COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM211Jan16/OTH172Sep18

In the matter between:

DISTELL LIMITED	Applicant
and	
ANHEUSER-BUSCH INBEV SA/NV	First Respondent
THE COMPETITION COMMISSION OF SOUTH AFRICA	Second Respondent

Panel	:	Yasmin Carrim (Presiding Member)
	:	Thando Vilakazi (Tribunal Member)
	:	Imraan Valodia (Tribunal Member)
Heard on	:	12 September 2019
Order issued on	:	17 February 2020
Reasons issued on	:	17 February 2020

REASONS FOR DECISION

Introduction

[1] In November 2016, Distell Limited ('Distell') laid a complaint with the Competition Commission ('Commission'), alleging that Anheuser-Busch InBev SA/NV ('AB InBev') had violated the terms of the conditions imposed by the Tribunal in the AB InBev/SABMiller PLC ('SAB') merger[1] by entering into exclusive branding agreements with outlets and entering into exclusive pouring rights agreements

[1] The conditions were imposed by the Tribunal's order of 30 June 2016, and subsequently amended on 04 August 2016, 16 November 2016, and 16 September 2018.

for events held at stadia. The Commission investigated the complaint and found that AB InBev's conduct did not amount to a violation of the conditions.

[2] Distell has now brought this application to the Tribunal in which it seeks an order declaring that the conduct of AB InBev violated the terms of the conditions and, in the alternative, an order reviewing and setting aside the Commission's decision that the conduct in question did not amount to a breach, mandating the Commission to re-investigate the complaint.

[3] AB InBev opposed the application.

[4] The Commission did not oppose the application but, given the centrality of its decision making to a ruling, filed papers to assist the Tribunal in its determination.

[5] Having heard the parties' oral argument and with the benefit of written heads of argument, we find that –

5.1. AB InBev's conduct as it relates to the enforcement of its exclusive branding rights with outlets did not amount to an infringement of the conditions.

5.2. With regard to the question of AB InBev's exclusive pouring rights at stadia, we find that the Commission's investigation into whether AB InBev's exclusive pouring rights at stadia amount to an infringement of the conditions was founded on an interpretation of the conditions that did not give due regard to all the surrounding facts and in particular the reasons for the Tribunal's decision. We thus review and set aside the Commission's decision not to invoke the proceedings established by Rule 39 of the Competition Commission's Rules on this issue. The relief we have granted in respect of this finding is to remit the issue back to the Commission for further investigation.

[6] The reasons for our decisions follow, starting with a description of the background to the application.

Background

[7] On 22-24 June 2016, the Tribunal convened a hearing to assess the Commission's recommendation that the proposed merger between AB InBev and SAB should be conditionally approved.

[8] Distell, along with other interested parties, participated in the merger hearing, raising several concerns and contributing to the proposed conditions circulated at the time.

[9] The merger was ultimately approved subject to conditions by the Tribunal on 30 June 2016 ('the conditions').

[10] The dispute at hand ultimately turns on the interpretation of clauses 7.1 to 7.3 of the conditions which read as follows:

> *"ACCESS TO COLD STORAGE AND REFRIGERATOR SPACE*
>
> *7.1. It is hereby recorded that the allocation of space within Outlets is the sole discretion of the outlet owner or operator.*
>
> *7.2. The Merged Entity will not preclude or induce any Outlet from offering non-Merged entity owned ambient and Cold Space and non-Merged Entity owned refrigerator space to competing third parties (Ambient space to include shelving, floor space and storage). This restriction shall not apply to an event sponsored by the Merged Entity, for the duration of such event.*
>
> *7.3. The Merged Entity shall ensure that Outlets which are solely supplied by it with beverage coolers or refrigerators are free for a period of 5 (five) years to provide at least 10% (ten percent) capacity of one such beverage cooler or refrigerator in such Outlets to South African owned and produced cider brands of competing third parties."*

[11] For the purposes of the conditions, the term "Outlet" was defined as "*Including licensed on-and off- consumption outlets*" and the term "Cold Space" was defined as meaning "*coolers, cold rooms and, refrigerators in Outlets*". Whilst

the capitalisation of “Ambient space” seems to indicate that it is a defined term, the conditions do not provide a definition for such.

[12] Whilst the conditions have undergone some amendment through applications unrelated to this one, these amendments have not impacted the above-referenced clauses.

[13] On 19 December 2016, Distell’s legal representative wrote to the Commission indicating that it suspected clause 7.2 of the merger conditions had been breached by AB InBev in three ways.

[14] The first was that AB InBev had required and/ or induced outlets to not offer space to Distell to make its products available and visible to the consumer. This allegation related primarily to promotional and pricing materials in outlet-owned spaces in both fully branded (‘FBO’) and non-fully branded (‘non-FBO’) outlets.[2] In support of this complaint, Distell listed several instances where AB InBev representatives had caused the removal of Distell promotional and pricing materials at both FBO’s and non-FBO’s.

[15] The second was that AB InBev had induced the organisers of events to exclude or limit competitor presence. Distell submitted that where AB InBev had allowed a competitive presence this presence was limited to those products which would not compete with AB InBev’s product lines. In support of this allegation, Distell provided details of AB InBev’s engagements with the organisers of two festivals, a Spring Day Festival held in Pretoria and the Waterkloof Air show. Distell submitted that these instances did not fall within the carve-out contained in clause 7.2 (namely that the obligations in 7.2 would not apply to any event sponsored by the merged entity for the duration of such event).

[2] On the submissions of AB InBev, an outlet becomes a Fully Branded Outlet (‘FBO’) upon the conclusion of a written agreement between AB InBev and the outlet in terms of which the visual promotion on the premises is limited to a particular AB InBev brand and colour scheme. In return, the outlet owners are benefitted by improvement, effected in terms of the initiative, to the appearance of the outlet. Importantly, this agreement does not preclude such an outlet from offering non-AB InBev products for consumers. *First respondent answering affidavit para 36-39* Hearing Bundle p371-372.

[16] The third was that AB InBev had entered into a range of agreements for exclusive pouring rights for events to be held at stadia across the country, in terms of which exclusive pouring rights were granted to AB InBev to the total exclusion of competitors at such stadia. Distell was unable to provide a comprehensive list of all the stadia which such agreements related to in support of this allegation but provided detail of at least one, entered into between AB InBev and the Western Cape Cricket Board in relation to Newlands Stadium in Cape Town.

[17] During its investigation of Distell's complaint, the Commission contacted AB InBev for a response to the allegations. In two submissions to the Commission, AB InBev broadly argued that:

> *"the conduct and agreements cited by Distell in support of its complaints did not fall within the ambit of condition 7 and in no way could be seen as breaching the conditions."*[3]

[18] In response to Distell's first two complaints, namely those related to the removal of Distell branding material and pursuit of exclusivity at certain events, AB InBev argued that clause 7.2 of the conditions had no application to space for advertising and promotional activities and nothing in the conditions prevented or precluded AB InBev's conduct.

[19] On AB InBev's interpretation, the conditions sought to ensure that outlets were not precluded from making competitors' *products* available and that insofar as the conditions regulated ambient space, this related to the ability of an outlet to store a competitor's product and not to any advertising or branding space.

[20] In relation to the complaint concerning exclusive pouring rights at stadia, AB InBev submitted that (i) stadia should not be considered outlets for the purposes of the conditions owing to their difference to conventional retail channels and (ii) should stadia be considered outlets for the purpose of the conditions, any obligation contained in the conditions would fall away because of the carve-out clause exempting 7.2 from application to sponsored events.

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[3] *Letter from AB InBev to the Commission dated 5 February 2018* p486 of Hearing Bundle.

[21] The Commission, after a period of investigation and having considered the submissions of both Distell and AB InBev wrote to Distell on 13 March 2018 advising Distell that:

> "*The Commission has carefully considered the above complaint by Distell and is of the view that AB InBev has not contravened clauses 7.2 and 7.3 of the conditions. The Commission is of the view that the conditions sought to ensure that competitors have access to cold storage and refrigerator space in AB InBev outlets and not stadia and other marketing opportunities in general, as alleged by Distell.*
>
> *Notwithstanding the above, the conduct forming the subject of this complaint is currently being investigated by the Commission's Market Conduct division, as it related to exclusive agreements with various stadia across the country which prohibit competitors of AB InBev from selling, promoting and advertising their products*."[4]

[22] The Commission submitted that its findings were based on the interpretation of the merger conditions, a thorough investigation which included engagements with both Distell and AB InBev, and consideration of information before the Commission.

[23] Upon consideration of the Commission's decision, Distell brought the present application. In its application, Distell sought a declaratory order from the Tribunal that AB InBev's conduct amounted to a breach of the conditions. In the alternative, it sought an order reviewing and setting aside the decision of the Commission to not invoke and follow the procedure set out in Rule 39 of the Rules for the Conduct of Proceedings in the Competition Commission ('Commission's Rules') and its finding that there was no breach of the conditions.

[24] Distell's application before us differed from its initial complaint to the Commission in that it was only premised on two accusations against AB InBev. The first was that it had breached the conditions through its exclusive branding

[4] *Letter from the Commission to Werksmans Attorneys dated 13 March 2018*. Hearing Bundle p289.

agreements with outlets. Whether this amounts to a breach of the conditions will turn on the interpretation of what constitutes 'ambient space' in clause 7.2.

[25] The second accusation was that there was a breach of the conditions by AB InBev's agreements with various entities in terms of which AB InBev, for all intents and purposes would hold exclusive pouring rights at stadia across the country. Whether these agreements amount to a breach turns on the interpretation of 'outlet' in clause 7.2 as well as whether AB InBev's conduct is in accordance with the sponsorship of an event or not.

[26] In support of its alternative relief, Distell submitted that the Commission failed to adequately assess the two allegations, and its decision that no breach had taken place should be set aside and substituted by an order of the Tribunal that the conduct amounted to a breach.

[27] Ruling on the application entailed an examination of (i) the powers of the Tribunal to issue a declaratory order in such a matter; (ii) the process behind an interpretation of the obligations contained in the merger conditions, and (iv) the ability of the Tribunal to review and set aside the decisions of the Commission. We thus now turn to assessing the law on these issues.

The law

Declaratory Orders

[28] The Constitutional Court has recently opined on the Tribunal's ability to provide declaratory orders in *Hosken*[5] where it held that sections 27(1)(d) of the Competition Act[6] read with section 58 are formulated broadly and grant the Tribunal the power to grant declaratory relief in respect of issues in dispute referred to it.[7] These powers, so the Court writes, are bolstered by persuasive policy considerations related to inter-court comity as well as to the fact that

[5] *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* [2019] ZACC 2 (Hosken).
[6] 89 of 1998 (the Act).
[7] Ibid para 76.

declaratory orders can bring clarity and finality to disputes that may, if unresolved, have far reaching consequences for each party.[8]

[29] The Court held that the requirements for issuing a declaratory order are non-contentious and were established in the Supreme Court of Appeal's (SCA) case of *Cordiant*[9] *w*here a two stage approach was implemented in determining whether or not to grant the declaratory relief, namely: (i) the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and (ii) the court may then exercise its discretion to grant or refuse the order sought.[10]

[30] Whilst Distell made written submissions on the first stage of the above-mentioned inquiry, that it had *locus standi* to bring the application for a declarator, AB InBev, rightly in our view, did not dispute these submissions. It chose rather to focus its energies on the crux of the matter and thus framing the question as to whether to grant the declarator as dependant on the discretion of the Tribunal.

[31] It is our view that the exercise of our discretion in this case would be determined by the interpretation of the conditions to the merger, which we will now turn to.

Interpretation of merger conditions

[32] The interpretation of merger conditions is not novel to the interpretation of legal documents generally.

[33] The Constitutional Court in *S.O.S*[11] held that:

> *"Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order. The well-established principles governing the interpretation of a*

[8] Ibid para 77.
[9] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50 (Cordiant).
[10] Ibid para 18.
[11] *S.O.S Support Public Broadcasting Coalition & others vs South Africa Broadcasting Corporation (*SOC) Limited & Others [2018] ZACC 37 (SOS).

court order were expounded upon in Firestone and more recently endorsed in Eke:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgement or order the courts intention is to be ascertained primarily from the language of the judgement or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgement or order and the court's reasoning for giving it must be read as a whole in order to ascertain its intention."[12]

[34] Regarding the interpretation of documents, the SCA in *Endumeni*[13] held as follows:

"Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed and the material known to those responsible for its production."[14]

[35] The Competition Appeal Court ('CAC'), considering the interpretation of ambiguous conditions in an order of the Tribunal for the purposes of an application to vary the conditions, cited with approval the Appellate Division's *Firestone*[15] case which held that:

"the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus as in the case of a document the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading the meaning of the judgment or order is clear and unambiguous no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it"[16]

[36] Jurisprudence thus enjoins the Tribunal to determine the manifest purpose of the order. It is trite that in merger proceedings, conditions are imposed upon merged entities to address potential harms arising as a result of the merger.

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[12] Ibid para 52, quoting *Eke v Parsons* [2015] ZACC 30 at para 29.
[13] *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (Endumeni) Para 18.
[14] Ibid para 18.
[15] *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (A) (Firestone) at 304D.
[16] Ibid at 304 E-F.

These potential harms are expressed as theories of harm in the merger approval process. Any exercise in determining the manifest purpose of the conditions in a merger would thus entail the examination of the potential theories of harm considered by the Tribunal at the time in which it made its order. Such theories would be found in the Tribunal's reasons for its decision, and to the extent that it would assist the process, an examination of the transcripts of the merger hearing itself.

Reviewing a decision of the Commission

[37] In this application, we are being called upon by Distell, in the alternative to a finding on the declaratory order, to review the Commission's decision not to invoke the procedure established in Commission Rule 39 as well as the Commission's decision that AB InBev's alleged conduct did not amount to a breach of the conditions.

[38] Commission Rule 39 establishes the procedure to be followed by the Commission "*if a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger*". Whereas Distell framed the review as being one of two decisions of the Commission, it is seemingly apparent that the Commission's decision that the conduct complained of by Distell does not amount to a breach of the conditions is the genesis of its failure to invoke Rule 39 and so was the decision on which we focused.

[39] Section 27(1)(c) of the Act grants the Tribunal the ability to review any decision of the Competition Commission. The mechanics of reviewing such a decision were not widely addressed in the hearing or in submissions. Distell argued that the decision amounted to 'administrative action' as envisioned in the Promotion of Administrative Justice Act[17] ('PAJA') and thus the review standards enshrined therein would apply. It argued that: (i) the power to issue a notice of apparent breach derives from legislation; (ii) the issue of such a notice constitutes the exercise of a public power or the performance of a public function by an organ

[17] No. 3 of 2000.

of state; (iii) the failure to take the decision to issue the notice adversely affects the rights of third parties; and (iv) the failure to issue the notice had a direct, external, legal effect.

[40] Whilst the arguments sought to define the decision as administrative action, we were not convinced by Distell. It is now common cause that the provisions of PAJA do not apply to the review of the Commission's decision to initiate and refer complaints to the Tribunal because they do not constitute 'administrative action' as it is defined in the statute. This was decided by the Supreme Court of Appeal in *Seven Eleven*[18] and has been followed in subsequent decisions.

[41] In *Seven Eleven*, the SCA held that the decision of the Commission to refer a complaint referral to the Tribunal was "*Investigative and not subject to review save in cases of ill faith, oppression, vexation or the like*."[19]

[42] In coming to its decision, the SCA relied heavily upon the Tribunal's reasoning in *Novartis*[20] wherein the Tribunal ruled that "*the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of section 50(2), its every action would be subject to scrutiny under the principle of administrative review.*"[21]

[43] In the present case, we believe that there is no difference between the Commission's decision to institute a breach process in terms of Commission Rule 39 and its decisions to refer an investigated complaint to the Tribunal in terms of Rule 50(2). Whilst the legislative regime which facilitates a private complaint instructing the Commission's decision to implement a Rule 39 procedure is not as clearly defined as those for private complaints facilitating complaint referrals, functionally the process operates no differently. We thus maintain that PAJA should not be applicable in the review of the Commission's decision to not initiate Rule 39 proceedings.

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[18] *Simelane and others NNO v Seven Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 SCA (Seven Eleven).
[19] Seven Eleven para 17.
[20] *Novartis SA (Pty) Ltd and Others v The Competition Commission and Others* CT 22/CR/8/Jun01.
[21] Ibid para 49.

[44] The fact that PAJA is not applicable to a decision does not mean that such a decision cannot be reviewed. In this regard, the Tribunal has recently held that:

> *"Courts have held that even when an action by a functionary does not constitute administrative action, as PAJA defines it, its exercise is not unconstrained and can still be reviewed by the courts applying that doctrine.*
>
> *Although this doctrine first developed by asserting that a functionary could only act in terms of its powers, its ambit was expanded to include the requirement that the functionary must act rationally."*[22]

[45] This is in line with the CAC's decision in *Computicket*[23] which held that the constitutional principle of legality demands that the exercise of public power, even if it does not constitute administrative action, must comply with the Constitution.[24]

[46] How then do you determine if a functionary has acted rationally? In *Computicket,* whilst explaining the grounds of review, the CAC found that a decision may be reviewed if the official concerned acted *mala fide* or with an ulterior motive, or failed to consider the question in the sense that she failed to apply her mind to the matter.[25]

[47] How do you determine whether a functionary has applied their mind to the matter? In *Mitchell*,[26] (cited with approval by the CAC), the Court held that a functionary could only be considered to have applied their mind properly if, *inter alia*, they "*took into account all relevant matter and disregarded irrelevant matter*".[27]

[48] In the case of *Walele*,[28] the Constitutional Court held that if a decision maker's opinion is challenged on the basis that it was irrational, the decision maker must

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[22] *Eston Brick and Tile (Pty) Ltd v the Commissioner of the Competition Commission and others* CR098Jul17/RVW131Aug17 (Eston) para 58 citing Cora Hoexter, *South African Administrative Law at a Crossroads: PAJA and the Principle of Legality*, https://adminlawblog.org 28 April 2017.
[23] *Computicket v The Competition Commission of South Africa* 118/CAC/Apr12 (Computicket).
[24] Ibid para 13.
[25] Ibid.
[26] *Mitchell v Attorney General Natal* 1992 (2) SACR 68 (N) (Mitchell).
[27] Ibid at p71 b.
[28] *Walele v City of Cape Town and others* 2008 (6) SA 129 (CC) (Walele).

show that "*the subjective opinion it relied on for exercising power was based on reasonable grounds*."[29] In *Walele* the Court ultimately found that the information which the decision maker admitted had been placed before it, could not constitute reasonable grounds for such a decision maker to come to a conclusion that certain preconditions had been satisfied.

[49] The jurisprudence of the Tribunal and other courts indicates that a decision of the Commission should be reviewed and set aside if it is found that the Commission failed to properly apply its mind to a matter, or if it is to be found that the information before it could not constitute reasonable grounds for the Commission to make the determination that it did.

[50] With these legal principles in mind, we now turn to assessing the merits of Distell's case.

The merits

Ambient space

[51] Recall that clause 7 of the conditions (i) affirms that outlet owners have sole discretion regarding the allocation of space in their outlets; (ii) prohibits the merged entity from inducing or precluding any outlet owners from offering ambient and cold space to competitors to the merged entity; and (iii) ensures that in instances where the merged entity has exclusivity of supply, ten percent of the storage capacity in merged entity supplied refrigerators should be allocated to South African-owned and produced cider brands of competing third parties.

[52] Distell alleges that AB InBev's agreements with branded outlets are in breach of clause 7.2 of the conditions because they do not allow outlets to carry other signage and advertising on their *walls* which, Distell alleges, are part of their 'ambient and cold space', as defined in the conditions.

[29] Ibid at 160 A – C.

[53] In support of its allegation Distell argues that clause 7.1 refers to the fact that outlet owners should have discretion related to all space within outlets, and when given the plain meaning of the words, this relates to all space, including the space for the placement of branding and promotional material of the competitors of the merged entity.

[54] As for clause 7.2, Distell submits that this condition requires that an outlet should be completely free to offer ambient space, cold space and refrigerator space to competitors of the merged entity and that the merged entity cannot preclude or induce an outlet from doing so. Here Distell relies on the dictionary definition of the word 'ambient' being "*existing or present on all sides and encompassing*" as well as "*existing in the surrounding area*" as well as a definition of the word 'space' being "*a limited extent in one, two, or three dimensions*" in order to advance the theory that the conditions obligate the merging parties to allow advertising and promotional material within outlets.

[55] Distell's overarching submission was that, on a plain interpretation of the phrase, "Ambient space" should be taken to refer to the walls and surfaces of outlets on which advertising material could be placed.

[56] In terms of a contextual reading, Distell argued that the conditions differentiate between three kinds of spaces, namely ambient, cold, and refrigerator space. They argued that 'cold space' and 'refrigerator space' clearly deal with the storage of the products in coolers or refrigerated areas, leaving the 'ambient space' nomenclature to refer to all other space in a shop not limited to the storage of products in an outlet. In other words, the word 'ambient' qualifies the 'space' in an outlet.

[57] Distell submitted that during the merger hearing it had raised a theory of harm related to the ability of the merged entity to exclude rivals' promotional material and that the Tribunal had imposed the 'ambient space' wording to address this concern.

[58] We were not convinced by Distell's argument.

[59] On a proper interpretation of clause 7.2 ‘ambient and cold space’ is limited to space within an outlet available for the storage and display of a product.

[60] On our interpretation clause 7.2 clearly does not seek to regulate the space on walls and surfaces for signage and promotional purposes. We reach this conclusion for several reasons.

[61] The dictionary definition of ambient may refer to the immediate surroundings of an item but we cannot apply this definition without regard to the context in which it is used.

[62] When the word ambient is used in juxtaposition to the words ‘cold’ and ‘refrigerator’, in the context of the conditions we could come to no other conclusion that a plain reading of the phrase indicates that the condition seeks to regulate storage space delimited by temperature rather than advertising and promotional space. In other words, ‘ambient’ read in the context of ‘*ambient and cold space’*, on a plain reading of the phrase, is an adjective that is used to describe the temperature of storage space available in outlets.

[63] This interpretation was bolstered by the fact that the phrases ambient, cold, and refrigerator space have industry specific connotations which preclude the interpretation of the conditions in support of Distell. In its answering affidavit, AB InBev argues that the phrase ‘ambient space’ and ‘cold space’ have a well-established meaning in the alcoholic beverage industry in that it is understood by all to refer to three-dimensional space used for the storage and display of an actual product within an outlet. In support of this point, the Commission submitted that in its investigation of the merger, it found that product placement agreements or arrangements between beverage manufacturers and retailers regarding the placement of their products were concluded according to temperature requirements.[30]

[30] Competition Commission Heads of Argument p15 para 36.

[64] In the industry the word 'ambient' amounted to a short-hand description for room temperature spaces as distinguished from cold spaces in which product was to be placed.

[65] Furthermore, the Commission submitted that an interpretation of clause 7.2 relating to advertising space was inconsistent with the theory of harm the condition sought to address. In its investigation of Distell's complaint, the Commission considered the original purpose for the Tribunal imposing clause 7.2.

[66] The Commission submitted that during the investigation of the original merger transaction competing third parties raised concerns relating to, *inter alia* (i) exclusivity arrangements regarding cold storage space, fridge space and floor space (ii) incentive programmes, payment and inducements by SAB to push the sales of its products in retail outlets and (iii) the exclusive branding of retail outlets.

[67] The Commission indicated that third parties had made submissions detailing their concerns that due to the arrangement SAB had with outlets pre-merger, it may prevent retailers from providing sufficient cold storage, fridge and shelf space to competing products post-merger. The third parties were concerned that the merged entity would not sacrifice the space currently allocated to SAB brands to accommodate any new AB InBev products but would instead secure additional space at the expense of competitors, thus impacting the ability of the competing firms to make their products available.

[68] This theory of harm was captured in the Tribunal's order in the recordal clauses of the conditions which read:

> *"Upon analysis of the merger, the Commission has identified several competition and public interest concerns. These concerns relate, inter alia to, the following.*
>
> *Foreclosure concerns related to competing third parties and small beer producers' access to cold storage and refrigerator space. In particular there is a concern that small beer producers would be foreclosed from accessing cold storage and refrigerator space owned by the merged entity. Post implementation of the proposed transaction the merged entity may require*

additional cold storage and refrigerator space. In its investigation of Distell's original complaint, it considered the theory of harm advanced during the merger hearing."[31] [our emphasis]

[69] The Commission thus argued that the theory of harm which was to be addressed by clause 7 did not contemplate branding and advertising concerns. We agree with the Commission in this respect.

[70] We were also persuaded by the fact that the heading to the relevant clause of the conditions indicates that the clause seeks to regulate "Access to cold storage and refrigerator space". Whilst we acknowledge that clause 1 of the conditions indicates that headings in the merging conditions should not be used in the interpretation of the conditions, the heading correlates to the theory of harm raised and provides linguistic context to the clauses whilst not presenting a conflict with the body of the clause.

[71] Hence we find that clause 7 of the condition was intended to apply the word 'ambient' to three- dimensional room temperature space for products and not to competitor branding and promotional materials at an outlet. AB InBev is accordingly not in breach thereof.

[72] We further find no fault in the Commission's investigation and reasoning as it relates to this issue and we thus also dismiss the alternative relief sought, being a review of the Commission's decision on this issue.

[73] This of course does not mean that the conduct of AB InBev is harmless and does not warrant further investigation – either under the provisions of the Competition Act or in terms of criminal law – but that is not a matter that falls within the ambit of this application.

Pouring rights at Stadia

[74] AB InBev has entered into agreements with sports bodies, event organisers and stadia owners which entitle it to exclusive pouring rights, that is the exclusive

[31]Competition Tribunal Order in LM211Jan16 30 June 2016.

right to market and sell its alcoholic drinks, during events at certain stadia. Distell contends that these agreements are subject to and in breach of clause 7.2.

[75] AB InBev denies on two grounds that it is in breach of clause 7.2. The first is that stadia do not constitute 'outlets' within the meaning of the conditions and the second is that in terms of the agreement from which AB InBev derives its exclusive pouring rights, AB InBev is a sponsor of the event at which it exercises those rights. It is accordingly exempted from clause 7.2.

[76] The Commission, in its investigation, agreed with AB InBev on the first ground. On its interpretation, the Commission submitted that the Tribunal's reasons supported the conclusion that stadia were excluded from the definition of 'outlets' for the purpose of the conditions. Acting on this interpretation, the Commission did not investigate the concern any further and did not assess whether the agreements could be considered events for the purposes of the exclusion.

[77] Distell disagreed. It argued that the word outlet, when given its plain meaning, when read contextually, and when considering the Tribunal's intent as determined from its reasons, must be read to include stadia. We agree with Distell.

[78] The Tribunal, in its reasons for its decision on the matter of outlets wrote as follows.:

> [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 used for the following purpose in the following clauses:*
>
> - *The acknowledgement by the merging parties of the freedom of discretion of an outlet owner to allocate space*

- *The merged entities undertaking not to offer inducements to proprietors of outlets;*
- *The reservation of capacity in fridges in outlets to cider rivals and small beer producers.*

[68] *What then is an outlet? In terms of South African Law alcohol can only be sold at a licensed 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 there would be uncertainty as to whether an on-consumption premises was an outlet. 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, the definition recommended by the Commission during the hearing, the term outlet is defined in a wide sense viz. to include on and off-consumption premises. (Note this was not the Commissions 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.*

[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 étre 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 hearing with a compromise solution.*

[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 the ordinary reader to follow, but it smacked of a nudge and a 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."*[32] (our emphasis)

[81] Firstly, the reasons establish that the theory of harm sought to be addressed by clause 7 of the conditions was access to markets and that the overall purpose of the condition was to lower barriers to entry in this market. Whilst the

[32] Anheuser-Busch InBev SA/NV / SABMiller plc [2016] 1 CPLR 121 (CT) para 66-76.

submissions of AB InBev indicate that stadia are comparatively not a broad highway to markets, it is trite that the captured audience of a stadium is still a market, access to which could potentially be foreclosed by the merged entity.

[82] The reasons go on to indicate that the phrase '*outlet*' for the purpose of the conditions should be interpreted in its broader legal context of on- and off-consumption outlets as are defined by relevant authorities for the purpose of licensing, explicitly indicating that the conventional dictionary definition should be avoided. Stadia still require alcohol licenses to operate and broadly operate under on-consumption licenses.

[83] The reasons expressly endorse the wide application of the phrase outlet rather than a limited one.

[84] In dealing specifically with whether stadia are to be considered an outlet, the reasons, on our reading, are clear. The Tribunal's reasons clearly indicate that there is nothing precluding stadia from being defined as an outlet for the purposes of the conditions.

[85] The Tribunal acknowledges the dispute in definition, then acknowledges that a proposal was put to it which sought to include stadia in the obligations under certain instances and not in others. The Tribunal, in paragraph 72 rejects this proposal, and specifically opts for the broader definition advocated by the Commission.

[86] The Tribunal goes on to reject the further classification of "*outlets and taverns*". The Tribunal after recording the differences between the merged entity's views and that of the Commission and Distell, opts for a broader, simpler definition of outlets into which stadia should fall.

[87] We believe that the Tribunal's intent was clearly discernible from the text of the reasons for its decision.

[88] Hence the Commission, in arriving at the decision that stadia did not fall within the definition of outlets, did not give due regard to the Tribunal's reasoning and

decision to opt for a broader definition of outlet. This conclusion by the Commission is not rational because, as the CAC found in *Computicket*, it failed to apply its mind to the matter when it did not give due regard to the clear conclusion of the Tribunal. On this basis alone Distell's review application in relation to this issue succeeds.

[89] And whilst we do not believe it is necessary, we now turn to address AB InBev's individual submissions as they relate to this issue.

[90] AB InBev presented four arguments in support of the exclusion of stadia from the definition of outlet.

[91] The first was that an outlet is a place at which a vendor carries on the business of selling its wares on an ongoing basis. It argued that SAB's promotion and sales at stadia, on the other hand are sporadic and only when there are events at the stadia. Nothing in the Tribunal's reasons seemed to contemplate the determination of an outlet based upon its operating hours or frequency of operation. The Tribunal makes references to the conditions applying to both restaurants and taverns, all of which, presumably and logically, may have distinct operating hours. Further, the theory of harm the condition sought to address, namely exclusion from supplying and heightened barriers to entry would still apply to premises which were opened for a sporadic or a sustained period of time.

[92] AB InBev then argued that the purpose of an outlet is to sell product for profit, while the primary purpose of SAB's pouring rights at stadia, on the other hand, is to promote its products and brand. Again, there was little evidence in the Tribunal's reasoning to indicate that the purpose of a premises should impact the definition of an outlet. Further, we were provided no economic evidence that SAB does not make a profit from the sale of its product at stadia, and to have a metric which differentiates between firms based upon the subjective intent of the firms is, in our view, unsustainable.

[93] AB InBev argues further that the points of sale at stadia are accessible only to the participants in and spectators of the events at stadia, and that the public

does not have access to them. But the debate between on- and off-consumption is not concerned with whether the public in general has access to the venue or whether they pay a cover charge. The distinction centres on whether liquor can be consumed at a particular premise or not. Once members of the public – no matter how infrequently they may visit that premise and whether they pay an admission fee or not – are in the stadium they are permitted to consume the liquor on that premise. On our interpretation, this is not more than a confirmation of a stadium's status as a premises which would require an on-consumption license to operate and would thus be defined as an outlet for the purposes of the conditions.

[94] AB InBev argues finally that it would lead to absurdity if the points of sale at stadia were to be treated as outlets within the meaning of condition 7. It would defeat its promotion and marketing activities if it had to include competitors' products in its activities of the stadia. We disagree. The Tribunal seemingly acknowledged that certain events which may be held at stadia may fall into the category of being an 'event' in the manner contemplated in the merger conditions. In such an instance, the caveat contained in clause 7.2 excluding the operation of the clause at sponsored events would be triggered.

[95] In essence, what AB InBev seeks to conclude is that all events which are held at stadia amount to sponsored events and therefore stadia should not be considered outlets. We disagree with this analysis and conclude that whilst it certainly may be that sponsored events can, and do, take place at stadia, this does not mean that stadia are not outlets for the purpose of the conditions.

[96] What then is the effect of our finding that stadia are outlets for the purposes of the conditions?

[97] We acknowledge that this finding alone is not enough to grant the declarator requested by Distell that the agreements entered into between AB InBev and the stadia amount to a violation of the conditions. This is because there is still an outstanding question as to whether the agreements are excluded from the operation of the conditions because they relate to sponsored events.

[98] Whilst Distell made submissions on this issue, we believe that the question is not ripe for hearing because the Tribunal has not had the benefit of viewing all of the agreements concluded by AB InBev in relation to exclusive pouring rights at stadia. A ruling in respect of only one or a handful of contracts may set unfair precedent to the others. Additionally, as a sponsored event is not defined in the conditions, economic analysis as to the dynamics around sponsored events may be required to compare and contrast such to the cumulative effect of the contracts concluded by AB InBev for exclusive pouring rights at stadia. Because we are not in the position to make a conclusive finding on such issues, the application for a declaratory order against AB InBev's conduct as it relates to its agreements for exclusive pouring rights at stadia stands to be dismissed.

[99] The Commission's election to not pursue Rule 39 proceedings was based on the determination that stadia were not included in the definition of outlets. Given our assessment above, namely that the Commission failed to apply its mind, this finding is thus irrational. We therefore review and set aside this decision.

[100] As to the relief consequent to a setting aside of the Commission's decision not to invoke Rule 39 proceedings, we note that the Commission did conduct a cursory investigation, albeit from an incorrect starting point, and has indicated that the exclusive agreements between AB InBev for pouring rights at stadia has been relayed to its Market Conduct Division. Notwithstanding this referral, which may take much longer due to it being a market-wide investigation, it would be in the interests of justice to provide certainty to all parties to those agreements and competitors alike as to whether Ab InBev's exclusive agreements for pouring rights at stadia amount to a breach of the merger conditions. For this reason, we require the Commission to conduct a focused investigation into whether or not AB InBev's exclusive agreements conferring it with exclusive pouring rights at stadia amount to a breach of the conditions on the understanding that the Tribunal considers stadia to fall within the definition of outlets. We do not find it necessary to set out the ambit or manner of the investigation since in our view the Commission enjoys wide investigative powers in its discretion as mandated by the Act. We do however require that it complete its investigation within 120 days of the date of this order.

Conclusion

[101] On a textual, contextual and historical assessment, clause 7 of the merger conditions clearly sought to regulate access to space in outlets in which competitors could make their products available and not for the presentation of promotional and marketing activities. On this issue, we saw no reason to exercise our discretion in favour of granting the declaratory relief sought by Distell.

[102] With regard to whether stadia are considered outlets, the Tribunal, on our reading, clearly intended that a broad definition of outlet apply to the conditions. This broad definition was to include stadia. However, this conclusion does not enable us to grant Distell's declaratory order. As we are not in a position to make a determination on this issue, we dismiss Distell's application for a declarator.

[103] Our finding does however present a basis on which the Commission's decision to not invoke Rule 39 proceedings can be reviewed and set aside.

[104] We have decided to not replace the Commission's decision with one of our own (i.e. that a breach had or had not taken place), in the appreciation that this would require the Tribunal to make a determination as to whether the agreements entered into between AB InBev and various bodies relating to stadia amount to sponsored events as described in the conditions. This, we feel, is a question to which the Commission must turn to assess when it conducts its investigation afresh on the understanding that stadia are included in the definition of outlets as ordered below.

ORDER

[1] Having heard the arguments in the matter the Tribunal orders as follows:

1.1. The application for a declarator that AB InBev breached the conditions imposed on the merger under case number LM211Jan16 is dismissed.

1.2. The Commission's decision to not invoke proceedings established in Rule 39 of its rules based upon the complaint of Distell insofar as such addressed the issue of the agreements concluded by SAB/ AB InBev with various entities regarding exclusive pouring rights at stadia, is reviewed and set aside.

1.3. The Commission must investigate whether or not the agreements between AB InBev and various parties which have the effect of granting AB InBev exclusive pouring rights at stadia are in breach of the conditions on the understanding that stadia fall within the definition of outlet contemplated in the conditions. Such investigation must be completed within 120 days of the date of this order.

17 February 2020

Ms Yasmin Carrim **Date**

Prof Imraan Valodia and Dr Thando Vilakazi concurring.

Tribunal case manager	:	Alistair Dey-Van Heerden and Andiswa Nyathi.
For the Applicant	:	Adv G Engelbrecht and Adv T Maroleng *instructed by* Werksmans Attorneys.
For the First Respondent	:	Adv W Trengove SC and Adv P Ngcongo *instructed by* Bowmans.
For the Commission	:	Romeo Kariga and Hilda Maringa.