competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: **LM242Mar15/DSC005Apr16**

In the matter between:

THE MINISTER OF ECONOMIC DEVELOPMENT	**First Applicant**
And	
THE COCA-COLA COMPANY	**First Respondent**
COCA-COLA CANNERS OF SOUTHERN AFRICA (PTY) LTD	**Second Respondent**
COCA-COLA SHANDUKA BEVERAGES SA (PTY) LTD	**Third Respondent**
AMALGAMATED BEVERAGE INDUSTRIES (PTY) LTD	**Fourth Respondent**
APPLETISER SOUTH AFRICA (PTY) LTD	**Fifth Respondent**
COCA-COLA SABCO (PTY) LTD	**Sixth Respondent**
COCA-COLA FORTUNE (PTY) LTD	**Seventh Respondent**
COCA-COLA BEVERAGES AFRICA LIMITED	**Eighth Respondent**

In re: the large merger between:

COCA- COLA BEVERAGES AFRICA LIMITED	**Acquiring Firm**
And	
VARIOUS COCA-COLA BOTTLING AND RELATED OPERATIONS	**Target Firm**

Panel	: Norman Manoim (Presiding Member) : Yasmin Carrim (Tribunal Member) : Imraan Valodia (Tribunal Member)
Heard on	: 13 April 2016
Order Issued on	: 14 April 2016
Reasons Issued on	: **22 April 2016**

Reasons for Decision

[1] We have been requested by the attorneys for the Minister of Economic Development ("the Minister") to provide as a matter of urgency reasons for our decision in respect of an application for further and better discovery that was issued on 14 April 2016.

[2] Ordinarily reasons for an interlocutory ruling of this nature are not sought by parties or are dealt with in the final decision of the Tribunal at the end of the matter. However the Minister's advisors indicated in their correspondence that reasons were requested as it is their intention to advise their client on whether to appeal or review this decision.

[3] Given this stated intention, the Tribunal in the interests of expediting the process is happy to provide its reasons on an urgent basis, although of necessity they are brief. We do not express a view on whether such an order is appealable, or subject to review before the conclusion of the merger proceedings, as that is a matter for an Appeal Court to decide should it be seized with the matter at this stage of proceedings.[1]

[4] The Tribunal issued its order in this matter on 14 April 2016 having heard argument and being presented with the final request from the Minister's legal team on the previous day i.e. 13 April 2016. For convenience this order is attached hereto as Annexure A. During the hearing we dealt only with requests of further and better discovery that remained in dispute, as on the day itself certain items were tendered by the merging parties whilst others were no longer pursued by the Minister.

[5] By way of background at a pre-hearing held on 1 April 2016, preparatory to the hearing of the present discovery application, the presiding member gave directions to the Minister's legal team to consider narrowing the focus of the document requests in their

[1] See views of the Competition Appeal Court regarding a review of *inter alia* discovery by a single member in *Old Mutual Properties (Pty) Limited and Old Mutual Life Assurance Company (South Africa) Limited and The Competition Tribunal and others* Case no:21/CAC/Jul02.

application. In particular the member emphasised that requests that were too widely formulated would not be redrafted by the panel.

[6] Notwithstanding this direction, and although the Minister filed a revised application, this guideline was insufficiently adhered to.

[7] We will not go into a line by line response to each request. Broadly, requests for discovery were refused when items-

7.1 Were formulated in an open-ended manner when it would not be clear to the recipient of the request the universe of the documents being requested. By way of illustration, but this deficiency is by no means limited to these items, see the drafting of the requests for items 2, 9, 15-17 and 25. Similarly open-ended, were several employment related requests. In contrast, the Food and Allied Workers Union's ("FAWU") request for certain documents, brought on the same day as the Minister's application which was similar to the Minister's employment related requests was better formulated. For this reason the panel granted certain items in FAWU's request. However as these items overlapped with some of the items requested by the Minister, the Tribunal extended access to these items to the Minister as well as seen in para 1.4 of our order.

7.2 Were established as redundant. In other words documents at a high level had already been discovered on issues in which there was no dispute of fact. Several documents were sought in order to establish that the merging parties' market shares in certain products had declined. This issue was not placed in dispute and since the Minister had documents evidencing this already, it was not made clear why more documents to the same effect were required.

7.3 Documents relating to the wholesale channel were requested without a sufficient justification as to why they were relevant to the issues on which the Minister sought to intervene in relation to the "Commissions cooler condition"

in what has been referred to as the Local and Traditional Channel ("L&T channel"). The merging parties challenged their relevance and this challenge was not effectively rebutted by the Minister, other than to state that his intervention is not limited to the L&T channel. Even if the merging parties have taken a narrower view of the Minister's remit than he considers he has, this response was not helpful in linking his theory of harm and the proposed condition to the class of documents required. The requests were motivated at a level of the speculative nature of what might be yielded rather than a more confident assessment by the experts on their probative nature in relation to the issues in dispute. Again a focused, well-motivated request, would have been helpful to us in order to understand the pertinence of what was being sought, but this was not forthcoming.

7.4 The merging parties indicated in their answer that a substantial number of documents were discovered prior to this application in relation to some of the issues on which further and better discovery had been requested. We are not in a position to know whether this is the case as we only have a list of the titles of the documents provided. Since the Minister's team of advisors had access to these documents they would have been in a position to evaluate whether they were deficient. In some instances they did this in clear terms – for instance item 8 which was a request to have the full document, when only excerpts had been provided. Here we ordered the full document to be produced. However, in respect of many others, the Minister did not engage with the adequacy of those already furnished, but rather argued that he was entitled to all documents requested, not only some. This argument however does not meet the test we set out in *Walmart*.[2] We are not engaged here in discovery for a prohibited practice case but the development of a theory of

[2] *The Minister of Economic Development and others and The Competition Tribunal and others* Case no: 110/CAC/Jul11 111/CAC/Jun11

harm to justify the imposition of conditions on a merger. As we stated in Walmart:

> *"Where the yield is minimal or uncertain, but the burden great, this would favour denying production."*[3]

7.5 Certain documents related to a dispute about the proper time period for which documents were required. The merging parties offered documents for the time period commencing in 2013. They justified this on the basis that this would show documents that existed one year prior to the commencement of merger discussions. In contrast the Minister asked for documents commencing in 2011. However no cogent justification was given for why documents should come from a period two years earlier. However as a precautionary step we ordered that documents evidencing the rationale should be discovered from the period 2011. If the merging parties are correct then no documents from prior to this period will exist. If it emerges they are incorrect then the panel may reconsider the time period issue as discovery issues are of an interlocutory nature.

[8] The deficiencies referred to above can be contrasted with the features of the document requests which we did allow. The reasons that these were allowed were because-

8.1 The request was sufficiently focused for example item 8 referred to above. Since the merging parties tendered discovery of the full document we did not need to consider any other issue pertaining to its relevance and probative value;

8.2 The requests were highly probative, and pertinent to the issues at hand, or where there may be a dispute in respect of the documents already produced.

---

[3] Paragraph 9 of the Tribunal's reasons as quoted at Paragraph 61 of the CAC's decision in the same matter. *Supra* footnote 2.

For this reason we considered that documents relating to the rationale for the merger as discussed at individual target firm level were relevant, as the motivation was that the respective target firms may have had different rationales for the merger than those put up in the documents provided, and hence the discovery was well motivated. In any event documents around rationale are viewed as vital for the consideration of the merger in general experience and are given great weight. As it is, the document requests around rationale were reformulated to make them more focused; or

8.3 The request was relevant to an apparent deficit in discovery on an issue in dispute (items 74-5). In his recommended conditions the Minister proposes removing a restraint of trade contained in the merging party's shareholders' agreement restricting the merged firm from entering a related market. The merging parties do not agree with this proposal. The Minister then sought documents that motivated the restraint and the merging parties denied that there were any. Here the probability that some documents must exist was convincingly made out on the probabilities; further if the documents exist they are directly relevant again to an issue in dispute between the parties regarding the need for a restraint. However if the documents don't exist, then the burden on the merging parties to provide an affidavit to this effect, is not too onerous, given the limited manner in which we again reformulated this request. (Note that there is a general provision in the order in paragraph 4 to provide that the merging parties must provide an affidavit where they allege a document does not exist.)

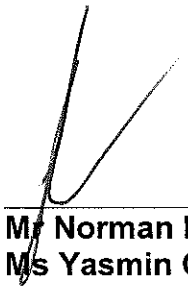
Conclusion

[9] These reasons briefly set out the Tribunal's approach in this matter. It must be borne in mind that the Minister has had access to the documents in the Commission's record

in this matter where the Commission had requested a wide range of documents from the merging parties which were furnished to him. From argument in this matter it would appear the Minister's advisors were advising the Commission on what documents should be requested in the course of the Commission's investigation. We do not comment on whether this approach should be subject to criticism as the merging parties had. The Minister has also been given further documents during the Tribunal's discovery process by the merging parties. The only point we make here is that discovery requests made late in the process by a party with prior knowledge of the full record and issues are burdensome for the merging parties, especially where requests are directed at several entities comprising the merging parties. The Act's mandate in section 52(2) is to exhort expedition of process; this is particularly apposite in time sensitive transactions such as mergers when assessing the reasonableness of burdensome and time consuming requests that lack sufficient focus on what is being sought and a proper motivation about why it is being sought.

[10] In this case the Minister's approach to remedies has been well documented as he has usefully done so by way of edits to the Commission's proposed remedies. There is thus on his version, a highly specified approach to the outcome he seeks from the Tribunal process. Regrettably, in many respects, the discovery request was far blunter, lacking a reasoned nexus between what was being sought and his proposed conditions. The criticism is not that no reasons were put forward – indeed they were - but the connection between the explanation of what the document was, its likely yield, and the relationship between the yield and the very specific conditions the Minister seeks, did not outweigh the countervailing considerations; viz, the imprecision of the requests' formulation, the doubtful utility of their yield to the issues under consideration and the burden on parties who had to discover.

[11] In general the Tribunal has followed the approach to discovery it took in the *Walmart* case, which is referred to in paragraphs 60 and 61 the judgment of the Competition Appeal Court in that same matter. We do not understand the CAC to have criticised or rejected this approach to discovery in merger proceedings. In short not everything that may be tangentially be relevant to the merger is required to be discovered in a merger proceeding.



Mr Norman Manoim **22 April 2016**
Ms Yasmin Carrim and Prof Imraan Valodia concurring **DATE**

Tribunal Researcher:	Aneesa Ravat and Karissa Moothoo Padayachie
For the merging parties:	Adv. M Van der Nest SC instructed by Bowman Gillfillan
For the Commission:	Maya Swart
For the Minister:	Adv. J Gauntlett SC and Adv. P Ngcongo instructed by Werksmans