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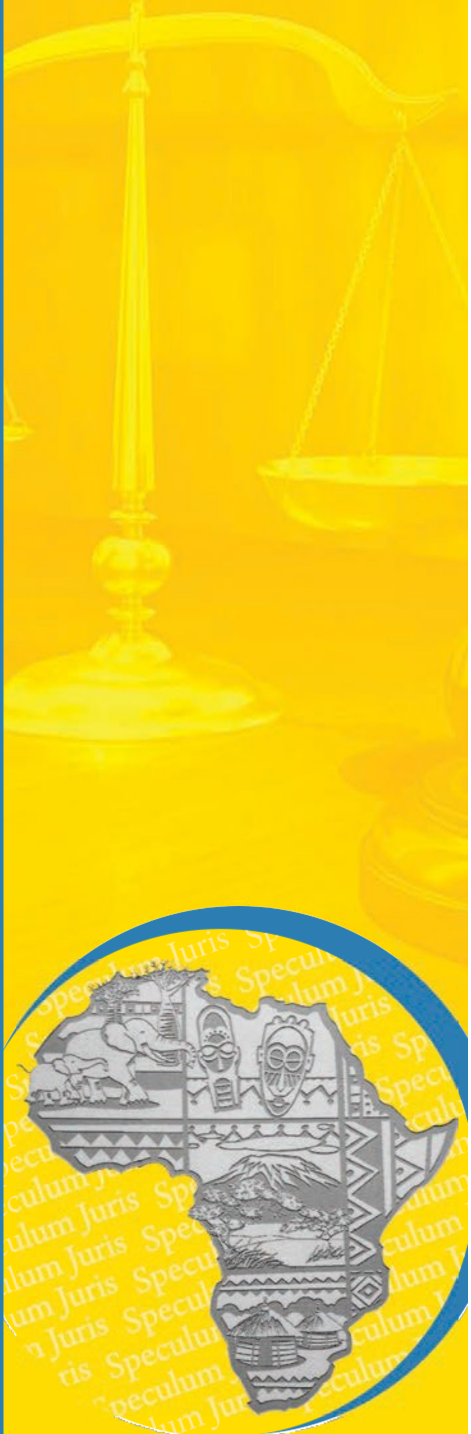

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Employment as a Public Interest Consideration in Merger Control: Lessons from *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* 2024 (4) SA 391 (CC)

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Abstract

This contribution analyses the Constitutional Court's decision in Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission *2024 4 SA 391 (CC), with a focus on its endorsement of causation as the appropriate test for determining the merger specificity of job losses in the context of merger control. In resolving a long-standing interpretative tension, the Court held that causation – requiring both a factual and legal link between the merger and the retrenchments – is the correct standard, thereby departing from the Competition Appeal Court's broader "some nexus" formulation. The contribution also examines the potential disjuncture between the concepts of "merger-specific" and "merger-related", which have often been used interchangeably by the courts. It considers the implications of the Constitutional Court's reasoning*

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alongside both the 2016 and the 2024 Public Interest Guidelines relating to merger control. Ultimately, the argument advanced is that the Coca-Cola *judgment affirms a more coherent and purposive interpretation of employment as a public interest consideration under South African competition law, while providing much-needed legal certainty for both merging parties and the competition authorities.*

Keywords: merger control; public interest; merger-specific; merger-related; employment; causation

1 INTRODUCTION

In *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission*[1] the Constitutional Court delivered a landmark judgment on the meaning of "merger-specific" within the context of South Africa's merger control regime. At the heart of the dispute was whether post-merger retrenchments were sufficiently connected to the merger to constitute a breach of the merger conditions. The Court's adoption of a causation-based test — which requires a demonstrable causal link between the merger and retrenchments — has provided clarity on the standard to be met in the assessment of the effects of mergers on employment. Against this backdrop, this contribution pursues two interlinked objectives. First, it analyses the three *Coca-Cola* judgments: the Tribunal decision, the Competition Appeal Court decision, and the final decision of the apex court. Second, it provides an evaluation and commentary on the *Coca-Cola* decision.

2 THE *COCA-COLA* CASE

This section explores the *Coca-Cola* judgments from the initial decision by the Competition Tribunal to the Competition Appeal Court and ultimately the conclusive decision of the Constitutional Court.

2 1 Facts

In May 2016 and September 2017, the Competition Tribunal approved two successive mergers that culminated in the creation of Coca-Cola Beverages SouthAfrica (CCBSA).[2] Both transactions were approved subject to public interest conditions, particularly concerning employment.[3] Notably, the first merger included a condition prohibiting the merging parties from retrenching any bargaining unit employees as a result of the merger, and any retrenchments of employees outside of the bargaining unit had to be limited to 250 employees within the category of hay grade 12 and above.[4] The second merger was approved subject to the conditions imposed on the first merger being replicated and preserved, and the merging parties accepted these conditions.[5]

Approximately two years later, CCBSA informed the Competition Commission of its intention to initiate a retrenchment process under section 189 of the Labour Relations Act 66 of 1995 (LRA), citing operational challenges, including rising input costs, the introduction of a Health Promotion Levy (sugar tax), and broader economic factors.[6] The entity issued a notice of its intention to dismiss some of its employees in the logistics and commercial functions of its business to reduce its operational costs.[7] A notice of termination was issued to some 368

1 2024 4 SA 391 (CC).

2 2016 2 CPLR 822 (CT) para 3.

3 *Coca-Cola v Competition Commission* para 5.

4 *Ibid* para 5.

5 *Ibid* para 8.

6 *Ibid* paras 9–10.

7 *Ibid* para 12.

employees who could be placed in alternative positions but had declined reassignment to alternative roles.[8]

The Food and Allied Workers Union (FAWU), a representative trade union of CCBSA's employees, lodged a complaint with the Commission, alleging that CCBSA had breached its merger conditions.[9] Accordingly, the Commission advised CCBSA of the complaint, to which it responded that it had indeed dismissed some 368 employees.[10] The entity alleged that it had paid R2.1 billion in sugar tax within nine months of the tax's introduction, and experienced a R300 million decline in gross profit.[11]

CCBSA advised that it was continuously recruiting new employees as existing employees exited to maintain the required aggregate headcount. As a result, 1067 employees had been employed in May 2019 (in the same month as the 368 retrenchments) into newly created roles arising from a restructuring within the merged entity.[12] CCBSA further emphasised that the prevailing economic climate and sugar tax at the time prompted a reduction in labour costs and that the entity needed restructuring, comprising making certain roles redundant to retrench employees who did not accept lower levels of pay, and recruit new employees at reduced labour costs.[13] The entity argued that the retrenchments were not related to the merger and were permissible for operational reasons under section 189 of the LRA. Further, the entity argued that where retrenchments removed duplicate roles, the rationale was only "to reduce staff costs and change the nature of the employment within the firm to reduce overall costs in view of the unforeseen events post-merger".[14]It argued that unforeseen post-merger economic developments necessitated the retrenchments and were not merger-specific, but rather justified as operational challenges.[15]

The Commission, however, found that the retrenchments were aimed at removing duplicate roles and reducing labour costs — objectives that, in its view, were merger-specific.[16] It concluded that CCBSA had flouted the merger conditions and issued a formal Notice of Breach.[17] The entity then brought a review application before the Competition Tribunal in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission*[18] setting in motion a legal battle that would end up at the highest court in the land.

2 2 Competition Tribunal Decision

The Tribunal began by clarifying that the intention behind merger conditions is not to protect individual employees *per se*, but to ensure that "employment losses arising from a merger are kept to a minimum".[19]

8 *Ibid* para 12.
9 *Ibid* para 14.
10 *Ibid* para 16.
11 *Ibid* paras 16–20.
12 *Ibid* para 18.
13 *Ibid* para 19.
14 *Ibid* para 25.
15 *Ibid* para 27.
16 *Ibid* para 55.
17 *Ibid* para 21.
18 2021 ZACT 101 para 1.
19 *Coca-Cola v Competition Commission* para 37.

This approach aligns with scholarly commentary such as that of Sutherland *et al.,* who posit that the scope of the competition authorities' intervention is only limited to protecting levels of employment, rather than the number of jobs lost.[20]

Drawing on its earlier decision in *BB Investment Company (Pty) Ltd v Adcock Ingrams Holdings*[21], the Tribunal reiterated the distinction between merger-specific retrenchments and those made for operational reasons. It stated:

> Translated to considerations of the public interest effect on employment, the practice thus far has been to distinguish, post-merger, between employment loss associated with the merger nexus, referred to as "merger-specific" employment loss and those in the second category of non-merger-specificity, often referred to as "operational" employment loss. The Competition Act intervention is jurisdictionally premised on the former "merger-specific", but not the latter "operational kind", which is considered to be purely the sphere of labour law.[22]

From this, the Tribunal reaffirmed that it does not concern itself with retrenchments based on operational grounds that fall within the domain of labour law. Instead, its jurisdiction applies where a link between retrenchments and the merger can be established. The Tribunal thus held that there was insufficient evidence to show that a "principal reason" for the retrenchments was to remove duplicate roles emanating from restructuring of the merged entity.[23] This is where the Tribunal introduced what is termed the "principal reasons" test.

In its submissions, CCBSA had urged the Tribunal to adopt the delict test of causation in determining whether it had substantially complied with its merger conditions.[24] However, the Tribunal rejected this approach as being inappropriate in the context of the matter before it.[25] It reasoned that post-merger retrenchments always result from the employer's decisions, whether or not they are a direct result of the merger or of some other reason. Thus, compliance with merger conditions must be assessed by interrogating the employer's actual decisions and incentives.[26] To support this, the Tribunal relied on the Constitutional Court decision in *National Union of Metalworkers of South Africa v Aveng Trident Steel*,[27] which held that determining the true rationale for retrenchments is a factual question to be resolved on a balance of probabilities by weighing available evidence tendered by the merger parties.[28]

The Tribunal further endorsed its approach previously taken in *BB Investment,* where it had stated that merger-specific retrenchments are those which can be shown to have some link to the incentives of the new controller/merged entity.[29] Therefore, the principal reasons test means that the factual enquiry focuses on whether the retrenchments are motivated primarily by the merger. It thus must be shown that the main reason for the retrenchments is the merger itself.

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20 Sutherland *et al. Competition Law of South Africa* (2022) 134.

21 2014 2 CPLR 451 (CT).

22 *BB Investment* paras 58–59.

23 *Coca-Cola v Competition Commission* para 76.

24 *Ibid* para 41.

25 *Ibid* para 42.

26 *Ibid* para 42.

27 2012 2 BCLR 168 (CC).

28 *Aveng Trident Steel* para 119.

29 *Coca-Cola v Competition Commission* para 47.

The Tribunal concluded that the unforeseen economic events emanating from the sugar tax prevailed as the principal reason for CCBSA's retrenchments, and as such, the retrenchments were not merger-specific.[30]

2 3 Competition Appeal Court (CAC) Decision

The central issue before the CAC was the appropriate legal test for determining whether retrenchments following a merger are merger-specific, or fall within the realm of retrenchments made for operational reasons governed by section 189 of the LRA.[31] The appeal challenged the Tribunal's adoption of the principal reasons test, which, according to the Commission, was a departure from its own test developed in *BB Investment*.[32] The CAC reiterated that intervention by the competition authorities was permissible only where job losses occurring after a merger were merger-specific, and not for operational reasons.[33]

Significantly, the court rejected the principal reasons and causation tests advanced by the Tribunal and CCBSA respectively, reasoning that they were inappropriate in a finding of merger specificity as they could potentially and significantly erode the safeguards envisaged by section 12A(3) for employees because there could not be a cause or reason for retrenchments, whether predominant, principal or otherwise.[34] The CAC held that the appropriate test remains that which was articulated in *BB Investment*.[35] In the latter case, it was held that merger specificity 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".[36] The CAC held that the test in *BB Investment* was objective and sound, as the Commission need only establish "some nexus" between the merger and retrenchments.[37] Applying this test, the court found that CCBSA breached the merger conditions because the retrenchments were merger-specific.[38]

2 4 Constitutional Court Decision

The Constitutional Court was yet again tasked with determining the appropriate test for assessing whether retrenchments following a merger are merger-specific.[39] In particular, the Court took issue with how the *BB Investment* test, or parts thereof, had been applied by the CAC. It held that a mere nexus would always be present between a merger and the subsequent decisions of the merged entity, even where more dominant, substantial or "principal" reasons are at play.[40]

Indeed, the implication of the test for some nexus is that the Commission cannot prove a link between a merger and retrenchments.[41] In fact, one can even say that the test for some nexus may be prejudicial to merging parties and erode the intention of the Act in safeguarding employment because it may result in a stringent merger regime that could potentially place firms in an unfavourable position. The Court further criticised the CAC for being selective in its

30 *Ibid* para 76.

31 2022 CPLR 22 (CAC) para 1.

32 *Competition Commission v Coca-Cola Beverages Africa* para 42b.

33 *Ibid* para 71.

34 *Ibid* para 83.

35 *Ibid* para 1.

36 *BB Investment* para 65.

37 *Competition Commission v Coca-Cola Beverages Africa* para 83.

38 *Ibid* para 87.

39 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 34d.

40 *Ibid* para 60.

41 *Competition Commission v Coca-Cola Beverages Africa* para 83.

application of the test in *BB Investment*, applying only part of the test.[42] In addition to the parts of the test that the CAC had extracted, which state that merger specificity requires a finding of "some nexus", the test in the latter case also required a consideration of what the situation would be if the merger had not transpired, and whether the decision-making was "sufficiently closely related to the merger".[43]

Turning to the merger conditions, the Court examined clause 9.2 which obliged CCBSA not to retrench employees because of the merger.[44] Further, condition 9.4.5 permitted only those retrenchments that are not merger-specific.[45] This condition stipulates that retrenchments referred to in the preceding clause 9.2 do not include:

> Necessary steps taken by the Merging Parties in terms of section 189 of the Labour Relations Act should operational requirements in the ordinary course of business that are not merger specific necessitate that such steps be taken.[46]

It was held that the wording in condition 9.4.5 (which permits only those retrenchments which are "not as a result of the merger or merger-specific") requires that subsequent retrenchments must be linked directly or predominantly to the merger.[47] The court stated that the phrase "as a result of" connotes or means something being the cause of a situation or circumstance, and thus falls within "causal terminology".[48] It was concluded that the but-for or causation test is a necessary inquiry in this regard.[49]

In support of this contention, the Constitutional Court endorsed the Tribunal's earlier approach in *BB Investment* (which was later endorsed by the Tribunal in *Coca-Cola v Competition Commission*) where it stated:

> Firms are dynamic institutions and not every change that results post-merger is necessarily attributable to the merger. That approach is far too mechanistic, and changes can be conceived of a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific.[50]

The Court held that these remarks by the Tribunal aligned with the first leg of the causation test (factual causation or otherwise but-for-test) and the second part of the test in *BB Investment,* which required a consideration of the pre-merger counterfactual.[51] With respect to the second leg of causation, which requires the identification of a link, it was held that the Tribunal's principal reasons test had been effective in testing for a causal link between the merger and retrenchments.[52] Although the Tribunal sought to steer clear of the causation test, the Constitutional Court held that it had applied certain elements of the test in its determination.

In its judgment, the Court reiterated that if employees are retrenched and then rehired at lower wages or salaries, the result would be that no duplicate positions are eliminated, only changes

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42 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 62.

43 *Ibid* para 62.

44 *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* para 5.

45 *Ibid* para 5.

46 *Ibid* para 5.

47 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 65.

48 *Ibid* para 65.

49 *Ibid* para 65.

50 *BB Investments* para 57; *Coca-Cola v Competition Commission* (Tribunal decision) para 47; *Coca-Cola v Competition Commission* (CC decision) para 62.

51 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 70.

52 *Ibid* para 69.

in terms and conditions.[53] The court acknowledged that this may be unfair under labour and employment law, but does not mean that the merger conditions were breached.[54] This reiterates Sutherland *et al.*'s argument that the competition authorities and the courts are only concerned with levels of employment, not with who was dismissed, replaced with whom, or how.[55] It was ultimately held that CCBSA did not retrench to eliminate duplications within the entity, but rather to reduce its labour costs.[56]

In this regard, it was accepted that the retrenchments were for operational reasons and not merger-specific. The final (and conclusive) decision was that the causation test is applicable in determining whether retrenchments are linked to a merger.[57] Therefore, the Constitutional Court's reasoning demonstrates that, in certain circumstances, conditions and obligations intended to safeguard the public interest in mergers can be superseded by the strategic decisions of the merged entity when it is confronted with economic challenges beyond its control. In such situations, it must be determined whether the retrenchments are directly or predominantly as a result of the merger by determining a causal link. A mere temporal or proximate link is insufficient. The Constitutional Court seems to recognise that there will always be some link or nexus, but a direct link is what the competition authorities and courts must concern themselves with.

3 THE LEGAL FRAMEWORK IN SOUTH AFRICAN MERGER CONTROL

3 1 Employment as a Public Interest Consideration in the South African Merger Control Regime

The regulation of mergers in South Africa has undergone significant development over the years, particularly in the treatment of public interest considerations by the competition authorities. First, the introduction of section 12A(1A) through amendments to the Competition Act[58] in 2018[59] requires that, in considering a merger, the Commission must determine whether such merger can or cannot be justified on public interest grounds stipulated in section 12A(3), despite its finding on the competition leg of the test.[60] This means that, even if, in its initial assessment, the Commission has found that a merger is likely to prevent or lessen competition, an assessment and a finding on public interest must still be made. Further, the 2024 Public Interest Guidelines relating to merger control (hereafter PI Guidelines 2024)[61] provide a comprehensive guide on the elements that the competition authorities must consider when dealing with public interest considerations, and particularly employment in section 12A(3)(b) of the Competition Act.[62]

53 *Ibid* para 74.

54 *Ibid* para 74.

55 Sutherland *et al.* (2022) 134.

56 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 74.

57 *Ibid* para 93.

58 89 of 1998.

59 See s 9 of the Competition Amendment Act 18 of 2018 GN 175 *GG* 42231 (14 February 2019).

60 See s 12A(1A) of the Competition Act.

61 Competition Commission "Revised Public Interest Guidelines Relating to Merger Control" GN 4544 *GG* 50323 (20 March 2024).

62 The PI Guidelines deal with employment under s 6.2 and set out some of the considerations to be made by the Competition Commission in dealing with the effect of a merger on employment.

Given the preceding, section 12A(3)(b) has become a critical provision which the competition authorities utilise to regulate the potential adverse effects on employment where firms seek to merge. As far as it is relevant, the section provides that:

> When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (b) employment.

In doing so, the Competition Commission and the Tribunal must evaluate "the effect" that the merger will have on employment. Sutherland *et al.* posit that the effect of a merger on employment has received more scrutiny and caution compared to the other public interest factors in section 12A(3).[63] Using data samples and statistics, Van Wyk e*t al.* also deduced that employment is the most prevalent of the public interest considerations in merger cases, as it always features alongside other public interest factors, even where it is not the public interest ground predominantly being dealt with in a merger.[64]

Over the years, the Competition Tribunal and the courts have also developed a range of approaches for determining whether a merger affects employment. Earlier decisions such as *Walmart Stores Inc. & Massmart Holdings Ltd*[65] and *Metropolitan and Momentum Ltd*[66] recognised the legitimacy of imposing employment-related conditions when approving mergers to safeguard against any adverse effects on employment.[67] Subsequent cases, such as *BB Investment*[68] elaborated various tests for determining the merger specificity of retrenchments, such as the test for "some nexus" or the use of a "counterfactual analysis".[69] The Constitutional Court's 2024 judgment in *Coca-Cola* represents a watershed moment in this regard by endorsing causation. This test requires that retrenchments be "directly" or "predominantly" linked to a merger to be deemed merger-specific.[70]

The Constitutional Court's judgment in *Coca-Cola* draws directly from the legal concept of causation as used in other areas of the law, grounding the test for merger specificity in a factual and legal inquiry into whether job losses would have occurred "but for" the merger.[71] Moreover, the judgment exposes a potential disjuncture between administrative and legal certainty: just one month before the court's ruling in *Coca-Cola*, the Competition Commission published the PI Guidelines 2024, which replaced the requirement of "merger-specific" with "merger-related".[72] Notably, this is a departure from the standard of "merger-specific" initially established by the Public Interest Guidelines relating to merger control published in 2016.[73] As this contribution will argue, "merger-related" is potentially a broader standard than "merger-specific". Moreover, the Constitutional Court's reasoning in *Coca-Cola* alludes to "merger-specific" being the standard moving forward.[74] Perhaps, this is only a matter of semantics, especially when the Guidelines also provide that the "Commission's primary consideration will be the direct effect

63 Sutherland *et al. Competition Law of South Africa* (2022) 134.

64 Van Wyk *et al.* 2023 *Studies in Economics and Econometrics* 381.

65 2012 1 CPLR 6 (CAC).

66 2010 2 CPLR 337 (CT).

67 *Metropolitan* paras 62–112; *Walmart* (merger decision) para 11.

68 2014 2 CPLR 451 (CT).

69 *BB Investment* paras 56–66.

70 *Coca-Cola v Competition Commission* para 65.

71 *Ibid* para 66.

72 PI Guidelines 2024 para 6.2.3.3.

73 Competition Commission "Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act, 1998" Proclamation 309 *GG* 40039 (31 May 2016) para 8.1.2.1.

74 *Coca-Cola v Competition Commission* paras 65–66.

on employment".[75] Notwithstanding, an argument will be made that "merger-specific" should consistently and clearly be the standard term used going forward.

4 COMMENTS AND DISCUSSION

4 1 An Evaluation of the *Coca-Cola* Decisions

Although the Tribunal rejected the causation test, its preference for the principal reasons test nonetheless engaged a key element of legal causation. In hindsight, this approach reads like a foreshadowing – it inadvertently laid the conceptual groundwork for the Constitutional Court's later, more explicit articulation of causation as the decisive inquiry for merger-specific retrenchments. It is reasonable to infer that the principal reasons test requires an inquiry into whether the merger was the "main", "leading", or "dominant" reason behind the decision to retrench. While the CAC rejected this test as inadequate, stating that the Commission will always, and in one way or the other, find a cause or reason for retrenchments, that critique arguably takes a narrow view.[76]

As emphasised in *BB Investment*, not every post-merger change within a firm can be attributed to the merger.[77] In *Coca-Cola*, for instance, CCBSA's evidence pointed to the sugar tax and its financial implications — not the merger — as the key driver behind its cost-cutting measures. While the merger may have created an opportunity to remove duplicate roles, it was not the principal reason for doing so. The principal reasons test thus assists in disentangling incidental changes from those genuinely attributable to the merger. However, it is not sufficient as a stand-alone test.

The Constitutional Court correctly considered that there are certain circumstances, beyond a firm's control, which may affect a merged entity post-merger and necessitate job losses, without necessarily being linked to the merger itself. As "dynamic institutions", firms need to take the necessary measures to adapt to certain unfortunate and unforeseen conditions, economic or otherwise. This supports the need for a causation-based inquiry to establish a causal link between a merger and subsequent retrenchments, to safeguard firms from unfavourable economic conditions and prevent a situation where public interest is protected at the expense of an entity's ability to sustain itself and compete effectively in its respective market. This would in fact be counterproductive to the objectives of the Competition Act because failing businesses are unable to operate and compete effectively in the economy and create employment opportunities. Efficiency and the public interest must be balanced, because either way both firms and the public share the benefits.

In applying the factual and legal leg of the test for causation, the competition authorities and the courts would have to ask the following questions:

(a) But for the merger, would the retrenchments have occurred?[78]

(b) Are the retrenchments directly or at least predominantly linked to the merger?[79]

An affirmative answer to both establishes merger specificity and a breach of any employment-related conditions imposed at the approval of a merger. The court correctly held that the enquiry for factual causation is based on logic. In contrast, the legal causation enquiry considers the

75 PI Guidelines 2024 para 6.2.2.

76 *Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* para 83.

77 *Ibid* para 84.

78 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 67.

79 *Ibid* para 67.

contemplation of both the Competition Act and the merging parties.[80] In applying the test the Constitutional Court expressed itself thus:

> It is actual decisions and conduct of the merged firm that must be tested for a causal nexus with the merger. Moreover, the test must be applied at the time of the alleged breach, taking into account all that has transpired since the merger, including the time lapse. The longer the lapse, the less probable the link with the merger.[81]

It is observed that the Tribunal and the Constitutional Court were of one mind regarding "merger-specific" as the standard for assessing retrenchments, notwithstanding that consensus was arrived at from different perspectives. The Tribunal has interpreted "merger-specific" as warranting a causation test, as seen in *BB Investment,* where the pre-merger counterfactual position was considered to determine whether retrenchments would have occurred in the absence of the merger. Further, the principal reason(s) test fashioned by the Tribunal in *Coca-Cola* also resembles the causation test, or the legal causation leg thereof, because an inquiry into the principal reason(s) may produce a reason that is sufficiently close to or related to the merger. Although the Tribunal "rejected" causation in its reasoning, it seems that it too recognised that the wording of section 12A(3) envisages a test for causation, or otherwise a direct link.

4 2 The Causation Enquiry as the Appropriate Test

Munyai has rightfully observed that causation remains one of the most under-utilised principles in South African competition law, and that this points to an underdeveloped framework for assessing the causal link between a firm's conduct and an alleged competition injury.[82] His analysis of abuse of dominance cases illustrates how the term "effect" as used in section 8 of the Competition Act (abuse of dominance provision) implicitly requires a causal link between the conduct of a dominant firm and any anti-competitive harm, and that it is the use of this word that potentially factors causation into a finding for abuse of dominance.[83] He further argues that legal causation is particularly important for establishing that the conduct of a firm is sufficiently close to the harm or whether the result is too remote from the ensuing effect.[84]

This contribution supports Munyai's argument and extends its logic to section 12A(3), which mandates that mergers must be assessed for their effect on employment. The repeated use of terms such as "link", "result" and "nexus" in case law suggests an implicit recognition that section 12A(3) carries an underlying requirement of causation, and the Constitutional Court has highlighted that the latter is indeed causal terminology.[85] Therefore, there seems to be a general recognition that the use of "effect" in section 12A(3) requires a test for causation. The fact that the determination is focused on the cause which is closely or directly related or linked to the merger further reinforces why the causation test is appropriate in this regard.

Moreover, Munyai notes that in the context of abuse of dominance cases, external factors may be the true reasons that firms exit markets, rather than exclusionary conduct.[86] These reasons include regulatory challenges, adverse changes in market conditions, and high operating costs, which necessitate establishing a causal nexus between the actions of the dominant firm in

80 *Ibid* para 67

81 *Ibid* para 61.

82 Munyai "The Lack of an Appropriate Causation Framework in Competition Law Proceedings under the Competition Act, 1998" 2017 *Obiter* 485.

83 Munyai 2017 *Obiter* 488.

84 *Ibid* 492.

85 *Coca-Cola v Competition Commission* para 65.

86 *Ibid* para 65.

question and the ensuing exclusionary result.[87] The factors identified by Munyai are akin to those in the *Coca-Cola* situation, which may generally prompt any business to retrench where necessary, whether or not the entity is formed through a merger.

It is also important to acknowledge that the test for causation is not doctrinally rigid *per se*. The courts, in dealing with cases in other branches of the law, have acknowledged that there are instances where other exceptions and alternatives may be developed in applying the test for causation through common sense and flexibility.[88] In *Lee v Minister of Correctional Services*,[89] the court remarked that the test for factual causation, otherwise known as the but-for test, is not inflexible, and there is a risk that a strict application of this test would yield injustices.[90] Thus, at times, common sense must prevail over strict logic.[91] This sentiment was echoed in *Coca-Cola,* where the Constitutional Court similarly remarked, in the context of the case before it, that the first leg of the enquiry (factual causation) is based in pure logic and must be applied with good sense.[92]

South African criminal law, for example, employs the doctrine of *novus actus interveniens* or *novus actus* to break the chain of causation between an accused's conduct and the harmful result. A *novus actus* means a "new intervening act" where, if such an act occurs, it would mean that between the initial act (the merger) and ensuing result (the decision to retrench), something happens that breaks the chain of causation, preventing one from regarding the initial act as the cause of the result.[93] This doctrine aligns conceptually with the final leg of the three-pronged test articulated by the Constitutional Court in *Coca-Cola,* which requires that the test be applied at the time of the alleged breach, considering all that has transpired since the merger (to identify any novus actus that may have occurred).[94]

Hypothetically, if it were found that the retrenchments would not have occurred in the absence of the merger, and if this doctrine was then applied, the Constitutional Court in *Coca-Cola* would have still found that the sugar tax and its effects constituted a *novus actus* which disrupted the causal link between the merger and retrenchments because it is an act which took place after the merger had been consummated (about two years after), with the retrenchments subsequently being made due to the effects of this new intervening act on the business of the merged entity. It follows that the legal causation leg of the test will assist in determining whether the merger was the dominant, primary driver or "principal" reason for the retrenchments.

4 3 "Merger-Specific" versus "Merger-Related": Semantics or a Gap in Legal Certainty?

At this point, we should turn to the distinction between merger-specific and merger-related. The Tribunal and the courts have used merger-specific and merger-related interchangeably over the years. For the most part, it seems consensus has been that retrenchments must be specific to a

87 Munyai 2017 *Obiter* 492.

88 *Ibid* 490.

89 2013 2 SA 144 (CC).

90 *Lee v Minister of Correctional Services* para 41.

91 *Ibid* para 49.

92 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* paras 66–67.

93 Snyman *Snyman's Criminal Law* 7 ed (2020) 72.

94 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 61.

merger.[95] The PI Guidelines 2016 adopted the merger-specific standard in assessing whether a merger would or has had a substantial adverse effect on employment.[96] The PI Guidelines 2024, on the other hand, appear to have shifted toward merger-related as the operative term.[97] This raises important conceptual questions: What is the origin of these terms? Are they interchangeable, or does each carry distinct implications for assessing retrenchments? Which is more appropriate to use if it is the effect that must be evaluated?

While neither term appears in the text of section 12A(3), merger jurisprudence from as early as the Competition Act's inception sheds some light in this regard. For instance, the Tribunal imposed a condition on employment in the merger between *Telkom SA Ltd and Praysa Trade*[98] in 2000, ordering that the merged entity may not retrench "as a direct result" of the merger for a period of 20 months from the approval date.[99] The latter judgment was one of the first that the Tribunal delivered after the enactment of the Competition Act in 1998. In *Daun et Cie AG and Kolosus Holdings Limited,*[100] the Tribunal remarked that the interventionist role of the competition authorities is premised on the powerful link between direct employment loss and restructuring initiatives such as mergers.[101]

These decisions, among others, saw the emergence of merger-specific and merger-related concepts and laid the groundwork for the now-familiar requirement that there must be a link between a merger and retrenchments.[102] Although there is no explicit mention of these two concepts in *Praysa* and *Daun et Cie AG*, the Tribunal's remarks in this judgment essentially allude to the fact that there must be a link between a merger and retrenchments. This interpretation is consistent with both section 16(3)(ii) of the initial Competition Act (that is, before any subsequent amendments to the Act after 1998) and the current section 12A(3), which both require that the merger must have an "effect" on employment.

The notion of an "effect" conveys that the legislature envisaged and still envisages a cause-and-effect relationship between a merger and retrenchments. In this relationship, the cause is responsible for bringing about the effect; thus, there exists a link between the two. The cause then becomes "specific" to the effect if it is the one thing responsible for the effect and can be distinguished or isolated from other potential causes. Therefore, if a merger is found to be the direct cause of retrenchments, then it suffices that the retrenchments are merger-specific or merger-related, as the courts have held. However, from a linguistic perspective, the terms "specific" and "related" are not synonymous. For example, if the retrenchments are "specific" to the merger, this means they are uniquely a result of the merger and not any other cause or situation. On the other hand, "related" indicates a connection or association between two or more things, which also implies a link.[103]

However, the link espoused by the word "related" appears broader and more relaxed, and the effect need not necessarily be a direct or unique result of the cause to establish a connection.

95 The Tribunal in *Minister of Economic Development v Competition Commission* paras 137–146 refers to "merger-related" retrenchments. In *Metropolitan* paras 112–115 and *Coca-Cola v Competition Commission* para 46, the Tribunal also refers to "merger-related" retrenchments. In *BB Investment* paras 54–57 and *Competition Commission v Coca-Cola* para 71, the Tribunal and Competition Appeal Court use the term "merger-specific".

96 PI Guidelines 2016 para 8.1.2.1.

97 PI Guidelines 2024 para 6.2.3.3.

98 2000 ZACT 43.

99 *Praysa* para 43.

100 2003 ZACT 49.

101 *Daun et Cie AG* para 126.

102 2001 ZACT 17 para 30.

103 *Ibid*.

The use of “related” arguably aligns with the first leg of the test in *BB Investment*, and was later endorsed by the CAC in *Coca-Cola*, which prescribes an inquiry for only “some nexus”. The authors submit that merger specific is more appropriate to use if a “direct’ link is required for a finding that a merger has adversely affected employment. The Constitutional Court’s insistence on a causal connection also affirms that “related” does not in itself mean that the link is direct, hence the court expressly held that the relation must be direct and predominant, and not merely just a relation.[104] This usage is more precise and effectively removes all other causes, such as economic conditions or other operational requirements, and grounds the finding of merger specificity in retrenchments being a direct result of the merger.

Nevertheless, the PI Guidelines 2024 (which came after the Constitutional Court judgment) have replaced “merger-specific” with “merger-related”. The potential for confusion remains, especially given the non-binding nature of the Guidelines. Section 79(4) of the Competition Act provides that, although non-binding, they must be considered when interpreting or applying the provisions of the Act. To this end, the PI Guidelines serve merely as advisory tools, which limits their legal authority. Changole *et al.* go so far as to say that, generally, PI Guidelines are “primarily for informational purposes”.[105] The Constitutional Court’s interpretation is thus the authority, and it clearly favours a stricter “merger-specific” standard grounded in causation. However, the authors submit that the competition authorities and merging parties alike should consistently adopt a merger-specific standard as the governing standard, and this should be clear in the PI Guidelines.

5 CONCLUSION

The judgment in *Coca-Cola* underscores that the test for whether retrenchments are specific to a merger must be interpreted contextually and purposively. Much as the use of the test had since been acknowledged in judgments such as *BB Investment*, *Walmart* and the Tribunal’s decision in *Competition Commission v Coca-Cola*, the Constitutional Court has recognised that not all retrenchments which occur before or after mergers are a direct result of them. This decision will therefore protect merging parties from being held liable for retrenchments which are not specific to the merger, while still allowing the competition authorities to enforce conditions where a demonstrable causal link between a merger and retrenchments exists. The legislature certainly did not envisage that its safeguards in section 12A(3) would undermine strategic decision-making by businesses when they need to retrench for structural or other economic challenges justifiable as operational reasons. Accordingly, this is a welcome development in assessing what constitutes “merger-specific” retrenchments when firms merge.

104 *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* para 68.

105 Changole *et al.* 2022 *Review of Industrial Organization* 4.