OPINION

for

MULTICHOICE

on

THE LEGALITY OF CERTAIN PROPOSALS FOR THE MUST CARRY REGULATIONS

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INTRODUCTION

1 Our consultant is Multichoice.

2 We have been instructed to provide a legal opinion on the legality of various proposals that other stakeholders have made concerning the Draft Must Carry Regulations (the **Draft Regulations**).

3 We consider the following issues:

3.1 Whether the Authority can lawfully require a Subscription Broadcast Service (**SBS**) to carry channels of free to air broadcasters like e.tv;

3.2 Whether the Authority can lawfully oblige an SBS to continue to provide Must Carry channels after a subscriber terminates her subscription;

3.3 Whether the Authority is lawfully entitled to determine the terms on which an SBS must carry channels; and

3.4 Whether the Authority can lawfully require that the channels concerned be carried by an SBS on a Must Carry, Must Pay basis.

4 We advise that none of these proposals could be lawfully implemented by the Authority via the Regulations.

5 We address each issue in turn.

MUST CARRY CANNOT EXTEND TO OTHER FREE-TO-AIR BROADCASTERS

6 e.tv argues that the Authority should extend the Must Carry obligation beyond the SABC to apply also to other free-to-air broadcasters. It states: "*there is no rational reason why other free-to-air broadcasters should also not be carried by subscription broadcasters*".[1] It goes so far as to say that excluding a broadcaster such as e.tv from the benefit of the Must Carry obligations would be "*arbitrary, irrational, unjustifiable and discriminatory*".[2]

7 We have considered these legal contentions and are of the view that they are without merit. This is for two reasons.

8 First, and most obviously, the Authority does not have the power to extend the Must Carry obligation beyond the SABC to other free-to-air broadcasters.

8.1 Section 60(3) of the ECA is limited to the channels of the SABC. It reads: *"The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by* ***a public broadcast service licensee****."* e.tv and other free-to-air broadcasters are not public broadcast service licensees.

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1 e.tv Submissions at para 20.

2 e.tv Submissions at para 15.

8.2 It is a central principle of law that organs of state "*may exercise no power and perform no function beyond that conferred upon them by law*".[3]

8.3 e.tv is driven to acknowledges that s60(3) of the ECA empowers the Authority to make regulations requiring a Must Carry regime only in respect of the channels provided by the SABC.[4] Yet it contends that *"this provision, read together with the remaining provisions of the ECA and the ICASA Act do not limit the Authority's discretion and ability to also extend the Regulations to other commercial free-to-air broadcasters with a public service mandate*".[5]

8.4 It is notable, however, that e.tv does <u>not</u> identify any law that would empower the Authority to extend the Must Carry regime to free-to-air broadcasters. Absent such a law, it does not matter whether the Authority believes it would be good policy to compel subscription broadcast services to carry free-to-air channels. It lacks the power impose that obligation, no matter how wise or unwise it may be.

8.5 Insofar as e.tv seeks to rely on the Authority's general regulation making powers under the ECA or ICASA Act, this cannot assist it.

8.6 The Authority could not rely on its general regulation-making power in s 4 of the ECA:

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3 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC) at para 58.

4 e.tv Submissions at para 7.

5 e.tv Submissions at para 7.

8.6.1 That section empowers the Authority to make regulations concerning "*any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation*." That does not expand the power in s 60(3); it merely restates it.

8.6.2 Section 4 also allows the Authority to make regulations concerning "*any technical matter necessary or expedient for the regulation of the services*", or "*any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation*". The imposition of a duty to carry channels from broadcasters other than the SABC is not a "technical matter" or a "matter of procedure or form". It would constitute a substantive obligation.

8.7 The Authority could also not rely on its general regulation-making power in s 4(3)(j) of the ICASA Act.

8.7.1 That section allows ICASA to "*make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority*".

8.7.2 But there is presumption of interpretation that a general provision does not depart from a specific provision.[6] Moreover, as the SCA has explained:

> *"Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another. … 'Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependant, and the content of the one statutory provision may shed light upon the uncertainties of the other.'"*[7]

8.7.3 This is especially so here, where section 4(3)(j) of the ICASA Act only contemplates regulations "*consistent with*" the objects of the ECA.

8.7.4 It would violate that presumption and principle to interpret the Authority's general regulation making powers to empower the Authority to extend Must Carry to free-to-air broadcasters when section 60(3) of the ECA – dealing specifically with the extent of the Authority's power to prescribe Must Carry regulations – only empowers the Authority to do so in respect of the public service broadcaster.

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6 See, for example, *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) at para 42.

7 *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) at para 19

9 Second, and in any event, even if we assume (contrary to our conclusion above) the Authority did have the power to extend the Must Carry obligation to other free-to-air broadcasters, e.tv is still wrong when it says that a choice by the Authority to exclude free to air broadcasters other than the SABC would be "*arbitrary, irrational, unjustifiable and discriminatory*"[8].

9.1 Parliament has made a choice, via section 60(3) of the ECA, to require that the Must Carry regime only need be implemented in respect of the SABC's channels – not those of other free to air broadcasters.

9.2 This choice made by Parliament must be taken into account by the Authority in making regulations, which are delegated legislation.

9.3 As the Constitutional Court has explained:

> *"Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.*
>
> *. . .*
>
> *The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it."*[9]

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8 e.tv Submissions at para 15.

9 *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 26, quoting *Bennion Statutory Interpretation* 3 ed (Butterworths, London 1997) at 189 (emphasis added)

9.4 It cannot then be "*arbitrary, irrational, unjustifiable and discriminatory*"[10] for the Authority to act consistently with this choice made by Parliament when it makes regulations.

10 If the Authority were to prescribe Must Carry regulations that also required the carriage of channels from free to air broadcasters like e.tv, this would be unlawful and invalid.

MUST CARRY CANNOT EXTEND AFTER SUBSCRIPTION

11 e.tv argues that the Must Carry obligation – which it argues should apply to its channels – should also extend after a subscriber's subscription is terminated. As it puts it: "*the Regulations need to ensure that the free-to-air channels (being the SABC channels and e.tv), continue to be available to Multichoice audiences when Multichoice turns off a subscriber's access to its services by reason of non-payment.*"[11]

12 Again, however, the Authority simply lacks the power to impose this obligation.

13 Neither the specific nor the general regulation making powers the ECA grants the Authority would permit it to accept e.tv's proposal and impose post-subscription access .

[10] e.tv Submissions at para 15.

[11] e.tv Submissions at para 22.

14 The specific power is in s 60(3), which reads:

> *"The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee."*

15 The ECA defines "*subscription broadcast service*" as "*a broadcasting service provided to a subscriber upon payment of a fee".* And "subscriber" is defined as: "*a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 for a fee*".

16 If those definitions are placed in s 60(3), it reads:

> *"The Authority must prescribe regulations regarding the extent to which a broadcasting service provided to a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 upon payment of a fee must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee."*

17 The power s 60(3) grants the Authority is therefore limited to regulating the extent to which an SBS must provide the Must Carry channels to subscribers. It does not grant the Authority the power to require that an SBS provides the Must Carry channels to people who are no longer subscribers.

18 The Authority could also not rely on its general regulation-making power in s 4 of the ECA:

18.1 That section empowers the Authority to make regulations concerning *"any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation."* That does not expand the power in s 60(3); it merely restates it.

18.2 Section 4 also allows the Authority to make regulations concerning "*any technical matter necessary or expedient for the regulation of the services*", or "*any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation*". The imposition of post-subscription access is not a "*technical matter*" or a *"matter of procedure or form*". It would constitute a substantive obligation, inconsistent with the nature of an SBS licence.

19 And, again, the Authority could also not rely on its general regulation-making power in s 4 of the ICASA Act.

19.1 We reiterate that there is presumption of interpretation that a general provision does not depart from a specific provision[12] and that the two provisions must be read together, with section 60(3) of the ECA shedding light on the extent of the powers conferred by section 4(3)(j)

[12] See, for example, *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) at para 42.

of the ICASA Act.[13] This is especially so here, where section 4(3)(j) of the ICASA Act only contemplates regulations "*consistent with*" the objects of the ECA.

19.2 It would violate that presumption and principle to interpret s 4(3)(j) of the ICASA Act to permit regulations compelling a Must Carry regime involving post-subscription access where this is not permitted by s 60(3).

20 There is a further reason why the ECA and ICASA Act should not be interpreted to allow post-subscription access. The common carrier – Sentech – is obliged to "*carry public broadcasting services*".[14] Post-subscription access would shift part of that burden (either permanently or temporarily) to SBS licensees. That is contrary to the division of labour envisaged in the ECA.

21 Imposing a post-subscription duty of access would therefore be unlawful and invalid.

THE AUTHORITY CANNOT INTERFERE IN COMMERCIAL NEGOTIATIONS

22 e.tv and SOS/MMA argue that if an SBS and the PBS are unable to reach an agreement on commercial terms, then the Authority can resolve the dispute and determine the terms on which the channels will be carried. e.tv argues that the

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[13] *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) at para 19

[14] ECA s 62(3)(c).

Chair of the Authority should determine the terms. SOS and MMA argue that the Authority as a whole must resolve any dispute about the terms.

23 This is plainly impermissible.

24 Section 60(3) limits the Authority's power to determine an SBS's must-carry obligations. The regulations it passes must make the Must Carry regime "*subject to commercially negotiable terms*".

25 If the Authority is to determine the terms on which the channels are to be carried, rather than those terms being determined by agreement between the parties, then this would not comply with the requirement that the channels are to be carried on commercially negotiable terms. Such a regulation would be contrary to s 60(3).

26 Indeed, the Authority has already rightly concluded in its Findings Document that it will not become involved in commercial negotiations or dispute resolution:

> *"The Authority's involvement in commercial negotiations may be perceived as undue interference in the commercial dealings of licensees. The Authority will not scrutinize the commercial nature of agreements as stated above other than to receive same from licensees to ensure that there is compliance with the Regulations."*[15]
>
> *The Authority's position is that as the parties negotiating the commercial terms, it is up to such parties to adopt a suitable dispute resolution mechanism as part of their commercial agreement."*[16]

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[15] Findings Document at para 6.5.

[16] Findings Document at para 8.6.

A MUST CARRY, MUST PAY REGIME WOULD BE UNCONSTITUTIONAL

27 e.tv proposes that the Regulations should provide that where an SBS carries channels under the Must Carry regime, the SBS must also pay the broadcaster concerned for the right to do so. In other words, e.tv proposes that the Must Carry obligation should be a "Must Carry, Must Pay" obligation.[17]

28 SOS and MMA adopts much the same position. They maintain that "*section 60(3) of the ECA enshrines the 'Must Carry, Must Pay' principle for subscription broadcasting services and requires ICASA to provide for same in its regulations*."[18]

29 We note that the SABC does not adopt this position. In contrast to e.tv and SOS/MMA, the SABC understands the ambit of section 60 (3) of the ECA is limited and that the SABC may only be compelled to offer its programmes if commercially negotiated terms have been agreed upon.[19]

30 We have considered the contentions of e.tv and SOS/MMA. We are of the view that they are not correct as a matter of law.

30.1 A Must Carry, Must Pay regime is not permitted by section 60(3) of the ECA.

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17 e.tv Submissions at para 19

18 SOS/MMA Submissions at para 8(d)

19 SABC Submissions, paras 3.5.3 to 3.5.4

30.2 Nor would such a regime be constitutionally valid. This is because, apart from anything else, such a regime would amount to an unconstitutional breach of section 16 of the Constitution.

31 We address each issue in turn.

Not permitted by section 60(3) of the ECA

32 As we have already explained:

32.1 Section 60(3) limits the Authority's power determine an SBS's must-carry obligations.

32.2 The regulations it passes must make the carry "*subject to commercially negotiable terms*".

33 The very idea of a Must Carry, Must Pay regime is at odds with this principle. It compels the SBS to pay for the channels concerned even if it does not wish to; does not consider that it obtains material value from them; and does not agree to this in negotiations. This is directly at odds with the idea of "*commercially negotiable terms".*

34 On this basis alone, a Must Carry, Must Pay regime would be unlawful and invalid.

35 Moreover, the Authority has already rightly rejected the idea that a Must Carry regime can be used to fund the SABC. As it explained:

> *"Payment regarding the transmission of must carry channels must be negotiated by both PBS and the SBS in terms of section 60(3) of the ECA. The PBS has an obligation to serve the public by producing content that is in the public interest."* [20]

Not permitted by section 16 of the Constitution

36 But even if section 60(3) were wide enough to allow for a Must Carry, Must Pay regime there is a more fundamental problem – the effect of section 16(1) of the Constitution.

37 Section 16(1) of the Constitution provides that "*Everyone has the right to freedom of expression, which includes… freedom of the press and other media*".

38 An important element of the right to freedom of the press is the right of the media to decide what materials to publish or broadcast. Critically for present purposes, this includes the right to determine which materials <u>not</u> to publish.

39 This has been made clear repeatedly by foreign jurisprudence.[21] These cases establish that:

39.1 a core part of the right to freedom of the media is the right to decide what to publish or broadcast and what <u>not</u> to publish or broadcast; and

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[20] Findings Document at para 2.38

[21] Eg: *Remuszko v Poland* 1562/10 (16 July 2013); *Miami Herald Publishing Co. v. Tornillo* 418 U.S. 241 (1974); *Turner Broadcasting v Federal Communications Commission* 512 US 622 (1994); and *Turner Broadcasting v Federal Communications Commission* 520 US 180 (1997).

39.2 a statute which compels publication or broadcasting of particular items at least limits the right to freedom of expression and the media.

40 South African courts have not squarely considered this principle thus far. However, we consider that when faced with the issue, they would almost certainly follow the approach of the foreign courts.

40.1 The SCA has already embraced the notion that the "*right to freedom of expression confers on the media the discretion to determine what means of communication would be most effective in relation to engaging the public and communicating and relaying information and events to it*".[22]

40.2 If the right to freedom of the media includes the discretion to determine "*what means of communication*" would be most effective, it would be most surprising if it did not include the right to determine what not to publish or broadcast at all.

41 We are therefore of the view that a law which compels the media to publish or broadcast certain content limits the rights to freedom of expression and the media contained in section 16(1) of the Constitution.

42 Where a legislative or regulatory regime requires Must Carry (as it does now) or requires Must Carry, Must Pay (which is what e.tv and SOS/MMA propose), in our view this would:

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[22] *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* [2017] 3 All SA 622 (SCA); 2017 (2) SACR 491 (SCA) at para 45

42.1 compel subscription broadcasters to broadcast certain specified channels to their subscribers; and

42.2 therefore limit the rights to freedom of expression and the media of the subscription broadcasters concerned.

43 The question then is whether such a regime would pass muster under the limitations analysis in section 36(1) of the Constitution.

44 For present purposes we assume that a Must Carry regime (without Must Pay) would amount to a permissible limitation of the right to freedom of expression. That is, it would be constitutionally valid.

45 But even on this assumption, a Must Carry, Must Pay regime would stand on quite a different footing from a constitutional perspective and would likely amount to an impermissible limitation of the right to freedom of expression. This is for three reasons.

46 First, the impact of such a Must Carry, Must Pay regime would be far more severe for the SBS. It is one thing to require a broadcaster to give up some of its capacity to carry the public broadcaster's channels. It is quite another to require that the SBS also pays the SABC in doing so.

46.1 The practical effect of this is that the SBS is compelled to use its financial resources available to purchase programming to pay for the SABC channels (or, on e.tv's argument, the other FTA channels) without having any choice about whether it wants those channels. This

directly affects the extent to which the SBS can purchase the programmes of its choosing. This seems a serious incursion into freedom of expression and the media.

46.2 Moreover, and to aggravate the problem, in many respects the SABC and other FTA broadcasters are competitors of the SBS. The idea that the Authority can compel an SBS not just to carry its competitor's programmes but also to pay for them is highly problematic from the point of view of freedom of expression.

47 Second, from the Authority's own study, there appears to be very little foreign precedent for Must Carry, Must Pay regimes.

47.1 While many countries have Must Carry regimes, it appears that Estonia is the only country to specify that broadcasters have the right to a reasonable charge from cable operators for retransmitting their public broadcast television programmes.

47.2 This is very slender basis on which to contend that this is a permissible limitation of the rights to freedom of expression and the media.

48 Third, and most critically, if the purpose of the regime is to ensure that the SABC's channels are able to reach as great a portion of the South African population as possible, there is an obvious and effective less restrictive means available to achieve that purpose. This is a Must Carry regime without Must Pay – that is without the SBS paying the SABC for the channels. Once there is an

effective less restrictive means available, it will generally be very difficult for the measure to withstand constitutional scrutiny.

49 In our view, therefore, a Must Carry, Must Pay regime would be in breach of section 16(1) of the Constitution. It would therefore be unconstitutional and invalid.

CONCLUSION

50 We are therefore of the view that:

50.1 The Authority cannot lawfully require an SBS to carry channels of free to air broadcasters like e.tv;

50.2 The Authority cannot lawfully oblige an SBS to continue to provide Must Carry channels to a person who is no longer a subscriber;

50.3 The Authority is not lawfully entitled to determine the terms on which an SBS must carry channels if it cannot reach a commercial agreement with the relevant broadcaster; and

50.4 The Authority cannot lawfully require that the channels concerned be carried by an SBS on a Must Carry, Must Pay basis.

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