Ex parte:

The South African Broadcasting Corporation Limited

In re:

Position paper and notice of intention to prescribe must-carry obligations in terms of section 4(4) read with Section 60(3) of the Electronic Communications Act No. 36 of 2005

**OPINION**

1 The issue for opinion is whether the Independent Communications Authority of South Africa ("the Authority") is competent "*to prescribe regulations which compel the SABC to offer its content to subscription broadcasters for no fee.*"

2 Of concern to the SABC is that to the extent that the Authority could compel it to offer its content to subscription broadcasters for no fee, this could amount to a form of expropriation without compensation. And if in the end this turned out to be the case, the SABC would consider challenging the Authority.

3 The SABC's concerns and need for the opinion come in the wake of the Authority's promulgation of a position paper and notice of intention to prescribe must-carry regulations in terms of section 4 read

together with section 60(3) of the Electronic Communications Act No. 36 of 2005 ("the Act").

4 Documents furnished to us in the brief are:

4.1 the SABC's written submissions to the Authority, dated the 29th October 2007; and

4.2 the Authority's position paper and draft regulations ("the draft regulations") dated the 22nd May 2008.

5 Section 4 of the Act provides *inter alia* that:

> "*(1) The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation ...*"

6 One of the objects of the Act, as set out in section 2(t) thereof, is to "*protect the integrity and viability of public broadcasting services*". These services are currently provided by the SABC.

7 Section 60(3) of the Act provides that:

> "*(3) 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*", being the SABC." (our underlining)

8 The phrase "*commercially negotiable terms*" is not defined in the Act and must be given its ordinary meaning in common parlance. Included in the phrase are terms which would deal with the payment of moneys in respect of such must-carry services because payment terms, above all, are those which are typically sought in commercial negotiations and, once negotiated, are included in the terms of any commercial contract. The phrase is not, however, limited to money matters. It would include any matters which would be the subject of negotiation in a typical commercial transaction related to the subject matter in question. One such additional term may well relate to the area in which the must-carry programme will be broadcast. Since Consultant or any broadcaster in the Consultant's position is likely to have acquired programmes subject to particular terms and conditions, including terms and conditions relating to the area of broadcast, it is inevitable that such matters will become the subject of commercial negotiation. A broadcaster in the position of Consultant (a licensee) would not have the power to confer greater rights in regard to the

broadcast of such programmes than it itself has and it would doubtless insist in the course of commercial negotiations that the counter-party with which it negotiates observes the same constraints.

9 We interpret section 60(3) of the Act to limit the ambit of the regulation which must be prescribed in respect of must-carry broadcast services. The limitation is that the compulsion to provide such service is subject to the terms which have been commercially negotiated. It would, therefore, not be proper for the Authority, by way of regulation, to seek to compel the provision of television programmes on a basis which overrides commercial negotiable terms or which precludes the parties from negotiating such commercial terms. So, for example, if the Authority sought by regulation to require that the programme be broadcast free of charge, then it would be preventing the parties from reaching commercially negotiated terms in regard to price or fees and that, we believe, would be beyond the scope of the power to make the regulations.

10 The position has been somewhat complicated by statements made by the Authority in its position paper which accompanies the draft regulations which have been circulated for comment.

11 At page 28 of the Authority's position paper and draft regulations published in Government Gazette No. 31081, Volume 515 and dated the 22nd May 2008, the following appears under "*18 must-offer*":

> "*The Authority supports the contention in most submissions that the must-carry obligations need to be mirrored by a must-offer requirement, and should not be interpreted as an obligation on subscription broadcasting services to pay public broadcasting services for carriage of such channels. Evidence from international benchmarking and best practice supports this contention. The Authority concludes that it will subject the designated Public Broadcasting Service Television Programmes to 'must-offer' obligations and expects the SABC to offer the designated television programmes on request.*"

12 This statement does seem to suggest that the Authority would wish to prevent Consultant from charging for the must-offer obligation imposed upon it. The Authority's position in this regard is one thing: the question is whether it has translated such an approach into the regulations. If it has, then a very serious question arises as to whether any such prohibition is *intra vires* the power accorded to the Authority to make regulations.

regulations and the position paper. For our part, we think it would not be out of place for Consultant to make the point to the Authority that it has no power to preclude Consultant from stipulating for, and negotiating, the various commercial arrangements which it wishes to make and to seek confirmation that the regulations are not intended to trespass in this regard, but rather are intended to acknowledge that any duty on Consultant to offer the programmes is subject to the conclusion of a commercial agreement. What the regulations can do is to compel Consultant to offer the programmes if commercial terms are negotiated. Consultant is precluded from an outright refusal to negotiate and will no doubt be obliged to negotiate *bona fide*. That, we believe, is the true purport and effect of section 60(3).

17 We address separately a particular concern raised by Consultant in consultation. This concern had to do with the question whether Consultant would be able to insist that a broadcaster retain existing advertising material which accompanies the programmes. If this is not so, then Consultant envisages that the broadcaster will supplement the programme material with its own advertising to the financial detriment of Consultant. Again, we think, this concern is addressed by the provisions of section 60(3) of the Act. The matter is essentially one for commercial negotiation and falls within the ambit of the section.

DATED at SANDTON this 26 day of JUNE 2008.

M D KUPER SC

K D RAMOLEFE