



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM021Apr17

In the matter between:

The Coca-Cola Company

Primary Acquiring Firm

and

Coca-Cola Beverages Africa (Pty) Ltd

Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Fiona Tregenna (Tribunal Member)
Heard on	: 27 September 2017
Order Issued on	: 27 September 2017
Reasons Issued on	: 19 October 2017

Reasons for Decision

Approval

[1] On 27 September 2017, the Competition Tribunal ("Tribunal") conditionally approved the merger between The Coca-Cola Company ("TCCC") and Coca-Cola Beverages Africa (Pty) Ltd ("CCBA").¹

[2] The reasons for approving the proposed transaction follow.

¹ Conditions attached as Annexure A.

Background

- [3] On 10 May 2016 we approved the large merger between Coca-Cola Beverages Africa Limited ("CCBA") and Various Coca-Cola Bottling and related operations ("CCBA I").²
- [4] This transaction consolidated independent bottlers of Coca-Cola in South Africa under one company. The independent bottling plants would be consolidated under CCBA and the owners of these bottling plants would hold shares in CCBA. One such independent bottler who would go on to hold shares in terms of that transaction was ABI, controlled by SABMiller. In terms of that transaction SABMiller controlled 54% in CCBA, TCCC through an affiliate controlled 12% and Gutsche Family Investments (Pty) Ltd controlled 34%. The transaction was approved subject to a number of conditions.
- [5] The transaction that is before us now, is the sale of SABMiller's shareholding in CCBA to TCCC. TCCC does not intend to retain control over CCBA in the long-term and intends to on-sell the shareholding to a third-party once a suitable one is identified.

Parties to transaction

Primary acquiring firm

- [6] The primary acquiring firm is TCCC, which is a publically listed company that is not controlled by another firm. TCCC owns the recipe for Coca-Cola and a number of other non-alcoholic beverages. It supplies concentrates for Coca-Cola and other non-alcoholic beverages to exclusive bottling companies.

Primary target firm

- [7] The primary target firm is SABMiller's shareholding of 54% in CCBA. SABMiller was acquired by ABInBev in a later large merger and it is the ultimate controller of SABMiller.³

² Case no: LM243Mar15.

³ Anheuser-Busch InBev SANV and SABMiller plc case no: LM211Jan16.

- [8] CCBA is involved in the production, distribution and sale of Coca-Cola branded beverages exclusively.

Proposed transaction and rationale

- [9] The proposed transaction involves TCCC through a subsidiary purchasing 54% share capital from SABMiller. Post-transaction TCCC will control CCBA.
- [10] TCCC has submitted that it has exercised its rights in relation to a shareholders agreement to oblige SABMiller to sell its shares in CCBA as it intends to sell control of CCBA to a new buyer.

Impact on competition

- [11] The Commission's investigation revealed that while there is a change of control from SABMiller to TCCC this will not change the pre-merger relationship. This is because all bottlers of TCCC products sign a Standard International Bottling Agreement ("SIBA"). Saliiently, the agreement restricts CCBA from bottling for any competitors and restricts shareholders from changing ownership without TCCC's consent. Holistically the SIBA agreements vested control over material decisions with TCCC despite its minimal shareholding. Therefore any increase in shareholding would not affect this relationship and neither would it raise any foreclosure concerns.
- [12] We concur with the Commission's competition assessment, i.e. that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market as the status quo will be maintained post-transaction. Further, the nature of the SIBA agreements precludes the potential for merger specific foreclosure post-transaction.

Public interest

- [13] Prior to the Commission finalizing its recommendation the merging parties and the Minister of Economic Development had entered into an agreement which addressed public interest issues. In essence their objective was to ensure that the public interest undertakings in CCBA I were replicated in the current merger. As there was no dispute in this regard we do not need to comment on them.

[14] While the Commission was satisfied with the terms of the agreement between the merging parties and the Minister, and has largely replicated these in the conditions, it wanted the undertakings in respect of BEE shareholding in the merged entity firmed up.

[15] In CCBA I the merging parties undertook by 2020 to increase the BEE shareholding in CCBA from 11% to 20% i.e. increasing it by 9% points.⁴ As SABMiller, in this transaction, is exiting CCBA its BEE shareholding, as well as that of its employee share ownership program ("ESOP") would be removed. The effect of this is that the post-merger, the merged firm's BEE shareholding would be reduced from its pre-merger level of 11% to 5.02%.

[16] In order to address the dilution of the BEE shareholding after SABMiller's exit, the merging parties and the Minister had agreed that the minimum BEE shareholding level be increased to 30%; i.e. a 10% increase on that set out in the CCBA I condition.

[17] The Commission whilst satisfied with the 30% threshold wanted changes to the language of the condition agreed to with the Minister to indicate that the 30% was seen as a floor for the BEE level, not a ceiling. Hence the current language in condition clause 4.2 which states "[p]arties shall procure the increase of the B-BBEE ownership percentage... of CCBSA up to at least 30% by 11 May 2021" to reflect this. Since the merging parties did not object to this proposal, it is again not a matter we have had to decide.

[18] What we do have to decide is a concern raised by the Food and Allied Workers Union ("FAWU"). It was concerned about the status of the ESOP post-merger. The Commission and merging parties had in the proposed conditions agreed that an ESOP would be implemented by May 2020. The extent of this shareholding was not defined. Instead in the proposed conditions it was described as a "... meaningful stake". At the hearing Mr. Masemola, the general secretary of FAWU, proposed that the percentage be defined more precisely. He proposed that this be set at 18%. The merging parties opposed this proposal. They did so for two reasons. Firstly the language as currently formulated had been agreed upon in a meeting that they had held with all their unions. Secondly, given that they still had to sell a stake of 30% to an as yet unidentified BEE shareholder it would be wrong to set the size of the

⁴ Condition clause no 5 in CCBA I case no: LM243Mar15.

employee stake now as this might prejudice the negotiations with the new shareholder. Given this latter argument we conclude the merging party's reservation about not specifying the ESOP percentage is reasonable.

[19] While the merger does not result in any negative impact on employment as no merger specific retrenchments are anticipated the merging parties agreed to a condition to maintain aggregate levels of employment for three years after the transaction is implemented.

Conclusion

[20] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, public interest issues that may arise from the proposed transactions are addressed in the conditions to this merger. Accordingly, we approve the proposed transaction conditionally.



Mr Norman Manoim

19 October 2017
DATE

Ms Yasmin Carrim and Prof Fiona Tregenna concurring

Tribunal Researcher: Aneesa Ravat

For the merging parties: Chris Charter and Albert Aukema of Cliffe Dekker Hofmeyr Inc
for CCBA and Claire Reidy and Derek Lotter of Bowmans for
ABInBev.

For the Commission: Maya Swart and Raksha Darji

ANNEXURE A

The Coca-Cola Company

AND

Coca-Cola Beverages Africa (Pty) Ltd

CC Case Number: LM021Apr17

CONDITIONS

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. **"Act"** means the Competition Act, No. 89 of 1998 (as amended);
- 1.3. **"Acquiring Firm"** means The Coca-Cola Company, directly or through its indirectly wholly owned subsidiaries;
- 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. **"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;
- 1.10. **"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 Coca-Cola Fortune Proprietary Limited;
- 1.11. **"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;

- 1.12. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act;
- 1.13. **"Conditions"** means the conditions referred to in this document;
- 1.14. **"Days"** means any calendar day which is not a Saturday, a Sunday or an official public official public holiday in South Africa;
- 1.15. **"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;
- 1.16. **"ESOP"** means the employee share ownership program which is envisaged in clause 11.1 of the May 2016 Conditions and the MoAs;
- 1.17. **"Implementation Date"** means the date, occurring after the Approval Date, on which the Proposed Transaction is implemented by the Merging Parties.
- 1.18. **"FAWU"** means the Food and Allied Workers Union;
- 1.19. **"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;
- 1.20. **"Labour Relations Act"** means the Labour Relations Act, No. 66 of 1995 (as amended);
- 1.21. **"May 2016 Conditions"** means the conditions approved by the Tribunal 10 May 2016 under case number LM/243/Mar15 in the First CCBA Transaction;
- 1.22. **"Merging Parties"** means, collectively CCBA and TCCC;
- 1.23. **"MoAs"** means the Memoranda of Agreement entered into with FAWU and NUFBWSAW and which form part of the May 2016 Conditions;
- 1.24. **"NUFBWSAW"** means National Union of Food Beverages Spirits Wine and Allied Workers;
- 1.25. **"Proposed Transaction"** means the acquisition of control over CCBA and its subsidiaries by TCCC.
- 1.26. **"SABMiller"** means ABI SAB Group Holding Limited, formerly SABMiller plc (now owned by AB InBev);
- 1.27. **"TCCC"** means The Coca-Cola Company, a United States publically registered company listed on the New York Stock Exchange and includes its subsidiaries;
- 1.28. **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act;
- 1.29. **"Tribunal Order"** means the Tribunal's merger Clearance Certificate (Form CT 10);

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

2. RECORDAL

- 2.1. On 10 May 2016 the Tribunal approved the First CCBA Transaction subject to conditions (the May 2016 Conditions). The May 2016 Conditions remain in force and CCBA and TCCC are bound to the May 2016 Conditions.
- 2.2. The Commission is concerned about the impact of the Proposed Transaction on employment given the current economic climate. The Merging Parties have offered an extension of the May 2016 conditions on employment.
- 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 increase the B-BBEE ownership percentage to a level of at least 30%.

3. CONDITIONS TO THE APPROVAL OF THE PROPOSED TRANSACTION

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 the 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.

4. BROAD-BASED BLACK ECONOMIC EMPOWERMENT CONDITION

- 4.1. Clause 5.1 of the May 2016 Conditions states the following:
"The Merging Parties commit to a follow-on broad-based empowerment transaction, to be implemented within 5 years of the Approval Date, that the current B-BBEE ownership

percentage of CCBSA of 11% under the B-BBEE Codes be increased by a further 9 percentage points to 20%."

- 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 30% by 11 May 2021.
- 4.3. The Merging Parties shall furthermore ensure that the B-BBEE ownership percentage is maintained at a level of at least 30%, 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 30%.
- 4.4. In the event that the B-BBEE Transaction 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.

B-BBEE TRANSACTION AND THE ESOP CONDITION

- 4.5. The commitment to implement the ESOP as part of the B-BBEE Transaction within 4 years of the approval date of the First CCBA Transaction (being May 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 and the ESOP:
 - 4.5.1. a meaningful stake should be allocated to the employees as part of the ESOP relative to other participants in the B-BBEE Transaction;
 - 4.5.2. unit allocation in the ESOP should be equal regardless of seniority of employee; and
 - 4.5.3. an appropriate ratio of the quantum of benefit in fact flowing to employees relative to the amounts retained for servicing any debt, capital or other obligations.
- 4.6. Former SABMiller employees shall not lose any benefits of the Zenzele scheme by virtue of the Proposed Transaction. In respect of participants that do not yet have fully vested rights, the same vesting profile will apply as if CCBA was still part of the SABMiller group.

5. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 5.1. The Merging Parties shall:

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- 5.1.1. Inform the Commission of the Implementation Date within 5 (five) business days of it becoming effective;
 - 5.1.2. Circulate a copy of the employment Conditions to all their employees and registered trade unions and/or employee representatives within 5 (five) business days of the Approval Date;
 - 5.1.3. On 12 May 2021 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 30%.
 - 5.1.4. File a merger notification in the event that the B-BBEE Transaction in terms of 4.4 above constitutes a merger under the Competition Act and meets the relevant financial thresholds.
 - 5.1.5. On 31 May 2020 submit an affidavit deposed by the Chief Executive Officer of CCBA, attesting to the implementation of the ESOP as part of the B-BBEE Transaction.
- 5.2. In the event that the Commission receives a complaint regarding non-compliance by the Merging Parties with these Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of the Conditions, the matter shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.
 - 5.3. CCBA will, within 30 days of each anniversary of the Approval Date up until the 6th anniversary, provide a suitable and appropriately detailed annual report to the expiry of 5 years following the Approval Date to the Competition Commission regarding its measures to comply with these Conditions.
 - 5.4. The report referred to in 5.3 shall be accompanied by an affidavit attested to by the Chief Executive Officer of CCBA confirming accuracy of the annual report and full compliance of these Conditions in the year to which the report relates.
 - 5.5. For the avoidance of doubt, the above reporting obligations can be included in any similar monitoring obligations pursuant to the May 2016 Conditions, for the period in which the May 2016 Conditions run concurrently with these Conditions.
 - 5.6. The Commission may request any additional information from CCBA which the Commission from time to time deems necessary for the monitoring of compliance with these Conditions.

6. VARIATION

- 6.1. Should the Merging Parties wish to amend the conditions, the Merging Parties shall be entitled, upon good cause, to make a proposal to the Competition Commission to consent to the waiver, relaxation, modification and/or substitution of one or more of the Conditions, which consent shall

not be unreasonably withheld. "Good cause" shall have its normal meaning as interpreted under the common law, save that 'good cause' shall additionally mean that the circumstances giving rise to the Merging Parties' request in terms of this condition 6.1 shall require that the circumstances could not reasonably have been foreseen by the Merging Parties at the time of the Competition Tribunal's approval of the Proposed Transaction and that the circumstances cannot reasonably be mitigated or addressed in another manner. Provided that the direct or indirect takeover or change in shareholding of CCBA anticipated by a proposed sale of a controlling stake in CCBA to an, at this stage, unidentified firm or entity, shall not be considered "good cause".

- 6.2. In the event of the Competition Commission and the Merging Parties agreeing upon the waiver, relaxation, modification or substitution of any aspect of the Conditions, the Competition Commission and the Merging Parties shall make application to the Competition Tribunal for confirmation by it of such waiver, relaxation, modification or substitution of any one or more of the Conditions.
- 6.3. In the event of the Competition Commission withholding its consent to a waiver, relaxation, modification and/or substitution of any one or more of the Conditions, the Merging Parties shall be entitled to apply to the Competition Tribunal for an order waiving, relaxing, modifying or substituting of any one or more of the conditions. The Competition Commission shall be entitled to oppose such application.



competitiontribunal south africa

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0189
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date: 27 September 2017

To: Cliffe Dekker Attorneys

Case Number: LM021Apr17

The Coca-Cola Company and Coca-Cola Beverages Africa (Pty) Ltd

You applied to the Competition Commission on **03 April 2017** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

☐ no conditions.

☒ the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The registrar, Competition Tribunal: