REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO: 140/CAC/MAR16

In the matter between:-

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED	First Appellant
THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST	Second Appellant
S.O.S. SUPPORT PUBLIC BROADCASTING COALITION	Third Appellant

and

MULTICHOICE PROPRIETARY LIMITED	First Respondent
SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED	Second Respondent
THE COMPETITION COMMISSION	Third Respondent

JUDGMENT: 24 JUNE 2016

DAVIS JP and BOQWANA AJA (VALLY AJA separate judgment)

Introduction

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

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

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

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

The relevant provisions of the Act

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

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

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

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

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

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

The agreement

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

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

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

The Entertainment channel

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

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

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

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

The FTA Channels

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

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

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

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

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

The Tribunal's decision

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

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

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

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

The appellants' case

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

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

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

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

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

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

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

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

Duration of agreement

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

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

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

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

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

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

'"Pre-1948 feature films" are a product of finite quantity. There is a fixed inventory of that product. It cannot be replenished. Moreover, it is a continuously depleting property in the sense that, with each repeat or rerun, its economic value approaches zero… (at 13)

The diminishing competitive position of Screen Gems must also be viewed in light of the fact that a considerable proposition of the value of a given feature is consumed by the first showing.' (at 65)

The test for transfer of a partial asset acquisition

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

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

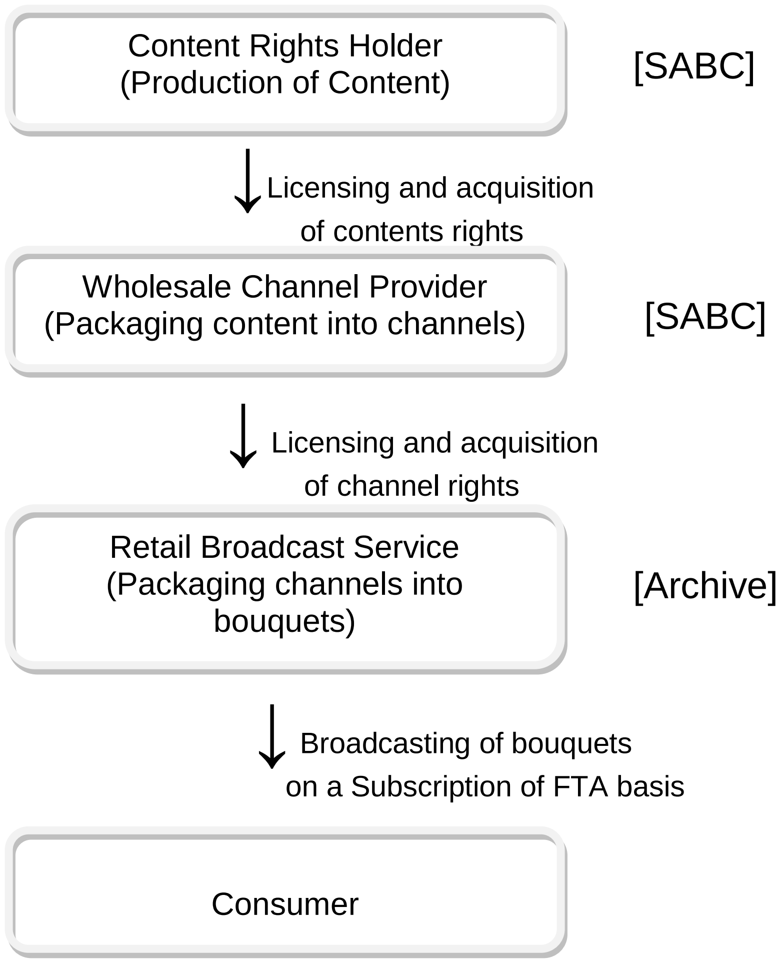
[31] Mr Budlender correctly cautioned that a test developed in the United States needs to be viewed within the merger notification regime in which the test was developed. Thus s 7 of the Clayton Act provides:

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

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

Respondent's case

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



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

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

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

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

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

Mr Patel continues:

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

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

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

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

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

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

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

Evaluation: Licensing Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By contrast Mr Patel states:

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

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

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

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

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

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

Weighing the evidence

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

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

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

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

The encryption issue

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

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

‘4.3 SABC FTA Channels

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

…….

7. **RESOLUTIVE CONDITION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alternative relief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Costs

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

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

1. The order of the Tribunal of 11 February 2016 is set aside.

2. First and second respondents are directed to provide the Competition Commission within 21 days of this judgment of all documentation including but not limited to all correspondence, board minutes, internal memoranda pertaining to the negotiation, conclusion and implementation of the agreement of 3 July 2013.

3. The Competition Commission is directed within 30 days of the receipt of the aforesaid information and documentation to file a report with the Competition Tribunal recommending whether or not the agreement gives rise to a notifiable change of control.

4. In the event that the Competition Commission recommends that the agreement gives rise to a notifiable change of control which falls within the definition of merger in terms of s 12 of the Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal to determine whether the conclusion of the agreement did entail such a merger as defined.

DM DAVIS

Judge President

NP BOQWANA

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	S Budlender with G Marriot and A Msimang
Instructed by:	Nortons Incorporated, Sandton
For the First Respondent:	D Unterhalter SC with M Norton SC and Z Cornelissen
Instructed by:	Werksmans Attorneys, Sandton
For the Second Respondent:	A R Bhana SC with PMP Ngcongo
Instructed by:	Cliffe Dekker Hofmeyr Inc., Sandton

REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

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

DATE SIGNATURE

C 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.

<u>The nature of the first and second respondents' businesses</u>

[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 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.

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

<u>The agreement</u>

[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;
>
> [20.2] the revenue derived from sales in respect of advertising and sponsorship deals on the SABC FTA channels shall accrue to the SABC;
>
> [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.

<u>The Act</u>

[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)."

<u>The contentions of the appellants</u>

[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.

<u>The first contention: transfer of assets</u>

[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.

<u>The findings of the Tribunal</u>

[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

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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)

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 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]

[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

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

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.

[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

[7] *Id.* at [76]

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.
>
> 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."

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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

[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 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?

[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]

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

[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 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.

[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.

[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.

[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, 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

[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)

> 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 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.

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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]

[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 relied upon a considerable amount of learning drawn from the jurisprudence of this Court and other Courts located internationally to show that there was a merger. 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.

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Vally AJA

24 June 2016