APPENDIX C:

OPINION BY ADVOCATES WIM TRENGOVE SC AND PHUMLANI NGCONGO

Please see the attached.

MULTICHOICE AND ELECTRONIC MEDIA NETWORK

THE PROPER PROCESS FOR THE ICASA INQUIRY

OPINION

Wim Trengove SC
Phumlani Ngcongo
Duncan Wild
7 June 2018

THE QUESTIONS

1 MultiChoice seeks advice on the following questions relating to the future conduct of the ICASA inquiry:

1.1 First, slide 113 of MultiChoice's submission seems to suggest that there ought to be three sets of hearings, those which just occurred, further hearings after the draft findings are published and a further set of hearings in relation to the second stage, considering remedies. Does MultiChoice agree that:

1.1.1 conducting public hearings is within the discretion of ICASA; and

1.1.2 relatedly, the failure to hold hearings subsequent to publication of the draft findings document would not be fatal?

1.2 Secondly, in relation to the second stage, accepting that s 67 is not the most elegantly drafted provision in the ECA, would the stipulation of proposed remedies at the end of stage one, inviting written representations, necessarily result in an unfair process? In other words, would the absence of a distinct inquiry for remedies necessarily result in an unfair process?

1.3 Thirdly, is MultiChoice aware of any legal obstacles to temporary measures to address market failure pending the outcome of the hearing?

1.4 Fourthly, in terms of s 67(4) of the ECA, who bears the burden to establish the relevant market(s) for purposes of the inquiry and whether competition therein is ineffective?

2 We address these questions collectively below.

THE ICASA INQUIRY AND PROCEDURAL FAIRNESS

3 The inquiry is subject to s 67[1] of the ECA and ss 4B[2] to 4D of the ICASA Act. It may culminate in the promulgation of regulations. It is accordingly subject to the Promotion of Administrative Justice Act No. 3 of 2000 ("**PAJA**") and the Regulations on Fair Administrative Procedures of 2002. These provisions, and particularly ss 4B(2) and (6) of the ICASA Act and ss 3(1) and (2) and 4(1) of PAJA, entitle MultiChoice to a fair hearing, that is, a fair opportunity to put its case in the inquiry.[3]

4 An essential ingredient of a fair hearing is that MultiChoice is given such

---

1 Section 67(4) of the ECA provides as follows:

"*The Authority [ICASA] must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.*"

2 Section 4B(1) of the ICASA Act provides as follows:

"*The Authority [ICASA] may conduct an inquiry into any matter with regard to —*

(a) the achievement of the objects of this Act or the underlying statutes;

(b) regulations and guidelines made in terms of this Act or the underlying statutes;

(c) compliance by applicable persons with this Act and the underlying statutes;

(d) compliance with the terms and conditions of any licence by the holder of such licence issued pursuant to the underlying statutes; and

(e) the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes."

3 *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 101, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 61-74

information as is necessary to make meaningful representations on the matters under consideration by ICASA. This is a common law requirement and has now also been codified in Regulation 3(4)(a), which provides that a notice of a public inquiry must "*contain sufficient information about the matter to be investigated to enable the public to submit meaningful representations"*.

5 MultiChoice cannot make meaningful representations on remedy until ICASA has finally determined the following matters:

5.1 Section 67(4) of the ECA makes it clear that ICASA may only prescribe pro-competitive conditions if,

5.1.1 it has defined the relevant market;

5.1.2 it has determined that competition in the market is not effective;[4] and

5.1.3 it has determined that there is a licensee with significant market power active in the market or market segment.[5]

---

[4] S 67(4A) of the ECA provides that:

"*When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things—*

(a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments; and

(b) the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments."

[5] S 67(5) of the ECA provides that:

"*A licensee has significant market power in a market or market segment if that licensee—*

(a) is dominant;

(b) has control of an essential facility; or

(c) has a vertical relationship that the Authority determines could harm competition."

5.2 ICASA may then prescribe pro-competitive conditions but only to address the lack of competition in the defined market. The remedy must be specifically designed to address the ineffective competition.

5.3 The issue of remedy will thus only arise if and when ICASA defines the relevant market and finds that competition in the market is defective in one or more respects.

5.4 Only once ICASA has identified one or more specific defects in the market, will it be possible to have a meaningful debate on the remedies that might be designed to cure the particular defects. Until then, MultiChoice cannot make meaningful submissions on the question of remedy in the abstract without knowing what defects, if any, they are designed to cure.

6 This bifurcated process[6] is also indicated by the following considerations:

6.1 Section 3(2)(b)(iii) of PAJA provides that a fair administrative procedure normally requires that any affected party be given "*a clear statement of the (proposed) administrative action"*. ICASA will accordingly have to give MultiChoice a clear statement of the pro-competitive terms it proposes to impose. It cannot rationally and reasonably do so at this stage. It can only do so if and when it determines that MultiChoice does not have effective competition.

[6] This bifurcated process was also contemplated in paragraph 1.4.4.1 of the Inquiry Notice. It made it clear that, following publication of ICASA's final findings, it "*may prescribe"* pro-competitive terms.

6.2 Section 3(2)(b)(i) of PAJA provides that, in order to give effect to the right to procedurally fair administrative action, an administrator must give an affected person "*adequate notice of the nature and purpose of the proposed administrative action*". ICASA is equally unable to give MultiChoice the requisite notice of any proposed remedy until the conclusion of the findings stage.

7 It is therefore vital that ICASA should undertake the inquiry in two distinct steps. The first step must finally define the market and determine whether there is ineffective competition and whether MultiChoice has market power. If so, the second step enquires into the conditions to be imposed to remedy the flaws found in the first step.

8 The next question is whether the second step, that is, the inquiry into remedy, should also include a public hearing. There is no general rule that an inquiry has to include a public hearing. The second step of ICASA's inquiry should however include a public hearing for two reasons.

8.1 The first is that ss 4B(2)(b) and (6) of the ICASA Act imply that ICASA is obliged to afford interested parties the option of an oral hearing if they so choose. They are entitled to a hearing on all aspects of the inquiry and not only some of them. It follows that, if the inquiry is undertaken in two steps, they are entitled to a hearing in both.

8.2 The second is that, in the context of an inquiry such as this one, an oral hearing is the only effective way of giving participants an

opportunity, not only to participate meaningfully, but also to hear what other interested parties say and to respond to them. It would be very hard to devise a paper hearing which satisfies these requirements.

OUR ANSWERS

9 *Is the decision to conduct public hearings within the discretion of ICASA?*

No, it is not. Sections 4B(2)(a) and (6) of the ICASA Act oblige ICASA to afford interested parties an oral hearing.

10 *Would the failure to hold hearings subsequent to publication of the draft findings document be fatal?*

No. ICASA must hold its inquiry in two stages and each stage must include its own public hearing. If, in either stage, ICASA publishes draft findings for public comment, it may be limited to comment in writing without a further hearing.

11 *Would the adoption of proposed remedies at the end of stage one, inviting written submissions, necessarily result in an unfair process?*

Yes, a fair process requires a two-stage inquiry and each stage must include a public hearing.

12 *Are there legal obstacles to temporary measures to address market failure pending the outcome of the hearing?*

ICASA derives its power to impose pro-competitive conditions from s 67(4) of the ECA. The section makes it clear that ICASA may only impose such conditions once it has satisfied all the requirements of the section. It thus does not have the power to impose interim conditions pending the final determination of its inquiry.

13 *Who bears the burden to establish the relevant market and whether competition in that market is ineffective?*

There is no true burden of proof because the inquiry is not an adversarial contest. But, in terms of s 67(4) of the ECA, ICASA may only impose pro-competitive conditions if, as a matter of objective fact, "*there is ineffective competition"* in a defined market. ICASA must accordingly be satisfied, as a matter of objective fact, that this jurisdictional fact has been established, before it imposes pro-competitive conditions.

Wim Trengove SC

Phumlani Ngcongo

Duncan Wild

Chambers, Sandton
7 June 2018