REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

24/6/16
DATE

SIGNATURE

CAC Case No.: 140/CAC/Mar 16CT

In the matter between:

Caxton and CTP Publishers and Printers Ltd	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 (Pty) Ltd	First Respondent
South African Broadcasting Corporation (SOC) Ltd	Second Respondent
The Competition Commission	Third Respondent

JUDGMENT

Vally AJA

Introduction

[1] I have had the pleasure of reading the judgment of my colleagues. I agree with the order they issue. However, the approach I have adopted in

coming to the conclusion that that order should be granted is slightly different from that of my colleagues. This is my reasoning.

[2] On 3 July 2013 the first and second respondents concluded a mutually beneficial commercial agreement concerning aspects of their two businesses. It is titled, *Commercial and Master Channel Distribution Agreement* (the agreement). It was amended three times, on 4 August 2014, 11 August 2014 and 21 November 2014.

[3] The Appellants were unsuccessful in convincing the Competition Tribunal (Tribunal) that the agreement and its implementation actually constituted a merger of parts of the businesses of the first and second respondents. They further failed to convince the Tribunal that there was *prima facie* evidence showing that parts of the two respondents' businesses were merged, albeit for a period of five years only. Their second contention was raised as an alternative to the first one and it only surfaced during the course of the hearing. It resulted from them successfully applying to have their notice of motion amended. The relief they sought was obviously predicated upon them convincing the Tribunal either of the correctness of their interpretation of the agreement, i.e. that it constituted a merger, or that there was sufficient evidence before the Tribunal warranting a finding that a *prima facie* case of a merger has been made out. As their contentions concerning the agreement failed to carry the day they were unable to secure any of the relief they sought. They have now appealed to this Court claiming that the Tribunal erred in not adopting their interpretation of the

agreement and in not granting them either the main or the alternative relief they sought.

[4] The relief they sought was an order compelling the first and second respondents to notify the Competition Commission (Commission) of the acquisition of control by the first respondent of part of the business of the second respondent. This control, they claimed, was the result of the implementation of the agreement. In the alternative, they asked that the Tribunal refer the agreement to the Commission for further investigation.

The nature of the first and second respondents' businesses

[5] The first respondent, MultiChoice (Pty) Ltd (Multichoice), is a private company. It is a wholly owned subsidiary of another private company, eighty percent (80%) of which is owned and controlled by another company which, in turn, is owned and controlled by a public company, Naspers Ltd (Naspers). Naspers, through its various subsidiary companies conducts business operations in South Africa, which consist, amongst others, of multi-channel digital subscription television (DStv) and terrestrial subscription television, M-Net. MultiChoice holds a commercial subscription television broadcasting service license in South Africa, which authorises it to broadcast a digital satellite television service to subscribers. It is presently broadcasting these services exclusively to its subscribers.[1] M-Net holds an analogue subscription terrestrial

[1] The subscribers are also referred to as viewers or consumers by the parties.

television broadcasting service. It is the business of the DStv television service that is of relevance to this case.

[6] The second respondent, the South African Broadcasting Corporation (SABC), is a public broadcaster. It is a statutory public body. It is licensed to provide two analogue based public television broadcasting services (SABC1 and SABC2) and one analogue based commercial public television broadcasting service (SABC3). Presently, it is broadcasting its services to members of the public. These services are free[2] to anyone who owns or has access to a television set. For this reason they are referred to as the Free to Air (FTA) platforms.

[7] MultiChoice and the SABC compete with each other in the market place. They compete largely over audiences and over customers – customers who purchase advertising slots from each of them. There are other forms of competition but these two largely capture the nature and structure of their businesses.

[8] There are two other businesses operating in the market place that also possess licences to provide the same or similar services as that of the first and second respondents. They are e-TV and Top TV.

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[2] In the sense that it does not require the viewer to pay a fee for accessing the broadcast on any television set. However, any person who owns a television set is required to pay an annual licence fee. The fee is paid to the SABC.

[9] The first appellant is a public company that engages, amongst others, in the business of publishing and printing. It has been exploring the viability of expanding its existing business(es) into the digital television business, which involves providing video content through various forms of digital media. Should it do so it would be a direct competitor to MultiChoice, the SABC, e-TV and Top TV.

[10] The second and third appellants are non-governmental organisations whose main concern is to protect and promote public broadcasting in the country and to protect and advance the public interest. They engage in all manner of advocacy-related work.

The agreement

[11] The agreement has been amended three times, with the last amendment occurring on 21 November 2014. It has a life span of five years. In terms of the agreement SABC committed itself to providing two channels for MultiChoice: a 24-hour daily news channel (the news channel) and a 24-hour daily entertainment channel (the entertainment channel). These channels retain the SABC branding but are broadcast and marketed by MultiChoice. They are also presented on the bouquet of services that make up the MultiChoice business.

[12] The SABC agreed to market these two channels on its FTA channels. In other words, it agreed to inform its FTA viewers that they could access its own material, which is not distributed on the FTA channels, on the DStv channels.

By so doing they would encourage their FTA viewers to subscribe to the MultiChoice bouquet of services. MultiChoice, too, markets these two channels on its other channels thus encouraging their subscribers to view the SABC material on the channels within its bouquet.

[13] As for the entertainment channel, the material broadcast there would only be available to the subscribers of MultiChoice. The SABC agreed that for the duration of the agreement it would not distribute nor authorise anyone else to distribute this material. It is, however, entitled to distribute it on its wholly owned channels, provided that the material that it intends to so distribute is exactly the same as has been first broadcast on the entertainment channel, and a certain condition has been fulfilled. The condition is confidential. However, it has no material impact on the outcome of this case.

[14] The entertainment channel would be created from archived material owned by the SABC. The SABC would consult MultiChoice on what material is to be distributed on this channel. MultiChoice would be allowed to terminate the agreement should it not be able to convince the SABC of the material to be distributed.

[15] The news channel would run for 24 hours each day. Its format and content are regulated by the agreement. The SABC is precluded from distributing any material from the news channel to any other broadcaster and it

is prohibited from creating and broadcasting its own 24-hour news channel or from licencing such a channel to other broadcasters.

[16] At present, MultiChoice has secured five million subscribers. The broadcasting of the SABC channels on its bouquet grants SABC exposure to these subscribers. MultiChoice benefits by increasing the choice available to its subscribers. It would also improve the attractiveness of MultiChoice to potential subscribers. The SABC has approximately eight million viewers accessing its FTA channels.

[17] Finally, MultiChoice would also provide to the SABC an entertainment genre television channel, to be compiled, packaged and branded by MultiChoice for SABC to distribute on its DTT platform when that is in operation. As yet, the SABC has not commenced providing any of its products through the DTT platform.

[18] The agreement provides that all existing SABC FTA channels, and any new ones that may be established, are to be transmitted or broadcast without encryption, or if encrypted a consumer would need no more than an M-Net DTT Set-Top Box (STB) if she wished to access the broadcast. This particular provision is the basis of a major part of the appellants' contention that the agreement constitutes a merger as contemplated by s 12 of the Competition Act, 89 of 1998 (the Act).

[19] Both SABC and MultiChoice are bound by a provision in the agreement that they should co-operate with each other in order "*to avoid the imposition of any competent regulatory authority of any burdensome obligation on either of the Parties, provided that in taking such steps the Parties shall preserve the commercial intention underlying the Agreement.*"

[20] MultiChoice has agreed to pay to the SABC the sum of R200m for the rights it receives with regard to the entertainment channel and R387m for the rights its receives with regard to the news channel. The payment is to be spread over a period of five years. At the same time, they have agreed to share the revenue stream that will flow from the implementation of the agreement. The revenue is to be distributed on the following basis:

> [20.1] the revenue derived from sales of advertising and sponsorships on the news and the entertainment channels shall accrue to the SABC;
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> [20.2] the revenue derived from sales in respect of advertising and sponsorship deals on the SABC FTA channels shall accrue to the SABC;
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> [20.3] the revenue derived from sales in respect of advertising and sponsorship deals on the MultiChoice Digital FTA Channel shall accrue to MultiChoice.

[21] The agreement has been implemented with both parties complying with the obligations arising therefrom.

The Act

[22] Section 12 of the Act is of direct relevance to this case. Its provisions read:

> "(1) (a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.
> (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through-
> (i) purchase or lease of the shares, an interest or assets of the other firm in question; or
> (ii) amalgamation or other combination with the other firm in question.
>
> (2) 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 may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
> (c) is able to appoint or to veto the appointment of a 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 61 of 1973);
> (e) in the 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 or 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 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 commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."

The contentions of the appellants

[23] The appellants contend that the agreement has effectively granted MultiChoice:

[23.1] control of part of the business of the SABC. This has also been referred to as the transfer of assets from the SABC to MultiChoice;

[23.2] the power to influence the policy of the SABC as regards encryption, which is an issue of strategic importance;

[23.3] the power to influence the policy of the SABC with regard to the exploitation of its news reporting capabilities.

The third contention was not pursued in this appeal. I, therefore, say nothing about it.

The first contention: transfer of assets

[24] The appellants draw attention to the following facts regarding the entertainment channel: (i) that MultiChoice has secured an exclusive licence to market and distribute the entertainment channel; (ii) that the content of the material distributed through the entertainment channel is the exclusive property of the SABC and to which it holds intellectual property rights; (iii) that this material constitutes assets of the SABC; (iv) that it is valued at R200m by the SABC and MultiChoice; (v) that it has a say over what material is presented on this channel; (vi) that the SABC is not free to distribute this material on its own channels unless it meets certain strict conditions; and (vii) that there has been a

cross-pollination of the two businesses in that the SABC will run advertisements on its FTA channels alerting its viewers of material to be distributed on the entertainment channel in order to encourage them to access it there, and MultiChoice will do the same on its other channels - run advertisements alerting them to the material that will be distributed on the entertainment channel. Collectively these facts, the appellants claim, demonstrate that MultiChoice has acquired control of part of the assets of the SABC, albeit only for a period of five years.

The second contention: Influence over the policy of the SABC

[25] Their second contention is that by virtue of certain key clauses of the agreement MultiChoice has effectively acquired material influence over the policy of the SABC on the important issue of encryption. It is common cause that the issue of a broadcaster adopting the policy of encrypting its material so that it can only be accessed by consumers who have acquired the necessary equipment (an appropriate STB) allowing for the signal to be decrypted and thereby viewed, is of fundamental importance in the industry. It lies at the heart of the competition between various retailers of television services and products. It is also common cause that the country's supply of television services is to experience a revolutionary shift involving the move away from analogue based transmission to digital based transmission. This change is expected to have momentous consequences. It is anticipated that this change will make accessible to millions of people information based products that are presently

unavailable to them. The change is anticipated to produce a huge boon for the growth and development of the education sector as well as for businesses in general. It is in the context of this that the policy adopted by the SABC as to the encryption of its material must be understood. It is also common cause that from the inception of this issue the SABC adopted a policy that it would encrypt the material to be broadcast on its channels This would require any viewer who wished to access the materials to have the necessary STB linked to her television-set so that the signal could be decrypted. DStv adopted the opposite position – that the broadcasting of the SABC channels should not be encrypted. The SABC at some point changed its policy. Like DStv, it now supports the policy of no encryption. The SABC claimed that it changed its policy prior to the conclusion of the agreement, but it is common cause that it only announced the change after the agreement was concluded. Unfortunately, the SABC provided very little detail of the change in its policy. Crucial details as to when it occurred, why it occurred and how the changed policy is consistent with its duties as a public broadcaster were not provided. As a result, the appellants argue that this change in policy on the part of the SABC is a product of the agreement. In other words they take issue with the SABC's averment that the policy was changed prior to, and on the own accord of the SABC. Their contention is based on an inference they draw from the fact that the SABC has failed to furnish crucial details of the change in its policy. They persist with the contention that the change only occurred because MultiChoice required it. The effect of the change is that the agreement has granted MultiChoice the power to materially influence the policy of the SABC on a matter of crucial import.

The response of MultiChoice and the SABC

[26] MultiChoice claims that it is a purchaser of the services provided by SABC. It has no role to play in the production of these services. The purchase is based on it getting sole rights in certain respects. There is nothing unlawful or unusual in this. The agreement is a typical licencing agreement that is widely concluded on a daily basis in the industry. MultiChoice is merely a distributor of the channels produced by the SABC. It plays no role in any decision taken with regard to the production of the content of the material that is distributed on the entertainment channel, and plays no role in the production of the material that is distributed on the news channel. It claims that the agreement underscores a vertical relationship between the SABC and itself. Finally, it denies that it has material influence over the policy of the SABC regarding encryption. Whatever decision the SABC took on this issue is a decision it took by itself. Hence, it denies that a merger as contemplated in s 12 of the Act has taken place between it and the SABC.

[27] The SABC agrees with MultiChoice's interpretation of the agreement, which is that it represents something akin to the sale of a product from a producer to a retailer. It also denies that it changed its policy on encryption because it was forced to do so by the agreement.

The findings of the Tribunal

[28] The Tribunal found that in order for the appellants to succeed they had to show that MultiChoice had acquired a business or part of a business of the SABC. For it to be part of a business, it has to be an asset. To pass muster as a merger the asset must change hands and it must involve "*a measurable and relatively permanent transfer of market share or productive capacity*"[3] from the firm that owns the asset to the firm that acquires it. The Tribunal has previously applied this approach to the question of whether a merger has been effected.[4] It is accepted by all the parties to this appeal that the approach is correct.

[29] The Tribunal accepted that the SABC operated at three different levels in the market place: (i) as a producer or purchaser of original material for broadcast; (ii) as wholesaler of its material to other broadcasters; and, (iii) as a self-distributor of its own material on its own television channels.

[30] Thereafter, the Tribunal asked whether there was a transfer of productive capacity from the SABC to MultiChoice by virtue of the agreement. It noted that it was common cause that the agreement had no impact on the capacity of the SABC to produce its own material. Regarding the entertainment channel the SABC had already produced the material that it agreed to distribute through the channel located on MultiChoice's bouquet of channels. As far as the material to be distributed through the 24-hour news channel is concerned, the agreement does not allow for or envisage any role for MultiChoice to play. The conclusion it

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[3] This is referred to as the Hovenkamp Test. Its origins lie in a passage in the academic work of a scholar from the USA who after studying a number of competition law cases found that it best described the findings in all those cases. The scholar is Herbert Hovenkamp. The passage is to be found in his work, *Federal Antitrust Policy, The Law of Competition and its Practice* at 498.
[4] *Competition Commission v Edgars Consolidated Stores Ltd* [2003] 1 CPLR 151 (CT)

drew from this analysis of the agreement is that there was no transfer of productive capacity from the SABC to MultiChoice.

[31] The next issue of focus for the Tribunal was whether the implementation of the agreement resulted in "*a measurable and relatively permanent transfer of market share*" from the SABC to MultiChoice. On this score, it accepted that the agreement had granted MultiChoice certain exclusive rights over SABC's material that was to be distributed through the entertainment channel. It also accepted that it was logically conceivable and theoretically possible for such a transfer of rights to result in a transfer of market share. But, it said, in the ordinary course of the television business licencing agreements were normal and on their own do not result in the transfer of a business. At this point the Tribunal shifted its focus away from a "*transfer of market share*" to a "*transfer of business*". Like the parties in this matter I do not read too much into this shift of focus for it cannot be said that it led them into error. What it did was to ask itself if the appellants had proven that the agreement had improved the market share of MultiChoice – either through increased revenue from sales of advertising and sponsorship deals, or from an increased number of subscribers- because of the additional channels on its bouquet. The answer it provided was an unequivocal "No". After noting that both the SABC and MultiChoice have disavowed any increase in market share or viewership for MultiChoice, the Tribunal stated:

> "First the acquiring and target firms have not said as much, and in the affidavits have disavowed this. The closest MultiChoice comes to making such a statement (about increased market share) ... (is) that the value which MultiChoice has secured is to augment its bouquet offering and thereby add value for its existing subscribers. Second merely because assets are being transferred does not suggest a transfer of viewers will follow. Indeed this is possible but not probable. What evidence is there that current SABC viewers,

> who are not already MultiChoice subscribers will, because of the transaction, become MultiChoice subscribers? On the (appellants) own version MultiChoice already offers viewers the choice of over 200 channels. What is it about this (the entertainment) channel that will cause the migration of viewers who have not already chosen to subscribe? The (appellants) do not offer any reason (sic) The size of the existing DStv offerings seems to favour (MultiChoice's) enhancement argument than (sic) the (appellants') market share increasing one."[5]

[32] Building on this analysis of the agreement the Tribunal went further and noted that, even if there are viewers who have yet to purchase MultiChoice's offerings, but who would want to access the material distributed on the entertainment channel, they may not actually take the plunge and join the ranks of MultiChoice's subscribers. Hence, it found that there was insufficient evidence demonstrating that the agreement produced any transfer of market share let alone "*a measurable and relatively permanent*' one. It then held that the onus of producing this evidence rested on the shoulders of the appellants, who failed to discharge it. Accordingly, it found that the appellants' reliance on this ground for their contention that a merger as contemplated in s 12 of the Act had been effected lacked merit.

[33] As for the fact that MultiChoice had secured exclusive rights to the material distributed on the entertainment channel the Tribunal found that:

> "Even if a rival might have wanted to get rights to the archive, this does not make the loss of such an opportunity a business in the hands of MultiChoice. Even if the strategy of MultiChoice was to buy up scarce resources required by a competitor – a question of fact we need not determine here – then that would be a question of whether a prohibited practice had been perpetrated. This possibility does not make the transaction a business. Expressed differently, the fact that a transaction may have potentially anticompetitive consequences does not by virtue of that alone, transform it into a potential merger,"[6]

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[5] *Reasons for Decision* at [64]
[6] *Id.* at [66]

[34] The Tribunal then focussed its attention on whether the transfer of assets (the SABC material that was to be distributed on the entertainment channel) constituted a part of the SABC's business. This focus, it acknowledged, was necessary as it is generally accepted in international competition law learning that if an asset constitutes, or could constitute, a business, and there is a transfer of that asset from one entity to another, such transfer may well result in the lessening of competition. The fact that the asset may not constitute the whole of the business activity or operation of the transferring firm is of no moment. By itself it has no bearing on whether competition was lessened by virtue of what can be termed a transfer-transaction. The Tribunal found however that the Act does not treat a transfer of assets on its own as potentially constituting a transfer of a business. The Tribunal placed particular emphasis on the distinction between "*a business*" and "*a bare asset*". According to it this was a distinction with a significant difference. Boldly, it pronounced, "(w)*e thus find that the transfer of assets does not amount to a business.*"[7] It, however, was acutely aware that the facts before it were deficient in many respects, making it difficult for it to decide whether the transfer that took place by virtue of the agreement was actually a transfer of "*a business*" or a transfer of "*a bare asset*". It decided that this should be considered when addressing whether the appellants had made out a case justifying being granted the alternative relief they sought. But the Tribunal did not leave it there. It went further and found that as the agreement was of limited duration, five years only, it could not constitute "*a relatively permanent*" transfer of a business from the SABC to MultiChoice.

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[7] *Id.* at [76]

[35] In the result the Tribunal dismissed the first contention of the appellants.

[36] As to the second contention, the Tribunal recognised that it was common cause that a decision of the SABC to adopt a policy of encryption or a policy of open access had significant commercial consequences for all the competitors in this market as well as for all the consumers. It was also common cause that the SABC had initially favoured a policy of encryption and that later it altered its position radically and entirely to one of open access. It recognised that this *volte face* on the part of the SABC is accredited by the appellants to the agreement, and, for them, is a manifestation of the fact that MultiChoice has acquired influence over a key, if not fundamental, policy decision of the SABC. The Tribunal accepted that in terms of the agreement the SABC cannot now decide to return to the policy of encryption without risking the termination of the agreement. The Tribunal also noted the averments made on behalf of the SABC to the effect that there is no causal connection between its decision to change its policy on encryption and its decision to conclude the agreement. But, the Tribunal was not satisfied with this response. It asked: if the content of the agreement was neutral to the decision of the SABC then why was no explanation forwarded by the SABC or MultiChoice on the reasons for inclusion in the agreement of the particular clause that precluded the SABC from ever transmitting it's material in encrypted form? While the Tribunal asked the correct question, it unfortunately was not able to extrapolate a reasoned response from either MultiChoice or the SABC as to the purpose of this clause. As a result, it

elected to "*not decide the matter on the causation issue and go on to consider the remaining arguments raised by* (MultiChoice and the SABC)."[8] These remaining arguments were scrutinised on the basis of an assumption that by concluding the agreement with the SABC, MultiChoice had acquired influence over the policy of the SABC. It did so by examining what in terms of the Act, particularly s 12(2)(g), would be sufficient influence by one firm over the policy of another for it to be found that the two firms had actually merged. It noted that in terms of this section sufficient influence would have to involve "*an element of control*" that would be exercised "*in ordinary commercial practice*"[9]

[37] The Tribunal decided that it was necessary to give some meaning to what the legislature intended by enacting s 12(2)(g). In this regard it found:

> "In ordinary commercial practice, such a person enjoys at least an ongoing form of control over the company, nor merely a specific aspect of it. Secondly, we must bear in mind that we are dealing with a competition statute. Our emphasis on control is the ability to influence the competitive inclination of a company. This suggests again that control should only be inferred when the policy covers a wide ambit not a limited specific aspect, particularly in the context of a target firm whose business covers a range of other activities, which remain unfettered by the influence of the putative controller, as in the instant case with SABC.
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> Further there is a danger in giving this section too broad an application. Many outsiders may be able to influence a company on one aspect of its business, or at a particular finite moment in time. If such persons, typically lenders or suppliers with some market power over a customer to hold them to some terms, were thought of controllers for the purpose of merger control, then merger activity would be ubiquitous. The section has to be given some sensible limitation as to both the scope and time of the policy matter in question."

[38] It was on this theoretical basis that the Tribunal decided to determine whether the influence exerted by MultiChoice over the SABC policy on encryption met the threshold of s 12(2)(g) of the Act. It found that as the

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[8] *Id.* at [91]
[9] Section 12(2)(g) of the Act. See [21] above for a full quotation of s 12 of the Act

agreement was of limited lifespan of five years and because its scope was limited to the entertainment channel, which does not cover the whole business of the SABC as a producer, wholesaler and broadcaster, the agreement does not meet the threshold of s 12(2)(g) of the Act. Finally, it found that the government's decision to adopt a policy against encryption was not to be laid on the shoulders of the SABC. As that decision is not one made by the SABC it falls outside the ambit of s 12(2)(g) of the Act.

[39] On that analysis of the agreement, the Tribunal refused the appellants the main relief they sought.

[40] On the alternative relief the Tribunal found that the appellants failed to establish even on a *prima facie* basis that the agreement constituted a merger as contemplated in s 12(2)(g) of the Act. Its reasoning on this score is captured in a single paragraph which reads:

> "Thus the case of the (appellants) has to be assessed, not on the facts in dispute, but on whether the inferences it seeks to draw from the undisputed facts, i.e. – the terms of the agreement as amended, are, on a balance of probabilities ... the more reasonable ones in determining whether they give rise to a merger situation. We have explained above that they do not. Thus even on a *prima facie* standard as the threshold for the alternative relief, we find the (appellants) do not succeed."[10]

Do the Tribunal's decisions constitute a misdirection?

[10] *Reasons for Decision* at [113]

[41] It is now established that the general approach to a s 12 analysis has to be broad in scope, otherwise the value of the section could be lost and the intention of the legislature would be defeated.[11]

[42] Section 12(1) specifically provides that where there is a transfer of part of a business from one firm to another a merger has been effected. It is by now well established in international competition law that a transfer only of intellectual property rights in a product could result in a merger. It goes without saying though that while a transfer of part of a business or a transfer of intellectual property rights in a single product may constitute a merger the decision on whether there actually has been a merger or not is fact-specific. In our law an important consideration is whether there has been a "*direct or indirect acquisition*" or "*direct or indirect control*" over the transferred business or part of a business. The appellants' case is fought on both fronts: they claim that there has been a direct or indirect acquisition of the archival material of the SABC by MultiChoice; and, there has been indirect control over the policy of the SABC by MultiChoice.

[43] On the first score they contend that as the agreement only allows the SABC to distribute its archival material through MultiChoice's bouquet of services, MultiChoice has either taken control of a part of the SABC's business and/or MultiChoice has increased its market share at the expense of the SABC. This conclusion is postulated on the basis of a specific understanding of the

[11] *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd/ Distillers Corporation (SA) Ltd, Stellenbosch Farmers Winery Group (Pty) Ltd & The Competition Commission* [2001-2002] CPLR 36 (CAC) at pp 45 - 46

agreement. That understanding is captured in [24] above. There is no doubt MultiChoice is given extensive say over the material that is distributed through the entertainment channel as that channel is part of its bouquet of channels and is made available only to its subscribers. It is also possible to conceive of the entertainment channel as being a separate business that is born out of the agreement and that it involves a combination of the assets of the SABC with that of MultiChoice.[12] There is also no doubt that the SABC is considerably constricted in its ability to re-use that material on its own channels.

[44] In my view, however, on their own these two facts do not allow for a conclusion that MultiChoice has acquired control over part of the business of the SABC as contemplated in ss 12(2)(a) –(f) of the Act. To draw that conclusion it would be necessary to have regard to other facts. Understandably, these are not available to appellants. And, I cannot on the basis of these two facts only draw an inference that they demonstrate that MultiChoice is entitled to, or actually does, exercise the kind of control over the SABC that is contemplated in ss 12(2)(a) – (f) of the Act. I cannot agree, therefore, that the established facts demonstrate on a balance of probabilities that the agreement has resulted in a merger of assets and that such a merger has effectively allowed MultiChoice control over parts of the business of the SABC.

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[12] While MultiChoice was of the view that the agreement underscores a vertical relationship between it and the SABC, the SABC was slightly more ambivalent about it. The SABC, during its oral submissions contented that in some ways the agreement could be conceived as one having "*created a business*" and that the creation of a business is not the same as a merger of two businesses. Inherent in this contention is, in my view, a concession that the agreement is as much one between parties operating in the market place in a manner horizontal to each other. This concession significantly dilutes MultChoice's claim that the agreement is solely one between parties engaged in a vertical relationship with each other.

[45] I would have to arrive at the same conclusion even if we were to view the entertainment channel as a separate business wherein the archival material (asset) of the SABC has been transferred. The facts established thus far do not show that there is joint control of that business. MultiChoice has paid the SABC R200m for this material, and while the control of this business does not appear to be wholly in the hands of the SABC, it would be difficult to conclude that MultiChoice has so much influence over it that it effectively constitutes joint control over the business. This conclusion might be possible if more facts were available.

[46] Turning my focus then to whether MultiChoice has increased its market share at the expense of the SABC, it is obvious that MultiChoice wishes to attract the customers of the SABC who have yet to join the ranks of its five million (5m) subscribers. It can, therefore, be accepted that by virtue of it offering the exclusive archival material of the SABC on its bouquet the attraction of its services increases. But, whether this will translate, or has translated, into an actual transfer of customers from the SABC to MultiChoice is something that cannot be, or has not been, established from the facts revealed thus far.

[47] The second ground upon which the appellants found their case concerns the control of the policy regarding encryption of the SABC channels once the DTT platform has been established. We know certain key clauses in the agreement make it impossible for the SABC to revert to its original policy of

encrypting its material without risking the early termination of the agreement. In which case the SABC would give up a substantial sum of money.

[48] As long as the agreement is threatened the SABC remains handcuffed. It cannot revert to its original position. The key to unlocking this handcuff rests with MultiChoice. Should it give up its right to terminate the agreement if the SABC were to change its policy on encryption then the SABC would be free to re-examine its position or re-evaluate its *volte face*. It may be true that the ultimate decision on whether encryption should be compulsory or not rests not with the SABC but with the government, but the value of the position adopted by the SABC cannot be underestimated. It is a very important participant in the television broadcasting market. In fact, it is the only public broadcaster available. It is established by statute. It has a specific and very important role to play in the dissemination of information and ideas, and in the provision of entertainment, to the public. It is a recipient of a significant subsidy from the public purse. Unlike MultiChoice, TopTV and e-TV, all of which are its competitors, it bears a general duty towards the public and is required to act in the public interest.[13] The policy it adopts on this important issue of encryption is central to its role as public broadcaster acting in the public interest. The fact that the ultimate decision of whether encryption is to be compulsory or not lies with government is of no moment. In any event that decision of the government,

[13] The Supreme Court of Appeal (SCA) has in a recent judgment highlighted the importance of this role for the general public life. In "South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others" [2015] 4 All SA 719 (SCA) at [49] it observed:

> "It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate. The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case." (footnotes omitted)

taken by the Minister of Communications, has been set aside by the SCA, who found that:

> "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 in clause 5.1.2(C), is thus illusory. "[14]

[49] Importantly, the SCA has found that the government decision on encryption is central to the ability of all the participants in this market to compete effectively and lawfully with each other. This is the view of the Commission, too.

[50] Should government persist with its view that encryption should be non-compulsory then if the SABC, upon re-examination of its present stance, decides that this policy is in conflict with its duty to serve and/or act in the public interest it would have to make known its opposition to the government decision and take whatever legal steps are available to it in order to protect its role and duties as a public broadcaster. At present it is unable to re-examine its policy without risking the early termination of the agreement. To the extent that the power to bring this early termination rests wholly in the hands of MultiChoice, it can be safely inferred that MultiChoice has a significant influence over the policy of the SABC. The policy, as stated above, is of crucial import. Moreover, the agreement is explicit that both parties will co-operate with each other to

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[14] *e.tv (Pty) Ltd v Minister of Communications* (Case No.: 1039/2015) [2016] ZASCA 85 (31 May 2016) at [50]

avoid any competent regulatory authority imposing any burdensome obligation on either of them. This could well mean that the SABC is contractually bound to co-operate with MultiChoice to ensure that the Minister's decision on encryption does not become a burdensome obligation on MultiChoice. This obligation to co-operate with MultiChoice on such an important issue could result in the SABC losing its autonomy to decide on and adopt a policy that is consonant with its interests and its duties as a public broadcaster. The Tribunal gave no thought to these aspects of the agreement. It also gave very little thought to the inexplicable change of attitude on the part of the SABC towards encryption of its material once the DTT platform is established.

[51] If regard is had to these aspects of the agreement then on the face of it (*prima facie*) the appellants have shown that the SABC and MultiChoice have constructed a merged business as contemplated in s 12 of the Act.

[52] By arriving at this conclusion I do not ignore the fact that whether the influence MultiChoice has acquired over the SABC's policy choice results in it actually exercising control in the ordinary course of business (bearing in mind that an important part of the SABC's business is to serve and advance the public interest) over the SABC is not entirely clear. An inference to this effect can be drawn, but it would certainly not be the only one that can be drawn. To make a definitive finding on this score it would be necessary to have regard to more evidence than is presently available. The information that would shed more light on this important issue rests in the hands of MultiChoice and the

SABC. They have elected not to furnish it to the Tribunal. The Tribunal on the other hand, instead of recognising this *lacuna* in the evidence proceeded to determine the issue on the basis of what was proven on a balance of probability rather than a *prima facie* basis. It reverted to its finding that the appellants had failed to show that the SABC had changed its policy on encryption because of the contents of the agreement. However, the Tribunal made that finding by applying the balance of probability standard. It was not made by applying the standard of proof required to establish that *prima facie* the policy change on the part of the SABC resulted from the conclusion of the agreement. The balance of probability standard deals with proof that is certain and final. The proof required to show a *prima facie* case, on the other hand, is one that is tentative. It is one that points to a possible rather than a definitive conclusion. The Tribunal in my view made an error by conflating the two tests. It is an error that is significant enough to constitute a misdirection warranting interference by this Court. It resulted in the Tribunal incorrectly refusing the alternative relief. An error refusing relief (main or alternative) when relief is due constitutes a material misdirection.

[53] It is on the basis of this reasoning that I hold that the appeal must succeed and the order of my colleagues should be granted.

[54] Finally, it bears mentioning that the appellants placed a considerable amount of learning drawn from the jurisprudence of this Court and other Courts located internationally. In my view, there is no need to engage with much of that

learning at this stage as any findings based on that learning may well change once more facts come to light after the Commission has concluded its investigation.

Vally AJA

24 June 2016