competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM021Apr17/VAR178Jan21

In the matter between:

Coca-Cola Beverages SA (Pty) Ltd	**First Applicant**
Coca-Cola Beverages Africa (Pty) Ltd	**Second Applicant**
The Coca-Cola Company	**Third Applicant**
Coca-Cola Fortune (Pty) Ltd	**Fourth Applicant**

And

Competition Commission	**First Respondent**
The Minister of the Department of Trade, Industry and Competition	**Second Respondent**
Food and Allied Workers Union	**Third Respondent**
National Union of Food Beverage Wine Spirits and Allied Workers	**Fourth Respondent**

Panel	: Y Carrim (Presiding Member)
	: A Ndoni (Tribunal Member)
	: F Tregenna (Tribunal Member)
Heard on	: 3 February 2021
Order Issued on	: 4 February 2021
Reasons Issued on	: 3 March 2021

REASONS FOR DECISION

Introduction

[1] This was an urgent variation application brought by Coca-Cola Beverages South Africa (Pty) Ltd ("CCBSA"), Coca-Cola Beverages Africa (Pty) Ltd ("CCBA"), The Coca-Cola Company ("TCCC") and Coca-Cola Fortune (Pty) Ltd ("CCF") to vary certain merger

conditions agreed to by the applicants, the Unions (FAWU[1] and NUFBWSAW[2]) and the Competition Commission ("the Commission") and imposed by this Competition Tribunal ("the Tribunal") in two conditionally approved mergers. CCBSA, CCBA, TCCC and CCF are collectively referred to as the "applicants".

[2] The Tribunal granted the application on 4 February 2021 and the reasons for granting the application are provided below.

Background

[3] The condition pertains to the commitment by CCBSA to increase Broad-Based Black Economic Empowerment (B-BBEE) participation in CCBSA. This condition will hereafter be referred to as the "Equity Ownership Condition" (EOC).

[4] CCBSA is an entity in which CCBA conducts its South African operations. CCBA indirectly controls CCBSA through CCF. CCBA, through Coca-Cola Sabco (Pty) Ltd, is the majority shareholder in CCF, the sole shareholder in CCBSA. CCF's (& in turn CCBSA's) current B-BBEE ownership percentage is approximately 10%.

[5] This variation application has its genesis from two Coca-Cola related transactions which were respectively approved on 10 May 2016[3] ("first merger") and 27 September 2017[4] ("second merger").

[6] In March 2015, the applicants notified the first merger which aimed to consolidate the independent Coca-Cola bottlers in South Africa into one entity (CCBA) and the acquisition by TCCC of certain SABMiller's brands such as Appletiser. Post-merger, SABMiller would control CCBA with a majority shareholding. The first merger was approved subject to conditions that, *inter alia*, CCBSA would implement the EOC through a B-BBEE transaction within 5 years of the approval of this merger (11 May 2021) so as to increase the B-BBEE ownership percentage of CCBSA to 20%.

[1] Food and Allied Workers Union.
[2] National Union of Food Beverage Wine Spirits and Allied Workers.
[3] *CCBA and Various Coca-Cola and Related Bottling Operations* (LM243Mar15).
[4] *The Coca-Cola Company (TCCC) and CCBA* (LM021Apr17).

[7] On 27 September 2017, this Tribunal approved the second merger whereby TCCC acquired SABMiller's majority shareholding in CCBA.[5] The second merger was approved subject to conditions that ensured that the public interest undertakings which were made conditions of the first merger were replicated and preserved in the second merger. Thus, the EOC was carried over to the second merger with some modifications. The modification came about as a result of an agreement between CCBA and the Minister of the Department of Trade, Industry and Competition (the "Minister"), with the approval of this Tribunal, to increase the B-BBEE ownership percentage in CCBSA from the initial target of 20% to approximately 30% by 11 May 2021.

[8] It was this condition that was sought to be varied, in terms of a new agreement concluded with the Minister and the applicants, alternatively for the deadline of 11 May 2021 to be extended to 11 May 2023.

[9] In the spirit of compliance with the EOC, the applicants commenced engagement processes with the Minister which culminated in the proposed variation and additional set of public interest commitments that would preserve the public interest objectives sought after in the first and second mergers. These were agreed to between the applicants and the Minister.

[10] The Commission and the unions are in support of the proposed variation.

Proposed variation

[11] In terms of the variation proposal, CCBSA would increase its B-BBEE shareholding held by employees through an Employee Share Ownership Plan (ESOP), namely Ikageng, rather than to spread black ownership through third party investors.

[12] This will be done by issuing a further 10% shareholding to the existing ESOP or a new ESOP that will benefit existing and future employees. Whether shares will be issued to an existing ESOP or a new one will depend on the outcome of ongoing discussions with the Minister and the BEE Commissioner.

[13] In terms of the variation proposal, CCBSA's B-BBEE ownership percentage would increase to 20% rather than 30% as stipulated under the existing EOC. The proposed

[5] This was as result of an option exercised by TCCC.

variation will offer certain benefits to employees such as increasing the level of ownership by employees in CCBSA, enabling the ESOP to partake in the governance of CCBSA through appointing directors in CCF and to grant the ESOP powers to block special resolutions.

[14] The additional commitments seek to strengthen the positive public interest impact of the original mergers. In terms of the new commitments, CCBSA will make a substantial investment over a period of time to localisation initiatives.[6] Further, CCBSA will also collaborate with its sugar suppliers to increase the volume of sugar procured from black farmers to a specified percentage of its total sugar procurement.[7]

Good cause shown

[15] Both sets of conditions from the original mergers make provision for the variation of the conditions upon 'good cause' shown. Clause 13.1 (clause 6.1 of the second merger conditions) of the Conditions states as follows:

> "*Should the Merging parties wish to amend the conditions, CCBA shall be entitled, upon good cause, to make a proposal to the Competition Commission to consent to the waiver, relaxation, modification and/or substitution of one or more of the Conditions…*"

[16] Good cause in this context will be shown where the circumstances giving rise to the merging parties' request for a variation could not have been reasonably foreseen by them at the time of the Tribunal's approval of the merger and which cannot be reasonably mitigated.

[17] In *Ferro*[8] this Tribunal reiterated the high court approach that exceptional circumstances are "*unusual and unexpected circumstances*", which must be determined on the facts of each case.

[18] The applicants approached the Tribunal for a variation of the EOC on the basis that the circumstances caused by the Covid-19 pandemic had compromised their ability to implement the transactions required for them comply with the EOC.

[6] The amount to be invested and the duration of said investment were claimed as confidential.
[7] The exact percentage figure of the sugar procurement commitment was claimed as confidential.
[8] *Ferro South Africa (Pty) Ltd and Others v Atland Chemicals CC t/a Atlin Chemicals* Case no: LM179Jan14/VAR152Nov16.

[19] This was the second time within a space of a year that the applicants applied to this Tribunal to vary certain conditions because of their inability to comply with the conditions due to Covid-19.

[20] On 8 May 2020, the Tribunal issued an order extending the deadline for the implementation of an ESOP (Ikageng). This was also one of the conditions of the abovementioned mergers and the deadline contemplated for that was 10 May 2020. The applicants had sought an extension of this to 24 July 2020. The extension was granted due to the limited availability of government and administrative services (essential for registering Trust documents) as a result of the Covid-19 pandemic. This was because neither the CIPC, nor the Master's office was able to process and register the documents required for the launch of the ESOP within the stipulated compliance period. The ESOP (Ikageng) was eventually launched on 26 May 2020 and it currently holds shares in CCF. Therefore, in partial fulfilment of the EOC the applicants established Ikageng which holds 5% in CCBSA through CCF.

[21] Following approval of the second merger, the applicants sought to implement an empowerment transaction that would contribute to complying with the EOC. TCCC sought to reduce its controlling position by selling a controlling interest in CCBA to an appropriate investor ("Attempted CCBA Transaction"). At the time TCCC was of the view that the potential new controlling shareholder would be in place ahead of the B-BBEE transaction so that it would be able to participate in selecting its long-term partner in the running of CCBSA business.

[22] In parallel (and to cater for the eventuality that the Attempted CCBA Transaction might not be completed), CCBA contemplated strategic investor transactions approximating an additional 20% which were earmarked to meet the total 30% required to fulfil the EOC (the "B-BBEE Transaction"). It was intended that the B-BBEE Transaction would increase the B-BBEE shareholding in CCBSA by approximately 20% to reach the targeted 30%.

[23] Ultimately, the Attempted CCBA Transaction did not come into fruition for various reasons, namely, the potential investors did not make binding offers and due to failure to reach an agreement with potential investors on the structure and terms of the transaction. Consequently, the negotiations were terminated in May 2019.

[24] Following the termination of the Attempted CCBA Transaction, CCBSA refocused its efforts on the B-BBEE Transaction whereby one or more B-BBEE shareholders would acquire a substantial shareholding (of up to approximately 20%) in CCF by 11 May 2021. Between May 2019 and January 2021 CCBA underwent an extensive investor process in which potential B-BBEE investors were identified and engaged in negotiation processes with the applicants. However, the B-BBEE Transaction has become commercially unfeasible because prospective investors' ability to raise equity and debt financing had been compromised by the Covid-19 pandemic.

[25] This was exacerbated by the CCBSA business being adversely affected by the restrictions introduced in the declaration of a national state of disaster to contain the pandemic. Investor confidence declined as prospective investors required more certainty regarding the performance of CCBSA in the near future.

[26] Nobody could have anticipated the Covid-19 pandemic and the havoc it has wreaked on the global economy and human species. This would certainly constitute "unusual and exceptional" circumstances that cannot be reasonably mitigated.

[27] The Covid-19 pandemic has also caused great economic uncertainty for businesses such as CCBSA in South Africa.

[28] Apart from the drastic economic decline caused by restrictions imposed on the movement of people, businesses and the sale of certain goods and services, the projections for economic recovery also remain uncertain for as long as the pandemic prevails.

[29] For this reason, an extension of the deadline to 11 May 2023, might still not be sufficient time for CCBSA to comply with the EOC as it stands.

[30] The proposed variation on the other hand seeks to achieve three critical public interest aspects of the mergers in a shorter time period as follows:

a. A greater spread of ownership contemplated in section 12A(3)(e) would be achieved through the creation of employee participation in equity and governance of CCBSA;
b. Black farmers would be provided an opportunity to participate or expand in the sector as contemplated in s12A(3)(c); and
c. Local production in the sugar and food beverages sectors would be promoted as contemplated in s12A(3)(a).

[31] In our view, the parties had demonstrated that there was sufficient good cause to support the variation.

Urgency

[32] The terms agreed with the Minister require that CCBSA issue the additional shares by 31 March 2021 if there is no need to incorporate a new ESOP. To that effect, CCBSA must lodge the requisite ESOP Trust Deed with the High Court by 18 February 2021 to allow a reasonable period of 6 weeks for the Master to register such Trust Deed and be in a position to issue additional shares to the ESOP by 31 March 2021. It is for this reason that we considered this application on an expedited basis.

Conclusion

[33] The Tribunal was satisfied that there is good cause shown to vary the EOC due to the fact that the variation would result in a greater spread of ownership in CCBSA, investment in local production and promotion of black sugar farmers. Accordingly, we granted the variation order on 4 February 2021.

Signed by:Yasmin Tayob Carrim
Signed at:2021-03-03 14:24:22 +02:00
Reason:I approve this document

Yasmin Tayob Carrim

Ms. Yasmin Carrim

3 March 2021
Date

Ms. Andiswa Ndoni and Prof. Fiona Tregenna concurring.

Tribunal Case Managers:	Mr Kgothatso Kgobe Ms Busisiwe Masina
For the Applicants:	Adv. J Wilson SC instructed by Daryl Dingley, Clare-Alice Vertue and Kgomotso Mmutle of Webber Wentzel
For the Commission:	Mr Thabelo Masithulela and Ms Maya Swart