COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: OTH201Feb15/DSM081Aug22

In the *interlocutory procedure* between:

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

Case no.: OTH201Feb15

In re: the matter between:

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

Panel	: A Wessels (Presiding Member) : A Ndoni (Tribunal Member) : T Vilakazi (Tribunal Member)
Heard on	: 26 November 2024
Reasons and Order issued on	: 10 April 2025

REASONS FOR DECISION AND ORDER

Introduction

[1] This is an exception application in which MultiChoice (Pty) Limited ("MultiChoice") applies for a declarator that the facts relied upon by the Competition Commission (the "Commission") and the applicants in the main matter do not disclose a merger in terms of section 12(2)(g) of the Competition Act 89 of 1998 as amended (the "Competition Act").

[2] MultiChoice has brought this exception application, in terms of Rule 42 of the Competition Tribunal Rules ("Tribunal Rules"), and asks the Competition Tribunal ("Tribunal") to dismiss the main application brought by the applicants namely, Caxton and CTP Publishers and Printers; the trustees for the time being of the Media Monitoring Project Benefit Trust; and the S.O.S. Support Public Broadcasting Coalition (collectively "the main matter applicants") on the ground that the facts alleged by the Commission in its affidavit filed on 9 April 2021 ("the Commission's Affidavit") fail to disclose, and cannot as a matter of law establish, a merger under the Competition Act.

[3] The facts contained in the Commission's Affidavit are heavily disputed.[1] These disputes cannot be resolved without a hearing in which all the relevant witnesses are examined and cross examined. However, MultiChoice submits that a trial is unnecessary and will be futile because the Commission's facts, taken at face value, do not, as a matter of law, disclose a merger. It accordingly submits that it would be appropriate to hear and determine its contention, akin to an exception, at the outset and before embarking on a long and expensive but futile trial.

[4] We first address the events leading up to the exception application and then analyse the question of whether it is appropriate to determine the matter by way of exception at this stage.

[1] Commission's disputed facts, Record: Bundle A, p1206; The applicants' disputed facts, Record: Bundle A, p1196; MultiChoice's disputed facts, Record: Bundle A, p1231; SABC disputed facts, Record: Bundle A, p1250.

Background

[5] The origins of this matter stem from a Commercial and Master Channel Distribution Agreement entered into between MultiChoice and South African Broadcasting Corporation (SOC) Limited (the "SABC") on 3 July 2013 ("the Agreement").

[6] In terms of the Agreement, the SABC *inter alia* agreed to allow MultiChoice to carry its free-to-air channels on MultiChoice's subscription services. MultiChoice undertook to pay the SABC for the right to do so. The SABC undertook in return that it would broadcast its free-to-air channels unencrypted so as to remain available to MultiChoice's subscribers.[2] In other words, the SABC agreed with MultiChoice not to encrypt its free-to-air channels, making them receivable on M-Net over the top ("OTT") Set-Top Boxes ("STB") without additional requirements.

[7] The Agreement allowed MultiChoice to terminate or suspend the agreement if the SABC encrypted its free-to-air channels, with a refund of fees paid.[3] MultiChoice initially agreed to pay the SABC R553 million, with 60% allocated to the entertainment channel and 40% to the news channel.[4]

[8] On 13 February 2015, the main matter applicants applied to the Tribunal for an order directing MultiChoice and the SABC to notify the Agreement as a merger within the meaning of section 12 of the Competition Act. MultiChoice and the SABC opposed the application. The substantive order that the main matter applicants sought in their application was that MultiChoice and the SABC be ordered to notify the Commission of the acquisition of control that arose from the Agreement.

[2] Clauses 2.1.6, 4.3 and 7 of the Agreement.
[3] Clause 7 of the Agreement. See also *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice Proprietary Limited and Others* (140/CAC/MAR16) ("*CAC judgment*") at para 69.
[4] *CAC judgment* at para 16.

[9] The Tribunal dismissed the application on 11 February 2016 and held that the main matter applicants had failed to establish that the Agreement constituted a notifiable merger.[5]

[10] The main matter applicants then appealed to the Competition Appeal Competition ("CAC"), which handed down its judgment on 24 June 2016.[6] The CAC also held that the main matter applicants had failed to show that MultiChoice had acquired material influence on encryption policy as per the agreement and on public policy on encryption as envisaged under section 12(2)(g),[7] and therefore exercised an element of control over the business of SABC. The CAC however upheld the main matter applicants' prayer for alternative relief[8] and ordered MultiChoice and the SABC to provide all their documents pertaining to the negotiation, conclusion and implementation of the Agreement to the Commission. Furthermore, it directed the Commission to file a report with the Tribunal recommending whether or not the Agreement gave rise to a notifiable merger. Lastly, if the Commission recommended that the Agreement gave rise to a notifiable merger, the CAC directed the Tribunal to re-hear the matter to determine whether the conclusion of the Agreement did entail such a merger.

[11] In the Commission's investigation, following the CAC orders, a dispute arose between the Commission, MultiChoice and the SABC on the question whether the CAC order permitted the Commission to employ its powers of subpoena and interrogation, in terms of Chapter 5B of the Competition Act, in its investigation. The main matter applicants applied to the CAC for an order declaring that the Commission was permitted to do so.

[12] The CAC dismissed the application on 28 April 2017[9] and the main matter applicants appealed to the Constitutional Court. The Constitutional Court

[5] *Caxton and CTP Publishers and Printers Ltd; The Trustees for the Time Being of The Media Monitoring Project Benefit Trust; SOS Support Public Broadcasting Coalition v Multichoice (Pty) Ltd; South African Broadcasting corporation (SOC) Ltd; Competition Commission* (OTH201Feb15) at paras 98 and 99.
[6] *CAC judgment*.
[7] Ibid at para 100.
[8] Ibid at para 114.
[9] *S.O.S Support Public Broadcasting Coalition v SABC* [2017] ZACAC 2 (28 April 2017) at para 33.

upheld the appeal on 28 September 2018[10] and held that the Commission was permitted to employ its investigative powers under Chapter 5B of the Competition Act.

[13] The Commission completed its investigation and filed its report with the Tribunal on 9 November 2018.[11] As appears from the report, the Commission considered all the documents submitted by MultiChoice[12] and the SABC[13] and interrogated the SABC and MultiChoice's witnesses.[14] The Commission analysed the evidence regarding the SABC's position before the Agreement, the negotiation of the Agreement and the SABC's position after the Agreement; considered the applicable legal framework, made its assessment on the encryption of the free-to-air channels and concluded that the Agreement had resulted in a change of control within the meaning of section 12(2)(g) of the Competition Act.

[14] On 5 February 2021,[15] the Tribunal issued a directive in which it directed the Commission to file a supplementary affidavit setting out each of its findings on which it relied for its conclusion that the Agreement constituted a notifiable merger in terms of section 12(2)(g) and the material facts and evidence upon which it relied in support of each of its findings. The Tribunal also directed the parties to identify the disputes between them and to indicate "*whether any of the disputes are capable of determination by argument on the papers, without the need for further oral evidence*" and to identify the disputes which, they contend, require oral evidence.[16]

[15] The Commission filed its supplementary affidavit on 9 April 2021[17] and re-iterated its conclusion that the Agreement constituted a notifiable merger under

[10] *S.O.S Support Public Broadcasting Coalition v SABC* [2018] ZACC 37 (28 September 2018).
[11] Commission's Report on whether the conclusion of the Commercial and Master Channel Distribution Agreement resulted in a merger between the South African Broadcasting Corporation (SOC) Limited and MultiChoice (Pty) Ltd dated 9 November 2018 ("Commission's Report").
[12] Commission's Report at paras 20 to 22.
[13] Ibid at paras 23 to 73.
[14] Ibid at paras 74 to 151.
[15] Commission affidavit, Record: Bundle A, p11 at para 23; Tribunal directive 5 February 2021, Record: Bundle A, p1191.
[16] Tribunal directive, Record: Bundle A, p1194 at para 1.6.2.
[17] Commission's affidavit, Record: Bundle A, p1.

section 12(2)(g). In line with the Tribunal's directive, the Commission set out the evidence and its findings of fact upon which it based its conclusion.

[16] Following an exchange of pleadings by the parties, MultiChoice launched an exception application on the disputed issues as it contends that it would be futile to refer the disputed issues to oral evidence because the Commission's findings of fact, taken at face value, do not disclose a merger.

The exception application

[17] MultiChoice's exception application focuses on the Commission's finding that the encryption aspect of the Agreement constitutes a merger. MultiChoice's exception application seeks the dismissal of the main matter and like MultiChoice, the SABC also contends that the facts alleged and relied upon by the Commission cannot, as a matter of law, establish a merger under section 12(2)(g) of the Competition Act.

[18] The Commission in its affidavit after setting out the evolution of the SABC's position in relation to encryption, proceeds, at paragraphs 97 to 102, to plead that the Agreement falls under 12(2)(g), and that it meets all of the four elements of the *Novus* material influence test. The Commission argues that the pleaded facts in its affidavit demonstrate, *inter alia*, that:

18.1 the Agreement materially influenced the policy of the SABC in relation to encryption within the contemplation of section 12(2)(g) of the Competition Act in that before the Agreement was concluded the SABC's strategic position was in favour of basic STB controls, including encryption;

18.2 after the conclusion of the Agreement, the SABC jettisoned its policy on encryption, influenced by Multichoice and the Agreement; and

18.3 the Agreement had a lasting impact on the structure of the market.[18]

[18] Commission's affidavit paras 95 and 96.

[19] The Commission submits that determining the matter on exception would not align with the CAC and Constitutional Court orders, which required the Commission to investigate whether the Agreement constituted a merger and for the Tribunal to rehear the matter using its inquisitorial powers. The Commission's affidavits incorporating its report require the Tribunal to determine complex questions of law and fact that are not suited for determination by way of an exception. The CAC judgment makes it clear that the effects of the encryption of the free-to-air channels in the marketplace and other related questions are relevant to whether the Agreement constitutes a merger.

[20] The main matter applicants submit that it is not appropriate to determine this matter by way of an exception. MultiChoice's exception is the type of procedural device best suited to adversarial litigation, which the CAC made clear should not be adopted in this matter. It would impermissibly pre-empt the very inquisitorial determination required by the CAC. In any event, the central issue in this matter (whether the conclusion of the Agreement gave rise to a merger) is a complex issue of fact and law that is not well suited to determination by exception.[19]

Disputes of fact

[21] Pursuant to the Tribunal's directive on 5 February 2021, the parties identified the material disputed facts and addressed the question whether they could be resolved on the papers or require resolution by oral evidence.

[22] The Commission identified many disputed facts[20] and maintains that nine of the disputes will require resolution by oral evidence. The main matter applicants also submitted disputed facts[21] and advocate for a referral to oral evidence.[22]

[19] The main matter applicants' heads of argument at para 5.1.
[20] Bundle A of the Record, p1206.
[21] Ibid, p1196.
[22] The main matter applicants' disputed facts, Record: Bundle A, p1202 at paras 8 to 10.

[23] MultiChoice also identified disputed facts[23] and asserts that six key issues can only be resolved by oral evidence.[24] It makes the point, at the outset, however, that the disputes of fact are not material to the outcome because the Commission's findings of fact do not, as a matter of law, disclose a merger. It gives notice that it would at the outset seek a determination of the legal issue.[25]

[24] The SABC also provided disputed facts[26] and it also contends that a range of issues would have to be referred to oral evidence.

Legal framework

[25] The Tribunal Rules do not explicitly provide for exceptions. However, under Rule 55(1)(b), if a "*question arises as to the practice or procedure to be followed in cases not provided for*" by the Tribunal's Rules, Rule 55(1)(b) permits it to "have regard" to the Uniform Rules of the High Court.

[26] Thus, exceptions before the Tribunal are determined by following High Court Rule 23. An exception may be based on a contention that (i) the relevant pleading lacks averments necessary to sustain a cause of action, and/or that (ii) the pleading is vague and embarrassing in that the other party does not know what case it is required to meet. MultiChoice does not contend that it does not know what case it is required to meet.

[27] The Tribunal has held that, whilst its approach to pleadings has historically been less stringent than that of the High Court given the *sui generis*[27] and inquisitorial nature of its proceedings, pleadings before the Tribunal are nevertheless required to adhere to the provisions of Tribunal Rule 15 and, particularly, Tribunal Rule 15(2). In *Invensys*,[28] the Tribunal set out three central considerations informing its approach to exceptions, namely, that complaint proceedings in the Tribunal are *sui generis*, containing elements of both High

[23] Bundle A of the Record, p1231.
[24] MultiChoice disputed facts, Record: Bundle A, p1239 at paras 19 to 53.
[25] MultiChoice disputed facts, Record: Bundle A, p1236 at paras 10 to 18.
[26] Bundle A of the Record, p1250.
[27] *Rooibos Ltd v South African Competition Commission* (129/CR/Dec08) ("*Rooibos*") at para 5; *BMW South Africa (Pty) Limited t/a BMW Motorrad v Fourier Holdings (Pty) Limited t/a Bryanston Motorcycles* [2011] 1 CPLR 1881 (CT) at para 38.
[28] *Invensys PLC v Protea Automation Solutions (Pty) Ltd* [2014] 2 CPLR 505 (CT) ("*Invensys*").

Court motion and trial proceedings; secondly, the subject matter of Tribunal proceedings often involves the intersect of law and economics, often requiring complex economic analysis of the facts to advance a theory of harm; lastly, the Tribunal enjoys inquisitorial powers, which it is required to exercise in its truth seeking functions, as such the guiding principle in its approach, is fairness.[29]

[28] The usual remedy for exception applications brought on the basis of vague and embarrassing pleadings is to grant the offending party an opportunity to amend its pleadings. When an exception application is brought purely on the basis of a point of law, which may be determinative of the matter, dismissal is the appropriate remedy.[30]

[29] In an exception, the Tribunal must take all the allegations at face value. The allegations of fact must be accepted unless they are palpably untrue or so improbable that they cannot be accepted. To uphold the exception, the Tribunal must be satisfied that on all possible readings of the facts no cause of action is made out.[31] If evidence can be led which can disclose a cause of action the exception must be dismissed. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.[32]

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[29] *Invensys* at paras 13 to 16.

[30] *American Natural Soda Ash Corporation and CMC Global v the Competition Commission, Botswana Ash (Ply) Ltd and Chemserve Technical Products (Ply) Ltd* [2001-2002] CPLR 430 (CT) at para 433. See also *Invensys PLC and Others v Protea Automation Solutions (Pty) Limited* [2014] 2 CPLR 505 (CT).

[31] *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O'Farrell NO and Others* [2013] 4 All SA 598 (KZD), dealing with the Competition Act: *H v Fetal Assessment Centre* 2015 (2) SA 193 CC:
"[6] Since this is an exception, the plaintiff must persuade me that, on every interpretation which the counterclaim can reasonably bear, no cause of action is disclosed. I am to take as true the averments pleaded by the defendant and to assess whether they disclose a cause of action. Neither party was able to refer me to any authority concerning the interpretation of the sections in question."

[32] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) 997:
"[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law. In the circumstances of this particular case (putting aside for the moment the complication to which I shall return in paragraph 8) that means that the excipient (respondent) had to show that ex facie the written documents relied upon by appellant it will not be possible to identify the res vendita on the ground and that there is no reason to suppose that any admissible evidence could conceivably exist which would enable that to be done. In my view, the respondent failed to establish that such was the case for reasons to which I shall return and the exception should have been dismissed on that ground alone."

[30] In *Pretorius*, the Constitutional Court held that it was better to resolve cases on merits after the leading of evidence, rather than through exceptions, where the matter involves "*potentially complex factual and legal issues*".[33] Likewise, in *Coolheat*,[34] the Tribunal held that: "*There are occasions where it is not appropriate to decide a law point without the benefit of a trial of the facts. The exception raises issues of mixed points of facts and law...hence it is not appropriate for determination now*".[35]

[31] The Tribunal's approach to exceptions mirrors that of the High Court in some respects.[36] However, the Tribunal has cautioned that there are important differences in the context that must be taken into account when seeking to make use of exceptions before it. Moreover, the Tribunal has also recently emphasised: "*the CAC thus cautions that in the context of exceptions, the Tribunal ought to properly delineate what the Commission may allege during the complaint referral stage from what the Commission was required to prove at the hearing stage*";[37] and the Tribunal should guard "*against inadvertently shoehorning the Commission to a premature election about its case before all the evidence is led and assessed*".[38]

[32] On the issue of whether the facts alleged by the Commission disclose a merger under the Competition Act, as a matter of law, we are also called upon to consider the meaning of section 12(2)(g) of the Competition Act, which states 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 practice, can exercise an element of control referred to in paragraphs (a) to (f)*".

[33] The CAC's interpretation of section 12(2)(g) is as follows:[39]

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[33] *Pretorius and Another v Transport Pension Fund and Others* [2019] (2) SA 37 (CC) at para 22.
[34] *Coolheat Cycle Agencies (Pty) Ltd v Competition Commission* [2014] ZACT at para 37.
[35] Ibid at paras 37 and 38.
[36] *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company and Others* (CR212Feb17) [2023] ZACT 3 (30 March 2023) ("*Bank of America CT*") at para 49.
[37] *Bank of America CT* at para 55, quoting with approval *Competition Commission v Interaction Market Services Holdings (Pty) Ltd In re: Interaction Market Services v Competition Commission CAC Case No: 193/CAC/Jun21 (25 March 2022) ("IMS")* at para 31.
[38] *Bank of America CT* at para 55, quoting with approval *IMS* at para 31.
[39] *Murray & Roberts Holdings Limited v Aton GMBH and Another* [2018] 2 CPLR 519 (CAC) at para 29.

"Section 12(2)(g) invariably involves a fact intensive inquiry in order to determine whether, on the facts of the particular case, a party has the ability to materially influence the policy of the target firm in a manner comparable to a person in ordinary commercial practice exercising control over the target company. Section 12 (2) (g), by reason of the wording employed therein and the varieties of ways in which de facto control may come about, can never give rise to bright lines. That is to say, it is extremely difficult to conceive of a 'one stop' test which would constitute a line over which a party cannot step, if it is to be found to exercise control over the target firm as set out in s 12 (2) (g) of the Act. Each case must be determined on its own facts in order to determine whether the acquiring firm has the power to influence the policy of the company as is envisaged in this provision….". (Own emphasis)

Assessment

[34] At the hearing, MultiChoice and the SABC submitted that as the issue for determination by the Tribunal is a legal question that may be dispositive of the matter, it should appropriately and conveniently be dealt with as a preliminary issue before the commencement of a hearing. Furthermore, if the exception is upheld, it will substantially curtail the proceedings and avoid an unnecessary and protracted hearing and/or the leading of unnecessary evidence.

[35] In response to the above, the Commission and the main matter applicants submitted that MultiChoice's attempt to separate legal questions is deemed inconvenient due to identified factual disputes that need resolution. In addition, determining the matter on exception would contradict the purpose of the CAC and Constitutional Court orders, which require a thorough investigation and re-hearing.

[36] We draw guidance from the decisions by the CAC and the Constitutional Court below in order to determine the merits of this exception application.

CAC's guidance

[37] The CAC held that "… *the concept policy of a firm should be viewed in a wide sense and within the context of each case.*"[40] It went on to say that "*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*

[40] *CAC judgment* at para 79.

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)".[41]

[38] It bears stating that the CAC sharply criticised the Tribunal for deciding the matter on its strict application, and for failing to invoke its wide inquisitorial powers to investigate the Agreement.

[39] In its judgment, ordering the rehearing of this matter, the CAC made it clear that in a merger proceeding the Tribunal should ensure that the full evidential complexity is available to it by employing its inquisitorial powers.[42] In particular, the CAC held that:

"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."[43] (Own emphasis)

[40] The central points to be drawn from the CAC judgment are as follows:

40.1 It is essential for the Tribunal to decide this matter with the full evidential complexity before it, so that it is able to advance the purposes of the Competition Act. Those purposes include to "*regulate the transfer of the economic ownership in keeping with the public interest*"[44] as well as ensuring that anti-competitive changes to market structures do not take place. In addition, the CAC held, "*[i]t must be in*

[41] *CAC judgment* at para 79.
[42] Ibid at para 110.
[43] Ibid.
[44] Ibid.

the public interest for transactions involving the public broadcaster to be examined with a particular consideration of the purpose of the Act."[45]

40.2 Moreover, the CAC held that the Tribunal should utilise its inquisitorial powers in the rehearing precisely because of the exceptional nature of this case, involving, as it does, the question of whether, through an agreement, MultiChoice acquired a relevant form of control over the public broadcaster. In the course of its judgment the CAC held: "*[t]his is an exceptional case, and … 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.*"[46] (Own emphasis)

[41] The Tribunal must therefore be guided by the principles set out by the CAC when conducting the rehearing of this matter. Determining the matter on exception will not be in line with the purpose for which the CAC granted paragraphs 2 to 4 of its order of 24 June 2016. The purpose of the CAC's order, read with the order of the Constitutional Court, required the Commission to investigate whether the Agreement constituted a merger. Furthermore, if the Commission concluded after its investigation that the Agreement constituted a merger, it was required to report this finding and recommendation to the Tribunal in the time period stipulated.

[42] In the light of the Commission's report that the Agreement constituted a merger, the Tribunal, using its inquisitorial powers, is required to rehear the matter and use its inquisitorial powers which would enable the Tribunal to resolve the factual disputes that the CAC identified in its judgment. The CAC added that the factual disputes on the papers, regarding whether the conclusion of the agreement gave rise to a change of control, should not be determined within the strict confines of the *Plascon-Evans* test. It emphasised that conclusions reached on a limited factual basis and relying on the *Plascon-Evans* test were

[45] *CAC judgment* at 110.
[46] Ibid at para 111.

not appropriate to finally determine the matter because of the public interest involved bearing in mind that this is an exceptional case.

[43] In contrast to the clear purpose of the CAC order, especially paragraphs 2 to 4 thereof, the MultiChoice exception requires the Tribunal to determine the matter without employing its inquisitorial powers and resolving any of the factual disputes that the CAC identified. It must be accepted that the CAC identified these factual disputes because their determination has a bearing on the just and final determination of the question whether the Agreement constituted a merger.

[44] If the Tribunal were to determine the matter on exception, it would be limited in its determination to what the parties have placed before it by way of evidence and the formulation of the issues for determination and would not employ its inquisitorial powers as the CAC clearly required it to do. It would treat the merger proceeding as an ordinary adversarial proceeding, which the CAC has found it is not. An inquisitorial proceeding means that the Tribunal plays an active role in the formulation of the issues for determination and the identification of additional evidence that the parties may not so far have indicated that they will present.

[45] In respect of whether the Agreement constitutes an acquisition of control in terms of section 12(2)(g) of the Competition Act, the CAC found that the SABC's decision against encryption was not clearly evident from the papers and that the Agreement might have constrained the SABC's strategic choices. In addition, the CAC's judgment indicated that the issue of control was not finally determined and required further investigation and rehearing by the Tribunal. Finally, the CAC judgment emphasised the importance of context and the strategic direction of a firm in determining material influence.

[46] In its report, the Commission concluded that the SABC was in favour of supporting STB controls and conditional access including encryption before the Agreement was signed.[47] Furthermore, the Commission concluded that the

[47] Commission's Report at para 209.

position of the SABC against encryption changed as "*after the conclusion of the Agreement, the SABC Board went through a process where there was confusion regarding the SABC position on STB controls to a position where the Board was clear that it did not support STB controls*".[48] As a result, the Agreement [redacted] and when asked whether the Agreement represented a significant change for the SABC, Ms Mokhobo replied as follows:[49]

> [redacted] *because now the SABC is a major player within the ICT communities and it's been the public podcaster who was* [redacted] *But also it helped very significantly the slowing down of progress of the implementation of DTT and they kept blaming policy confusion. There was no policy confusion, if they had gone with the original policy by now we will be talking a totally different story."*

[47] Thus, the Tribunal now has the opportunity to determine these issues by analysing the Commission's evidence, questioning witnesses, and hearing full arguments. This is in line with the CAC's conclusion that its findings were not final and determinative, necessitating a rehearing to reach finality using the Tribunal's inquisitorial powers. Therefore, with the issues properly ventilated at a hearing, the Tribunal could reach different conclusions on questions of law and fact, particularly regarding the substance of the Agreement and disputed facts.

Constitutional Court's guidance

[48] The Constitutional Court supported the CAC's reasoning, directing the Commission to investigate, and the Tribunal to rehear the matter if the Competition Commission recommends that that the agreement gives rise to a

[48] Commission's Affidavit, Record: Bundle A, p38-39 at para 94.
[49] Commission's Report at para 86.

notifiable change of control which falls within the definition of a merger in terms of section 12 of the Competition Act.[50]

Context and potential impact on competition in the market

[49] As indicated above, the CAC guidance is that context is very important and the concept *policy of a firm* should be viewed in a wide sense and within the context of each case.[51] The CAC further highlighted the relevance of the effects of encryption on the market, which must be evaluated in a proper context.[52] In light of this, the Commission alleges that MultiChoice's influence on SABC's encryption policy impacted market structure and competition and found as follows:

> *"MultiChoice's ability to influence SABCs policy on encryption materially impacted the structure of the market in that it protected MultiChoice's dominance in the PayTV market in that the STB Control and conditional access would have enabled the SABC to compete with MultiChoice and enable new entrants into the PayTV market."*[53]

[50] The Tribunal must in this case determine complex issues of fact and law. The central issue, whether the conclusion of the Agreement gave rise to a merger in term of section 12(2)g, which should be viewed in a wide sense, raises complex issues of both fact and law and ultimately potentially affects competition in the relevant markets and millions of South African consumers. As we have indicated, the CAC has found that this matter has a clear public interest component and that 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 Competition Act. The many disputed facts in this matter relating to control in terms of section 12(2)g of the Act in our view are not well suited for determination by exception and can only be determined in their

[50] *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* 2019 (1) SA 370 (CC) at para 90.
[51] *CAC judgment* at para 79.
[52] Ibid at para 80.
[53] Commission's affidavit, Record: Bundle A, p39 at para 96.

proper context through the hearing of oral evidence, with due regard to the purpose of the Competition Act and the public interest.

Conclusion

[51] We are not satisfied that on all possible readings of the facts as set out in the Commission's affidavits, its Report, and the affidavits of Caxton, Media Monitoring and S.O.S, that no cause of action has been made out that the conclusion of the Agreement gave Multichoice the power to influence the policy of SABC, which if established, would constitute a merger in terms section 12(2)g of the Act.

[52] Furthermore, to grant the exception application would be inappropriate and would depart from the CAC order, read in the context of the CAC judgment, as well as the judgment and order of the Constitutional Court, which ordered us to re-hear the matter employing our inquisitorial powers.

[53] In the circumstances, MultiChoice's exception application is dismissed.

ORDER

[1] MultiChoice's exception application is dismissed.

[2] There is no order as to costs.

Signed by:Andiswa
Signed at:2025-04-10 09:48:13 +02:00
Reason:Witnessing Andiswa

Ms Andiswa Ndoni — **Date** **10 April 2025**

Mr Andreas Wessels and Prof Thando Vilakazi concurring.

Tribunal case manager	:	Juliana Munyembate
For the Applicant	:	Adv. Wim Trengove SC and Adv. Michelle Norton SC *instructed by* Werksmans
For the first, second and third respondents	:	Adv. Andreas Coutsoudis and Adv. Kyle Courtney Pillay *instructed by* Nortons Inc
For the fourth respondent	:	Adv. Rafik Bhana SC and Adv. Phumlani Ngcongo *instructed by* Cliffe Dekker Hofmeyr Inc
For the fifth respondent	:	Adv. Ngwako Maenetje SC, Adv. Yanela Ntloko and Adv. Lebogang Phaladi *instructed by* Ndobela and Associates Inc