COMPLAINTS AND COMPLIANCE COMMITTEE[1]

18/2/2019 **CASE NO: 316/2019**

KHULISA SOCIAL SOLUTIONS NPC Complainant

and

MULTICHOICE (PTY) LTD Respondent

Tribunal JCW van Rooyen SC
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

From the Complainant: David Dison;
Advocates for the Respondent: W Trengove SC and with him adv Phumlani Ngcongo, **Instructed by**: Dr D Milo from Webber Wentzel, Jhb.

From the Coordinator's Office: Ms M Lalla
Coordinator of the CCC: Ms Lindisa Mabulu

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[1] The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Consumer and Compliance Department at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee as to sanction, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

JUDGMENT

JCW van Rooyen SC

[1] On 23 January 2019, *Khulisa Social Solutions NPC* ("*Khulisa*") lodged a complaint with the Complaints and Compliance Committee at ICASA.[2] *Khulisa* complains that the upcoming listing of the MC Group on the Johannesburg Stock Exchange ("JSE") will result in a contravention of section 13(1) of the Electronic Communications Act 2005 as amended. The subsection provides that a "*licence may not be let, sub-let, assigned, ceded or in any way transferred, and the* ***control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority***." [3]

[2] *Khulisa's* argument, put by Mr Dison, in summary, amounted to the following:[4]

a. It is trite that licensing authorities such as ICASA are concerned with changes in the ultimate control of licenses and licensees. The mere fact that the licensed vehicle remains the holder does not mean that the Authority is not concerned about changes in the control of that vehicle. The transfer of the control of a license requires the permission of the Authority under the ECA.

b. For 25 years since the MNet license was grandfathered by the Independent Broadcasting Act of 1994, Naspers Ltd ("Naspers") has controlled Mnet, which later became Multichoice when DSTV was brought in. As of the listing of Multichoice on the 27th of this month Naspers will no longer control Multichoice. We will show from the Respondent's own papers that it is clear that in this proposed listing

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2 The complaint was lodged under sections 17A, 17B, and 17C of the Independent Communications Authority of South Africa Act, 2000.

3 Accent added.

4 The numbers have been adapted for purposes of the summary.

on the 27th of this month, control shifts from Naspers to the new listed stand-alone company MG Group Ltd, controlled by the senior leadership team of the Multichoice business.

c. The Complainant submits that the CCC does have jurisdiction and requests it to rule on an urgent basis because there has been fundamental non-compliance with the ECA in regard to the failure by Multichoice to obtain written permission from the Authority to transfer control of the Multichoice license, with no intention on the part of the Respondent to do so.

d. On the 27th of this month there will be a transfer of the ultimate control of the license from Naspers Ltd to the management and board of Multichoice Group Ltd ("MG Group Ltd") with no written permission being sought from the Authority. It is submitted by the Complainant that the CCC has jurisdiction because the failure to obtain the Authority's written permission to transfer is an instance of non-compliance with the ECA.

e. The mere fact that the license will continue to reside in Multichoice (Pty) Ltd is not a valid answer to the complaint. The Respondent's own papers reflect its admission that there is a need for it to show that there has been no change in ultimate control. It argues that in dealing with the enquiry into ultimate control that there has been no transfer of control because there is a similarity of Naspers shareholders in the newly listed vehicle. Yet on the other hand the Respondent's own description of the two stage corporate restructuring makes it plain that Naspers shareholders will take up the shares distributed to them *in specie* but, after the 27th, will trade in the shares of the listed vehicle with the public and investors on the JSE. More significantly, the listed vehicle will be an independent stand-alone company no longer accountable in any manner to Naspers. Instead of Naspers being the parent company, MG Group Ltd, the new listed company, will be the controlling company. This is change of control.

f. The Respondent's next submission is that because Naspers shareholders will take up the 438 million shares *in specie* in the new Multichoice Group Limited (purpose-built for the unbundling and listing and not a continuation of the old Multichoice Group (Pty)

Ltd) there is no change of control. Somehow on this basis Naspers appears to have been advised or persuaded since the unbundling and listing announcement of 17th September 2018 that it does not have to comply with its undertaking to obtain regulatory approval. This is in contradiction to the representation that it would do so in its notice (included in the Papers before the CCC).

g. Ultimate control is not necessarily shareholder control. In this matter there is a transfer of control from Naspers as parent company to control by MG Group Ltd, the newly-created listed vehicle. MG Group Ltd is not answerable to Naspers as its controlling parent company, unlike the old Multichoice Group (Pty) Ltd. All the Multichoice unbundling and listing documents underscore this. Members of the senior management are on the board of the new owner and indeed the senior executive Mr Patel is the executive chair of the self-standing independent group. This is a sea-change from being a subsidiary of Naspers for the last twenty five years of its license. It will be a fundamental transfer of control.

h. Multichoice Group (Pty) Ltd is a subsidiary of Naspers and has been its PayTV arm for the duration of its 25 year IBA/ICASA license. Multichoice is the Pay-TV arm of Naspers for only nine more days if the listing goes ahead as scheduled. Thereafter it is envisaged that the new listed company will be in control, untrammeled by Naspers as parent company. There is no more accountability to Naspers. This constitutes a transfer of control which has not been submitted to ICASA for written approval.

i. This transfer of control plainly and simply requires written permission from the Authority. The fact that there will be no accountability owed by Multichoice to Naspers after the 17th February plainly means a change in control. The MC Group Ltd pre-listing statement ("KSS3") confirms this at page 22 of the papers:"Pursuant to the Unbundling the Company will be an independent publically traded company." Multichoice will no longer report to Naspers after the unbundling and listing process has been concluded. In the light of the scheme of significant corporate restructuring it is fallacious for the Respondent to aver that there is no transfer of control because there might be similar

shareholders for a short period after the listing to the Naspers shareholders. There must be group that will assume control.

j. And indeed the exiting controlling investor, Naspers, tells us who that is in its SENS announcement of 17 September'.The strong leadership team is diverse, experienced and well-positioned to take the company forward."That leadership team will no longer be accountable to Naspers Ltd. It will form the critical part of the board of the MG Group Ltd. In the absence of candour from the Respondent we can only speculate why Multichoice failed to advise the Authority of the change of control after making a representation on the 17th September 2018 that it would. The Respondent offers no explanation for this *volte face.* It merely pleads a bare denial of having created an impression that the unbundling transaction required the written approval of ICASA. The publishing of the pre-listing statement on 21 January 2019 was silent on any regulatory approval being sought or having been obtained. This was the first indication that Multichoice had abandoned the stated intention of its parent to seek regulatory approval. Instead the pre-listing statement made it clear that it was intended that the unbundling and listing process would commence very soon, in five weeks' time, on 27 February 2019. The pre-listing statement displays no intention by the Respondent to subject this change of control to regulatory scrutiny.

k. Hence the filing of the urgent Complaint to the CCC requesting that a recommendation be made to ICASA for the Respondent to comply with section 13(1) of the ECA.

l. South Africa is emerging out of a period of ubiquitous corruption into one of accountability and a return to good governance. We cannot merely play lip-service to the regulatory order and then skip over it as if there is no need for accountability. At the Competition Commission and now at ICASA Multichoice has displayed a tendency to avoid regulation that might affect its bottom line. This results in great harm to the mass of South Africans who struggle with access to affordable data, information and good programming. Such harm is far greater than the short-term inconvenience of a delayed listing for Multichoice, a delay which could have been avoided if it had complied with its undertaking to

subject its patent change of control to the scrutiny of the Authority. Khulisa urges the CCC to recommend to ICASA that Multichoice (Pty) Ltd, the holder of the Individual Broadcasting Service license, comply with its obligation request permission from the Authority to transfer control from Naspers to Multichoice Group Ltd.

POINTS IN LIMINE

[3] In the documentation before the CCC the Respondent argued that the matter was not urgent, that the complaint had not been lodged within 60 days as prescribed by the ICASA Act, that since the listing had not yet taken place, there was, in any case, no past contravention, that the CCC did not have jurisdiction over future events and that insufficient attempts had been made to come to a settlement, as required by the Regulations concerning the CCC.[5] Although the Respondent did not persist with these points at the hearing, a few observations should be made. In essence the complaint was lodged in terms of section 17B of the ICASA Act, which sets no time limit for a complaint to be lodged with the CCC. Section 17C indeed requires a limit of 60 working days for a complaint lodged with and by the *Authority*. This is not such a complaint. It was lodged directly with the CCC. The matter of absence of urgency, as decided by the undersigned as a matter of procedure in terms of section 17(6) of the ICASA Act, was not pursued at the hearing. The argument on behalf of Multichoice that no attempt at settlement was made beforehand was also, justifiably, not persisted with at the hearing - in urgent matters that procedure is not applicable. A last matter must however be dealt with: it is true that the CCC does not have jurisdiction over future contraventions. The undersigned put this to Mr *Trengove SC,* who stated that since the listing would take place soon, it

[5] **REGULATIONS GOVERNING ASPECTS OF THE PROCEDURES OF THE COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Published under Government Notice R886 in *Government Gazette* 33609 of 6 October 2010.**

would be in the interests of justice to deal with the matter as if the listing had already taken place. We, accordingly now deal with the merits of the Complaint.

MERITS OF THE COMPLAINT

[4]*MultiChoice* is the holder of an individual Television licence, which it has held for many years. We will accept in its favour that there is no reason to believe that *MultiChoice* will not continue to hold the licence into the foreseeable future. *Khulisa* does not dispute this fact. However, it bases its complaint on the notion that, following the listing of the MC Group on the JSE, control over the *MultiChoice* licence will indirectly be transferred to a new group of shareholders. Put differently, the shareholder profile of the MC Group will change from a single holding company to a large and un-coordinated group of individuals who openly trade shares on the JSE. *Khulisa* suggests that this fact alone is sufficient to conclude that there will be a transfer of control for purposes of section 13(1) of the ECA.

[5] The complainant bases its case on the change in the profile mix of the shareholders of *MultiChoice's* great-grandparent company and that this will cause a transfer of control over *MultiChoice* and the licence it holds. *Khulisa* persists with this approach in its replying affidavit, where it also introduces a new argument: the change of shareholders in the MC Group will cause a change in the operational management of *MultiChoice*, which includes a change in control over the licence. Thus, if the Complaint is justified, *Khulisa* requests the CCC to find that the listing will be in contravention section 13(1) of the ECA because *MultiChoice* nor any of its parent companies requested the prior written permission of ICASA in terms of section 13 of the Electronic Communications Act. Of course, the duty to apply for an amendment of this nature only lies with the licensee, *Multichoice*.

[6] *Mr Trengove* SC, representing Multichoice, however, argued that the complaint was wrong in law and in fact. He made the following points:

(i)The complaint ignores the company structure within which Multichoice falls, as well as the reason for and the effect of the unbundling and listing of the MC Group.

(ii)The listing of the MC Group does not result in the transfer of control.

(iii)The genesis of the complaint is the decision of Naspers Limited ("Naspers") to unbundle its video-entertainment business from the remainder of its business operations. The Naspers company structure is as follows:[6] Naspers owns 100% of the shares in MIH Holdings (Pty) Ltd ("MIH Holdings"), which, in turn, owns 100% of the shares in MC Group.MC Group owns 80% of the shares in MCSA Holdings. The remaining 20% is owned by Phuthuma Nathi Investments (RF) Limited and Phuthuma Nathi Investments 2 (RF) Limited (collectively, "Phuthuma Nathi").MCSA Holdings owns 100% of the shares in MC South Africa, which holds all of the South African video entertainment operations in the Naspers group. This includes Multichoice and Electronic Media Network (Pty) Ltd ("M-Net").

(iv)Naspers has two classes of ordinary shares, namely A shares and N shares.The A shares are not listed. Each carries 1000 votes. Dividends paid on these shares are limited to a maximum of 20% of the dividends paid on the N shares.The N shares are listed on the JSE. Each N share carries one vote. At the end of the financial year ending 31 March 2018, Naspers had 438,656,059 N shares and 907,128 A shares.

(v)On 17 September 2018, Naspers announced its decision to unbundle the video entertainment business from the rest of the

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6 MultiChoice's Answering Affidavit, CM1 (Record p71).

Naspers business.[7] The main reason for doing so, the CCC was informed, is that Naspers has evolved into two distinct and divergent business lines: (1) a high-growth internet business with an international focus; and (2) a cash-generative video entertainment business that operates on the African continent. The Naspers board of directors resolved that there was no longer any strategic value in keeping the two business streams together as there was no synergy, particularly because Naspers intends to continue to shift its focus towards a global consumer internet company.

(vi)There are, it was argued, additional benefits for the unbundling:[8] The listing of MC Group will create an empowered top 40 JSE-listed African entertainment company, which will situate MC Group at the forefront of digital transformation in Africa. The unbundling gives investors new opportunities. Shareholders do not currently enjoy direct access to the value of MC Group. The video entertainment portion of the Naspers business is bundled together with all the other assets within the Naspers group, some of which are significantly more valuable, which means that the considerable value of the video entertainment business is not recognised and arguably not even reflected in the Naspers share price. The unlocking of new investor opportunities is illustrated by the fact that the Public Investment Corporation, which is the largest N class shareholder in Naspers, will receive new highly-valuable shares for no consideration at all. The unbundling also advances Naspers' commitment to Broad-Based Black Economic Empowerment and broad socio-economic transformation in South Africa. On the date of unbundling, Naspers will deliver for no consideration to Phuthuma Nathi an additional 5% stake in MCSA Holdings.

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[7] Naspers Announcement on the Listing and Unbundling of Video Entertainment Business as MultiChoice Group on the JSE, 17 September 2008 (Record p9).

[8] MultiChoice's answering affidavit paras 16-20 (Record, p52-53).

(vii)The unbundling transaction will be carried out as follows:[9] MIH holdings will distribute all of its shares in MC Group to Naspers as a dividend *in specie.* Naspers will become the holder of 100% of the shares in MC Group. Thereafter, two events will happen simultaneously: MC Group will list on the JSE; Naspers will distribute the MC Group shares to its shareholders as a dividend *in specie*. The effect of the listing will be that MC Group will be separately listed on the JSE, and it will become the ultimate parent company of Multichoice. The current Naspers shareholders, who were previously indirect owners of the shareholding in MC Group through MIH Holdings, will become the direct shareholders of MC Group. At the initial moment of listing, therefore, the shareholders of MC Group will be the same as the shareholders prior to listing. But, as public trading commences, the MC Group shareholder pool will change from day to day. *Mr Trengove* added, in support of his client's case, that no individual shareholder or consortium of shareholders will have control over MC Group.

[viii]Section 13 of the ECA regulates two scenarios: the letting, assigning, ceding, or transfer of the licence *and* the assigning, ceding, or transferring of *control* over the licence. *Khulisa* does not base its case on the first scenario. The public listing does not result in the transfer of the licence itself. Under the second scenario, *Khulisa* also does not found its case on the understanding that the listing causes the assigning or ceding of control over the licence. *MultiChoice* is neither assigning nor ceding control over the licence, within the meaning that is ordinarily assigned to these legal acts. This component of the second scenario is accordingly not at issue.

[ix] The only question, then, is whether the public listing causes the transfer of *control* over the *MultiChoice* licence. The ECA offers no definition of "control." The courts have yet to interpret its meaning within the context of section 13(1) of the ECA. *Khulisa*

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[9] See, also, MultiChoice's Answering Affidavit, CM1 (Record, page 71).

contends that any change of shareholders equates to the *transfer* of control of the licensee and the licence. This interpretation is, according to *Mr Trengove*, fundamentally flawed in that as a general matter, it would lead to an absurd result: every time a publicly listed licensee changes shareholders (which is every trading day) the prior written consent of ICASA would be required. That would not be a sensible meaning of the section. Nor can it be the effect or the purpose of the provision.[10]

[x]That being said, this Committee, it was argued, does not need to resolve the precise ambit of section 13(1) in this dispute to dispel *Khulisa's* argument. *Khulisa* makes the assumption that the change in shareholders after listing is sufficient to establish a transfer in control. But this assumption is, according *Mr Trengove*, wrong. On the facts of the case, it was argued, the change of shareholders is either of no material consequence or does not result in the *transfer* of control over the licensee. Section 13(1) of the ECA seeks to prevent the transfer of control over the *licence,* not the *licensee.* The text of section 13(1) contrasts with the text of section 64(1) of the ECA.[11] Unlike the former that prohibits unauthorised transfer of control over the *licence*, the latter provision regulates or prohibits changes over the control of the *licensee*. The statutory presumption is that the same words should

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para. 18.

[11] Section 64 provides as follows: **64. Limitations on foreign control of commercial broadcasting services** (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 (20) percent.

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

be given the same meaning, and,[12] conversely, different words should bear different meanings.[13] And there is no reason, it was argued, to depart from this statutory presumption. In sum, control over a licence does not mean control over the licensee. Section 13(1) of the ECA is not concerned with changes in control over the licensee, and it makes no difference that the shareholders of the licensee undergo changes. In this matter, it was argued, *Multichoice* remains in control of the licence at all times. It controls the licence before the listing, and it will continue to control the licence afterwards.

[xi] *Multichoice*, accordingly, submits that the CCC should reject the argument advanced by *Khulisa* that control over the licence (held by *Multichoice*) should be equated with control of the licensee (by the parent companies of MultiChoice). Since *Multichoice* will continue to hold control of the licence after the listing takes place, there can be no support for the allegation that the listing will cause control over the licence to move away from the licensee. Even if section 13(1) is interpreted to include control of the licensee, the listing of MC Group still does not result in the transfer of immediate control over the licensee. The parent and grandparent companies remain in control of *Multichoice* both before and after listing. Apart from the 5% endowment to Phuthuma Nathi — which does not impact on the control of *Multichoice* — there is no change in the shareholder profile of MCSA Holdings or MC South Africa. There is therefore no transfer in the control over *MultiChoice* and the *MultiChoice* licence. Even if section 13(1) is interpreted expansively to include ultimate control of the licensee, the listing of MC Group still does not result

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[12] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 47; *Public Carriers Association v Toll Road Concessionaries* 1990 (1) SA 925 (A) at 949F.

[13] See D Lowe and C Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (Bloomsbury 2018) 39

in the transfer of control over the licensee. The ultimate control of *Multichoice* currently lies with the shareholders of Naspers. Nothing about the listing effectively changes this situation or, if it does, there is no transfer of ultimate control. For this, *Mr Trengove* argued, there are two reasons: MultiChoice is currently under the ultimate control of the Naspers shareholders. Pursuant to the unbundling, *MultiChoice* will remain under the ultimate control of the same shareholders. There will thus be no change in its ultimate control. Secondly, pursuant to the unbundling, no single shareholder or group of shareholders will acquire control of MultiChoice. The unbundling will, accordingly, not bring about a transfer of control to anybody.

FINDING OF THE CCC

[7] We repeat section 13(1) of the ECA:

An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, ***and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.*** *(accent added)*

[8] It is significant, as *background* to the present matter, that it has been held by our Courts over many years,that companies are *separate* legal persons – whatever their relationship to another company. This approach of the House of Lords in *Salomon v Salomon & Co*[14] was adopted by the South African Appellate Division in 1938 and has, as in the past, recently again been followed by the Supreme Court of Appeal. The exception would, however, as stated by Corbett JA, be cases of fraud.[15] The latter is,

[14] For reference see footnote 15 hereunder.

[15] See *Salomon v Salomon & Co* [1897] AC 22 (HL) ((1895 – 9) All England Rep 33); and *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, which are the seminal judgments in England and South Africa affirming the effects of the

of course, not part of the present case. Adding to the passage in the previous footnote, it is also significant what Corbett CJ stated in *The Shipping Corporation of India Ltd v Evdoman Corporation & Another*:[16]

In the present case the issue is an entirely different one and different considerations arise. The issue is whether, because of the status of SCI and its relationship with the Government of India, its property should be treated as being the property of the Government. Here one immediately encounters the basic rule spelt out by Innes CJ *in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530* at 550-1:

'A registered company is a legal persona distinct from the members who compose it. In the words of Lord MacNaghten (*Salomon v Salomon & Co* 1897 AC at 51):
"the company is at law a different person altogether from the subscribers to its

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independent and self-standing juristic personality of companies. Thus Corbett JA stated as follows in *The Shipping Corporation of India Ltd* 1994(1) SA 550(A) at 566C-F : 'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify piercing or lifting the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words device, stratagem, cloak and sham have been used . . . .' ; also see Quoted with approval by Schippers AJA, writing for the Supreme Court of Appeal in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA).

[16] 1994(1) SA 550(A) at 565.

memorandum; and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them". That result follows from the separate legal existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.' … It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'stratagem', 'cloak' and 'sham' have been used… In my view, no ground has been shown for piercing the corporate veil in the present case.

[9] Since MultiChoice will continue to hold and control the licence after the listing takes place, there can be no support for the argument of *Khulisa* that the listing as such will cause control over the licence to be transferred. The listing does not amount to a transfer in the control over MultiChoice and the MultiChoice licence. The ultimate control of MultiChoice currently lies with the shareholders of Naspers. Nothing about the listing effectively changes this situation, or if it does, there is no transfer of ultimate control. For this there are two reasons: MultiChoice is currently under the ultimate control of the Naspers shareholders. Pursuant to the unbundling, MultiChoice will remain under the ultimate control of the same shareholders. There will thus be no change in its ultimate control. Secondly, pursuant to the unbundling, no single shareholder or group of shareholders will acquire control of MultiChoice. The unbundling will accordingly not bring about a transfer of

control to anybody. In any case, the perspective put forward in the next paragraph would, additionally, take care of the complaint.

[10] Seen from a different perspective, the CCC's conclusion also holds true on an additional ground. Multichoice is an independent legal person according to the approach of our Courts (following a House of Lords judgment). It is the *licensee* which is subject to section 13 of the ECA and unless it transfers control, it will not act in conflict with section 13 of the ECA. There is no way in which the activities of Naspers on the Stock Exchange can have any effect on the *licensee*, Multichoice (Pty) Ltd, as an independent legal person. Only if Multichoice as a company decides, whatever the reason, to transfer its shares in such a manner that present control would be lost, will it be under a legal duty to approach ICASA for its consideration and agreement. And this is, of course, an application on which only the *Council* of ICASA may decide on.[17]

THE CCC'S FINDING

The CCC's finding is, accordingly, as follows:

1. **The listing as such will not lead to a transfer of control in conflict with section 13(1) of the ECA.**

2. **If circumstances change and a transfer of control is decided upon by the licensee, the authorisation by the Council of ICASA will have to be sought before transfer.**

The complaint is, accordingly, not upheld.

[17] See section 4(4)(f) of the ICASA Act 2000, as amended.

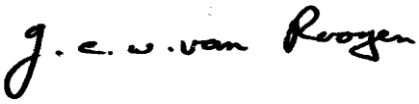
ADVICE TO THE COUNCIL OF ICASA

1. There has not been a finding against the Licensee for the reasons provided above.

2. Since there has not been a finding against the licensee no order in terms of section 17E(2) of the ICASA Act is recommended to Council

ADVICE TO COUNCIL AS TO ITS FUNCTIONS IN TERMS SECTION 17B(b)

That the Chief Executive Officer be requested that the record of the license of Multichoice (Pty) Ltd accords with the records in possession of ICASA as to the name of the Company.



JCW VAN ROOYEN SC

The Members of the CCC agreed. 22 February 2019