COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 17 June 2010 Case number: 31/2010

COUNCIL REFERRAL: SUPER 5 MEDIA OWNERSHIP AND CONTROL COMPLIANCE WITH SECTION 64 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 (ECA)

Complaints and Compliance Committee Panel

P Delport (Acting Chairperson)
S Thakur (CCC Member)
N. Ntanjana (CCC Member)
T. Ramuedzisi (CCC Member)
J.C.W. Van Rooyen SC (Councillor)

For the Respondent

Tiaan Du Pisanie

Michelle Garden

Jack Phalane (Fluxmans Attorneys)

Khulile Boqwana

[1] In terms of s 17C of the ICASA Act 13 of 2000 as amended

Judgment

Prof P Delport

[1] Super 5 Media is a subscription broadcaster. Its main shareholder, Shenzhen Media, holds 75% shares in Super 5 Media. Shenzhen Media has two shareholders: a Black economic entity, Imbani Media Pty Ltd with 80% shareholding and Sino Africa Group Ltd, a company with shareholders in the Republic of China. The question which arose was whether the foreign shareholding is not in contravention of section 64 of the Electronic Communications Act no. 36 of 2005 ("ECA"), which places limits on foreign control of a broadcaster. In this respect the licence requires that Super 5 Media must provide the Independent Communications Authority of South Africa with a "shareholders' agreement or its equivalent". It is common cause that a shareholders' agreement does not exist. The Authority has not regarded the so-called "Heads of Agreement" lodged by Super 5 Media as having satisfied the "equivalent". Super 5 Media's point of view has been that it is not required by law to have a shareholders' agreement and that it should be permitted to provide the Authority with alternative proof of its compliance with section 64.

[2] So as to bring the matter to a conclusion the Council of the Authority decided to refer the matter to its judicial arm, the Complaints and Compliance Committee to investigate whether Super 5 Media is in compliance with its licence condition as to the shareholders' agreement or its equivalent. If the CCC were to find that Super 5 Media is not in compliance, it would then, in the normal course, recommend a sanction to Council. If the CCC were to find that Super 5 Media is in compliance, the matter would end there and the judgment of the CCC would be sent to Council for noting. See in this regard the *Mafisa* judgment (case1/2007) and, generally, *Islamic Unity Convention v Minister of Communications* 2008 (3) SA 383 (CC) (2008 (4) BCLR 384).

[3] A shareholders' agreement (SHA) is a voluntary contract between shareholders or some of them. All the requirements of the law of contract apply to such a contract and it is not different merely because it is a SHA. The function of such an agreement is usually to regulate or amend rights that a shareholder or the company acquires from the founding documents, being the

Memorandum of Association and the Articles of Association. The SHA cannot change any rights flowing from the Companies Act 61 of 1973 or the founding documents, but only pertains to the enjoyment or the exercise of those rights. Under common law the founding documents are contractual in nature, forming a contract between the shareholders (in that capacity). The SHA is therefore used to *alter* the exercise of the rights as a shareholder and not to confirm any of the rights. If a SHA would be concluded to confirm any of the rights of a shareholder/s, it would be superfluous and would not add anything to the existing rights. The Memorandum and Articles are statutory contracts in the sense that new shareholders are bound by the contract and all its terms and conditions and that the "contract" may be amended by a majority and not only by unanimous assent. All founding documents of a company are public record and are open for inspection by any person.

[4] The requirement in the licence that a SHA must be submitted to prove compliance with section 64 of the ECA is therefore superfluous and not capable of compliance for the above reasons. If a single shareholder, also the company, does not wish to conclude a SHA, the condition, whether resolutive or suspensive, is incapable of fulfilment. That the conclusion of a SHA is optional, appears clearly from what Levinsohn AJP recently said in *Hughes v Ridley & Others* 2010(1) SA 381(KZP):

"It would follow therefore that the rights and obligations of shareholders *inter se* would principally be governed by the articles of association or a shareholders' agreement *where such has been concluded*." (emphasis added)

[5] It follows that Super 5 Media cannot be expected in law to provide a SHA if it does not have a SHA. The licence, however, makes it possible for Super 5 Media to provide an "equivalent". The equivalent should be the Memorandum and Articles of the Company, which also amounts to a contractual relationship between the Company and its shareholders and the shareholders *inter se*. The CCC, accordingly, decided that Super 5 Media must provide it with an affidavit by its Chairperson, as confirmed by a Chartered Accountant, as to whether Super 5 Media is in compliance with section 64 of the ECA. Its Memorandum of Association and Articles of Association were also required.

[6] Super 5 Media provided the CCC with such an affidavit as confirmed by an affidavit from a chartered accountant. This document addresses the following:
(1) The extent of paid-up capital contributed by a foreigner;

(2) Any veto rights enjoyed by the foreigner

(3) Any dividend policy that may favour the foreign shareholder;

(4) The voting rights and number of directors representing the interests of foreigners. We will return to the details of the affidavit. The affidavit, in essence, repeats what is to be found in the Memorandum and Articles of Association.

[7] 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.

[8] "Control" in company law may generically be defined as control over the management of the company. This may 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 & Benade Corporate Law of (2000) 460:

"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."

It is clear from this definition that 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 separate from the transfer of the share and also without the knowledge or concurrence by the company.

[9] The original shareholding of Super 5 Media (known previously as Telkom Media) was: Telkom SA Ltd 75%; MSG Africa (Pty) Ltd 5%; Women's Development Bank Investment Holdings 5%; Videovision Entertainment 15%. Telkom sold its shares to Shenzhen Media SA (Pty) Ltd. The present name of the company is Super 5 Media, which has the following share structure:

Shenzhen Media SA (Pty) Ltd	75%
MSG Afrika (Pty) Ltd	5%
Women's Development Bank Investment Holdings (Pty) Ltd	5%
Videovison Entertainment (Pty) Ltd	15%

[10] Sino-African Development Group Ltd (referred to as Sino Africa Group Ltd in the affidavit by the Chairperson of Super 5 Media), a foreign company, owns 20% of the shares in Shenzhen Media SA, while Imbani Media (Pty) Ltd owns 80%. There is a SHA between Sino-African, Imbani and Shenzhen, but it does not concern Super Media 5 as it is not a party to the SHA. This SHA preserves the powers as per the shareholding and does not confer any additional rights on any of the shareholders. In terms of clause 6 of the SHA, Sino-African may appoint 1 director and Imbani may appoint 4 directors.

[11] The 5 directors of Super 5 Media are: 4 directors "representing" (words used in the affidavit of the Chairperson) Imbani; and C Shang, "representing" Sino Africa. Sino Africa therefore has a 20% representation on the board of Super 5. There was a SHA between Telkom and the other shareholders. However, the Telkom shares were sold and transferred to Shenzhen Media. There is no evidence that a new SHA was concluded and the mere fact that Shenzhen became a shareholder does not make it subject to the SHA.

[12] The directors of Super 5 Media are appointed in terms of the standard articles and the provisions of, inter alia, the Companies Act 61 of 1973. This entails that the directors are appointed by majority vote and that Shenzhen as 75% shareholder can therefore, in the absence of any agreement to the contrary, appoint and remove all the directors. The fact that certain of the directors "represent" Imbani and Sino Africa as per the affidavit by MB Mathabathe is not correct, as they do not have any such appointment rights vis-à-vis Super 5 Media. The statement in par 21 of the affidavit by MB Mathabathe that Sino Africa, through its 20% shareholding in Shenzhen who

has a 75% shareholding in Super 5 Media, therefore has a 15% “indirect interest” in Super 5 Media (i.e. 75% control in Shenzhen times the 20% in Super 5), is perhaps correct in respect of a financial interest, but it does not apply to *control* percentage. It has a 20% control percentage.

[13] From the above it is clear that Sino Africa does not exercise control over a commercial broadcasting licensee – the control lies with Shenzhen Media, in which it has a 20% interest, which is not *control* of Shenzhen Media. Sino Africa’s has, indirectly via Shenzhen and the SHA, the power to appoint *one* director on the Board of Super 5 Media and there are, presently, five directors. If any one of the directors is absent, there is an alternate for that director. There is, accordingly, compliance with the requirement that not more than 20% of the directors may be foreigners.

The above findings, accordingly, demonstrate conclusively that Super 5 Media is not in contravention of section 64 of the ECA.

PA Delport 24 June 2010

Committee members Prof JCW van Rooyen SC, N Ntanjana, T Ramuedzisi and S Thakur concurred in the judgment of Acting Chairperson Prof PA Delport