COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO166Jan222/OTH103Sep22

In the matter between:

Deputy Chairperson of the National Executive Forum, an informal body representing the current employees of South African Breweries (Pty) Ltd and Beneficiaries of the SAB Zenzele Employee Share Trust	First Applicant/ First Intervening Party
Phillip Mabunda	Second Applicant/ Second Intervening Party

and

Coca-Cola Beverages South Africa (Pty) Ltd	First Respondent
The South African Breweries (Pty) Ltd	Second Respondent
Chairperson and Trustees of the SAB Zenzele Employee Share Trust	Third Respondent
The Competition Commission	Fifth Respondent

Panel	:	M Mazwai (Presiding Member)
	:	AW Wessels (Tribunal Member)
	:	L Mncube (Tribunal Member)
Heard on	:	19 April 2023
Order Issued on	:	26 June 2023

ORDER AND REASONS FOR DECISION

Introduction

[1] The application before me is for my recusal from the panel in a matter presently pending in the Competition Tribunal ("**Tribunal**") (under case number CO166Jan22 and Competition Commission case number LMD141221).

[2] The pending matter is an application to make a Settlement Agreement between the Competition Commission ("**Commission**"), South African Breweries (Pty) Ltd ("**SAB**"), and the Chairperson and Trustees of the SAB Zenzele Employee Share Trust, an order of the Tribunal. For the sake of convenience, I shall refer to the pending matter as "**the Main Application**".

[3] This recusal application is brought by The Deputy Chairperson of the National Executive Forum, an informal body representing the current employees of SAB and Beneficiaries of the SAB Zenzele Employee Share Trust (the first applicant), and Phillip Mabunda (the second applicant), a beneficiary of the SAB Zenzele Employee Share Trust. Mr Mabunda is also the Deputy Chairperson of the National Executive Forum (the first applicant) and a full-time union shop steward. The first and second applicants are collectively referred to below as the "**applicants**".

[4] The applicants allege that I will not be objective and impartial in considering the Main Application because I was part of a panel that heard and adjudicated on an urgent interim relief application on 20 March 2020, which was brought by Coca-Cola Beverages South Africa (Pty) Ltd ("**CCBSA**") against Anheuser-Busch InBev SA/NV ("AB InBev"), SAB, the Chairperson of the SAB Zenzele Employee Trust Allocation Committee ("**Chairperson of the Allocation Committee**") and the Commission.[1]

[1] Case number URG154Mar20.

[5] CCBSA is opposing the application on the basis that no case has been made out for a recusal.[2]

[6] Having heard the recusal application, I have decided not to recuse myself.

[7] These are the reasons for my decision.

Background

[8] On 27 September 2017, the Tribunal conditionally approved the acquisition of control over Coca-Cola Beverages Africa (Pty) Ltd ("**CCBA**") and its subsidiaries by The Coca-Cola Company ("**TCCC**") (the "**TCCC/CCBA merger**"). In terms of the merger, TCCC acquired SABMiller's shareholding in CCBA. [3]

[9] At the time of the merger, CCBA was part of the SABMiller Group ("**SABMiller**") and the employees of CCBA were beneficiaries of the SAB Zenzele Employee Trust, a broad-based black economic empowerment employee benefit program that had been established by SABMiller in 2010 (the "**Zenzele Scheme**").

[10] The interim relief application was brought by CCBSA on behalf of its employees who were beneficiaries to the Zenzele Scheme. These employees were transferred to TCCC as a result of the TCCC/CCBA merger but their participation in the Zenzele Scheme was preserved by a condition to the merger ("**Former SABMiller Employees**").

[11] The interim relief application was triggered by a decision of the Chairperson of the Allocation Committee to allocate additional (top-up) benefits to the beneficiaries of the Zenzele Scheme, to the exclusion of the Former SABMiller Employees who were transferred to TCCC.[4]

[2] The Commission and SAB indicated that they would abide by the Tribunal's decision.
[3] Case Number: LM021Apr17.
[4] *Coca-Cola Beverages South Africa (Pty) Ltd and Anhauser Inbev SA/INV and 3 others*, CT case number URG164Mar20, at paras 6 and 7.

[12] CCBSA sought to, *inter alia*, interdict and restrain SAB and the Chairperson of the Allocation Committee from disbursing benefits to beneficiaries of the Zenzele Scheme, pending the outcome of the Commission's investigation into whether the decision to disburse benefits to the exclusion of the Former SABMiller Employees constituted a breach of the condition under which the TCCC/CCBA merger was approved, namely that *"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."*[5]

[13] The Tribunal panel that heard the interim relief application comprised three members, namely myself and my colleagues, Ms Yasmin Carrim (who was the presiding member) and Ms Andiswa Ndoni. The Tribunal panel found *inter alia* that CCBSA had established a *prima facie* right that the condition imposed an obligation to secure the future rights of former SABMiller employees.[6]

[14] Further, the Tribunal held that there would be very little, if any prejudice to other beneficiaries of the Zenzele Scheme if the distribution of the funds was kept in abeyance pending the outcome of the Commission's investigation. The Tribunal granted CCBSA's application for urgent interim relief on 31 March 2021.

[15] On 14 January 2022, following an investigation into the alleged breach of the merger condition, the Commission concluded the Settlement Agreement which is the subject of the Main Application in respect of which my recusal is sought.

[16] Subsequent to the filing of the Main Application in the Tribunal, on 9 February 2022, the applicants lodged an intervention application seeking to oppose confirmation of the the Settlement Agreement on the basis that CCBSA alternatively, its employees, have no right to claim the top-up benefits which

[5] Ibid, at para 13.
[6] Ibid, at para 25.

were allocated in October 2019.[7] Notably, the applicants were not parties to, nor had they made any submissions in, the interim relief proceedings.

[17] Neither CCBSA nor SAB opposed the intervention application and in an order dated 30 March 2022, the Tribunal's panel which comprised of Mr Andreas Wessels (as the presiding member), Prof. Liberty Mncube and Mr Enver Daniels, granted the applicants the right to participate in the Main Application as intervenors.

[18] The hearing of the Main Application commenced on 12 August 2022 before the Tribunal panel with submissions from the parties in response to the Tribunal panel's questions on whether the correct provision, namely section 49D of the Competition Act, 89 of 1998 ("**the Act**") was used in bringing the Main Application. The panel comprised of myself and my collegues, Mr Wessels (as presiding member) and Prof. Mncube.

[19] Following submissions by the parties on the relevant provision of the Act, the presiding member indicated that the Tribunal would not be able to complete the hearing on the merits on that day and that the hearing would have to be postponed to a date to be agreed.

[20] It was then that the applicants' legal representative submitted that his clients had just drawn his attention to a matter that he wished to raise with the Tribunal. It was then, for the first time, alleged that the applicants were of the view that I ought to recuse myself from the hearing of the Main Application because I had sat on the panel that heard the interim relief application.

[21] The application for my recusal was subsequently lodged on 1 September 2022. The applicants allege that I will not be objective and impartial in considering the Main Application because I sat as a Tribunal panel member and allegedly *"already formulated a view on the matter during the urgent interim [relief]*

[7] Case Number: CO166Jan22/INT183Feb22.

proceedings"[8] that the Former SABMiller Employees had a *prima facie* right to the top-up allocation. It was also alleged that I concurred with the ruling of the panel as penned by Ms Yasmin Carrim.

[22] On this basis, the applicants alleged that they have a reasonable apprehension that I will not be objective and impartial in looking at the questions to be decided by the Tribunal in the Main Application.

Legal Framework

[23] In terms of section 34 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"):

> "*Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."*

[24] The Tribunal was established in terms of section 26 of the the Act. In terms of section 26(4) of the Act, the Tribunal is an an independent body subject only to the Constitution and law; and must be impartial and perform its functions without fear, favour or prejudice.

[25] In terms of section 26(2) of the Act, the Chairperson and members of the Tribunal are appointed, on a full or part-time basis, by the President, on recommendation of the Minister of Trade, Industry and Competition. Further, the Minister may after consultation with the Chairperson appoint members on an acting part-time basis.

[26] In terms of section 31 of the Act, the Chairperson is responsible for allocating panels to each matter referred to the Tribunal and must ensure that each panel consists of three members, and at least one member must have legal training

[8] FA, p14, para 25.

and experience. Further, a panel cannot consist of more than one acting member.

Challenge to the recusal application being heard by a full panel

[27] At the hearing on 19 April 2023, before hearing the merits of the application, the applicants raised a preliminary issue pertaining to the constitution of the panel. It was submitted that I alone must decide on the application and it would be irregular for the other members (Mr Wessels and Prof. Mncube) to decide on the application for recusal, as they had no say on the question of whether or not I should recuse myself.[9]

[28] Notably, the applicants raised this issue for the first time at the hearing on 19 April 2023, whereas they were notified on 13 March 2023, that a full panel, constituting myself, Mr Wessels and Prof. Mncube, would hear the application. There was no explanation given for why this issue was not raised prior to the hearing.

[29] The applicants' counsel relied on the provisions of section 27(1)(b) of the Act which states that the Tribunal may adjudicate on any other matter that may in terms of the Act be considered by it, and may make any order provided for in the Act; and on section 27(1)(d) which states that the Tribunal may make any ruling or order necessary or incidental to the performance of its functions in terms of the Act; and further on section 31(5) which states that the Chairperson of the Tribunal, or another member assigned by the Chairperson, sitting alone, may make an order of an interlocutory nature that, in the opinion of the Chairperson does not warrant being heard by a panel comprised of three members.

[30] In response, counsel for CCBSA submitted that section 31(5) is discretionary and does not impose an obligation on the Chairperson to have a single member hear particular types of matters. It was pointed out that the applicants' counsel

[9] Transcript, p4, lines 4 to 19.

had not pointed to any precedent or case law that suggests that it would be improper or irregular for three members to sit on the recusal application.[10]

[31] Whilst I have the discretion to determine whether it is appropriate for an interlocutory matter to be heard by a single member under section 31(5) of the Act, the section is not appropriate in this case as the order in the recusal application would be final in effect. If an order has a *"final effect, then it is not an interlocutory order and could not be made by a single member."*[11] I therefore determined that the panel of three members must decide this application.

[32] Moreover, the Tribunal's proceedings are *sui generis* in nature and the Tribunal is duty bound to have regard to decisions of the Constitutional Court and High Courts when determining matters before it. There is case precedent which I refer to below, which supports that recusal applications against an individual judge or judges may be heard by the full bench.

[33] In the *SARFU*[13] case, the Constitutional Court recorded that:

> *"Counsel were in agreement that the whole Court should participate in the hearing and that the Judges should consider the application individually and collectively. This is how the matter was dealt with and in the result the Judges whose recusal was sought, and the remainder who were asked to look to their conscience, considered their own positions individually, and also considered the application as a whole, collectively, and concluded unanimously that none should be recused."* [14]

[34] The Constitutional Court in *SARFU* also stated:

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[10] Transcript, p8, lines 2 to 13.

[11] *Goodyear South Africa (Pty) Ltd v Competition Commission and Others* (198/CAC/Jan22) [2022] ZACAC 7; [2022] 2 CPLR 24 (CAC) (19 July 2022), at para 41.

[13] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC) ("*SARFU*").

[14] *SARFU*, at para 34.

"[30] ….it was the duty of this Court to give collective consideration to the question whether the Judges concerned should recuse themselves.

[31] Judges have jurisdiction to determine applications for their own recusal. If a Judge of first instance refuses an application for recusal and the decision is wrong, it can be corrected on appeal. But no provision exists in any law for an appeal against a decision of this Court…. this Court clearly has a duty to act constitutionally. If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case."[15]

[35] In *Ex Parte Goosen and others* ,[16] an application was made for the recusal of one of the three members of the bench. The full bench considered the application and dismissed it. Similarly, in *Ntuli v S,* the recusal application was heard by the full bench.[17]

[36] It is clear from the above, that there is nothing precluding Mr Wessels and Prof. Mncube from hearing the recusal application.

[37] In the circumstances, an *ex-tempore* order dismissing the preliminary issue was handed down and the panel as currently constituted continued to hear the recusal application. Mr Wessels and Prof. Mncube have applied their minds individually to the recusal application.

[38] Having dealt with the premilinary issue of the composition of the panel, I shall now set out my reasons for dismissing the recusal application.

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[15] *SARFU*, at paras 30 and 31.

[16] *Ex parte Goosen and others (Legal Practice Council and others as amici curiae) (Recusal Judgment)* [2019] 3 All SA 161 (GJ).

[17] *Ntuli and another v S* [2018] 1 All SA 780 (GJ).

Reasons for dismissing the recusal application

[39] The test for recusal was formulated by the Constitutional Court in *SARFU*[18] as follows:

> *"… the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial*." [own emphasis]

[40] The test for recusal was also subsequently confirmed by the Constitutional Court in *Bernert*,[19] as being whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. The test contains a two-fold objective element: firstly, the person considering the alleged bias must be

[18] Ibid, at para 48.

[19] *Bernert v Absa Bank Ltd* (CCT 37/10) [2010] ZACC 28; *Bernert v ABSA Bank Ltd* 2011 (4) BCLR 329 (CC); 2011 (3) SA 92 (CC) (9 December 2010) ("*Bernet*") at para 29.

reasonable; secondly, the apprehension of bias itself must also be reasonable in the circumstances of the case.[20]

[41] It is presumed that judges (in this case Tribunal panel members including myself) will carry out their oath of office of being impartial when adjudicating disputes. The Constitutional Court accepted that "*the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias"*.[21] Further, *"judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy on the basis of its own circumstances."*[22]

[42] The applicants have an onus to rebut the presumption that I will be impartial when adjudicating the Main Application. They have failed to discharge this onus. The applicants have not alleged any association by myself with any of the parties in the Main Application, nor that I have an interest in the outcome of the case. They have not produced any evidence to suggest that I have a closed mind to the in the Main proceedings. Having concurred in the order and reasons of the interim relief order does not on its own suggest that I shall not approach the present matter with an open mind. The applicants have not presented any evidence that something I have done, outside the interim relief proceedings, would give rise to a reasonable apprehension of bias.

[43] In this regard, I note that a judicial officer is obligated to adjudicate a case and not to accede too readily to suggestions of an appearance of bias.[23] This would apply equally to Tribunal panel members. Further, evidence of a reasonable apprehension of bias must be convincing and not mere speculation. The Constitutional Court in *SACCAWU* held that:

> *"mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety is not enough. The*

[20] *SARFU*, at para 45 with reference to *R. v. S. (R.D.)* (1997) 118 CCC (3d) 353.
[21] *SARFU*, at para 40 with reference to *R. v. S. (R.D.)* (1997) 118 CCC (3d) 353.
[22] *SARFU*, at para 40 with reference to *L'Heureux-Dube and McLachlin JJ* in *R. v. S*.
[23] *SARFU*, supra, para 46.

court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law." [24]

[44] The *SACCAWU* matter dealt with an application for recusal of two of the three judges, namely Conradie JA and Nicholson JA, hearing the matter on appeal in the Labour Appeal Court ("**LAC**"), referred to as the *Nkatu* appeal. The application for recusal was brought on the grounds that the applicants (dismissed employees) had a reasonable apprehension that the judges would be biased. This was because they had previously confirmed the dismissal of employees in another appeal, in the LAC, referred to as the *Nomoyi* appeal. It was contended that key issues and a number of witnesses in both appeals were identical and that the LAC's adverse findings on the issues and witnesses in *Nomoyi* gave rise to a reasonable apprehension of bias.

[45] It was further contended that having regard to the factual findings in *Nomoyi* the judges would *"find it very difficult to abandon the mental picture they formed."*[25] The Constitutional Court in *SACCAWU* considered the fact that in refusing the application for recusal in the LAC, Nicholson J recorded that apart from the LAC's findings in *Nomoyi*, no other ground for recusal was advanced.[26] Further, Nicholson JA concluded that the two appeals concerned a different sets of events.[27]

[46] In this recusal application, where no other grounds for recusal have been advanced, I considered whether the key issues that I have to consider in confirming the settlement agreement are the same as those that I considered in the interim relief application. They are not the same.

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[24] *South African Commercial Catering & Allied Workers Union v Irvin & Johnson Limited Seafoods* [2000] ZACC 10; 2000 (3) SA 705 (CC) ("SACCAWU"), para 17.

[25] *SACCAWU*, para 20.

[26] *SACCAWU*, para 21.

[27] *SACCAWU*, para 21.

[47] A *prima facie* right is not conclusive evidence of a right. It merely points to evidence sufficient to grant interim relief pending the outcome of the Commission's investigation.

[48] The issue decided by the panel in the interim relief application was whether the distribution of funds should be held in abeyance because the former employees may have (*prima facie*) a right to be included as beneficiaries. This is significantly different from the application to confirm the settlement agreement, in which the panel will have to consider whether the settlement agreement remedies the breach of merger conditions which the Commission found after its investigation.

[49] The Constitutional Court also confirmed that the appropriate test to determining whether there is a reasonable apprehension of bias based on an allegation that the central issues in a case had already been determined by the judges whose recusal was sought, is:

> *"…if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact." "*[28] [own emphasis]

[50] The apprehension of bias must *"relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision……"*[29]

[51] I have not expressed any views regarding the settlement agreement to date. I also note that the applicants did not participate in the interim relief application. I have not heard their submissions in opposition to the settlement agreement in

[28] *SACCAWU,* para 33.

[29] SARFU, supra, at para 43, citing *Commonwealth of Pennsylvania and Raymond Williams et al v Local Union 542, International Union of Operating Engineers, et al* 388 F.

the Main Application. The applicants' submissions therefore constitute a live issue which I have not previously considered.

[52] There is nothing in the Tribunal's Reasons or in the submissions of the applicants related to the interim relief application to create an inference that I will be biased towards the applicants when considering the Main Application.

[53] In the Main Application, the panel must consider whether or not the settlement agreement must be made an order of the Tribunal. The standard established in the CAC's decision in *Netcare Hospital*, is whether the agreement is rational, meets the objectives of the Competition Act or whether it is so shockingly inappropriate that, if confirmed, it would bring the competition authorities into disrepute.[30]

[54] As the High Court held in *Group Five Construction (Pty) Limited and others v Member of the Executive Council for Public Transport Roads And Works Gauteng and Others:*[31]

> "*It has never been our law that a judge who has presided in one matter cannot preside in another matter involving some or all of the same parties or that a judge who has adjudicated on one dispute cannot adjudicate on a similar dispute. As was said in Phillips v Hanau and Hoffa 1871 Supreme Court of the Cape of Good Hope "This is a new action, and if judges are not to try an action because in a previous action, where the same facts have come before them they have expressed a particular opinion, there will be an end of many actions altogeth*er. *There would have to be something beyond the ordinary for a recusal by a judge who is cognizant of her duty to sit in a case*."[32]

[30] *Netcare Hospital Group (Proprietary) Limited and Another v Manoim NO and Others* (CAC 75/CAC/Apr08) [2008] ZACAC 1 (27 October 2008), at par 29.

[31] *Group Five Construction (Pty) Limited and others v Member of the Executive Council for Public Transport Roads And Works Gauteng and Others* (2009/31971) [2015] ZAGPJHC 55; [2015] 2 All SA 716 (GJ); 2015 (5) SA 26 (GJ) (13 February 2015).

[32] Paras 16 and 17.

[55] Further, the High Court in *Ndlovu v Minister of Home Affairs*[33] held that "[*i*]*t is one thing to say that a judge has strong views opposing a particular form of legal practice. It is an entirely different matter to extrapolate from those views to a reasonable belief that if confronted with a case where that form of practice emerges the judge would disregard existing authority and make a finding on the issue in question adverse to the particular litigant."*[34]

[56] The applicants have failed to satisfy the two-pronged reasonableness test and have not provided any convincing or cogent evidence that the circumstances of the Main Application are such that I will not be able to disabuse my mind from the interim relief proceedings and consider the evidence advanced by the applicants in support of their case.

[57] Accordingly, I find that a reasonable, objective and informed person, in possession of the above relevant facts, would not, having regard to the presumption of impartiality, reasonably apprehend that I might not bring an impartial mind to bear on the adjudication of the Main Application.

[58] In light of the above, I grant an Order as below.

[33] *Ndlovu v Minister of Home Affairs and Another* (16425/09) [2010] ZAKZDHC 79, 2011 (2) SA 621 (KZD) (21 December 2010).
[34] Para 38.

ORDER

1. The recusal application is dismissed.

2. Each party is to bear its own costs.

Ms Mondo Mazwai

26 June 2023

Date

Having individually considered the application and the Reasons above, we concur that the application for recusal must be dismissed.

Mr Andreas Wessels

Signed by:Liberty Mncube
Signed at:2023-06-26 21:51:07 +02:00
Reason:Witnessing Liberty Mncube

Professor Liberty Mncube

Tribunal Case Managers:	Matshidiso Tseki and Sinethemba Mbeki
For the Applicants:	Adv M Skhosana
	instructed by M Raselo Inc
For the First Respondent:	Adv M Engelbrecht SC
	instructed by Cliffe Dekker Hofmeyr