COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:
IR194Mar22/EXT061Jul23

In the matter between:

eMedia Investments Proprietary Limited	Applicant
And	
MultiChoice Proprietary Limited	First Respondent
The Competition Commission	Second Respondent

Panel	:	M Mazwai (Presiding Member)
	:	L Mncube (Tribunal Member)
	:	G Budlender (Tribunal Member)
Heard on	:	24 August 2023
Order issued on	:	18 December 2023
Reasons issued on	:	15 February 2024

REASONS FOR DECISION

Introduction

1. MultiChoice (Pty) Ltd (*"MultiChoice"*) operates DSTV, which is a subscription television broadcasting service. Since 2007 eMedia Investments (Pty) Ltd (*"eMedia"*) has supplied certain packaged television channels to MultiChoice, which has broadcast them as part of its DSTV subscription service.

2. On 12 May 2017 the parties concluded what was referred to as the Commercial Master Channel Agreement. The Agreement stipulated that eMedia would provide specified content and channels to MultiChoice for a five-year period ending on 31 March 2022. MultiChoice paid eMedia a fee for the acquisition of the rights over specified content and channels. MultiChoice undertook to broadcast them on its DSTV platform.

3. The content and channels that were subjects of this Agreement were the eNCA channel, eNuus bulletin, eTV Africa channel and four channels which were referred to as the “eChannels”. The eChannels are the eTV Extra, eToonz, eMovies and eMovies Extra channels. MultiChoice was not granted any exclusive rights in respect of the eChannels.

4. The Agreement did not provide for any right of renewal.

5. From November 2021, negotiations took place to conclude a further Agreement. MultiChoice made it clear that it was only interested in the acquisition of the rights in respect of the eNCA channel and eNuus Bulletin. It was not interested in acquiring rights in respect of the eChannels, which it had broadcast up until then.

6. On 25 February 2022, the parties concluded an Agreement in respect of the acquisition of rights in respect of the eNCA Channel and eNuus bulletin. MultiChoice made clear that it would no longer broadcast the eChannels from 1 April 2022.

7. eMedia then initiated a complaint that MultiChoice's conduct constituted an abuse of dominance in breach of ss 8(1)(c) and 8(1)(d)(ii) of the Competition Act (*"the Act"*). It also instituted an urgent application to the Tribunal, in which it sought interim relief in terms of s 49C(1) of the Act. The relief sought was that, pending the final conclusion of the Tribunal's hearing into the complaint initiated by eMedia, or for a period of six months after the date of the interim order, MultiChoice would be interdicted from removing the eChannels from the bouquet of channels shown on the DSTV platform.

8. On 31 May 2022, the Tribunal dismissed the application for interim relief.[1]

9. eMedia appealed to the Competition Appeal Court. On 1 August 2022 the CAC, by a 2-1 majority, upheld the appeal and granted eMedia the interim relief that it had sought in terms of s 49C(2)(b).[2]

10. On 31 January 2023, the Tribunal extended the interim relief by agreement between the parties, until the finalisation of a complaint hearing by the Tribunal or for a period of six months, whichever occurred earlier.

11. On 20 June 2023, the Competition Commission concluded its investigation of the eMedia complaint. It issued a notice of non-referral. eMedia indicated that it would self-refer its complaint to the Tribunal.

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[1] Case No: IR194MAR22.

[2] *eMedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another* (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC)

12. eMedia approached MultiChoice to agree to a further extension of the interim relief. MultiChoice refused to agree to this.

13. In July 2023, eMedia then made a two-part application to the CAC:

13.1. In Part B it launched a constitutional challenge to s 49C(5) of the Act. It contended that the subsection was unconstitutional because it failed to provide for more than one extension of an interim relief order granted in terms of s 49C of the Act. It further sought an interim reading-in of the words *"or further periods"* following the words *"a further period"* in s 49C(5), and a further interim interdict pending the finalisation of the Tribunal's hearing into the complaint or until six months from the date of the order of the CAC, whichever was the earlier.

13.2. In Part A, eMedia sought interim interdictory relief that pending the finalisation of Part B, MultiChoice was directed to maintain the *status quo* and was interdicted from removing from the bouquet of channels on the DSTV platform, eTV Extra, eToonz, eMovies and eMovies Extra (the eChannels).

14. The CAC concluded that the words *"a further period"* in s 49C(5) of the Act do not limit the power of the Tribunal to granting only one extension to the interim relief granted under s 49C.[3] It directed the Tribunal to determine eMedia's application

[3] Case No: 248/CAC/JUL23. The Orders were issued on 28 July 2023, and reasons for the Orders were handed down on 23 August 2023.

for a further extension of its interim relief in accordance with s 49C(5) on the papers filed before the CAC. Pending the finalisation of the Tribunal's determination of eMedia's application for an extension of its interim relief, MultiChoice was directed to maintain the *status quo*, and was interdicted from removing the eChannels from the bouquet of channels on the DSTV platform of which they currently formed part. Subject to eMedia complying with its filing obligations set out in the CAC's Order, the Tribunal's interim relief order of 19 December 2022 was extended until the earlier of the finalisation of the Tribunal's determination of the application, the conclusion of the hearing into the alleged prohibited practice, or a further period not exceeding six months.

15. On 18 December 2023, the Tribunal further extended the interim relief order until the earlier of the conclusion close enough the hearing into the complaint referral to the Tribunal by the eMedia; or a further period of six months from the date of the order whichever occurs first, with reasons to follow.

16. These are those reasons for the Tribunal's decision.

The two previous orders made by the CAC

17. At the hearing before the Tribunal, eMedia placed substantial reliance on the fact that the CAC has previously made two orders in which interim relief was granted.

18. The first order was made on 1 August 2022. The CAC made the order which, it found, the Tribunal should have made, in terms of s 49C(2)(b), when this matter

was first brought before it. The CAC made an order in terms of s 49C(2)(b). That order, and the reasons for it, are plainly relevant to the matter now before the Tribunal.

19. The second order was made on 28 July 2023. It is quite different. The CAC found that s 49C(5) permits the Tribunal to extend an interim order for successive periods not exceeding six months, and granted relief which was consequential upon that finding. The CAC made an interim order to regulate the position while the Tribunal exercises its power under the Act to decide whether to extend the interim order. The CAC did not consider, and it did not purport to consider, whether good cause had been shown for an extension in terms of s 49C(5). The second order therefore does not assist the Tribunal in making a decision under s 49C(5).

The order made by the CAC on 1 August 2022

20. The CAC's order of 1 August 2022 is underpinned by findings of both fact and law.

The CAC's findings of law:

21. The CAC in effect found that the alleged conduct of MultiChoice, if established, does or may constitute a prima facie prohibited practice for the purposes of interim relief. That is a finding of law. The Tribunal is bound by the CAC's findings of law.

22. It might be argued that this is only a provisional finding, having been made in interlocutory proceedings for interim relief. But even if that were so, the Tribunal

would not lightly depart from the CAC's finding, particularly given that the present application is also an interlocutory proceeding for interim relief.

The CAC's findings of fact

23. The CAC's findings of fact with regard to the alleged conduct of MultiChoice cover a multiplicity of matters. It is not necessary for the purposes of this decision to determine whether the CAC's findings of fact are binding on the Tribunal, by virtue of res judicata or issue estoppel (a form of res judicata).

24. In relation to the CAC's findings of fact, it is necessary to consider the contention of MultiChoice that the Tribunal had before it new facts which were not before the CAC.

25. MultiChoice contended that there were facts before the Tribunal which were not before the CAC when it made its decision of 1 August 2022. This is correct.

26. MultiChoice contended, as we understand its position, that the Tribunal is not bound by the decision made by the CAC on 1 August 2022, but that in any event, the new facts justified the Tribunal deviating from the findings which the CAC made.

27. The following facts were not before the CAC when it made its first order, and were relied upon by MultiChoice in the hearing before us:

27.1. The Competition Commission has, since the first decision of the CAC, decided not to refer the complaint to the Tribunal.

27.2. MultiChoice has introduced evidence by an economist which was not before the CAC; and

27.3. There is now some evidence as to what happened during the two months when an interim order was not in force. This bears on the impact which the absence of the interim order has or will have upon competition;

The decision of the Competition Commission

28. The fact that the Commission has declined, after investigation, to refer a complaint to the Tribunal, is a fact that must be taken into account. This is a conclusion reached by the body which the Act has given the task of undertaking such an investigation.

29. However, the Tribunal is of course not bound by the opinion of the Commission. The Commission may be incorrect in the conclusion that it reached. The Act provides for self-referral by a complainant where the Commission declines to refer its complaint to the Tribunal. This specifically recognises the possibility of error by the Commission.

30. The Commission is not obliged to provide detailed reasons for its decision, and has not done so. It has provided a brief summary of its reasons. We do not think any practical purpose would be served by analysing them now.

31. The self-referral is still to be heard by the Tribunal, and its merits are still to be determined. There can be no doubt that interim relief may be granted on good

cause shown, notwithstanding the decision of the Commission. The Tribunal should consider and decide that question on the merits.

The two-month "experiment"

32. The unusual history of this matter has had the result that for a period of two months, there was an "experiment" in the sense that MultiChoice had removed the channels in question from its offerings, with the consequence that during that period, eMedia did not receive the benefit which it would otherwise have received in this regard. The events during that period bear on the question whether eMedia has demonstrated that it will suffer irreparable or serious harm if the interim relief order is not extended.

33. However, there are disputes as to what that "experiment" reveals, and differing contentions as to what its significance is. eMedia contends that it shows that eMedia would suffer irreparable or serious harm if the interim relief were to come to an end. MultiChoice contends that the temporary removal of the eMedia channels did not have an adverse impact on eMedia's advertising revenue or a meaningful impact on its overall viewership. We are not able to resolve that dispute in this application on paper for interim relief.

The new evidence by an economist

34. In this application, MultiChoice introduced evidence of an economist which was not before the CAC when it decided the interim relief appeal in August 2022.

35. There is difficulty in interrogating this evidence and reaching firm conclusions in that regard, during proceedings for interim relief, on paper.

36. In summary with regard to the new facts and evidence: In our opinion, and in the light of the considerations which we set out below, we do not think the new facts and evidence are decisive of any of the questions which are before the Tribunal.

The grounds on which the Tribunal may grant and extend interim relief

37. The Tribunal may grant interim relief *"if it is reasonable and just to do so"*, having regard to the factors specified in s 49C(2)(b). The Tribunal may extend an interim order *"on good cause shown"*: s 49C(5). Logically, the factors relevant to the decision whether to grant interim relief must also be applicable in determining whether good cause has been shown for an extension.

38. The Act prescribes three factors which the Tribunal must consider in determining whether it is *"reasonable and just"* to grant an interim order. Those factors are:

38.1. whether there is prima *facie* evidence of an alleged prohibited practice. That requirement is mandatory: if there is no *prima facie* case of a prohibited practice, then there is no basis for the granting of an interim order.

38.2. the need to prevent serious or irreparable damage to the applicant; and

38.3. the balance of convenience.

39. The questions of irreparable damage and the balance of convenience are not looked at in isolation or separately, but are taken in conjunction with one another.[4] They are closely related.

40. There is no onus on MultiChoice to show that it is no longer just and equitable for eMedia to enjoy interim relief. The onus is on the party which seeks the extension to show good cause for this.

41. We first address the purposes of the Act, and then consider the three factors which are prescribed by the Act.

The purposes of the Act

42. The application must be considered, and the relevant factors must be assessed and weighed, with due regard to the purposes of the Act. This is a matter on which the CAC laid great emphasis in its reasons of 23 August 2023.

43. The preamble to the Act records the recognition by the people of South Africa that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. The economy must be open to greater ownership by a greater number of South

[4] *York Timbers Ltd v South African Forestry Company* IR078FEB01.

Africans. One of the purposes of the Act is to provide all South Africans equal opportunity to participate fairly in the national economy.

44. In its judgment, the CAC emphasised the need for interim or final relief to be contextualised within the transformative purpose of the Act. It drew attention, in this regard, to the trenchant statements of the Constitutional Court in the *Mediclinic* case.[5]

> *"[3] It ought never to be acceptable for any of us, including the corporate citizens of this land, to indulge, talk less of over-indulge, in the unconscionable practice of seeking to record the highest profit margin possible by any means necessary, in wanton disregard for what that would do to the rest of humanity. Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions."*

> *"[7] Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to*

[5] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35 at paras 3 and 7.

somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system."

45. MultiChoice's current dominant position has its origin, at least in part, in our history. eMedia is a medium-size black-owned company. The CAC made clear that this is a material consideration.

46. eMedia pointed out in this regard that it has substantially higher HDP ownership than MultiChoice . MultiChoice countered this by pointing out that it has a higher overall B-BBEE score, level 1 than eMedia, which has a level 2 B-BBEE score.

47. In both of its judgments in this matter, the CAC placed great emphasis on the need to enable participation by HDPs in the relevant market(s). This directly addresses the question of ownership. The CAC took the view that the higher HDP representation of eMedia is a very relevant consideration in determining an application for interim relief. We are bound by that decision.

Prima facie proof of an exclusionary practice?

48. The parties introduced conflicting evidence by experts to support their contentions as to whether the eMedia complaint reveals an exclusionary practice. This involves questions of both law and fact.

49. The CAC held:

> *"MultiChoice's abrupt step, in cutting off an important source of eMedia's ability to benefit from its advertising revenue, on a platform such as MultiChoice results not only in a commercial blow to it but leads to other anticompetitive considerations affecting eMedia. This is not a case of cross subsidisation by a dominant firm. In this case there are no other broadcasting services that can be utilised by smaller firms. By excluding eMedia from the broadcasting platform amounts to exclusionary conduct at this stage."*[6]

50. In the context of whether MultiChoice's conduct amounts to an exclusionary act, eMedia contends that MultiChoice has not put up any persuasive reason for why it elected not to carry the e-Channels. eMedia contends that the eChannels are popular, and that MultiChoice cannot justify its exclusion on any commercial basis, other than a desire on the part of MultiChoice to limit the ability of eMedia to compete with it.

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[6] Paragraph 103: emphasis added.

51. In response, MultiChoice contends that its business model does not support the broadcasting of the eChannels, which are also available for free on open access through eMedia's Openview. MultiChoice initially contended that it did not have sufficient carrying capacity to broadcast the eChannels. However, it was demonstrated before the CAC that this is not so. MultiChoice was driven to concede this, and that it does indeed have the necessary capacity.[7]

52. In The Bulb Man case,[8] the CAC held as follows:

> *"We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the probabilities in favour of the applicant."*[9]

53. The CAC drew attention to European competition law authority that a refusal by a dominant undertaking to deal will not be considered an abuse under Article 82 of the EC Treaty if it is objectively justified. This will be the case if the refusal can be justified on business grounds other than the intention to eliminate a competitor from the market.[10]

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[7] Para 98.
[8] *The Bulb Man (SA) Pty Ltd v Hadeco (Pty) Ltd* Case No 81/IR/APR06.
[9] *The Bulb Man* para 56.
[10] Faul and Nickpay The EC Law of Competition 3.156. The European Court of Justice in Post Danmark A/S v Konkurrencerådet (C-23/14) EU:C:2015:651 ("Post Danmark II") held at para 57 and para 60 "Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.

54. The converse is that the absence of any demonstrated commercial reason for the conduct in question may lead to the inference that the motive is exclusionary or the abuse of market power in breach of the provisions of the Competition Act.

55. In our opinion, MultiChoice has failed to demonstrate that at present, there is an objective business ground which justified its refusal to broadcast the channels in question. That would be the case if, for example, MultiChoice wished to broadcast other channels, and demonstrated that it did not have the capacity to broadcast both those channels and the eChannels. This has not been demonstrated in the evidence placed before the Tribunal. It may therefore be that the motive for refusing to broadcast the eChannels is exclusionary or the abuse of market power in breach of the provisions of the Competition Act. Whether that is indeed the case will have to be decided when the eMedia complaint is determined. At this interim stage, the proposition is sustainable.

56. It may be that once the relevant witnesses have given oral evidence, and that evidence has been tested in the hearing, the Tribunal will reach a different conclusion. However, as matters stand, and having regard to the findings of the CAC, we conclude that eMedia has made out a prima facie case of a restrictive or prohibited practice.

And at para 62 it went on to conclude that "the application of the as-efficient-competitor test does not constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 82 EC. In a situation such as that in the main proceedings, applying the as-efficient-competitor test is of no relevance". In Unilever Italia Mkt. Operations Srl v AGCM, judgment of 19 January 2023, (C-680/20) EU:C:2023:33, the European Court of Justice approved Post Danmark II, when it held at para 58 that "the competition authorities cannot be under a legal obligation to use the 'as efficient competitor test' in order to find that a practice is abusive".

The need to prevent serious or irreparable damage to the applicant

57. eMedia alleges that if the eChannels are not broadcast on the MultiChoice DSTV platform, it will lose significant advertising revenue, with the result that it will suffer serious or irreparable damage in its ability to compete with Multichoice. It has produced some evidence to support this proposition.

58. MultiChoice disputes the proposition. It has introduced facts to show that eMedia is a wealthy company, and that without the advertising revenue from the broadcasting of the eChannels on the DSTV platform, it will be able either to use its own resources, or obtain loans to the extent that this is necessary, to enable it to carry on with its business and compete with Multichoice.

59. There is therefore a dispute of fact in this regard. At this stage of the proceedings, it is not for the Tribunal to reach any binding conclusion in this regard. It is sufficient for present purposes to state that eMedia has produced some evidence that it will suffer serious or irreparable damage, and that it remains to be seen in due course whether it is able to prove that on a balance of probabilities.

Balance of convenience

60. In our opinion eMedia has shown that it will likely suffer some damage to its ability to compete if the channels in question are not broadcast on the DSTV platform.

61. That damage has to be weighed against the damage which MultiChoice will suffer if it is required by an interim order to continue to broadcast the channels in question.

The evidence shows that MultiChoice wishes to introduce additional channels, and that it has sufficient bandwidth to do so. MultiChoice has not established that it will suffer any material damage in this regard, or in any other respect, if it is required in the interim to continue to broadcast the eChannels. It may be able to establish this at the referral hearing in due course, but it has not established that on the papers before us.

62. It follows that on the evidence before us, the balance of convenience strongly favours eMedia. The evidence shows on one side a likelihood of damage which may be serious or irreparable, and on the other side, no likelihood of material damage.

63. A matter which the Tribunal has to consider is the consequence of successive periods of extension. It is possible, as a matter of simple logic, that if the interim order is extended, the existence and extent of prejudice to MultiChoice may change as time passes. The balance of convenience may thus shift over time. That has to be considered on the facts, on a case-by-case basis. Each time the Tribunal is faced with an application for an extension of interim relief, it has to weigh again the prejudice which will be suffered by the respondent if the order is extended, because this will impact on the balance of convenience.

64. As matters currently stand, when one considers together the second and third factors (the need to prevent serious or irreparable damage to the applicant, and the balance of convenience), the balance comes down squarely on the side of eMedia.

65. That could change in time, as circumstances change. However, on the evidence before us, and having regard to the judgment of the CAC and the need to take a robust approach with regard to the facts, we conclude that eMedia has satisfied the test for the granting of interim relief.

66. In our opinion, the circumstances favour an extension of the interim order, particularly when one has regard to the imperative of transformation which the CAC has emphasised.

Signed by:Geoff Budlender
Signed at:2024-02-15 10:30:05 +02:00
Reason:Witnessing Geoff Budlender

Geoff Budlender

15 February 2024

Adv. Geoff Budlender SC **Date**

Concurring: Ms Mondo Mazwai and Professor Liberty Mncube

Tribunal Case Managers:	Ofentse Motshudi and Sinethemba Mbeki
For the Applicant:	Adv Du Plessis SC with Adv Gavin Marriot assisted by Adv Sarah Pudifin-Jones and Adv Siyabonga Nelani Instructed by Nortons Inc.
For the First Respondent:	Adv Wim Trengove SC with Adv Jerome Wilson SC assisted by Adv Mbikiwa, Adv Ngakane Instructed by Webber Wentzel