competition commission
south africa

Media Statement
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COMMISSION WELCOMES THE DECISION BY THE COMPETITION APPEAL COURT THAT COCA-COLA BEVERAGES AFRICA WAS IN BREACH OF MERGER CONDITIONS

The Competition Commission South Africa (Commission) welcomes the decision of the Competition Appeal Court (CAC) handed down on 17 June 2022, to uphold an appeal that Coca-Cola Beverages Africa (CCBA) was in breach of merger conditions when its subsidiary, Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA), retrenched 368 bargaining unit employees in 2019. The decision dealt with the important legal questions, firstly about the nature and standard of review in section 27(1)(c) of the Competition Act 89 of 1998, as amended ("the Act") read with Competition Commission Rule 39(2)(b) and secondly, the correct test that the Competition Tribunal (Tribunal) should apply to decide whether retrenchments are merger specific as opposed to retrenchments for operational reasons.

The Commission lodged the appeal following a ruling by the Tribunal in September 2021 setting aside a Notice of Apparent Breach issued by the Commission and finding that CCBA had substantially complied with its obligations with respect to merger conditions. The matter ultimately relates to two mergers involving Coca-Cola which were approved with conditions in May 2016 and September 2017, which conditions sought to provide protection to employees who are members of the bargaining unit, from being retrenched as a result of the mergers. The consequences of an issue of a Notice of Breach could result in the revocation of merger approval, an administrative penalty, or an order of divestiture in the event of the firm and the Commission *inter alia* being unable to agree on a plan to remedy the breach.

The CAC found that the Tribunal erred in concluding that section 27(1) confers anything other than ordinary review of powers. When issuing a Notice of Breach, the Commission acts as a specialist regulator utilising investigative and prosecutorial powers conferred by the Act. The duties and powers the Commission is enjoined to perform in this instance dictate that it must act in a manner that is lawful, reasonable, and procedurally fair and this is the appropriate standard of review in this case.

CCBA argued that retrenchments were necessitated, at the time, as a result of the macro-economic climate, the imposition of the sugar tax, and the large raw material price increases, in particular the price

of sugar. CCBA stated that the retrenchments were required in order to mitigate the losses attributable to the sugar tax, and to ensure CCBSA's continued profitability. The Tribunal considered these factors to be the principal reason for the retrenchments even though it accepted that the retrenchments involved duplications of positions of bargaining unit employees.

In considering whether the Commission acted reasonably in issuing the Notice of Apparent Breach the CAC confirmed that before issuing a Notice of Apparent Breach there must "*appear*" to have been a breach of the merger conditions which is a threshold that is indicative of something less than conclusive proof of a breach. However, a burden is placed on the merging party seeking the review to show that the applicant has substantially complied with the merger conditions. It is not for the Commission to convince the Tribunal that there has been a breach, or compliance, or a lack thereof. Only a party to a merger will have the full facts and only it can justify its decision and show it has substantially complied with the merger conditions.

The CAC accepted that the adoption of the "*causal connection*" or "*the principal reason*" test advanced by CCBA and the Tribunal respectively could be prejudicial and would significantly erode the safeguards afforded to employees by section 12A (3) of the Act through merger conditions against merger specific retrenchments. That is so because, in reality, the Commission can never prove a lack of a cause or reason, predominant or otherwise. The CAC endorsed the test in *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings* [2014] 2 CPLR 451 (CT), which states that *"merger specific"* means conceptually "*an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller",* as being an objective and sound test, because the focus is on demonstrable outcomes rather than the subjective attitude or intention of the merging parties.

The CAC ruled that there was an apparent breach of the merger conditions, the Notice of Apparent Breach was correctly and reasonably issued, and the retrenchments were merger specific. A cost order was granted against CCBA.

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