THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

In the matter between	140/CAC/Mar16
S.O.S SUPPORT PUBLIC BROADCASTING COALITION	First Applicant
THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST	Second Applicant
CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED	Third Applicant
and	
SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED	First Respondent
MULTICHOICE (PROPRIETARY) LIMITED	Second Respondent
THE COMPETITION COMMISSION	Third Respondent

JUDGMENT: 28 April 2017

DAVIS JP

Introduction

[1] On 24 June 2016 this Court held that an agreement entitled "Commercial and Master Channel Distribution Agreement" ('the agreement') concluded between first and second respondents in July 2013 did not give rise to a merger within the meaning of s 12 (1) of the Competition Act 89 of 1998 ('the Act').

[2] However, this Court expressed reservations that the Competition Tribunal (Tribunal), against whose decision the appeal to this court had been lodged, did not enjoy the benefit of an investigation of the agreement by the third respondent; in particular whether the agreement fell within the scope of s 12 (1) of the Act.

[3] The Court noted that the agreement involved a public broadcaster and hence it was 'in the public interest for transactions involving the public broadcaster to be examined with a particular consideration of the purpose of the Act'. It also observed that there was a considerable lack of clarity concerning a number of factual aspects in the record which were relevant to the ultimate determination of whether s 12(1) of the Act was applicable. In this connection the Court was critical of the approach adopted by the Tribunal:

> '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.' (para 110)

[4] It is for this reason that the Court issued the following order:

1. 'The order of the Tribunal of 11 February 2016 is set aside.
2. [Multichoice] and [the SABC] are directed to provide the Competition Commission within 21 days of this judgment [copies] 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 in control which falls within the definition of [a] merger in terms of s 12 of the Act, it is directed that a rehearing of the mater shall be conducted by the Tribunal to determine whether the conclusion of the agreement did entail such a merger as defined.'

[5] On 13 October 2016 the applicants brought an urgent application before this Court in which they sought the following relief:

1. A declaration that first and second respondents are in breach of the order to provide the documentation as set out in this Court's order on 24 June 2016;

2. an order for first respondent to provide information and documentation to third respondent;

3. an order for second respondent to provide documentation, alternatively a schedule to third respondent;

4. authorisation either by way of a declaration of variation of the order or a new order for third respondent to exercise investigative powers as set out in Part B of Chapter 5 of the Act for the purposes of discharging its reporting obligations in terms of the June 2016 order.

The matter was argued before this Court on 2 December 2016 and judgment was reserved.

[6] On 7 December 2016 an enquiry into the management and performance of first respondent commenced in Parliament. On 8 and 9 December 2016 erstwhile representatives of first respondent, including former board member Mr Krish Naidoo (who, subsequent to this application being launched, was appointed to the new interim board of first respondent) and former group GEO,

Ms Lulama Makhobo testified under oath before the parliamentary enquiry, which investigation included an examination of the agreement.

[7] The applicants adopted the view that portions of this testimony were directly relevant to the issues that were debated before this court on 2 December 2016. Accordingly, in a further application to this Court, they sought admission of these proceedings into evidence. In a supplementary affidavit deposed to by Mr William Bird, director of the second applicant, detailed reference was made to the testimony of Mr Naidoo and Ms Makhobo before the enquiry which took place in Parliament. Mr Bird then stated:

> 'It is in the interests of justice that the Commission should be able to have regard to additional evidence and oral testimony that has emerged during the current inquiry conducted by an ad hoc parliamentary committee, and should be in a position to conduct its own detailed interviews with the relevant witnesses into issues such as the exclusive licensing of the SABC's archival programming and the clauses in the Multichoice Agreement relating to encryption.'

The core issue

[8] Mr Budlender, who appeared with Mr Kelly on behalf of the applicants, correctly noted that the core issue to be resolved in this application is the proper interpretation of the 24 June 2016 order granted by this Court. In this connection there is a well-established test for the interpretation of court orders, as set out in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304:

> 'Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its

subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk. v Peens en Andere*, 1970 (2) SA 35 (NC) at p. 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise ... infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefore, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.'

[9] This approach has been confirmed recently by the Constitutional Court in two decisions. *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29; *Electoral Commission v Nhlope* 2016 (5) SA (1) (CC) at para 33.

The application of 13 October 2016

[10] Mr Budlender's primary argument was that, on the basis of this jurisprudence and thus the proper interpretation of the order, of 24 June 2016, third respondent was entitled to exercise its ordinary powers of investigation, thereby fulfilling its obligations in terms of the court order. In his view, this submission became all the more powerful when first and second respondents' failure to comply properly with this Court's order of 24 June 2016 was taken into account.

[11] In this connection he referred to a letter generated by the third respondent on 4 October 2016, written by its senior legal counsel, Mr Romeo Kariga, which, given its importance to the submissions made by applicant, I reproduce in full:

1. 'We refer to the above matter and the order of the Competition Appeal Court ("CAC") dated 24 June 2016, and our correspondence to the Competition Tribunal ("Tribunal") dated 06 September 2016.
2. As you are aware, the CAC order in this matter requires that the Competition Commission ("Commission") be furnished with "all

documentation ... pertaining to the negotiation, conclusion and implementation of the agreement of 3 July 2013" to enable it to compile its report. On 25 July 2016, Multichoice (Pty) Ltd ("Multichoice") and the South African Broadcasting Corporation (SOE) Limited ("SABC") respectively furnished the Commission with some, but not all, of the documents envisaged in the CAC order of 24 June 2016. As a result, on 17 August 2016, the Commission wrote to Multichoice and the SABC, requesting further submissions and documents. On 31 August 2016, Multichoice provided the Commission with further documents. On 15 September 2016 and 30 September 2016, the SABC gave the Commission further documents as well.

3. In its letter date 31 August 2016, Multichoice stated that, other than documents which had already been submitted to the Commission, it does not have any further documents as requested by the Commission. On 23 September 2016, the Commission requested Multichoice to provide an affidavit to that effect. On 30 September 2016, Multichoice submitted the affidavits from Mr Mark Payner, CEO of Multichoice and confirmatory affidavits from Mr Imtiaz Patel and Greg Hamburger, being the people who negotiated and drafted the Agreement respectively. The affidavits state that Multichoice does not have the further documentation requested by the Commission. Furthermore, Multichoice stated that is has no obligation to itemise documents that it says are in its possession, which it contends do not fall within the scope of the CAC order. In the circumstances, the Commission is unable to determine whether or not Multichoice has complied with the order of the CAC.
4. The SABC responded to the Commission's letter of 17 August 2016 in two letters. The first letter was sent to the Commission on 15 September 2016 and the second letter on 30 September 2016. Both letters came with attachments. Notably in its letter of 30 September 2016, the SABC states that it "could not manage to trace" some of the key documents requested by the Commission which are envisaged in the CAC order. It is not clear to the Commission what SABC means when it says that it "could not manage to trace" documents, when it is clear that these documents existed. The Commission is of the view that the SABC has therefore not complied with the order of the CAC. The Commission will send a letter to the SABC requesting an explanation as to what happened to these documents, why

they could not be traced, and the process followed in tracing the documents, by way of a sworn affidavit by the CEO of SABC.

5. In light of the above, as at the date of this letter, the Commission has not been furnished with "all documentation... pertaining to the negotiation, conclusion and implementation of the agreement of 3 July 2013" as required by the CAC order to enable it to perform its task envisaged in the CAC order. The order of the CAC contemplated that the Commission should render its report to the Tribunal once it has been furnished with "all documentation". The documents that have been submitted to the Commission are not sufficient to enable the Commission to properly discharge its Court mandated task in this matter. In order to give proper effect to the order of the CAC, and to preserve the effectiveness of the order of the CAC, as required by the Constitution, the Commission intends to interrogate certain relevant executives in Multichoice and SABC who were responsible for the negotiation and conclusion of the Agreement, including board members who deliberated on the negotiation, conclusion and implementation of the .....
6. In view of the fact that the Commission's investigation of this matter is subject to a court order and the Commission's report must be submitted to the Tribunal, the Commission therefore requests a directive from the Tribunal on whether the Commission is entitled to conduct such interrogation in order to give effect to the CAC order in circumstances where it has not been furnished with "all documentation" as envisaged by the CAC. As pointed out above the documentation submitted to the Commission is not sufficient to enable the Commission to properly give effect to the order of the CAC.' (my emphasis)

[12] On the basis of this letter Mr Budlender submitted that it was clear that both first and second respondent had failed to comply fully with the order and hence this had the effect that third respondent was prevented from carrying out its obligations pursuant to the order.

Respondent's correspondence

[13] To fully assess this submission, it is necessary to refer to the responses of first and second respondent .In a letter of 31 August 2016 second respondent replied to third respondent through its attorney. It supplied third respondent with a further lever arch file of documentation with regard to the negotiation and conclusion of the agreement. Regarding the request for board minutes, the letter recorded that there are 'only two passing references' to the negotiation and conclusion of the agreement in these minutes and that no other documentation sought by third respondent existed.

[14] The letter then continues:

> 'Members of Multichoice management team are empowered to make many decisions concerning the business of the company, including, for example, as regards to negotiation and conclusion of this and other channelled distribution agreements without those decisions having to be motivated to and ratified by the Board of Multichoice.'

[15] On 15 September 2015, seven weeks after the deadline imposed by this Court in its 24 June 2016 order had lapsed, first respondent replied to the third respondent's letter of 17 August 2016. It furnished third respondent with further documentation. This did not include documentation pertaining to its change of position regarding encryption which, as observed in this Court's judgment, involved first respondent shifting its position from supporting encryption to opposing it. The letter from first respondent's attorneys concluded by stating that they were 'in the process of engaging with the SABC, regarding the remaining questions which had been posed by third respondent'.

[16] In its letter of 23 September 2016 to first respondent, third respondent pointed out that the encryption issue was relevant to whether the agreement between first and second respondent, which precluded the first respondent from encrypting its broadcast signals, had influenced first respondent's change of stance.

[17] The letter concluded thus:

'The Commission requires that the SABC furnish it with "all documentation ... pertaining to the negotiation, conclusion and implementation of the agreement of 03 July 2013" as per the Commissioner's letter of 17 August 2016 by no later than 30 September 2016. The Commission reserves its rights to institute the appropriate legal proceedings to ensure compliance with the CAC order.'

[18] On 30 September 2016, first respondent's attorney informed third respondent that, notwithstanding a diligent search, first respondent was not able to trace any further documents requested. Insofar as board minutes dealing with encryption was concerned, they wrote:

'Please refer to a memorandum date 9 December 2011, prepared for the SABC Board of Directors, attached hereto as annexure Q2.11 and the various documents in response to question 2.6.

[19] In amplification of this response, Mr James Aguma, the acting Group Chief Executive Officer of first respondent, said the following in his answering affidavit:

'No written presentations were made to the Joint Board and Group Exco meeting on 05 September 2013, as contemplated in the Commission's question 2.13 above. The people who served on these internal bodies of the SABC who supported STB Control had made verbal submissions but no written presentation was made by them.

In relation to the SABC's Board resolutions regarding Set Top Boxes, referred to in the SABC Board Minutes of the Special Board meeting held on 20 September 2013, reference was made in the minutes to a previous position which the SABC board held which supported STB control. However, no such board resolutions and minutes existed. I have confirmed that this is the case with the Company Secretary of the SABC, as confirmed in the attached confirmatory affidavit.'

[20] The approach of second respondent was crystallised in an answering affidavit of the Chief Executive officer of second respondent, Mr Mark Rayner, who confirmed that second respondent had provided all available documentation pertaining to the negotiation, conclusion and implementation of the agreement which was in its possession. Further documentation, as

requested by third respondent in its letter of 17 August 2016, did not exist. Furthermore, all documentation relating to encryption and conditional access which pertained to the negotiation, conclusion and implementation of the agreement in the possession of second respondent had been provided to third respondent.

[21] To return to applicant's argument, Mr Budlender noted that, in the first place, much of the documentation provided to third respondent had been submitted after the court deadline of 25 July 2016. Furthermore, it appeared that key documents could not be located and in the case of second respondent it was claimed that they did not exist. In this connection Mr Budlender referred to third respondent's observation in its answering affidavit:

> 'It would be playing possum if the Commission was simply to fall over and say that in that event its recommendation to the Tribunal is that the transaction is not a merger.'

[22] In Mr Budlender's view, as the purpose of the 24 June 2016 order was to enable a proper inquiry to be conducted into whether the agreement fell within the scope of s 12 (1) of the Act, the inadequate compliance with the court order necessitated a declaration that the third respondent be empowered to exercise its powers of investigation under s 49A of the Act.

The further application

[23] Pursuant to the further hearing on 3 April 2017 which was triggered by the SABC hearing in Parliament and an affidavit deposed to by Mr Bird to which I have made reference, Mr Budlender submitted that, as both Mr Naidoo and Ms Makhobo had voluntarily testified in public and on oath before a parliamentary enquiry that they were involved in the process that led to the conclusion of the agreement, it was clear that they would be well placed to offer information to third respondent that was relevant to an enquiry concerning the applicability of s 12(1) of the Act. This evidence could then ameliorate the

inability of third respondent to properly carry out its functions, which inability had been caused by the fact that key documents 'could not be traced' by the first and second respondents.

[24] In particular, Mr Budlender argued that this further evidence would demonstrate that :

1. The agreement was discussed and debated by the first respondent's board;
2. At least two of first respondent members had strong views about the lawfulness of non-encryption in terms of the agreement;
3. First respondent's board was evidently divided about the agreement, contrary to the impression created in its papers filed before the Tribunal in response to the applicants' application; and
4. First respondent received at least two opinions relating to the agreement and, more specifically on the issue of encryption.

Evaluation

[25] As indicated, the key to unlocking this dispute turns on the meaning of the order which was granted on 24 June 2016. In interpreting this order the jurisprudence is well established. If the meaning of the order is clear and unambiguous, it is not open to this Court to give it a fresh interpretation or to supplement its meaning.

[26] In my view, the meaning of the order is clear and unambiguous. In the first place, the order was granted following a decision by the Tribunal that the agreement did not fall within the scope of a merger as defined in the Act. This Court held that the Tribunal did not have the benefit of third respondent's assistance in that the latter had advised that it had not investigated the transaction. This Court also found that there were exceptional circumstances in this case which dictated a different result from the default position, namely that a lack of evidence had put an end to the dispute and that the appeal against the Tribunal's decision should fail without more.

[27] To recapitulate: this Court found that it was in the public interest that clarity, if possible, should be achieved with regard to a number of factual aspects of this case which had been disputed. It was for this reason that a limited order, which was similar to the draft order proposed by the applicants, was granted, namely that first and second respondents should provide all documentation possessed by them which was relevant to the negotiation, conclusion and implementation of the agreement. On the basis of this documentation, third respondent was directed to examine the transaction and make a recommendation to the Tribunal. Furthermore it was clear from the reasoning adopted in its judgement, that this Court was cognisant of the fact that the agreement had been entered into in July 2013 and that it was imperative that the matter be brought to finality as expeditiously as possible. Hence a restrictive timetable was employed for the relief so granted in terms of the order.

A fresh order

[28] As a final submission, applicants sought the issue of a fresh order. Three reasons were offered in support thereof:

1. There was a dispute about whether the Commission was entitled to exercise its powers of subpoena under s 49A of the Act.
2. This Court may exercise its jurisdiction under s 62(2)(a) of the Act to resolve this issue. It may do so by granting declaratory relief, or by way of a fresh order expressly authorising the Commission to do so.
3. Non-compliance with a court order is a constitutional issue. It was therefore contended that this court has jurisdiction to hear this matter and grant additional relief in accordance with s 66 (2)(b) of the Act.

[29] For reasons which I have set out, the order of 24 June 2016 did not and cannot be read to grant third respondent powers in terms of s 49A of the Act. Accordingly there is not an issue to resolve, in that the meaning and purport of the order so granted made clear the scope of the powers to be granted to third respondent in order to generate a report. There is thus no basis to grant a fresh order.

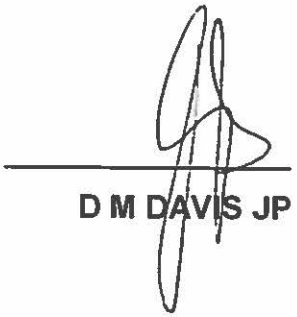
Conclusion

[30] For all the reasons set out, there is no room to dispute the clear wording of the order, namely that third respondent was entitled to be provided with all documentation relevant to the agreement which was possessed by the two respondents. Had this court decided to grant a more far reaching form of relief, that is to order that a full scale investigation be conducted by third respondent, it would have said so in express terms. This latter conclusion cannot be implied from the wording of the order nor from the reasoning employed to justify the granting of what was considered by the Court to be exceptional relief in the circumstances.

[31] It follows that no additional justifiable grounds had been raised for the granting of a fresh order. In substance, this case is about applicants' argument that third respondent has an entitlement to exercise its powers by way of subpoena in terms of s 49 A of the Act. The order of 24 June 2016 did not refer to powers under s 49A of the Act and expressly confined the source of the inquiry to be conducted by third respondent exclusively to documentation as set out in the order. In other words, the order made clear the nature of the remit given to third respondent which, in terms of the order of this Court, was predicated on a limited basis.

[32] Turning to the further evidence sought to be led with regard to the parliamentary hearing, it follows from the approach that I have adopted, that an order which would empower third respondent to conduct interviews with Mr Naidoo and Ms Makhobo falls outside of the scope of the order which was granted on 24 June 2016. By contrast, there does not appear to be any obstacle to third respondent examining the transcript of the parliamentary hearings. After all, this transcript is a public document. Whatever information is contained therein surely can be employed by third respondent to make a recommendation as to whether the agreement gives rise to a notifiable change of control, failing within the definition of merger in terms of s 12 of the Act.

[33] For all of these reasons, the application of 13 October 2016 and the further application of 13 December 2016 are dismissed with costs including the costs of two counsel.



D M DAVIS JP

ROGERS JA and VICTOR AJA concurred