



## **BACKGROUND**

1. This case has been before the Competition Tribunal (“Tribunal”), the Competition Appeal Court (“CAC”) and the Constitutional Court.
2. The genesis of this matter arises from a commercial agreement entitled the “Commercial and Master Channel Distribution Agreement” concluded between the SABC and MultiChoice on 3 July 2013 (“the Agreement”).
3. Application to the Tribunal
  - 3.1. The matter was brought directly to the Tribunal by Caxton and CTP Publishers and Printers Limited (“Caxton”), The Trustees for the time being of the Media Monitoring Project Benefit Trust, and S.O.S Support Public Broadcasting Coalition, (collectively Caxton and Others). The complaint raised by Caxton and Others at the Tribunal was that the Agreement constitutes an intermediate merger in terms of section 12(1) of the Competition Act 89 of 1998, as amended (the “Act”), which should have been notified as such in terms of section 13A(1) of the Act.
  - 3.2. On the evidence before it, the Tribunal concluded that the Agreement concluded between SABC and MultiChoice does not amount to a merger as contemplated in section 12(1) of the Act.
4. Appeal to the CAC
  - 4.1. Caxton and Others noted an appeal against the decision and order of the Tribunal to the Competition Appeal Court (“CAC”). On 24 June 2016 the CAC handed down its judgment in the matter and, on the evidence before it, concluded that the agreement concluded

between the SABC and MultiChoice did not give rise to a notifiable merger as follows:

- 4.1.1. In respect of the Entertainment Channel complaint, that is, the contention that the agreement conferred control on MultiChoice over the SABC's archives, the CAC found that a license to exploit an asset for a limited period "*on its own and without more cannot constitute a merger transaction.*"<sup>1</sup>
- 4.1.2. Regarding the encryption complaint, that is, that the agreement conferred control over the SABC's policy on encryption, the CAC found that "*on analysis of the evidence provided, it could not be concluded that the agreement fell within the definition of a merger in terms of section 12 of the Act.*"<sup>2</sup>
- 4.2. The CAC then concluded that since this case concerns a public broadcaster and is a matter of public interest, a less formalistic and more substantive approach to the case was required."<sup>3</sup> The CAC then issued an order:
  - 4.2.1. Setting aside the order of the Tribunal;
  - 4.2.2. Directing the SABC and MultiChoice "*to provide the Competition Commission within 21 days of this judgement of all documentation including but not limited to all correspondence, board minutes, internal memoranda pertaining to the negotiation, conclusion and implementation of the agreement of 3 July 2013*";
  - 4.2.3. Directing the Commission to "*within 30 days of the receipt of the aforesaid information and documentation to file a report with the Competition Tribunal recommending whether or not the agreement gives rise to a notifiable change of control.*"
  - 4.2.4. If the Commission recommends that "*the agreement gives rise to a notifiable change of control which falls within the definition of a merger in terms of section 12 of the Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal*

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<sup>1</sup> Paragraph 48 of the judgment

<sup>2</sup> Paragraph 109 of the judgement.

<sup>3</sup> Paragraph 11 of the judgement.

*to determine whether the conclusion of the agreement did entail such a merger as defined”.*

- 4.3. It is in the context of the above order of the CAC that SABC and MultiChoice respectively, filed documents with the Commission on 25 July 2016, and the parties and the Commission had various interactions which gave rise to a dispute that was heard by the CAC and then the Constitutional Court.
- 4.4. The essence of the dispute related to the documents that were submitted by the SABC and MultiChoice which, in the Commission’s view, were inadequate and therefore failed to meet the order of 24 June 2016. The Commission sought to use its investigative powers in terms of section 49B of the Act to interview the executives of both the SABC and MultiChoice and obtain the information which was clearly lacking from the documents submitted. The SABC and MultiChoice opposed the Commission’s intention to interview their executives who had participated in the negotiation, conclusion and implementation of the agreement.
- 4.5. On 4 October 2016, the Commission dispatched a letter to the Tribunal seeking a directive on whether it is entitled to conduct interrogations of certain executives of the SABC and MultiChoice in terms of Part B of Chapter 5 of the Act. On 6 October 2016 MultiChoice responded to the Commission’s letter and the SABC responded on 11 October 2016. Both MultiChoice and the SABC stated that the Commission does not have the powers to conduct interrogations in terms order of the CAC. On 11 October 2016 the Tribunal issued a directive stating that it does not have jurisdiction to issue directions for further conduct of the proceedings or for the further interpretation of the order of the CAC.

## 5. Application to the CAC

- 5.1. As a result of the dispute between the Commission and SABC and MultiChoice, on 13 October 2016 Caxton and Others brought an application before the CAC seeking an order the Court to interpret its 24 June 2016 order as permitting the Commission to use its investigative powers in terms of section 49B of the Act, or to issue a fresh order enabling the Commission to use its investigative powers.

- 5.2. The CAC held in its judgment of 28 April 2017 that its order – i.e. its order of 24 June 2016 – did not and cannot be read to grant the Commission powers in terms of s49B of the Competition Act. It held further that the order was clear and unambiguous and that it expressly confined the source of the inquiry to be conducted by the third respondent exclusively to documentation as set out in the order.
- 5.3. This meant that the Commission would have been limited to the documents furnished to it by MultiChoice and the SABC. Further that if there are any gaps in the documents furnished it could not request any of the executives of the two entities to explain the gaps in the documents. It also meant that the Commission could never subpoena any of the past or present employees and executives of the two entities to give oral explanations regarding the circumstances surrounding the conclusion of the Agreement.

## 6. Appeal to the Constitutional Court

- 6.1. Caxton and Others brought an application for leave to appeal to the Constitutional Court on 22 May 2017 concerning the ambit of the powers of the Commission in carrying out its investigation into the merger issue. The Commission supported the application for leave to appeal brought by Caxton and Others. Before the hearing of the matter by the Constitutional Court, Caxton and Others sought to withdraw the application for leave to appeal. The Commission wrote to the Constitutional Court stating that the application for leave to appeal should proceed as set down by the Constitutional Court. The Constitutional Court issued a directive that the matter would proceed as set down and oral arguments were presented by Caxton and Others, the Commission, the SABC and MultiChoice on 23 November 2017.
- 6.2. On 28 September 2018 the Constitutional Court handed down its judgment and order overturning the decision and order of the CAC. The Constitutional Court's order reads as follows:

*“[90] In the result the following order is made:*

- 1. Leave to appeal is granted.*

2. *The appeal is upheld, and the Competition Appeal Court's order of 28 April 2017 is set aside and replaced with following:*
- (a) *It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.*
- (b) *The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order, within 30 court days of this order*
- (c) *The first and second respondents are ordered jointly and severally to pay the costs of the application, including costs of two counsel"*

- 6.3. Pursuant to the order of the Constitutional Court the Commission invited various former and current executives of the SABC and MultiChoice to come and give evidence under oath.
- 6.4. The SABC and MultiChoice submitted further documents to the Commission arising from the oral testimony of the witnesses.

## **DOCUMENTS SUBMITTED BY MULTICHOICE**

7. MultiChoice submitted various documents pursuant to the order of the CAC on 24 June 2016.
8. The documents submitted by MultiChoice did not contain business plans, Board Minutes or documents presented to the Board, or any strategic documents relating to the negotiation and conclusion of the Agreement.
9. The representatives of MultiChoice confirmed when they were giving oral evidence that such documents do not exist. The representatives of MultiChoice could not remember some of key information that the Commission requires to assess if the Agreement led to a merger.

## **DOCUMENTS SUBMITTED BY THE SABC**

10. The SABC submitted various documents relating to the negotiation, conclusion and implementation of the Agreement. The documents were analysed by the Commission. The documents submitted to the Commission show that there was a change in the policy of the SABC in 2013 which may have resulted from the negotiation and conclusion of the Agreement.

## **COMMISSION'S ANALYSIS**

### **Entertainment Channel**

11. The Agreement before it was amended was very restrictive in what the SABC could do with the content licensed to MultiChoice in respect of the Entertainment Channel. This led to further negotiations on the amendments to the Agreement. The amendments to the Agreement all relate to the Entertainment Channel. The amendments were effected before the launch of the Entertainment Channel in 2015.

12. On the basis of the evidence made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as completed in section 12(1) of the Act for, inter alia, the following reasons:

12.1. At all times the SABC had the final say on what went onto the channel. Thus the SABC set up the Entertainment Channel as it deemed fit in terms of content and scheduling;  
and

12.2. MultiChoice did not have access to the SABC archives and did not control the archives save to request certain programmes to be included on the channel.

## Encryption

13. The position communicated by officials of the SABC showed that the policy of the SABC with regards to STB Control was vacillating from time to time.
14. The evidence provided to the Commission indicates that the policy of the SABC changed materially as a result of the Agreement.
15. The minutes of the SABC Board and other internal documents made available to the Commission do not point to a clear decision by the Board to support non-encryption prior to at least the signing of the Agreement in July 2013 and this is consistent with other evidence provided to the Commission. The minutes of the SABC Board and other internal documents provided to the Commission rather point to the existence of a stance supporting encryption at least up to after signature of the Agreement.
16. On a consideration of evidence before the Commission as a whole, the Agreement influenced the SABC's policy on encryption. The CAC in *Distillers Corporation South Africa Limited and Another vs Bulmer (SA) (Pty) Ltd*<sup>4</sup> stated the following:

*“It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation to section 12 of the Act”.*<sup>5</sup>

17. Being able to influence a policy on encryption materially impacted the structure of the market in that it protected Multichoice's dominance in the PayTV market in that the STB Control would have enabled new DTT entrants into the market that would have significantly challenged the dominance of MultiChoice particularly at lower LSM segments of the market.

## CONCLUSION

18. In light of the above, the Commission concludes as follows:

18.1. In respect of the Entertainment Channel the Agreement, on the basis of the evidence

<sup>4</sup> CAC Case Number 08/CAC/MAY01.

<sup>5</sup> Ibid at at page 24.

made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as contemplated in section 12(1) of the Act; and

- 18.2. In respect of the encryption case, the Agreement the Agreement resulted in a notifiable change of control as envisaged in section 12(2)(g) of the Act.

## **RECOMMENDATIONS**

19. In view of the fact that the Commission has concluded that the Agreement constitutes a merger as contemplated in section 12(1) of the Act, the Commission recommends that the following procedure should be followed in disposing of the matter:

19.1. The current application launched Caxton and Others which is currently before the Tribunal as a result of the 24 June CAC order, should be postponed sine die pending the processes mentioned below:

19.1.1. The Commission will call upon MultiChoice and SABC to file the transaction in terms of section 13A(1) of the Act as a merger; and

19.1.2. The Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that there has been a contravention of section 13A of the Act.

19.2. This recommendation is consistent with the judgement of the Constitutional Court that the 24 June 2016 CAC order does not limit the powers of the Commission to investigate cases where there is implementation of a merger before it is approved by the competition authorities as that power is derived from the Act. The application by Caxton and Others similarly does not take away the Commission's powers in terms of the Act to refer a prior implementation case where it has found that a merger has occurred.