COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CO166Jan22

In the matter between:

The Competition Commission	Applicant
and	
The South African Breweries (Pty) Ltd	First Respondent
Chairperson and Trustees of the SAB Zenzele Employee Share Trust	Second Respondent
Food and Allied Workers Union	Third Respondent
Coca-Cola Beverages South Africa (Pty) Ltd	Fourth Respondent
SAB National Employee Forum	Fifth Respondent
Deputy Chairperson of the National Executive Forum, an informal body representing the current employees of South African Breweries (Pty) Ltd and Beneficiaries of the SAB Zenzele Employee Share Trust	First Intervener
Phillip Mabunda	Second Intervener

Panel	:	AW Wessels
	:	M Mazwai
	:	L Mncube
Heard on	:	22 August 2023 and 29 November 2023
Order and Reasons Issued on	:	15 June 2026

REASONS FOR DECISION AND ORDER

Introduction

1. On 22 August 2023 and 29 November 2023 respectively, the Competition Tribunal ("Tribunal") heard an application to confirm a settlement agreement as a consent order. The settlement agreement was entered into between (i) the Competition Commission ("Commission"), the applicant; (ii) The South African Breweries (Pty) Ltd ("SAB"), the first respondent; and (iii) the Chairperson and Trustees of the SAB Zenzele Employee Share Trust ("the Zenzele Trust Functionaries"), the second respondent. The Commission, SAB and the Zenzele Trust Functionaries will be referred to as "the parties to the settlement agreement".

2. The first and second respondents, SAB and the Zenzele Trust Functionaries, both agreed to the terms of the settlement agreement.

3. The application was brought in terms of section 49D read with section 58(1)(b) of the Competition Act 89 of 1998, as amended ("the Act").

4. The matter relates to remaining / unallocated participation rights or so-called 'top-up' benefits (following this Tribunal's interim order issued on 30 March 2020[1]) of the SAB Zenzele Employee Share Scheme ("Zenzele Scheme"), an employee share ownership scheme established by SABMiller through the Zenzele Employee Share Trust ("the Trust") during or around 2010 as part of its strategy to realise direct ownership by its employees. The Zenzele Scheme would mature on 31 March 2020. Under the scheme, SABMiller allocated shares and corresponding participation rights to qualifying employees. These shares were held by the Trust, for the benefit of the qualifying employees.[2]

5. Of direct relevance to this application is the non-compliance by the merger parties with a public interest-related condition imposed by the Tribunal on 27 September 2017 in a large merger transaction.[3] In that transaction The Coca-Cola Company ("TCCC") acquired SABMiller's[4] shareholding in Coca-Cola Beverages Africa (Pty) Ltd ("CCBA") and its subsidiaries, including Coca-Cola Beverages South Africa

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[1] Tribunal Order in *Coca-Cola Beverages South Africa (Pty) Ltd v Anhauser-Bush Inbev SA/NV and Others* (URG164Mar20) [2020] ZACT 91, Consolidated Hearing Bundle, p 215-217.
[2] Settlement Agreement, Consolidated Hearing Bundle, p 6 at para 3.1.
[3] Tribunal case no: LM021Apr17, Consolidated Hearing Bundle, p 23 - 30.
[4] "SABMiller" was defined in that transaction as "*ABI SAB Group Holding Limited, formerly SABMiller plc (now owned by AB InBev)*".

(Pty) Ltd ("CCBSA") (hereinafter "the Merger"). The Tribunal approved the merger subject to conditions, and specifically, relevant to this matter, a condition that:

"[4.6] Former SABMiller employees shall not lose any benefit of the Zenzele Scheme[5] by virtue of the Proposed Transaction. In respect of participants that do not yet have fully vested rights, the same vesting profile will apply as if CCBA was still part of the SABMiller group" (the "Tribunal's Merger Condition").

6. The settlement agreement that has been referred to the Tribunal for confirmation has as its purpose to address apparent non-compliance by the merger parties with the conditions imposed in the Merger.

7. We note that SAB is the party liable to give effect to the abovementioned clause 4.6. The Zenzele Trust Functionaries and SAB are responsible for ensuring that the payment of benefits is made in accordance with the imposed condition.

8. It is important to note, as is common cause, that this matter is not a review or application for variation of the Tribunal's order granting conditional approval to the Merger and imposing the Tribunal's Meger Condition.[6]

9. We further note that in terms of clause 6.1.5 of the settlement agreement, SAB had to "*ensure timeous service of this Settlement Agreement upon all the Respondents, which include all potentially affected parties, in order to afford such parties the opportunity to participate in any hearing before the Tribunal confirming this Settlement Agreement as an order and to make submissions to the Tribunal*."

10. The third respondent, the Food and Allied Workers Union ("FAWU"), representing employees in SAB and CCBSA[7], did not participate in the proceedings relating to the settlement agreement.

11. The fourth respondent, CCBSA, supported confirmation of the settlement agreement. It argued that its confirmation is in the interests of its employees who are entitled to benefits as a consequence of the conditions imposed by the Tribunal in the Merger.

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[5] The "*Zenzele scheme*" was defined as the B-BBEE scheme established by SABMiller in South Africa in 2010.

[6] Commission's Reply to Opposing Affidavit of the First and Second Interveners, Consolidated Hearing Bundle, p 187 para 33.

[7] The fourth respondent.

12. The fifth respondent, SAB National Employee Forum ("SAB NEF"), did not oppose the application.

13. Thus, the application was supported by SAB, the Zenzele Trust Functionaries and CCBSA and was not opposed by either FAWU or SAB NEF.[89]

14. Two interveners opposed the application, namely (i) the Deputy Chairperson of the National Executive Forum[9] ("the DCNEF"), the first intervener; and (ii) Mr Phillip Mabunda ("Mr Mabunda"), the second intervener (collectively referred to as "the interveners"). Mr Mabunda is an SAB employee (and as such a beneficiary of the Zenzele Trust) and also the Deputy Chairperson of the National Executive Forum. Mr Mabunda and the Deputy Chairperson of the National Executive Forum thus are one and the same person.

15. Having read the papers and heard the parties, we set out our reasons for decision and order below.

Procedural matters

16. On 30 March 2022, the Tribunal issued an order granting the interveners standing to participate in these proceedings, pursuant to an agreement between the Commission, CCBSA and the interveners.[10] We note that SAB elected to file a Notice to Abide. Thereafter, on 2 June 2022, the interveners filed an affidavit deposed to by Mr Mabunda in which he set out his and the National Executive Forum's grounds of opposition to confirmation of the settlement agreement.

17. We note that the DCNEF is an informal body which purports to represent the current employees of SAB and beneficiaries of the Zenzele Trust. It must however be distinguished from SAB NEF. Mr Mabunda (who is the Deputy Chairperson of the National Executive Forum) does not represent SAB NEF or its majority members.[11] Had that been the case, there would have been no need for him to

[8] Commission's Reply to Opposing Affidavit of the First and Second Interveners, Consolidated Hearing Bundle, p 186 para 29.
[9] An informal body which purports to represent the current employees of SAB and beneficiaries of the Zenzele Trust.
[10] Order: Intervention Application, Consolidated Hearing Bundle, p 62-64.
[11] Commission's Reply to Opposing Affidavit of the First and Second Interveners, Consolidated Hearing Bundle, Record: p 189 para 39.

apply for leave to intervene, since SAB NEF is cited as the fourth respondent in this matter.[12]

18. The Commission contended that it is not evident from the papers that the interveners have been authorised by SAB NEF or FAWU's SAB employees to oppose the application, nor that the interveners represent the majority of the Zenzele Trust's thousands of beneficiaries. The Commission however submitted that it agreed to the intervention to enable interested parties (and the interveners) an opportunity to address the Tribunal on the proposed plan to rectify the breach of the Tribunal's Merger Condition.

19. The matter was set down for hearing on 12 August 2022. On that day the Tribunal heard arguments relating to the appropriate procedure regarding the settlement agreement. This was after the Tribunal requested the parties to the settlement agreement and the interveners to make submissions on whether the Tribunal has the power in terms of the Act to confirm, as a consent order under section 49D, read with section 58(1)(b) (as per the application), a remedial plan that was accepted by the Commission under Rule 39 of the Rules for the Conduct of Proceedings in the Commission ("Commission Rules") to remedy an apparent breach of the Tribunal's Merger Condition (as has been incorporated into the settlement agreement).

20. Following such submissions, the Tribunal indicated that it would not be able to complete the hearing on the merits on that day and that it would have to be postponed to a later date to be agreed.

21. The interveners then raised the view that Ms Mazwai ought to recuse herself from the matter in light of the fact that she had sat on a panel that granted interim relief in relation to the alleged breach of the Tribunal's Merger Condition. The interveners thereafter, on 1 September 2022, formally lodged an application for Ms Mazwai's recusal which the Tribunal heard on 19 April 2023.

22. On 26 June 2023, the Tribunal dismissed the recusal application. The interveners neither appealed nor sought to review this decision, despite having at some stage indicated that they would.[13]

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[12] Ibid at para 40.1.
[13] Email from MT Raselo Inc., attorneys for the interveners, dated 18 August 2023.

23. On 11 October 2023, the Tribunal issued a notice of set down for the continuation of the hearing on 29 November 2023.

Background

24. To contextualise the issues, we provide further details regarding the Merger (see paragraph 5 above) and the Tribunal's Merger Condition (see paragraph 5 above), as well as the complaint that the Commission received regarding non-compliance with the Tribunal's Merger Condition and how that relates to SAB's Zenzele Scheme.

The Merger and Tribunal's Merger Condition

25. During the course of the Commission's investigation of that Merger in 2017, FAWU had raised a concern about the Merger's effect on the rights of CCBA employees insofar as they arose from the Zenzele Scheme since those employees would, after the Merger, no longer be employees in the SAB/AB InBev group (and stood to lose benefits they had in the Zenzele Scheme under SAB/AB InBev, pre-merger). The Merger would result in approximately 4 800 employees, who were beneficiaries of the Zenzele Scheme, to be "transferred" out of the SAB/AB InBev group to TCCC (collectively referred to as the "Former SAB Employees").

26. To protect the Former SAB Employees' continued participation as beneficiaries of the Zenzele Scheme, the Tribunal in 2017 approved the Merger subject to the Tribunal's Merger Condition, namely "*Former SABMiller employees shall not lose any benefit of the Zenzele Scheme*[14] *by virtue of the Proposed Transaction. In respect of participants that do not yet have fully vested rights, the same vesting profile will apply as if CCBA was still part of the SABMiller group"*.

27. In 2020, CCBSA raised a complaint with the Commission regarding the merger parties' alleged non-compliance with the Tribunal's Meger Condition on behalf of its employees formerly in the employ of SAB. We deal with this further below.

[14] The "*Zenzele scheme*" was defined as *"the B-BBEE scheme established by SABMiller in South Africa in 2010*".

The Zenzele Scheme and 'top-up' benefits

28. As indicated above, during or around 2010, SABMiller established the Zenzele Scheme. SAB is appointed as administrator to administer the Zenzele Trust as per clause 21(1) of the Trust Deed, "*the Trustees have appointed SAB as the Administrator to administer the Trust*"[15].

29. The Trust is tasked with giving effect to the imposed conditions in the Merger under direction of SAB. Regarding the allocation of participation rights, in terms of the Trust Deed, the Allocation Committee is the committee established "*by SAB for the purpose of allocating Participation Rights to Beneficiaries in terms of Clause 11*"[16].

30. In late 2019, the Chairperson of the Zenzele Scheme's allocation committee (as established by SAB) issued a notice to certain Zenzele Scheme "participants", informing them that the Zenzele Scheme was reaching maturity in April 2020 and of the availability of remaining / unallocated participation rights, which would be equally distributed among them as a 'top-up' to their existing benefits (hereinafter "the top-up benefits").[17]

31. We note that the abovementioned final allocation does not constitute a new set of SAB share participation units but is comprised of a pool of forfeited and unallocated share participation units that accumulated from the inception of the Zenzele Scheme.

32. Notably, the Former SAB Employees, whose employment had transferred as a result of the Merger and who remained beneficiaries of the Zenzele Scheme, did not receive such notice, thus excluding them from receiving the top-up benefits. This led to the complaint by CCBSA (described below) and ultimately the current application before us.

33. We note that there is no distinction made in the Tribunal's Merger Condition between existing rights (at the time of the Merger) and future rights. This was confirmed by the Tribunal in its interim relief decision to hold in abeyance and not

[15] Trust Deed, Consolidated Hearing Bundle, p 143 at para 21.1.
[16] Ibid, p 117 at para 1.19.
[17] Consolidated Hearing Bundle p 160.

distribute a stated amount of the 2019 top-up benefits.[18] The relevant clause in the Merger conditions contemplates that the same vesting profile will apply to the Former SAB Employees (as indicated above, affecting approximately 4 800 employees) and creates a legitimate expectation that the Former SAB Employees will receive the same benefits as the current SAB employees.

Complaint to the Commission by CCBSA

34. On 17 January 2020, CCBSA lodged a complaint with the Commission challenging the exclusion of the Former SAB Employees from the top-up benefits and asserting that the exclusion constituted a breach of the Tribunal's Merger Condition.[19]

35. Pending the Commission's investigation of the complaint, CCBSA applied to the Tribunal for an urgent interdict to prevent the Zenzele Scheme from distributing the top-up benefits, seeking to have them preserved in trust until the Commission's investigation was concluded.

36. The Tribunal heard the application and on 30 March 2020 granted an order in favour of CCBSA preserving the funds to be paid to employees.[20] The funds remain in trust pending the determination of this application.[21]

Commission's Notice of Apparent Breach

37. On 17 April 2020, the Commission found SABMiller in breach of the conditions in the Merger and issued a Notice of Apparent Breach under Commission Rule 39(1).[22]

38. The Commission found that the wording of the Tribunal's Merger Condition did not support an interpretation that the obligations under clause 4.6 were limited to preserving only benefits or entitlements that were already due to the Former SAB Employees at the date of the approval of the Merger. Further, that the exclusion of

[18] See Tribunal's Reasons in in *Coca-Cola Beverages South Africa (Pty) Ltd v Anhauser-Bush Inbev SA/NV and Others* (URG164Mar20) [2020] ZACT 91, Consolidated Hearing Bundle, p 218-226 at paras 21 to 23.
[19] Consolidated Hearing Bundle, p 17.
[20] Tribunal Order and Reasons for Decision in *Coca-Cola Beverages South Africa (Pty) Ltd v Anhauser-Bush Inbev SA/NV and Others* (URG164Mar20) [2020] ZACT 91, Bundle A, p 166-177.
[21] Clause 6.1.3 of the settlement agreement specifically records that payment will only be made within 30 days of this Tribunal's confirmation of the settlement agreement as an order.
[22] Commission's Notice of Apparent Breach, Consolidated Hearing Bundle, p 43.

the Former SAB Employees from the 2019 allocation was inconsistent with clause 4.6 of the approval to the Merger, which requires that Former SAB Employees not lose any benefits as a result of the Merger. It concluded therefore that SAB should have paid the impacted CCBSA employees the funds due to them from the Zenzele Trust but failed to do so.[23]

39. SAB noted the Commission's findings and indicated its willingness to resolve the matter so as to avoid a dispute, and in a manner which recognises the interests of persons or groups which may be affected. SAB also undertook various consultations with FAWU.

40. Importantly, SAB did not seek to have the Tribunal review the Commission's Notice of Apparent Breach in terms of Commission Rule 39(2)(b). It stands.

41. The Commission accepted SABMiller's proposed plan to remedy the apparent breach of the Tribunal's Merger Condition concerning the failure to include the Former SAB Employees in the allocation of the top-up benefits.

42. On 13 January 2022, the remedial plan was incorporated into a settlement agreement to make provision for and facilitate payment of the top-up benefits to all qualifying Zenzele Scheme beneficiaries, including to the Former SAB Employees.[24] The Commission concluded that the terms of this settlement agreement adequately address the apparent breach of the Tribunal's Merger Condition.

Legal framework

Section 27(1)(d)

43. Section 27 of the Act deals with the functions of the Tribunal. In terms of section 27(1)(d) of the Act, the Tribunal may "*make <u>any</u> ruling <u>or order necessary or incidental</u> to the performance of its functions in terms of this Act*" (emphasis added).

[23] Consolidated Hearing Bundle p 41 para 7.
[24] Competition Commission's Heads of Argument, p 9, at para 25.

Tribunal's jurisdiction over 'large' mergers

44. It is trite that the Tribunal has jurisdiction over 'large' mergers in terms of section 16 of the Act. It is also common cause that the Merger was conditionally approved by the Tribunal in terms of section 16(2) of the Act which provides that upon receiving a referral of a large merger and recommendation from the Commission in terms of section 14A(1) …, the Tribunal must consider the merger in terms of section 12A and the recommendation …, and within the prescribed time approve the merger; <u>approve the merger subject to any conditions</u>; or prohibit implementation of the merger.

45. As indicated above, the matter before us concerns the apparent breach of the Tribunal's Merger Condition imposed by the Tribunal when conditionally approving the Merger in 2017.

46. In terms of section 16(3) of the Act, upon application by the Commission, the "*Tribunal may revoke its own decision to approve or conditionally approve a merger <u>or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger</u>, …*" (emphasis added).

47. Following the Commission's investigation of apparent breach, it concluded the settlement agreement that is before us. As indicated, we requested the parties to make submissions regarding the appropriate procedure for the matter before us.

Rules relating to a breach of merger conditions

48. Rule 39 of the Commission's Rules deals with the breach of merger conditions or obligations and empowers the Commission to issue a Notice of Apparent Breach if a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger. It is common cause that the Commission in this case in 2020 issued a Notice of Apparent Breach relating to the Merger.

49. Commission Rule 39 further provides, following the issuing of a Notice of Apparent Breach, that a firm against whom the notice is issued may submit to the Commission a plan to remedy the breach, or the firm must bring an application requesting the Tribunal to review the Commission's Notice of Apparent Breach. It is common cause that in this matter the merger parties did not bring an application

to review the Commission's Notice of Apparent Breach. Indeed, the settlement agreement was crafted and agreed to in order to remedy the breach the Commission had found.

50. In terms of Commission Rule 39(4) if the Commission accepts a firm's proposed plan, it must monitor the firm's compliance with the plan. It is common cause that the Commission in this case accepted the proposed remedial plan and that the "*plan"* that was agreed upon is encompassed in the settlement agreement. As indicated above, the Commission, SAB and the Zenzele Trust Functionaries agreed to the remedial plan recorded in the settlement agreement as the means of resolving the apparent breach the Commission had found.

51. On a plain reading of Commission Rule 39, there is no need for a firm's proposed plan to be confirmed by the Tribunal. It may simply be resolved between the Commission and the party to whom the Notice of Apparent Breach has been issued. Be that as it may, in the present case, the parties to the settlement agreement have referred the agreement reached to the Tribunal for confirmation[25].

Sections 49D and 58(1)(b)

52. Section 49D of the Act provides that the Tribunal, without hearing any evidence, may confirm a consent agreement as a consent order in terms of section 58(1)(b):

> *"(1) If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E[26], agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b)."*

53. Section 58(1)(b) of the Act deals with orders of the Tribunal and states that in addition to its other powers in terms of the Act, the Tribunal may confirm a consent agreement in terms of section 49D as an order of the Tribunal.

[25] Submissions of behalf of the Fourth Respondent, Consolidated Hearing Bundle, p 237 at para 13.
[26] This section deals with the outcome of a market inquiry.

54. It is trite that agreements concluded under section 49D are unenforceable until confirmed by the Tribunal.

55. On the plain wording of section 49D, it applies in the context of complaints against prohibited practices and market inquiries. This is underscored by the fact that section 49D operates in respect of an agreement struck between the Commission and a "*respondent*", defined in section 1 of the Act as a "*firm against whom a complaint of a prohibited practice has been initiated in terms of this Act"*.

56. In *GlaxoSmithKline,*[27] the Competition Appeal Court ("CAC") held that two jurisdictional requirements must be satisfied for the Tribunal to confirm an agreement as a consent order under section 49D, namely: (i) the Commission and the respondent must have agreed the terms of an appropriate order; and (ii) the agreement must have been reached during, on or after completion of the Commission's investigation of a complaint.

57. The Tribunal generally has a discretion in respect of the confirmation of consent orders.

58. In *Netcare*[28] the CAC confirmed that when considering a consent agreement, the Tribunal exercises a discretion.[29] It explained that the process provided for in section 49D is intended to bring about the expeditious conclusion of cases, avoid protracted hearings and conserve resources.[30] In exercising its discretion whether to approve a consent order the Tribunal must be satisfied that the objectives of the Act, together with the public interest, are served by the agreement.[31] Furthermore that the true inquiry before the Tribunal is whether the agreement is a rational one, meets the objectives of the Act and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute.[32]

59. The Tribunal has previously used its discretion to employ consent order procedures in relation to mergers. However, we acknowledge the distinctions between those matters and the present case.

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[27] *GlaxoSmithKline South Africa (Pty) Ltd v Lewis N.O. and Others* (62/CAC/APR06) [2006] ZACAC 6; [2007] 1 CPLR 18 (CAC) (6 December 2006) ("*GlaxoSmithKline").*
[28] *Netcare Hospital Group (Proprietary) Limited and Another v Manoim NO and Others* (CAC 75/CAC/Apr08) [2008] ZACAC 1 (27 October 2008) ("*Netcare*").
[29] *Netcare*, para 26.
[30] *Netcare*, para 25.
[31] *Netcare*, para 29.
[32] *Netcare*, para 29.

60. The Commission referred us to the Tribunal's decision in *RTT Group*[33], where the Tribunal confirmed an application to confirm a settlement agreement brought in terms of sections 58(1)(a)(iii)[34] and 59(1)(d)(iii) of the Act. The matter concerned the payment of an administrative penalty by the merger parties following their failure to comply with (monitoring) conditions imposed by the Tribunal in relation to the transaction.[35] Similarly, consent order cases involving section 13A(3) contraventions (prior implementation of a merger) have received Tribunal confirmation. Those matters also involved the imposition of administrative penalties, a function which the Commission is not empowered to perform independently.[36]

61. The present matter is distinguishable. Here, the Commission's Rules empower it to monitor compliance with a remedial plan accepted by it, without requiring confirmation from the Tribunal. Conversely, the Commission cannot enforce the payment of an administrative penalty without a Tribunal order.

62. While the Tribunal has a discretion in respect of the confirmation of consent agreements, the exercise of that discretion remains subject to the Act and the Tribunal's own Rules.

Arguments on Tribunal's powers

63. As indicated above, the Tribunal requested the parties to the settlement agreement and the interveners to make submissions on whether the Tribunal has the power in terms of the Act to confirm this settlement agreement that relates to a merger – i.e., giving effect to a remedial plan in the Merger as accepted by the Commission under Rule 39.

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[33] *Competition Commission of South Africa v RTT Group (Pty) Ltd* (LM105Aug15/OTH22Jan16) [2018] ZACT 97 (29 June 2018) ("*RTT Group*").
[34] Deals with the powers of the Tribunal to impose an administrative penalty in terms of section 59.
[35] On 23 September 2015, the Tribunal issued an order and merger clearance certificate approving the merger between RTT Group (Pty) Ltd, Warehouseit (Pty) Ltd and Courierit SA (Pty) Ltd subject to conditions.
[36] See *Competition Commission of South Africa v QCP1 Investments (Pty) Ltd and Cape Trans Property Investments (Pty) Ltd* (CO077Aug22; 2022Feb0046) [2022] ZACT 29; [2022] 2 CPLR 29 (CT) (22 August 2022) ("*QCP1 Investments*"); *Competition Commission of South Africa v Nedbank Ltd and ERF 7 Sandown (Pty) Ltd (*CO076Aug22), decision of 17 August 2022 ("*Nedbank*"); *Competition Commission v Kagiso Media Investments (Pty) Ltd* (CO008Apr21) [2021] ZACT 92 (5 May 2021) ("*Kagiso Media*"); and *Competition Commission v Retail Capital (Pty) Ltd and Another* (CO078Jul20) [2020] ZACT 64 (5 August 2020) ("*Retail Capital*").

64. The Commission and CCBSA argued, albeit on different grounds, that the Tribunal has the power in terms of the Act to confirm the settlement agreement.

65. The Commission contended that section 49D, read with section 58(1)(b) of the Act, should be interpreted broadly to allow the Tribunal to confirm the settlement agreement as a consent order under these sections. Alternatively, the Commission contended that the Tribunal could exercise its discretion and confirm the settlement agreement under its broad powers in terms of section 27(d) of the Act.

66. CCBSA argued that section 16(3) of the Act deals with merger proceedings in the Tribunal and empowers the Tribunal, on application by the Commission, to make any appropriate decision regarding any condition relating to a merger. It submitted that this application serves as the Commission's request for the Tribunal to exercise its jurisdiction over a merger condition (that the Tribunal imposed), as such the Tribunal can exercise its discretion under section 27 to confirm the settlement agreement.

67. SABMiller elected to abide by the decision of the Tribunal.

68. The interveners disputed that the Tribunal has the power to confirm the settlement agreement and sought that it be remitted to the Commission to exercise its functions under Rule 39.[37]

69. In our view, the interveners' contention that this matter ought to be remitted to the Commission to exercise its functions under Rule 39 would be circular and achieve nothing. The Commission's view is clear (and seeks to enforce a condition imposed by the Tribunal – to which SAB agrees): the Former SAB Employees must be included in the payment of the top-up benefits. Remitting the matter to the Commission would likely result in the Commission monitoring compliance with the remedial plan (in terms of Commission Rule 39(4)), which already provides for the inclusion of the Former SAB Employees.

70. The interveners, relying on *GlaxoSmithKline*,[38] further argued that the Tribunal does not have jurisdiction to confirm the settlement agreement under section 49D

[37] Transcript (12 August 2023) p 47, lines 1-8.
[38] *GlaxoSmithKline* at footnote 27 above.

of the Act, as this application was brought outside the 12-month period contemplated in section 49B(1) read with section 50(1) of the Act.

71. The interveners' reliance on the facts in *GlaxoSmithKline* is misplaced. That case concerned whether the Tribunal lacked jurisdiction to confirm an agreement in terms of section 49D after expiry of the 12-month period in section 50(2). The present matter does not concern the initiation of a complaint or the referral by the Commission of a complaint or the issuing of a notice of non-referral by the Commission to the complainant. Accordingly, *GlaxoSmithKline* does not assist the interveners.

72. The interveners also argued that section 16(3) of the Act is not applicable to this case as it pertains to the Tribunal's right to revoke a decision to approve a merger. However, as already indicated above, section 16(3) deals not only with the revocation of a merger but also states that upon application by the Commission, the Tribunal "*may … in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger …*".

73. The interveners' argument is based on an incorrect reading of the relevant provision as section 16(3) empowers to Tribunal, in addition to the power to revoke a merger's approval, to make any appropriate decision relating a merger condition, upon application by the Commission.

74. The interveners went on to argue that the Tribunal may only exercise the discretion conferred under section 27(d) of the Act to make a ruling that is necessary and incidental to its functions, and that the confirmation of a remedial plan (guised as a settlement agreement) is neither necessary nor incidental to the Tribunal's functions.

Context and assessment

75. As indicated above, the first question before us was our powers in the context of the circumstances of this case. The application was brought in terms of section 49D of the Act, read with section 58(1)(b), and on a plain reading of section 49D it does not relate to merger issues. Furthermore, a remedial plan accepted by the Commission in terms of Rule 39 does not require approval from the Tribunal in

terms of the Rule. We therefore asked the parties to address us on this issue, which they did.

76. We have indicated that, on a plain reading, section 49D operates in the context of complaints regarding prohibited practices. The defined term ‘respondent’ in the Act refers to a firm against whom a complaint of a prohibited practice has been initiated. The present matter is a merger-related matter and not a prohibited practices complaint matter. The question thus becomes whether other provisions of the Act and when a context-sensitive approach is adopted, supply the necessary basis for the Tribunal to make an appropriate order.

77. We next set out the relevant context.

78. First, we emphasise that while the interveners opposed the inclusion of the Former SAB Employees in the top-up benefits, they have not raised any grounds of opposition vitiating (i) the Tribunal’s order conditionally approving the Merger; (ii) the Tribunal’s Merger Condition; or (iii) the Commission’s Notice of Apparent Breach and/or finding that the exclusion of the Former SAB Employees from the top-up benefits constitutes a breach of the Tribunal’s Merger Condition.

79. Second, any breach by the merger parties of the Tribunal’s Merger Condition constitutes a contravention of the Act. It would be highly concerning if merger parties made commitments to secure approval of a proposed merger, only to argue later that the undertakings made have to be interpreted in a more limited fashion. In this case the Tribunal approved the Merger subject to the Tribunal’s Merger Condition in a ‘large’ merger over which the Tribunal clearly has jurisdiction in terms of section 16 of the Act. It found that it was necessary and appropriate to impose the Tribunal’s Merger Condition in the public interest.

80. Third, in essence, the contents of the settlement agreement and its objective relate to the public interest, i.e., the effects of the Merger on employees, specifically the Former SAB Employees. This aligns with the purpose of the Act to promote and maintain competition in the Republic in order “*to promote employment and advance the social and economic welfare of South Africans*”. The remedy in the Merger (i.e., the Tribunal’s Merger Condition) was imposed in the public interest to protect a large number of beneficiaries of the Zenzele Scheme from the harm that would arise if they ceased to benefit fully from the Zenzele Scheme as a consequence of

the Merger. Thus, the settlement agreement concerns the Tribunal's Merger Condition and ensuring that the Former SAB Employees would not lose any benefits under the Zenzele Scheme as a result of the Merger.

81. We note that, in the circumstances, there is a rational connection between the Allocation Committee's initial failure to allocate the top-up benefits to the affected employees (and the complaint to and investigation of the Commission), and the proposed remedy (agreed between the parties to the settlement agreement) of recalculation and due payment (as provided for in the terms of the settlement agreement).

82. Fourth, the settlement agreement follows upon an investigation conducted by the Commission of a complaint regarding an alleged breach of the Tribunal's Merger Condition and it issuing a Notice of Apparent Breach in terms of its Rule 39. It has complied with this Rule: it issued a Notice of Apparent Breach, received submissions, found an apparent breach, and accepted a remedial plan.

83. Importantly, the Commission indeed found an apparent breach of the Tribunal's Merger Condition. The factual background makes it quite clear that the Commission came to the conclusion that there had been a breach of the Tribunal's Meger Condition acting entirely within its authority to do so, and after (i) considering the context of the initial Merger notification and investigation; and (ii) the basis on which the Tribunal's Merger Condition was proposed to the Tribunal at the time of the Merger and imposed by the Tribunal as a condition to the Merger's approval.

84. As already indicated, Commission Rule 39, standing alone, does not require Tribunal confirmation of a remedial plan. However, the absence of such a requirement does not, without more, preclude the Tribunal from considering a remedial plan and make an appropriate order where the circumstances warrant it. This must be determined on the facts and merits of each case.

85. Fifth, the Commission and SAB came to an agreement about the apparent breach. In accordance with Commission Rule 39(2)(b) it was open to SAB to review the Commission's Notice of Apparent Breach on the grounds that it had substantially complied with its obligations with respect to the conditions imposed on the Merger. However, the Commission's notice was never reviewed. It stands. SAB has agreed to remedy the apparent breach by ensuring that deemed employees receive their

full allocation of the top-up benefits (as provided for in the terms of the settlement agreement).

86. Sixth, an order by the Tribunal would give certainty to all parties concerned and would give effect to the expressly preserved rights of the affected employees.

Functions of the Tribunal and Tribunal orders

87. Section 27(1)(d) confers a broad power upon the Tribunal to "*make <u>any</u> ruling or <u>order necessary or incidental</u> to the performance of <u>its functions</u> in terms of this [the Competition] Act*" (emphasis added). We have already dealt above with the Tribunal's functions and jurisdiction over large mergers under section 16 of the Act. As indicated above, the Tribunal has jurisdiction over 'large' mergers (section 16(2)) and merger conditions (section 16(3)). Section 16(3) of the Act authorises the Tribunal, on application by the Commission, to make '*any appropriate decision regarding any condition*'.

88. The Tribunal's functions therefore clearly include its adjudication of large mergers and any merger conditions that it has imposed. Given the Tribunal's authority to approve, conditionally approve or prohibit large mergers under section 16, it is incidental to the Tribunal's functions to make an order that gives legal effect to a Commission-approved remedial plan addressing a breach of a condition the Tribunal itself imposed. Thus, in our view the resolution of the apparent breach of the Tribunal's Merger Condition is incidental to the performance of the Tribunal's functions in terms of section 27(d) of the Act in the exercise of its jurisdiction under sections 16(2) and 16(3) of the Act.

89. The Tribunal fulfils an inquisitorial function in the public interest.[39] In this matter the Tribunal exercised its inquisitorial powers by seeking submissions from the parties on the sections of the Act that are relevant.

90. We note that the CAC has held (albeit in the context of an interim relief application) that the Tribunal is not confined to granting the exact relief sought in a notice of motion. Rather, the Tribunal may grant alternative relief where (i) a case is made

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[39] *Competition Commission of South Africa v Senwes Ltd* (CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (12 April 2012) at paras 48 to 50.

out for such relief in the papers; (ii) the respondent is appraised of the alternative relief contemplated; and (iii) the respondent is granted a full hearing in respect of that relief.[40]

91. In our view an appropriate order in this case is one authorising payment of the top-up benefits to qualifying Former SABMiller Employees. Such an order satisfies the above requirements in that: First, the objective of condition 4.6 was to ensure that the Former SABMiller Employees do not lose their benefits as a result of the Merger. Second, the case advanced in the Commission's and CCBSA's papers is for payment of the top-up benefits to the Former SABMiller Employees; the settlement agreement was concluded to facilitate that payment. Although the notice of motion sought confirmation of the settlement agreement, implicit in that relief is the implementation of the payment it contemplates. Third, the interveners opposed the application on the merits, contending that the Former SABMiller Employees be excluded from the top-up benefits. The interveners were therefore not only appraised of the alternative relief but actively opposed it. Finally, the interveners were afforded an opportunity, through both written and oral submissions, to address the issues and the Tribunal's powers to give effect to the Tribunal's Merger Condition through the provisions of the Act.

92. We consider it appropriate in the circumstances of this case to not confirm the settlement agreement for the reasons mentioned, but to issue an order on terms similar to those in the settlement agreement insofar as they give effect to the Tribunal's order in 2017 and the agreed remedy to the apparent breach.

Intervenors' objections to the Commission's Apparent Breach under Rule 39

93. The interveners contended that their exclusion from the Commission's Rule 39 investigation constituted a denial of just administrative action under section 33 of the Constitution. We have no reason to regard the Commission's Rule 39 process as constitutionally deficient. The Commission's investigation was directed at the merger parties, specifically at SAB, the party upon whom the Tribunal's Merger Condition obligation rests. Commission Rule 39 provides a specific mechanism for the firm in apparent breach to submit a remedial plan or to seek review.

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[40] *Glaxo Wellcome (Pty) Ltd v Terblanche, Diane N.O* (03/CAC/OCT00) (Glaxo) pp 19 -21. See also *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002).

94. The interveners are not the subjects of that process. The section 33 right to procedurally fair administrative action attaches to administrative action that adversely affects a person's rights or legitimate expectations. At the time of the Commission's investigation, the interveners' entitlement to the disputed allocation was itself in dispute and had been preserved by the Tribunal's interim order of 30 March 2020. They were not parties whose settled rights were being removed by the Commission's process - they were parties whose claimed rights were being evaluated. Furthermore, the interveners were afforded the opportunity to participate in the Tribunal proceedings and exercised that opportunity fully. The proceedings before this Tribunal, in which the interveners were heard, satisfy the requirements of section 33 in the circumstances of this case.

95. The interveners also contended that the Allocation Committee's December 2019 resolution vested property rights in the SAB employees, and that the settlement agreement's recalculation purports to diminish those vested rights in breach of section 25 of the Constitution. We address this directly. Even if the December 2019 allocation constituted a vesting of rights - which is itself a contested question - those rights were, at the time of their purported vesting, subject to a prior legal obligation (i.e., a condition to the approval of the Merger) that had not been honoured. The Tribunal's Merger Condition, a valid and enforceable order of this Tribunal, required that the Former SAB Employees be included in the 2019 allocation. That obligation predated and overrode the Allocation Committee's resolution. A right that vests in breach of a prior legal obligation cannot be regarded as a fully vested property right for constitutional purposes: a person cannot acquire a constitutionally protected entitlement to the proceeds of a breach.

96. In our view the SAB employees that DCNEF purports to represent are not being deprived of any legitimate benefit and are not being required to give up benefits that were due to them – the outcome is one that was always intended at the time of the Merger's conditional approval.

97. Importantly, the referral of the matter to the Tribunal allows for an administratively just procedure to conclude the Commission's investigation concerning the apparent breach of the Tribunal's Merger Condition and to give certainty to all parties. It serves the purpose as envisaged by section 34 of the Constitution,

namely the resolution of a dispute "*by the application of law in a fair public hearing before ... [an] independent and impartial tribunal*".

98. A Tribunal order would provide the Commission, SAB, and most importantly, the Former SAB Employees as well as other affected employees, with certainty regarding effect being given to the top-up benefits. It is in the interests of justice that there be certainty and finality to the disputes relating to the apparent breach.

99. Ultimately, the order that we have decided to make will enable payment to CCBSA employees of benefits due to them under the Merger conditions clearly intended to ensure that such employees derived all benefits that would have accrued to them had they, but for the Merger, remained employed within SAB.

100. As indicated above, the Tribunal's Merger Condition had the aim of preserving and protecting the public interest as it relates to employees and ownership (in the form an employee share scheme). The remedy to the breach (as contained in the settlement agreement) aligns with the clear intention that the Former SAB Employees be afforded the same benefits under the Scheme as those that remained with SAB following the Merger.

101. It is imperative that certainty be provided in relation to two key areas namely: (i) the recalculation of the 2019 allocation of the Zenzele scheme to include in the final allocation Former SAB Employees who were transferred to CCBSA; and (ii) allowing CCBSA the opportunity to check the recalculation against its records to ensure that the final allocation includes all Former SAB Employees who were transferred to CCBSA through the merger.

102. In the circumstances, we make an order in terms of section 27(1)(d), read with section 16(3), giving effect to the remedial plan agreed between the Commission and SAB for the purpose of remedying the apparent breach of the Tribunal's Merger Condition.

Other issues raised by the interveners

103. The interveners further raised certain other grounds of opposition to confirmation of the settlement agreement. We deal with these arguments raised by the interveners below.

104. We note that the Commission submitted that it, when considering the alleged breach, considered and rejected the objections raised by the interveners. It stated that the interveners' objections are the same or similar to those previously raised by SAB during the Commission's investigation into the apparent breach. According to the Commission, the only new ground raised by the interveners is the alleged invalidity of the settlement agreement for wont of signature by NEF, FAWU and beneficiaries of the Zenzele Trust. The Commission submitted that there is no merit in that contention. Having rejected such submissions, the Commission determined that a breach of the conditions in the Merger had occurred. That decision stands and cannot be impugned.

105. First, the interveners argued that the Zenzele Trust's Trustees acted outside their powers when they signed the settlement agreement.

106. The Tribunal's order in the Merger is enforceable in the same manner as a court order might be. The Tribunal's Merger Condition (clause 4.6) remains valid and enforceable regardless of who signed the settlement agreement. The remedy contained in the settlement agreement regulates how the allocation will be (re)calculated and paid, but it does not alter the basic premise that the affected employees must benefit from such payment. That issue is not a matter for determination in this application.

107. The Trustees' involvement relates to holding the Zenzele Scheme funds in trust and making payment in accordance with the allocation and the Zenzele Trust representative's signature on the settlement agreement simply acknowledges its obligations in this regard. The merger parties are bound by the remedial plan to the Commission to address the breach having not challenged the Commissions Notice of Apparent Breach. Since the Trust holds the funds due to the affected employees, it cannot escape such liability. In our view the Trustees accordingly acted within their powers under the Trust Deed, as read in light of the changes brought about by the Tribunal's Merger Condition imposed by the Tribunal.

108. Second, the interveners argued that the settlement agreement was not signed by the SAB NEF, FAWU and affected beneficiaries.

109. Notably, the abovementioned parties have themselves not raised such concerns, were consulted on the matter, and themselves elected not to oppose the

application. FAWU, in particular, indicated that it does not object to the application.[41]

110. The settlement agreement records the merger parties' remedial plan to ensure compliance with clause 4.6. and the parties that are involved in ensuring that the remedial plan is carried out, SAB (as founder of the Zenzele Scheme) and the Zenzele Trust Functionaries.

111. As noted above, the duty is upon SAB to comply with the Tribunal's Merger Condition and on the Commission to enforce the imposed condition in the Merger. The Trust is a necessary party to this because its cooperation is required to give effect to the remedy contained in the settlement agreement. Thus, the *lis* is between the Commission and SAB, and the Zenzele Trust Functionaries are a necessary party to the agreement by which that *lis* is resolved, because their cooperation is required to give effect to the remedy contained in the settlement agreement. There is no jurisdictional requirement that third parties be signatories to an agreement that resolves the *lis* between the Commission and a party found to have acted in contravention of the Act, or a merger condition imposed by the Tribunal.

112. Third, the interveners argued that the conditions are not binding on Zenzele Trust and its beneficiaries as they were not parties to the Merger.

113. The Tribunal's Merger Condition forms part of the Tribunal's order and are valid and enforceable and is not the result of an agreement; the Tribunal's Merger Condition was imposed by this Tribunal in the exercise of its powers under section 16 of the Act in terms of public interest considerations. The Tribunal's Merger Condition remains unaffected as this matter does not relate to the amendment of the merger conditions. Therefore, the remedial plan concluded does not impact upon any party's rights or entitlement to an allocation since this stem from the Tribunal's Merger Condition.

114. This technical argument raised by the interveners indeed signifies the importance of the Tribunal making an appropriate order to ensure that all parties, including the interveners, are required to give recognition thereto and may not obstruct the

[41] Settlement Agreement, Consolidated Hearing Bundle, p 12 at para 5.3; Commission's Reply to the Opposing Affidavit of the First and Second Interveners p 192 at para 40.7.

enforcement thereof. The condition in question had as its objective that the Former SAB Employees should not lose any benefits of the Zenzele Scheme as a consequence of the Merger.

115. Fourth, the interveners argued that the merger conditions cannot amend the trust deed, which was never amended to include the affected employees as qualifying employees.

116. Importantly, it is not the settlement agreement that resulted in an amendment; rather, the imposition of the Tribunal's Merger Condition affected the manner in which the Trust Deed falls to be interpreted, because the Tribunal's Merger Condition created a fiction/obligation that must be given effect to. The primary goal of the Tribunal's Merger Condition was to ensure that affected employees continue to receive the same benefits from the Zenzele Trust as if their employment had not been terminated. It would be at odds with the regime of conditional merger control to allow a substantial condition to the approval of the Merger to be overridden by technical arguments about a Trust Deed's interpretation.

117. We further note that at the stage that the Tribunal's Merger Condition was imposed by the Tribunal, no issue was raised that it could not be given effect to in light of the terms of the Trust Deed. The Tribunal's Merger Condition changed the manner in which the Scheme operates, and the interpretation and implementation of the Trust Deed must fit the conditions imposed in the Merger approval and could not operate to sidestep the relevant condition. The provisions of the Trust Deed therefore must be read together with the Tribunal's Merger Condition and must be read and applied in a manner that gives effect to clause 4.6.

118. The high-water mark of the interveners' objection appears to be that the trust deed precludes the continued allocation of benefits to the Former SAB Employees. That is no answer: it is not for the Trust Deed to fit the conditions in the Merger, but rather for the merger parties to which the Tribunal's Merger Condition applies to ensure that the Zenzele Scheme is administered in line with the Tribunal's imposed conditions that formed the basis for its approval of the Merger.

119. Although, for the above reasons, we do not have to deal with the Trust Deed and how it should be interpreted, we note for completeness the following: in terms of the Trust Deed, the shares held by the Trust are not held for the benefit of

Qualifying Employees (as the interveners now contend that term to mean), clause 3.2 provides that the "*Trust shall be administered by the Trustees for the benefit of the Beneficiaries*", which the former SAB employees are.

120. Further, in terms of clause 2.1, the object of the Trust is to "*facilitate ownership by each Beneficiary of SAB shares*". The Trust Deed defines "Beneficiary" as a "*Qualifying Employee who is appointed as a beneficiary of this Trust in terms of clause 11*".[42] In other words, in order to be a beneficiary, a person must (at the time of becoming a beneficiary) fall within the class of Qualifying Employees. The effect of the Tribunal's Merger Condition was to create a fiction that the Former SAB Employees remained as Qualifying Employees and Beneficiaries despite the transfer: the Former SAB Employees are Qualifying Employees and remain so for the duration of the Zenzele Scheme.

121. Fifth, the interveners argued that clause 4.6 does not apply to clause 11[43] of the trust deed, only clause 13[44] of the trust deed.

122. The Tribunal's Merger Condition creates a legal obligation which facilitates the affected employees' right to continue to enjoy the benefits of their participation in the Zenzele Scheme post the implementation of the Merger. As already indicated above, the Trust Deed must be interpreted in a manner that gives meaning to the Tribunal's Merger Condition.

123. Finally, the interveners' contention that it was never envisaged that there would be a final allocation, is misplaced. At the time of the approval of the Merger, the mechanisms for the forfeiture of share participation units were in place by virtue of the Trust Deed. It ought thus reasonably to have been contemplated that between the date of the approval of the Merger and the winding up of the Zenzele Trust, a pool of forfeited share participation units would have been accumulated and would require allocation to the beneficiaries of the Zenzele Scheme, including the affected employees.

124. In conclusion, the interveners can hardly rely on technicalities, qualifications and loopholes that were not raised or carved out at the time that the Tribunal's Merger Condition was imposed – any such technicalities (if existing at all) do not obviate

[42] Trust Deed, Consolidated Hearing Bundle, p 118 at para 1.1.18.
[43] This deals with the award of participation rights to beneficiaries.
[44] This deals with employment service requirements and the termination of employment.

any breach of the conditions imposed in the Merger. Furthermore, the interveners' submissions are devoid of connection to the fact that SAB is in fact the founder of the Zenzele Scheme and that SAB and the Zenzele Trust Functionaries have entered into an agreement to resolve the Commission's finding of a breach of the Tribunal's Merger Condition.

125. The outcome that the interveners seek to achieve would not result in compliance with the Tribunal's Merger Condition. Moreover, it would result in depriving certain employees of payments that they are entitled to by virtue of the Tribunal's Merger Condition that was inserted for their protection in the face of a Merger that removed them from the SAB group.

126. For all the above reasons, we conclude that the interveners' grounds of opposition do not advance the matter and cannot lead to a different outcome to the process already completed by the Commission. In addition, they cannot be relied on as a reason for not ensuring compliance with a substantive merger condition imposed by the Tribunal in the Merger flowing from a concern raised by FAWU at the time of the Merger. The imposed conditions in the Merger are legally valid and binding and have not been set aside or amended. As such they have the force of law and must be complied with. Accordingly, the interveners' opposition to the application on technical grounds must fail.

Conclusion and Order

127. The Tribunal fulfils an inquisitorial function in the public interest.[45] In this matter the Tribunal exercised its inquisitorial powers by seeking submissions from the parties on the sections of the Act that are relevant.

128. We further emphasized that the matter concerns the public interest, i.e., the effects of the Merger on employees, specifically the Former SAB Employees, and the remedy to an apparent breach of a public interest-related condition imposed by the Tribunal in the Merger. Our order gives effect to the preservation of benefits that accrued to employees, in accordance with sections 2(1)(c) (to promote employment and advance the social and economic welfare of South Africans) and

[45] *Competition Commission of South Africa v Senwes Ltd* (CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (12 April 2012) at paras 48 to 50.

2(1)(f) of the Act (to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons).[46]

129. It is imperative that the integrity of the merger regime be preserved through the enforcement of merger conditions that have been imposed by the Tribunal. It is in our view proper in the circumstances of this case that the Tribunal ultimately, having imposed the Merger Condition in the first place, and in order to give effect to the remedy and certainty to all parties, make an order to give effect to the remedy to the apparent breach.

130. We indicated that the application was brought in terms of section 49D of the Act, read with section 58(1)(b). As we have explained, section 49D on a plain reading operates in the context of complaints regarding prohibited practices and not merger-related matters. Section 58(1)(b) states that the Tribunal may "*confirm a consent agreement in terms of section 49D as an order of the Tribunal*".

131. The Tribunal however clearly has jurisdiction in terms of section 27(d), read with section 16(3), as explained above, over the subject matter, i.e., the Merger and the Tribunal's Merger Condition, as well as the remedy to an apparent breach of the Tribunal's Merger Condition.

132. For the above reasons, to resolve the matter, to bring finality to the matter and to provide certainty, we make the following order:

    132.1. SAB and the Zenzele Trust Functionaries must recalculate the 2019 allocation to include as part of the final allocation former SABMiller employees who were transferred to the CCBSA group and who remain eligible to be beneficiaries under the Trust Deed as at 31 October 2019 (not including, for example, those persons who have forfeited their rights such as so-called "bad leavers").

    132.2. SAB and the Zenzele Trust Functionaries must provide CCBA, subject to such confidentiality undertakings as may be necessary, an opportunity to check the recalculation against its own records to ensure that the final allocation includes all former SABMiller employees who were transferred

[46] See Commission's Record of Investigation, Consolidated Hearing Bundle, p 41 at para 8; Commission's Reply to the Opposing Affidavit of the First and Second Interveners pp 178 – 180 at paras 7 – 8.

to the CCBSA group and who remain eligible to be beneficiaries. The CCBA may approach the Tribunal in the event of any difference between the individuals identified by SAB and CCBA, which cannot be resolved between them.

132.3. The funds preserved in trust pursuant to the Tribunal's order of 30 March 2020 must be paid out to the Zenzele Scheme beneficiaries in accordance with the revised calculation in terms of paragraph 132.1. above. Such payment must be made within 30 days of this order.

132.4. There is no order as to costs.

15 June 2026
Date

Presiding Member
Mr Andreas Wessels

Concurring: Ms Mondo Mazwai and Prof. Liberty Mncube

For the Commission:	Ms Candice Slump assisted by Mr Simphiwe Gumede
For SAB:	Ms Lebohang Mabidikane of Bowmans
For CCBSA:	Advocate Greta Engelbrecht SC, instructed by Cliffe Dekker Hofmeyr
For the Interveners:	Advocate Mduduzi Skhosana, instructed by MT Raselo Inc.