COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing : 27 and 28 August 2010 Case number: 37 / 2010

Caxton and CTP Publishers and Printers Ltd Complainant

vs

Multichoice Africa(Pty) Ltd First Respondent

and

Electronic Media Network Ltd Second Respondent

Complaints and Compliance Committee

PA Delport (Acting Chairperson)

N Ntanjana

T Ramuedzi

Z Ntukwana

J Tlokana

JCW van Rooyen SC[2]

For the Complainant: S Syman SC (with him S Stein) instructed by J Antunes from Fluxmans Inc

For the Respondent: SF Burger SC, instructed by Amanda Armstrong from Werksmans Inc

Co-ordinator of the CCC: Ms Lindisa Mabulu

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[1] Established in terms of s 17A of the ICASA Act 13 of 2000 as amended.
[2] Councillor appointed as member in terms of section 17A (1) of the ICASA Act.

Judgment

PROF PA DELPORT

[1] On 29 August 2007 Caxton and CTP Publishers and Printers Limited ("Caxton") applied to the Independent Communications Authority of South Africa ("ICASA") to investigate and thereafter adjudicate upon its complaint against MultiChoice Africa (Pty) Limited ("Multichoice") and Electronic Media Network Limited ("MNet"). MultiChoice was then an applicant for a commercial subscription broadcasting license in terms of section 51 of the Electronic Communications Act, 36 of 2005 ("ECA").

[2] It was contended that MultiChoice contravened sections 64, 65 and 66 of the ECA and that the same would apply to MNet, subsequent to the proposed merger between Multichoice and MNet.

[3] ICASA refused to initiate the investigation with respect to MultiChoice since the latter had not been licensed yet. The CCC only has jurisdiction over licensees. Although MNet was a licensee, it was decided to adjudicate both matters at the same hearing. The omission to deal with the matter led to a review application instituted in the North Gauteng High Court, Pretoria. The application was dismissed but the Court ordered the Independent Communications Authority of South Africa ("ICASA") "…to immediately undertake and complete an investigation of MultiChoice and MNet in terms of Sections 64, 65 and 66" of the ECA. ICASA had, in any case, tendered to do so. Thereafter Caxton lodged an application for leave to appeal which was turned down by the High Court. Caxton then filed an application for leave to appeal to the Supreme Court of Appeal. As a result of High Court Rule 49(11) the order of the first Court was suspended. Once the application had been dismissed by the Supreme Court of Appeal the Co-ordinator of the CCC had problems in finding a date which would suit both sets of counsel in this matter. The CCC then directed that the matter be placed on the Roll of the CCC for 27-28 August 2010.

Caxton Submission

[4] Caxton submitted:
(a) that MultiChoice and MNet, through their holding company, Naspers Limited ("Naspers"), is in Contravention of section 64 of the ECA in that a foreigner directly or indirectly has "an interest either in voting shares or paid-up capital" as a result of its exceeding 20 percent; and
(b) that there is a contravention of section 65(1)(a) of the ECA as Naspers through Multichoice and MNet "directly or indirectly exercises control over more than one commercial broadcasting service license in the television broadcasting service."
(c) in relation to section 66 of the ECA, that there is a contravention which will require to be updated and further investigated by ICASA.

[5] Section 64 of the ECA provides as follows:

"(1) A foreigner may not, whether directly or indirectly—
(a) exercise control over a commercial broadcasting licensee; or
(b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty percent.

(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners."

[6] After argument *in limine* by both senior counsel as to whether sections 65 and 66 applied to the Respondents or not, it was decided to reserve judgment on these points. My colleague, Prof van Rooyen, will deal with the points *in limine* in the judgment, which follows upon this one.

[7] It was accepted by both counsel that the salient point in terms of section 64 which had to be decided was in respect of section 64(1)(b), which provides as follows:

" A foreigner may not, whether directly or indirectly—
…
(b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty percent."

[8] Section 1 of the ECA provides that a "financial interest"

"means an interest that may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it—
(a) the power to control the licensee; or
(b) an effective say over the affairs of the licensee".

[9] Naspers owns and controls 80% of the voting power of both MultiChoice and M-Net. "Control" in company law can be generically defined as control over the management of the company. This can be by way of voting rights in respect of shares, whereby the holder of the voting rights indirectly controls (the appointment) of directors who manage the company in the first instance ("voting control"). Direct control at board level, by way of voting rights exercised by the board (members) is, however, also "control" even though such a "controller" may not have any voting rights in the company ("management control"). While voting control will usually entail management control, the converse is not true. Control may be on various levels and is summarized as follows by *Cilliers and Benade*:

"A distinction is often made between four categories of control which differ in degree of security and effectiveness. They are: (a) complete control, which entitles the holder thereof to exercise all the voting rights at company meetings; (b) majority control which entitles him to exercise more than 50% of the voting rights; (c) minority control, which means that the controller exercises sufficient voting rights, though less than the majority, to place him in de facto control of the company; (d) management control or control of the proxy voting machinery, which is usually coupled to minority control, enabling the controller to control the company by soliciting proxy votes, particularly where the shares of the company are widely held." [3]

[10] It is clear from this definition that mere shareholding is not the determinant, but the entitlement to exercise voting rights. A voting right, as one element of a share (a personal right) in a company is capable of being ceded to third parties separately from the transfer of the share and also without the knowledge or concurrence of the company. The fact that Naspers controls 80% of the votes in MultiChoice and M-Net, clearly gives it direct *de iure* control.

[11] It is, accordingly, clear that Naspers directly controls MultiChoice and M-Net, within the company law definition and also in terms of section 64 of the ECA.

[3] Cilliers & Benade *Corporate Law* (2000) 460.

"Foreigner"

[12] Caxton contends that "foreigner" should be defined as anybody (also a South African) living abroad ("wide definition"). Multichoice on the other hand contends that it must be defined as "a person born and belonging to another country". Its interpretation is based on the fact that there is no definition of "foreigner" and that the ordinary meaning, as in the *New Oxford Shorter Dictionary*, should apply ("narrow definition"). Although there are other definitions that were advanced by Caxton to support its contention, like the definition of "resident" in the Income Tax Act 58 of 1962, these do not support a wide interpretation within the context of the ECA. The reason for this is that section 2(w) of the ECA provides that ICASA must ensure "that broadcasting services are effectively controlled by South Africans". This is, in our opinion, indicative that the intention and purpose of the ECA is to refer to South African citizens and that it does not support the wide definition of foreigner. On the information in the share register certain of the registered (and beneficial shareholders) are indicated as "non-resident". As "non-resident" is not an antonym for "South African", a "non-resident" could nonetheless be a South African. Therefore the share register may conceivably indicate holders who are non-resident but nevertheless South African.

[13] The ECA refers to a "foreigner" and the contention by Caxton is that this would include the plural while Multichoice argues that it must be interpreted as denoting the singular. There are cogent arguments for and against both these interpretations, but in our opinion the strongest argument must be found in the intention and purpose of section 64. It attempts to regulate "foreign control" as defined, for purposes of section 64(1)(b). Therefore, if a multiplicity of foreigners controls more than, e.g. 20%, of the voting shares it may amount to a contravention of section 64(1)(b). It may be that there is, in the language of take-over law, no "agreement, undertaking or understanding" as amongst these foreigners so as to exercise their voting rights in a particular way. This may and will be important for take over regulation and competition law. However, the purpose of the ECA is "that broadcasting services (must) effectively (be) controlled by South Africans" - section 2(w) of the ECA. The moment "a foreigner", as set out in section 64, has control, section 64 is contravened. However, in light of the purpose of the ECA, the same *could* apply if foreigners, even without an "agreement, undertaking or understanding" *inter se*, went above the thresholds in section 64 as it would then clearly not be in line with the purpose of the ECA. We stress the word "could" as the definition of "foreigner" is not conclusive in light of later findings.

[14] The Naspers share register indicates various shareholders with non-South African addresses. We accept that these shareholders might be "foreigner/s" as defined above, i.e. non-South African citizens. However, the actual situation may be different in that a South African citizen may, for whatever reason, have a non-South African address, which would not make him/her a "foreigner".

Naspers Share Capital Structure

[15] Various dates were used in the submissions for determining the share structure, but the latest published financial statements are dated 31 March 2009 (also figures referred to by Caxton in par [60] of its submission and by Multichoice in par [24] of its submission) and these figures will be used as basis, as variations due to timing "do not yield a different result". The balance sheet of Naspers as on 31 March 2009 was as follows:

712131 class A ordinary shares of R20 each	R14 242 620

404305411 listed class N ordinary shares of 2 cents each	R 8 086 108
TOTAL ISSUED SHARE CAPITAL	R22 328 728
SHARE PREMIUM	R18 607 104
SHARE CAPITAL AND PREMIUM	R40 935 832

"…voting shares or paid up capital"

[16] Section 64 is contravened if foreign holding exceeds a 20% interest either in voting shares or paid-up capital in a commercial broadcasting licensee. The voting position in Naspers is as follows:

712131 class A ordinary shares of R20 each (1000 votes per share)	712 131 000
404305411 listed class N ordinary shares of 2 cents each (1 vote per share)	404 305 411
TOTAL VOTES	1 116 436 411

Of the 404 305 411 N ordinary shares, 171 230 282 (42.60%) were held by foreigners as at 31 March 2009.

[17] Questions were posed by Caxton as to the indirect foreign shareholding in the A shares which are "held" as follows:

Naspers Beleggings Ltd ("Nasbel"),	49.15%
Keeromstraat 30 Beleggings Ltd,	30.80%
Wheatfields Investments (Pty) Ltd ('Wheatfields"),	18.73%
Unidentifeid individuals	1.32%

There was no information before the CCC as to the percentage of the A ordinary shares indirectly held by "foreigners". Although it is true that the CCC may not simply sit back and strictly follow an adversarial process,[4](section 17C of the ICASA Act provides that the CCC

[4] *See Islamic Unity Convention v Minister of Telecommunications & Others* 2008(3) SA 383(CC) *para* [47] – [49] : "[47] To 'investigate' or 'inquire into' a complaint means more than simply to sit back and decide on the complaint on an adversarial basis in the same way as a criminal court. The term 'investigate' means to 'search or inquire into' or 'examine', while 'inquire' means to 'seek knowledge of (a thing) by putting a question' or to 'request to be told'. As counsel for the second respondent suggested, the BMCC was required to play an active and inquisitorial role in determining matters before it. If the investigative powers that were conferred on the BMCC were understood, as they must, to have referred to the inquisitorial role played by the BMCC, then there was nothing unconstitutional and thus impermissible in the arrangement. In *S v Baloyi* (Minister of Justice and Another Intervening) this court considered the constitutionality of s 3(5) of the Prevention of Family Violence Act, which allowed for an inquisitorial process in terms of which the magistrate enquired into the reasons for the accused's failure to comply with an interdict and allowed the court to sentence him to a fine and imprisonment. This court held that fairness to the complainant required that the proceedings be inquisitorial in that it places the judicial officer in an active role to get at the truth, which usually will be done through questioning the accused. Fairness to the accused, on the other hand, dictates that within this format the general protection granted by the CPA should apply in measure similar to that available to a person charged under s 170. Such a balancing of constitutional concerns leaves the presumption of innocence undisturbed. At most it may affect the right to silence. The procedure involved in the magistrate's court in the present case did not raise this issue, nor was it an issue before us in the confirmation. That issue would have to be resolved when it arises. (Footnotes omitted.) I mention *Baloyi* to illustrate that even regarding certain aspects or instances in judicial proceedings an inquisitorial process is countenanced, provided that fairness to the accused is assured.

"must investigate" and section 17C(6) read with 4C(2) of the ICASA Act provides for the power to order a person to appear before it and make a statement and be questioned) the CCC cannot embark on a fishing expedition without a basis having been laid for such an investigation. The information that could be required for such a basis in respect of the "foreign" shareholders of A shares is a matter of public record in terms of section 113 of the CA 1973. Caxton has placed certain facts before the CCC and the matter was fledged out in documentation from both sides as well as argument by senior counsel. Further investigation by the CCC was, however, contended for by Caxton. Fairness, however, dictates that the inquiry ends here and that the CCC should not embark on a "fishing expedition" on mere speculative allegations.

N Shares and voting

[18] The voting position is therefore that the N shares have 36.21% of the total votes in Naspers. Foreigners hold 171 230 282 of the N shares, which give them 15.34% voting in Naspers. If this voting is applied to the Naspers voting of 80% in Multichoice, it translates to 19.18% (15.34% x 80%). The result is therefore that foreigner/s, on the information as at 31 March 2009, do not have an interest in voting shares exceeding 20%.

"…or paid up capital"

[19] "Capital" in company law is used in many contexts and has many meanings, depending on the type of regulation that is envisaged by, *inter alia*, the common law and the Companies Act 61 of 1973 ("CA 1973"). Paul L Davies[5] states:

"Unhappily 'capital' is a word of many different meanings and even in the legal, economic and accounting senses with which we are concerned, it is used loosely and to describe different concepts at different times, although its users do not always recognize the fact."

[20] The share capital of a company may consist of either par value shares (PV) or no par value (NPV) shares. A PV share has an indicator of value, known as its nominal value, which

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[48] I agree with counsel for the respondents that the inquisitorial role is an inherent aspect of regulatory authority, which in this case the BMCC represented. Licensees in the broadcasting industry are part of a regulatory realm which requires that they abide by their concomitant responsibilities. They accept as a condition of their licences 'that they will adhere to the same reasonable controls as are applicable to their competitors'. The BMCC fulfilled its objects of conducting investigations into complaints by engaging in a fact-finding exercise so as to be able to make a finding, which it then forwarded to ICASA. What was required was for the scheme, created in terms of the impugned provisions of the IBA Act and the Complaints Procedures, to ensure fairness.

[49] In my view the impugned provisions of the IBA Act endeavoured to achieve this goal. Section 63(4) enjoined the BMCC, when investigating and adjudicating a complaint, to afford the complainant and the licensee a reasonable opportunity to make representations and to be heard. In terms of s 63(6), both were entitled to legal representation. Disputed para 1.24 of the complaints procedures also made provision for the A licensee, where the finding was against it, to be afforded an opportunity to make representations with regard to the BMCC's recommendations to ICASA as to what penalty, if any, should be imposed. Should ICASA consider that a heavier penalty than that recommended by the BMCC was warranted, the licensee would be given yet another opportunity to make representations. Section 22(3)(a) provided that the chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured fairness**."[Footnotes omitted. The judgment also dealt with the CCC and it can be accepted that what was said about the BMCC also applies to the CCC**]

[5] *Gower's Principles of Modern Company* Law 6th Edition 234.

is actually only the minimum (subject to authority to issue at a discount) amount that the company will obtain if it issues the share. In the case of PV shares the Memorandum of Association must state the amount of the authorised share capital and the division thereof into shares of fixed amount (the nominal value) (section 75 CA 1973). The amount of issued PV shares is represented by a share capital account for the particular class of PV shares. A company may only issue shares if the full issue price of or other consideration for such shares has been paid to and received by the company (section 92 CA 1973). Before the introduction of the CA 1973 the position was that shares could be issued as partly paid-up shares, with the effect that some of the capital was paid while a part was still outstanding, to be "called-up" by the company under certain circumstances. The part that was paid was the "paid-up" capital and was therefore share capital. The extent of the paid-up capital could also influence the voting rights of the shareholder in the company. Due to section 92 of CA 1973, all capital is now "paid-up" as the full price must be received by the company on allotment or issue of the shares. "Paid-up" capital and "share capital" are therefore, for the present at least, synonymous. Under the present company law regime, the concept of "paid-up" capital has no significance and is not different from "share capital".

[21] In the case of PV shares the difference between the par value of the shares and the value of the assets or money acquired by the company must be transferred to share premium account.[6]

[22] The basic approach initially followed by the courts, and strengthened through provisions of the CA 1973, in regard to the *maintenance of share capital* was that the contributed (paid-up) capital of a limited company constitutes the fund to which creditors of the company must look for the satisfaction of their claims, and that this fund should be maintained.[7]

[23] However, it soon transpired that companies maintained their paid-up share capital but repaid the share premium account or used it to pay dividends, the argument being that it is not "capital" for common law purposes or in respect of other statutory provisions dealing with "capital", that did not expressly include it as "capital". This argument is common and commenced with, *inter alia*, *Verner v General & Commercial Investment Trust* [1894] 2 Ch 239 (CA) and runs through copious cases and various jurisdictions, including the Supreme Court of New South Wales - *Re Coca-Cola Amatil Ltd* 28 ACSR 323. Both parties submitted copious authorities and precedents which, upon careful reading in the correct context, illustrate this point.

[24] Due to the problems with the exact meaning of capital and whether, *for certain rules in company law and statutory provision in the CA,* the share premium is included as "capital, the CA 1973 provides:

"76 **Premiums received on issue of shares to be share capital, and limitation on application thereof**

(1) Where a company which is not a banking institution in terms of the Banks Act, 1965 (Act 23 of 1965), issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the 'share premium account', and the

[6] Section 76(2) CA 1973; Cilliers & Benade *Corporate Law* (2000) 222 *et seq*.
[7] *Trevor v Whitworth* (1887) 12 App Cas 409 (HL) 416; Cilliers & Benade *Corporate Law* (2000) 322 *et seq*.

provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply *as if* the share premium account were paid-up share capital of the company" (emphasis added).

[25] It is therefore clear that share premium is to be treated as paid-up capital, in respect of "provisions of this Act relating to the reduction of the share capital…". Section 76 CA 1973 extends the concept of paid-up capital therefore to include the share premium account, only for the purposes of reduction of capital rules under the common law and the CA 1973. It also does not state that share premium *is* capital, but only, for purposes of "the provisions of this Act relating to the reduction of the share capital" , "as if" it is capital. Specific exceptions are made in section 76 but these are not relevant here and merely serve to approximate the positions of stated capital and share capital. The argument by Caxton that paid-up capital includes share premium under all circumstances, also for e.g. "control" in law, is not supported either by the CA 1973 or the case law. That it may be treated as the same "from a financial and accounting perspective" as per the affidavit by Professor Harvey Elliot Wainer in *Caxton v ICASA and others* (Case No 13300/2008), does not change the legal position because it is, as indicated above, clearly not the case from a "legal" perspective. Synonyms "from a financial and accounting perspective" are not necessarily such in a legal perspective.

[26] In actual fact, the CA 1973 expressly excludes share premium if control is computed and, through section 195, it was possible to create the N shares (generically speaking). Section 195 provides, as far as it is relevant, as follows:

"195 **Determination of voting rights**

(1) A member of a public company having a share capital shall-

(a) if the share capital is divided into shares of par value, be entitled to that proportion of the total votes in the company which the aggregate amount of the nominal value of the shares held by him bears to the aggregate amount of the nominal value of all the shares issued by the company…"

Share premium is clearly excluded.[8] This is also another example that the word "capital" is used in different contexts in the CA and that it does not necessarily or always include the share premium or other statutory non distributable reserve.

Financial interest of the N shareholders

[27] Caxton argued strongly that the N shareholders are in actual fact the "owners" of Naspers as 99.81% of any dividend or liquidation surplus would be paid out to them. That may be the case, but a shareholder in a company does not have a direct financial interest in a company, merely a proprietary interest.[9] Although the levels of economic and proprietary

[8] Cilliers & Benade *Corporate Law* (2000) 104 fn 64 and Kunst, Delport and Vorster *Henochsberg on the Companies Act* 368.

[9] A principle established in *Aron Salomon* v *A Salomon & Co Ltd* [1897] AC 22 (HL) and confirmed as part of our law in a long line of cases such as *Estate Salzman v Van Rooyen* 1944 OPD 1 at 4; *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606; *Lipschitz NO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (W) at 487–488; *Pressings and Plastics (Pty) Ltd v Sohnius* 1985 (4) SA 524 (T) at 529; *Nel v Metequity Ltd* 2007 (3) SA 34 (SCA) at para 11; *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) at 674–675; *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W). It is accepted that under certain circumstances a shareholder does have a direct financial interest, but it is under special circumstances,

interest would in many, if not most instances, be proportional, the use of the N share (in the generic sense), influences this proportion as illustrated above. Whether this is desirable as a matter of corporate law is moot. The fact is that the CA 1973 permits it and users are free to use it as they wish. The principle that the vast majority of the capital is provided and dividend income received by capital providers who will not control the company through, e.g. voting rights, is an investment decision by the provider/s. Under the new Companies Act 71 of 2008 this phenomenon will even be more pronounced.

[28] Section 64(1) recognizes the possibility of the "financial interest" and provides that "[A] foreigner may not, whether directly or indirectly—
…
(b) have a financial interest …, exceeding twenty percent."

However, a "financial interest" is defined as follows in the ECA:

… an interest that may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it—
(a) the power to control the licensee; or
(b) an effective say over the affairs of the licensee.

[29] The exact ambit of this definition is clear in corporate law, but no evidence was led or allegations made that a particular situation falls within the ambit of "financial interest". A financial interest, however large, without the effect in (a) or (b) is of no significance as far as control in company law or under section 64 is concerned. The mere fact that a large financial interest exists, whether held as shareholder/s as contended by Caxton or as creditor does not *per se* give "control". There must clearly be something additional such as an agreement, undertaking or understanding, linked to and based on the financial interest which confers control in the wide sense. Although "financial interest" by the N shareholders was alleged, there was no evidence or allegation as to an agreement, undertaking or understanding or anything similar, which would give control. Without some connecting factor between "financial interest" and "control", section 64 cannot become operational.

Finding

[30] For the above reasons the complaint by Caxton in terms of section 64 of the ECA is dismissed.

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PA Delport

such as in or pre-liquidation (*McLelland* v *Hulett* 1992 (1) SA 456 (D)) or based on a direct statutory provision (S*tellenbosch Farmers' Winery Ltd* v *Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A)).

PROF JCW VAN ROOYEN

[31] Caxton's complaint was, further, that Multichoice and MNet are in contravention of sections 65 and section 66 of the ECA. *In limine* the legal question whether sections 65 and 66 of the ECA are applicable to Multichoice and MNet, was raised by Multichoice and MNet.

[32] Sections 65 and 66 of the ECA are equivalent to sections 59 and 60 of the Independent Broadcasting Authority Act 1993 ("IBA Act"), which was repealed by the Electronic Communications Act 2005 as a whole. Of course, the Independent Communications Authority Act had, in 2000, already substituted the Independent Broadcasting Authority of South Africa with the Independent Communications Authority of South Africa.

[33] Sections 65 and 66 of the ECA deal with control and cross-media ownership of commercial broadcasters licensed in terms of the ECA, previously in terms of the IBA Act. I quote the sections in a footnote.[10]

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[10] **Limitations on control of commercial broadcasting services**

65. (1) No person may—

(a) directly or indirectly exercise control over more than one commercial broadcasting service licence in the television broadcasting service; or

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than one commercial broadcasting service licence in the television broadcasting service; or

(c) be in a position to exercise control over a commercial broadcasting service licence in the television broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service license in the television broadcasting service.

(2) No person may—

(a) be in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;

(c) be in a position to exercise control over two commercial broadcasting service licences in the FM sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting licence in the FM sound broadcasting service.

(3) A person referred to in subsection (2) must not be in a position to control two commercial broadcasting service licences in the FM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.

(4) No person may—

(a) be in a position to exercise control over more than two commercial broadcasting service licences in the AM sound broadcasting service;

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the AM sound broadcasting services; or

(c) be in a position to exercise control over two commercial broadcasting service licences in the AM sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service licence in the AM sound broadcasting service.

(5) No person referred to in subsection (4) may be in a position to control two commercial broadcasting service licences in the AM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.

(6) The Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from the provisions of subsections (1) to (5).

(7) The Authority may, whenever the Authority considers it necessary in view of the developments in broadcasting technology or for the purposes of advancing the objects and principles enunciated in section 2, institute and conduct a public inquiry and make recommendations to the Minister regarding the amendment of any of the provisions of subsections (1) to (6).

(8) The recommendations contemplated in subsection (7) must be tabled in the National Assembly by the Minister within 14 days of receipt thereof, if the National Assembly is then in session, or if the National Assembly is not in session, within 14 days after the commencement of its next ensuing session.

Limitations on cross-media control of commercial broadcasting services

66. (1) Cross-media control of broadcasting services must be subject to such limitations as may from time to time be determined by the National Assembly acting on the recommendation of the Authority, after consultation with the Minister, in accordance with the provisions of the Constitution.

(2) No person who controls a newspaper, may acquire or retain financial control of a commercial broadcasting service licence in both the television broadcasting service and sound broadcasting service.

(3) No person who is in a position to control a newspaper may be in a position to control a commercial broadcasting service licence,

[34] Section 31 of the Broadcasting Act 4 of 1999 was amended by the Broadcasting Amendment Act 2002, which added subsections (3) and (4) to section 31. The two subsections provide as follows:

"(3) Pursuant to an inquiry in terms of section 28 of the IBA Act, the Authority must issue recommendations as to whether sections 49 and 50 of the IBA Act are applicable to broadcasting services carrying more than one channel and the extent and terms upon which such sections must apply.

(4) Sections 49 and 50 of the IBA Act must not apply to such broadcasting services until the Authority has issued such a recommendation and that recommendation has been submitted to the Minister for tabling in the National Assembly, and has been adopted by the National Assembly."

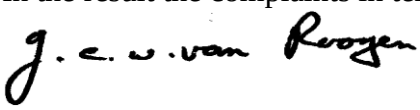
[35] It is common cause that the recommendation, which was submitted to the Minister in 2004, was not tabled in the National Assembly. Both Multichoice and MNet carry more than one channel and were thus, exempted by section 31(4).

[36] Section 92(3) of the ECA provides as follows:

"Where sections of the related legislation and the IBA Act did not apply to broadcasting services pending a recommendation by the Authority, the equivalent sections in this Act will not apply to such services until the recommendation has been adopted in the National Assembly."

"Related legislation" in terms of the ECA includes the Broadcasting Act and,obviously, the above 2002 amendment thereof. Section 92(3) of the ECA adds the IBA Act to it. Sections 49 and 50 of the IBA Act are clearly the sections which are "equivalent" to sections 65 and 66 of the ECA. Section 31(4) of the Broadcasting Act, with its exemption, is kept alive by section 92(3) of the ECA. Accordingly sections 65 and 66 of the ECA are not applicable to Multichoice or MNet.

In the result the complaints in terms of sections 65 and 66 are dismissed on these grounds.



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either in the television broadcasting service or sound broadcasting service, in an area where the newspaper has an average ABC circulation of twenty (20%) percent of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps substantially with the said circulation area of the newspaper.

(4) In this section ''Substantial overlap'' means an overlap by fifty (50%) percent or more.

(5) A twenty (20%) percent shareholding in a commercial broadcasting service licence, in either the television broadcasting service or sound broadcasting service, is considered as constituting control.

(6) The Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt affected persons from any of the limitations provided for in this section.

(7) The Authority may, whenever the Authority considers it necessary in view of the developments in broadcasting technology or for the purposes of advancing the objects and principles enunciated in section 2, institute and conduct a public inquiry and make recommendations to the Minister regarding amendment of any of the provisions of subsections (1) to (6).

(8) The recommendations contemplated in subsection (7) must be tabled in the National Assembly by the Minister within 14 days of receipt thereof if the National Assembly is then in session, or if the National Assembly is not in session, within 14 days after the commencement of its next ensuing session.

(9) A determination made in terms of subsection (1), whether or not pursuant to an inquiry by the Authority, is not applicable to, and is not enforceable against, any broadcasting service licensee to which such determination relates for the duration of the term of the licence valid at the time such determination is made, but becomes applicable to, and enforceable against, such a broadcasting service licensee only upon the renewal of its licence upon the expiration of such term.

The Members of the CCC, N Ntanjana, Z Ntukwana and J Tlokana concurred in both judgments. JCW van Rooyen also concurred in the first judgment and PA Delport in the second judgment.