd and CCW Namibia Properties (Pty) Ltd. The merger is to be effected by way of a scheme of arrangement in terms of section 311 of the South African Companies Act, 61 of 1973. The material term of the scheme is that Wal-Mart has offered to acquire 51% of Massmart's ordinary share capital.

[3] It is common cause between the parties that the merger requires approval of the Namibian Competition Commission. Accordingly, on 26

November 2010, Wal-Mart and Massmart informed the Commission of the proposed merger in terms of section 44(1) of the Competition Act, 2 of 2003 (the Act).[3] On 9 February 2011, the Chairperson of the Namibian Competition Commission informed Wal-Mart and Massmart that the Commission had approved the proposed merger subject to four conditions. The four conditions were set out in a notice entitled "Notice of Determination by the Commission" in relation to Proposed Merger. The conditions were that:

- the merger should allow for local participation in accordance with section 2(f) of the Competition Act 2003, in order to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people;
- there should be no employment losses as a result of the merger;
- the merger should not create harmful effects on competition that may give rise to the risk of the market becoming foreclosed to competitors, especially small and medium enterprises; and
- the approval of the Minister of Trade and Industry is required in terms of section 3(4) of the Foreign Investment Act, 1990 (Act No 27 of 1990).

[4] In addition to their application to the Competition Commission for approval of the proposed merger, Wal-Mart's legal representatives wrote to the Permanent Secretary of the Ministry of Trade and Industry on 15 December 2010. In that letter, they requested confirmation from the Ministry

[3] Section 44(1) provides: "Where a merger is proposed each of the undertakings involved must notify the Commission of the proposal in the prescribed manner."

that the proposed merger transaction between Wal-Mart and Massmart did not require the approval of the Minister of Trade and Industry in terms of Notice 75 of 2010.[4] That Notice was issued by the Minister in terms of section 3(4) of the Foreign Investment Act, 27 of 1990 and provides that "a foreign national who intends setting up any form of retailing business of any size in Namibia" must first seek and obtain the permission of the Minister of Trade and Industry. No reply was received to this letter but it will be noted that the fourth condition stipulated by the Competition Commission was a condition that the Minister's approval in terms of section 3(4) of the Foreign Investment Act was required.

[5] Nearly a month after receiving the conditional approval of the merger from the Competition Commission, Wal-Mart applied to the Minister of Trade and Industry on 8 March 2011 to review the Commission's decision in terms of section 49 of the Act.[5] Section 49(1) of the Act provides that parties to a merger that have received a determination by the Commission in terms of section 47(7) of the Act may, within 30 days of the date of the determination, apply to the Minister to review the Commission's decision. Section 49(2) provides that within 30 days of receiving the application for review, the Minister must by notice in the *Gazette* give notice of the application for a review and invite interested parties to make submissions within the time stipulated in the notice. Section 49(3) then provides that the Minister must, within four months of the date upon which the application for review was made, make a determination of the review by confirming the Commission's

[4] See full citation at note 2 above.

[5] The full text of s 49 is set out at para 26 below.

decision, or by overturning it, or by amending it by ordering restrictions or including conditions.

[6] Wal-Mart urged the Minister to amend the Commission's decision by deleting the four conditions attached to the merger approval on the grounds that they were vague, unlawful and/or irrational, and therefore invalid. They 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.

[7] The application for review also informed the Minister that, as the South African Competition Tribunal was expected to approve the merger by 8 April 2011 at the latest, the merging parties would have to consider further legal remedies in Namibia, if the Minister did not conclude the review process by 18 March 2011. The consequence of the merger being approved in South Africa, but not yet having been finalized in Namibia, would, according to Wal-Mart, preclude the merging parties from implementing the transaction, which would "have a variety of contractual and other ramifications" according to the review application.

[8] On 11 March 2011, the Permanent Secretary to the Ministry wrote to Wal-Mart's legal practitioners acknowledging receipt of the application for review but stating that, given the process stipulated in section 49 of the Act,

the request that the Minister complete the review within ten days was "unreasonable". On 14 March, Wal-Mart's legal representatives responded to this letter and stated that the application for ministerial review was (somewhat mysteriously) "not confined to section 49 of that Act, which was a reference our office unfortunately by error inserted without instructions into our letter". They continued by saying that a decision of the South African authorities was expected by 8 April, and that the "matter unfortunately cannot await a determination stretching beyond that date". Nevertheless the letter concluded by stating that they persisted in the application for review as lodged.

[9] Four days later, Wal-Mart instituted these proceedings in the High Court on an urgent basis. They sought an order declaring Notice 75 to be unauthorized by law and invalid and an order that the four conditions attached to the approval of the merger by the Commission were also unlawful and invalid. Respondents were given a week to lodge answering affidavits, if they opposed the application. The Minister and the Commission both opposed the application. In its answering affidavit, the Commission indicated that the truncated time periods had prevented it from preparing and filing a record of its decision and it requested time to complete the record, and if necessary lodge a supplementary answering affidavit. This request was again repeated at the hearing of the urgent application. Wal-Mart opposed the request on the basis that it had not proceeded by way of Rule 53, and that, as applicant, it was entitled to waive its right to the record. In the event, the High Court proceeded without the record of the Commission's decision.

[10] The Commission raised two preliminary points in opposition. It argued that Wal-Mart had not established a basis to proceed by way of urgency; and it argued that the application was premature as Wal-Mart had not exhausted its internal remedies, in particular the section 49 review. The Minister raised the same two points, and added two others, which were abandoned in the High Court. The first of these was non-joinder, on the basis that the five Namibian subsidiaries had not been joined in the proceedings. Letters were produced in reply from each of the companies indicating they did not wish to be joined. The second was a challenge to the authority of the deponent who made the founding affidavit but this too was addressed in reply. Neither the Commission nor the Minister pleaded over on the merits, though they did assert that many of the substantive issues raised by the application were legal issues that would be addressed in argument.

[11] The application was heard by the High Court on 6 April 2011 and judgment was handed down on 28 April.

High Court judgment

[12] The High Court granted condonation to the applicant to bring the application by way of urgency. In reaching this conclusion, it reasoned that if the application had been enrolled in the ordinary course, it would not have been heard till the last term of 2011 or early 2012, which would have left the status of the merger uncertain, once the merger had been approved in South Africa. The High Court found that Wal-Mart had not unduly delayed in

launching the application and that the Minister and Commission had not been prejudiced by the expedited proceedings.

[13] The High Court then considered whether Wal-Mart had brought the application prematurely. The key issue here was whether Wal-Mart had been bound to pursue the section 49 ministerial review, prior to instituting legal proceedings. The High Court, relying on *National Union of Namibian Workers v Naholo*,[6] held that where a statute created an internal remedy, it was a matter of statutory interpretation as to whether that remedy had first to be exhausted before recourse could be had to a court.[7] The mere fact that a statute creates an internal remedy does not imply that access to court is prohibited pending the exhaustion of that remedy. Tötemeyer AJ in *Naholo* identified two criteria relevant to determining whether the remedy needed to be exhausted. The first relates to the language of the statutory provision, and the second to the time that the internal remedy will take to pursue and whether, given the time that it might take, it would, in effect, deprive an applicant of a remedy as a result of delay.[8]

[14] The High Court held that both the criteria identified in *Naholo* were of application to this case.[9] It held accordingly that section 49 did not require the Wal-Mart to exhaust the ministerial review process before approaching the Court for relief. It observed that section 49 states that merger parties "may make application to the Minister" to review the decision of the Commission.

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[6] 2006 (2) NR 659 at paras 50 – 62.
[7] High Court judgment at para 32.
[8] See *Naholo*, cited above n 6, at para 61.
[9] See High Court judgment at para 35.

This, the High Court reasoned, was language that did not suggest the ouster of the jurisdiction of the Court. The Judge also noted the time that the review would take (the statute sets an upper limit of four months) might deprive Wal-Mart of effective relief and observed in this regard that the failure of the Minister to institute the review promptly also suggested that the review would not be an effective remedy in the circumstances. Further considerations that the High Court considered to weigh in favour of dismissing the objection that Wal-Mart had not exhausted its remedies were the fact that one of the issues that the Minister would have to consider would be the validity of Notice 75, a notice that the Minister himself had issued[10] as well as the fact that most of the issues raised by Wal-Mart were legal questions.[11]

[15] The Court then considered the merits of the application. It 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 him by section 3(4) of the Foreign Investment Act; and 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

[10] Id at para 36.
[11] Id at para 37.

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.

[16] 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 had not been given notice of the Commission's intention to impose the condition the fairness of the procedure followed by the Commission was flawed.

[17] 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. 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 gain not rationally related to the reasons given for it. The Court also held that the terms of the condition were impermissibly vague.

[18] 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. It is against these orders that appellants now appeal. One further event needs to be noted. On 9 June, Wal-Mart successfully applied to the High Court on an urgent basis for an order declaring that the noting of the appeal would not suspend the operation and execution of the judgment delivered by the High Court on 28 April 2011. In addition to granting the relief sought by Wal-Mart, the High Court made an adverse costs order against the appellants, ordering them to pay the costs of Wal-Mart on the scale as between attorney and client.

Proceedings in this Court: application to augment appeal record

[19] On 1 June 2011, the Commission and the Minister 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. A pre-appeal hearing with the registrar was held on 13 July at which both the appellants and the respondent were represented. The signed minutes of that meeting disclose that all the parties were content with the appeal record that had been lodged.

[20] Despite that agreement, on 10 October 2011, just over a week before the appeals were due to be argued in this Court, the Commission lodged an application to supplement the appeal record. It wished to lodge the papers filed in the interlocutory application brought by Wal-Mart on 9 June for an

order that the judgment of the High Court would not be suspended, pending this appeal. The Commission also sought condonation for the late institution of the application. Wal-Mart opposed the application, and lodged both an answering affidavit and heads of argument in support of that opposition. Soon after the commencement of the appeal hearing on 18 October 2011, the Commission's counsel abandoned the application to augment the appeal record, in my view correctly. The only issue that remains therefore is the question of costs in this regard. I shall deal with that question at the end of this judgment but it should be noted for purposes of taxation that the hearing on this issue did not exceed half an hour.

Issues on appeal

[21] There were two substantive issues before the High Court: the first concerned the validity of Notice 75, and the second concerned the validity of the four conditions imposed by the Competition Commission. This judgment deals first with the validity of Notice 75. Before considering the second substantive issue, the validity of the conditions imposed by the Commission, this Court must consider whether the High Court was correct in determining that issue despite the fact that the section 49 review of the Commission's decision had not run its course. Only if this Court concludes that the High Court was correct in determining the validity of the conditions despite the fact that the review had not run its course, will this Court then consider whether the conditions imposed by the Court were correctly set aside by the High Court.

[22] It should be noted at this stage that the Minister did not lodge either written or oral argument on the validity of the conditions. He did not do so because, in his view, he is seized with the review under section 49 of the Act, which will require a consideration of the merits of the conditions. In the view of the Minister, his performance of that review function might well be tainted were he to have tendered argument on the validity of the conditions in these proceedings.

[23] The final issue that the Court will have to consider will be the appropriate relief, including costs.

Relevant legal provisions

[24] Section 2 of the Act provides as follows:

> "**Purpose of the Act**
> The purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia in order to –
> (a) promote the efficiency, adaptability and development of the Namibian economy;
> (b) provide consumers with competitive prices and product choices;
> (c) promote employment and advance the social and economic welfare of Namibians;
> (d) expand opportunities for Namibian participation in world markets while 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 a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons."

[25] Section 47(2) of the Act provides that:

> "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, including –
>
> (a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
>
> (b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
>
> (c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
>
> (d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
>
> (e) the extent to which the proposed merger would be likely to affect employment;
>
> (f) the extent to which the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;
>
> (g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets;
>
> (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."

[26] Section 49 of the Act reads as follows:

"**Review of decisions of Commission on mergers by Minister**

(1) Not 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.

(2) Within 3 days after receiving an application in terms of subsection (1), the Minister must by notice in the *Gazette* –

(a) give 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.

(3) 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.

(4) The Minister must –

(a) give notice of the determination made by the Minister in relation to the review –

(i) to the Commission and to the parties involved in the proposed merger, in writing; and

(ii) by notice in the *Gazette*; and

(b) issue written reasons for that determination to the Commission and the parties involved.

(5) The Minister may determine the procedure for a review in terms of this section."

[27] Section 3(1) of the Foreign Investment Act, 1990 provides as follows:

"Subject to the provisions of this section and the compliance with any formalities or requirements prescribed by any law in relation to the relevant

> business activity, a foreign national may invest and engage in any business activity in Namibia, which any Namibian may undertake."

And section 3(4) of the same Act reads:

> "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."

Notice 75

[28] The first substantive issue that arises for decision is whether Notice 75 is invalid. Although the appellants argued that this issue should not be dealt with until the ministerial review process under section 49 of the Act was complete, this argument cannot be sustained for two reasons. First, the validity of Notice 75 is not an issue that can be determined by the ministerial review process under the Competition Act. The Notice was issued in terms of the Foreign Investment Act and its validity is governed by that Act not the Competition Act. Although the Commission stipulated that the merger parties should obtain permission within the terms of Notice 75 as a condition of its approval of the merger, the question of its validity and application of Notice 75 arises separately from the approval of the merger proceedings. Even if the condition stipulated by the Commission were to be removed, the question still arises for the merger parties whether Notice 75 is valid and of application.

Moreover, the validity of Notice 75 is a legal issue that only a court may determine authoritatively.

[29] Secondly, Wal-Mart approached the Minister on 15 December 2010 to ask whether the Minister considered Notice 75 to affect the merger transaction, but they received no response to this enquiry. If the Minister had informed them, at that stage or at any time since, that he did not consider Notice 75 to be of application to the merger transaction, Wal-Mart would not have needed to seek declaratory relief to determine the legal validity of Notice 75. But the Minister did not do so. Wal-Mart therefore was entitled in the light of the Minister's failure to respond to their letter of 15 December 2010 to seek declaratory relief concerning the validity of Notice 75. The appellants' argument that Wal-Mart acted prematurely in seeking declaratory relief concerning Notice 75 cannot therefore be sustained.

[30] The High Court found that paragraph (a) of Notice 75 was *ultra vires* the terms of section 3(4) of the Foreign Investment Act and invalid for two reasons. The first was that the Minister had conferred upon himself the power to permit departures from the prohibition he himself had issued, although this "dispensing" power was not expressly conferred by section 3(4) of the Act. Secondly, the High Court found that retail businesses do not fall within the ambit of "the provision of services or the production of goods" as specified in section 3(4) of the Foreign Investment Act.[12]

[12] Section 3(4) is set out at para 27 above.

[31] It seems logical to address the second question first. For, if section 3(4) does not embrace the retail sector, then the Minister was not permitted to issue any notice in relation to the retail sector under section 3(4). The question that arises in this regard is whether the prohibition contained in paragraph (a) of Notice 75, the only paragraph in Notice 75 that is of application in this case, does fall within the ambit of section 3(4) of the Foreign Investment Act. Section 3(4) empowers the Minister to "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 adequately provided by Namibians and to declare that from a particular date no foreign national shall become engaged in that business.

[32] In interpreting section 3(4), it is necessary to consider its statutory context. The long title of the Foreign Investment Act is "to make provision for the promotion of foreign investments in Namibia". Consistent with the purpose identified in the long title, section 3(1) of the Act provides that "a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake,"[13] subject to the other provisions of section 3.

[33] Section 3(4) thus provides for an exception to the principle in section 3(1) that foreign nationals may invest and engage in business in Namibia. The scope of the exception contained in section 3(2) relates to those businesses engaged "primarily in the provision of services or the production of

[13]The full text of section 3(1) of the Foreign Investment Act is set out at para 27 above.

goods". When section 3(4) refers to businesses engaged in "the provision of services or the production of goods" does it refer to the retail industry?

[34] The retail industry is by definition engaged in the sale of goods to the general public. Retailers do not produce goods and so cannot be considered to fall within the category of business that is engaged in the production of goods. The question is whether retailers "provide services" within the meaning of section 3(4). The appellants argue that selling goods to the public constitutes the provision of a service. They argue, relying on the dictionary definition of services, that to provide services is to serve, help or benefit others or to supply the needs of others. As selling goods to the public benefits the public and supplies its needs, retailing is the provision of a service, they argue.

[35] If the definition suggested by the appellants were to be accepted, the phrase "provision of services" would have a very broad import. Arguably every business is aimed at supplying the needs of consumers or citizens, which would mean that the Minister has the power to prohibit foreign nationals engaging in nearly any category of business. Such an outcome does not fit easily with the text and context of section 3 for at least three reasons.

[36] First, and most importantly, it is at odds with the long title of the Act and with section 3(1) which establishes the principle that foreign nationals may invest and engage in business in Namibia. Section 3(1) is subject to the exception established in section 3(4). But attributing a meaning to the

"provision of services" in section 3(4) which would permit the Minister to prohibit foreign nationals from engaging in any business that "supplies the needs of others" would have the effect that nearly all businesses might fall within the terms of section 3(4) and thus limit, if not destroy, the ambit of the principle established in section 3(1).

[37] Secondly, an ample reading of "the provision of services" as suggested by the appellants could arguably include within its scope "the production of goods," as goods are ordinarily produced to supply the needs of others. Yet, it is clear that section 3(4) considers the "provision of services" and "the production of goods" to refer to two different types of business.

[38] A third difficulty with the interpretation proposed by the appellants, arises from the fact that the Act qualifies those businesses that may be specified by the Minister as those "primarily" engaged in the provision of services or the production of goods. The use of the adverb "primarily" makes clear that although a business may do different things (including the provision of services as a secondary or ancillary activity), it is the primary activity of the business that must fall within the exemption. If the provision of services covered nearly every form of business activity, it would be hard to see what ancillary or secondary activities could arise. Moreover, as will be discussed in the next paragraph, the primary activity of retailers is not the provision of services but rather the sale of goods to the public.

[39] A narrower meaning for the "provision of services" than that proposed by the appellants would thus fit the legislative context more neatly. What is that narrower meaning? At common law, as counsel for Wal-Mart argued, the legal contract for the sale of goods is different to the contract for the performance of services. When suing for payment of a purchase price owing in respect of a contract of sale (*emptio)*, one pleads that the money is due as a result of "goods sold". When suing for the remuneration due in respect of a contract of services (*locatio conductio operis*), one sues for "services rendered". This established legal distinction between the sale of goods and the provision of services is clear and is also consistent with the framework of the Act.

[40] The view that selling goods does not constitute the provision of services has been endorsed in another context, the area of trade mark protection. In *Miele et Cie GmbH & Co v Euro Electrical (Pty) Ltd,* the South African Appellate Division was concerned with an application by Miele to interdict the respondent from using its registered trade mark.[14] The respondent argued that its use of the Miele trade mark related to the provision of services, not goods, and as the trade mark was registered only in relation to goods, it was not an infringement of Miele's registered trade mark.[15] Corbett JA, rejected this argument as follows:

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[14] 1988 (2) SA 583 (A); followed in *Tool Wholesale Holding (Pty) Ltd v Action Bolt (Pty) Ltd* 1991 (2) SA 80 (A)

[15] This litigation took place under the old South African Trade Marks Act, 62 of 1963, which has now been replaced by the Trade Marks Act, 194 of 1993.

> "Repairing is, of course, a service, but in the context of Euro Electrical's business it is merely ancillary to the main activity of selling goods. And, in my view, it is artificial and incorrect to regard the selling of goods, even if they all emanate from a single manufacturing source, as the provision of services."[16]

Although this *dictum* relates to a context different to the one under consideration in this case, it is clear that a distinction is being drawn between the selling of goods and the provision of services. It is the distinction that underlies the common law contractual distinction referred to above and it is a distinction consistent with the language and purpose of section 3(4) of the Foreign Investments Act.

[41] 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.

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[16] Id at 599 F.

[42] The second substantive issue is whether the conditions imposed by the Commission were invalid. Before considering that issue, it is necessary to consider the argument raised by the appellants that it is premature for a court to consider this question given that the ministerial review contemplated in section 49 of the Act has not run its course. It is to this preliminary issue that this judgment now turns.

Exhaustion of internal remedies

[43] Was the High Court correct in deciding that Wal-Mart could seek to have the conditions imposed by the Commission set aside without first letting the ministerial review provided for in section 49, which Wal-Mart itself had instituted, run its course? Both appellants argued that the High Court erred by permitting Wal-Mart to obtain relief before the ministerial review in terms of section 49 had run its course. On behalf of Wal-Mart, it was argued that the effect of requiring Wal-Mart to exhaust the ministerial review process would be to "oust" the jurisdiction of the courts, something it is presumed the legislature does not intend to do. Counsel for the Minister responded that requiring Wal-Mart to pursue the section 49 review process before approaching a court would not oust the jurisdiction of the Court but merely defer its jurisdiction till the review process was complete.

[44] Counsel for Wal-Mart argued that section 49 was not an effective remedy to it for essentially three reasons: because it was time-consuming, because the Minister, especially in relation to the condition relating to Notice 75, would be a judge in his own cause, and because the Minister had

expressed his contempt for Wal-Mart's position in his affidavit that indicated that he was not able to approach the matter in a fair way.

[45] Ordinarily, the question whether an applicant will be required to exhaust internal remedies before approaching a court for relief, turns on the interpretation of the relevant statute (or contract, though that does not arise in this case). At times, a statute may expressly provide that an internal remedy must be exhausted before approaching a court. More commonly, though, the statute does not expressly insist that an applicant exhaust the internal remedy it provides before approaching a court. The question is whether the statute implicitly requires exhaustion of the internal remedy. The mere fact that a statute has provided an internal remedy is not generally sufficient to establish that it intended to insist that the internal remedy be exhausted before a court is approached for relief.[17] More is required.

[46] In *National Union of Namibian Workers v Naholo*, Tötemeyer AJ identified two considerations relevant to the determination of whether internal remedies should be exhausted. The first is the wording of the relevant statutory provision; and the second is whether the internal remedy would be sufficient to afford practical relief in the circumstances. In *Naholo*'s case, Mr Naholo, the Acting General Secretary of the National Union of Namibian Workers, had been dismissed by the Union. A clause of the Union's constitution provided that Mr Naholo would have the right to appeal to the next

[17] See *National Union of Namibian Workers v Naholo*, cited above n6, at paras 59 - 60. On this point, the Court cited with approval the decisions of the South African Appellate Division in *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503 C – D and *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (A) at para 15.

national congress of the Union. Tötemeyer AJ observed that national congresses only occurred every four years and that if Mr Naholo had to wait years to prosecute an appeal, he would be "virtually remediless".[18] This consideration persuaded the Court that the internal remedy provided by the Union's constitution would not provide effective relief and therefore did not need to be exhausted before Mr Naholo approached the Court.

[47] The requirement that the internal remedy provide effective redress is one that has been acknowledged by South African courts as well.[19] 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. The nature of this relief will be relevant to determining whether Wal-Mart should have exhausted the ministerial review process before approaching the High Court.

[48] The first question that arises is whether section 49 *expressly* prevents parties dissatisfied with the decision of the Commission from approaching a court in all circumstances, until the ministerial review provided for in the section has been exhausted. Section 49 provides that a party to the merger "may" make application to the Minister for a review of the Commission's decision.[20] In my view, the language of the section cannot be said *expressly* to

[18] Id at para 61.

[19] See, for example, *Nichol and Another v Registrar of Pension Funds and Others*, cited above n 17, at para 18; the discussion in Baxter *Administrative Law* (1984: Juta) 721 and the references cited there; and the discussion in Hoexter *Administrative Law in South Africa* (Juta: 2007) at 478 - 482.

[20] The full text of section 49 is set out at para 26 above.

prohibit access to court for in terms it does not state that no party may approach a court for relief until the review has been completed. It simply states that the parties may approach the Minister for review.

[49] The next question that arises is whether section 49 implicitly prohibits a party from approaching the court until the review is complete. To answer this question, it is necessary to undertake a careful analysis of the review procedure and powers set out in the section. Section 49 contemplates an important role for the Minister in determining whether mergers should be permitted or prohibited. Four aspects of the review mechanism are of particular relevance. First, there is the fact that it is the Minister of Trade and Industry who is responsible for deciding the review. As the member of the Cabinet charged with the responsibility of administering and executing the functions of government with respect to trade and industry,[21] which requires him to direct, co-ordinate and supervise the Ministry of Trade and Industry,[22] the Minister bears great responsibility. Moreover, he is directly accountable to the President and Parliament for the performance of these duties.[23] The review power has thus been entrusted to a democratically accountable and senior member of government.

[50] Secondly, section 49(2) requires the Minister to publish by notice in the *Gazette* the fact of the review and invite interested parties to make submissions on the matter. This process provides an important opportunity for interested members of the public to make relevant submissions to the

[21] See Article 35(1) of the Constitution.
[22] See Article 40(a) of the Constitution.
[23] Article 41 of the Constitution.

Minister on the proposed merger. This opportunity is all the more important, given that the Commission is not compelled to afford interested parties notice of the application for merger permission or to provide interested parties with an opportunity to submit comments to it.[24]

[51] Thirdly, section 49(3) makes plain that the Minister is not only empowered to confirm or overturn the decision of the Commission but is also empowered to amend the decision of the Commission by ordering restrictions or including conditions to the approval of the proposed merger. The Minister therefore has extensive powers to alter the decision of the Commission in the light of the information he receives, which a court reviewing the Commission's decision does not. In making his decision on the proposed merger, the Minister, like the Commission will have to take into account the considerations set out in section 2 of the Act,[25] as well as those set out in section 47(2).[26]

[52] Fourthly, the 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

[24] Section 46 of the Act does empower the Commission to hold a conference in relation to the proposed merger if the Commission considers it appropriate but it does not provide that members of the public must be informed of the conference or given an opportunity to participate. Section 47(3) of the Act also permits the Commission to appoint an inspector to investigate the proposed merger and to report to it. Finally, section 47(6) provides that any person may voluntarily submit a statement or other relevant information to the inspector of the Commission in respect of a proposed merger.

[25] The terms of section 2 are set out at para 24 above.

[26] The terms of section 47(2) are set out at para 25 above.

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."[27] 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.

[53] These four factors all 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. The question in each case will be whether the review process will provide effective relief. Two situations can be mentioned here. 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. The task of balancing the competing interests in the Act is not a task for which a court has any special competence. Nor is it one that in the scheme of the Act is assigned to a court. It is a task reserved by the legislation first for the Commission and then for the Minister.

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

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. 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 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.

[54] On the other hand, if the complaint does not relate to the manner in which the balancing exercise has been struck, and is 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 whether the ministerial review process provides effective relief to the litigant.

[55] 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.

[56] I turn now to apply these principles to the facts of this case. Is the relief sought *a quo* in relation to the conditions attached by the Commission to its approval of the merger premature, in that Wal-Mart should first have exhausted the review process provided for in section 49 of the Act? In what follows, I consider the challenges to the first three conditions imposed by the Commission. Given the conclusion reached above in relation to the validity of Notice 75, it is not necessary to consider the fourth condition further.

[57] Wal-Mart argued that the first condition, that the merger allow 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, and also on the grounds that it was vague, arbitrary and irrational. 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.[28] 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" authorizes the terms of the condition.

[58] Wal-Mart challenged the second condition, which required there be no employment losses as a result of the merger, on the ground that it was irrational and disproportionate. And it challenged the third condition, that there be no harmful effects on competition, on the basis that it was irrational, vague and *ultra vires* the powers of the Commission.

[59] It is clear that these three conditions seek to address one or other of the statutory purposes set out in section 2 and section 47. 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). 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

[28] The relevant portion of section 3(3) provides that: "No foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to provide for the participation of the Government or any Namibian as shareholder or as partner in such business, or for the transfer of such business to the Government or to any Namibian …".

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.

[60] To 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 Commission's decision on the merger. 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. It may well be, however, that any complaints Wal-Mart has about the imposed conditions are resolved during the review process.

[61] Counsel for Wal-Mart argued that the time that the review would take means that the review would not be an effective remedy, as contemplated in *Naholo*. As mentioned in para 31 above, in *Naholo* the internal remedy was a review by a national conference which only takes place every four years, a very different time frame to that provided in section 49. Moreover, the time periods provided in section 49 are maximum time periods, which may be shortened by the Minister where circumstances require. Wal-Mart originally requested the Minister to complete the process within ten days. 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. However, it may well be that the Minister could seek to finalise the review in a shorter period than the four months set as the limit for the review by the Act. The review could be concluded within two months, for example. This could be achieved by publication in the *Gazette* within two weeks of the date of the judgment, followed by a two week period for interested parties to comment on the proposed merger. The Minister would then have a month within which to prepare his decision and reasons. Given the complex considerations at play, as well as the fact that the maximum time period for the review is four months, and that it may take place more quickly than that, it cannot be said that the time period renders the section 49 review process "ineffective".

[62] It may be as Wal-Mart noted that competition authorities in other southern African countries approved the merger transaction more quickly than has happened in Namibia and South Africa. The fact that other authorities have determined the case more quickly does not mean that the Namibian procedure is not an effective procedure. 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.

[63] Wal-Mart's final argument was that, in the light of the Minister's conduct before and during the litigation, they considered that he was biased and would not bring an open mind to bear on the proposed merger transaction. In making this submission, the respondent relied on the decision of this Court in *Minister of Health and Social Services v Lisse* in which the Court held that it would not remit a decision to a Minister for several reasons. The first was that on the record, the consideration afforded by the Minister to the decision has been biased and arbitrary.[29] The other reasons for the non-remittal included the substantial prejudice that would be suffered by Dr Lisse.[30] In that case, the relevant Minister had refused to issue written authorization to Dr Lisse to use the facilities of the Windhoek State Hospital for his private patients as required by section 17 of the Hospitals and Health Facilities Act, 36 of 1994. The Court was of the view that the result of the application was a foregone conclusion and that the manner in which Dr Lisse's application had been dealt with was a "travesty of justice".[31] It accordingly refused to remit the matter to the Minister and ordered that the authorization be granted.

[64] The evidence relied upon by the respondent to support their allegation of bias was a passage in the answering affidavit. In that passage, the Minister stated that Wal-Mart's suggestion that it would have been impossible to conduct the ministerial review in the 10-day period proposed by Wal-Mart. He continued that any "suggestion by the applicant to the contrary should be

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[29] 2006 (2) NR 739 (SC) at paras 30 - 32. See also the following South African authority referred to with approval in *Lisse*'s case: *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council* 1999 (1) SA 104 (SCA) at 109 F – G; *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others* 1986 (2) SA 663 (A) at 680 E – F.

[30] Id. At para 31.

[31] Id.

dismissed with the contempt it deserves". We have found earlier in this judgment that the 10-day period proposed by Wal-Mart was impracticable. It may be that the language of the answering affidavit was more emphatic than required, but it is by no means evidence that the Minister will approach the review with a closed mind. Wal-Mart also pointed to the fact that the Minister had not responded to their letter concerning Notice 75 dated 15 December 2010. The letter of 15 December was addressed to the Permanent Secretary in the Ministry, not the Minister. The failure of the Permanent Secretary to respond to this letter may well have been unfortunate and discourteous. Nevertheless it was not a letter addressed to the Minister, and does not establish that the Minister will not approach the review with an open mind. The evidence pointed to by the respondent to suggest that the Minister was biased is flimsy, at best, and goes no way to establishing the assertion of bias. It cannot be said that a reasonable person who considered these facts would conclude that the Minister would not act impartially in deciding the review. The submission relating to the Minister, in this regard, must thus be rejected.

[65] At this point, I pause to observe that although counsel must have considerable latitude in making submissions to the Court on behalf of those they represent, when doing so, disparaging statements not grounded in the record should be avoided. In this case, in oral argument, the suggestion by counsel for the respondent that the Commission was, amongst other things, "illiterate", apparently based on grammatical errors in the reasons furnished by the Commission for its decision, in our view, may arguably have reached the limits of that latitude.

[66] In conclusion, the appellants' argument 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.

Costs

[67] The appellants have succeeded in their appeal against the order of the High Court to a significant extent. The High Court's order declaring invalid the conditions imposed by the Commission when it approved the merger transaction must be set aside. But the appellants have not succeeded in their appeal against the order of invalidity relating to Notice 75. At the hearing, counsel for the Minister suggested that if this were to be the outcome, a costs order in their favour in the proportion 75:25 might be appropriate as it would acknowledge that the focus of the litigation has always been the conditions imposed by the Commission when it approved the merger transaction. Counsel for Wal-Mart did not suggest otherwise in reply. The two issues are by and large severable, the only connection between them being the fact that the Commission required approval in terms of Notice 75 as a condition of its approval of the merger. The net effect of the proposed apportionment would

require the respondent to pay approximately half the appellants' costs both on appeal and *a quo.* I consider such a result both reasonable and fair in the circumstances.

[68] In considering the appropriate costs order, one of the considerations aired at the hearing was the fact that Wal-Mart had successfully obtained an order from the High Court implementing the order made by the High Court pending the appeal.[32] This order will, of course, now fall away. It was accompanied by a special costs order against the appellants. No appeal has been lodged against either the order implementing pending appeal, or the costs order attached to it. Indeed, appeals against such orders will be entertained only in exceptional circumstances.[33] At the hearing, appellants did not seek to have the costs order in those proceedings set aside, it is not necessary to consider whether this Court would have the jurisdiction to do so. Answering that question would require a consideration of both the rules of this Court, the empowering legislation and this Court's inherent powers in respect of matters interlocutory to appeals before it. Whatever the answer to that question may be, it will be a salutary practice, and one in accordance with justice, for the High Court when granting applications to implement orders pending appeal, either to reserve the costs of such applications for decision by this Court, or to order that the costs be costs in the appeal.[34]

Order

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[32] The circumstances of this application were described at para 18 above.

[33] See the decision of the South African Constitutional Court, *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC) at para 12.

[34] See, for an approach consistent with that suggested here, the South African decision of *N and Others v Government of the Republic of South Africa and Others (No 3)* 2006 (6) SA 575 (D) at para 15.

[69] Accordingly, we make the following order.

1. The appeal succeeds in part and fails in part.

2. Paragraph 2 of the order made by the High Court in Case No A 61/2010 on 29 April 2010, declaring paragraph (a) of Notice 75 of 2010, published in Government Gazette No 4460 on 29 March 2010 invalid and striking it down, is confirmed.

3. Paragraphs 3 and 4 of the order made by the High Court in Case No A 61/2010 on 29 April 2010, are set aside and the following orders are substituted for them:

> "3. The relief sought in paragraph 3 of the Notice of Motion for an order declaring the conditions subject to which the second respondent approved the proposed merger between the applicant and the fourth respondent invalid is refused;
>
> 4. The applicant is ordered to pay 50% of the costs of the first and third respondents, such costs, in relation to each respondent, to include the costs of one instructing and one instructed counsel."

4. The respondent's application to the second appellant to review the decision of the first appellant in terms of section 49 of the Competition Act 2003 shall, for the purposes of the time limits stipulated in that section, be deemed to have been lodged on the date of this judgment.

5. Subject to paragraph 6 below, the respondent is ordered to pay 50% of the costs of the first and second appellants on appeal, which include the costs, in relation to each appellant, of two instructed and one instructing counsel.

6. The first appellant is ordered to pay the respondent's costs of opposition to its application to augment the appeal record in this Court, such costs to include the costs of one instructing and two instructed counsel.

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O' REGAN AJA

I agree.

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SHIVUTE CJ

I agree.

_____

MARITZ JA

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