IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO.: LM136Dec21 / INT125Oct22

In the large merger proceedings between:

SUNSIDE ACQUISITIONS PROPRIETARY LTD	Primary Acquiring Firm
NAMIBIAN BREWERIES INVESTMENT HOLDINGS LTD	
DISTELL GROUP HOLDINGS LTD	Primary Target Firms

and

COMPETITION COMMISSION OF SOUTH AFRICA

and

THE CASUAL WORKERS ADVICE OFFICE (CWAO)	Intervenor
THE WOMEN ON FARMS PROJECT (WFP)	Intervenor

CWAO AND WFP HEADS OF ARGUMENT

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INTRODUCTION

1. How can promoting competition be said to promote employment and advance social welfare of South Africans when the merging parties emerge as bad actors? This is the argument that we will develop in these heads of argument.

2. It is trite that the Tribunal has a legislative imperative. But it also has a constitutional imperative.

3. During their evidence, the witnesses for the Casual Workers' Advice Office ("**CWAO**") and the Women on Farms Project ("**WFP**") had detailed the plight experienced by vulnerable workers, including casual workers, labour broker workers and farm dwelling worker communities, who are assisted by CWAO and WFP.

4. Ms Samuel, Mr Potlaki and Ms Makhaula detailed how these vulnerable workers are marginalised through the chosen business practices of the merging parties (Sunside Acquisitions Proprietary Limited and Namibian Breweries Investment Holdings Limited ("**Heineken**") and Distell Group Holdings Limited ("**Distell**")) by engaging the use of labour broker workers.

5. The Tribunal heard the following evidence:

5.1. Ms Samuel testified about the dire and dangerous working conditions at Distell farms that women farmworkers endure in order to scrape together a living with wages as low as the breadline. She illuminated the fragility of temporary work.

5.2. Mr Potlaki explained that vulnerable workers earn little more than a few rands per hour, receive no benefits, have no job security and can barely make a living. Mr Potlaki also explained that vulnerable workers are engaged through labour brokers for periods exceeding three months, yet are denied the benefits of permanent employment envisaged by section 198A of the Labour Relations Act 66 of 1995.

5.3. Ms Makhaula exposed the sexual abuse, predation and harassment that women suffer at the hands of the merging parties' labour brokers just to secure a living.

6. Heineken stubbornly insists that it does not use labour brokers. But we know that Heineken used service providers that in turn use labour brokers to staff Heineken operations. Distell directly engages the services of labour brokers. Mr Barendse for Distell confirmed that the reliance on casual and labour broker workers is an essential part of the business model of the merging parties, without which their operations would not run smoothly.

7. The plight of the vulnerable workers goes to the very heart of social welfare. Social welfare is inclusive of dignity, substantive equality, equity, and fairness. As Justice O'Regan in *S v Makwanyane*,[1] powerfully stated

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."[2]

8. The Competition Commission ("**Commission**") has recommended that the proposed merger be approved subject to certain conditions. Those conditions do not address concerns raised by the CWAO and the WFP.

9. The recommendation and conditions were prepared without any analysis of the effect that the merger would have on these vulnerable workers. In fact, the merging parties' public interest analysis intentionally excludes vulnerable workers and focuses only on permanent and fixed-term employees of Heineken and Distell, despite vulnerable workers forming an integral part of

[1] 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

[2] Id at para 328.

the merging parties' respective businesses. The vulnerable workers were neither consulted by the merging parties nor the Commission.

10. The right of workers to be consulted on decisions affecting their livelihoods is an expression and recognition of their right to dignity, substantive equality, equity and fairness.

11. The primary concern raised by CWAO and WFP is thus that the Commission's investigation and conditions do not consider or offer protection for vulnerable workers, and thus, their vulnerability is perpetuated post-merger.

12. This was also confirmed further by evidence for the merging parties. Ms Mosadi said that these workers do not form part of the "employment" of Heineken and Mr Barendse also confirmed that these workers did not form part of any discussion about the effect of the merger on employment. Furthermore, Mr Barendse suggested that the vulnerable workers are somehow less legitimate than permanent, unionised workers.

13. The suggestion by Mr Barendse that vulnerable workers are somehow less legitimate than permanent, unionised workers demonstrates the intersectional discrimination faced by vulnerable workers.

14. The idea of legitimacy being a spectrum is wrong. Calling something more legitimate is a sanitised way of saying that the other is illegitimate. The

concept of illegitimacy of a person with dignity has no place in our constitutional framework. The Constitutional Court, although in a different context, held that "the long-held distinction between "legitimate" and "illegitimate" … in our law [is] abhorrent to our constitutional values of human dignity, ubuntu and substantive equality".[3]

15. In *Peterson v Maintenance Officer*,[4] the court stated:

> "I am of the opinion that this common-law rule which differentiates [legitimacy] and [illegitimacy] … conveys the notion that the [illegitimate] do not have the same inherent worth and dignity as the [legitimate]."[5]

16. The same applies to the suggestion that vulnerable workers do not have the same inherent worth and dignity as permanent, unionised employees, within the context of the broad concept of employment.

[3] Centre for Child Law v Director General: Department of Home Affairs and Others 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC)

[4] Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others 2004 (2) SA 56 (C) at 64I – 65A.

[5] Id at para 19.

17. It is unassailable that the inability to work and sustain oneself subjects the worker and their dependents to a life of untold indignity.[6]

18. Justice O'Regan in *S v Makwanyane*,[7] powerfully stated:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]."[8]

19. And further: "without dignity, human life is substantially diminished".[9]

20. Importantly, the exclusion of vulnerable workers from the public interest analysis in the merger enquiry traps both them and their dependents in a cycle of poverty which is a direct legacy of this country's colonial and

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[6] Mahlangu and Another v Minister of Labour and Others 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) at para 56.

[7] 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

[8] Id at para 328.

[9] Id at para 327

apartheid past. It is that very system of racialised and gendered poverty that the Constitution seeks to undo.

EMPLOYMENT IN GENERAL

21. The purpose of employment is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life of dignity. Indeed, section 24 of the Constitution states that "*Everyone* has the right to fair labour practices".

22. The Competition Act 89 of 1998 ("**the Act**"), and its concomitant public interest considerations, serve a remedial purpose: namely, to undo the gendered and racialised system of poverty inherited from South Africa's colonial and apartheid past. Thus section 2 of the Act states that "The purpose of the Act is to promote competition *in order to* promote employment and advance the social and economic welfare of South Africans".

23. In the present matter, it is clear that no legitimate purpose is advanced by excluding vulnerable workers from the public interest analysis of "employment" under section 12A(3)(b). The inclusion of vulnerable workers would accord with legislation such as the Compensation for Occupational

Injuries and Diseases Act.[10] If anything, their exclusion has a significant stigmatising effect which entrenches patterns of disadvantage based on race, sex and gender. CWAO and WFP have highlighted the lived experiences of vulnerable workers, the majority of whom are Black women, and the structural barriers which they and their dependents continue to face.

24. In considering those who are most vulnerable or most in need, the Tribunal should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender and social class. This recognition is congruent with the values of human dignity, the achievement of equality and ubuntu – being the values of our newly constituted society. To exclude vulnerable workers from the consideration of an employment analysis is manifestly unlawful.

25. The differentiation between vulnerable workers on the one hand, and permanent and fixed-term workers on the other, amounts to discrimination. The excluded workers are Black and Coloured workers, including women workers, who do not find themselves in a privileged social class. This amounts to intersectional discrimination, acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in

[10] 130 of 1993.

society and the structural dynamics at play. This simultaneous and intersecting discrimination multiplies the burden on the disfavoured group.

26. By including vulnerable workers in the term "employment", the goal of substantive equality is advanced at a structural level by granting the remedy sought. To this end, it empowers vulnerable workers and brings them closer to the "substantive freedom" that our constitutional dispensation seeks to achieve.

27. While the exclusion of vulnerable workers from an employment analysis may seem benign and indirect, the Constitutional Court has already established that a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups amounts to indirect discrimination.[11] Further, the Constitutional Court has established that for the purposes of a Constitution section 9(3) enquiry, there is no qualitative difference between discrimination that occurs directly or indirectly.[12]

THE SCOPE OF THE EMPLOYMENT ANALYSIS UNDER SECTION 12A(3)(b)

28. The merging parties have intentionally limited their public interest analysis to only permanent and fixed-term employees and have excluded vulnerable

[11] Pretoria City Council v Walker [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (Walker) at paras 31-2.

[12] Id at para 35.

workers. This fact is evident from the evidence of Ms Mosadi and Mr Barendse.

29. The exclusion demonstrates the fact that not only are casual workers, labour broker workers and farm dwelling worker communities undervalued, but their's is also not considered to be real work of the kind performed by workers that do in fact fall within the narrow definition of "employment" adopted by the merging parties. One can only imagine the pain of these workers who work graciously, hard and with pride only for their work and by consequence them, to go unrecognised. This amounts to casual workers, labour broker workers and farm dwelling worker communities themselves not being treated with dignity.

30. In the same vein, both Ms Mosadi and Mr Barendse affirmed that the merging parties are committed to human rights. However, such commitment was refuted by the lived experiences detailed by the witnesses on behalf of CWAO and WFP.

31. Section 12A(3)(b) states that the "Competition Commission or the Competition Tribunal *must* consider the effect that the merger will have on … Employment".

32. "Employment" is not defined in the Act.

33. In the Oxford Dictionary, "employment" is simply defined as "the state of having a paid job – of being employed". This definition is broader than the definition employed in the Labour Relations Act and for good reason.

34. For example, this can be contrasted with the provisions of section 12A(3)(e), the colloquially called ESOP provisions that specifically refers to "workers in the firm", with the Act defining "workers" as being employees of the firm in terms of the Labour Relations Act.

35. It is clear that a textual and purposive reading of section 12A(3)(b) shows that the focus of the employment analysis does not only extend to employees of the firm (as is the case with the ESOP provisions) but instead enjoins the Commission and Tribunal to assess the effect that the merger will have on employment generally.

THE ANALYSIS, THE EFFECT AND MERGER SPECIFICITY

36. "Employment" as understood by the merging parties is short-sighted and is at odds with the purpose of the public interest analysis. The merging parties adopted a narrow definition of employment. We submit this is the incorrect approach.

37. The correct approach is to consider the employment conditions of all workers engaged either directly or indirectly by the merging parties and then

consider what the effect the merger could have on those workers. This is particularly important in light of Mr Barendse's evidence that casual and labour broker workers form an integral part of the workforce of Distell.

38. We submit that the merging parties had an obligation, especially in light of the evidence given by Mr Barendse that casual and labour broker workers are an integral part of the merging parties' business models, to consider this vulnerability of workers within its workforce, to introspect, and then provide the Commission with a full and meaningful analysis, based on consultation, on how the merger will create a net positive effect on the public interest.

39. It is evident that this was not done. Consequently, the Commission was robbed of its obligation to investigate and provide the Tribunal with an analysis and recommendation relating to vulnerable workers. Moreover, vulnerable workers, who are already at risk due to the precarious nature of their employment, were denied consultation.

40. Being at the bottom of the social hierarchy means that Black women are often required to do the least skilled, lowest paid and most insecure jobs. The case of vulnerable workers at the workplaces of the merging parties is particularly severe, as evinced by CWAO and WFP. With this being the case, the merging parties entered into the merger each having a net negative effect on employment and are being bad actors.

41. The effect of the merging parties' failure to consider vulnerable workers' precarious position, and that the merging parties are ignorant to their plight, suggests that the merging parties had planned to do nothing, or not planned to do anything, about it. This in turn demonstrates that the merger is likely to perpetuate this net negative effect post-merger.

42. Section 2 of the Act uses verbs indicative of positive action – promote and advance – suggesting that in the promotion of competition some positive act is required in relation to employment and social welfare.

43. The merger cannot be said to be justifiable on the public interest consideration if the merger will simply perpetuate the perilous working conditions for vulnerable workers, especially women. In order for the merger to be justifiable on employment grounds, a condition must be crafted to create a net positive effect on employment. To do so will be fulfilling the purpose of the Competition Act.

REMEDY

44. Due to the power dynamics at play and the vulnerability of the workers in question, neither CWAO nor WFP have the locality or proximity to the information necessary to craft a condition, because that condition must be effective and practical. That obligation must rest on the merging parties to

propose, and indeed we call upon the merging parties to fulfil their obligations.

45. As such, we submit that in conditionally approving the merger, the merging parties must be obligated, as part of the merger conditions, to provide the Tribunal with an analysis of the extent of their use of vulnerable workers, a report on the extent of the dire working conditions that the vulnerable workers endure, and a proposed plan that is subject to the Tribunal's approval to ameliorate the dire working conditions of the affected vulnerable workers.

46. The merging parties should submit their analysis, report and proposed plan within one month of any conditional merger approval, for the Tribunal to consider the practicality and efficacy of the proposed plan.

JATHEEN BHIMA

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Chambers, Sandton

24 January 2023