

EMPLOYMENT

Competition and Employment law observations from the recent decision of Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another [2024] ZACC 3

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Introduction

The recent Constitutional Court decision of *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another* [2024] ZACC 3 (“**Coca-Cola case**”) offers valuable insights from both a competition law and employment law perspective. In this article we highlight some areas which best illustrate the legal intersection between these two specialised areas of law.

Brief factual background

The Coca-Cola case, essentially, revolved around whether Coca-Cola Beverages Africa Proprietary Limited (“**Coca-Cola Beverages**”), the holding company of Coca-Cola Beverages South Africa Proprietary Limited, had complied with certain merger conditions relating to a large merger approval granted by the Competition Tribunal during 2016.

Section 12A of the Competition Act, No. 89 of 1998 (“**Competition Act**”) requires, among others, that the Competition Commission or the Competition Tribunal must determine whether a merger can or cannot be justified on substantial public interest grounds, by assessing the factors referred to in section 12A(3) of the Competition Act. One of the public interest factors that must be considered in this regard is the effect of the merger in question on employment.

During 2016, merger conditions were negotiated between four independent bottling entities^[1], the Minister of Trade and Industry and the Food and Allied Workers Union (“**FAWU**”). Certain of these conditions were extended to the National Union of Food, Beverage, Wine, Spirits and Allied Workers (“**NUFBWSAW**”). The Competition Commission was satisfied with these merger conditions. These agreed merger conditions were confirmed by the Competition Tribunal as a condition for the approval of a large merger involving the consolidation of these four independent bottling entities.

The merger conditions

The merger conditions provided for several employment related conditions including the following^[2] –

- “as condition 9.1: the maintenance of the aggregate employee numbers from the four operations, as at approval date, for a period of three years;
- as condition 9.2: that no retrenchments of “bargaining unit employees” were to be effected “as a result of the merger” and that retrenchments outside of the bargaining units were limited to 250 employees in category Hay Grade 12 and above;
- as condition 9.4.5: that retrenchments precluded by condition 9 did not include “necessary steps” taken by the Merging Parties in terms of section 189 of the Labour Relations Act (LRA) should operational requirements in the ordinary course of business that are not merger specific necessitate that such steps be taken; and
- as condition 11.2: that in the event of any “conflict of interpretation” between the conditions and the union agreements, the agreements would prevail”.

The key issue in dispute that arose for determination was whether Coca-Cola Beverages had breached certain merger conditions when it dismissed certain employees for operational requirements (i.e., retrench them), in terms of section 189A of the Labour Relations Act, No. 66 of 1995 (“**LRA**”).

Employee dismissals

The employee dismissals arose, so Coca-Cola Beverages contended, as a result of deteriorating economic conditions, rising input prices and the imposition of a ‘sugar tax’^[3]. As a result, and during January 2019, Coca-Cola Beverages notified the Competition Commission of the aforementioned challenges that it faced and warned that dismissals for operational requirements may be required. Subsequently, Coca-Cola Beverages sent notices in terms of section 189(3) of the LRA to FAWU and NUBWSAW.

Coca-Cola Beverages indicated that a restructure, particularly in the logistical and commercial functions, was required to deal with the aforementioned operational challenges which had impacted materially on the economics of its business. Coca-Cola Beverages further indicated that if the proposals to restructure were implemented, then retrenchments might be necessary. However, before taking any decisions, Coca-Cola Beverages stated that it intended to consult with employees on, amongst others, possible measures to avoid or minimise retrenchments. Consultations with the trade unions followed with the CCMA providing facilitation. FAWU then filed a complaint with the Competition Commission in which it alleged that Coca-Cola Beverages had breached certain of the employment related merger conditions. Thereafter the Competition Commission notified Coca-Cola Beverages that it had received a complaint from FAWU and requested information from Coca-Cola Beverages on a number of issues. Whilst this exchange of correspondence with the Competition Commission was taking place, Coca-Cola Beverages implemented retrenchments. Ultimately, 368 employees from within the bargaining unit (referred to in condition 9.2 above) were dismissed for operational reasons.

The Competition Commission issued a Notice of Apparent Breach in terms of rule 39 of the Competition Commission Rules (“**Rules**”). Coca-Cola Beverages, in response to the Notice of Apparent Breach, denied that the retrenchments were related to the merger or that it had breached the merger conditions. The three main grounds on which the Commission alleged a breach of the merger conditions were as follows, namely (a) the reduction of staff costs through retrenching and rehiring at lower wages, (b) the alleged breach or circumvention of the merger condition pertaining to the harmonisation^[4] of employment conditions and (c) the alleged misuse of the retrenchments to reduce staff through the elimination of posts or roles that were duplicated because of the merger^[5].

Coca-Cola Beverages approached the Competition Tribunal to review the Competition Commission’s Notice of Apparent Breach. The Competition Tribunal found that there had not been a breach of the employment related merger conditions by Coca-Cola Beverages on any of the aforementioned grounds.

The matter, thereafter, went to the Competition Appeal Court, who overturned the Competition Tribunal’s decision. Coca-Cola Beverages then appealed that decision to the Constitutional Court (“**Court**”).

Constitutional Court’s decision

The Court, in ultimately setting aside the Competition Appeal Court’s decision, and finding that the dismissals were not merger related, dealt with several issues of importance.

The Court confirmed that the matter before them involved a Constitutional issue as it pertained to the nature and standard of review to be applied in such matters. In having regard to Rule 39 of the Rules, the Court found, among others, that where a party challenges a Notice of Apparent Breach there is a “single permissible ground of review” namely a determination of whether “the firm has substantially complied with its obligations” with respect to the approval or conditional approval of the merger. This is an objective enquiry. The Court found that the Competition Appeal Court had not applied the correct grounds of review because the Competition Appeal Court had confined their consideration of the matter to whether the Competition Commission had acted lawfully, reasonably and procedurally fairly in issuing the Notice of Apparent Breach^[6].

Furthermore, the retrenchments took place in job categories below Hay Grade 12. It was not in dispute that duplicate positions were envisaged at head-office level (a level, which was not the subject matter of the retrenchments in question) as a result of the merger that was approved by the Competition Tribunal during 2016. In this regard, the Court held that, “Those subject to retrenchments included warehouse operators, janitors, cleaners, wash-bay attendants, truck helpers, fleet artisans, panel beaters and so on in the regional bottling businesses. These are not the type of functions that, on the multi-regional logic of this merger, became duplicated because of it”.

^[7]

Competition and employment law considerations

The Coca-Cola case illustrates the areas of overlap between competition law and employment law. We have highlighted some of those areas of overlap below.

Sanctions: potential breach of merger conditions and/or unfair dismissals

As explained in detail above, the case turned on whether the merged entity, Coca-Cola Beverages, was in breach of certain employment related merger conditions. The sanctions for a breach of a merger condition are very serious and could include the imposition of an administrative penalty up to 10% of annual turnover in the preceding financial year, including exports, for a first time offender and possible divestiture. Alternatively, the Tribunal “*may revoke its own decision to approve or conditionally approve a merger, or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues in section 12A(3)(b) or (c)*”^[8].

From an employment law perspective, the LRA confers on every employee the right not to be unfairly dismissed and the concomitant obligation on employers not to dismiss employees without a fair reason and without following a fair procedure. Section 187 of the LRA deals with ‘automatically unfair dismissals’. A dismissal will be regarded as unfair if, *inter alia*, the reason for the dismissal is “*a transfer, or a reason related to a transfer, contemplated in section 197 or 197A*” of the LRA. In other words, where the dismissal of an employee is related to a transfer of a business as a going concern. The term merger is broadly described in section 12(1)(b) of the Competition Act and includes the purchase or lease of shares, an interest or assets of another firm. Therefore, certain (but not all) mergers may involve the transfer of a business as a going concern.

In instances where employees are dismissed for reasons related to a transfer, they may be entitled to a higher maximum amount of compensation: the maximum being the equivalent of 24 months’ remuneration, as opposed to the maximum of the equivalent of 12 months’ remuneration in other dismissal cases.

Although the Court did not need to opine on the employment law consequences of the dismissals related to the merger, it is important to note that there are such consequences arising from protections afforded to employees in terms of South African labour legislation. Since not every breach of a merger condition could potentially give rise to such labour law consequences, it is important to consult an experienced employment lawyer for a proper application of the law to the facts of your particular circumstances.

Causation

If it is found that the cause for the termination of employment is the transfer of a business as a going concern then any such dismissals may be deemed to be automatically unfair (the test for whether this is the case is set out in, for instance, the case of *Van der Velde v Business & Design Software (Pty) Ltd (2)* [2006] 10 BLLR 1004 (LC)). The test for causation is, thus, important from an employment perspective.

Similarly, from a competition law perspective, it may be necessary to determine whether employees were dismissed “*as a result of a merger*” or if the dismissals in question were “*merger specific*”. In the Coca-Cola case the Court confirmed the test for causation and how it should be applied. In clarifying the correct test for causation, the Court held that^[9] “*[T]he phrase “as a result of” is recognised causal terminology. In the context of a statute containing this phrase, it has been held to invoke the two-stage enquiry into factual and legal causation, but subject to a constitutionally compliant, purposive and context-sensitive approach to the interpretation of the instrument in which the words are to be found.*”

In applying the causation test to the facts of the matter, the Court found that the principal reason for the retrenchments could not be said to be the merger approved in 2016. Rather, there was substantial evidence led by Coca-Cola Beverages that the cause of the retrenchments were operational requirements arising out of a poor macro-economic climate, the sugar tax and the sharp increase in raw material prices.

The words used

The particular words used in the formulation of the merger conditions in question were of crucial importance in the Coca-Cola case. The Court stated that^[10] “*[T]he setting in which the causation enquiry arises in this case is an amalgam of statute and contract – statute because the rule 39 enquiry is a precursor to sanction under the relevant sections of the [Competition] Act; and contractual because the merger conditions imposed by the [Competition] Tribunal were the product of written agreements between Coca-Cola [Beverages] and the trade unions.*”

In the Coca-Cola case, Coca-Cola Beverages could retrench certain employees for operational reasons should the circumstances justify doing so (subject to complying with the merger conditions imposed on it) and it, therefore, had some flexibility to respond to unforeseen operational challenges on its business. Merger conditions are often negotiated by parties in circumstances where the financial and economic impact of future events that may impact on their businesses (even on a global scale) are opaque or are completely unknown. It is, therefore crucial to ensure that the words used in crafting merger conditions are unambiguous, clear in their meaning (to avoid interpretative disputes) and, where necessary, allow sufficient flexibility to respond to uncertain future events.

From an employment law perspective, the procedure to be followed by an employer contemplating the dismissal of one or more employees will depend principally on the reason for the dismissal. Where dismissals are related to an employer’s economic, technological, structural or similar needs the process that must be adhered to is prescribed by section 189 or section 189A of the LRA: the latter provision applying in the instance of so-called ‘large scale retrenchments’. In these instances, the notice to consult and the minutes of the consultations between the employer and the potentially affected employees, and/or their trade union representatives, need to be clear, unambiguous and accurately recorded as these documents are often relied upon by the parties in a dispute.

Conclusion

The Coca-Cola case highlights the intersection of employment law and competition law considerations in relation to a commercial transaction that constitutes a large merger. In our view, it also shows that a multi-disciplinary legal team is essential to navigating transactions which are subject to scrutiny by regulatory authorities and trade unions, and which traverse different areas of law.

[1] The merger took place between four previously independent bottling entities of the Coca-Cola Company (i.e., Amalgamated Beverage Industries, Coca-Cola Sabco Proprietary Limited, Coca-Cola Shanduka Beverages South Africa Proprietary Limited and Coca-Cola Cannery Proprietary Limited), to create one entity (i.e., Coca-Cola Beverages South Africa Proprietary Limited). There was, a subsequent merger, at the holding company level in 2017.

[2] Paragraph 13 of the Coca-Cola case.

[3] The Health Promotion Levy on Sugary Beverages Act, No. 66 of 1995 which came into force after the 2016 merger approval was obtained.

[4] The Court found that that there was no complaint of breach of the harmonisation condition made against Coca-Cola Beverages in the Notice of Apparent Breach (paragraph 76).

[5] Paragraph 72 of the Coca-Cola case.

[6] Paragraph 55 of the Coca-Cola case.

[7] Paragraph 89 of the Coca-Cola case.

[8] Paragraph 5 of the Coca-Cola case.

[9] Paragraph 65 of the Coca-Cola case.

[10] Paragraph 67 of the Coca-Cola case.



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