REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

In the matter between:- CASE NO: 140/CAC/MAR16

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED	First Appellant
THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST	Second Appellant
S.O.S. SUPPORT PUBLIC BROADCASTING COALITION	Third Appellant
and	
MULTICHOICE PROPRIETARY LIMITED	First Respondent
SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED	Second Respondent
THE COMPETITION COMMISSION	Third Respondent

JUDGMENT: 24 JUNE 2016

DAVIS JP and BOQWANA AJA (VALLY AJA separate judgment)

Introduction

[1] This appeal concerns the nature of a "Commercial and Master Channel Distribution Agreement" concluded between first respondent and second respondent

during July 2013 ('the agreement') and, in particular, whether it gives rise to a merger within the meaning of s 12 (1) of the Competition Act 89 of 1998 ('the Act').

[2] The concept of a merger transaction and hence which transactions fall within the scope of a merger review lies at the heart of this dispute. The definition of a merger transaction which is to be subjected to the scrutiny of competition authorities seeks to identify those transactions which are "suitable" for merger review. By suitability, we mean that the transaction in question could lead to consequences that are in conflict with the chosen policy goals of the competition law regime. Expressed differently, the focus is on whether the transaction may lead to structural changes in the relevant market and, accordingly, whether there is a reasonable likelihood that the transaction could interfere detrimentally with a competitive market outcome.

[3] The purpose of developing the concept of a merger transaction which is clear, predictable and comprehensible is to ensure that the system of merger review targets transactions that may lead to structural and durable changes in the market place and therefore hold the likelihood of substantially preventing or lessening competition. At the same time, the system should avoid the review of transactions that might pose no competitive risks or could be more appropriately be dealt with by different instruments. Viewed within the context, the goal must be to minimise the costs resulting from what are referred to as type I errors, by ensuring that transactions that raise no competitive problems do not have to be notified, while preventing type II errors, that is problematic transactions that might otherwise escape a merger review. See in general, OECD working party No 3 on Co-Operation and Enforcement: 'The Concept of a Merger Transaction 18 June 2013.

The relevant provisions of the Act

[4] In terms of s 13 A (1) the party to an intermediate or a large merger must notify the Competition Commission of that merger in the prescribed manner and form. Section 13 A (3) provides that the parties to such a merger may not implement the merger until it has been approved with or without conditions by the Competition Commission in terms of s 14 (1) (b), by the Competition Tribunal in terms of s 16 (2) or the Competition Appeal Court in terms of s 17 of the Act.

[5] For a transaction to require a notification, two elements must be satisfied.

(i) The transaction must comply with a definition of "merger" as contained in s 12 (1) of the Act; and

(ii) The relevant financial thresholds must be met. This is not an issue in the present dispute.

[6] A merger is defined in s 12 (1)(a) of the Act as occurring 'when one or more firms directly or indirectly acquire(s) or establish(es) direct or indirect control over the whole or part of the business of another firm'. Section 12 (1) (b) provides that this control can be achieved in any manner. The section then sets out a non-exhaustive list of transactions that may give rise to an acquisition of control by a firm, including the purchase and lease of assets. Of equal relevance is s 12 (2) (g) of the Act, which provides that a person controls a firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f) of s 12 (2) of the Act.

[7] Before dealing with the current jurisprudence which has interpreted these sections, we must turn to a description of the agreement.

The agreement

[8] The agreement concerns the licensing of certain rights in respect of television channels for a period of five years. The key components of the agreement are:

1. An Entertainment channel, being on entertainment channel to be developed and produced by second respondent for first respondent in respect of which first respondent will have, subject to qualifications, exclusive distribution and marketing rights.
2. A News channel, being a 24 hour news channel, to be developed and produced by second respondent for first respondent in respect of which first respondent will have, subject to qualifications, exclusive distribution and marketing rights.
3. The SABC Digital FTA channels, that is the free to air channels which will in the future be transmitted by second respondent on its digital terrestrial television platform ('SABC DTT Platform') and in respect of which first respondent will have non-exclusive distribution marketing rights.
4. The MultiChoice Digital FTA channel, that is a free to air entertainment channel, to be provided by first respondent to the second respondent for distribution in the future on the SABC DTT Platform and in respect of which the first respondent will have non-exclusive distribution and marketing rights.

[9] The two key components which were the subject of the present dispute concerned the Entertainment channel and the FTA channels. It is therefore necessary to deal with these provisions in somewhat more detail.

The Entertainment channel

[10] The agreement contemplates that the entertainment channel will be created from materials sourced in the archives of second respondent. First and second respondent shall meet (as soon as possible after the signing of the agreement) to discuss the scheduling and precise details of the content of the entertainment channel. Second respondent was required, pursuant to this meeting, to deliver to first respondent "a comprehensive presentation" which should provide "precise details" as to the content, programming schedule, name, broadcast hours and detailed costs of the channel. First respondent will "convey its content, programming and scheduling requirements" and raise any concerns that it might have with the proposal of second respondent. Thereafter, a detailed "content description schedule" will be incorporated into the agreement. In the event that the parties are unable to agree on this schedule, first respondent has the right to terminate the agreement. The content for this channel will be owned by second respondent as it will be sourced from its archives.

[11] The agreement provides that first respondent will have exclusive rights to broadcast the entertainment channel in "the territory", which is defined as all of Africa, subject to clearances which second respondent is able to procure from countries other than South Africa. It is then required to inform first respondent which will be able to broadcast the channel in other parts of the continent, save for South Africa,

where it is clear that there is such a clearance. In certain circumstances; second respondent is precluded from distributing or authorising anyone else to distribute the entertainment channel or any branded block or substantially similar channels. It may distribute the entertainment channel on its wholly owned services, on condition that there is, at all times, a specified delay of 60 days following the first broadcast of the channel on any system of first respondent, in which case it must be broadcast by second respondent in exactly the same format and according to the same schedule as broadcast by first respondent but subject to the delay clause.

[12] First respondent has the right to monitor the performance of the entertainment channel and, if the performance falls below a certain specified benchmark, the fees paid by first respondent for the distribution of the entertainment channel will accordingly be reduced.

The FTA Channels

[13] First respondent is to provide second respondent with a MultiChoice FTA channel, for the second respondent to distribute on its DTT Platform. First respondent will grant second respondent a non-exclusive license to receive, distribute and market this channel in South Africa during the term of the agreement. First respondent will be responsible for any costs of delivery of this channel; that it for any new transmission equipment. Second respondent grants to first respondent a non-exclusive right to distribute and market SABC FTA channels in South Africa (at present SABC 1, 2 and 3). The parties agree to discuss in 'good faith' the terms for first respondent to distribute these channels in the rest of Africa.

[14] In terms of clause 4.3.1 read with clause 2.1.6 of the agreement, second respondent undertakes not to transmit its FTA signals unencrypted, but in a way that would be receivable by first respondent's set top – boxes for the duration of the agreement. Clause 2.1.6 of the agreement provides:

> 'The Channel Signals for the SABC FTA channels as transmitted in South Africa would at all times be available to and receivable on the M-Net DTT Set-Top Boxes distributed in South Africa. The SABC agrees that the SABS FTA channels will not at any times be encrypted or allow any conditional access system to be applied in respect of the Channel Signals for the SABC FTA channels transmitted on the SABC DTT Platform in South Africa so that viewers are able to view the SABC FTA Channels without requiring anything other than the installation of an M-Net DTT Set-Top Box.'

[15] In the event that second respondent transmits any of its FTA channels on an encrypted list basis so that they are not freely available for any viewer with a M-Net STB, first respondent is afforded the right to terminate the agreement or continue to broadcast these channels without paying any fees to second respondent in terms of clause 7 of the agreement.

[16] It appears that, in consideration for the grants of these rights to first respondent and the supply of the Pay TV channels first respondent has agreed initially to pay second respondent R 553 m, 60% of which amount is allocated to the entertainment channel and 40% to the news channel. There have been subsequent amendments to this clause but these are not particularly relevant to the present dispute.

The Tribunal's decision

[17] In dismissing appellants case to compel first and the second respondents to notify third respondent of acquisitions of control which arose from the agreement, the Tribunal found that there was no transfer of productive capacity; that is the rights to use some of second respondent's archive did not constitute the transfer of a part of second respondent's business to first respondent. In terms of the agreement, the Tribunal held that the second respondent did not transfer market share or a business to first respondent. The contrary suggestion by appellants was found to be an inference unsupported by the facts. The Tribunal also emphasised that the agreement was limited to five years and hence did not have the necessary permanence. It held further that comparative authority suggested that, for an agreement to be considered to be 'relatively permanent' and thus to have the characteristics of relative permanence, the agreement had to endure for a period of much longer than five years. For these reasons the Tribunal found that the acquisition of rights pursuant to the agreement did not amount to a transfer of the business.

[18] The Tribunal further held that the appellants had failed to establish the issue should have been determined by government policy and by industry players respectively with regard to the question of encryption. Accordingly, these issues fell outside the strict ambit of s 12 (2) (g) of the Act. Hence; the agreement regarding encryption and access between first and second respondents could not be held to constitute control by first respondent over second respondent's business. The Tribunal expressed the point thus:

> 'On the present record we do not have enough clarity on what issues will be determined by governmental policy and which will still be determined by industry

players, assuming that they still have some freedom of choice in these respects. However, to the extent that they do not, then the policy issue is not one of a firm as 12 (2) (g) requires, but that of government bringing the issue outside of the ambit of that subsection.' (para 97)

The appellants' case

[19] As indicated, appellants concentrated on two key components of the agreement; that is the entertainment channel and the provisions of the agreement relating thereto as well as upon the provisions regarding encryption. We turn first to the provision relating to the entertainment channel.

[20] In his most able argument, Mr Budlender, who appeared together with Mr Marriot and Ms Msimang for appellants, submitted correctly that s 12 (1)(b) of the Act recognises that an agreement to lease the shares, interest or assets of another firm may give rise to an acquisition of control. Accordingly, a license agreement which also constitutes a grant by the licensor of the right to use the assets in question to the licensee must be capable of transferring control over the licensed asset to the licensee as envisaged in s 12 (1)(a) of the Act.

[21] The agreement results in first respondent acquiring control over a material portion of the archives of second respondent, a most significant asset. In particular, the agreement provided that second respondent's grant to first respondent of an exclusive license to broadcast a channel, the content of which is to be determined jointly by the respondents pursuant to the agreement, was to be constituted of programmes sourced in the archives of second respondent. Appellants contended that these provisions fell within the scope of s 12 of the Act.

[22] The agreement also included a restraint imposed upon second respondent not to distribute or to authorise any other party to distribute the channel, any adaption, part version or individual program, which formed part of the channel and any branded block or substantially similar channel.

[23] On the basis of this reading of the agreement, Mr Budlender submitted that, by granting this license, the second respondent had divested itself of the right to use or otherwise exploit the content of the channel either individually or as a package. Although the copyright in the archive remained with second respondent, it no longer controlled this key asset because it could not exploit any of it for its own commercial purposes, save in the limited circumstances set out in the agreement, and subject to the time delay to which we have referred. In Mr Budlender's view, it was not simply the archived content which was significant. The restraint prevented the second respondent from licensing "any substantially similar channel" to the entertainment channel to a third party for the duration of the agreement. Accordingly any "reruns" by second respondent in operating another channel of archived entertainment material would clearly be "substantially similar" to the entertainment channel and would fall foul of the restraint.

[24] In seeking to illustrate the value of the right, Mr Budlender referred to the conservative estimate that a R 200 m fee, including payment for the entertainment content restraints, had been paid by the first respondent to second respondent. In his view, this hefty fee supported the further submission, that an independent channel wholesaler would manifestly be able to operate a viable self-standing business, even if it had no assets other than the copyright in these programs. The acquisition of the copyright in these programmes enabled the acquirer to access the channel

wholesaler market and to produce a market turnover within a reasonable timeframe. The assets thus constituted part of a business within the meaning of the Act.

[25] Furthermore, given that the exclusive licensee, being first respondent was the only party able to exploit the licensed asset for so long as the license remained in place, it was clear that first respondent had acquired control over the relevant assets, sufficient to bring the transaction within the scope of s 12 of the Act.

Duration of agreement

[26] Turning to the duration of the agreement, Mr Budlender referred to the decision of this Court in *Goldfields Limited v Harmony Gold Mining Company Limited and another* [2005] 1 CTLR 74 (CAC) at 91 to the effect that there was no basis for a distinction to be drawn between short and long term control, particularly when the wording of s 12 (2) (g) is carefully considered. In its *Goldfields* decision this Court found that an acquiring firm, pursuant to the relevant agreement, would be able to:

> 'Effect a permanent and irreversible change to the very structure of its competitor; at the very least it will be able to materially interest a key policy of appellant by ensuring that appellant's long-term strategy of entering into the IAMGold transaction could not be implemented.' (para 92)

[27] The appellant's argument is that an agreement of "only" five years duration must be understood within the context of the specific business model of the television industry which has been undergoing fundamental transformation in recent times. The migration to DTT, for example, represents a significant move in the direction of media convergence. The whole country will be required to obtain STB's if a person wishes to continue viewing television. The migration to DTT therefore represents a

unique opportunity for broadcasters to capture more viewers than subscribers on a scale not previously experienced in South African broadcasting history. Control over first respondent's archival content will ensure that the ability of any other broadcaster to make significant inroads into the relevant market will be seriously undermined, particularly as first respondent will be able to offer access to lower LSM groups who watch local content primarily through second respondent's channels.

[28] In Mr Budlender's view, no other broadcaster will be able to match the offering of first respondent. In further support of this argument relating to how the duration of the exclusivity is to viewed in the context of the broadcasting industry, Mr Budlender referred to *United States v Columbia Pictures Corporation* 189 F. Supp 153 (SDNY 1960), a decision of the US District Court for the Southern District of New York. In this case the court was concerned with an agreement that had been concluded between a wholly owned subsidiary of Columbia Pictures and Universal Studios. This subsidiary had acquired exclusive television licenses for fourteen years to show over 600 pre 1948 feature films from the Universal Studios. It would receive a percentage of the income from distributing these firms and would pay Universal a minimum annual fee. There was an exclusive but time limited right to broadcast part of Universal Studios' valuable archives.

[29] The court held that this agreement constituted an acquisition of control over assets and fell to be assessed for its potential anti-competitive effects. In particular, the court held that the fact that the agreement was time bound did not preclude a conclusion that a change of control had occurred because:

> '"Pre-1948 feature films" are a product of finite quantity. There is a fixed inventory of that product. It cannot be replenished. Moreover, it is a continuously depleting property in the sense that, with each repeat or rerun, its economic value approaches zero... (at 13)
>
> The diminishing competitive position of Screen Gems must also be viewed in light of the fact that a considerable proposition of the value of a given feature is consumed by the first showing.' (at 65)

The test for transfer of a partial asset acquisition

[30] Much of appellants' arguments in attacking the decision of the Tribunal turned on its approach in *Competition Commission v Edgars Consolidated Stores Limited* [2003] 1 CPLR 151 (CT) at para 37 where the Tribunal adopted a test for partial asset acquisition in the case of a merger as proposed by USA academic Professor Herbert Hovenkamp. In its decision, the Tribunal cited Hovenkamp with approval when the learned author stated:

> 'Anti-trust policy becomes concerned with partial asset acquisitions when the asset that changes hands represents a measurable and relatively permanent transfer of market share or productive capacity from one firm to another.' cited at para 33 of the Tribunal's decision

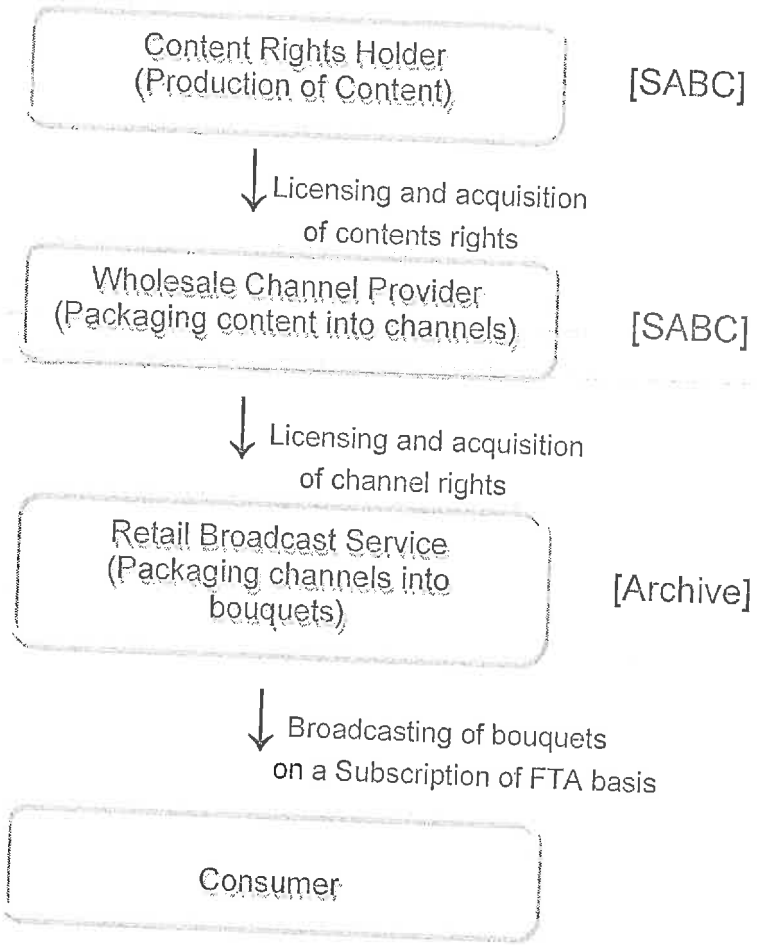
[31] Mr Budlender correctly cautioned that a test developed in the United States needs to be viewed within the merger notification regime in which the test was developed. Thus s 7 of the Clayton Act provides:

'No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.'

[32] It is thus correct that the Clayton Act does not provide for the notification of mergers. This however, does not mean that there is no merit in the broad approach developed by Professor Hovenkamp. Accordingly, Mr Budlender, in the alternative, submitted that the agreement between respondents satisfied the Hovenkamp test because it served to transfer productive capacity from second to first respondent in the upstream market for wholesale channel provision and further restrained the second respondent from increasing its market share and increasing first respondent's market share in the downstream market for broadcasting.

Respondent's case

[33] Central to the respondent's case was an analysis of the television industry as developed by first respondent's expert economist, Mr James Hodge. Mr Hodge described the television broadcasting value chain as comprising of three markets in a vertical relationship to each other; the production of content and licensing of rights by content rights holder, the wholesale channel provision by channel providers and retail broadcast service provision to consumers. According to Mr Hodge, the chain can be depicted thus:



[34] Following on this description, first respondent contends that, given vertical integration in the industry, a retail broadcaster may also license content or channels from another retail broadcaster. If a vertically integrated firm in any industry is to sell output from an upstream division to third parties, by its very nature, this will be to potential rivals of its downstream division.

[35] First respondent points to the affidavit of Mr Imtiaz Patel, the group CEO of first respondent, who states that over the years first respondent has concluded channel licensing agreements with a number of channel providers which were also

broadcasters in the South African market. On this basis, first respondent characterised the agreement as a commercial arrangement between vertically integrated providers at different levels of the broadcasting value chain, in terms of which an upstream wholesale channel provider has agreed to supply the others, as downstream retail service providers with channels. In particular, it was contended that second respondent had sought to maximise value in an asset by licensing first respondent to exploit the archive.

[36] Turning to the question of exclusivity Mr Patel states in his affidavit:

> 'There is nothing unusual about a channel distribution agreement between a vertically-related channel provider and retail broadcaster which happen to compete against one another in the downstream market for retail broadcasting services.'

Mr Patel continues:

> 'As a matter of commercial sense and practice, a retail broadcaster which acquires a new channel which is not already broadcast in the territory will require a measure of exclusivity in respect of the rights for which it is paying, whether or not the parties compete with one another in the downstream market. Where the channel provider is itself a retail broadcaster, the protection of exclusivity will necessarily involve restriction on the channel provider's right to broadcast the channel.
>
> For the licensee, exclusivity enables it to differentiate its content offering from that of other broadcasters. It also incentivises the licensee to invest in marketing the content, without others free-riding on its efforts. For the licensor, exclusivity enables it to realise significantly higher value for the content.'

[37] First respondent's expert economist Mr Hodge also referred to the Hovenkamp test, to which we have already made reference, as well as the subsequent refinement by Areeda and Hovenkamp that there must be 'an acquisition of a going (even though failing) concern or its equivalent involving an immediate and relatively permanent transfer of market share from one to another ... corporation.'

[38] On the basis of this approach, first respondent contends that the test formulated by Hovenkamp and later refined by Areede and Hovenkamp was designed to ensure that normal market transactions involving the sale of output to a downstream firm which, in turn, uses these outputs and the production process to potentially improve its market share in the downstream market including licensing agreements should not be captured under the scope of a merger transaction.

[39] First respondent also noted that, in terms of the EU Jurisdictional Notice at para 28 'a change of control on the lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time provided those agreements are renewable. A concentration may arise even in cases in which agreements envisaged a definite end – date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned.

[40] It is for this reasons that, it was found that in terms of an agreement, control for a period of between 10 – 15 years was sufficient to establish lasting control for the purposes of a merger but a period of three years was clearly insufficient. See *Lehman Brothers /SCG /Starwood / le Meridian* Case No P/M 3858 at para 9.

[41] In support of these arguments, second respondent contended that first respondent does not have control over material portion of the archive of the second

respondent. The material which will be employed for the production of the channel was only 0.6% of the total archived material. Such a miniscule percentage could not be regarded as material. Accordingly, second respondent contends that the appellants' attempt to characterise the licence as an acquisition of sole control over second respondent's archives amounted no more than a right obtained through a license to broadcast exclusively for a defined and relatively short period. Further the content shown on the channel would make up less than 1% of the total content of the archive of second respondent.

Evaluation: Licensing Agreement

[42] The key question for the determination of this component of this case turns on the appropriate test for 'acquires or establishes direct or indirect control over the whole or part of the business for another firm. To recap: the Tribunal had followed its earlier decision in *Competition Commission v Edgars Consolidated Stores Limited* (2003) 1 CPLR 151 (CT) and hence the test developed by Hovenkamp, to which we have already made reference. The Tribunal had found that there had been no transfer of productive capacity from second to first respondent and that 'the rights to use some of the archive do not constitute the transfer to MultiChoice, of productive capacity that can be considered to be a business' (para 57). Further the Tribunal found that there was no sufficient evidence of a transfer of market share sufficient to fall within the concept of the transfer of a business.

[43] Appellants have now sought to rely on the Canadian Competition Act of 1985 and, in particular s 110 (2) of that Act, which provides for a merger notification threshold for asset acquisitions as follows:

'110 (2) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of any of the assets in Canada of an operating business if the aggregate value of those assets, determined as of the time and in the manner that is prescribed, or the gross revenues from sale in or from Canada generated from those assets, determined for the annual period and in the manner that is prescribed, would exceed the amount determined under subsection (7) or (8), as the case may be.'

[44] This provision is however made subject to a qualification in s 111 which provides for exemptions from merger notification for a series of classes of transactions including:

'An acquisition of real property or goods in the ordinary course of business if the person or persons who propose to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or an operating segment of the business.'

[45] The question is whether part of a business was transferred pursuant to the agreement. The first challenge is to formulate the appropriate test to apply to this inquiry. The Hovenkamp test of seeking to examine whether there has been a relatively permanent transfer of either market share or productive capacity from one firm to another is not entirely incongruent with other areas of South African law. There is, for example, a significant body of jurisprudence as to the meaning of the term "transfer of a business as a going concern" as set out in s 197 of the Labour Relations Act 66 of 1995. This phrase has been given meaning in a number of cases, including *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd* 2015 (6) BCLR 660 (CC) paras 36-37 and *Communication Workers Union and others v*

Mobile Telephone Networks (Pty) Ltd and another (2015) 36 ILJ 1989 (LAC). In this latter case at para 13, the Labour Appeal Court said:

> 'As this court remarked in *City Power* ... a court is required to examine the substance of the agreement to determine whether an entity retains its identity after a transfer so that it can be concluded whether the transferor carries on the same or similar activities with the same personnel and/or business assets without substantial interruption. As the court stated (in *City Power*);
>
> > *'[T]he questions is whether the activities conducted by a party such as first respondent [ie the old service provider] constitute a defined set of activities which represents an identifiable business undertaking* so that when a termination of an agreement between first respondent and appellant takes place, it can be that this set of activities, which constitutes a discrete business undertaking has now been taken over by another party."' (Emphasis added)

[46] Notwithstanding that this dictum sought to bring clarity to another Act, the approach constitutes a helpful amplification upon the Hovenkamp test; that is, was there a transfer of an identified set of activities and structures which can now be identified as a separate business undertaking and which could be pursued by the transferee. It gives content to the phrase "a merger occurs when one or more firms directly or indirectly acquire ... direct or indirect control over the whole or part of the business of another firm." In other words, the component of the business, which is transferred must have constituted part of the business of the transferor and has now been placed under the direct or indirect control of the transferee.

[47] The appellants were clearly cognisant of the difficulties which confronted them with regard to this requirement. It is for this reason that they argued that if the rights in the archived material, that are the subject of the license, were owned by an independent channel wholesaler, the latter could exploit those assets by packaging them into a channel and granting an exclusive license to broadcast the channel thereby generating revenue in the amount of R 200 million.

[48] It is understandable that the appellants would couch their argument in terms of ownership. A license to exploit an asset for a limited period on its own and without more cannot constitute a merger transaction. If it were so, it would mean that all licensing agreements of this nature would constitute mergers. This would trigger a plethora of either false positives or false negatives as described earlier in this judgment.

[49] As noted, reliance was placed by appellants on the judgment in *United States v Columbia Pictures Corporation supra*. This case however was based on entirely different facts as can be seen from the introduction to the judgment:

> 'The complaint alleges that the violations arise from the execution and subsequent performance of two interrelated agreements: an agreement entered into August 2, 1957, under which Screen Gems, a wholly-owned subsidiary of Columbia, was granted for approximately fourteen years by Universal the exclusive license to distribute for television exhibition approximately six hundred Universal feature films originally produced prior to August 1, 1948 for theatrical, exhibition; and an agreement, executed concurrently by the three defendants, under which Columbia guaranteed performance by Screen Gems of all the obligations under the distribution

agreement, and that Screen Gems would continue to be the exclusive licensee for television exhibition of substantially all Columbia pre-August 1, 1948 feature films.

Under the distribution agreement, Screen Gems undertook television distribution of the Universal feature films. Screen Gems was to receive certain specified percentages of the total income from such distributions, and guaranteed payment of Universal of annual minimums totalling $20,000,000 during the first seven years.

The Government alleges that the agreements themselves are agreements to fix prices, illegal *per se* under s 1 of the Sherman Act. It also alleges that, the distribution since August 2, 1957 of the universal and Columbia feature films by Screen Gems, prices were fixed and competition eliminated between Universal and Columbia *per se* in violation of s 1 of the Sherman Act.

The Government further alleges that the exclusive distribution rights received by Screen Gems constituted the acquisition of an asset within the meaning of s 7 of the Clayton Act, the effect of which may be substantially to lessen competition in the distribution of feature films for television exhibition in New York City and the contiguous areas known as Metropolitan New York.'

[50] Even if it could be argued that somehow the agreement to license first respondent could be analysed as a business within the meaning set out above, the wording of s 12 makes it clear that what has to be transferred is part of the transferor's business which is now transferred as "a going concern" to the transferee. No evidence on these papers was provided to suggest that what was transferred by second respondent pursuant to the agreement constituted a discrete business operation which prior to the agreement, had been run by second respondent. This

lack of evidence in itself reveals the difficulty of considering the agreement to be a notifiable transaction within the clear meaning of s 12 of the Act.

[51] There is a further difficulty concerning the period of the license; that is five years and as to whether this period is sufficient to meet the requirement of "a relatively permanent transfer". The EU Consolidated Jurisdictional Notice emphasises that the period of a license must 'be sufficiently long in order to lead to a lasting change in the control of the undertaking concerned in the structure of the market'. While there are suggestions that given the migration to DTT, and hence the rapidly changing nature of television in the country, a five year period is sufficient to change the structure of the market. Mr Patel, in his answering affidavit, contested the effect that this will have on the market as follows:

> 'The News Channel and the Entertainment Channel will enhance MultiChoice's local news and entertainment offerings respectively, add value for its existing subscribers, and promote retention of subscribers, but are unlikely to result in an expansion of its subscriber base. The SABC is entitled to broadcast the News Channel once it launches its DTT platform and may broadcast the Entertainment Channel subject to the qualifications set out in the Agreement.
>
> Any growth in MultiChoice's market share arising from the Agreement will not be at the expense of the SABS or e-tv, neither of which is in the subscription television market.'

[52] It is instructive in the evaluation of these arguments to explore appellants submission based *inter alia* on the decision of the *European Commission in the*

Novartis / Glaxosmithkline Oncology Business: Case No COMP / M7275. In this case the relevant parties signed a share purchase agreement based on which:

> 'Novartis will acquire sole control over GSK's portfolio of oncology pharmaceutical products composed of 10 marketed products and 2 pipeline products. These products are marketed or are in clinical development for the treatment of advanced cancers. The acquired business consists in transfer of rights, licences, marketing authorisations and employees necessary for commercialisation and R&D in respect of the oncology pharmaceuticals concerned.'

[53] Unsurprisingly the Commission came to the following conclusion:

> 'Absent the Transaction, Novartis and GSK's MEK inhibitors would likely have constrained each other in the potential market for targeted therapies for ovarian cancer. Based on the above, the Commission considers that the likely elimination of Novartis' pipeline MEK inhibitor following the Transaction will result in the loss of a credible competitor. Furthermore, there would not be any other player that would exert any competitive pressure on the merged entity post-Transaction.
>
> In light of the above and of all available evidence, the Commission concludes that the Transaction raises serious doubts as to its compatibility with the internal market as regards targeted therapies for the treatment of ovarian cancer because it would enable the merged entity to restrict competition through non-coordinated effects.' (paras 82-83)

[54] It is clear from the facts of the Novartis case that the nature of the transaction, into which the parties entered, notwithstanding the price that was paid, pursuant to the purchase agreement, created a level of such permanence, which on a further assessment of the facts, would clearly raise serious doubts for any responsible competition authority as to the competitive effects thereof. By contrast, the present

transaction set to ensure for the limited duration of five years and which limited contains the limited scope as set out above cannot on any basis, be classified as similar so as to justify the same application of legal principle.

[55] In summary, based upon the test that we have developed to apply to an asset transfer acquisition' there is no basis by which to conclude that part of the business which was conducted by second respondent was now run by first respondent. Furthermore, on the evidence available on the papers, there is insufficient evidence to conclude, on the probabilities, that market share will sufficiently be altered so as to meet a test which would distinguish a commercially based licensing agreement from a transaction which falls within the scope of s 12.

[56] A further difficulty which confronts appellants concerns the limited makes of the agreement. Appellants sought to use the authority of this Court's decision of *Goldfields Limited v Harmony Gold Mining Company Limited and another* [2004] ZACAC 91, to support the argument that a five year period could create a sufficiently significant degree of permanence so as to alter the structure of the relevant market.

[57] In the *Goldfields* case, a transaction was initiated in order that the purchaser would acquire the entire issued share capital of a company in exchange for the issue to the company's shareholders of new shares in the purchaser company. The offer was structured in two separate transactions: At the first stage the offer was made to acquire up 34.9% of the share capital in the target company. At the second stage a further offer would be made which had to commence the day after the consideration was settled in respect of the first offer. When the matter came before the Tribunal, it held, on the balance of probabilities, that it had not been established that the two

offers formed part of the single offer sufficient to acquire control and further that the first offer alone did not amount to a change or control for the purposes of a merger transaction.

[58] Applying a "substance over form", approach to the two transactions, this Court found that the purchaser 'will be able to effect a permanent irreversible change to the very structure of its competitor; at the very least it will materially influence a key policy of appellant by ensuring that appellant's long term strategy of entering into IAM Gold transaction could not be implemented'.

[59] The judgment in *supra*, must be taken to mean that following *Goldfields,* in an examination of the substance of the transaction, an irreversible effect on the competitive process would take place, once the first offer had been accepted.

[60] In the present case the only way in which the approach adopted in *Goldfields, supra* could be applied is on the basis of evidence which revealed that there would be an irreversible effect on the relevant market; that is to the effect that the agreement will necessarily bring about a lasting and fundamental change in the structure of the relevant market. Appellants' case was based upon the argument that the agreement, and with it control over second respondent's archival material, will effectively ensure that the ability of any other broadcaster, including second respondent, to make material inroads into the relevant market would be seriously undermined. On this argument, first respondent would be able to offer second respondent's FTA channels as well as enjoy exclusive access to second respondent's Pay - TV channels as part of a "low cost" offering, which would particularly appeal to lower LSM groups who predominately watch local content primarily. In appellants' view, no other broadcaster

would then be able to match first respondent's offering. This would have the kind of effect upon the relevant market which should trigger an inquiry pursuant to a merger notification.

[61] These averments were vigorously contested by respondents and in particular, in terms of the evidence of Mr Patel, on behalf of first respondent. According to Mr Patel as stated earlier in the judgment:

> 'The News Channel and the entertainment Channel will enhance MultiChoice's local news and entertainment offerings, add value for its existing subscribers, and promote retention of subscribers, but are unlikely to result in any expansion of its subscriber base.
>
> It is equally unlikely that access to the SABC's free-to-air channels (which will in any event be available to all South African viewers free of charge) will enable MultiChoice to attract new subscribers. There would be no incentive for consumers to pay a monthly subscription fee for content which is available to them free of charge.'

[62] A similar debate concerned the question of whether the exclusivity of the agreement supported appellants' case. Mr Moolman, on behalf of the appellants, stated in his affidavit:

> 'In circumstances where the channel owner is itself a broadcaster (i.e is vertically integrated) and competes with a licensee, it is inconceivable that the grant of a right to the channel would be exclusive.'

By contrast Mr Patel states:

> 'The licencing of channels on an exclusive basis is the norm in the broadcasting industry. As a matter of commercial sense and practice, a retail broadcaster which requires a new channel which is not already broadcasted in the territory will acquire a

measure of exclusivity in respect of the rights for which it is paying whether or not the parties compete with one another in the downstream market.'

Mr Smith, an expert economist who deposed to an affidavit on behalf of the appellant brought the following caution to the debate:

'Exclusivity may be common place, and so too a situation in which horizontal broadcasting competitors licensed channels to one another, but it seems that the question of whether or not these two coexist requires further investigation, it seems to involve a closer combination of mutual interest and is present in either the two features alone.'

[63] Mr Smith continues in his affidavit as follows:

'The nature of the exclusivity and, in particular, the restrictions on how the SABC may use the channel and the content it supplies as part of the channel. The exclusivity that is part of a typical licensing arrangement does not usually restrict the content producer from broadcasting the channel itself, nor from selling the same (or similar content to other downstream broadcasters. In this case, however, the Agreement does exactly that.'

Weighing the evidence

[64] Mr Budlender submitted that this court should not rely on the *Plascon Evans* test in order to evaluate the evidence placed before it; that is, where there is a dispute on the facts, final relief should be granted in motion proceedings only if the facts as stated by the respondent together with the admitted facts that the applicant's affidavit would justify such an order. *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at 634-635.

[65] In support of this submission reference was made to a decision of this Court in *Patensie Sitrus Beheerend Bpk v Competition Commission and others* [2003] 2 CPLR 247 (CAC), particularly where the Court in reference to s 52 (1)(b) and s 55 (3) of the Act emphasised that the Tribunal may conduct itself in an informal and inquisitorial manner and accordingly "play an active role to get at the truth". This is wise guidance which should be followed by the Tribunal. Unfortunately, in an appeal, where all the evidence is presented on affidavit, this Court has no other alternative than to apply the tried and tested *Plascon Evans* rule. Its application leads us to the conclusion that the asset transfer case of the appellant has not been shown to fall within the ambit of s 12 of the Act.

[66] Confronted with an argument that the Tribunal did not fully probe some of these disputes, an inquisitorial approach was open to the Tribunal of which we have made reference. However which, at this stage of the proceedings there is no other evidential mechanism available to an appellate court than to have recourse to the *Plascon Evans* approach. The finding does not mean, however, that the appellants will invariably be without a remedy. To this issue we shall return, after an examination of the encryption issue.

[67] For these reasons and based on the record presented to the Court we find that the agreement relating to the entertainment channel does not fall within the definition of merger.

The encryption issue

[68] The essence of the appellants' contention on the encryption point is that clause 4.3.1 read with clause 7 of the agreement confers upon second respondent the ability

to materially influence a key policy decision of first respondent regarding the manner in which it broadcasts or distributes its free-to-air channels in the DTT broadcasting environment, within the contemplation of s 12(2) (g) of the Act. The relevant clauses of the agreement read as follows:

'4.3 SABC FTA Channels

4.3.1 The SABC undertakes and agrees that all Channel Signals in respect of the SABC FTA Channels as transmitted by the SABC on the SABC DTT Platform shall be broadcast or transmitted by or on behalf of the SABC, unencrypted and without any conditional access system and shall always be available and receivable by M-Net DTT Set-Top Boxes distributed in South Africa throughout the Term, without requiring anything other than the installation of an M-Net DTT Set-Top Box.

.....

7. RESOLUTIVE CONDITION

Should any one or more of the SABC FTA Channels be made available on the SABC DTT Platform in South Africa at any time during the term on an encrypted basis, and that access to the SABC FTA Channel(s) is / are controlled or limited by means of a conditional access system or otherwise not freely available for viewing by a viewer using an M-Net DTT Set-Top Box, then:

7.1. MCA shall immediately, or at any time thereafter, be entitled to suspend or terminate this Agreement in whole or in part; or

7.2. MCA may elect to continue distribution of some or all of the Channels in accordance with the terms of this Agreement without payment of any Fees from the date that access to any SABC FTA Channels is controlled or limited by means of a conditional access system or otherwise not freely available for viewing by a viewer using an M-Net DTT Set-Top Box, and the SABC shall immediately refund to MCA any and all Fees already paid by MCA to the SABC in accordance with this Agreement.'

[69] In terms of these provisions second respondent undertakes to broadcast all its free-to-air channels unencrypted, and to make available all of its free-to-air channels in a manner that they can be received and viewed by viewers using nothing more than first respondent's M-Net Set-Top-Boxes ('STBs'). If second respondent does not comply the terms of the agreement, clause 7 entitles first respondent to suspend or terminate the agreement immediately in whole or in part or may elect to continue distributing some or all of the channels without paying any fees to second respondent and second respondent would be obliged to refund it all of the fees already paid in accordance with the agreement. If one has regard to clause 5 of the agreement dealing with contribution and fees, repayment of fees may run into hundred millions of rand.

[70] According to appellants, this situation allows first respondent to dictate to second respondent how it should conduct its business, second respondent cannot change its policy on encryption and if it does it stands to lose and to pay back a considerable amount of money to first respondent. Its decision making power is accordingly fettered by these encryption clauses.

[71] Furthermore, so the argument goes, the undertaking made by second respondent fundamentally affects its ability to compete with first respondent. It further ensures that subscribers to first respondent's low cost offerings will receive everything that the second respondent has to offer *via* first respondent's decoders plus its new channel offerings. This would increase first respondent's market share and solidify its position to the exclusion of other players or potential competitors in the industry. This is so, because encryption is critically important for free- to- air channels in order to

compete with Pay-TV broadcasters. It provides a high quality signal and is less susceptible to signal piracy. These advantages make it possible for broadcasters to attract premium high definition content. Non-encryption would as a result make it difficult for second respondent and potential new free-to-air entrants to access to premium content. First respondent on the other hand, being the only broadcaster with an established base of encrypted signals would remain as the only broadcaster with the ability to attract premium content and would easily be able to increase its market share. To support their view, appellants rely on submissions made by the Competition Commission on the National Integrated ICT Policy in February 2015 and Ofcom report in the United Kingdom.

[72] In this part of their case, appellants seek to invoke the provisions of s 12(2) and, in particular, s 12 (2)(g) of the Act. Section 12(2) lists various forms of control as follows:

> 'A person controls *a firm* if that person –
>
> (a) beneficially owns more than one half of the issued share capital of *the firm*;
>
> (b) is entitled to vote a majority of the votes that maybe cast at a general meeting of *the firm*, or has the ability to control the voting of the majority of those vote either directly or through a controlled entity of that person;
>
> (c) is able to appoint or to veto the appointment of the majority of the directors of *the firm*;
>
> (d) is a holding company, and *the firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No.61 of 1973);

(e) in a case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' interest, or controls directly, or has the right to control the majority of the members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commerce practice, can exercise an element of control referred to in paragraphs a to f' (Underlined for emphasis)

[73] In *Caxton and CTP Publishers and Printers Limited v Media 24 (Pty) Ltd*, case no. 136/CAC/March 2015 ('*Novus*') at paras 45 to 48 this Court set out the approach to be followed in interpreting s 12 (2) (g). It observed that the term '*ability*' found in (g) can be viewed as a power derived from an agreement in the same way that powers in (a) to (d) are sourced from instruments such as a shareholders agreement. It further held that the influence the provision speaks of must be over '*the policy of the firm*'.

[74] *'Policy of the firm'* typically relates to strategic or important decisions of a firm such as budgets, business plans, major investments and/or appointment of senior management. These are matters which regulators have traditionally considered to be matters to be looked at when determining the existence of control of a firm. See *Faull and Nickpay, The EC Law of Competition* 2nd edition at 808; *Caxton v Media 24 and others supra* at para 46

[75] The term '*materiality*' as held in *Novus* points to a range of matters over which the power extends. In that case this Court held that power over one or two matters may not have the sufficient extensiveness so as to meet the threshold of materiality, depending on the nature of those matters. The range of influence, so required,

however, need not be as extensive as that which is exercised directly by shareholders in general meetings or indirectly through the board by the person with power to appoint directors, it must though, as in both instances be '*reasonably extensive since otherwise it will not be comparable to the influence exercised by a person with control contemplated in paras (a) to (d)*' (Novus para 48). Lastly, power can either determine or prevent an outcome.

[76] The appellants presented a number of arguments in support of their contention that first respondent acquired control over second respondent's business as envisaged in s12 (2) (g). It sought to highlight the significance brought about by the migration to DTT to the South African viewers and the broadcasting industry as well as its commercial advantage. There can be no question about the fact that the DTT migration and the issue of encryption or non-encryption are important. We appreciate the fact that they have occupied the broadcasting space for quite some time and are contentious.

[77] The focus of the issues at hand, however, should be limited to whether the non-encryption of the free-to-air channel signals to be broadcast digitally on the second respondent's DTT platform as stipulated in the agreement and its public policy on encryption conferred control on first respondent as contended by the appellants.

[78] The first question is whether the non-encryption undertaking in the agreement constitutes material influence over a *policy of a firm* within the meaning of s 12(2) (g). According to the second respondent its business entails production, wholesaling, broadcasting of television and radio. It argues that the scope of the encryption policy under challenge is extremely narrow and does not meet the threshold of material influence over the *policy of the firm*. The second respondent also points to the

narrowness of this issue and contends that it does not meet the threshold of materiality propounded by this Court in the *Novus* case. Firstly, it argues that the undertaking only applies to the second respondent's free-to-air channels to be transmitted digitally on its DTT platform; channels broadcast on platforms other than DTT are not touched by the agreement nor was the second respondent precluded from deciding at any time to encrypt any subscription channel it might wish to broadcast. Secondly, digital broadcasting was due to commence on 1 February 2016 and channels would be broadcast only in respect of the remaining thirty months.

[79] In our view the concept *policy of a firm* should be viewed in a wide sense and within the context of each case. While it should be accepted that influence on one aspect of a firm may not be sufficient to constitute material influence over the policy of that firm, context is very important. There may be matters whose nature is so material to the strategic direction of the firm (even if numerically few) such that influence on them may be reasonably extensive in a manner that qualifies to control contemplated by paras 12 (2) (a) to (d) of the Act. That qualification, we would suggest, was made in the *Novus* judgment by reference to '*depending on the nature of those matters*' (at para 48.

[80] We are however doubtful that in this matter we have enough facts to come to such a conclusion. Based on the evidence before us, the effects of the encryption of the free-to-air channels, if any, in the market place would be for a short duration given that the agreement terminates in July 2018. It is also not clear if there would be digital channels on platforms other than the DTT platform and how much of those would fall outside the agreement.

[81] Even if we were to assume on behalf of the appellants that the encryption policy carries strategic significance, the difficulty that the appellants have is that a decision not to encrypt the free-to-air channels has already been made by the second respondent. It has undertaken and agreed that it will not encrypt for the duration of the agreement. It seems logical, in our view, that the forms of control indicated in s 12 (2) (g) involved acquisition of control in respect of decisions that may be made in future. Mr Unterhalter SC who appeared for the second respondent together with Ms Norton SC and Ms Cornelissen argued that it could not have been the intention of the legislature that a party who undertakes certain obligations in a contract which may constrain its strategic direction, conferred upon the other party the power to influence its future strategic policy. We agree with this view.

[82] Mr Budlender on behalf of the appellants submitted that, though this may be the case, the second respondent may still want to change its decision in future to encrypt its free to air channels. This it may not do during the term of the agreement because of the undertaking it made and if it does not comply with the encryption clause it faces a hefty penalty in terms of clause 7. Second respondent stood to lose a lot if it breached the agreement and that was indicative of the influence that first respondent had on this matter.

[83] Whilst the point made by the appellants has value, these kinds of circumstances cannot give rise to material influence within the meaning of 12 (2) (g) in our view. Second respondent took a decision to limit its strategic options contractually. It may decide to opt out of the agreement but if it does it must face the consequences of a breach.

[84] It was submitted further on behalf of the appellants that the circumstances leading up to the conclusion of the agreement are indicative of the influence that first respondent has on second respondent's encryption policy. This is because its stance at the initial stages of the debate on encryption and prior to the conclusion of the agreement was to support the encryption of its channels. Its U-turn on this issue clearly proved the amount of influence that second respondent had on its public policy. According to the appellants, second respondent has not been able to show that the decision not to encrypt was made before the conclusion of the agreement.

[85] The respondents on the other hand submit the second respondent took the decision against encryption independent of the first respondent and that was before to the conclusion of the agreement. According to the second respondent, this decision was taken in view of its universal access obligations, which are to make their service accessible to the largest possible audience of South Africa and in a cost effective manner. It concluded that mandatory conditional access and encryption would be costly to itself and to the consumer. Accordingly, when the proposed undertaking was made, it appeared to be commercially acceptable within the context of its own position and obligations as a public broadcaster. The encryption provision in the agreement is therefore consistent with its own position.

[86] The appellants contend that the Court must accept this not to be the case because it is not supported by any evidence. They further allege that, in fact, as early as January 2013, they had come to understand that the second respondent and e.tv were engaged in negotiations with Sentech around STB encryption standard. It is not clear how this information was obtained. The appellants further contend that the letter by Dr Ngubane, the then chairman of the SABC Board dated 30 January 2013 which

advised of the SABC Board's decision to exclude the functionality known as Conditional Access from the STB control system which could be used to terminate access for users who do not pay their subscription fees, did not talk directly to the question of encryption.

[87] These issues are clearly disputed on the papers by the respondents. The proposition that second respondent supported encryption prior to the agreement is not as clearly evident from the papers as the appellants have suggested. What the papers show, though, is a process involving discussions between government and various stakeholders, including the broadcasters where in the process of these discussions broadcasters changed views at different points in time. There is no clear indication, that prior to the signing of the agreement, the second respondent took a decision different to that which is contained in the agreement.

[88] Furthermore terms such as '*control system*', '*conditional access*' and '*encryption*' appear to bear different meanings while they were at times used interchangeably. The appellants themselves sought to highlight that fact when they asked the Court to regard *conditional access from the STB control system* raised in Dr Ngubane's letter referred to above to be unrelated to the issue of *encryption*. Second respondent suggests the opposite.

[89] To illustrate the point of fluctuation by the parties on this issue further, in 2008 the second respondent was opposed to conditional access control system in its submissions to the Department of Communications so was e.tv. The then Broadcasting Digital Migration ('BDM') policy mentioned '*a control system to prevent STBs from being used outside borders of South Africa and to disable the usage of stolen STBs and capabilities to unscramble the encrypted broadcast signals so that*

only fully compliant STBs made or authorised for use in South Africa could work on the network.' The 2012 BDM policy provided that STBs would have a robust STB control system and did not mention encrypted signals or conditional based control system. The appellants conceded in their heads of argument that the 2008 and 2012 policies did not mention encryption or decryption but made reference to control system. In August 2013 Minister Yunus Carrim proposed amendment to the BDM policy that a control system for STBs would be mandatory but that its use by broadcasters would not be. In 2015 the current Minister, Minister Faith Muthambi published an amendment to the BDM policy stating that STBs must have a control system to prevent government subsidised free-to-air DTT STBs from functioning in non-South African DTT networks and that the STB control system for free-to-air DTT STBs will not have capabilities to encrypt broadcast signals for the subsidised STBs. Depending on the kind of broadcasting services individual broadcasters may at their own cost make decisions regarding encryption of content. For completeness the government policy as it stands reads as follows:

> ' 5.1.2 (A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, STB control system in the free-to-air DTT will be non-mandatory.
>
> 5.1.2 (B) The STB control system for the free-to-air DTT STBs shall-
>
> not have capabilities to encrypt broadcast signals for the subsidised STBs; and
>
> be used to protect government investment in subsidised STB market thus supporting the local manufacturing sector.

5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content.'

[90] Second respondent 'officially announced' its decision on 1 November 2013, only a few months after the agreement was signed with first respondent stating, *inter alia*, that '[a]*s a public broadcaster, we have taken the decision not to support conditional access of set-top boxes*, as is a suitable option for us as a free-to-air broadcaster...' The reasons for the decision were said to be related to its universal access mandate and costs. The date of the official announcement does not necessarily support a view that the decision and reasons given were contrived and taken only after the agreement was concluded.

[91] On the basis of the rule in *Plascon-Evans*, *supra* there is no reason not to accept the version given by the respondents that the second respondent made the decision of its own accord and independent of the first respondent and this was not as a result of the agreement.

[92] The agreement does not *per se* prevent second respondent from adopting a public policy supporting encryption. What it does is to constrain it from encrypting the free-to-air for the duration of the agreement. The second respondent asserts that the agreement provides for eventualities such as regulatory changes that may occur pursuant to the migration to the DTT environment, which may require the signals to be broadcast by second respondent on an encrypted basis.

[93] Clause 20.2 provides for the striking off of any term of the agreement that is determined to be completely or partially void and/or unenforceable by any competent

regulatory authority. In that event parties shall consult with one another with a view to negotiate a provision which substantially gives effect to the parties' intention and intentions and satisfies the relevant regulatory authority. If no agreement is reached within three months of the negotiations either party may terminate the agreement by written notice to the other without the other waiving its rights not to terminate before. It would seem that the consequences of a breach in clause 7 are not negated by clause 20.2.

[94] The effect of government policy, that is to increase the barrier for firms that wish to encrypt, is not a matter located within s 12 (2) (g). Subsequent to the hearing of this appeal the Supreme Court of Appeal held in *e.tv (Pty) Ltd and others v Minister of Communications and others* [2016] ZASCA 85, that the amendment to the BDM policy which effectively dropped encryption capability from subsidised ST boxes was unlawful and hence invalid. We requested further written submissions from the parties as to the possible consequences for the present dispute which might follow from this judgment. We are indebted to the parties for their further assistance.

[95] As appellants have noted in their note, respondents had argued before this Court that first respondent could not have acquired material influence over a matter which had already been determined by government. The SCA judgment may well have undermined this argument in that a free to air broadcaster may now be able to make its own choice about encryption. However, as first respondent notes in its supplementary note, the question as to whether STB's will include encryption capability is a matter which remains to be determined by the Universal Service and Access Agency of South Africa, albeit that this state agency will not be required to consider the encryption policy which was set aside by the SCA. These arguments

notwithstanding, the decision may well have consequences for the relevant agreement between first and second respondent but it has no further bearing on our findings, namely that, on its own, clause 4.3.1 read with clause 7 does not fall within the meaning of control under s 12(2) (g) of the Act, as we have determined that meaning in this judgment.

[96] It might be asked why the non-encryption clause was included in the agreement if the undertaking made was in line with the second respondent's position and did not make much of a difference. The answer to this is simple, first respondent wanted to protect its commercial interests. Government policy and hence that of the second respondent might now be compelled to change on encryption whether this now happens, it falls outside the scope of our enquiry.

[97] Lastly, even if the policy of encryption had commercial relevance as it is suggested, namely that encryption substantially increases the ability of potential competitors to attract premium content. This issue is disputed on the papers. First respondent's expert Mr Andrew John Snoad alleges that most free-to-air broadcasters worldwide do not encrypt their signals but they still obtain high definition content from international studios. According to the first respondent, it is highly unusual for terrestrial free-to-air broadcasting signals to be encrypted. In addition to that, the second respondent's press release that we referred to earlier on states that '*[r]esearch through benchmarking with other public broadcasters across the world*' showed that other public broadcasters do not have conditional access on their services either, which it contends is a standard practise. It further notes that conditional access is predominantly used by Pay-TV operators.

[98] Verona Duwarkah, the Group Executive: Television of second respondent states in her affidavit on behalf of second respondent that second respondent has not had difficulties in attracting high premium content because of non-encryption and that it supports certain control features as they have been provided in the South African National Standard (SANS 862: 2013) which means copying of the high definition digital content is not possible. The appellants hold a different view and contend that Mr Snoad's claims and that of second respondent should be rejected. They further contend that the Walt Disney and CBS letters given by first respondent as examples of content which do not require encryption where their content is broadcast on a free-to-air network must be rejected as hearsay.

[99] Even if these examples were disregarded there are clearly disputes of fact on the papers between the parties on these issues and there is no reason to depart from the rule that disputes ought to be resolved on the respondents' version.

[100] For those reasons, the appellants have not been able to show that the first respondent has acquired material influence on the first respondent's encryption policy as per the agreement and on its public policy on encryption as envisaged under s12(2)(g), and as the law has been set out by this Court in the *Novus* case, *supra*.

Alternative relief

[101] In its amended notice of motion the appellants introduced before the Tribunal a prayer for alternative relief in the following terms:

'(i) directing MultiChoice and the SABC within 14 days of the hearing, to produce all documentation, including but not limited to all correspondence, board minutes, internal memoranda, pertaining to the

negotiation, conclusion and implementation of the Agreement;

(ii) directing the Commission, within 30 days from the date upon which MultiChoice and the SABC produce the aforesaid information, and having considered the information produced and any other relevant information available to it or requested by it, to file a report with the Tribunal recommending whether or not the Agreement gives rise to modifiable changes of control; and

(iii) directing a re-hearing of the matter by the Tribunal, to determine whether the conclusion of the Agreement entailed a modifiable change of control

[102] Appellants contended, in support of this alternative form of relief, that the Tribunal, which is not a civil court but an administrative body clothed with inquisitorial powers the primary purpose of which is to protect the public interest, ought to have required the Competition Commission to investigate the matter further before rendering a final decision if it was satisfied that a '*prima facie* case' had been made out. The Tribunal held that, even if the test to grant alternative relief should be that a *prima facie* case is made out, the appellants had not met the test on the papers.

[103] There was much debate about the application of the test for a '*prima facie* case' as set out in *Hülse-Reutter and others v Gödde* 2001 (4) SA 1336 (SCA) at para 12-14 and confirmed by Wallis JA in *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd and others* 2013 (2) SA 213 (SCA) at para 40:

'The requirements of a prima facie case in relation to attachments to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that

there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. ... Nestadt JA, in the Weissglass case ... warned that a court "must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospect of success".'

[104] Respondents contend that the inferences sought to be drawn by the appellants are contradicted by the undisputed facts and hence appellants failed to establish a case which can be supported by credible evidence; that is evidence; which was available and potentially available after discovery and other steps directed to procuring such evidence.

[105] The *Children's Resource Centre Trust* case turned on the question of certification of a class action. Wallis JA sought to develop a test as to when certification should be granted in the appropriate case. The learned judge of appeal accepted that where there was no prospect of a trial court, 'with the benefit of all the evidence that the plaintiff could muster or suggest would be available to it, holding that the claim is legally tenable certification should be refused. See para 38.

[106] The reference to a test for establishing a *prima facie* case and the application of this test to the facts in the *Children's Resources Centre* case was designed to provide the appropriate test as to when the kind of alternative relief sought in this case might be granted. More is required, however, than a simple application of the test developed in *Children's Resource Centre supra* and that more is to be found in the location of the appropriate context.

[107] The grant of such alternative relief should be analysed within the context of the scheme of the Act. Section 13 A of the Act imposes an obligation upon a party to an intermediate or large merger to notify the Competition Commission of that merger in the prescribed manner and form. In turn, this triggers an enquiry by the Competition Commission, in terms of s 14 of the Act, in respect of an intermediate merger. What is sought by appellants was correctly described in the Tribunal's decision as a *sui generis* remedy. This *sui generis* remedy needs to be further evaluated in terms of an observation made by the Tribunal in its decision, namely 'a consideration of mergers is clearly a key function of the Tribunal's powers under the Act'. para 22 of the Tribunal decision.

[108] In this case, the Tribunal, did not have the benefit of the Competition Commission's investigation, for the latter advised that it was not investigating the transaction. The Tribunal then concluded that there was no basis by which to require such assistance from the Commission in order to determine whether the agreement gave rise to a notifiable transaction. Appellants contend that the Tribunal worked with an inadequate factual matrix and that it could have exercised its inquisitorial powers to ensure that it had a sound evidential foundation upon which to base its ultimate decision, hence they seek the relief in this alternative form.

[109] Given that the relief sought by the appellants is *sui generis,* there is a difficulty as to the determination of the appropriate test, particularly in a case where, on an analysis of the evidence provided, it could not be concluded that the agreement fell within the definition of merger in terms of s 12 particularly s 12 (2) of the Act.

[110] In the vast majority of cases, this lack of evidence would surely be the end of the dispute. However, in this case there are a series of significant exceptional

circumstances which must be taken into account. In the first place the agreement involves the public broadcaster. This in itself triggers a reference to the Preamble to the Act, namely that one of the purposes of the Act is to 'regulate the transfer of the economic ownership in keeping with the public interest'. It must be in the public interest for transactions involving the public broadcaster to be examined with a particular consideration of the purpose of the Act. Secondly, as we have indicated throughout our judgment, there is a considerable lack of clarity on a number of factual aspects which were disputed True, on a *Plascon-Evans* test, *supra* which we are obliged to follow in evaluating the evidence in the appeal record, the respondent's version should be preferred. But the Tribunal is clothed with inquisitorial powers. A merger proceeding is not a trial in the ordinary civil sense of that word. The Tribunal should employ inquisitorial powers to interrogate evidential questions beyond the strict confines of *Plascon-Evans* to ensure that the full evidential complexity is available to it in order that it might come to a decision which advances the purposes of the Act. Mergers are not a place for the accusatorial formation adopted by the Tribunal in all too many of its hearings. Again it regrettably failed to inquire in this particular case. There are many questions regarding disputed factual contentions which we have raised in this judgment which could have been better answered if an inquisitorial approach had been adopted and a more sustained line of questioning been implemented by the Tribunal in the hearing before it. Thirdly, as is evident from paras 49-50 of the judgment of SCA in the *e.tv* case *supra,* questions of encryption may well stifle competition. While the SCA judgment does not, in our view, disturb the finding regarding the application of s 12(2) (g) of the Act, the following passage from the SCA judgment has significance for this part of our enquiry.

'The effect of this, as pointed out by the first group of NAMEC, is that once the analogue signal is switched off, free-to-air broadcasters will not be able to encrypt their signals and all those with television sets that do not have ST boxes with encryption capability will not be able to access high-definition content that can compete with the pay-television broadcasts. This is the view also of the Competition Commission, which advocates conditional access, as well as that of SOS and MMA... All the appellants advocate encryption in order, *inter alia*, to facilitate competition amongst broadcasters. The effect of the amendment is that high quality television will not be available to the poorest in our society, and competition will be stifled. The ability of free-to-air broadcasters to encrypt their signals, as allowed for in clause 5.1.2 (C), is thus illusory.'

[111] In summary, for all these reasons, this is an exceptional case. There is more than enough evidential doubt, coupled to a clear public interest component, in this transaction to dictate that a less formalistic and more substantive approach to the enquiry is required.

[112] We are cognisant of the fact that the agreement has been entered into in July 2013 and that the matter must be brought to finality. Accordingly a restricted timetable must be employed for any relief granted. Furthermore, in the event that the Competition Commission files a report to the effect that the agreement does not give rise to a change of control in terms of the Act, it would appear to be a fruitless exercise for the matter to be reheard by the Tribunal in the light of the exhaustive enquiry which has already taken place in this court and previously in the Tribunal.

Costs

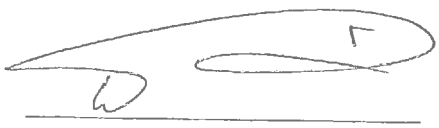
[113] In this case, we agree with the Tribunal that this is a matter which does concern important questions in the broadcasting industry and in the public interest at large and accordingly no award of costs will be made.

[114] For these reasons therefore the following order is made:

1. The order of the Tribunal of 11 February 2016 is set aside.
2. First and second respondents are directed to provide the Competition Commission within 21 days of this judgment 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.
3. The Competition Commission is directed 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. In the event that the Competition Commission recommends that the agreement gives rise to a notifiable change of control which falls within the definition of merger in terms of s 12 of the Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal to determine whether the conclusion of the agreement did entail such a merger as defined.

DM DAVIS

Judge President



NP BOQWANA

Acting Judge of Appeal

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