COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM211Jan16

In the matter between:

Anheuser- Busch InBev SA/NV	Primary Acquiring Firm
and	
SABMiller plc	Primary Target Firm

Panel	: Norman Manoim (Presiding Member) : Andiswa Ndoni (Tribunal Member) : Imraan Valodia (Tribunal Member)
Heard on	: 22, 23 and 24 June 2016
Order Issued on	: 30 June 2016
Reasons Issued on	: 4 August 2016

Non-Confidential Reasons for Decision

Conditional Approval

[1] This merger entails the largest beer company in the world buying its main global competitor and second largest beer producer on a global scale. It is a transaction of extravagant ambition and complexity. The acquiring firm, Belgium incorporated Anheuser-Busch InBev SA/NV ("AB InBev"), is paying £71 billion to acquire the target firm, SAB Miller plc ("SABMiller"), one of South Africa's iconic manufacturing firms. SABMiller was established in 1895 and now operates in over 75 countries. For the most part of its corporate history SABMiller has been the acquirer, not the acquired. Despite the fact that pre-

merger the majority of its shareholders were foreign, and it has had its primary listing in London since 1999, most South Africans still see the company as quintessentially South African; perhaps a testimony to the success of its marketing which appeals to its customers sense of patriotism as much as their sense of taste.

[2] Unsurprisingly, given this historic perception of the company, and the scale of the merger, the case has raised a wide range of concerns with a variety of constituencies. Perhaps more surprising is the fact that most of these issues have easily been resolved without the need for a lengthy contested merger process. There are several reasons to account for this. No significant overlap exists between the firms' operations in this country. AB InBev does not manufacture in South Africa and its market share of the products it distributes here is miniscule. Second, SABMiller's position of dominance before the merger is so extensive that it is difficult to conceive how even the added weight of AB InBev could make this position more compelling than it already is. Third, AB InBev adopted a pragmatic approach to those with concerns about the merger and voluntarily agreed to a wide range of significant measures to appease its critics. Fourth, the merger was notified in several other jurisdictions.[1] In order to get the deal through in these jurisdictions where overlaps were more significant than here, the merging parties agreed to divest a number of brands, some of which formed part of SABMiller's local repertoire which it will now have to give up. The post-merger SABMiller will be a slimmer version of the present.

PART A: PROCESS HISTORY

[3] The merger was announced in the last quarter of 2015, and after a period of negotiations, the takeover offer was sufficiently improved for the SABMiller board to recommend acceptance to its shareholders. It was notified to the Competition Commission ("Commission") on the 14 December 2015. The

[1] All other jurisdictions have either approved or conditionally approved the merger.

Commission's investigation process lasted from that date until the 31 May 2016, when it filed its recommendation.[2] The Tribunal approved this merger subject to conditions on 30 June 2016.

[4] During the investigation process the merging parties engaged in negotiations with three government departments.[3] The result was that they gave a series of undertakings that were then set out in a contract with these departments ("the Agreement") that preceded the recommendation from the Commission. As the merging firms had agreed to be bound by these undertakings they found their way into the Commission's draft recommended conditions ("Commission's conditions") although modified in some form.[4] The major difference between the Agreement and the Commission's conditions is that the Commission focussed its attention on the cider market and proposed that SABMiller divest itself of its stake in Distell.

[5] The Tribunal held a prehearing on the 7 June 2016 where all parties which had expressed an interest in the merger were invited to attend. At that pre-hearing, the merging parties followed a pragmatic approach and agreed not to oppose the participation in the hearing of any of the parties who expressed an interest. All the interested parties indicated that they could make representations by way of submissions as opposed to requiring discovery, leading witnesses etc. As a result the Tribunal was able to draw up a time-table to hear the matter in three days. All interested parties were directed to give written submissions in advance of the hearing to motivate their suggested changes to the

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[2] As an international merger this transaction has been notified in a number of jurisdictions whose decisions have impacted on the effects of the transaction in South Africa. For instance divestitures undertaken to satisfy European Union and United States authorities will lead to certain brands in the SABMiller portfolio and currently distributed in SA going to rivals. These brands as currently understood are Miller, Grolsch, Pilsner Urquell and Peroni.

[3] These government departments were the Economic Development Department, the Department of Trade and Industry and the Department of Agriculture, Forestry and Fisheries. The Agreement is dated 3 May 2016.

[4] See the Commission recommendation at paragraph 476 page 145 which summarises the commitments made to government and afterwards remarks *"... some of which will feature on the Commission's conditions."*

Commission's conditions and to indicate by way of marked-up edits, what those changes were. This they duly did.[5]

[6] The hearing ran as arranged from the 22 June to the 24 June 2016. During the course of the hearing we heard from the Commission, the merging parties and the following parties who made submissions:

6.1 The Minister of Economic Development ("the Minister");

6.2 Heineken South Africa ("Heineken");

6.3 Distell Limited ("Distell");

6.4 Food and Allied Workers Union ("FAWU") ;

6.5 Agency for New Agenda and Black Business Forum represented by Mr Tshediso Mokhoanatse;

6.6 Petition from SAB former Employees ("SAB former Employees") represented by Mr John Radasi;7

6.7 Tavern Owners Association represented by Mr Boyce Mathibela ("Tavern Owners");

6.8 SA SMME Forum represented by Mr Tebogo Khaas; and

6.9 GrainSA represented by Mr Jannie de Villiers.

[7] When we approved the merger on the 30 June 2016 it was made subject to conditions. For convenience a copy of that order and the non-confidential version of the conditions is attached hereto marked Annexure A.

Competition Analysis

[8] The Commission has done a most competent and thorough job in analysing this merger. The public version of its report is available for all to read.[6] We need not burden these reasons by rehashing them. Instead we summarise them only insofar as they are relevant to matters which appear in the conditions. Part B

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[5] One participant withdrew after having received a letter of comfort from the merging parties' legal representatives on an issue that it appears was not merger specific.

[6] The report can be found on the Tribunal's website; http://www.comptrib.co.za/publications/case-documents/anheuser-busch-inbev-sa-nv-and-sabmiller-plc/

of our decision deals with the main issues of the merger being the horizontal overlap, vertical issues and public interest concerns. Where these issues require more elaboration we deal with them in Part C of this decision, where we discuss the debate about some of the conditions that arose during the hearing.

[9] Both firms are vertically integrated manufacturers of beverages operating in several international markets. Our jurisdiction confines us to examining the effect of this transaction on the South African market.

PART B: THE MAIN ISSUES

Horizontal overlap

[10] There is an overlap in South Africa in respect of clear beer and a potential overlap in respect of cider.[7] In its report the Commission took the view that the relevant markets were for clear beer and flavoured alcoholic beverages ("FAB"). This is because it considered cider to be part of the FAB market.

[11] No party seriously disputed this approach to the market definition which also accords with the analysis of these markets adopted in recent cases.[8] We have no reason to differ with this approach in this matter and we will accept these market definitions although they are broadly defined and contain products that are differentiated.

Beer overlap

[12] The overlap in beer in the SA market is slight. At present AB InBev only distributes, but does not manufacture beer products in SA. It utilises the services of a firm called DGB Proprietary Limited to do so. Despite being a beer giant in many international markets it is a minnow in SA. Its market share at the

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[7] The term clear beer is used to differentiate it from sorghum beer.

[8] Competition Commission and SABMiller and others [Competition Tribunal Case no 134/CR/Dec07(008482) 24 March 2014] para 56; Diego South Africa (Pty) Ltd, Heineken International BV, Namibian Breweries and Brandhouse Beverages (Pty) Ltd, DHN Drinks and Sedibeng Breweries [Competition Tribunal case LM090Aug15 25 November 2015] para 21.

time of the merger is less than 0.1%.[9] SABMiller's is close to 85%-90% depending on which surveys are relied on.[10] However, the merger will not lead to an increase in the merged firm's market share in South Africa. This is because in terms of undertakings given to other competition authorities, most notably in Europe and the United States, the merging parties have undertaken to divest certain of SABMiller's brands. These are Miller, Grolsch, Pilsner Urquell and Peroni Brands which at present collectively account for a market share of 1.4% in South Africa.[11] The implication of this, as the merging parties counsel pointed out, was that the merger meant that the merged firm was gaining a market share one fourteenth the size of the market share it would be losing in SA. In short, as calculated on present market shares, the merger, despite being horizontal, would lead to a dilution not an increment in market shares.

[13] Heineken, the merging parties' largest local competitor as well as being the third largest internationally, disputed the significance of this arithmetic.[12] The merged firm it argued, now held over 200 brands. The argument seemed to be that with all these brands in its arsenal, the merged firm's market share must, by inference, increase. However, this is by no means inevitable. SABMiller already has, pre-merger, a significant number of brands as a result of past acquisitions. Yet despite this fact the market shares of its internationally acquired brands are modest when compared to the success of its domestic brands. Moreover, despite being part of the current SABMiller portfolio, the soon to be divested brands did not fare particularly well in the years they have been in the South African market an inference drawn from the facts that they have less market share than those of Heineken.

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[9] Page 648 of Trial Bundle. The Trial Bundle comprising two level arch files of 922 pages should be distinguished from the voluminous record the Commission filed alongside its recommendations which will be referred to as the Trial Record in later footnotes.
[10] Table 5 of the Commission's recommendation found at page 57 of the recommendation and page 57 of the Trial Bundle.
[11] Page 648 of the Trial Bundle.
[12] When we refer to Heineken we refer to the joint venture between Heineken International BV and Namibia Breweries. The submission was made on behalf of the JV. See Trial bundle page 279 paragraph 3.

[14] There is thus no proven relationship between the number of international brands a firm may have in its portfolio and its ability to wrest market share for them in a domestic market, where they are not widely known.

[15] The Commission did consider the effect of AB InBev as a potential competitor of SABMiller in the domestic market absent the merger. The document that gave rise to this suspicion is an AB InBev marketing plan dated May 2015.[13] The document proposes AB InBev could increase its SA market share from [redacted] to [redacted] by 2020.[14] This document appears to have been prepared prior to contemplation of the merger. However we have no context for this document. Nor do we know at what level of the company was it considered or whether the recommendation received serious consideration at the time. Admittedly it is described as a "dream".[15] Thus while a possible counter-factual[16] to this merger is more aggressive entry from AB InBev, presumably driven by using some of its stronger global brands already present in the local market, it is by no means clear that this was either probable, nor if attempted, likely to be as successful as the optimistic writer of the report anticipated. If there had been competition from AB InBev going forward, it is likely to have been at the premium end of the market. Since the bulk of SABMiller's sales are at what is called by AB InBev the 'core market' such entry even if successful would not have dented the core.

[16] Considering that the role of potential competition is always difficult in competition cases. There is no evidence that SABMiller pre-merger made pricing decisions to deter possible AB InBev entry. Presumably the presence of the much stronger number two in the market, Heineken, with an estimated between 10% to 15% market share, is more its current concern.[17]

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[13] See Trial Bundle File 4 pages 2811- 2851. Internal AB InBev document entitled [redacted]

[14] Ibid page 2844.

[15] The Commission refers to this document which suggested that the potential was there, but does not analyse it further.

[16] By counter-factual we mean what the markets would have looked like had the merger not taken place.

[17] See Trial Record Bundle B File 1 page 148.

[17] The proper evaluation of the counter-factual requires a comparison not with the current market, but that which exists after the merger is consummated. Since post-merger the merged firm has to divest of brands currently in the market with a share of 1.5% and it gains a market share of 0.1%, the probabilities suggest the firm emerges, post-merger with a diminished, rather than enhanced market presence.[18]

[18] In order to decide on whether the merger would likely lead to an anticompetitive effect we have to choose between these two sources of evidence. One source of evidence is the divested and acquired market shares.[19] The other, conflicting source, is based on a strategic plan's medium term projection of what market share might be gained. While the potential competition scenario might posit a more competitive market it is premised on untested assumptions, about which we can be highly sceptical. By contrast, the evidence of the net market shares post-merger, are based on much more solid foundations being the actual market shares as they are at present. Thus the potential competition scenario posed by this counter-factual is insufficiently probative.

[19] We thus conclude that in the clear beer market the merger is unlikely to lead to an increase in the merged firms market share- a diminution seems more likely – and that even if it did, the effect would be so slight as to not alter the market power it already enjoys, pre-merger.

Cider

[20] Both firms manufacture cider. SABMiller is pre-merger involved in the FAB market directly through its wholly owned Redds and Brutal Fruit cider brands and indirectly, through its shareholding in Distell, which is the largest player in the local FAB market, with its Savannah and Hunters Dry cider brands, with a

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[18] See footnotes 9 and 11

[19] Based on present market shares.

market share between 50%- 55%.[20] However, post-merger, in terms of the divestment condition, SABMiller will no longer have any economic interest in Distell, so its remaining interest in FABs will be through its wholly owned brands.[21] With these brands, SAB Miller is currently, the second largest producer in the FAB market with a share between 20%- 25%.[22] However AB InBev is also a producer of ciders and its Stella Artois Cider brand is the largest cider brand in the world, although it is currently not present in the local market. If any AB InBev cider brands enter the local market then post-merger, the cider market will, if anything, be more competitive than it is at present; at worst if it does not enter the market still has to be more competitive with the divestiture from Distell.

[21] The merger thus does not lead to a substantial prevention or lessening of competition in respect of the FAB market of which cider is an important constituent.

[22] The divestment may also bring about renewed competition in the liquor sector. What is now the SABMiller shareholding in Distell came about through an interesting history that precedes the formation of what is now known as Distell. It was presaged by a liquor war between the Rembrandt Group (later to become a Distell shareholder) and the then South African Breweries ("SAB") in the late 1970's when the former, a producer of wine and spirits through its subsidiaries, entered the beer market though the acquisition of another beer company owned by entrepreneur Louis Luyt. A few years later SAB entered the wine and spirits market, one crucial to the Rembrandt interests. The then National Party stepped in as peacemaker. The solution was that SAB bought out Rembrandt's beer interests and stayed out of wine, getting in return a share in the then Distillers and SFW companies, both predecessors of the present Distell, which

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[20] Table 6 of the Commission's recommendation found at page 59 of their report and page 59 of the Trial Bundle.
[21] The divestment condition is contained in clause 4.
[22] Ibid.

is the product of a merger between them.[23] Our predecessor, the Competition Board disapproved of this deal, but as it had only recommendatory, not binding power, its advice was not followed by the politicians and the deal was implemented. The implications of that arrangement was that neither firm had the incentive to cross into the others territory. Whilst SABMiller does compete in the FAB market, with its cider offering outside of Distell, the question is whether it does so with the same vigour as it does in the beer market. At the same time Distell has stayed clear of the beer market. The divestiture potentially changes this scenario. Freed of SABMiller as a shareholder Distell might prove an attractive partner for another international beer company – while it's unlikely to develop its own brand, its distribution network will be attractive to another brand holder.[24] Similarly the merged firm divorced from Distell may be more ambitious about increasing its cider presence given the strength of AB InBev in this market internationally. Furthermore according to the Distell submission the cider market has been growing here at a greater rate than beer and this trend is predicted to continue.[25] The merged firm may well find cider an attractive prospect and use its international brands to expand more aggressively in this market.

[23] Whether this will happen remains to be seen, but the divestiture makes this prospect more likely than if the current status quo had continued.[26]

[24] Conditions which contain certain measures proposed by Distell that relate to cider specifically will be discussed below.

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[23] This merger was approved under the current Act in 2003. For more on this history see *International Directory of Company Histories,* Vol.59. St. James Press, 2004.
[24] Distell submission Trial Bundle page 265 paragraph 28.1.2
[25] Distell submission Trial Bundle page 255-6.
[26] The public version of the conditions is sufficient to evaluate competition concerns, the confidential version only redacts information sensitive to the parties involved.

Vertical issues

[25] Prior to the merger, SABMiller's core beer manufacturing business is vertically integrated; both backward into the supply of key inputs and forwards into the supply chain.

[26] This vertical integration impacts significantly on the industry's supply chain given the size and scale of SABMiller's procurements. Likewise, AB InBev is a significantly integrated firm internationally. It will post-merger be in a position to switch the supply of certain inputs produced locally for SABMiller, to foreign suppliers. This is because with their combined buying power and AB InBev's extensive procurement network, imports of inputs could be obtained more cheaply than SABMiller could pre-merger. Thus there is concern that the merger could lead to import substitution at the expense of local industry. Given the scale at which the merged firm can purchase inputs from local industry its capacity to foster de-industrialisation by changing supply choices is post-merger a real possibility. A second and paradoxically contradictory concern is that the merged firm uses its buyer power to source all available inputs from local industry to serve its international operations and thus force local competitors to source inputs from more expensive suppliers. The conditions proposed in respect of inputs serve to address both these concerns by on one hand requiring the merged firm to retain current levels of purchases from local producers and secondly to expand investment in the supply chain. Put differently they address both the concerns of demand for inputs so producers do not face exit, and the increase in supply of inputs, so rivals of the merged firm are not foreclosed.

[27] A second concern which is not a classic competition concern but is more correctly thought of as a public interest concern is based on the anticipated behaviour of post-merger management. Prior to the merger, SABMiller, concerned for its reputation in the local market, was willing to make

concessions to smaller rivals that post-merger, an internationally based controller, may be less willing to. For this reason the merger raises certain public interest concerns in respect of the supply of key inputs which the conditions imposed also seek to redress. The conditions in respect of small beer producers are an example of this.

Public interest

[28] The merger as noted raised several public interest concerns. Most of these were the subject of the Agreement between the Government and the Merging parties concluded prior to the merger being referred to the Tribunal. They range from measures to protect small brewers, incentives to emerging famers and skills development in the supply chain.

[29] For the most part these conditions have proved to be uncontentious and so we discuss them now. At the outset we observe that the process followed in this case was of the merging parties first reaching agreement with the Government on these issues. Since the merging parties undertook in the Agreement to comply with these undertakings, they did not oppose their inclusion as conditions during the hearing. It is not therefore necessary for us to enquire whether these concessions, which now become conditions for the approval of the merger, in largely the same form as they are in the Agreement, would have been required of the merging parties.

[30] Where however concessions appeared on the face of it, inappropriate or disproportionate, we have intervened as we did with the moratorium on retrenchment. We discuss this further below.

[31] The undertaking that has attracted the most attention is the merging parties' commitment to invest one billion rand (R 1, 000 000 000.00) for three identified objectives. This amount is in addition to an amount of one billion one hundred million rand (R 1, 100 000 000.00) which SABMiller had already planned to

spend on transformation and investment objectives over the next five years in South Africa.[27]

[32] The amount is to be paid into a fund, known in the conditions as the "AB InBev Investment Fund" which we will refer to as the Fund. The Fund amount, to be spent over a period of five years, is directed to three different objectives as follows:

32.1 Agricultural development in the amount of six hundred and ten million rand (R 610,000,000.00);[28]

32.2 Enterprise development in the amount of two hundred million rand (R 200,000,000.00);[29] and

32.3 South African societal benefits in the amount of one hundred and ninety million rand (R 190,000,000.00)[30].

[33] The bulk of this investment, 61%, is for agricultural development into the agricultural supply chain. The recipients will be both emerging farmers and existing commercial farmers. The two inputs that SABMiller purchases from SA farmers at present are barley and hops, both ingredients that go into the production of beer. The reason for the investment is that the SA supply of hops and barley is insufficient to meet local demand and so firms look to imports to make up the balance.[31] The ambition of the Government is that with increased investment SA farmers can meet all of local demand, and presumably, if the merged firm's expansion plans are realised, increased new demand on the continent.

[34] The enterprise development is intended to further skills training in input sectors. The societal benefits funding serves a variety of different purposes ranging from

[27] See clause 15.6 of the conditions.
[28] Set out more specifically in clause 17of the conditions.
[29] Set out more specifically in clause 18 of the conditions.
[30] Set out more specifically in clause 15.3.3 of the conditions.
[31] For instance in 2015 South Africa was a net importer of barley. See clause 17.1.1 of the conditions.

alcohol abuse awareness, to improving environmental behaviour in the merged firm, to the funding of bursaries.

[35] When the Commission drafted its set of conditions it left this societal benefits set of objectives out, reasoning that it did not form part of the public interest objectives set out in the Competition Act, 89 of 1998 ("the Act").

[36] As a legal proposition the Commission is correct. Not all public interest issues fall within the jurisdiction of the Act. The Act restricts public interest considerations to those identified in section 12A(3) of the Act. Therefore the jurisdiction of the competition authorities is limited to those grounds. Since the imposition of conditions has juristic consequences – they are enforceable against the merging parties and failure to comply can lead to a firm becoming liable for an administrative penalty – it follows that the Act confines the Tribunal to imposing only those conditions set out in the Act. Mr Coetser who appeared for the Minister conceded this point.[32]

[37] However Mr Coetser argued that the conditions in contention, set out in clause 15.3 of the conditions, fell within the ambit of section 12A(3).

[38] The section provides a great deal of latitude when it comes to interpretation. For instance subsection 13A(3)(a) refers to the effect of the merger on "... a particular sector or region". In order to determine whether this widely framed provision contemplates some of the conditions proposed, the Tribunal would require evidence. Typically this would emerge in the course of a dispute. The party alleging an adverse or positive public interest effect would present the Tribunal with such evidence whilst the adverse party would present evidence to refute it. Unusually, in this case the merging parties, on whom the burden of compliance rests, are happy to accept these effects fall within the Act's ambit

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[32] While the Agreement was signed by three Government departments only the Minister appeared as a party to the hearing.

and have offered these undertakings in return. Given this concession we will accept that it does. This should not be meant to construe that for future cases these issues constitute public interest grounds cognisable in terms of section 12A(3) of the Act.

Employment

[39] Concerns regarding employment arose in two sections of the Commission's recommended conditions. The first dealt with a moratorium on merger specific retrenchments and consequential issues related to this, the second specifically dealt with the fate of a share ownership scheme for some SABMiller employees known as the Zenzele Scheme.

[40] No objections to the Commission's formulation, which largely followed that adopted in the Agreement, were raised by any party. However the Tribunal in reviewing the condition found its terms over broad and disproportionate, and for this reason we have imposed certain amendments.

[41] In paragraph 8.1 of the Commission's recommended conditions, after the reference to there being no merger specific retrenchments, an additional sentence appeared that stated as follows:

"8.1 The merged entity shall not retrench any employee in South Africa as a result of the merger. For the avoidance of doubt, it is recorded that this condition shall endure in perpetuity" (Our underlining)

[42] We have removed the underlined sentence in 8.1. Whilst the parties may have been agreeable to not limiting the moratorium on retrenchment, it is highly improbable that merger related retrenchments are possible in perpetuity. Merger specificity as we have suggested in *Adcock* is a function of time.[33] As

[33] *BB Investment Company (Pty) Ltd and Adcock Ingram* LM002Apr14 at para 118 *"as time proceeds the distinction between operational and merger specific elides"*

we have indicated in that case and in many other decisions, we distinguish between what we term 'merger specific' retrenchments and 'operational' retrenchments. The former fall within the purview of section 12A(3), the latter do not, as they lack a causal connection to the merger and hence the Act's public interest remit. The longer the period that passes after the implementation of the merger, the less likely it is that a disputed retrenchment is merger specific, and the more likely it is operational. In most mergers we have set a time limit in this regard to create certainty.

[43] Here the merging parties, whilst confining the moratorium to merger specific retrenchments, have in the Agreement elected not to subject it to any time limit. The problem is further exacerbated by the existence of a presumption that any retrenchment is merger specific, unless the merged firm can prove otherwise. This presumption is also, not subject to any time limit. This formulation then found its way into the Commission's conditions. Despite this concession by the merging parties, which presumably comes about because there are no operational overlaps in SA, such a provision, which suggests that merger related employment effects can exist perpetually, is irrational and overbroad. Left as currently formulated, it has the potential to leave the competition authorities arbitrating retrenchment disputes for an indefinite period, creating an administrative burden, whilst confusing both the merged firm and the affected employees as to their respective rights. We have been reluctant to do too much surgery on this clause, in view that it is not disputed by the merging parties. However in order to clip its wings to something more rational our solution is two-fold. We have retained the concept of an onus but reversed it after time. Thus the clause now provides that in the first five years the onus is placed on the merged firm to demonstrate non-merger specificity, thereafter the onus is reversed on the employee. The solution introduces greater legal certainty in the event of future disputes, whilst not imposing a time bar on the moratorium, in accordance with the negotiated outcome in the Agreement.

[44] The Zenzele Scheme is a share participation scheme for employees of SABMiller that has existed since 2010. A large number of employees are or

have been members of the scheme, many of them members of the trade union, FAWU. The shares are in the unlisted SAB company. The shares have been given to the employees by way of a loan repayable from dividends. The scheme will reach maturation in 2020. Doubtless, influenced by the generous payday to be enjoyed by executives in SABMiller if the deal is accepted, FAWU wanted the vesting of the shares to be accelerated. The merging firms were unwilling to do so. In the Agreement there was a condition in this regard that purported to arrive at a compromise. FAWU was not happy with the solution proposed. It also felt it had not been properly consulted about the formulation of it.[34] It then took up its issue with the Commission, who recall had, at that stage not yet issued its recommendation. However the Commission was not persuaded that the Zenzele issue was merger specific.[35] The Commission did not include the condition in its proposed conditions but during the hearing the merging parties and the government still put it forward.

[45] FAWU then took the issue to the Tribunal. Its submission with the Tribunal included a witness statement from Mr. Masemola its general secretary. In his witness statement Masemola proposed that there must either be a new condition or alternatively that the present condition (i.e. the one that emerged from the Agreement) be removed from the set of conditions.

[46] The response of the merging parties was that they too would be satisfied to leave this out of the conditions and leave the fate of the Zenzele participants to bargaining outside of these merging proceedings. Accordingly both requested

[34] "In short the conditions are a product of a consultative process between the Commission, the merging parties and the Minister from which negotiations FAWU was excluded." (Witness statement of Katishisi Masemola para 20).
"The conditions were unilaterally imposed by the merging parties" (page 409 of the Trial Bundle at Para 4.2 4.3)
"FAWU objects to the fact that is appears as if the minister played a role in influencing the decisions of the Commission to include the conditions, without meaningful engagements and consultation with the employee participants.
"...part of the concern of FAWU has been the lack of consultation, meaningful consultation with it prior to the conditions being agreed to" (Transcript 23 June 2016 page 156 line 7)
[35] See Commission recommendation paragraph 510.4.1 at page 155.

that the conditions relating to the acceleration of the scheme be deleted from the Commission's conditions. The government's legal representative did not oppose this. We have complied with the request and the reference to Zenzele has been deleted, save for clause 13 which states that the merged firm will present the Government and the Commission its plans for Black economic empowerment issues after the expiry of the scheme in 2020 with the object of maintaining Black participation.

[47] We deal with the remaining public interest issues that were contested when we discuss the conditions.

PART C: AMENDMENTS TO THE COMMISSION'S CONDITIONS

Competition Conditions

[48] Heineken and Distell, both competitors of the merged firm in beer and cider respectively, both raised competition concerns.

[49] The merging parties made various concessions to Distell pursuant to receiving its submission. These are reflected in two areas. First as regards inputs, Distell was concerned that if the merged firm increased cider production its procurement of apple concentrate would be in excess of what the local market could supply at present. For this reason clause 11 of the conditions protects cider competitors from the merged firm foreclosing local supply of apple concentrate for AB InBev brands or new Merged Entity brands. If the merged firm procures in excess of a certain target of local procurement for these purposes, it will be required to procure the excess from imports or from any incremental local production brought about by its own investment.[36] This condition lasts for 10 years, where-after the restriction is removed.

[36] The target is set out in clause 11.1- 11.2 of the conditions. Starting at one million litres it increases annually on a linear basis over time so that it reaches five million in the tenth year.

[50] Cider producers also benefit in respect of a distribution condition. The merged entity must ensure that where it supplies fridges to outlets the owner of the outlet will be free to use up to 10% of the capacity of at least one fridge to rival South African owned and produced ciders. Whilst this provision does not prefer Distell over other cider producers, it is most likely to be the beneficiary of this concession given the current market sizes of the remaining competitors.[37]

[51] No similar fridge space concession was made in respect of rival beer producers, save for what are defined as Small Beer Producers, which we come to later. Heineken sought a similar concession for other beer producing rivals of the merged firm who were not Small Beer Producers. The merging parties were unwilling to make this concession, arguing that Heineken as a large international competitor could make its own investment for fridges in outlets. Heineken countered by querying the logic of making such a concession to all cider producers. After all if Distell was the likely recipient it was unclear why it should be given that, as unlike Heineken in beer market, Distell was the dominant producer of cider in the country. The merging parties justified this apparent anomaly on a public interest not a competition ground – Distell they said, was a South African owned firm. This however is not a convincing basis for distinction. Whilst the public interest grounds recognise an effect on small and Black owned business they do not recognise national ownership as a specific category. The more likely reason for the concession is to protect the value of the Distell business for the purpose of the divestiture. Since the divestiture forms part of the conditions we would accept the cider concessions as part of a legitimate restriction imposed for a fixed length of time to improve the prospects of realising a greater economic value for that interest.

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[37] Competitors such as Diageo, Halewood Int, Douglas Green Bellingham, Heineken, The Really Great Brand co, KWV, Namaqua and others. Page 59 of the Commission's recommendation found at page 50 of the Trial Bundle.

[52] Heineken was not however without some improvement to its position. The Commission's conditions contained a provision in respect of crowns or what the layperson would understand as a bottle top or cap. Pre-merger, SABMiller controls the only crown manufacturer in this country, Coleus Packaging Pty Ltd ("Coleus"), which it obtained by virtue of a merger in 2002 that the Tribunal approved subject to certain conditions. These conditions which guarantee supply to rivals are still in force.

[53] Heineken and Distell are both reliant on Coleus for supply. The merging parties in the Commission's conditions had undertaken to give security of supply but only for five years. However both Heineken and Distell expressed concern about what might happen after that time, given that new entry into this market was unlikely. The merging parties accepted this concern and undertook to guarantee security of supply for as long as they continue to control Coleus.[38]

[54] Heineken and Distell were satisfied with the terms of this undertaking.

Input concerns

[55] As mentioned earlier, prior to the merger SABMiller has been a dominant and in some instances a monopsony buyer of certain inputs into the beer production chain. This raised two concerns. First, that the providers of these inputs might be terminated if AB InBev could switch sourcing to international suppliers in preference to local suppliers. Second, given the huge volumes SABMiller procures, any significant switching of suppliers to imports could lead to a serious threat to the future of local input producers particularly those who sell primarily or almost entirely to SABMiller. This also poses a threat to smaller domestic competitors of SABMiller because they are less able to source external supplies at a competitive cost. The merged firm has given various undertakings in this respect. Primarily it undertakes to source inputs at least at the same level as it did at the time of the merger. This is expressed in the form

[38] See clause 6 of the conditions.

of a ratio of local procurement at the Approval date. This reference to a ratio rather than a fixed quantity means that as the merged firm expands its domestic production the actual procurement of local inputs will increase proportionately.

[56] One input requires special mention and that is barley. Pre-merger SABMiller through its subsidiary – is the sole buyer of barley in the country for use in the production of beer. Even rival producers purchase this input from SABMiller. The Commission's investigation revealed that some in the industry believe that the only reason SABMiller sells this input to rivals is for reputation.[39]

[57] We do not know if this view is widespread. However there are other economic reasons as well, other than a change in company policy that may threaten the domestic supply of barley to local rivals. This is because AB InBev is the largest procurer of barley in the world.[40]

[58] AB InBev's sources of barley include countries whose barley is subsidised. SABMiller at present does not source all its barely from local sources and at present some of its barley requirements come from imports. Given the buying power the post-merger firm will have combining both firms' purchase needs, the possibility of a change in purchasing patterns is probable. The merging parties for this reason offered the Input supply condition discussed above which would apply to barley as well.

[59] However farmers raised concerns that they would be squeezed on pricing and that there should be a condition to this effect as well. These concerns were articulated at the hearing by Grain SA which represents farmers and emerging

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[39] See for instance submissions made by Alan J Melville on behalf of Bulls & Bear Brewing (Pty) Ltd (previously known as Brickfields Brewing Company) in his submissions to the Commission during their investigation; *"It should be said that SAB has always been supportive of the craft beer industry; we have been able to buy out malts and hops from their subsidiary companies and their personnel have always been supportive when it comes to other quality issues, such as laboratory testing (if required) and even expertise in the event of questions or problems (I personally have experience of SAB's Cape Town staff resolving a microbiological issue in a local craft brewery)"* Found at page 436 of Trial Bundle B File 1.
[40] See table 9 in Commission recommendation page 117 and 118.

farmers. Grain SA in its submission to the Tribunal suggested that a price mechanism be included as part of the conditions. The Commission in its recommendation suggested that there be a condition that there be no change to the terms of contract that exist presently. Since the current terms include a pricing formula for barley we understand this to be a form of pricing condition. However this part of the recommendation was never translated into a condition. There is therefore a lacuna in this respect which must be considered.

[60] The pricing of barley had for many years been the subject of acrimony between farmers and SABMiller. This is because unlike other agricultural commodities there was no market for the product at which prices could be determined. Eventually in 2009 the industry settled on a formula underpinned by the wheat price that had been developed by economists at the University of Pretoria. The reason for the wheat price underpin was that farmers rotated their plantings of wheat and barley and wheat is a commodity that is traded on SAFEX and thus gives the pricing formula a market derived price to use as an index. Until recently this formula served both buyer and sellers well. However due to the drought a tariff was imposed in respect of wheat to protect the local wheat industry. SABMiller was not prepared to pay this additional amount for barley and farmers were told to accept a price that excluded this tariff component for the current 2016 season. Some farmers who spoke to the Commission saw a coincidence between this new more aggressive pricing approach and the announcement of the present merger.[41] Others linked it to changes in European pricing which was more favourable than local pricing.[42] Mr Jannie De Villiers who made submissions on behalf of Grain SA was not in a position to express a view on this aspect.[43]

[61] Wheat is not of course a substitute for barley from the demand side. However barley farmers have in the past switched to wheat instead of barley in a

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[41] See para 397 page 122 of the Commission's recommendation.
[42] Ibid.
[43] See transcript 23 June page 196 lines 5-14.

particular season where the barley price compared less favourably to that of wheat.

[62] The merging parties were, for this reason, of the view that no pricing mechanism was necessary as farmers would substitute for wheat if the price offered for barley was less profitable to them than growing wheat. De Villiers however argued that not all farmers were in a position to substitute wheat for barley. In the Western Cape which is the biggest barley growing area famers also need to rotate crops during the season and hence growing barley is attractive. His evidence was that post-merger the current pricing mechanism would become harder to hold the merged firm to and with the ease of import substitution by the merged firm farmers faced a real fear of being squeezed further.

[63] We put these difficulties to Mr Wolf of SABMiller who is in charge of overall procurement. He was willing to concede to a condition that required implementation of the formula provided this excluded any tariff imposed amount on the price of wheat. When he heard that this submission had been made, Mr De Villiers wrote to the Tribunal and suggested farmers would be better off without a pricing mechanism of this nature being imposed.[44]

[64] We have in the end opted not to impose a pricing condition. The reason for this is that the formula is still the subject of bargaining between the parties and imposing one version of it would favour one party and not the other.

[65] Second the condition on inputs provides that the merged firm must adhere to purchasing from domestic suppliers at the same ratio to total purchases that it did on the approval date. In this case that date would be the 2016 season. However because the decision of SABMiller in this season to exclude the tariff on wheat was imposed, there may in this year be lower than normal supplies

[44] Email to Tribunal dated 27 June 2016.

of barley. To eliminate any recent distortions we have gone for a ratio on the Approval date to be determined not at the 2016 level, but rather as the highest level taken over a three year period including 2016.[45]

Outlets

[66] Access to market for products was a major competition and public interest issue in this case, given SABMiller's extensive distribution network, which many view as a barrier to entry. The merging parties were willing to give undertakings in this regard to lower barriers to entry in outlets. However during the hearing this undertaking, on closer scrutiny, became an area of contestation. Exactly what premises constituted an outlet? In order to appreciate the debate it is first necessary to identify where in the conditions the term outlet is relevant.

[67] The term is used for the following purposes in the following clauses:

- The acknowledgement by the merging parties of the freedom of discretion of an outlet owner to allocate space[46]
- The merged entity's undertaking not to offer inducements to proprietors of outlets[47]
- The reservation of capacity in fridges in outlets to cider rivals and small beer producers[48]

[68] What then is an outlet? In terms of South African law alcohol can only be sold at licenced premises. Two classes of premises exist where alcohol may be sold legally off and on-consumption. Off-consumption refers to premises where alcohol may be purchased, but not consumed such as retail outlets. On-consumption is where both purchase and consumption take place on the premises of the seller such as restaurants and bars. If the term outlet was used without further definition, i.e. to be given its ordinary dictionary meaning, then

[45] See final sentence in clause 9.1.
[46] 7.1 of the conditions.
[47] 7.2 of the conditions.
[48] 7.3 and 10.1 of the conditions.

there would be uncertainty as to whether an on-consumption premise was an outlet.[49] We don't have to decide this linguistic point; it suffices to observe that a narrow interpretation which limits the term outlet to a place of off-consumption, is certainly arguable.

[69] If the merged firm were to adopt this approach post-merger then undoubtedly disputes would arise with rivals and small beer producers who would contend for a wider meaning.

[70] For this reason in the definition recommended by the Commission during the hearing, the term outlet is defined in this wide sense viz. to include on and off-consumption premises. (Note that this was not the Commission's position in its original proposed conditions, but was instead a definition which arose from Distell's submissions and marked up version of the conditions.) The Commission in their original conditions used the term outlet but did not define it. It appears the Commission changed its position in response to concerns raised by competitors during the Tribunal process.[50]

[71] Once the proposal to extend the definition in this way had been proposed at the hearing, the merging parties became concerned about its effect on sponsored events. Since the raison d'ètre for sponsorship is exclusivity for the period of the event, all parties were agreed that this was a justifiable exclusion from the term outlet. Hence we provided expressly for this in clause 7.2.

[72] The next dispute arose as to whether the term outlet, if more widely defined, should include stadiums. The merging parties contended it should not, but Distell argued it should. Eventually the two parties emerged from their own negotiations on the last day of the hearing with a compromise solution.

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[49] The Oxford Dictionary defines an outlet as "*...a point from which goods are sold or distributed.*"
[50] See submissions from Heineken and Distell in this regard.

[73] In terms of this proposal ("the Distell proposal") the stadium would be excluded from being considered an outlet but subject to certain caveats. It would be regarded as exclusive in respect of certain categories of alcohol, unless the merging parties chose not to supply that category, in which case the obligations regarding stadium exclusivity would not apply. Not only was this clause drafted in a manner hard for ordinary readers to follow, but it smacked of a nudge and wink deal between these two parties. The Commission opposed it and advocated the simple definition of outlet that we have adopted.

[74] The merging parties took a middle of the road view. If we did not agree with the Distell proposal, then the term outlet wherever it appeared, should be replaced with the phrase "outlets and taverns". Despite the use of the term outlet no definition of outlet should be provided they said.

[75] This suggests that the merging parties understand the term outlet, without definition, to be restrictive and to apply only to off-consumption premises. Hence the need to broaden it to include a limited class of on-consumption premises, namely taverns.

[76] The term tavern is an industry term to cover former shebeens that are now licensed. It is thus a historic social and marketing construct, not a legal construct. No rationale was advanced by the merging parties for excluding other on-consumption outlets, but including taverns. For this reason we have opted for the Commission's inclusive definition which includes all on and off-consumption outlets.[51]

Exclusionary behaviour concerns

[77] Heineken has alleged that SABMiller pre-merger has been engaged in certain exclusionary practices by virtue of its dominant position in the clear beer market where Heineken competes with it. This exclusionary behaviour it argues will

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[51] See clause 1.2.40 of the conditions.

intensify post-merger. The first point made by Heineken is that the merged firm will now have in its portfolio more than 200 brands. In order to exploit the value of its brands the merged firm will seek to engage in aggressive expansion to secure market share for its new brands. Heineken has therefore proposed several amendments to clauses 7 and 9 of the conditions, ostensibly to improve access to outlets for rivals. Heineken argues that the protection to outlets afforded by the conditions to small beer producers will be ineffectual as none of these producers has the ability to be effective competitors of the merged firm.

[78] Heineken's second suggestion for conditions is the insertion of a code of conduct for the merged firm. Heineken has accused SABMiller in having engaged in what it terms "dirty tricks" in seeking to exclude its products from expanding in the market place. It had provided the Commission with several examples of pamphlets, allegedly distributed by SABMiller employees or agents that sought to persuade outlets, it seems particularly taverns to raise prices of Heineken products so they could make more money. None of these pamphlets were dated; nor do we know when they were distributed or by whom. From the dates on one of them these appear to have been distributed in 2007. As evidence of existing exclusionary conduct continuing at time of merger they appear to be weak. However what was remarkable about the Heineken submission was how little it detailed its own difficulties in the local market and how much it relied on a reading of the Commissions' report and other submissions to make out its case on exclusionary effects. Presumably since Heineken faces SABMiller on a daily basis in this market and AB InBev in many others internationally, it could have had more information to share on this topic had it deemed it merger specific.

[79] What Heineken fails to answer is how the merger increases SABMiller's existing position of dominance and thus the likelihood of increased engagement in exclusionary conduct, given that its market share is estimated to be between 85% to 90% and that AB InBev's SA market share is miniscule. Even if it is argued that AB InBev strides like a colossus outside our borders and now

enters, SABMiller is sufficiently bulked up in the market pre-merger for this additional muscle to make little difference to its existing leverage.

[80] Of course post-merger the merged firm will want to increase its market share. But pre-merger that is what its current management want as well and such an attitude is what one expects in a competitive market. The firm is not a charity. However the addition of new brands does not guarantee it market share. At present the AB InBev brands in the market account for a South African market share of only 0.1%. The brands that SABMiller has in the market which it is required, because of international competition approval to divest, account for 1.5%. Thus on these figures, post-merger, the merged firm is giving up brands worth more than 14 times the size of the brands it is divesting. In comparison to Heineken the divested brands have not fared that well in the market place despite being part of SABMiller with its extensive distribution network and penetration of outlets. This suggests that the ownership of brands outside this market or which have a weak footprint in it at present are not certain predictors of success in the market. Indeed it is equally likely that the entry of new brands from AB InBev may cannibalise existing SABMiller market brands as much as it might hurt non merged firm rivals.

[81] Where a firm has no market power pre-merger or where its market power is transient or tenuous a theory of portfolio power or a deep pockets effect may warrant further scrutiny. Where pre-merger the target is already super dominant and its dominance has been enduring and never seriously contested, merger specific concerns are unpersuasive.

[82] The merger also already contains certain conditions to which the merged firm has agreed to improve competitors' positions in the market from what they were pre-merger. For instance the concessions made around Coleus which improve Heineken's security of access, for instance clause 7.1, also favour other competitors and the increased investment, a burden the merged firm alone faces, will bring efficiencies into the supply chain that other competitors can benefit from.

[83] As far as the fridge access is concerned whilst it is true that this is limited to small beer manufacturers who are unlikely to constitute as serious a threat to the merged firm's continued dominance as may another international competitor such as Heineken, the important thing to remember is that this was imposed as a public interest not a competition concern. Heineken unlike the small firms is able to sponsor its own entry into these Outlets.

[84] Heineken's suggestion that the Tribunal impose a code of conduct provision lacks merger specificity. If SABMiller had engaged in this form of exclusionary conduct pre-merger this suggests it did not require additional market power in order to be able to do so. Heineken's remedy if this conduct has indeed taken place (a fact not conceded by the merging parties) is to bring a prohibited practice case where all the facts can properly be established.

Remaining public interest concerns

[85] Representatives of small business associations and Black Business suggested certain amendments to the Commission conditions. These related to the governance of the Fund by what is termed in the Conditions the "Implementation Board" ("the Board") and the class of persons eligible to benefit from it.

[86] First, before we address these concerns it needs to be pointed out that in terms of the Agreement the Fund of one billion rand (R 1, 000 000 000.00) was divided. An amount of five hundred and fifty million rand (R 550,000,000.00) was to be administered by the Board, whilst the remaining amount of four hundred and fifty million (R 450,000,000.00) was to be administered by the merged firm. When we inquired the rationale for this split we did not receive an explanation, but on the final day the merging parties legal representatives announced that it had been agreed with all that the entire Fund would fall under the Board's auspices.

[87] The Board will consist of six members of which three will be appointed by the Government and three by the merged firm. The NGO's suggest that this will lead to a governance weakness as the voice of small business or Black business will not be heard. The strongest view on this subject came from Mr Tebogo Khaas of the SMME Forum who has served on a similar board constituted to administer a fund after the Massmart/Walmart merger. Mr Khaas complained that government representatives on the Walmart board had been less than diligent in attending meetings and he produced an attendance register to this effect.[52] The government's legal representative produced his own which disputed this.[53] This is not a point we have to decide.

[88] The parties have decided how they wish to govern the Fund and this is a matter for them to decide. The argument made by the government was that there were many representatives of small business who would seek representation and this was impractical. There is also the point, although not made by the government, that presumably the Board should avoid conflicts of interest by having on it those with an interest in being beneficiaries. We are satisfied that the Board is constituted in a manner that is rational given both its role and stated purposes. Nor is there any value in otherwise micro-managing its processes beyond those set out it the conditions.

[89] The argument raised only by Mr Tshediso Mokhonatse, who represents both the Agency for New Black Agenda and the Black Business Forum, submitted that the class of beneficiaries should be restricted by race. He proposed that references to emerging farmers and commercial farmers be confined to Black persons in those classes. This suggestion did not find any support from the Commission, merging parties or the Minister. Whilst the Constitution recognises the need to promote the achievement of equality[54] and the Act in section 12(A)3 lists as one of the public interest factors the need for Black

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[52] See exhibit D.
[53] See exhibit E.
[54] Section 9(2) of the Constitution.

business to become competitive there was no evidence led by Mr Mokhonatse to suggest that the conditions as framed would not achieve this. Several clauses in the conditions give preference to emerging farmers, a class that by definition will be weighted heavily in favour of black entrants whilst other clauses such as 18.1.7 which deal with enterprise development state:

"[C]reate sustainable new and convert existing industrialised suppliers to Black ownership."

[90] Mr Mokhonatse's submission would oblige the Board to restrict its Fund on racial grounds. This would remove from the Board, notably comprised of an equal number of government representatives, the discretion to identify deserving cases from all groups of South Africans. Nothing in the conditions disobliges the Fund members from advancing Black empowerment objectives, indeed this is stated, however we should not impose any restriction on them in the manner suggested. The Board should be entitled to serve the twin objectives of using the fund to sponsor new entry as well as to reward current participants who wish to expand activities in the supply chain.[55] A racial restriction is not required to further the former but may frustrate the achievement of the latter.

Minister's issues

[91] The Minister had, as we have seen, with the other Departments, reached the Agreement with the Merging parties prior to the Commission's recommendation. The Minister's legal representative, and at times the merging parties, were anxious not to see the conditions dilute the terms of that Agreement. Whilst parties are of course free to reach any agreement that they wish prior to the determination of a merger by the competition authorities such an agreement cannot bind our discretion when it comes to the content of the conditions.

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[55] See for instance clauses 18.1.2 and 18.1.5

[92] One such provision which we deemed inappropriate was a clause the Minister sought to have inserted in the variation clause that read as follows;

"For the avoidance of doubt, nothing in this clause 20 shall derogate from any provision of the [Ministers] Agreement."

[93] We do not know what the purpose of this clause was nor was it made clear to us in argument. We deem it inappropriate if it suggests that the conditions cannot be amended if they derogate from what is contained in the Agreement. Such an outcome would mean the competition authorities cede their discretion in this matter to another party which would be a dereliction of their public function to regulate mergers. Whilst this may not have been the intention of those who sought its inclusion, it is nevertheless a fair reading of what it states and for that reason we have deleted it from the proposed conditions.

Conclusion

[94] In our view the extensive conditions offered by the merging parties and as modified by the Tribunal, adequately remedy any competition or public interest concerns raised by the Merger. The merger is thus approved subject to the Conditions that are annexed hereto.

[95] The merging parties are to be commended for their constructive response to concerns raised about their transaction. As a result our process has been made much shorter and more efficient than it might otherwise have been.

04 August 2016

Mr Norman Manoim **DATE**

Ms Andiswa Ndoni and Prof Imraan Valodia concurring

Tribunal Researcher: Derrick Bowles and Aneesa Ravat

For the Merging Parties:	Frank Snyckers S.C. assisted by Mark Wesley, instructed by Webber Wentzel and Bowman Gilfillan.
For the Commission:	Ms. Anisa Kessery and Mr. Grashum Mutizwa
For The Minister of Economic Development:	Paul Coetser of Werksmans Attorneys.
For Heineken South Africa:	Athony Norton of Nortons Inc.
For Distell Limited:	Jeremy Gauntlett S.C. assisted by Greta Engelbrecht, instructed by Werksmans Attorneys
For Food and Allied Workers Union:	Tembeka Ngcukaitobi instructed by TGR Attorneys
For Agency for New Agenda and Black Business Forum:	Mr. Tshediso Mokhoanatse
For Tavern Owners Association:	Mr. Boyce Mathibela
For the SA SMME Forum:	Mr. Tebogo Khaas
For GrainSA:	Mr. Jannie de Villiers