competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP034Jun15
EXC088Jul15
EXC107Aug15
EXC109Aug15
STA204Dec15

In the matter between:

SHOPRITE CHECKERS PROPRIETARY LIMITED	First Applicant
PICK 'N PAY RETAILERS PROPRIETARY LIMITED	Second Applicant
SPAR GROUP LIMITED	Third Applicant

and

MASSMART HOLDINGS LIMITED	Respondent

Panel	: Norman Manoim (Presiding Member) : Anton Roskam (Tribunal Member) : Andiswa Ndoni (Tribunal Member)
Heard on	: 26 & 27 July 2016
Reasons Issued on	: 01 September 2016

Reasons for Decision

Introduction

[1] In these reasons we decide two applications brought against Massmart Holdings Limited ("Massmart") relating to its referral currently pending before the Competition Tribunal ("the Tribunal"). The first application is a stay of proceedings application. The second concerns exceptions.

[2] Massmart's referral relates to the alleged anti-competitive enforcement of exclusivity provisions between each of Shoprite Checkers Proprietary Limited ("Checkers"), Pick 'n Pay Retailers Proprietary Limited ("Pick 'n Pay"), Spar Group Limited ("Spar") and their respective landlords, which have the alleged effect of preventing Massmart from trading in fresh food and groceries.

[3] On 31 October 2014, Massmart lodged a complaint with the Competition Commission ("the Commission") against Shoprite, Pick 'n Pay and Spar, in terms of section 49(2)(b) of the Act.

[4] On 20 November 2014, the Commission announced its decision to incorporate the complaint with similar complaints that were then being investigated, and proceed with further investigations.

[5] However on 12 May 2015, the Commission issued Massmart with a Notice of Non-Referral, *inter alia* informing it that the Commission had taken a decision to conduct a market inquiry and that the Commission would publish terms of reference for the market inquiry in the Government Gazette sometime in May 2015. This it then did and this inquiry is what is known as "the Grocery Inquiry".[1]

[6] Therefore, the Commission's non-referral comes as a result of the Commission's decision to conduct a market inquiry rather than to investigate and consider the merits of the complaint.

[7] After the Commission non-referred the complaint, Massmart sought to refer its complaint to the Tribunal in terms of section 51(1) of the Act on 9 June 2015.

[8] In response none of the respondents filed answering affidavits. Instead, all three filed exceptions and, in addition, Spar brought the stay application.

[9] As agreed at a pre-hearing with the parties, the hearing of both applications took place before us on 26 and 27 July 2016.

[10] The exceptions were taken by each of Shoprite, Pick 'n Pay and Spar. The crux of the exceptions is that Massmart's referral to the Tribunal lacks the necessary averments

[1]Market inquiries are a new form of procedure set out in sections 43A to 43C of the Act, which came into effect on 1 April 2013.

to sustain its complaint that the applicants have contravened sections 5(1), 8(c) and 8(d) of the Competition Act 89 of 1998 ("the Act"), and that it is "vague and embarrassing".

[11] At the hearing on 27 July 2016, Mr Van der Nest, who appeared for Massmart, conceded that the section 8 argument put forth by Massmart needed clarification and was not properly delineated. In other words, Massmart accepted that the exception in regard to the section 8 argument was properly taken. Furthermore, Massmart requested that it be allowed time to rework and properly delineate its argument, as is the norm in exception procedures.[2]

[12] Spar applied for an order staying Massmart's referral until the Commission's Grocery Inquiry was concluded. Shoprite, although not an applicant, supported this application. Pick 'n Pay did not participate in the stay application.

[13] In the stay application, Spar and Shoprite allege that the issues raised by Massmart in its referral are the same issues under investigation in the Grocery Inquiry, and that having the Tribunal determine Massmart's referral prior to its conclusion will result in a duplication of efforts and resources, is contrary to the principal of institutional comity, and is not in the interests of justice.

[14] For purposes of maintaining simplicity in these reasons, the exception application arguments and stay application argument will be discussed separately below.

[2] Transcript page 188 lines 7-23.

Stay Application

[15] Spar and Shoprite submitted that Massmart's complaint referral be stayed pending the finalisation of the Commission's Grocery Inquiry. They advanced a number of reasons:

a. Firstly, the issue of the impact of long-term exclusive leases entered into between the developers and national supermarket chains on competition in the grocery retail sector will be investigated by the Commission in its ongoing Grocery Inquiry and that there is a real risk that the Tribunal may pre-empt the results of the Grocery Inquiry. The two processes may lead to different and competing determinations being made in relation to the key issues.[3] It was contended that the balance of convenience favours the staying of the self-referral proceedings pending the finalisation of the Grocery Inquiry.

b. Secondly, refusing the stay application will result in unnecessary duplication of expenses and deployment of resources.[4]

c. Finally, in terms of the principle of institutional comity, the Tribunal is required to defer its consideration of the self-referral. The principle of comity, it was submitted, is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of co-existence and to avoid collisions of authority and potential uncertainty.[5]

[16] Massmart, on the other hand, submitted a number of reasons why the stay application should be dismissed:

a. Firstly, the Commission's decision as to how it chooses to address anti-competitive conduct with its limited public resources cannot eliminate or limit Massmart's statutory right to pursue its complaint before the Tribunal for what amounts to *prima facie* anti-competitive conduct.[6]

[3] Transcript page 89 lines 21-25 & page 90 lines 1-2.
[4] Transcript page 90 lines 16-20.
[5] Transcript page 89 lines 1-5.
[6] Transcript page 238 lines 24-25 & page 239 lines 1-5.

b. Secondly, the inquiry is likely to focus on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy, rather than on the likes of Massmart.[7]

c. Thirdly, the outcome of the grocery inquiry is not dispositive of Massmart's complaint. In the event that the Grocery Inquiry produced any of the outcomes contemplated in sections 43C(3)(a) to (c), namely, initiation of a fresh complaint, by operation of the doctrine of *functus officio*, a regulator such as the Commission could not revisit its earlier decisions and revive or revisit matters over which it has finally and definitively exercised its powers.

d. Fourthly, the two processes are distinct under the Act and the Tribunal has no jurisdiction over the Grocery Inquiry, with it becoming relevant to subsequent proceedings only if the Commission initiates or refers a complaint. Furthermore, any potential duplication arising from the two processes is minimal and unavoidable.[8]

e. Fifthly, there is no prospect of pre-emptive or conflicting conclusions.[9] The Tribunal does not reach a "conclusion" after an "investigation"; it determines a complaint referred to it, as it should by operation of section 52. In contrast, the "conclusion" of the Grocery Inquiry will be a report by the Commission, with or without (non-binding) recommendations to the Minister, and possibly, a decision by the Commission to take further action (including initiating complaint and referral proceedings) or to take no further action. Consequently, the two decisions are not comparable in either legal status or effect.

f. Sixthly, the institutional comity principle is inapplicable in this matter.[10] The Commission performs an investigative function and a quasi-prosecutorial role before the Tribunal in matters that it has referred for determination. The two institutions do not both enjoy "authority" that could possibly collide.

g. Lastly, the balance of convenience weighed in favour of Massmart. Any further remedial actions arising from the Grocery Inquiry can only be confirmed by the Tribunal following the initiation of a future complaint and its referral to the Tribunal.

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[7] Transcript page 228 lines 16-22.
[8] Transcript page 191 lines 6-21.
[9] Transcript page 207 lines 3-5.
[10] Transcript page 193 lines 23-25.

[17] In terms of section 50(2) of the Act, the Commission must do one of two things when a complaint is submitted to it. It must either refer the complaint to the Tribunal, if it determines that a prohibited practice has been established or "in any other case, issue a notice of non-referral to the complainant". If the Commission fails to do either of them within one year of it receiving the complaint, then in terms of section 50(5) the Commission is deemed to have issued a notice of non-referral. However, in terms of section 50(4) the one-year period may be extended by agreement between the complainant and the Commission or on application to the Tribunal.

[18] In this matter the Commission did not determine that a prohibited practice had been established. It did not seek Massmart's agreement or request the Tribunal's ruling for the extension of the one-year period. Rather, it issued the notice of non-referral well before the expiry of the one-year period and at about the same time as its decision to institute the Grocery Inquiry. By implication, the Commission was content to see the referral takes its course at the same time that the Grocery Inquiry proceeded.

[19] In *Novartis*[11], the Tribunal held that to determine whether a stay application should be granted or denied, the test to be applied comprises three requirements. They are: (1) whether the applicant has reasonable prospects of success in the High Court review (read in this case "Grocery Inquiry"); (2) whether it is in the interests of justice to stay the proceedings; and, (3) where the balance of convenience lies.[12] The reasonable prospects of success is, of course, to be understood as a *sine qua non* of a referral (read stay), not as a sufficient ground.[13]

[20] Market inquiries are not adjudicative processes nor are they in any way determinative of issues or rights of parties. The outcome of a market inquiry is recommendatory in nature.[14] Furthermore, the issues to be determined by the complaint referral and the market inquiry are not the same. The main focus of this market inquiry will be to identify and assess the causes of barriers and any other factors and developments that impacts on competition in the grocery retail sector, especially in townships, peri-urban

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[11] *Novartis SA (Pty) Ltd v Main Street Ltd (2)* 22/CR/B/ June01.
[12] See *Olympic Passenger Services (Pty) Ltd Ramlagan* 1957(2) SA 382(D) at 383F, where it was held that by the balance of convenience is meant the prejudice to the applicant if the interdict is refused, weighed against the prejudice of the respondents if the interdict is granted.
[13] *Novartis SA (Pty) Ltd v Main Street Ltd (2)* 22/CR/B/ June01 at [16].
[14] See section 43C(a) and (b) of the Act.

and rural areas.[15] Nothing that would be decided by the inquiry would be definitive of the Massmart issue. The applicants have therefore failed to meet the prospects of success requirement.

[21] The second leg of the test is whether it is in the interests of justice to stay the proceedings. This requires an equitable evaluation of all the circumstances of a particular case. Spar and Shoprite submitted that the evaluation of whether it is in the interests of justice to stay the proceedings involves four issues. They are: (1) the overlap of issues to be determined by the Tribunal with those to be determined by the market inquiry; (2) the danger of divergent or conflicting findings by the Tribunal and the market enquiry; (3) the market enquiry being better placed to conduct an initial investigation of the competitive effect of exclusive leases; and (4) the institutional comity between the Tribunal and the Commission.

[22] As stated above, the two processes are not the same. The Grocery Inquiry provides recommendations. The Tribunal is the sole institution with adjudicative powers over complaint proceedings pursued under the Act. Therefore, there is no danger of conflicting findings. The issue of institutional comity does not arise.

[23] With regard to the balance of convenience, the argument of duplicity of efforts by the Tribunal and the market inquiry does not stand, as the issues to be determined by the two processes are not the same.

[24] Accordingly, we find that the prospects of success, the interests of justice and the balance of convenience do not favour staying the application pending the determination of the market inquiry.

[25] Accordingly, the application is dismissed. Massmart is entitled to its costs in opposing the stay. Since Shoprite, although not an applicant, supported the application it should also be jointly and severally liable with Spar for Massmart's costs. Our order appears at the end of these reasons.

Per Ms Andiswa Ndoni

Mr Norman Manoim and Mr Anton Roskam concurring

[15] Grocery Retail Sector Market Inquiry, Statement of Issues, 15 July 2016, para 36.

Exception Applications

[26] The respondents collectively have raised a number of exceptions to the Massmart referral. Some of these overlapped; others were specific to a particular respondent.

[27] Massmart usefully summarised them in its heads of argument as follows:

> *"24. The cumulative grounds of exception proffered by the applicants are the following:*
>
> *24.1 There is no evidence that Massmart's complaint to the Commission is the same as its referral to the Tribunal;*
>
> *24.2 Massmart failed to join the counter-parties to the impugned lease agreements in the Tribunal proceedings;*
>
> *24.3 Massmart failed to allege the specific terms of the lease agreements that it impugns;*
>
> *24.4 Massmart failed to define the relevant markets;*
>
> *24.5 Massmart failed to establish dominance;*
>
> *24.6 Massmart failed to establish harm to competition; and*
>
> *24.7 Massmart failed to establish anti-competitive vertical conduct."*[16]

[28] Common to all were the complaints in respect of the pleading of the relevant markets and the absence of an intelligible case on dominance.

[29] As noted earlier at the hearing Massmart abandoned its defense of its dominance case and stated that it would reconsider it. We therefore do not need to decide this objection.

[30] Certain exceptions were not pursued in argument. Thus Shoprite's argument regarding whether the complaint referral was borne out of the complaint to the Commission need not be considered either.

[31] We now deal with what was left of the complaint which was the section 5(1) complaint. The essence of the objection concerned the manner in which the market had been defined in the referral. We deal with this first. There were other residual objections which we go on to consider.

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[16] Massmart Consolidated Heads of Argument in respect of the stay and exception applications par 24 pages 10-11.

[32] During the hearing Massmart responded to the objections around the market definition by opting for a particular definition of the market that was clear in its terms. The question arose as to whether this restated, for want of a better term, market definition was to be found on the papers and if it was, did it make out a cause of action that was not excipiable.

[33] These are the two questions that we go on to consider.

Does the present referral reflect the section 5(1) case now contended for by Massmart?

[34] As noted, in the course of the hearing, Mr. Van Der Nest, who appeared for Massmart, succinctly articulated what Massmart's theory of harm was in respect of its section 5(1) case. It was explained in this way:

a. Massmart seeks to enter the national market for selling fresh grocery products ("fresh") through its Game chain, many of whose stores are located in shopping Malls nationwide, where at present, they sell general merchandise. By entering this fresh market nationally it believes it will be able to achieve sufficient economies of scale, and other efficiencies, to be able to compete successfully with the three respondents. However entering that market (the national market) requires it to be able to sell fresh in shopping malls. Access to these malls is largely foreclosed to Game because each of the three respondents, respectively, have exclusivity agreements with the landlords of these malls which exclude rivals from selling fresh in the particular mall. Thus entry on the scale necessary to effectively compete in the areas where it is required to compete is denied to them. This theory comes with several caveats. Massmart accepts that the exclusivity provisions i.e. the lease clauses it seeks to impugn, have a local, not national effect. (It is not clear from even the revised market definition contended for at the hearing whether each mall constitutes a local market on its own or whether it represents an outlet which constitutes a portion of the total outlets that are available to competitors to be able to enter the national market).[17]

b. Second, Massmart makes clear that the exclusionary effect is cumulative. It comes about not because of what happens at the local level of any individual mall, nor

[17]Case examples Massmart used in argument referred to the beer industry where rivals had complained of being foreclosed from outlets. See Footnote 21 infra. The theory of harm was based on how a firm wishing to compete in a national market through which one needed access to such outlets had a percentage of the national market foreclosed to it by the existence of exclusive agreements in outlets. Since the outlets customers were local not national there was an interrelationship between the two.

does it even come about if we take the collective malls of any one of the respondents. Rather, it is the aggregate of the exclusive agreements of all three that forecloses Massmart's effective entry into the market. In the referral this is referred to as a network. Perhaps the terminology is not correct. They don't mean a network in the traditional economic sense. What they mean is that the cumulative effect of these separate restraints effectively forecloses entry to rivals in the national market for fresh.

[35] The necessary allegations to support this theory can be found in various places in the referral, provided the reader digs hard enough to find them, as they do not appear in any one place nor in the expected section which deals with market definition. In short, finding it requires one to be a determined and resolute reader.[18] The second problem is that the reader is faced with having to shut out the noise created by other allegations about market definition in the referral that are either inconsistent with or irrelevant to this theory.[19] The combination of these two problems means that the respondents' criticism that the referral is vague and embarrassing has substance.

[36] Of course there is nothing to stop a pleader from alleging, based on the same facts, alternative candidates for a relevant market or theory of harm. However this choice should be made clear in the referral; the reader should be able to easily distinguish between those allegations that comprise the main case, and those the alternatives. The problem with the current referral is that the main case and the alternative or alternatives – if they are to be considered as such – are presented as a single consistent case, without the suggestion that they represent separate or alternate theories.

[37] As was made clear during argument by Mr Gauntlett for Shoprite, the respondent no less than the complainant, is required to plead material facts. Since the respondent's task is by definition responsive to a referral if the latter is opaque the former cannot be any less so. By failing to make out a coherent, internally consistent case, a complainant

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[18] Massmart does not define a market with clarity, it makes several attempts but arrives at different formulations and delineations. For example, in its referral affidavit: Paragraph 8.1 provides for a geographic market of grocery stores with "*a local and a national dimension*"; paragraph 8.2 provides for "*a subset of local markets*"; paragraph 8.3 provides for a market which comprises "*larger formalised retailers which offer full range or more limited one stop shopping*" and "*other types of grocery shopping mission*"; paragraph 8.4 provides for a narrower market "*for anchor grocery tenancy in malls*"; and finally paragraph 13.3.1 provides for "*a market for securing grocery tenancy in malls*".

[19] For example in paragraph 8.3 of the referral affidavit, Massmart provides that "*The precise boundaries of the product market will depend on the nature of shopping missions that consumers seek to carry out, the available choices for those shopping missions and the degree to which consumers consider those choices to be substitutable with one another*".

deprives a respondent not only of its right to understand the case against it, but also the concomitant duty to set up a clear and intelligible defense.

[38] The case that Massmart advanced in argument does clarify its position in the manner the complaint referral does not. Of course, we find that on a fair reading of the referral this clarity does not emerge from it. However, even if it did, this would not suffice. A precise theory of harm does not suffice to render a pleading adequate. The pleader must allege the material facts to support this. This is the question which we now consider.

Do the material facts necessary to sustain the section 5(1) case appear in the referral?

[39] Rule 15 requires the pleader not just to set out its grounds of complaint, but the material facts on which it relies. This means more than asserting that X is the relevant product and Y the relevant geographic market. In relation to market definition, a material fact is not simply what the market definition is, but also why it is so. This does not mean burdening the referral with reams of econometric data - that is evidence for the trial, but it does require allegations of fact to suggest why the market definition contended for has been arrived at. These facts would rarely be self-evident.

[40] To give some examples of where the referral needs amplification:

For Massmart clearly access to shopping malls is considered crucial. If so, it should explain why. Expressed differently, if these are outlets for its sales from which it says it is excluded, why can it not go elsewhere? More detail would be required as to the nature of the foreclosure alleged in the leases. Why could Massmart not be able to enter the market other than through these foreclosed malls? What is the nature of the exclusivities - what products do they cover; how long are they; are all objectionable or only those which exceed a particular time period?

[41] Given that that foreclosure is said to operate in a national market, how much of the market is foreclosed by the respondents, and if so, how much and by whom? Again this need not require exact precision, but some informed estimate would at the very least be required for each respondent to appreciate how much is allegedly foreclosed by it.

[42] Massmart argued that it does not have all this information and would only be able to obtain it through discovery. But this argument cannot justify the paucity of information

it has alleged. Presumably, since Massmart has, on its own version, been interdicted by some of the respondents or been warned by landlords about what it may not do, it has some idea of the nature of some of the exclusivity clauses and can use this as a basis to infer more generally about the nature of those leases it has not had sight of.

[43] This is not an exhaustive issue of the points to be covered in a revised referral, but it gives some idea of the factual detail that is lacking if the present theory of harm is to be pursued

Does the theory show if properly pleaded disclose an infringement of section 5(1)?

[44] During the course of the hearing we raised another concern with the Massmart's legal representatives. Assuming its theory of harm was adequately pleaded with the material facts alleged, did it disclose an infringement of the Act? The current case as pleaded relies not on the foreclosure effect of any single respondent's exclusive leases in malls, but on the aggregate, as shown by the excerpt below from the Massmart founding affidavit:

> *"13.2.1.2 In this context and while a single exclusive agreement between a landlord and an incumbent retailer may not necessarily have a net anti-competitive effect, the likelihood of foreclosure effects are heightened due to the cumulative effect of exclusivity agreements between landlords and incumbent retailers that prevail on a national basis and at strategic entry points."*[20]

[45] Thus, on Massmart's case the foreclosure comes about because of the aggregation or foreclosure achieved by the three firms not anyone individually. To support their contention about foreclosure Massmart referred to certain EU decisions and a UK market enquiry. Both are supportive of the theory that foreclosure of outlets essential to a rival to compete in can be exclusionary. However in the one case, *Stergios Delimitis v Henninger Bräu AG* the respondent was a single firm.[21]

[46] The UK market enquiry related to the cumulative effect of separate exclusivity deals. It thus more closely resembles the case Massmart now seeks to bring, than does *Delimitis*. However, it does not appear to assist Massmart in framing its concern as a

[20] See para 13.2.1.2 on page 18 of the Trial Bundle.
[21] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935 [1992].

contravention of section 5(1) of the Act. As the authors of a leading text remarked, the market enquiries which had been conducted under two successive statutes had:

> *"... allowed the UK competition authorities to intervene in markets where there is a perceived competition problem but not necessarily an infringement under Art 101 or 102."*[22]

[47] The same observation could be made about section 5(1) of our Act.

[48] Nor is there any suggestion that these exclusivity arrangements are the product of collusive relationships between the respondents.

[49] Although we raised this difficulty with Massmart during the hearing of argument it was not a point raised as an exception by any of the respondents. As a matter of fairness we consider that Massmart must be given an opportunity to consider this aspect and either remedy it or consider arguments that meet this concern.

Other exceptions

[50] Shoprite argued that section 5(1) can only apply to a single agreement as opposed to a class or category of agreements. Since Massmart's case required having regard to the effect of a wide variety of agreements and not a single agreement, it did not the meet the legal requirement of the section.

[51] It is correct that the Act is drafted in the singular. But there is little significance to this. This is the approved mode of drafting in plain language, as the editor of Black's Law Dictionary, Bryan Garner, points out in his book on legal writing in plain English where he advises drafters to prefer the singular over the plural:

> *"You'll find an age old provision in statutes and contracts: "The singular includes the plural; the plural includes the singular." Only the second part of this formulation ever mattered."*[23]

[52] As it happens the Interpretation Act, no 33 of 1957, contains Garner's *"age old provision"*. In terms of section 6(b):

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[22] *Economics for Competition Lawyers*, Gunnar Neils, Helen Jenkins and James Kavanagh 2011, page 325 footnote 21.

[23] See Bryan Garner *"Legal Writing in Plain English"* 2001 page 114. Garner gives a useful example of the ambiguity that can arise from the use of the plural which he says can be avoided by the use of the singular.

"In every law, unless the contrary intention appears—
(a) words importing the masculine gender include females; and
(b) words in the singular number include the plural, and words in the plural number include the singular." (Our emphasis)

[53] This makes the position clear. The only question then is whether the contrary intention appears from the text of the Act, but none does. Nor can one be inferred. Indeed it would be absurd if it did. Since section 5(1) is concerned with anticompetitive conduct in a market underpinned by an agreement, it would seem a logical conclusion that if a respondent made use of more than one such exclusive agreement, the more likely its anticompetitive effect. It is hardly likely in this context that the legislature would have intended the word *agreement* to be limited to the singular. This exception is dismissed.

[54] The next exception that some of the respondents raised is that Massmart had not joined any of the landlords to the referral. They argued that in respect of the section 5(1) complaint since the agreement is at the heart of the complaint both parties to an agreement sought to be impugned should be joined. In response, Massmart argued that since the respondent tenants were the beneficiaries of the exclusivity and they were entered into solely for their benefit, it was not necessary for the landlords to be joined. In the alternative, Massmart argued that, as it had joined SAPOA, an industry organisation that most shopping centre landlords belong to, the landlords would have knowledge of the application. In addition, Massmart pointed out that SAPOA had, in any event, brought a similar complaint about exclusive leases to the Commission.

[55] We do not need to give a definitive answer to this exception as Massmart will be redrafting its referral in important respects including possibly the relief sought. It would be premature until then to decide this point. Nevertheless we offer the following guidance: Where a complainant seeks to attack the specific terms of an agreement that it seeks to have expunged, ordinarily both parties to the agreement should be joined. Where, as in prayers one and two, the practice is the subject of the relief, rather than a specific clause in a lease, citing the landlord may not be required.[24]

[56] The remaining issue raised by Spar was that the agreements in question should have been attached. Massmart pointed out that it does not have these agreements since they are between the respondent firm and its particular landlord. Again, we do not need

[24] See paras 1-2 of the Massmart notice of motion on page 3 of the Trial Bundle.

to determine this point definitively now; it would seem that this might depend on the way the referral is framed and the nature of the relief sought once the amended referral is filed.

Conclusion

[57] The exceptions in respect of the failure to define and allege the material facts concerning the definition of the relevant market and consequent anticompetitive effects are upheld. However Massmart will be given an opportunity to amend its referral to remedy this deficiency. Since the excipients have been largely successful, they should be entitled to their costs.

ORDER

1. The applications for exception are partially upheld. Massmart is given leave to amend its referral affidavit in accordance with the guidance provided, subject to it doing so within 40 business days from date of this decision.

2. Massmart is liable for the costs of the first to third applicants in the exception application, on a party and party scale, including the costs of two counsel.

3. The application for a stay is dismissed.

4. Spar and Shoprite are jointly and severally liable for Massmart's costs in respect of its opposition to the stay application, on a party and party scale, including the costs of two counsel, the one paying the other to be absolved.

Mr Norman Manoim

01 September 2016
DATE

Mr Anton Roskam and Ms Andiswa Ndoni concurring

Case Manager:	Kameel Pancham
For the First Applicant:	JJ Gauntlett SC, L Kuschke (heads of argument only) SC, MJ Engelbrecht instructed by Werksmans Inc.
For the Second Applicant:	DN Unterhalter SC, GD Marriot, J Wilson SC (heads of argument only) instructed by Nortons Inc.

For the Third Applicant:	A Annandale SC, M du Plessis, A Coutsoudis instructed by Garlicke and Bousfield
For the Respondent:	M van der Nest SC, F Snyckers SC, MM Le Roux, N Muvangua instructed by Cliffe Dekker Hofmeyr