



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: URG164Mar20

In the matter between:

**Coca-Cola Beverages South Africa (Pty) Ltd** **Applicant**

And

**Anhauser-Busch Inbev SA/NV** **1<sup>st</sup> Respondent**

**South African Breweries (Pty) Ltd** **2<sup>nd</sup> Respondent**

**The Chairperson of the SAB Zenzele Employee Trust Allocation Committee** **3<sup>rd</sup> Respondent**

**The Competition Commission of South Africa** **4<sup>th</sup> Respondent**

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Panel : Y Carrim (Presiding Member)  
: M Mazwai (Tribunal Member)  
: A Ndoni (Tribunal Member)  
Heard on : 20 March 2020  
Order Issued on : 30 March 2020  
Reasons Issued on : 31 March 2021

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### REASONS FOR DECISION

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#### Introduction

1. In this application Coca-Cola Beverages South Africa (Pty) Ltd (“CCBSA”) sought urgent interim relief against Anhauser-Busch Inbev SA/NV (“AB Inbev”), South African Breweries (Pty) Ltd (“SAB”) and the Chairperson of the SAB Zenzele Employee Trust Allocation Committee, hereafter referred to as the respondents.
2. The interim relief was requested while the Competition Commission (“Commission”) was investigating an alleged breach of the merger conditions imposed by the Tribunal in the

merger between The Coca Cola Company (TCCC) and Coca-Cola Beverages Africa (Pty) Ltd.

3. On 27 September 2017, the Tribunal conditionally approved the acquisition of control over Coca-Cola Beverages Africa (Pty) Ltd (“CCBA”) and its subsidiaries by TCCC (“the merger”).<sup>1</sup>
4. The merger involved TCCC acquiring the SAB Miller shareholding in CCBA.
5. At that time CCBA was part of the SABMiller group, under the control of AB InBev. The employees of CCBA were therefore beneficiaries of the SAB Zenzele Employee Trust, interchangeably referred to as the Zenzele Scheme. The Zenzele Scheme is SABMiller’s broad based black economic empowerment program (“B-BBEE”) that had been established in 2010.
6. The application was brought by CCBSA on behalf of its employees who were beneficiaries of the Zenzele Scheme and were transferred as a result of the merger but whose participation in the Zenzele Scheme was preserved by a condition to the merger (“former SABMiller employees”).
7. The application was triggered by a decision of the Chairperson of the Allocation Committee to allocate additional benefits to the beneficiaries of the Zenzele Scheme, to the exclusion of the former SABMiller employees.
8. In essence the applicant sought an order that the respondents be interdicted from disbursing benefits to beneficiaries of the Zenzele Scheme pending the outcome of the Commission’s investigation, alternatively that an amount be set aside or guaranteed pending the Commission’s investigation of the alleged breach.
9. The Tribunal, after hearing the parties granted an order on 30 March 2020 as follows:
  - 9.1. The second respondent, as administrator of the Zenzele Scheme, and the third respondent, as Chairperson of the Zenzele Scheme Allocation Committee, (collectively the Scheme respondents) are required to hold in abeyance and not distribute [R52 million], from the 2019 top-up benefits for the Former SABMiller Employees pending Final Determination of the Commission Investigation.

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<sup>1</sup> *The Coca-Cola Company (TCCC) and CCBA (LM021Apr17)*.

9.2. In the event that the Final Determination is a finding of breach of Merger condition 4.6, the Scheme respondents, with the assistance of the applicant, must compile a list of the Former SABMiller Employees who would qualify for the 2019 top-up benefits.

9.3. There is no order as to costs.

10. Our reasons follow.

## **Background**

11. During the merger proceedings between TCCC and CCBA, concerns were raised by the Food and Allied Workers Union (“FAWU”) that its members employed at CCBA and who would no longer be part of the SABMiller group because of the merger stood to lose their benefits under the Zenzele Trust.

12. In response to this concern SABMiller provided undertakings to FAWU and the employees of CCBA at the time that there would be no adverse impact on Zenzele Scheme beneficiaries who, because of the merger, would move across to CCBA.

13. The undertakings were recorded as follows in clause 4.6. of the merger conditions (“the merger condition”):<sup>2</sup>

*“Former SABMiller employees shall not lose any benefits of the Zenzele Scheme by virtue of the Proposed Transaction. In respect of participants that do not yet have fully vested rights, the same vesting profile will apply as if CCBA was still part of the SABMiller group.”*

14. The Zenzele Scheme was set to mature on 31 March 2020. Upon the unwinding of the Trust the scheme beneficiaries would be entitled to participate in a new scheme that SAB intended to implement. SAB planned to launch its new empowerment transaction (“the Zenzele Kabili Scheme”) through the newly formed SAB Zenzele Kabili Holdings (RF) Limited. The Zenzele Kabili Scheme was to be listed on the B-BBEE segment of the main board of the JSE which meant that retail shareholders and beneficiaries of the Zenzele Scheme who participated in the new empowerment transaction would be free to trade their Zenzele Kabili shares on the JSE from the planned date of listing, i.e. 15 April 2020.<sup>3</sup>

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<sup>2</sup> See page 19 of the record.

<sup>3</sup> See para 15.3, page 108 of the Record. The planned listing of the Zenzele Kabili Scheme did not ultimately take place in April 2020 due to the Covid-19 pandemic.

15. In late 2019, and in anticipation of the impending maturation of the Zenzele Scheme, the Chairperson of the Allocation Committee established under the Zenzele Trust deed (“Chairperson”) informed Zenzele beneficiaries that the remaining unallocated participation rights held by the trust would be allocated to beneficiaries on an equal basis as a top-up allocation to their existing benefits. However, the former SABMiller employees who had moved over to CCBSA were excluded from this top-up allocation.
16. CCBSA, upon becoming aware of this notification, contacted the respondents in December 2019 and inquired about the exclusion of former SABMiller employees from the top-up benefit. On CCBSA’s understanding these employees qualified for the top-up allocation in accordance with the merger conditions.
17. Attempts by CCBSA to resolve this issue amicably with the respondents failed and in January 2020 CCBSA informed the Commission of an alleged breach of the merger condition.

#### **Grounds for interim relief**

18. This was an application for interim relief pending an alleged breach of merger conditions. It is well established law that, in the context of mergers, “*the duty given to the Tribunal to adjudicate does not exclude the duty to grant an interdict*”.<sup>4</sup> The Tribunal is also entitled to impose any ruling or order necessary or incidental to the performance of its functions under the Act.<sup>5</sup> In order to succeed the applicant must meet the following requirements:

[29.1] There must be a *prima facie* clear right on the part of the applicant;

[29.2] There must be an injury committed or reasonably perceived;

[29.3] The balance of convenience must favour the granting of interim relief; and

[29.4] There must be no other satisfactory remedy that is available to the applicant.

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<sup>4</sup> *Gold Fields Limited v Harmony Gold Mining Company Limited and Another* (44/CAC/Nov04).

<sup>5</sup> See *Competition Commission v Hosken Consolidated Investment Holdings and Another* (CCT296/17).

## **Prima Facie Right**

19. As indicated earlier, during the merger hearing in 2017 FAWU raised a concern that former SABMiller employees would, due to the merger, be prejudiced through the exit from SABMiller and the Zenzele Scheme and therefore asked the Tribunal that the scheme benefits continue to accrue to the former SABMiller employees post the merger. The concern was acknowledged by the merging parties who provided an undertaking as reflected in clause 4.6 of the merger conditions and reproduced here:<sup>6</sup>

*“Former SABMiller employees shall not lose any benefits of the Zenzele scheme by virtue of the Proposed Transaction. In respect of participants that do not yet have fully vested rights, the same vesting profile will apply as if CCBA was still part of the SABMiller group.”*

20. The respondents interpret the condition narrowly and understood FAWU, at the time, to be concerned about the loss or forfeiture of beneficiaries' existing rights, and not about entitlements to any future allocation of rights. In their view, because the former employees were invited to participate in the new Zenzele Kabili Scheme there was no breach of clause 4.6 and the applicant had failed to establish a *prima facie* right.

21. However, on an ordinary reading of the merger condition, no such distinction is made between existing rights and future rights. On the contrary the undertaking in respect of *“participants that do not yet have fully vested rights, the same vesting profile will apply”* suggests entitlement in the future that will take place *“as if CCBA was still part of the SABMiller group”*. An undertaking of this nature – namely that the same vesting profile will apply - suggests at the very least that the duration of the employees' employment with CCBA post-merger would be taken into account because for this purpose CCBA would still be treated as being part of SABMiller.

22. Clause 4.6 creates a legitimate expectation that the former employees, for purposes of the Zenzele Scheme, would continue to be treated as if they remained employed in the SABMiller/ABInBev group. Any future benefits should therefore also accrue to these former employees argues CCBA.

23. Moreover, in a letter dated 21 August 2017 to the Commission, the merging parties confirmed that the former employees would not lose any benefits of the Zenzele Scheme by virtue of the second CCBA transaction and confirmed that CCBSA employees will have

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<sup>6</sup> See page 19 of the record.

the opportunity to benefit in a new ESOP arrangement to be completed within a period of 4 years from the approval date of the first CCBA transaction.<sup>7</sup>

24. The opportunity to participate in a new ESOP arrangement given to the former SABMiller employees (now CCBSA employees) clearly contemplated a future benefit and not merely an existing benefit. Thus, there is no basis for the respondents to now argue that the benefits should somehow only be limited to existing benefits.

25. In the Tribunal's view, the applicant had established a *prima facie* right that the condition imposed an obligation to secure the future rights of the former SABMiller employees.

26. A final argument put up by the respondents as to why clause 4.6 should be interpreted to apply only to existing rights of employees at the time was that it would be inconsistent with the terms of the Trust Deed and hence, unlawful to afford future rights to employees that had been transferred to a new employer. The respondents referred to paragraph 13.3.2 of the Trust Deed which states that if a beneficiary would transfer to a new employer as a result of the transfer of a SAB or AB InBev business a beneficiary retains participation rights according to only the years of service.<sup>8</sup> Therefore, a beneficiary may lose his/her participation rights pursuant to the sale of business.

27. However, the provisions of the Trust Deed must be read together with the merger condition. The merger condition provides that the former SABMiller employees be treated as if they were still part of the SABMiller group and accordingly had not been transferred. Hence as a matter of law they do not fall within the ambit of clause 13.3.2 of the Trust Deed.

### **Irreparable Harm and Balance of Convenience**

28. We do not find it necessary to deal with the issue of balance of convenience or irreparable harm in any detail here because the consequence of not granting a remedy to the applicants was obvious the Trust would be wound up and the scheme benefits would be dissipated by 31 March 2020 to the prejudice of the former SABMiller employees.

29. ABInBev estimated that an amount of approximately **[R52 million]** would be required to be paid to the former SABMiller employees and its records reflect that approximately 2229 employees would receive payments of approximately **[R23 000]** on this basis.

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<sup>7</sup> Letter dated 17 August 2017 at page 85 of the Record.

<sup>8</sup> See page 112 of the Record.

## Conclusion

30. After considering all the submissions made by the applicant and the respondents the Tribunal concluded that the best remedy would be to require the respondents to set aside and not distribute the amount that was possibly owed to the former SABMiller employees until such time as the Commission had concluded its investigation. There would be very little, if any prejudice to other beneficiaries of the Trust if the money was kept in abeyance pending the outcome of the Commission's investigation.
31. As a final remark, the respondents informed the Tribunal that a decision was made to postpone the implementation of the Zenzele Kabili Scheme given the current circumstances in South Africa due to the Covid-19 pandemic. The timeline for launching the Zenzele Kabili Scheme would therefore be suspended and this will give them time to contact beneficiaries for the necessary approval concerning the Top-up benefit as well as the necessary amendment of the Trust Deed.

## Preliminary objections by the respondent

32. Finally, for the sake of completeness we deal with the preliminary objections that had been raised by the respondents to the applications namely: the application lacked urgency, non-joinder of the Trustees of the Trust and locus standi of CCBSA.<sup>9</sup>
33. In our view all three objections were without merit, and deal with each of these in turn.
34. The matter of urgency was obvious, the Zenzele Scheme was to be wound up on 31 March 2020 and the Commission had not yet completed its investigation in the complaint lodged by CCBSA of alleged breach of the merger condition. In any event CCBSA had demonstrated that it had attempted to resolve this matter amicably since late 2019 and as late as 17 January 2020.<sup>10</sup>
35. As to *locus standi*, CCBSA as a party to the merger has a material interest in ensuring compliance with the merger condition. As employer of the former SABMiller employees, it has a material interest in protecting the rights of these employees pursuant to the merger condition. In our view this is sufficient interest in the matter to establish *locus standi*.

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<sup>9</sup> See Answering Affidavit

<sup>10</sup> See Founding Affidavit

36. Regarding the non-joinder of the trustees of the Trust, it was clear that the Trustees were not responsible for the administration of the Trust or for the decision to award the top-up allocation. In accordance with clause 21(1) of the Trust Deed, the trustees had appointed SAB as the Administrator to administer the Trust. The Trustees are also not involved in the allocation of participation rights. In terms of the Trust Deed, the Allocation Committee is established by SAB to allocate participation rights to beneficiaries. The Allocation Committee, through its Chairperson, is therefore the appropriate party against whom relief must be sought. The key functions with which this application is concerned occur under the control of SABMiller and/or ABInBev for its/their benefit through the Allocation Committee. Therefore, the relief sought was to regulate the actions of the Allocation Committee and SABMiller (under the control of AB InBev), not the trustees.

37. As stated in clause 11.1 of the Amended and Restated Trust Deed of the Share Scheme, the Allocation Committee is required to furnish SAB, as administrator, with a list of qualifying employees.<sup>11</sup> The responsibility to compile such a list is therefore the responsibility of the Allocation Committee not that of the trustees. The Chairperson's letter to beneficiaries confirms as much, when it states: "*We are pleased to inform you that SAB Zenzele Allocations Committee has resolved that all qualifying SAB Zenzele beneficiaries...*"<sup>12</sup>

38. The preliminary objections were accordingly all found to lack any merit.

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**Ms Yasmin Carrim**

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**31 March 2021**  
**Date**

**Ms Mondo Mazwai and Ms Andiswa Ndoni concurring.**

Tribunal Case Managers : Ms Busisiwe Masina and Ms Rietsie Badenhorst

For the Applicants : Adv. MJ Engelbrecht SC, instructed by Cliffe Dekker Hofmeyr

For the First, Second and Third Respondents : Adv. V Maleka SC and P Ngcongco, instructed by Bowmans

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<sup>11</sup> See page 380 of the Record.

<sup>12</sup> See page 77 of the Record.



For the Competition  
Commission

: Ms. Maya Swart