

COMPETITION

The test for merger specificity restated and endorsed

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As part of the merger notification process, merging parties must disclose whether the merger will or even has caused job losses – the protection of jobs is a significant public interest mandate under the [Competition Act 89 of 1998](#) (Competition Act). However, job losses caused for operational reasons remain a matter to be dealt with per and under the [Labour Relations Act 66 of 1995](#) (LRA). The difficulty can be to distinguish between the two types of job losses as the competition authorities are not mandated to consider operational retrenchments.

To that end merging parties must explain the cause and motivation for past job losses and also any expected retrenchments caused by the amalgamation of businesses. This is in line with the Commission's guidelines under the Competition Act which sets out its approach to the public interest provisions and what is required of merging parties.^[1] Typically merging parties would have this type of information available, as these would be considered commercially under rubrics such as savings, synergies, efficiencies, job duplication's and such like.

The Competition Appeal Court (CAC) in *Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* (194/CAC/Oct21) [2022] ZACAC 4 (17 June 2022) (CCBA case) affirmed that the interpretation of the word merger specific "*implicate the sensitive interplay between labour law and competition law jurisprudence.*"^[2] The CAC recognised it may only determine employment issues within the scope of the and that competition authorities must observe this careful distinction while giving equal effect to the objects of the Competition Act.^[3]

Small mergers in digital markets are on the Competition Commission's radar

In 2014, in the *BB investment case*^[4], the Tribunal set the principle that merger specific means conceptually an outcome that can be shown, as a matter of probability, to have some connection to the incentives of the new controller.^[5] The principle set out in *BB Investment* was subsequently endorsed by the Tribunal in *Sibanye Gold Limited v Competition Commission* [2015] 1 CPLR 324 (CT).

Despite its approach in the past, in the CCBA case the Tribunal introduced another test for merger specificity.

The CCBA case centred on a complaint that CCBA breached certain employment related merger conditions imposed in 2016^[6] and extended in 2017^[7] by retrenching 368 employees. The Tribunal decided that the retrenchments were operational and thus not actionable under the Competition Act by CCBA. In coming to its decision, the Tribunal rejected the "*causation*" also known as the "*but for*" test as set out in *BB Investment*, and fashioned a new test by inquiring into the "*principal reasons/principal motivation*" for the retrenchments.^[8]

However, in the same breath, it is important to note that the Tribunal is not a court of law, and therefore it is not bound by its previous decisions and is empowered to interpret the Competition Act in matters before it, subject to limited exceptions.^[9]

On appeal, the CAC observed in the CCBA case with reference to *BB Investment*^[10] 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.*"^[11]

The CAC confirmed that the test in *BB Investment* is objective and sound because the focus is on demonstrable outcomes (effects) rather than considering the subjective attitude or intention of the merging parties.^[12]

The CAC homed in on the likely duplication of roles where a merger involves a consolidation, which was the case at the time of the merger and which, in turn, constitutes an incentive on the part of the merged entity to retrench. For example, it would be unlikely that a firm would continue to employ more people for a job that requires one person.^[13]

Accordingly, the CAC found that the incentives of the new controlling shareholder (to reduce duplication in the staff complement post-merger) were likely implicated in the retrenchments, and therefore merger specific.^[14]

The effect of the CAC's judgement is that jobs were saved. The CAC reaffirmed the principle as to what constitutes merger specific retrenchments by not following the "new approach" employed by the Tribunal. The CAC in the CCBA case has now set the test for merger specificity of retrenchments as per the *BB investment* case 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*".

This must be observed and followed by merging parties going forward.

Footnotes

- [1] The Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Act (31 May 2016).
- [2] See paragraph 4 of the CAC judgment.
- [3] *Ibid*.
- [4] [2014] 2 CPLR 451 (CT).
- [5] *Ibid* at paragraph 56.
- [6] *CCBA and Various Coca-Cola and Related Bottling Operations* (LM243Mar15).
- [7] The Coca-Cola Company and CCBA (LM021Apr17).
- [8] See paragraph 76 of the Tribunal judgement.
- [9] The Tribunal is an independent adjudicative body established in terms of section 26 of the Competition Act. Also see *Massmart Holdings Limited v Shoprite Checkers Proprietary Limited; Massmart Holdings Limited v Shoprite Checkers Proprietary Limited and Others* (CRP034Jun15/CON211Nov16) [2017] ZACT 34 (22 March 2017) at paragraph 11. See section 62 of the Competition Act.
- [10] *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings* [2014] 2 CPLR 451 (CT) (**BB Investment**).
- [11] See paragraph 82 of the CAC judgment.
- [12] See paragraph 83 of the CAC judgement.
- [13] See paragraph 87 of the CAC judgement.
- [14] See paragraph 88 of the CAC judgment.



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