Exploring the sensitive interplay between labour law and competition jurisprudence: *Coca-Cola Beverages Africa (PTY) Ltd v Competition Commission of South Africa & Another* [2024] ZACC 3

1 Introduction

On 17 April 2024, the Constitutional Court of South Africa handed down a landmark judgment in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission & Food and Allied Workers Union* [2024] ZACC 3. The case highlighted the intersection of labour and competition, two areas of the law that are cardinal to the protection, promotion, and realisation of socio-economic rights. Labour law is paramount to the realisation of socio-economic rights because it regulates, among other things, the right to fair wages, employment equity, safe working conditions, social security benefits, and job security, which all ensure that individuals can earn a living to support their families and afford access to goods and services essential for their socio-economic well-being. Competition law, on the other hand, advances the realisation of socio-economic rights through the promotion of fair markets and the combating of anti-competitive conduct, ensuring that consumers have access to the best quality goods and services at fair prices, which is essential for consumers' economic well-being.

The court had to consider whether the retrenchment of workers violated the conditions attached to a merger approval. A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm (s12(1)(a), Competition Act 89 of 1998 (CA)). It is essential that competition authorities scrutinise mergers as they may have the effect of lessening competition or creating monopolies, which may, in turn, harm consumers through restriction of consumer choice and charging of excessive prices. When assessing a proposed merger, the competition authorities must consider the merger's impact on competition as well as on public interest (ss 12A(1) and 12A(1A), CA). One of the listed public interest grounds that the authorities must consider is a merger's impact on employment (s 12A(3)(b), CA). The case, thus, brought into focus the role of employment in competition law insofar as the analysis of mergers is concerned.

Chapter 2 of the South African Constitution provides for the recognition, promotion, and protection of socio-economic rights, which include labour relations, environmental rights, property rights, rights to adequate housing, rights to health care, food and water, the right to social

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security, and the right to basic and further education (ss 26 to 29, Constitution of the Republic of South Africa, 1996). It has been posited that the most significant of all socio-economic rights are the rights to housing, healthcare, food and water and social security (Mubangizi "The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation" 2006 *African Journal of Legal Studies* 4). This may be true insofar as their realisation is dependent on the State, and there is an obligation on the State to take reasonable legislative and other measures to achieve such realisation (Mubangizi (2006); Heyns and Brand "Introduction to Socio-economic Rights in the South African Constitution" 1998 *Law, Democracy & Development* 158).

However, a state-centric approach to the realisation of human rights generally has been criticised as outdated and ineffective. There has been a call for corporate entities to play a more prominent role in the realisation of rights, especially socio-economic rights (Mota Makore, Osode and Lubisi "Reconstructing the Global Human Rights Order in Pursuit of a Binding Business Human Rights Treaty in the Era of Decolonization" 2022 *Juridical Tribune* 105-107; Chirwa "Non-state actors' Responsibility for Socio-economic Rights :The Nature of Their Obligations Under the South African Constitution" 2002 *ESR Review: Economic and Social Rights in South Africa* 2; Chirwa "A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa" 2002 *ESR Review: Economic and Social Rights in South Africa* 20). Considering the above, regulators play an important role in ensuring that corporate entities promote socio-economic rights or, at the very least, do not violate them. Competition law and its effective enforcement can, therefore, be used as a tool to hold corporate entities accountable and promote the realisation of socio-economic rights (Tavuyanago and Mpofu "Safeguarding South African Consumers' Socio-Economic Rights During COVID-19: Competition Commission v Babelegi Workwear and Industrial Supplies" 2024 *Journal of African Law* 133).

Labour relations and the effective regulation thereof also play a pivotal role in the realisation of socio-economic rights as access to the labour market through employment and the freedom to choose one's trade, occupation, or profession provide access to economic resources that are key to unlocking the rest of the socio-economic rights. To this end, the labour rights contained in sections 22 and 23 of the Constitution are fundamental as the wages earned by workers are used to improve their welfare through paying for needs such as housing, food, water, and education.

Since employment plays a cardinal role in the realisation of other constitutionally protected rights, it is no surprise that its protection is regulated by various pieces of legislation, with the most prominent ones being the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Employment Equity Act 55 of 1998 (EEA) and the National Minimum Wage Act 9 of 2018 (NMWA). To emphasise the value of employment, it is also featured as a critical

consideration in other legislation not directly aimed at protecting and promoting labour, such as the Competition Act 89 of 1998 (CA). In respect of the CA, the significance of employment is reflected in the objectives of the Act, with one being the promotion of employment and the advancement of the social and economic welfare of South Africans (s 2(1)(c), CA). The Act further considers employment by listing it as one of the grounds which must be considered when assessing mergers (s 12A(3)(b), CA).

However, within the competition law province, the employment role noted above is not without contestation. The CA primarily seeks to promote the efficiency, adaptability, and development of the economy (s 2(1)(a), CA) and to provide consumers with competitive prices and product choices (s 2(1)(b), CA), which have been argued to be the primary goals of competition policy (Kelly *et al*. *Principles of Competition Law in South Africa* (2017) 2). These purely economic objectives are often fulfilled through mergers, which allow firms to enter or expand within a specific market. It is trite that the effective regulation of mergers bolsters economic growth and may benefit consumers through lower prices because of the merged firm's ability to leverage economies of scale. Further, mergers are an avenue for investment, including foreign direct investment (FDI). (s 2(1)(c), Protection of Investment Act 22 of 2015). However, the expansion of a firm may present a threat to employment where there are overlaps in positions within the merged entity, leading to the need to effect retrenchments.

Considering the above and in discussing the *Coca-Cola* case, this contribution explores the persistent tug-of-war between two competing interests: the expansion and sustainability of corporations in an open market through mergers on the one hand, and the protection of employment, advancement of social justice and the protection of the socio-economic welfare of workers on the other. It notes the need to balance the economic and social objectives of the Competition Act and how, sometimes, striking that balance is easier said than done.

2 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* (CCT 192/22) [2024] ZACC 3 (17 APRIL 2024)

2 1 Factual Background

On 10 May 2016, the Competition Tribunal (Tribunal) approved a large merger between four independent bottlers for the Coca-Cola Company to create a single bottling entity, Coca-Cola Beverages South Africa (CCBSA), a subsidiary of Coca-Cola Beverages Africa (CCBA) (para 10). The merger was approved subject to conditions which included conditions relating to employment (para 9 of Annexure A to *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations*). The employment-related conditions included the following:

- that CCBA maintain the aggregate employee numbers from the four operations, as of the approval date, for three years;
- that no retrenchments of bargaining unit employees are to be affected as a result of the merger;
- that retrenchments outside of the bargaining units be limited to 250 employees and
- 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 (para 13).

Between 2017 and 2018, CCBA went through business challenges emanating from the 2017 economic downturn, the 2018 introduction of the 'sugar tax', an increase in input prices and increased competition within the market (para 16). On 19 January 2019, CCBA informed the Competition Commission (Commission) of the challenges it was facing and alerted it to the potential of retrenchments for operational requirements. On 21 January 2019, CCBA sent notices in terms of section 189(3) of the LRA to the Food and Allied Workers Union (FAWU) and the National Union of Food, Beverage, Wine, Spirit and Allied Workers (NUFBWSAW) referring to the need to carry out a restructuring of the business which included effecting retrenchments (paras 16-17). On 16 April 2019, the Commission notified CCBA that it had received a complaint from FAWU for breach of the condition, placing a moratorium on merger-related retrenchments for three years. While communications between the Commission and CCBA were ongoing, CCBA implemented retrenchments with effect from 31 May 2019 (para 21). On 24 October 2019, the Commission issued a Notice of Apparent Breach in terms of rule 39(1) of the Commission's rules and subsequently put CCBA on terms to submit a plan to remedy the breach alternatively, for CCBA to approach the Tribunal for relief against the Notice (paras 22-24). CCBA opted for the latter, and on 14 May 2020, it applied to the Tribunal for review of the Commission's notice (para 25).

2 2 Tribunal Decision

The Tribunal, in considering whether the retrenchments were merger-specific, referred to the Constitutional Court decision in *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd)* [2020] ZACC 23, which dealt with the test to determine the true reason for dismissal (para 27). The Tribunal favoured the test for causation adopted by the second judgment in *Aveng*, which relates to a factual enquiry based on proof, as opposed to the delictual test for causation. The court favoured this approach because where conflicting reasons are proffered for the retrenchments, the true reason for them is a factual question to be resolved on the probabilities rather than an enquiry into whether the conduct is sufficiently closely or directly the cause of the loss for legal liability to arise (para 27; see also *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission of South Africa* (RVW150May20) [2021] ZACT 101) paras 41-42; Dlamini-Jordan and

Tavuyanago "The New Dawn Birthed by Amendments to Section 187(1)(C) of the Labour Relations Act 66 of 1995: A reflection on *National Union of Metalworkers of South Africa v Aveng Trident Steel"* 2023 *Acta Universitatis Danubius Juridica* 54).

The Tribunal acknowledged that if the retrenchments by CCBA were to remove duplication of positions, then they would qualify as merger-specific, and CCBA would have a case to answer. However, based on the evidence presented by CCBA it appeared that the retrenchments were to address the impacts of the sugar tax, adverse macroeconomic circumstances and rising input prices (para 29). On the evidence, the Tribunal found that CCBA had substantially complied with the merger conditions and retrenchments for operational reasons were allowed (para 9.4.5 of Annexure A to *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* [2016] ZACT 68).

2 3 Competition Appeal Court Decision

Unsatisfied with the Tribunal's finding, the Commission approached the Competition Appeal Court (CAC) to decide on the correct test for determining whether retrenchments were merger-specific. (*Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* [2022] ZACAC 4). The CAC found that the correct test to determine the reason for retrenchments was looking at whether an outcome could be shown as a matter of probability to have some nexus associated with the incentives of the new controller (para 31).

According to the CAC, the nexus would be more easily established where merging firms were engaged in overlapping activities. This was found to be the case, based on CCBA's December 2019 letter to the Commission where it noted that 'retrenchments sought to reduce the cost of employment including the removal of unproductive duplication of roles' (para 32). Further, the CAC relied on the Commission's argument that where a merger involved four entities, there was a well-founded expectation of duplication of positions and an incentive on the part of the merged entity to retrench. Based on the 'some nexus' test preferred by the CAC, the decision of the Tribunal was overturned (para 33).

2 4 Constitutional Court Decision

CCBA, aggrieved by the CAC's decision, approached the Constitutional Court (CC) to bring finality to several issues, including the assertion of the correct test for determining whether retrenchments were causally linked to the merger (para 34(d)). CCBA argued that the correct test for causation was factual, utilising the *conditio sine qua non*-test and asking, "But for the merger, would retrenchments have taken place?" (para 43). The Commission argued that there was an incentive for CCBA to retrench as four firms carrying out overlapping functions were collapsed into one, creating the potential for duplication of positions (para 46).

The CC rejected the CAC's test for determining the reason for retrenchment, noting that, given that the effect of a merger is generally that the newly merged firm attains control over the enterprise, there would always be 'some nexus' between the merger and the incentives of, and subsequent decisions and outcomes in, the merged enterprise. Thus, if this test were to be preferred, a finding of merger specificity and breach would always be inevitable (para 60). The CC also found that the Tribunal had considered the pre-merger counterfactual in applying the but-for test, finding that even if the merger had not taken place, CCBA would have retrenched employees due to the adverse economic conditions and the sugar tax (para 62). The CC concurred with the Tribunal's reasoning in opposing the 'some nexus' approach, where the Tribunal, quoting *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty) Ltd* [2014] 2 CDLR 451 (CT) (para 57), noted that firms were dynamic institutions and thus, not every change that resulted post-merger was necessarily attributable to the merger. Considering the above, the CC found that the analysis of the facts by the Tribunal was cogent and revealed no misdirection, nor any clear error (para 92). It, thus, upheld the appeal, concluding that there was no basis in law or fact for overturning the Tribunal's judgment (para 93).

3 The role of employment in merger analysis and the 'substantial compliance' requirement

3 1 The role of employment in merger analysis

The CA seeks to promote economic development while advancing public interests (Preamble, s 2, CA), with the ancillary consequence of safeguarding consumers' socio-economic rights (Tavuyanago and Mpofu, 133). When assessing a merger, the Commission or Tribunal must conduct a dual enquiry, assessing first whether a proposed merger is likely to prevent or lessen competition substantially (competition test) and second, whether the merger can or cannot be justified on substantial public interest grounds (public interest test) (ss 12A(1) and 12A(1A), CA). The nature of the merger review process is that both the competition and public interest tests must be conducted and carry equal weight. Thus, a 'competitive' merger may be prohibited based on its adverse effect on public interest grounds. Conversely, an 'anti-competitive' merger may be saved where there is a gain in respect of the public interest. Employment as one of the public interest grounds (s 12A(3)(b), CA), therefore, has the potential to block a competitive merger or cure an uncompetitive one. The role of employment in the merger review process can consequently not be gainsaid. In *Coca-Cola*, the prominence of employment in merger analysis was acknowledged by both the CAC and the CC. The CAC, in its judgment, noted the following regarding the role of employment:

> The appeal has as its backdrop the incomparable statutory public interest safeguards and crucible afforded by section 12A(3) through the imposition of merger conditions monitored by the Commission. The issues raised implicate

> the sensitive interplay between labour law and competition law jurisprudence. (para 4)

The CC echoed the CAC's observations and noted regarding legislative intent, that "South Africa faces one of the highest unemployment rates in the world, particularly amongst younger members of society. This was no doubt considered by Parliament in formulating section 12A of the Competition Act" (para 1) where it recognised the effect that mergers may have on employment. It noted that the conditions prohibiting retrenchments directly resulting from mergers reflected a legislative intent to protect jobs and mitigate the negative impacts of corporate restructuring on employment (Van Staden "Constitutional Court sets a corporate precedent in Coca-Cola merger retrenchments ruling" 2024. https://www.dailymaverick.co.za/opinionista/2024-04-22-constitutional-court-sets-a-corporate-precedent-in-coca-cola-merger-retrenchments-ruling/ accessed 10-05- 2024).

While the CAC and the CC did not go into a detailed discussion regarding the importance of employment, I proffer that its significance cannot be overstated as it is intricately woven into each of the aims of the CA. Firstly, regarding the promotion of efficiency, adaptability, and development of the economy (s 2(1)(a), CA), the industry cannot thrive and thus contribute to economic development without a robust and stable labour force. Second, regarding the provision of competitive prices and product choices for consumers (s 2(1)(b), CA), the cost of labour at manufacturing and distribution levels as part of the cost of production is shifted onto consumers. Third, concerning the promotion of employment and advancement of socio-economic welfare (s 2(1)(c), CA), the CA recognises that safeguarding the interests of employees is crucial for the fulfilment of its objectives. Fourth, regarding the expansion of opportunities for South African participation in world markets (s 2(1)(d), CA), local firms will not be equipped to compete on a global scale without a stable and productive labour force. Fifth, regarding ensuring opportunities for SMEs to participate in the economy (s 2(1)(e), CA), SMEs are a key driver to poverty alleviation through their empowering of local communities by creating employment and income generation. Lastly, concerning the promotion of a greater spread of ownership to historically disadvantaged persons (s 2(1)(f), CA), the value of employees and the need to actively involve them by providing an ownership stake has been recognised through Employee Share Ownership Plans (ESOPs). It can be, therefore, argued that employment lies at the heart of all merger assessments.

3 2 Is 'substantial compliance' with merger conditions enough?

At the heart of CCBA was the question of how to determine whether retrenchments effected by a merged entity were a direct result of the merger. While the CC correctly decided and pronounced on the test to determine the reason for retrenchments, the timing of the retrenchments

by CCBA was peculiar. The retrenchments were affected in May 2019, 3 years after the conditional approval, which placed a 3-year moratorium on retrenchments, which raises the question of whether CCBA had been planning on retrenching all along and waiting for the 3-year period to lapse. The question becomes, what happens when the period to which conditions are attached ends? This is where the Tribunal's finding that CCBA had substantially complied with the merger conditions falls short. It can be argued that a moratorium on retrenchments is a resolutive condition insofar as retrenchments resulting from a merger are concerned.

Such a condition only serves to hold retrenchments in abeyance until the stipulated period expires. As soon as the period specified in the condition lapses, the obligation to preserve employment that the employer has terminates. Thus, the employer can retrench employees without fear of reprisal from the competition authorities or consideration of the plight of workers. From a reading of the case and interpretation of the term 'substantial compliance', it appears that a firm must show its compliance with the conditions for the prescribed period and then be released from the obligations created by the conditions. Such a situation is not in the best interests of employees as it may lead merging parties to negotiate and accept conditions in bad faith. The merging parties can make a calculated business decision to keep the requisite workforce for a specified period while knowing that retrenchments will ensue, thus defeating the Act's objectives insofar as the protection and promotion of employment is concerned.

From the above, it can be argued that conditional approval of a merger based on a moratorium on retrenchments is susceptible to misuse. Firms can simply use the moratorium as a device to obtain the necessary regulatory approvals while postponing retrenchments. While the CA provides remedies for breach of merger conditions, including revocation of the approval (ss 15(1)(c) and 16(3), CA), a revocation based on breach of a retrenchment moratorium would not cure the job losses. There thus needs to be proactive mechanisms to avoid or minimise job losses arising out of mergers. There have been calls in other parts of the world to block mergers that threaten jobs altogether (Miller & Brown "To Save Jobs and Slow Inequality, Stop the Merger Frenzy" 2022 American Economic Liberties Project, https://www.economicliberties.us/wp-content/uploads/2022/01/Stop-the-Merger-Frenzy_Quick-Take_Final_1.10.pdf accessed 17-10 2024, 9). However, such an approach is not desirable for South Africa due to the benefits that mergers present. For example, mergers are a crucial vehicle for investment (s 2(1)(c), Protection of Investment Act 22 of 2015), thus contributing to the growth of the economy as envisaged by the CA (s 2(1), CA). Further and in some instances, mergers may result in more jobs (Shapiro "Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets" 2019 *Journal of Economic Perspectives* 87; Montag "Mergers, Foreign Competition, and Jobs: Evidence from the U.S. Appliance Industry" 2023 *George J. Stigler Centre for the Study of the Economy & the State Working Paper No. 326* 1, 14).

Accepting then that competition policy and the effective regulation of mergers is desirable for both economic development and, in some instances, job creation, it is desirable to have a merger regime that encourages mergers. What is needed is a balance between promoting mergers and protecting employees. Regarding the length of moratoria on retrenchments, perhaps mandating more extended periods, between five and ten years, may create this balance. Such extended periods would, on the one hand, show a genuine commitment to job protection by the merging parties while ensuring that the moratorium is not in perpetuity. On the other hand, it would provide employees with medium to extended security of tenure thus protecting livelihoods.

4 Conclusion

Employment as a public interest in merger regulation, on the one hand, and the economic objectives of the CA, on the other, need delicate balancing to ensure that economic development remains a priority but not at the expense of labour rights. It has been suggested that the *Coca-Cola* judgment supports a cogent and economically grounded approach to the interpretation of the CA, which reflects the realities of commercial circumstances being experienced by South African Businesses (Lotter and Reidy "South Africa: Bowmans assists Coca-Cola Beverages Africa in key competition case before the Constitutional Court" 2024 https://bowmanslaw.com/insights/south-africa-bowmans-assists-coca-cola-beverages-africa-in-key-competition-case-before-the-constitutional-court/ accessed on 09-05-2024). While the above is true and the consideration of the prevailing economic climate is important in interpreting the Act, such an interpretation must not be made at the expense of the public interest objectives of the Act. The decision by the CC must not be construed to imply that economic considerations will always trump public interest considerations. If anything, the case illustrates the delicate nature of the balancing act that is needed when dealing with mergers. While upholding the flexibility for firms to adapt to market dynamics through restructuring, the court also underscored the importance of safeguarding employment opportunities, particularly in a nation confronted with substantial unemployment challenges (Van Staden (2024)). This decision, thus, highlights the need to balance corporate efficiency and social responsibility and serves as a guiding light for future merger evaluations while affirming the judiciary's commitment to upholding the public interest in economic matters (Van Staden (2024)).

It is observed that while there is a need to promote employment, which would help unlock other socio-economic rights, it would be prejudicial to firms and potentially have a chilling effect on investments to demand merging parties that they make unconditional commitments not to retrench any employees. The CC's decision points out that parties to a prospective merger or companies considering post-merger restructuring will always have to carefully strike a balance between economic and public interest considerations and align their business

strategy with one of the key objectives of the Act – the protection and promotion of employment.

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