

CONFIDENTIAL



IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: LM021Apr17/VAR178Jan21

In the matter between:

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

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

The Coca-Cola Company **Third Applicant**

Coca-Cola Fortune (Pty) Ltd **Fourth Applicant**

And

Competition Commission **First Respondent**

**Minister of the Department of Trade, Industry and
Competition** **Second Respondent**

Food and Allied Workers Union **Third Respondent**

**National Union of Food Beverage Wine Spirits and
Allied Workers Union** **Fourth Respondent**

Panel Y Carrim (Presiding Member)
A Ndoni (Panel Member)
F Tregenna (Panel Member)

Heard on: 3 February 2021

Decided on: 4 February 2021

CONFIDENTIAL VARIATION ORDER

On application by Coca-Cola Beverages South Africa (Pty) Ltd, Coca-Cola Beverages

Africa (Pty) Ltd, The Coca-Cola Company and Coca-Cola Fortune (Pty) Ltd, the Tribunal orders the following:

The Conditions attached to the Tribunal's order issued on 27 September 2017 under case number LM021Apr17 are varied as follows:

1. Clause 1 of the 2017 Conditions is deleted and replaced with the following:

(1) DEFINITIONS

In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings –

1.1) **"AB InBev"** means Anheuser-Busch InBev SA/NV;

1.2) **"Acquiring Firm"** means The Coca-Cola Company, directly or through its indirectly wholly owned subsidiaries;

1.3) **"Act"** means the Competition Act, No. 89 of 1998 (as amended);

1.4) **"Approval Date"** means the date on which the Proposed Transaction is approved by the Tribunal;

1.5) **"B-BBEE"** means broad-based black economic empowerment as defined in the B-BBEE Act;

1.6) **"B-BBEE Act"** means the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 (as amended);

1.7) **"B-BBEE Codes"** mean the Codes of Good Practice on Broad-Based Economic Empowerment 2013, published pursuant to the B-BBEE Act;

1.8) **"B-BBEE Transaction"** means the transaction referred to in clause 5.1 of the May 2016 Conditions read with clause 4.2 of these conditions;

1.9) **"Black Sugarcane Farmers"** means sugarcane farmers who are historically disadvantaged persons as defined in section 3(2) of the Act;

1.10) **"CCBA"** or the **"Merged Entity"** or **"Target Firm"** means Coca-Cola Beverages Africa Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, including its subsidiaries;

(1.11) "**CCBA Coca-Cola Bottling Operations in South Africa**" means the businesses of ABI Bottling Proprietary Limited, Appletiser South Africa Proprietary Limited, Waveside Proprietary Limited, Coca-Cola Cannery of Southern Africa Proprietary Limited, Coca-Cola Shanduka Beverages South Africa Proprietary Limited and CCF;

(1.12) "**CCBA Employees**" means all employees of CCBA's South African registered companies, including CCBSA, who are employed for an indefinite duration;

(1.13) "**CCBSA**" means ABI Bottling Proprietary Limited, a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, to be re-named Coca-Cola Beverages South Africa Proprietary Limited on or about 1 October 2017, and that will house the CCBA Coca-Cola Bottling Operations in South Africa, with the exception of Appletiser South Africa Proprietary Limited which will remain a subsidiary of CCBSA;

(1.14) "**CCF**" means Coca-Cola Fortune Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa;

(1.15) "**Commercially Reasonable and Practical Terms**" has the same meaning as in the May 2016 Conditions, namely "terms that provide for the application of appropriate quality standards (based on the CCBA Group's usual and standard business practices in South Africa over time), reasonable availability of goods, and reasonably competitive commercial terms. Such terms shall not be regarded as commercially unreasonable or impractical if the merged entity has, before calling off further negotiations with an affected supplier, given that supplier written notice as to the reasons why its terms of supply were considered not to provide for appropriate quality standards, reasonable availability, and reasonably competitive commercial terms";

(1.16) "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act;

(1.17) "**Conditions**" means the conditions referred to in this document;

(1.18) "**Days**" means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa;

- (1.19) "**DTIC**" means the Department of Trade, Industry and Competition;
- (1.20) "**Employee(s)**" means any permanent employee (as contemplated under South African labour law) of CCBSA as at 10 May 2016, and excludes (i) employees of labour brokers who provide services to CCBSA in South Africa; (ii) independent contractors and their employees; and (iii) short-term, fixed-term contractors;
- (1.21) "**ESOP**" means an employee share ownership program;
- (1.22) "**FAWU**" means the Food and Allied Workers Union;
- (1.23) "**First CCBA Transaction**" means the consolidation of various bottling operations within CCBA approved subject to conditions by the Tribunal on 10 May 2016 under case number LM/243/Mar15;
- (1.24) "**Ikageng**" means the Ikageng Employee Share Trust established on 26 May 2020, being the employee share ownership program which is envisaged in clause 11.1 of the May 2016 Conditions read with the MoAs;
- (1.25) "**Implementation Date**" means the date, occurring after the Approval Date, on which the Proposed Transaction is implemented by the Merging Parties;
- (1.26) "**Labour Relations Act**" means the Labour Relations Act, No. 66 of 1995 (as amended);
- (1.27) "**May 2016 Conditions**" means the conditions approved by the Tribunal on 10 May 2016 under case number LM/243/Mar15 in the First CCBA Transaction;
- (1.28) "**Merging Parties**" means, collectively, CCBA and TCCC;
- (1.29) "**MoAs**" means the Memoranda of Agreement entered into with FAWU and NUFBWSAW and which form part of the May 2016 Conditions;
- (1.30) "**NUFBWSAW**" means the National Union of Food, Beverages, Wine, Spirits and Allied Workers;
- (1.31) "**Proposed Transaction**" means the acquisition of control over CCBA and its subsidiaries by TCCC;

(1.32) "**SABMiller**" means ABI SAB Group Holding Limited, formerly SABMiller plc (now owned by AB InBev);

(1.33) "**Second ESOP**" means the second ESOP (in addition to Ikageng) contemplated in clause 4.2 of these Conditions;

(1.34) "**TCCC**" means The Coca-Cola Company, a United States publicly registered company listed on the New York Stock Exchange, and includes its subsidiaries;

(1.35) "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act;

(1.36) "**Tribunal Order**" means the Tribunal's merger Clearance Certificate (Form CT 1);

(1.37) "**Zenzele scheme**" means the B-BBEE scheme established by SABMiller in South Africa in 2010.

2. Clause 2.3 of the 2017 Conditions is deleted and replaced with the following:

(2.3) *On the effect of the Proposed Transaction on B-BBEE ownership, the Commission found that SABMiller will exit as a majority shareholder in CCBA and TCCC will become the new controlling shareholder in CCBA. The Proposed Transaction will reduce the level of B-BBEE ownership of CCBSA based on the Merging Parties' view on their relative shareholding upon the exit of SABMiller. The Merging Parties have offered to vary the terms of the proposed B-BBEE Transaction as set out in clause 4.2 below.*

3. Clause 3.1 of the 2017 Conditions is deleted and replaced with the following:

(3.1) *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 the Approval Date."

4. Clause 4.2 of the 2017 Conditions is deleted and replaced with the following:

(4.2) Notwithstanding the above May 2016 Conditions, in terms of these Conditions the Merging Parties shall procure the increase of the B-BBEE ownership percentage (as measured in the B-BBEE Codes) of CCBSA up to at least 20% by 31 May 2021. CCBSA will achieve this increased ownership percentage as follows:

(4.2.1) Approximately 10% shareholding in CCF or CCBSA will be allocated to Ikageng or the Second ESOP for the benefit of existing and future CCBA Employees on substantially the same terms as the shares that were issued to Ikageng in May 2020. For the avoidance of doubt, it is recorded that the shares will be issued on the same vendor funding terms as the shares that were issued to Ikageng, and that CCBA Employees will never be required to pay into Ikageng or the Second ESOP, as the case may be.

(4.2.2) An additional shareholding, to increase the total B-BBEE shareholding of CCBSA to 20%, will be allocated to Ikageng or the Second ESOP and/ or other existing B-BBEE shareholders of CCF, on substantially the same terms as the shares that were issued to Ikageng in May 2020.

5. Clause 4.3 of the 2017 Conditions is deleted and replaced with the following:

(4.3) The Merging Parties shall furthermore ensure that the B-BBEE ownership percentage is maintained at a level of at least 20%, other than allowance for reasonable grace periods of no longer than 12 months, to facilitate the exit of B-BBEE shareholders and entry of new B-BBEE owners. The B-BBEE structure shall be designed to ensure that there is a stable and consistent shareholder base with limited turnover and on a normalised basis is approximately 20%.

6. Clause 4.4 of the 2017 Conditions is deleted and replaced with the following:

(4.4) In the event that the allocation of shares to Ikageng or the Second ESOP in terms of 4.2 above constitutes a merger under the Competition Act and meets the relevant financial thresholds, then a merger notification will be submitted to the Commission in the requisite manner.

7. Clause 4.5 of the 2017 Conditions is deleted and replaced with the following:

(4.5) The commitment to implement the ESOP envisaged in clause 11.1 of the May 2016 Conditions and the MoAs as part of the B-BBEE by 24 July 2020

remains binding and will be honoured by the Merging Parties. In line with the commitments outlined in the MoAs, the Merging Parties shall give due consideration to the following principles in the design of the B-BBEE Transaction, the ESOP envisaged in clause 11.1 of the May 2016 Conditions and the MoAs, and the further ESOP share allocation referred to in clause 4.2 above.

8. The following is inserted after clause 4.6 of the 2017 Conditions:

Governance

(4.7) In the event that the further ESOP share issuance referred to in clause 4.2 is allocated to Ikageng, Ikageng will be entitled to appoint two independent trustees as directors to the board of directors of CCF. Alternatively, In the event that the further ESOP share issuance referred to in clauses 4.2 is allocated to a Second ESOP, each of Ikageng and the Second ESOP will be entitled to appoint one independent trustee as a director to the board of directors of CCF.

(4.8) The independent trustees will be:

(4.8.1) elected by the beneficiaries of the relevant ESOP(s); and

(4.8.2) certified by an independent third party as meeting the qualification criteria for trustees set out in the trust deed of Ikageng (as amended) and in the trust deed of the Second ESOP (if applicable).

(4.9) The memorandum of incorporation of CCF will be amended to provide that special resolutions will require the approval of ordinary shareholders holding at least 80% plus one ordinary share of the total issued ordinary shares in CCF.

Training

(4.10) CCBA will engage the DTIC regarding the implementation of appropriate and continuing training programs for ESOP trustees, and to educate employee beneficiaries on share ownership, within (1) one year of achieving the increased B-BBEE ownership percentage as set out at clause 4.2.

(4A) LOCALISATION

(4A.1) CCBSA will contribute a total amount of [CONFIDENTIAL: ██████████

██████████

[REDACTED]
 [REDACTED] after the order by the Tribunal approving these varied Conditions, to localisation initiatives agreed upon by the DTIC and CCBSA. An appropriate structure, to agree on and monitor this commitment, will be established by CCBSA and the DTIC and will have suitable representation from CCBSA and the DTIC.

(4A.2) CCBA and/or CCBSA shall allocate 3 (three) senior employees to localisation initiatives for 6 (six) months within the 1st (first) year after the order by the Tribunal approving these varied Conditions.

(4B) PROCUREMENT

(4B.1) CCBSA shall collaborate with its sugar suppliers in South Africa to increase the volume of sugar procured by CCBSA from Black Sugarcane Farmers, within [CONFIDENTIAL: [REDACTED]] of the order by the Tribunal approving these varied Conditions, to no less than [CONFIDENTIAL: [REDACTED]] of its total sugar procurement. In order to give effect to this undertaking, and subject thereto that such arrangements are on Commercially Reasonable and Practical Terms, CCBSA commits to:

(4B.1.2) take all practical steps to influence the procurement process of the millers supplying CCBSA in order to drive an increase of procurement of sugar from Black Sugarcane Farmers; and

(4B.1.3) re-balance, where necessary, CCBSA's procurement of sugar between millers.

9. Clause 5.1.3 of the of the 2017 Conditions is deleted and replaced with the following:

(5.1.3) On 31 May 2020 submit an affidavit deposed by the Chief Executive Officer of CCBA, attesting to the implementation of the ESOP envisaged in clause 11.1 of the May 2016 Conditions read with the MoAs as part of the B-BBEE Transaction.

10. Clause 5.1.4 of the of the 2017 Conditions is deleted and replaced with the following:

(5.1.4) Submit an affidavit deposed by Chief Executive Officer of CCBA, attesting to the increase of the B-BBEE ownership percentage (as measured in the B-BBEE Codes) of CCBSA up to at least 20% and the implementation of the further ESOP share allocation. as set out in clause 4.2 above, by no later than 9 June 2021. This

affidavit will set out inter alia how CCBSA achieved the increased B-BBEE ownership percentage of CCBSA and the process that will be followed in order to obtain a verification of the aforesaid percentage from an accredited B-BBEE verification agency. Such verification shall be provided to the Commission as soon as it becomes available.

11. Clause 5.1.5 of the 2017 Conditions is deleted and replaced with the following:

(5.1.5) File a merger notification in the event that the allocation of shares to Ikageng or the Second ESOP in terms of 4.2 above constitutes a merger under the Act and meets the relevant financial thresholds.

12. Clause 5.3 the 2017 Conditions is deleted and replaced with the following:

(5.3) CCBA will, within 30 days of each anniversary of the Approval Date up until the 7th (seventh) anniversary, provide a suitable and appropriately detailed annual report to the Commission and the DTIC regarding its measures to comply with these Conditions.

Signed by: Yasmin Tayob Carrim
Signed at: 2021-02-04 11:22:37 +02:00
Reason: I approve this document

Yasmin Tayob Carrim

**Presiding Member
Ms Yasmin Carrim**

4 February 2021

Date

Concurring: Prof. Fiona Tregenna and Ms Andiswa Ndoni