COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: RVW150May20

In the review application of:

Coca-Cola Beverages Africa (Pty) Ltd	**Applicant**
And	
Competition Commission of South Africa	**Respondent**
Food and Allied Workers Union	**Intervenor**

Panel:	Y Carrim (Presiding Member) A Ndoni (Tribunal Member) H Cheadle (Tribunal Member)
Heard on:	18 March 2021
Order Issued on:	18 August 2021
Reasons Issued on:	18 August 2021

REASONS AND ORDER FOR DECISION

Introduction

[1] On 18 March 2021, this Tribunal heard a review application brought by Coca-Cola Beverages Africa (Pty) Ltd ("CCBA") against the Commission's decision to issue CCBA with a Notice of Apparent Breach (the "Notice") in terms of section 27(1)(c) of the Competition Act (the "Act") read with the Rule 39(2)(b) of the Commission's Rules[1] ("Rule 39(2)(b)").

[2] The Commission's decision to issue the Notice stems from a complaint laid by the Food and Allied Workers Union ("FAWU") with the Commission to the effect that the retrenchment of 368 employees on 31 May 2019 by Coca-Cola

[1] Rules for the Conduct of Proceedings in the Competition Commission published under GN R857 in *GG* 21504 of 1 September 2000.

Beverages South Africa (Pty) Ltd ("CCBSA"), a subsidiary of CCBA, was in apparent breach of CCBA's merger conditions.

Background

History of the relevant mergers

[3] Two Coca-Cola related transactions were approved on 10 May 2016[2] ("first merger") and 27 September 2017[3] ("second merger").

[4] In March 2015, the applicants notified the first merger that entailed the consolidation of independent Coca-Cola bottlers in South Africa into one entity, CCBA,[4] and the acquisition by The Coca-Cola Company ("TCCC") of certain SABMiller's brands such as Appletiser. Post the first merger, SABMiller would control CCBA with a majority shareholding.

[5] The first merger was approved subject to various public interest conditions of which two are relevant to this review:

> "***9 Employment Conditions***
>
> *9.1 Notwithstanding any other provision in this paragraph 9, CCBA commits that, for a period of no less than three years from the Approval Date, it will maintain at least the number of Employees as are employed in the aggregate by the Merging Parties as at Approval Date.*
>
> *9.2 Without derogating from its commitment set out in paragraph 9.1, CCBA shall not retrench any Bargaining Unit Employees as a result of the merger, and any retrenchments of employees outside of the bargaining unit shall be limited to 250 employees within the category of Hay Grade 12 and above.*

[2] *CCBA and Various Coca-Cola and Related Bottling Operations* (LM243Mar15).
[3] *The Coca-Cola Company and CCBA* (LM021Apr17).
[4] These were Amalgamated Beverage Industries (ABI), CocaCola Sabco Proprietary Limited (conducted through its subsidiary in South Africa, Coca-Cola Fortune Proprietary Limited), Coca-Cola Shanduka Beverages South Africa Proprietary Limited and Coca-Cola Canners of Southern Africa Proprietary Limited.

…

9.4 In the interest of clarity, retrenchments in the context of this condition do not include:

9.4.1 voluntary separation agreement (subject to paragraph 9.3.1);

9.4.2 voluntary early retirement packages;

9.4.3 unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act;

9.4.4 resignations or retirements in the normal course;

9.4.5 necessary steps taken by the Merging Parties in terms of section 189 of the Labour Relations Act should operational requirements in the ordinary course of business that are not merger specific necessitate that such steps be taken."

11 Trade Unions

11.1 The Merging Parties have entered into agreements with FAWU and NUFBWSAW regarding certain concerns which FAWU and NUFBWSAW have raised in relation to the proposed merger, which agreements are attached as Annexure "B" and Annexure "C" ("the Union Agreements"). The Merging Parties agree that the terms of clauses 3, 4 and 5 of each of the Union Agreements shall be conditions of the approval of the proposed merger.

11.2 In the event of any conflict in interpretation between the terms of these conditions and the Union Agreements, the terms of the Union Agreements shall prevail."

[6] The Union Agreements dealt with employment issues pertaining to harmonisation of wages, working conditions, and benefits across the different entities forming part of the CCBA.

[7] In approving the merger, the Tribunal stated that the conditions in clause 9 was to '*ensure that for a period of at least three years CCBA would maintain at least the number of Employees as are employed in the aggregate by the merging parties as at the Approval Date. Furthermore, where the merging parties seek*

to retrench employees, appropriate measures to more sufficiently mitigate the consequences were put in place'.

[8] On 27 September 2017, the Tribunal approved the second merger following TCCC exercising its option to acquire SABMiller's majority shareholding in CCBA. The second merger was approved subject to the replication and preservation of the public interest conditions contained in the first merger. Thus, the employment conditions were carried over to the second merger as follows:

> ***'3 Employment Condition***
>
> *3.1 In clause 9.1 of the May 2016 Conditions states the following:*
> *"Notwithstanding any other provision in this paragraph 3, CCBA commits that, for a period of no less than three years from the Approval Date, it will maintain at least the number of Employees as are employed in the aggregate by the Merging Parties as at Approval Date"*
>
> *3.2 The period mentioned in clause 9.1 of the May 2016 Conditions shall be extended to apply for a period no less than 3 years from the date of implementation of the Proposed Transaction.*
>
> *3.3 For the avoidance of doubt, the May 2016 Conditions shall continue to apply to, and be honoured by the Merging Parties, including the commitments made in terms of the MoAs.'*

History of retrenchments

[9] On 19 January 2019, the CCBSA wrote to the Commission to advise it that it was operating under extremely difficult circumstances for two years with '*declining profits as a result of rising input costs, new legislation and macro-economic forces*'. In an appendix to that letter, it outlined the adverse operational context consisting of the effect that a stagnant economy had on consumer disposable income, increased competitor activity and large raw

material price increases, particularly the price of sugar. It experienced [redacted][5]

[10] In this context, CCBSA stated that the introduction of the Health Promotion Levy (the "sugar tax") in April 2018 put its already struggling business under immense pressure. In order to secure the sustainability of the business it had to rationalise its operations by reducing its total headcount in sales and operations functions where additional jobs had become redundant given the no growth environment. It advised the Commission that, accordingly, it intended instituting the consultation process required under section 189 of the Labour Relations Act[6] ("LRA"). It stated that it would try to place the redundant employees in suitable alternative jobs and that, if employees were placed at a lower grade, they will have to accept the revised benefits of the new role.

[11] On 21 January 2019, the CCBSA issued a section 189A notice that it contemplated the dismissal of certain of its employees in the logistics and commercial functions on grounds of its operational requirement to optimise its organisational structures to reduce costs and to transition into a more efficient and cost-effective structure.[7]

[12] The official consultation process under section 189A commenced at the beginning on 5 February 2019 and concluded on 16 April 2019 when the parties were unable to resolve the dispute. The CCBSA accordingly gave the 368 employees, who were not able to be placed in alternative positions and who refused to accept alternative positions, notice of termination with effect from 31 May 2019.

[13] On 6 September 2019, FAWU, representing the retrenched workers, referred a dispute over the fairness of their dismissals to the Labour Court. The central thrust of its case was that the CCBSA intended to replace those that it intended

[5] Letter from CCBSA to the Commission, dated 19 January 2019 (pages 49-52 of the Consolidated Bundle.)
[6] Act No 66 of 1995.
[7] Section 189 (A) LRA letter from CCBSA to Phillip Mokwena of FAWU, dated 21 January 2019 (pages 53-67 of the Consolidated Bundle.)

to retrench with new recruits at lower remuneration. It is evident from the Record that FAWU has not pursued its case in the Labour Court despite a statement to the contrary by counsel for FAWU during the hearing that it had not abandoned its case.[8]

The Commission's investigation

[14] On 28 March 2019, FAWU submitted a complaint in terms section 49B of the Act to the effect that the conduct complained of was a '*potential violation of the Tribunal Ruling that no job losses should occur as a result of approval*'.

[15] On 16 April 2019, the Commission advised CCBA that a complaint had been received that it had '*breached the Conditions as it relates to clause 9.1 of the Conditions read with clause 3.2*' and requested certain information in particular the number of employees retrenched, the reasons for the retrenchment and the current headcount.

[16] On 6 May 2019, CCBA responded in detail. It advised that 368 employees were to be retrenched and that the current headcount as of May 2019 was [redacted] which was more than the 2016 headcount of [redacted]. The reasons given for the retrenchment were those set out in its letter to the Commission on 19 January 2019; namely, the adverse economic impacts on its sales, anticipated raw material costs and the sugar tax. It stated that the sugar tax amounted to R2.1 billion for the nine months from its introduction in April 2018 to the end of December 2018.[9]

[17] On 28 May 2019, the Commission requested further information, in particular how CCBA would be able to retain its headcount if it was going to retrench, how the implementation of the sugar tax was 'causally linked to the retrenchments' and in this regard, its financial statements and demand volumes immediately prior to and post the implementation of the sugar tax.

[8] Tribunal Transcript of Proceedings RVW150May20 (18 March 2021) page 85 lines 8-14 but see page 1086 of the Commission's Investigation Record which records that CCBA's answering affidavit was filed at the Labour Court on 20 September 2019.
[9] Letter from CCBSA to the Commission, dated 6 May 2019 (pages 89-106 of the Consolidated Bundle.)

[18] On 7 June 2019, CCBA responded.[10] In respect of the headcount, it pointed out that CCBSA was continuously recruiting new employees as existing employees exited as part of natural attrition in order to both replace them and to meet the aggregate headcount required under the merger conditions. And in this regard, stated that CCBSA had employed 1067 employees in May 2019 into newly created roles as a result of restructuring and meeting the aggregate headcount as a result of the voluntary and involuntary retrenchments.

[19] In respect of the 'causal link' between the sugar tax and the retrenchments, it referred to its letters to the unions in which it stated that trading environment, economic climate and the sugar tax necessitated the optimisation of its organisational structures to reduce labour costs and allow CCBSA's operations to transition into more efficient and cost-effective structures by making changes to organisational structures and to cut costs by aligning pay levels to the value of work, namely making certain roles redundant in order to allow it to retrench existing employees, who do not accept lower levels of pay, and to recruit new employees at those reduced levels of pay.

[20] In so far as the role of the sugar tax was concerned, CCBA stated that the retrenchments were required in order to mitigate the losses attributable to the sugar tax and to ensure CCBSA's continued profitability. In support of this, it pointed out that CCBSA and the FAWU had strongly opposed the introduction of the sugar tax because of its potential for job losses. It provided a comparison of its income statements for the financial years 2017 and 2018, which reflected that [redacted] that it paid R2.1 billion in the new sugar tax and that its gross profit decreased by R300 million. The note accompanying the income statement for 2018 reads as follows: '*Despite* [redacted] *the (i) new sugar*

[10] Letter from CCBSA to the Commission, dated 7 June 2019 (pages 109-115 of the Consolidated Bundle.)

tax and (ii) weak SA economy which impacted sales, has led to a profit decline [redacted]

[21] On 24 October 2019, the Commission issued the Notice to the effect that *'[i]t appears to the Competition Commission that you have breached an obligation that was part of the conditions in terms of which the merger was approved*'. In a letter to CCBA's attorneys on the same date, the Commission states that after an extensive investigation, it found that the retrenchments were merger specific because the *'[a]ffected employees were employed at the merged entity's bottling operations, which the merged entity indicated that it wished to rationalise in order to reduce duplications and staff costs*' and that the retrenchments '*took place during the moratorium period prescribed in clause 9.2 of the Merger conditions*'.[11]

[22] It also bears noting that it is clear from the correspondence summarised above that the complaint referred to in the Commission's letter dated 16 April 2019 concerned the impact that the retrenchment might have on the aggregate headcount required under condition 9.1 of the first merger and its extension for a further period in condition 3.2 of the second merger. No information was ever solicited by the Commission on the issue of duplications at this stage of the investigation.

[23] Because of the time limits imposed by rule 39(2) of the Commission Rules, two courses of action were open to CCBA in terms of rule: either to propose a remedial plan outlining its approach to remedy the breach or request the Tribunal to review the Notice within 10 business days of the Notice. However, on 11 November 2019, CCBA's attorneys sought an extension of the periods to '*present proposals to address the complaint*' and to '*address a formal written submission … with neither the Commission nor our client conceding any position or detracting from their rights at this stage*'.

[11] Notice of Apparent Breach, dated 24 October 2019 and Letter from the Commission to CCBA, dated 24 October 2019 (page 121-123 of the Consolidated Bundle.)

[24] The Commission granted the extension. While the CCBA were preparing their submission, its attorneys requested the Commission to provide it with '*any documentation relevant to the Notice of Apparent Breach, including, without limitation, the complaint and related documents, the record and any reasons attaching to the notice, such that we may take these into account in making our submissions'*. The Commission dismissed the request stating that it had provided the CCBA with '*sufficient information to respond to the notice of breach by making proposals to remedy same'*.

[25] On 20 December 2019, CCBA filed its submission.[12] The submission reiterated that CCBSA experienced significant challenges given the economic environment, in particular material increases in costs, the sugar tax and declining macro-economic circumstances and demand negatively impacting its medium to long term sustainability. These events and circumstances, it was submitted, arose post-merger and the full extent of their impact were unforeseeable at the time of the merger. It reiterated that the rationale for the retrenchment was '*to reduce the cost of employment given the declining commercial and operational circumstance and to better utilize the workforce of the firm (including the removal of the unproductive duplication of roles)*'. In so far as there was any removal of duplication in respect of some of the job losses, it was to '*reduce staff costs and change the nature of the employment within the firm so as to reduce overall costs in view of the unforeseen events post-merger*'.

[26] The submission further sets out the proactive steps that CCBSA took to raise its concerns over the excessive price of sugar and the introduction of the sugar tax with the relevant regulatory and parliamentary bodies.

[27] In conclusion, the submission states that there are no reasons, and the Commission has not presented the CCBA with any information to conclude that

[12] CCBA submissions to the Commission, dated 20 December 2019 (page 132-138 of the Consolidated Bundle).The submissions were specifically incorporated as part of the CCBA's founding affidavit at paragraph 44 (CCBA 'Founding Affidavit' Consolidated Bundle page 16).

the retrenchments were merger specific and, accordingly, requested the Commission to withdraw its Notice.

[28] On 9 April 2020, the Commission sent an email to CCBA's attorney taking a new tack, namely that '*the provisions requiring the merged entity to harmonise working terms and conditions culminated in the involuntary retrenchment of 388*[13] *employees (who all form part of the collective bargaining unit) in breach of the conditions*'[14] while at the same time CCBSA '*hired new employees in the same/similar positions but for less wages and less benefits*'. It also questioned CCBSA's rationale for the retrenchments given that only those areas in which duplications arose from the merger were targeted and no other areas or no other cost cutting measures were effected.

[29] On 21 April 2020, CCBA's attorneys submitted supplementary submissions in which it addressed the two new issues raised by the Commission.[15] Firstly, it listed the different cost cutting measures that it had introduced supported by documentation. Secondly, it pointed out that the harmonisation process was required to be achieved by 10 May 2020 and that the minimum level of wages, working conditions and benefits would be set at the minimum levels applicable to employees within ABI Bottling (Pty) Ltd at the time. Employees who enjoyed more favourable conditions would not be affected.

[30] CCBSA submitted that there was no nexus between the factors to be taken into account in harmonisation and any retrenchments on grounds of operational requirements. It also stated that there was no evidence to suggest that it focused on employees earning better terms and conditions of service for the simple reason that only [redacted]% of the affected employees were from the company

[13] CCBA later corrected the erroneous understanding that there had been retrenchment of 388 employees, this number was in fact fewer, it was 368 (CCBA Founding Affidavit at paragraph 32, page 13 of the Consolidated Bundle).
[14] Paragraph 11 of Merger Conditions (first merger) recorded that the clauses in the agreements entered into between the merging parties and the unions relating to a post-merger collective bargaining process in respect of harmonization of wages, working conditions and benefits to be concluded within four years of the date of the merger approval.
[15] CCBA Supplementary submissions to the Commission, dated 20 April 2020 (page 143-147 of the Consolidated Bundle.) The supplementary submissions were specifically incorporated as part of the CCBA's founding affidavit at paragraph 48 (page 17 of the Consolidated Bundle).

identified by the Commission and that employees historically associated with one of the merging entities, [redacted]

[31] On 29 April 2020, the Commission, without responding to the supplementary submissions, merely informed CCBA that rather than submitting a remedial plan, CCBA had decided instead to make further submissions, and since it remained in breach of the merger conditions, the Commission afforded the CCBA a further 10 business days to submit a remedial plan. On 14 May 2020, CCBA launched its application to review the Commission's decision to issue the Notice. FAWU applied to intervene in proceedings on 29 October 2020[16] and it was granted participation rights on 2 December 2020.[17]

Legal issues raised

The nature of a review in terms of section 27(1)(c) of the Act

[32] Section 27(1)(c) confers on this Tribunal the power to hear any appeal or review any decision of the Commission that may in terms of the Act be referred to it. Given its context, review does not amount to an appeal on the merits but a determination as to whether the decision reviewed is lawful, reasonable and procedurally fair.

[33] However, Rule 39(2)(b) provides for a specific form of review for breach of merger approved conditions. A firm may '*request the Competition Tribunal to review the Notice of Apparent Breach on the grounds that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger*'.

[34] As the Constitutional Court noted in *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others*[18] nothing in section 33 of the Constitution

[16] Case Number RVW150May20/INT151Oct20.
[17] Direction of the Competition Tribunal RVW150May20 (2 December 2020).
[18] [2007] 12 BLLR 1097 (CC).

guaranteeing everyone the right to administrative action that is lawful, reasonable, and procedurally fair '*precluded specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA*'.[19]

[35] Accordingly, the nature of the review under Rule 39(2)(b) is to provide a separate and context specific form of review, namely, to determine whether a firm has substantially complied with its merger conditions. Such a determination necessarily involves whether the decision to issue the notice is lawful, reasonable and procedurally fair.

The merger employment conditions

[36] It is important in interpreting employment related merger conditions to understand the public interest issue at stake. The public interest concern in section 12A(3)(b) is '*the effect that a merger will have on … employment'*. That is not surprising given the high rate of unemployment that characterises the South African labour market. The merger conditions seek to limit the negative impact that a merger, which invariably involves a duplication of personnel or restructuring, has on employment.

[37] The manner in which conditions seek to achieve this is two-fold: either by setting an employee level below which the merging parties may not go for a period of time; or by preventing the merging parties from retrenching employees on grounds that are merger specific. The object is not to protect individual jobs, which is the focus of the unfair dismissal provisions in the LRA, but to ensure that employment losses arising from a merger are kept to a minimum. As this Tribunal has previously stated:

> '*Translated to considerations of the public interest effect on employment, the practice thus far has been to distinguish, post-merger, between employment loss associated with the merger nexus, referred to as "merger specific" employment loss and those in the second category of*

[19] At paragraphs 91 and 92.

non-merger-specificity, often referred to as "operational" employment loss.

The Competition Act intervention is jurisdictionally premised on the former "merger-specific", but not the latter "operational kind", which is considered to be purely the sphere of labour law'.[20]

[38] The merger conditions in this matter reflect both methods. Clause 9.1 of the first merger conditions obliges CCBA to '*maintain at least the number of employees as are employed in the aggregate by the Merging Parties as at the approval date*' for three years. Clause 3.1 of the second merger conditions simply extended the period. And clause 9.2 obliges CCBA to '*not retrench any Bargaining Unit Employees as a result of the merger…*'.

[39] While condition subclauses 9.1 and 9.2 place employment limitations on the merged entity as a result of the merger, clause 9.4 expressly excludes retrenchments occasioned by operational requirements in the ordinary course from '*retrenchments as a result of the merger*'. It is thus evident from clause 9 read as a whole that, although CCBA must retain the number of employees as at the approval date and that it is not permitted to retrench for merger specific reasons, it is permitted to retrench employees on grounds of operational requirements.

[40] One issue arose concerning the interpretation of clause 9.2 during the investigation, namely whether there was a moratorium on retrenchments as a whole or in respect of merger specific retrenchments. The Commission initially took the view that moratorium in clause 9.1 applied equally to clause 9.2. On internal legal advice, it correctly retracted that view and the issue as to whether the actual date of the retrenchments occurred in or without the period of the moratorium fell away. Clause 9.2 prohibits merger specific retrenchments whenever they occur.

[20] *BB Investments, BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty) Ltd* [2014] 2 CPLR 451 (CT) ("*BB Investments*") at paragraphs 58 and 59.

Determining merger-specificity

[41] The CCBA pressed the Tribunal to adopt the '*causation test*' from the law of delict. The test involves two distinct enquiries, namely a factual one and a legal one. The factual enquiry involves applying the 'but-for' test. This is a hypothetical enquiry into the probabilities as to whether the loss would have happened but for the wrongdoer's conduct. The legal test only applies if the loss would not have occurred but for the wrongdoer's conduct. That test is to determine whether the conduct is sufficiently closely or directly the cause of the loss for legal liability to arise.

[42] The very summary of the delictual test demonstrates its inappropriateness for an enquiry into whether a firm '*has substantially complied with its merger conditions*', in this case whether the CCBSA retrenched the employees for reasons arising from the mergers or reasons arising from operational requirements. The *cause* of the retrenchments, whether for reasons arising from the merger or other operational requirements, is the employer's *decision*. It is that decision and the underlying incentives and stated reasons for that decision that need to be interrogated.

[43] In *National Union of Metalworkers of South Africa and others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another*[21], the Constitutional Court had to determine whether the dismissal of employees who refused to accept changes to their terms and conditions during a restructuring constituted an automatically unfair dismissal in terms of section 187(1)(c) of the LRA or one permitted under section 189. The Court was equally divided as to whether a delictual test of causation should be adopted or whether in a situation where there are two conflicting reasons proffered for the dismissal, a tribunal should on an evaluation of the facts determine on the probabilities which version is to be preferred. The judgment turned, however, on an interpretation of section 187(1)(c).

[21] 2012 (2) BCLR 168 (CC).

[44] Given the nature of the review under Commission Rule 39, the wording of the employment condition and the fact that this Tribunal is faced with two conflicting proffered reasons for the retrenchment, the latter approach is the more suitable one to adopt. As the second judgment in *Aveng Trident Steel* states:[22]

> '*The determination of the true reason for the dismissal appears to me to be simply a matter of fact, which is established in accordance with the rules applicable to the evaluation of evidence. Where an employee proffers a contrary version regarding the true reason for the dismissal, a court must resolve the dispute of fact by evaluating the evidence and making a finding as to which of the two version is to be preferred on a preponderance of probabilities, and why. Where there are two conflicting, irreconcilable versions before it, a court must apply the well-established approach laid down in Stellenbosch Farmers Winery*'.[23]

[45] The relevant considerations in *Stellenbosch Farmers' Winery* for the purposes of these proceedings is that the Tribunal must resolve factual disputes by making '*an evaluation of the probability or improbability of each party's version on each of the disputed issues' and 'determine whether the party burdened with the onus of proof has succeeded in discharging it*'.[24] Given our conclusions on the dispute of fact discussed below, it is unnecessary to determine whether it is the Commission or the merged parties that carry the burden of proof.

[46] Because a merger invariably involves duplication and restructuring, any retrenchment immediately before or soon after gives rise to a legitimate concern that the retrenchment may be merger related. As this Tribunal observed in *Goldfields Ltd v Harmony Gold Mining Company Ltd and Another*[25] that '*in practice differentiating operational related reductions from those that are merger related may be very difficult indeed. There is a legitimate concern that firms otherwise engaged in non-merger operational retrenchments, may use*

[22] At paragraph 119.
[23] *Stellenbosch Farmers*' *Winery Group Ltd and v Martell Et Cie* 2003 (1) SA 11 (SCA) at paragraph 5.
[24] At paragraph 5
[25] [2005] 1 CPLR 297(CT) at paragraph 21.

that opportunity to disguise, as operational, retrenchments that are in fact merger specific'.

[47] In *BB Investments* this Tribunal held that merger specific meant '*conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller*',[26] which is consistent with the approach adopted in *Stellenbosch Farmers' Winery* and the second judgment in *Aveng Trident Steel*. Importantly the Tribunal goes on to state that '*firms are dynamic institutions*' and *'[n]ot every change that results post-merger is necessarily attributable to the merger'*. That approach it held '*is far too mechanistic*' and changes can be conceived of '*a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific*'. Thus, the proximity of the retrenchments to the approval of the merger is also a factor to be taken into account in determining the probabilities as to whether the retrenchments are merger specific.

Analysis of factual issues raised

The Complaint

[48] FAWU initially formulated its complaint as a '*potential violation of the Competition Tribunal ruling that no job losses should occur as a result of approval*' of the merger.

[49] It subsequently complained that the simultaneous retrenchment and recruitment of replacements at lower remuneration and conditions constituted a contravention of clause 11 of the merger conditions in respect of harmonisation of remuneration and terms and conditions of employment.

The Commission's case

[50] It appears form the Commission's letter of 16 April 2019 that it initially interpreted FAWU's complaint as an alleged breach of clause 9.1 and 3.2 of the respective merger conditions. That was presumably on the basis that the initial

[26] At paragraphs 56 and 57.

proposed retrenchment of 1072 employees (later reduced to 368) would have the knock-on effect of breaching the employment levels contained in clause 9.1. In other words, a retrenchment on grounds of operational requirements was only permissible under clause 9.2 as long as the employment levels guaranteed under clause 9.1 were retained.

[51] The Commission's Notice issued on 24 October 2019 fails to identify the condition breached. It merely states '*[i]t appears to the Competition Commission that you have breached an obligation that was part of the conditions in terms of which the merger was approved*'.

[52] The basis of the alleged breach is only disclosed in the Commission's covering letter to CCBA's attorneys that it discloses the nature of the breach, namely that the *'[a]ffected employees were employed at the merged entity's bottling operations, which the merged entity indicated that it wished to rationalise in order to reduce duplications and staff costs*' and that the retrenchments '*took place during the moratorium period prescribed in clause 9.2 of the Merger conditions*'. The misinterpretation of clause 9.2 in respect of it being subject to a moratorium was subsequently corrected but indicates in part an ongoing lack of clarity as to the basis for its decision to issue the Notice.

[53] Thus, at this stage of the investigation, the reasons given for the Commission's decision is the rationalisation of the merged entities bottling operations arising from CCBSA's incentive to retrench so-called 'duplicate' employees arising from the merger and the reduction of staff costs.

[54] During its engagement with CCBA, the Commission introduced a new tack in April 2020 to the effect that the hiring of new employees for less wages and benefits breached the employment condition for CCBA to engage in negotiations with the trade unions to harmonise terms and conditions in accordance with clause 11 of the merger conditions.

[55] By April 2020, there are accordingly three bases put forward on which the Commission makes its finding that, as a result of its investigation, CCBA has

breached clause 9.2 of the merger conditions, namely that the retrenchments were (a) to remove duplicates arising as a result of the merger; (b) a reduction in staff costs; and (c) to frustrate the merger obligation to engage in collective bargaining to harmonise remuneration and terms and conditions in the merged entities.

[56] Quite apart from the procedural issues for review arising from the shifting grounds for the Notice and the failure to properly inform CCBA of the case that it had to meet, each of these three findings need to be interrogated not only as a matter of fact but also as to whether they constitute a basis for concluding that the retrenchments are merger specific.

[57] Removal of Duplicates. This, if proved, would be merger specific. The Commission infers that the '*employees were from the bottling operations of the merged entity where the duplications occurred as a result of the merger'*.[27] In support of this conclusion all it cited was a table in the Merger Report indicating where duplications would occur as a result of the merger and that most of the duplications '*occurred in roles such as manufacturing, logistics, and sales … precisely the areas where the retrenchments took place*'. Although CCBA readily admits that *some* of the employees retrenched occupied duplicate positions,[28] the Commission does not put up any evidence as to whether *all* or, *if not all, which* or *how* many of those employees occupied duplicate positions. This is a dispute of fact which we discuss later.

[58] Reduction of staff costs. This ground arises initially as an independent ground. In its answering affidavit, the Commission states that CCBSA's '*motive for the retrenchments was to reduce labour costs, as it retrenched the affected employees and hired new employees in the same roles but at lower salaries*'. There is no dispute that CCBSA's reason for the retrenchments was to cut costs, including staff costs. There is also no dispute as to the macro-economic conditions concerning the post-merger circumstances, namely macro-

[27] Commission 'Answering Affidavit' at paragraph 30.2.2 (page 228 of the Consolidated Bundle).
[28] CCBSA's final submissions at paragraph 8.1.5 (page 134 of the Consolidated Bundle).

economic conditions, the implementation of the sugar tax and the anticipated rise in material costs. What is at issue is the nexus between the two, which the Commission denies, and asserts is a facade for the real reason for cutting costs, namely, to remove duplications arising from the merger. In other words, this is not an independent ground but tied up inextricably with the first ground. It, accordingly, is part of the dispute of fact that arises in respect of the first ground which we discuss later.

[59] Breach of harmonisation obligation. The reduction of labour costs ground gained new traction when the Commission sent an email on 9 April 2020 to CCBA's attorneys to the effect that '*the provisions requiring the merged entity to harmonise working terms and conditions culminated in the involuntary retrenchment of 388 employees (who all form part of the collective bargaining unit) in breach of the conditions*' while at the same time CCBSA '*hired new employees in the same/similar positions but for less wages and less benefits*'.

[60] The new tack is glossed in its answering affidavit to the effect that '*[t]here is no credible reason for retrenching employees and simultaneously hiring 1067 employees in largely the same roles as those of the retrenched employees. It is plausible that the underlying reasons for retrenching employees and rehiring in the same roles at lower costs is an attempt by CCBSA to avoid the higher employment costs that are associated with the 2016 Merger and 2017 Merger'* (our emphasis). Because clause 11 of the 2016 Merger requires the CCBA to harmonise working terms and conditions of employees with the merged entity and that that process requires that disparities to be '*addressed by elevating the wages earned by the lesser paid employees to the higher wages earned by their counterparts in the same role' therefor 'the only reasonable conclusion is that the retrenchments are merger specific*'.

[61] Quite apart from a *plausible* conclusion becoming the *only reasonable conclusion*, what is not explained is how the retrenchment of higher paid employees might affect the harmonisation process of setting standard terms and conditions across the merged entities because the Memorandum of Agreement between FAWU and the merged entities on harmonisation is not

dependent on what individual employees earn but on the minimum levels that applied to ABI Bottling (Pty) Ltd at the time. The relevant provisions of clause 3.2 of that Agreement reads as follows:

> '*The parties agree that, as an element of the post-merger collective bargaining process, that within 4 years of the date of approval of the Proposed Transaction by the Competition Tribunal ("the Approval Date"), they will have harmonised wages, working conditions and benefits across different entities forming part of CCBSA. This harmonisation will be to a level no less than the minimum level of wages, working conditions and benefits as apply within ABI Bottling Propriety Limited ("ABI") at that time, provided that any employee, who, at the time, enjoys more favourable wages, working conditions or benefits will not be negatively affected*.'

[62] The Commission also fails to demonstrate *as a matter of fact* that the replacing of retrenched employees with new employees at lower wages and working conditions had any impact on the harmonisation process, which was to expire in May 2020. If there was any impact as matter of fact, that should have been part of the investigation and evidence demonstrating the alleged impact on the negotiations with reference to the collective agreement itself.

[63] Accordingly, the core dispute of fact that is required to be resolved is whether the reasons giving rise to CCBSA's cutting of costs are its post-merger circumstances or the merger-specific removal of duplications – a dispute of fact that can only be resolved on the probabilities, which we deal with below.

CCBA's reasons for the retrenchment

[64] CCBA raises three reasons for the retrenchments in response to a drop in revenue and profitability and to ensure its medium to long term sustainability. The first is the macro-economic climate. The second is the imposition of the sugar tax. The third is the anticipated sharp increase in raw materials, in particular the price of sugar.

[65] The macro-economic climate. In its voluminous correspondence with the Commission, it iterates and reiterates that it is facing a challenging economic climate within which to trade post-merger. There is no evidence on the record that this is contested during the investigation nor are the allegations to that effect in the Founding Affidavit properly responded to.[29]

[66] Nevertheless, in mischaracterising multi-factored reasons proffered by CCBA, the Commission's answering affidavit relies on CCBA's claim that its decline in sales is due to a tough economic climate in order to disprove that the 'decrease in revenue could not be solely attributed to the sugar tax…'.[30]

[67] The Sugar Tax. There is no dispute as to the fact of the sugar tax and that CCBSA paid R2.1 billion in respect of that tax for the period April to December 2018. The Commission discounts the impact of the tax on CCBSA on two grounds, namely that the knowledge of the tax predated the merger and that CCBSA nevertheless continued to be 'very profitable' in that year.

[68] The Health Promotion Levy on Sugar Beverages was first raised as a single line item in the Minister of Finance's budget speech in February 2016. It was only in July 2016, that National Treasury issued a Policy Paper proposing the tax rate for the levy. The first merger was notified in March 2015 and approved in May 2016. The CCBA submitted in answer to the allegation of prior knowledge that the full impact of the sugar tax effect was unknown to it at the time of the merger, which, given the timelines, cannot be disputed. There is accordingly no basis for the finding that CCBA had knowledge of the actual impact that the sugar tax would have on its operations at the time of the merger or that it used the impact of the sugar tax to disguise its motivation to remove duplications arising from the consolidation of the bottling companies.

[29] These allegations were not addressed in the Commission's Answering Affidavit and instead elicited no more than a bare denial (at paragraphs 56 at pages 237 of the Consolidated Bundle, see also page 241 of the Consolidated Bundle where the Commission does not even provide its *ad seriatum* response to paragraph 33 of CCBA Founding Affidavit).
[30] Commission 'Answering Affidavit' at paragraph 30.2.4 (page 229-230 of the Consolidated Bundle).

[69] As the full impact of the sugar tax became clear, CCBA made submissions to the National Treasury's Finance Standing Committee between August 2016 and July 2017 strongly arguing that that the proposed sugar tax would have a negative impact on CCBA's business and its employment levels.

[70] In January 2017, FAWU made similar representations to the Finance Standing Committee where it echoed the concerns about the negative impact the sugar tax would have on employment levels in the soft drinks sector.[31]

[71] The Commission does not dispute that both CCBA and FAWU warned of the negative impact that the sugar tax would have on employment levels, it instead finds that it did not have that impact on the business and employment levels of CCBA because it had '*continued being very profitable even after spending R2.1 billion in relation to the Sugar Tax'*.[32]

[72] The fact that the CCBSA recorded a profit for 2018 does not mean that its profitability was not substantially affected by a R2.1 billion tax. It is not disputed that CCBSA's gross profit decreased by R300 million year on year or that [redacted] Moreover, there is no engagement nor answer, other than a bare denial from the Commission, to CCBA's claim[33] that the need to cut costs was aimed at ensuring the long-term sustainability of the business.

[73] The Commission also mischaracterises the CCBA's claim that CCBSA's decrease in revenue is 'solely attributable to Sugar Tax'.[34] The CCBA has consistently asserted throughout its engagement with the Commission that there were three causes for its decrease in revenue: the macro-economic

[31] FAWU Submissions to Standing Committee 26 January 2017 at item 2 (pages 1046-1047 of the Commission Investigation Record).
[32] Commission 'Answering Affidavit' at paragraph 30.2.4 (page 229-230 of the Consolidated Bundle).
[33] CCBA's 20 December 2019 submission (page 132-138 of the Consolidated Bundle).
[34] Commission 'Answering Affidavit' at para 30.2.4 (page 229-230 of the Consolidated Bundle).

climate; the sugar tax; and a sharp increase in the cost of raw materials (mainly the price of sugar).[35]

[74] Increase in cost of raw materials. CCBA throughout its engagement with the Commission asserted that one of the causes for its poor economic performance is the anticipated sharp increase in raw materials in particular the price of sugar. Its December 2019 submission to the Commission states that it proactively made submissions to the International Trade Administration Commission of South Africa regarding the excessive price of sugar in South Africa. The submission was specifically incorporated by reference in CCBA's founding affidavit, which the Commission merely notes and does not deny.[36]

Evaluation of the probabilities on duplications

[75] Since the other reasons advanced by the Commission are not merger specific, the only finding to be evaluated is that CCBSA had a motive to remove duplications. In doing so it does not dispute CCBSA's decrease in revenue and profitability in 2018 caused by prevailing macro-economic conditions, particularly the imposition of the R2.1 billion sugar tax and the anticipated sharp increase in raw materials. It, however, finds that these circumstances do not justify the retrenchments because it remained profitable in the year 2018.

[76] Despite being provided with the specific details of the roles that were made redundant by CCBSA, the Commission failed to investigate and determine which of those roles were duplicated roles in order to not only identify them but also to indicate which duplicate roles were not filled by replacements. It relied instead on an *inference* to be drawn from information in the Merger Report indicating where the duplications occurred as a result of and at the time of the merger, and a statement by CCBA that *some* of the retrenched workers were

[35] See in particular its response to the request from the Commission on 6 May 2019 at page 92 of the Consolidated Bundle and the extract of its income statement submitted to the Commission on 7 June 2019 at page 114 of the Consolidated Bundle.
[36] CCBA 'Founding Affidavit' at paragraph 48 (Page 17 of the Consolidated Bundle) and Commission 'Answering Affidavit' at paragraphs 70-71 (pages 241-242).

in duplicate roles. As a result, there is insufficient evidence to demonstrate that a principal reason for the retrenchments was the removal of duplicate roles.

[77] It is also clear from the information provided by CCBA that the retrenchments were part of a larger cost cutting exercise, which involved [redacted][38] Moreover, CCBSA replaced the retrenched employees with new employees, which, if in duplicate roles, would indicate that the motivation was not to remove duplications *per se*. Taken together, the probabilities are poor that the retrenchment was principally motivated by the removal of duplicates and not strong even as a marginal motivation, bearing in mind that what this Tribunal has to determine is whether CCBA '*substantially complied*' with the merger condition.

[78] It follows that the Commission's discounting of the reasons advanced by CCBA for the reduction of staff costs falls away. In any event, for the reasons advanced below, the more probable reason for the retrenchments is the one proffered by CCBA.

[79] Given that there is no dispute in respect of the evidence provided by CCBA in respect of the macro-economic climate, the R2.1 billion sugar tax imposed in 2018 and the anticipated sharp increase in the costs of input raw materials, the probabilities strongly favour CCBSA's stated reasons for cutting costs generally and specifically in respect of the reduction of staff costs, which included the involuntary retrenchments. The cutting of costs in challenging economic circumstances is a requirement in response to an economic need of an

[37] See for example CCBSA's Answering Affidavit in the Labour Court proceedings at paragraphs 9. 1.5 and 9.1.9 (page 1090-1091 of the Commission's Investigation Record).
[38] CCBA's 6 May 2019 submission to the Commission at page 94 of the Consolidate Bundle and its Founding Affidavit at paragraph 30 (pages 13-14 of the Consolidated Bundle). These measures are not disputed – see Commission 'Answering Affidavit' at paragraphs 63-64 (pages 239-240 of the Consolidated Bundle). See also paragraphs 4.1.5-4.1.6 in the 21 April supplementary submission to the Commission on CCBA's behalf which is also incorporated by reference in clause 48 of its Founding Affidavit (page 17 of the Consolidated Bundle) and not disputed – see paragraph 70 of the Commission's Answering Affidavit at pages 241-242 of the Consolidated Bundle.

employer and accordingly an operational requirement as it is contemplated in the definition of 'operational requirements' in the LRA.[39]

Condonation

[80] Finally, we turn to the issue of Condonation. The Commission issued its Notice of Apparent Breach on 24 October 2019. CCBA had 10 days to either submit a remedial plan or institute a review of the Notice under Commission Rule 39(1). Instead, it engaged in a process, with the consent of the Commission, to persuade it to withdraw the Notice. In addition to the correspondence between the Commission and CCBA's attorneys, CCBA made a formal submission on 20 December 2019 which dealt with the two grounds stated in the letter accompanying the Notice for finding the retrenchments merger specific, namely duplications and the reduction of staff costs.

[81] After a meeting between the Commission and CCBA's attorneys on 9 April 2020, a further submission was made on 21 April 2020 dealing with new allegations that the reduction in staff costs was to impact negatively on the harmonisation process contemplated in clause 11 of the merger conditions.

[82] In a letter dated 29 April 2020, the Commission informed the CCBA that because it had not remedied its breach of clause 9.2 of the Merger Conditions, it afforded it a further 10 days to remedy the breach, failing which the Commission would approach the Tribunal for appropriate relief.

[83] On 14 May 2020, CCBA instituted review proceedings within 10 business days of the letter.

[84] Bearing in mind that the Commission initially relied on an alleged breach of condition clause 9.1 in the Notice and then, during its investigation, on clause 9.2 and thereafter on clause 11, the Commission's shifting grounds raises the question whether its Notice was effectively valid.

[39] The definition in the LRA reads as follows: '"*operational requirements" means requirements based on the economic, technological, structural or similar needs of an employer*'. (emphasis added)

[85] Because the new grounds for its finding that CCBA appeared to breach employment conditions were only raised in April 2020, requiring further submissions from CCBA, the Commission must have come to a new finding based on those submissions.

[86] In our view, it had in effect revised the grounds of its original Notice and, although it did not serve a fresh Form CC19 notice, as it should have, stating the grounds clearly, its letter of 29 April 2020 read with the original Notice effectively constituted notice for the purposes of Commission Rule 39(1).

[87] However, even if we are wrong in holding that the 29 April 2020 letter constituted notice for the purpose of Commission Rule 39(1) and that condonation is necessary, we hold that CCBA has established sufficient cause for condonation in filing this application for review for the following reasons.

[88] The factors that are to be considered in determining whether sufficient cause for condonation has been established include the explanation for the delay, the degree of non-compliance, the prospects of success, the respondent's interest in the finality of the judgment, the convenience of the Tribunal and the avoidance of unnecessary delay in the administration of justice.[40] The cogency or relevance of each of these factors will vary with the circumstances and so, for example, even if prospects of success are good, a flagrant breach of the rules may lead to the refusal of an application for condonation.

[89] Although we have determined that, on the merits, CCBA should succeed in its review, this factor is not conclusive and, accordingly, the other factors must be taken into account. The *explanation for the delay* is that the Commission agreed to allow CCBA to make further submissions after the issuing of the Notice of Apparent Breach. The *degree of non-compliance* is serious given that the delay in filing the application for review is almost 6 months, but this is mitigated by the

[40] Harms, *Civil Procedure in the Superior Courts,* LexisNexis at Part C12.3

Commission's agreement not only to permit the submissions but also that it was the Commission's shifting of its grounds of apparent breach that triggered both. CCBA clearly has an *interest in the finality* of the judgement as does FAWU and the retrenched employees it represents.

Order

[90] For the reasons set out above, the following order is made:

(a) Declaring that CCBA has substantially complied with its obligations with respect to clause 9.2 of the Merger Conditions; and

(b) Setting aside the Notice of Apparent Breach issued by the Commission on 24 October 2019.

Signed by:Halton Cheadle
Signed at:2021-08-18 17:26:11 +02:00
Reason:I approve this document

Halton Cheadle

Professor Halton Cheadle **18 August 2021**
Date

Ms Yasmin Carrim and Ms Andiswa Ndoni concurring.

Tribunal Case Managers:	K Kgobe, B Masina and M Tshabalala
For the Applicants:	G Engelbrecht SC instructed by Bowmans
FAWU:	N Muvangua instructed by Palesa Msimanga of Cheadle Thompson & Haysom
For the Commission:	R Kariga and W Gumbie