REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA
HELD IN CAPE TOWN

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
(4)
......**17 June 2022**......... ....
DATE SIGNATURE

Case NO: 194/CAC/Oct 21

In the matter between

COMPETITION COMMISSION **APPELLANT**

and

COCA-COLA BEVERAGES AFRICA (Pty) Ltd **FIRST RESPONDENT**

FOOD AND ALLIED WORKERS UNION ('FAWU') **SECOND RESPONDENT**

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 17 June 2022

JUDGMENT

Siwendu AJA (Victor JA and Nkosi AJA concurring)

[1] This appeal raises important legal questions about the nature and standard of review envisaged in section 27(1) (c) of the Competition Act 89 of 1998 (the Act) read with Competition Commission Rule 39(2)(b). The pervading concern is whether the section confers the Competition Tribunal (Tribunal) with a "*separate and context specific form of review*" akin to an appeal. Coupled with the above question is the correct test the Tribunal should apply to decide "*merger specific*" retrenchments as opposed to retrenchments for "*operational reasons*" under the Labour Relations Act 66 of 1995 (the LRA).

[2] The appeal flows from a complaint lodged by the Food and Allied Workers Union (FAWU) to the Competition Commission (the Commission) that Coca-Cola Beverages Africa (CCBA) breached certain employment related merger conditions by retrenching 368 employees who were part of the bargaining unit. On 24 October 2019, after investigations and engagements with CCBA, and its attorneys, the Commission issued CCBA with a Notice of Apparent Breach (Notice of Breach) of the employment merger conditions. The consequences of an issue of a Notice of Breach could result in the revocation of merger approval, an imposition of an administrative penalty or an order of divestiture.

[3] Instead of tabling a remedial plan, an alternative available to a party in terms of the Competition Commission Rules (CCRules), CCBA elected to apply to the Tribunal for a review of the Notice of Breach and for an order to set it aside. CCBA also sought an order declaring that it had substantially complied with the merger conditions. There is no contest that the review power in CCRule 39(2)(b) is conferred on the Tribunal to avoid the severe consequences that may flow from a Rule 39(1) Notice of Breach if in fact there has been

substantial compliance with imposed merger conditions. CCBA succeeded in its application and the Tribunal ruled that it had substantially complied with the merger conditions.

[4] The appeal has as its backdrop the incomparable statutory public interest safeguards and crucible afforded by section 12A(3)[1] through the imposition of merger conditions monitored by the Commission. The issues raised implicate the sensitive interplay between labour law and competition law jurisprudence. The abiding principle is that this Court may only determine employment issues within the scope of the Act. The challenge for the Tribunal and this Court is to observe this careful distinction while giving equal effect to the objectives of the Act. In this instance the importance of labour relations and their protection in section 23, as well as freedom of trade in section 22 of the Constitution are implicated.

Condonation

[5] The Commission seeks condonation for the late filing of its notice of appeal. It attributes this to internal administrative procedures it had to adhere to and unavailability of its counsel before filing the notice.

[6] At different times, both parties did not adhere to the time frames imposed by the Rules. Even though at first CCBA opposed the application, it did not make submissions in this regard. Ms Engelbrecht (for CCBA) advised the Court that CCBA will abide by its decision.

[1] In terms of section 12A (3) the competition authorities must conduct an assessment of the effect of the proposed merger on public interest grounds listed in section 12A (3) regardless of the outcome of the competition analysis conducted under section 12A (2). The importance is evident from the decision – *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb 02) [2003] ZACT 15 (19 March 2003) para 214.

[7] The Court determined that condonation should be granted. The case raises important questions of law which are significant to both parties.

Background

[8] A brief background to the merger and its mechanics is necessary to give a proper context to the issues at hand.

[9] CCBA operates in the non-alcoholic beverages (NABs) market which includes amongst others, the Ready to Drink (RTD) and Carbonated Soft Drinks (CSD) market. Part of the production cycle of these beverages involves sugar, its producers, bottlers and distributors. CCBA manufactures, bottles and distributes the Coca-Cola Company (TCCC) products to wholesalers, formal and informal retailers. Typical points in the supply chain involve production, distribution, marketing and sales.

[10] On 19 March 2015, SABMiller PLC, the Gutsche Family Investments (Pty) Ltd and the TCCC notified the Commission of a large merger. The proposal was to combine the bottling operations of the NAB business in South Africa under a single entity now known as Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA). CCBSA would be a subsidiary of Coca-Cola Beverages Africa Ltd (CCBA).

[11] The merger of the bottlers was the first of two contemplated transactions. It was reported that the second transaction would entail an introduction of a new controlling shareholder for CCBA. I understood further from the Commission's investigation report that at the time, TCCC planned to exit the African bottling market. The estimated time horizon for the second transaction was between 18 to 24 months.

[12] The first transaction involved the merger of four of the five authorised TCCC Bottlers, namely:

a) Coca-Cola Shanduka Beverages South Africa (Pty) Ltd (CCSB);
b) Waveside (Pty) Ltd (Waveside) / Coca-Cola Canners of Southern Africa (Canners);
c) Coca-Cola Fortune (CCF) / Coca-Cola Sabco (Pty) Ltd (Sabco); and
d) ABI Bottling (Pty) Ltd (ABI).

The transaction excluded Peninsular Beverage Company (Pty) Ltd (PenBev). It envisaged that CCBSA would be held by the three shareholders in the following proportions: SABMiller (54%), TCCC (12%) and Gutsche Family Investments (Pty) Ltd (GFI) (34%).

[13] Thus, the first CCBA transaction resulted in the consolidation of various local Coca-Cola bottling operations. The bottling assets were to be jointly housed in a new company called Coca-Cola Beverages SA (CCBSA), which would be a subsidiary of Coca-Cola Beverages Africa Limited (CCBA). The local bottling company's Head Office would be relocated, managed and directed from South Africa. The company would remain a tax resident of South Africa. After the implementation of the transaction, CCBSA as the newly authorised TCCC bottler would retain the distribution function. Geographic location[2] of the operations would remain in the various provinces.

[14] Investigations reported based on submissions made to the Commission that bottlers do not compete with one another because of pre-existing vertical restraints imposed by TCCC as part of its distribution operating model. As a result, the bottlers are contractually precluded from trading in or with customers in the same geographic area by virtue of the Standard International Bottling

[2] Reference: Volume 3, page 276.

Agreement (SIBA) imposed by TCCC. It was reported that the territorial provisions are designed to encourage each bottler to invest in the necessary capital, distribution infrastructure and management talent in order to compete with TCCC's rival brands.

[15] Consequently, it was accepted that the merger would not result in the combination of the manufacturing operations of the four entities. The Commission reported that the merging parties considered their position analogous to the findings of the Competition Appeal Court (CAC) in *Competition Commission v South African Breweries Ltd and Others*[3]. The CAC found there was no geographical horizontal overlap between the bottlers before the merger.

[16] The Commission identified a number of competition and public interest concerns. These included *inter alia,* the impact the transaction would have on employment. Merger conditions were deemed necessary to avoid the negative impact on the NAB market in South Africa which would affect employment and localisation. When regard is had to the reported total employee complement of the merging parties at the time, the investigation revealed a concentration of employees in the Sales, Manufacturing and Logistics areas of the business.

[17] Given the proposed consolidation, it was reported that the merging parties would close about six of the separate offices because one office was required after the merger. The merging parties disclosed that the implementation of the proposed transaction will result in a duplication of about 250 positions at an executive, managerial, administrative and technical level. The merging parties anticipated that there would be no involuntary retrenchments amongst employees who form part of the bargaining unit. It was stated that*:* '*This will*

[3] (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC).

therefore result in a number of positions within the bottling operations being duplicated and, hence – the need to retrench post-merger.'

[18] Ultimately, in 2017, TCCC acquired SABMiller's majority bottling interest in CCBA and became the controlling shareholder wielding approximately 66% of the interest. When the Commission approved the second transaction, it reported that the merging parties stated that it would not have an effect on employment as the day-to-day operations of CCBA would not change post-merger. They agreed that the conditions which applied in the first CCBA transaction would continue to apply to the merging parties in this transaction, including CCBA and TCCC. The Tribunal approved the second transaction on 27 September 2017.

[19] Even though the net public interest determined by the Commission is not apparent from the papers, it is safe to conclude that the imposition of the conditions to protect and preserve employment is a sign post that the public interest was substantial. The relevant conditions were:

'9 EMPLOYMENT CONDITIONS

9.1 Notwithstanding any other provision in this paragraph 9, 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.

9.2 Without derogating from its commitment set out in paragraph 9.1, CCBA shall not retrench any Bargaining Unit Employees as a result of the Merger, and any retrenchments of employees outside of the bargaining units shall be limited to 250 employees within the category of Hay Grade 12 and above.

9.3 The Merging Parties commit to put in place suitable and appropriate measures to mitigate the consequences of the retrenchments by providing:

> 9.3.1 in each year during which a retrenchment contemplated in paragraph 9.2 or a separation contemplated in paragraph 9.4.1 takes place flowing from the Merger, employment in the CCBA group within South Africa to such number of permanent

employees as are equal to the number of employees retrenched or separated, voluntarily or non-voluntarily (with the intention that there shall be no net reduction in employment arising from the Merger for a period of no less than three years from the Approval Date).'

[20] Before the approval of the second transaction, the Commission assessed the merging parties' compliance with the first CCBA conditions. It found that the merging parties had started implementing all of the conditions except for the B-BBEE transaction requirement. The following conditions were imposed in respect of the second transaction:

EMPLOYMENT CONDITIONS

'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.'

[21] On 19 January 2019, approximately a year and five months after the second transaction, CCBA notified the Commission of intended changes to its employee complement. What prompted the changes was a need to rationalise its business and streamline its operations because it was confronted by unusual business circumstances, which occurred post-merger.

[22] CCBA advised the Commission that economic difficulties necessitated it to rationalise and streamline its operations to optimise it to meet these unusual business circumstances. The retrenchments were a legitimate response to: (1) a

decline in its revenue and profitability due to the macro-economic climate and a decline in sales volumes; (2) a competitive environment with new entrants, increased discounts and marginal revenue growth; and (3) the imposition of the Health Promotion Levy (the sugar tax). In April 2018 it paid R2.1 billion in the new sugar tax. Its gross profits decreased by R300 million. It also anticipated sharp increases in the cost of raw materials.

[23] Its letter stated that it envisaged a reduction in the total headcount by approximately 1200 employees predominately in sales and operations functions where there are "*additional jobs*" that have become redundant given the fact that there was no growth in the environment. It indicated that it would reduce reliance on outsourced service providers by bringing within its operations previously outsourced roles, such as canteen services, cleaning and IT. It planned to create specialised roles in sales for account managers. It anticipated a net jobs addition of 858 heads from this. I pause to mention that CCBA framed the concern about compliance with merger conditions solely as one of the maintenance of the agreed aggregate head count.

[24] In CCBA's letter dated 21 January 2019 to FAWU, it identified that optimisation would occur within the Logistics and Commercial operations. It advised that given the need to adapt the organisation to face the future, it had become imperative for the company to '*reduce our labour costs and transition to more efficient and cost-effective operational structures*'. It noted that the management of its fleet by a third party in the company with the exception of a few sites, was counter-productive. Even though retrenchments may be necessary, as part of the merger conditions, it emphasised that '*there would be no forced merger-related retrenchments*' within the bargaining units of the CCBSA group of companies, as defined in the recognition agreements in place at the various entities in CCBSA (Bargaining Unit).

[25] To this end, the company proposed to reduce the number of resources in the following roles: Clerk Fleet. In addition, the company proposes to make the following roles redundant: Fleet Artisan, Fleet Planner, Fleet Storeman, Battery Bay Attendant, Body Builder, Body Builder Assistant, Clerk: Planned Maintenance, Fuel Attendant, Motor Mechanic, Panel Beater Assistant, Semi-Skilled Artisan and Transport Assistant.

[26] It advised FAWU that activity levels in the warehouses have reduced significantly as a result of the reduction in sales volume. It proposed to reduce the number of resources in the following roles: Warehouse Operator, Team Leader Warehouse, Shunter Driver and Warehouse Clerk. In addition, it proposed to make the following roles redundant: Janitors, Cleaners, Scrubber Operators, Truck Washing, Wash-bay Attendants, Re-packers, Checkers and Truck Helpers.

[27] In respect of the commercial part of the business, it advised that the current trading environment, economic climate and legislative conditions forced the company to review and optimise its Route-to-Market (RTM) strategy to ensure the company remains competitive and sustainable. It proposed to reduce the number of resources in the following roles: Merchandiser, Pre-Seller Merchandiser, Field Marketer, Customer Relationship Representative and Sales Team Leader.

[28] Lastly, with regard to the finance function, it noted that since 2016, finance made a number of changes in an effort to remain efficient and competitive. A number of employees were redeployed to different roles. The impacted sites were spread across the country such as Clerical, Filing Credit

Control and Senior Bookkeeper in the finance function in Midrand, Bloemfontein, Heidelberg, Port Elizabeth and Nigel.

Before the Tribunal

[29] The decision of the Tribunal clarifies the history of the retrenchments and the process followed sufficiently. CCBA took the decision to retrench employees between November and Decembers 2018. It disputed that the retrenchments were "merger specific". It maintained throughout that the retrenchments were caused by market and regulatory circumstances beyond the control of CCBA and/or CCBSA. There was no moratorium placed on retrenchments for operational reasons. As already alluded to above, the retrenchments took place within a period of a year and five months from the second transaction.

[30] The Tribunal observed that during investigations and engagements with CCBA, the Commission changed its position about the foundation of its complaint on a number of occasions. At first, the Commission claimed there was a breach of merger conditions because the retrenchments occurred "*during the moratorium*" - and appeared to be "*merger specific*" falling within the purview of the merger conditions.

[31] A further assessment by the Commission revealed that the retrenchments took place in the bottling operations of the merged entity. It opined that a substantial number of retrenchments occurred in the manufacturing, logistics and sales parts of the business. In its view, the merger resulted in a duplication of roles in these business areas.

[32] The Tribunal observed that in its letter of complaint dated 16 April 2019, the Commission referred to the impact the retrenchments might have on the

aggregate headcount required under merger condition 9.1 of the first merger and its extension for a further period in condition 3.2 of the second merger. The Tribunal went on to state that:

‘No information was ever solicited by the Commission on the issue of duplications at this stage of the investigation.’

Nevertheless, the Tribunal accepted as part of its reasoning that a merger invariably involves duplication and restructuring, any retrenchment immediately before or soon after gives rise to a legitimate concern that the retrenchment may be merger related.

[33] The Tribunal also noted that in a letter to CCBA's attorneys on 24 October 2019, the same date of the Notice of Breach, the Commission stated that after an extensive investigation, it found the retrenchments were merger specific because:

‘the [a]ffected employees were employed at the merged entity's bottling operations, which the merged entity indicated that it wished to rationalise in order to reduce duplications and staff costs’ and that the retrenchments “took place during the moratorium period prescribed in clause 9.2 of the Merger conditions”.’

[34] The Tribunal observed further that on 9 April 2020, the Commission had raised a fresh issue about harmonization in an email to CCBA's attorney taking a new tack, namely that ‘*the provisions requiring the merged entity to harmonise working terms and conditions culminated in the involuntary retrenchment of 388 employees (who all form part of the collective bargaining unit) in breach of the conditions*’ while at the same time CCBA ‘*hired new employees in the same/similar positions but for less wages and less benefits*’. The Commission had questioned CCBA's rationale for the retrenchments given that only those areas in which duplications arose from the merger were targeted and no other area or why no other cost cutting measures were effected.

[35] The Tribunal noted that the merger conditions envisaged a "*two-fold*" public interest protection mechanism: 'either by setting an employee level below which the merging parties may not go for a period of time; <u>or</u> by preventing the merging parties from retrenching employees on grounds that are merger specific'. [My emphasis underlined]. Clause 9.4 expressly excludes retrenchments occasioned by operational requirements in the ordinary course from '*retrenchments as a result of the merger*'. It is thus evident from clause 9 read as a whole that, although CCBA must retain the number of employees as at the approval date and that it is not permitted to retrench for merger specific reasons, it is permitted to retrench employees on grounds of operational requirements.

[36] Nevertheless, the Tribunal accepted that Clause 9.2 prohibited merger specific retrenchments whenever they occur.

[37] In dealing with section 27(1)(c) of the Act, the Tribunal accepted that a review differs from an appeal, noting that a review engages the question whether the decision reviewed is lawful, reasonable and procedurally fair. However, it reasoned that Rule 39(2)(b) provided a:

'separate and context specific form of review, namely to determine whether a firm has substantially complied with its merger conditions. Such determination necessarily involves whether the decision to issue the notice is lawful, reasonable and procedurally fair.'

[38] With regard to the test for determining whether the retrenchments were "*merger specific*", the Tribunal rejected the delictual test, also known as the *"causation test"* proposed by CCBA as inappropriate, acknowledging that the *"cause"* of the retrenchments would be an employer's decision. It agreed that the employer's stated reasons for the decision that *must be examined*. [Emphasis added].

[39] After an evaluation of the facts and the allegations of: (1) duplications; (2) reduction in staff costs; and (3) breach of harmonisation obligations, it considered CCBA's commercial reasons as already alluded to above. It concluded that economic and commercial grounds advanced by CCBA were not in dispute. It stated that:

'The Commission's conclusions about the duplication of roles were based on an inference and not properly identified and investigated. There was insufficient evidence to demonstrate the principal reasons for the retrenchment.'

[40] Following this, the Tribunal decided the case on a preponderance of probabilities to determine whether CCBA substantially complied with the merger conditions, and whether it had discharged its onus on a preponderance of probabilities. The Tribunal relied on the formulation in *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie.*[4]

[41] It determined that taken together, the probabilities were poor that the retrenchments were "*principally motivated*" by the removal of duplicate positions and not strong even as a marginal motivation. It accepted CCBA's commercial reasons for the retrenchments concluding that CCBA substantially complied with its obligations.

Grounds of Appeal

[42] The Commission's appeal is premised on three grounds:

a) The first contention is that the Tribunal purported to sit as an appeal body in a review application. The complaint is that section 27(1)(c) of the Act read with Commission Rule 39(2)(b) does not provide for a separate and context specific form of review as propounded by the Tribunal. It is said the Tribunal

[4] 2003 (1) SA 11 (SCA).

misconstrued the section and erred by evoking a hybrid review test for lawfulness, reasonableness and procedural fairness.

b) The second ground pertains to the test applied by the Tribunal to determine whether the retrenchments were "*merger specific*". The Commission complains that by inquiring into "*principal reasons*" to determine whether the retrenchments were merger specific, the Tribunal departed from its own precedent and test developed in *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings*[5] endorsed by this Court in *Sibanye Gold Limited v Competition Commission*[6].

c) Lastly, the Commission complains that the Tribunal was wrong in substituting the decision of the Commission and determine the issue itself. It is contended that in view of the gaps the Tribunal identified in the evidence presented by the Commission, and absent exceptional circumstances, the Tribunal was obliged to remit the matter to the Commission.

The Nature of the Review Powers

[43] At the outset, I accept that the nature and the applicable standard of review are inter-related and should be considered contemporaneously. However, in this instance, it is necessary to segregate the two to highlight their proper meaning and context.

[44] Section 27(1)(c) of the Act provides that the Competition Tribunal may:

'hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it.'

[45] CCRule 39 of the Competition Commission reads:

[5] [2014] 2 CPLR 451 (CT).
[6] [2015] 1 CPLR 324 (CT).

'(1) If a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger, the Commission must deliver to that firm a Notice of Apparent Breach in Form CC 19, before taking any action.

(2) Within 10 business days after receiving a Notice of Apparent Breach, a firm referred to in sub-rule (1) may –

> a)…..
>
> b) request the Competition Tribunal to review the Notice of Apparent Breach on the grounds that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger.'

[46] Both counsel agree that the Tribunal acted as an appeal body but differ on whether the section confers the appeal powers assumed.

[47] Even though Ms Engelbrecht accepts that the review power must be exercised by reference to the ambit and content of the provision that creates it, her point of departure is that section 27(1)(c) read with CCRule 39(2)(b) confers "*special statutory review powers*" akin to an appeal. She argues that the power of review under the section differs from the ordinary judicial review in the administrative law sense.

[48] On this score she relies on the court's decision in *Nel & another v Master of the High Court Eastern Cape & others*[7] which suggests a "*third type of review*". The point was made in the context of the Insolvency Act. The Supreme Court of Appeal states that the insolvency statute creates a review mechanism akin to an appeal.

[49] It is contended that the interpretation proffered above derives from the specialist nature of the inquiry the Tribunal must make to determine whether a firm has substantially complied with merger conditions. Ms Engelbrecht finds

[7] 2005 (1) SA 276 (SCA).

support for this contention in the Constitutional Court case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[8].

[50] Reliance is also placed on the dicta in *Sibanye Gold Limited v Competition Commission*[9] to support both the arguments about the unique nature of the review and the standard for review. The Competition Tribunal stated that:

‘This review is peculiar in the sense that it is coupled to an implied declaration that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger. In essence, the effect of rule 39(2)(b) appears to be that, if it is found that the merged entity has substantially complied with its obligations with respect to the merger conditionally approved, then the Notice of Apparent Breach should be set aside.’

[51] Mr Ngcukaitobi (for the Commission) disputes the argument as fundamentally flawed. He contends that the court in *Nel* makes clear that the nature of the review can only be construed relative to the statute. The court in *Nel* stated that:

‘Thus, when engaged in this third kind of review, the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the court's powers under this kind of review are ‘unlimited’ or ‘unrestricted’, this is not entirely correct. The precise extent of any ‘statutory review type power’ must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the ‘ordinary’ judicial review of administrative action (the ‘second type of review’ identified by Innes CJ in the Johannesburg Consolidated Investment Co case),

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[8] (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC). She also relies on the decision in A*gri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* (660/2011) [2012] ZASCA 134; 2013 (5) SA 484 (SCA) as well *Competition Commission of South Africa v Group Five Construction Limited* (195/20) [2021] ZASCA 37 (8 April 2021) to bolster the view advanced.

[9] [2015] 1 CPLR 324 (CT).

so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies.'[10]

[52] The language employed in section 27(1) is not obscure. As a matter of logic, an action taken by the Commission under the Rule 39(1) will precede any review contemplated by section 27(1) of the Act and/or its invocation. An important point made by the court in *Agri Wire* is that it is not permissible to look to CCRule 39 to give scope and meaning to the Act which created the Rule. I agree with Mr Ngcukaitobi that the scope and jurisdiction of the Tribunal is to be found in the Act. The court's decision in *Nel* does not support the perspective suggested on behalf of CCBA.

[53] In my view, the simple point made in *Sidumo* and *Agri Wire* is that, where the Legislature has created specialist structures like the Tribunal to resolve particular disputes effectively and speedily, it is best to use those structures and no more. It concerns a reference to the *institution* created by statute rather than the nature or substance of the review power conferred.

[54] I find that the Tribunal erred in concluding that section 27(1) confers anything other than ordinary review powers. Had the Legislature intended otherwise, it would have done so expressly.

What is the review standard to be applied to set aside the Notice of Apparent Breach?

[55] There is no contest that a decision of the Commission to issue a Notice of Breach constitutes administrative action. Part of CCBA's complaint was that the Commission issued the Notice of Breach in circumstances where it was provided with the full information that underlies CCBA and CCBSA's

[10] *Nel* para 23.

submission that the retrenchments were not merger specific, negating the factual considerations placed before it. I agree in part with Ms Engelbrecht that in order to understand the review standard to be applied, the text, context and purpose of Commission Rule 39(2)(b) must be interrogated.

[56] As already stated, the Tribunal first took the view that a review under CC Rule 39(2)(b) "*necessarily involves whether the decision to issue the notice is lawful, reasonable and procedurally fair*". Despite the cautioning, the Tribunal paid lip service to its own injunction.

[57] A ground for appeal by the Commission is that the Tribunal erred in positing a hybrid review that tests a decision for lawfulness, reasonableness and procedural fairness. It contends that "*rationality*" and "*reasonableness*" reviews are distinct tests and that rationality is not aimed at testing the reasonableness of a decision.

[58] Mr Ngcukaitobi contends that a proper inquiry by the Tribunal was whether the Commission rationally came to the conclusion to issue the Notice of Apparent Breach. As I understand it, a rationality test means all that is required of the Commission is that the decision to issue a notice of breach must be rationally connected to the information before it and the reasons advanced for issuing it. He relies on the decision in *Democratic Alliance v President of the Republic of South Africa and Others*[11]:

'...rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational

[11] (CCT 122/11) [2012] ZACC 24; 2013 (1) SA 248 (CC).

relationship, an executive decision of the kind with which we are here concerned is constitutional.'[12]

[59] On the other hand, Ms Engelbrecht contends that the majority in *Sidumo*, recognising a type of "*special statutory review of arbitrations*" conducted in the CCMA under the LRA on narrow grounds, which did not include specific mention of rationality or reasonableness, held that the review grounds are nevertheless "*suffused*" with the standard of reasonableness in section 33 of the Constitution. She contends that the same consideration applies here, because the decision to issue a Notice of Apparent Breach constitutes administrative action.

[60] The risk of conflating rationality and reasonableness and a court being bogged down in the semantics was evident during argument. As pointed by the Supreme Court of Appeal in *Edcon Ltd v Pillemer NO & Others*[13], a decision considered after *Sidumo,* the earlier test requiring a "*rational connection between the material properly before the arbitrator and the decision reached*" had been replaced with a test requiring an inquiry into whether the award is "*one that a reasonable decision maker could arrive at considering the material placed before him.*"[14] The Supreme Court of Appeal observed, however, that the standard of *"reasonableness"* confirmed by *Sidumo* is conceptually the same as the earlier *"rationality"* test, the only difference being semantic.[15] The reasonableness of the award now accordingly becomes the focus of the inquiry on review.

[61] Sight cannot be lost that unlike other functionaries who make administrative decisions, when issuing a Notice of Breach, the Commission acts as a specialist regulator utilising investigative and prosecutorial powers

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[12] *Democratic Alliance* para 32.
[13] (191/08) [2009] ZASCA 135; [2010] 1 BLLR 1 (SCA).
[14] *Edcon* para 15.
[15] *Edcon* para 16.

conferred by the Act. I find that the duties and the 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*. I consider this to be the appropriate standard for review in this case. [Emphasis added]

[62] There was no complaint about the lawfulness of the Notice of Breach or the procedure followed to issue same. I find that the Tribunal correctly articulated the review standard. However, it failed to apply it to the issues before it. A proper question to ask was whether the Commission acted *reasonably* in issuing the Notice of Breach.

Did the Commission act reasonably in issuing the Notice of Apparent Breach?

[63] This question is allied with the review standard dealt with above and the gateway lies in the relationship between CCRule 39(1) and CCRule 39(2). As will be apparent from the analysis of the Rule, it has bearing on the manner the Tribunal dealt with the evidence before it, and the allocation of the evidentiary burden between the Commission and CCBA.

[64] An issue that arose but did not develop fully during argument is the import of the jurisdictional fact in CCRule 39(1). I pause to mention that CCRule 39(1) is a standalone requirement. It is intended as a basis to trigger action by the Commission. It requires that before the Commission issues a Notice of Breach – there must "*appear*" to have been a breach of the merger conditions. In my view, an "*appearance*" of a breach is synonymous with an "*apparent or ostensible breach*". It conjures a threshold which is indicative of something less than conclusive proof of a breach. Ms Engelbrecht agreed that an appearance of a breach does not equate to proof of a breach. Accordingly, all that was required was for the Tribunal to satisfy itself that an apparent breach

existed, and that the Commission acted reasonably in issuing the Notice of Breach.

[65] This brings me to the import of CCRule 39(2)(b). A Tribunal can only set aside the Notice of Breach if it finds that merging parties have *substantially complied* with their obligations in the merger conditions. Three correlated facets of the Rule are evident from its plain reading, namely; (1) the party to whom the Rule is directed; (2) where the burden of proof lies; and (3) the applicable standard of proof.

[66] Ms Engelbrecht appeared to accept the distinction between CCRule 39(1) and 39(2)(b). Nevertheless, she argued that the Commission had the duty to put up facts to dislodge what was presented by CCBA. The Commission didn't discharge that duty. The argument is similar to the approach by the Tribunal. Its implication is that it was for the Commission to show evidence of a breach and by implication, provide evidence about CCBA's compliance or lack thereof.

[67] Such an approach is not congruent with CCRule 39(2)(b). On the contrary the rule makes clear that a burden is placed on the applicant seeking the review to show that "*it*" has substantially complied with the merger conditions. [My emphasis underlined]. The scheme of the two rules make it clear that it is not for the Commission to convince the Tribunal that there has been a breach, or compliance or a lack thereof. That duty falls on the merging party seeking a review.

[68] Interestingly, Ms Engelbrecht made a sound observation and accepted that imposing such a duty on the Commission would be more onerous albeit that she conflated the application of the two rules. Even if she is correct that the rule enjoins the Tribunal to enter upon the merits *de novo* and assess whether there

has been substantial compliance, other than a rebuttal of the facts presented by CCBA, there is nothing for the Commission to do once it has met the required threshold; namely, that there was an apparent breach of the merger conditions.

[69] There is good reason for Rule 39(2) - 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.[16] [Emphasis added] I find that the Tribunal failed to draw this material distinction. The error permeated its approach and evaluation of the facts before it. It apportioned an evidentiary burden not envisaged by the Rules on the Commission.

[70] Contrary to the point raised by CCBA that an appeal does not lie against the reasons for the decision, in this instance, the manner of the assessment of the evidence has a bearing on how the Tribunal applied the test to determine whether the retrenchments were merger specific and whether CCBA had substantially complied with the conditions. It has grave implications in the investigation and prosecution of future breaches of merger conditions.

Merger Specificity

[71] Characteristically, job losses in mergers occur after restructuring, duplications or the merging entity's desire to down size its operations. Intervention under the Act is only permissible if it is found that the retrenchments of the 368 employees were "*merger specific*" and not for "*operational reasons*", the latter being the domain of labour law. As already stated, the argument by CCBA is that the retrenchments were unrelated to the

[16] The view that it is for merging party or entity to justify its decision to retrench employees also finds support in the *Minister of Economic Development and Others v Competition Tribunal and Others; South African Commercial, Catering and Allied Workers Union v Walmart Stores Inc. and Another* (110/CAC/Jul11, 111/CAC/Jun11) [2012] ZACAC 2; [2012] 1 CPLR 6 (CAC) para 140.

merger. They were permissible and for "*operational reasons*" as contemplated in section 189 of the LRA. CCBA's case is that there is no merger specificity and no nexus to the merger.

[72] From inception, the merging parties specifically advised the Commission that given that the type of merger entailed a consolidation of head office functions, and that the operations and the functions of the merged entities would remain the same in all the geographical locations, there would be no retrenchments of the bargaining unit employees. It will be recalled that the consolidation of the head office function led to the agreement *not* to retrench more than 250 employees as provided in clause 9.2 of the merger conditions. [Emphasis added]

[73] In so far as the employees forming part of the bargaining unit, there is no dispute that the merger conditions in clause 9.2 prohibits the retrenchments of bargaining unit employees as a result of the merger. It was crafted to protect the employees. Ms Engelbrecht confirmed that CCBA was not reticent or concerned when it agreed to a condition that prohibited a retrenchment of employees in the bargaining unit. Although it had first cast some doubt in its papers before the Tribunal, CCBA now accepts that the merger condition operates in perpetuity and there was nothing to say that it comes to an end after three years. It is distinguishable from the obligation to retain a certain number of employees.

[74] The main controversy is whether the retrenchments were merger specific and the test to be employed to determine "*merger specific*" retrenchments. There is recognition that the nexus is often complicated and the distinction blurred. The relevant objective facts centre on two features which led to the Commission's conclusion that the retrenchments were merger specific, namely,

(1) the anticipated post-merger duplication of certain roles; and (2) CCBA's obligation to harmonise working conditions across the group.

[75] The Commission's complaint is that the retrenchments occurred in the Sales, Manufacturing and Logistics areas of the merged entity where it had identified potential duplications. It was not disputed that of the 368 retrenched employees, the majority (69%) were associated with CCF, 21% with ABI and 10% with CCSB (being Shanduka related) and formed part of the bargaining unit.

[76] During argument Ms Engelbrecht criticised the Commission for presenting "*a broad notion of duplication*" contending that the table relied on by the Commission failed to identify actual roles duplicated. Relying on the fact that the merged entities remained separate operationally, she countered that the reference to a "*duplication of roles*" made by CCBA in the various representations and engagements with the Commission was not due to "*overlapping activities*" brought about by the merger. Rather, they were as a result of cost-cutting measures implemented through what I understand to be a reduction of the number of hands required for the roles in the various operations unrelated to the merger.

[77] In contrast, Mr Ngcukaitobi points to a letter dated December 2019 from CCBA's attorneys which expressly stated that: "*CCBSA recognizes that certain of the job losses were occasioned by the removal of duplications*". He contends that the Tribunal disregarded the letter even though it was sufficient evidence of the complaint. Ms Engelbrecht contended that the reference to "*duplication*" was meant in the context of the cost reduction measures taken in response to the unforeseen economic events for "*operational reasons*".

[78] The second objective feature concerns the agreement to harmonise working conditions. The Tribunal viewed it as a "*change of tack*" by the Commission and disregarded it in its consideration. I observe that this complaint emerged following further engagements with CCBA after the Commission issued the Notice of Breach. The rationale for harmonisation was meant to improve wages earned by the lesser paid employees to the higher wages earned by their duplicates occupying a similar role. The Commission persists that the retrenchment of the higher earning employees for cost cutting purposes was merger related.

[79] The question was: "How could there be no nexus with the merger if workers earning a higher salary are retrenched and replaced in the very same positions at a lower salary?" Ms Engelbrecht admits that there was a harmonisation obligation but the obligation to do so had not been triggered by the time of the retrenchments. CCBA had a discretion when to implement it. The point made on CCBA's behalf is that all this was done to lower labour costs for operational reasons, a domain of labour law. She contended that CCBA could not be found to have breached a merger condition that had not yet come into operation. The difficulty with this argument is that the harmonisation obligation was time bound. It had to have been implemented by May 2020. Objectively, a delay, coupled with retrenchments before the implementation leans close to supporting a nexus with the incentives of the employer.

[80] Given the above facts, the Tribunal correctly recognised that if there was evidence of the merging parties seeking to remove duplicates, the retrenchments "*would be merger specific*". After the Tribunal correctly rejected "*causation*" also known as the "*but for*" test, it fashioned its own test by inquiring into "*the principal reasons/ principal motivation*" for the retrenchments.

[81] Mr Ngcukaitobi takes specific issue with the test applied by the Tribunal and questions its departure from the objective test developed in *BB Investment Company (Pty) Ltd,* endorsed by this Court in *Sibanye Gold.* He also takes issue with the Tribunal's approach to the facts before it and argues that the Tribunal ignored that CCBA readily admitted that some of the retrenched employees occupied duplicate positions in the merged entity. The point advanced is that had the Tribunal applied the correct test, it would have found there is sufficient evidence to establish *some nexus* between the retrenchments and the merger. CCBA repeated the *casual connection* approach before us. [Emphasis added]

[82] In *BB Investment* the Tribunal stated 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*"[17]. [My emphasis underlined]

[83] It is not difficult to see the prejudicial effects and why an adoption of either the "*casual connection*" or "*the principal reasons/principal motivation*" test advanced by CCBA and the Tribunal respectively could be prejudicial. If accepted, it would significantly erode the safeguards afforded to employees by section 12A (3) of the Act through merger conditions against merger specific retrenchments. The reality is that the Commission can never prove "*a lack of a cause or reason*" predominant or otherwise. I endorse the test in *BB Investment* as objective and sound because the focus is on demonstrable outcomes [effects] rather than the subjective attitude or intention of the merging parties.

[84] While the Tribunal in *BB Investment,* pointing to the dynamic nature of firms, affirmed that not every change that results post-merger is necessarily attributable to the merger, it indicated that:

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[17] *BB Investment* fn 5 para 56.

'*Most cases where we have imposed conditions relating to employment have involved firms with overlapping activities. Here the nexus is more easily established because the inference of merger specificity is highly probable, when merging firms are engaged in overlapping activities. Why would the firm continue to employ two people to do the same job, post-merger, when employing one would suffice?*'[18].

[85] The letter Mr Ngcukaitobi refers to has significance. In this instance, consistent with CCRule 39(2)(b), if indeed, as Ms Engelbrecht contends, the retrenchments were separate and unrelated to the business areas and duplicated roles identified by the Commission before the merger, CCBA bore the burden to place before the Tribunal facts to distinguish the retrenchments from the roles identified before the merger.

[86] Lastly, CCBA disputes that there is a *nexus associated with the incentives of the new controller* in this case. Ms Engelbrecht argues that merger specificity cannot be found where the incentives of the old controllers with those of the new controller were not examined and tested. The retrenchments were implemented 3 years after the merger. The question is not whether CCBA was making a profit, but about the long-term sustainability of the firm and of the operations.

[87] The compelling argument by Mr Ngcukaitobi is that where as in this case, a merger involves four entities, there will be a well-founded expectation of duplication, and in turn an incentive on the part of the merged entity to retrench. Based on *BB Investment*, the probability of a nexus will be accentuated and easily established because it is not likely that a firm would continue to employ more people for a job that requires one person.

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[18] *BB Investment* para 60.

[88] I have no qualms with the proposition that the further removed in time from the merger a retrenchment occurs, the less likely it is that the retrenchment is as a consequence of the merger. I am nevertheless unpersuaded because the argument does not account for the interest of the new majority controller, TCCC after the conclusion of the second transaction. Retrenchments were effected despite the extension of the merger conditions. The incentives of the new controlling shareholder are highly implicated in the circumstances.

[89] I am satisfied that:

a) there was an apparent breach of the merger conditions;
b) the Notice of Apparent Breach was correctly and reasonably issued by the Commission; and
c) the retrenchments were merger specific.

[90] Accordingly, I make the following order:

1. The appeal is upheld.
2. The finding that CCBA had complied with the merger conditions is set aside.
3. CCBA is ordered to pay the costs of the appeal.
4. The cost order includes the consequent employment of two counsel, and including those of Senior Counsel.

T SIWENDU

ACTING JUDGE OF APPEAL

I concur

pp. ____________________

M VICTOR

JUDGE OF APPEAL

I concur

pp. ____________________

V NKOSI

ACTING JUDGE OF APPEAL

APPEARANCES

For the Appellant:	Adv Ngcukaitobi SC
With him:	Adv S Quinn and Adv T Charlie
Instructed by:	Maenetja Attorneys
For the Respondent:	Adv Engelbrecht SC
Instructed by:	Bowmans
Heard on:	28 April 2022
Delivered on:	17 June 2022