competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:
IR107Oct23/SUP160Dec23

In the matter between:

eMedia Investments Proprietary Limited	Applicant
Platco Digital Proprietary Limited	Second Applicant
And	
MultiChoice SA Holdings Proprietary Limited	First Respondent
MultiChoice Proprietary Limited	Second Respondent
SuperSport International Proprietary Limited	Third Respondent
The South African Broadcasting Corporation (SOC) Limited	Fourth Respondent
The Competition Commission	Fifth Respondent

Panel	:	Mr. A Wessels (Presiding Member)
	:	Ms M Mazwai (Tribunal Member)
	:	Prof. T Vilakazi (Tribunal Member)
Heard on	:	18 January 2024
Order issued on	:	15 April 2024
Reasons issued on	:	02 July 2024

REASONS FOR DECISION

Introduction

1. The present matter concerns an application for interim relief relating to an alleged abuse of dominance in the acquisition, supply and broadcasting of sports content.

2. The applicants, eMedia Investments Proprietary Limited and Platco Digital Proprietary Limited ("Platco"), collectively referred to as "eMedia", filed an application for interim relief in terms of section 49C of the Competition Act, 89 of 1998, as amended ("the Act") against MultiChoice SA Holdings Proprietary Limited, MultiChoice Proprietary Limited, SuperSport International Proprietary Limited ("SuperSport") (collectively referred to as "MultiChoice") and The South African Broadcasting Corporation (SOC) Limited ("the SABC").

3. The Competition Commission ("Commission") is cited as the Fifth Respondent, but it played no part in these proceedings. eMedia does not seek relief against the Commission.

4. eMedia seeks an order interdicting MultiChoice and the SABC from enforcing a restriction in a sub-licensing agreement between them that prevents the SABC from flighting, in particular, premium sports events sub-licensed to the SABC by MultiChoice, to viewers who access the SABC content through eMedia's platform, Openview.

5. eMedia alleges that this conduct is an abuse of a dominant market position by MultiChoice, and it impedes eMedia's ability to grow and stifles competition in the

market. eMedia contends that MultiChoice's conduct contravenes sections 8(1)(d)(i), 8(1)(d)(iii), 8(1)(c), and 5(1) of the Act.

6. We decided, after hearing the parties, to grant interim relief to eMedia and accordingly we issued the following order on 15 April 2024:

1. Having heard the parties in the above matter, the Competition Tribunal orders as follows:

1.1. *The First to Fourth Respondents are interdicted from implementing and enforcing any restriction in sub-licensing agreements entered into between them relating to the broadcasting of sports events in terms of which the South African Broadcasting Corporation (SOC) Proprietary Limited ("SABC") is prohibited from transmitting or making available the sub-licensed broadcasts on platforms owned or operated by the Applicants; and*

1.2. *The First to Fourth Respondents are interdicted from including restrictions which prohibit the SABC from transmitting or making available sub-licensed broadcasts on platforms owned or operated by the Applicants in future sub-licensing agreements concluded between them relating to the broadcasting of sporting events.*

2. *Each party shall bear its own costs.*

7. Our reasons follow.

The Parties

8. eMedia and its subsidiaries, which include Platco, are a South African, vertically integrated media group with holdings in a variety of broadcasting, content and production businesses. The group operates, *inter alia*, as a content producer, a content aggregator, and a free-to-air broadcaster.

9. Platco is a subsidiary of eMedia which owns and operates the Openview platform. Openview is a direct-to-home, free satellite platform and infrastructure that distributes radio and television services to viewers in South Africa.

10. MultiChoice is vertically integrated. It operates at all levels of the broadcasting value chain as a content aggregator and as the largest satellite broadcaster in South Africa, through its satellite platform, DStv.

11. SuperSport, a subsidiary of MultiChoice, is the company responsible for acquiring broadcasting rights to sports events, programming and packaging these into sports channels, and supplying those channels to the MultiChoice group for inclusion in its various retail audio-visual services.

12. The SABC is a national broadcaster that has a number of free-to-air terrestrial channels such as SABC1, SABC2 and SABC3. These channels are broadcasted throughout the country using its own and third-party owned platforms. These include:

    12.1 Sentech (SOC) Limited, an analogue signal, digital and satellite transmission services provider;

12.2 Openview;

12.3 DStv; and

12.4 StarSat.

Preliminary issues

13. At the beginning of the hearing, we heard an application by MultiChoice to admit a further affidavit, which was filed subsequent to eMedia's replying affidavit. MultiChoice's contention was that the SABC filed an answering affidavit which broadly supports eMedia's case, and which eMedia places reliance on in its replying affidavit (and heads of argument). MultiChoice argued that this is unfair and prejudicial to it and that its further affidavit must therefore be admitted.

14. MultiChoice also accused the SABC of raising its own complaints[1] in its answering affidavit about the sub-licensing arrangements and seeking 'new' relief which MultiChoice categorises as an attempt by the SABC to obtain interim relief in respect of its own complaint lodged with the Commission without (i) filing its own interim relief application; or (ii) joining this application as a co-applicant.

15. MultiChoice argued that it would be unfair and prejudicial to it if it is denied an opportunity to file an affidavit in response to what the SABC has said in its answering

[1] The SABC filed its own complaint with the Commission in relation to sub-license agreements that it concludes with MultiChoice. At the time of these reasons, this complaint was still being investigated by the Commission.

affidavit, more so where the SABC largely supports eMedia's case, and eMedia in turn, places reliance on the SABC's answering affidavit to bolster its case. In order to cure this prejudice, its further affidavit should be admitted.

16. The SABC opposed this application. It raised two main points. Firstly, it argued that MultiChoice filed its application late and failed to provide an adequate explanation for why its further affidavit should be admitted. It contends that this cannot go unexplained. Secondly, it labels MultiChoice's arguments as an attempt to limit how it, as a respondent, should respond to a case before it in its answering affidavit.

17. eMedia did not oppose MultiChoice's application.

Our finding

18. In terms of section 52(2)(a) of the Act, the Tribunal must conduct its proceedings in accordance with the principles of natural justice. The test is one of fairness and justice[2].

19. In our view, it is in the interests of justice for us to have all the relevant facts before us to allow the issues to be properly ventilated. The SABC and MultiChoice filed their respective answering affidavits on the same day. Given this, MultiChoice could hardly be expected to have had the foresight of anticipating in its answering affidavit the SABC's case.

[2] Computicket Proprietary Limited v The Competition Commission Case No: 20/CR/Apr10, at par 22. See also Norvatis SA Proprietary Limited and others v the Competition Commission, Case No: 22/CR/B/Jun01, at par 56.

20. Fairness dictates that MultiChoice's further affidavit must be admitted. Furthermore, the SABC conceded during the hearing that it would suffer no prejudice if the affidavit were admitted since it had itself filed an answer to the affidavit.[3] Its only reservation was that it answered in a short period of time and needed more time. By their nature, interim relief proceedings often require truncated timelines due to the urgency of the matter and this does not render proceedings unfair. The SABC had an opportunity to answer, and it did.

21. In the circumstances, we admitted MultiChoice's further affidavit.

Factual background

22. On 14 June 2018, MultiChoice (through SuperSport) entered into a Licensed Broadcaster Agreement with Rugby World Cup Limited in relation to the 2023 Rugby World Cup. In terms of this license agreement, SuperSport was required to conclude a sub-license with a national free-to-air broadcaster to broadcast 24 of the Rugby World Cup matches, including all of the Springbok matches.

23. MultiChoice (through SuperSport) generally procures rights to broadcast a range of sporting events on its DStv platform. These broadcasting rights are usually owned by the entity that organises the sporting event. These include bodies such as FIFA or other football associations, Rugby World Cup Limited, and International Cricket Council.

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[3] Transcript, p.14, line 7 – 22.

24. These exclusive broadcasting rights are sometimes split into two categories: (i) pay-tv rights; and (ii) free-to-air rights. Rights owners may prefer offering a composite package of pay-tv rights and free-to-air rights to a single operator when licensing the broadcasting rights to sporting events rather than selling these separately to different operators. MultiChoice alleges that selling the rights as a composite package to a single operator is beneficial to the rights owner because it enables the rights owner to transfer the transaction costs, obligation and inconvenience of negotiating with another operator to the party acquiring the composite rights.[4]

25. Where rights are sold as a composite package, the rights owners impose an obligation on the acquirer of the package to sub-license the pay-tv rights (where the acquirer is a free-to-air operator) or the free-to-air rights (where the acquirer is a pay-tv operator).[5]

26. In the South African context, local legislation imposes certain obligations on acquirers of broadcasting rights. Section 60[6] of the Electronic Communications Amendment Act, 36 of 2005 ("ECA") prohibits a subscription broadcasting service provider (such

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[4] MultiChoice AA, at par 25 to 26.
[5] Ibid. Also see eMedia FA, at par 101 to 105.
[6] Section 60 provides: *Restriction on subscription broadcasting services 60 (1) Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority. (2) In the event of a dispute arising concerning subsection (1), any party may notify the Authority of the dispute in writing and such dispute must be resolved on an expedited basis by the Authority in accordance with the regulations prescribed by the Authority. (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.*

as MultiChoice) from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events.

27. It bears mentioning that when we heard this application, the Rugby World Cup had already passed. However, eMedia argued that MultiChoice's alleged conduct in relation to the Rugby World Cup is but one example of an alleged ongoing pattern of conduct by MultiChoice in respect of the broadcasting of premium sports events.

28. It is common cause that sporting events to be broadcasted are ongoing and that, at the time of the hearing, a number of future sporting events were imminent and would be taking place. Those listed by the SABC as affected by the impugned restriction include:[7]

    28.1. The ICC Women's T20 Cricket World Cup (played in South Africa in 2023).

    28.2. The semi-final and final of the Currie Cup rugby tournament in 2023.

    28.3. ICC Cricket World Cup 2023 matches.

    28.4. Springbok rugby tests played in South Africa between 2019 and 2024.

    28.5. MTN8 and Nedbank Cup soccer, as part of the Premier League Soccer sub-license agreement.

[7] SABC AA, at par 28.

28.6. Other future sports events that would need to be sub-licensed by the SABC from SuperSport include the ICC T20 World Cup 2024 (which occurs in June 2024), and the ICC T20 Cricket World Championship (which SuperSport has the license to until 2031).

29. MultiChoice itself admits that the impugned restriction is a common feature in its sub-licensing agreements to prevent the dilution of its exclusive rights to premium sporting content.[8] For that reason, the need for interim relief remained despite the Rugby World Cup having passed since these sports events are ongoing and the restriction is contained in other similar agreements.

The relationship between the SABC and MultiChoice

30. In the case of the Rugby World Cup, MultiChoice acquired the free-to-air rights as a composite package, as the Rugby World Cup owner opted to offer the pay-tv rights with the free-to-air rights.

31. As a consequence of obligations imposed by the rights owners, MultiChoice was obliged to sub-license the rights to a free-to-air broadcaster such as the SABC. There is a dispute as to the delay in concluding this sub-license agreement. It is not necessary for our purposes to assess the reasons for the delay, save to state that MultiChoice and the SABC concluded the sub-license agreement shortly after the Rugby World Cup had started. As a consequence, the SABC was only able to flight

[8] MultiChoice AA, at par 11. See also eMedia FA, at par 25.

16 of the 24 matches that comprised the free-to-air rights that MultiChoice had bought.

32. The nub of the complaint by eMedia is an alleged restrictive clause in the sub-license agreement, which prevents the SABC from broadcasting the licensed sporting content on third party platforms. The clause in question reads as follows:

"The Broadcast Rights which may be exercised by THE SUB-LICENSEE are the rights to broadcast the Licensed Matches (specified in clause 6 below) in full on a maximum of (1) one single occasion within the Licensed Territory during the Licensed Period in the Licensed Languages on anyone of its existing Free to Air domestic terrestrial television channels, known as SABC 1 or SABC 2 or SABC 3 or SABC Sport and including on SABC's wholly- owned and operated OTT Platform known as SABC Plus only (subject to geo-blocking to the Territory) and sabcsport.com (subject to geo-blocking to the Territory). For the avoidance of doubt the SUB-LICENSEE may not transmit or make available the Licensed Matches on any third party owned or operated platform (our emphasis). *THE SUB-LICENSEE is obliged to exercise the rights granted herein. The Parties agree that the broadcast on pay broadcaster's platforms of any of the SABC channels as part of the Must Carry Regulations shall not constitute a breach of the provisions of this Agreement. No other pay platform, which does not qualify to carry THE SUB-LICENSEE's television channels in terms of the Must Carry Regulations, may carry the Event and THE SUB-LICENSEE shall ensure that such broadcast shall not occur on any such other pay platforms".*

33. It is this clause and similar restrictions in other agreements which prohibit the SABC from transmitting or making available sub-licensed broadcasts of sports events on eMedia's platforms. eMedia seeks to impugn these restrictions and similar restrictions in future sub-licensing agreements relating to the broadcasting of sports events.

The relationship between the SABC and eMedia

34. eMedia and the SABC have a Signal Distribution and Channel Carriage Agreement ("Carriage Agreement") between them. In terms of this Carriage Agreement, the SABC has granted eMedia a right to transmit SABC television channels and radio stations on the Openview platform. The Carriage Agreement is for a duration of five years from March 2021 to March 2026.

35. According to eMedia, the Carriage Agreement means that eMedia is entitled to transmit on its Openview platform the relevant SABC channels and radio stations in exactly the same format (content wise) as they are transmitted on the SABC's own or other platforms. This includes the SABC Channel 2 on which, for example, the Rugby World Cup matches were broadcasted.

eMedia's case

36. *eMedia*[9] enjoins us to apply a context sensitive and transformational approach to determine whether the requirements of section 49C have been established, with the Constitution as the prism through which we assess this.

37. eMedia alleged that MultiChoice (i) has control over, and is dominant in the upstream market for the acquisition of premium sports content; and (ii) is also dominant in the downstream market for the supply of premium sporting content. eMedia argued that through MultiChoice's control of upstream premium sporting content, MultiChoice is able to exploit its dominant position downstream in the broadcasting of premium sporting content (transmitted through satellite broadcasting on MultiChoice's DStv platform). This it does by imposing unjustifiable restrictive clauses in its sub-licensing agreements with the SABC in order to limit competition.

38. eMedia contended that the impugned restriction is intended to induce the SABC, as a customer of MultiChoice in relation to the sub-licensing of premium sports rights, to restrict its dealings with Openview, the only credible competitor of MultiChoice's DStv platform.

39. eMedia further argued that the restriction prevents the SABC from complying with the terms of its existing contractual arrangements with Openview. This is because instead of the SABC broadcasting the same broadcasting content as it provides across other

[9] eMedia Investments Proprietary Limited South Africa v MultiChoice Proprietary Limited and Another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC) (1 August 2022).

third-party platforms such as StarSat, the SABC is required to provide different content when utilising the Openview platform. According to eMedia, this conduct constitutes an inducement for the SABC not to deal with Openview as contemplated in section 8(1)(d)(i).

40. According to eMedia, the restriction limits the SABC from being able to reach all of the viewers that it wishes to reach, and in turn, its viewers who access its programming through Openview are precluded from being able to access premium sports content flighted on the SABC channels. This, eMedia argued, is despite the fact that Openview subscribers pay their television licences.

41. eMedia also alleged that the conduct amounts to an exclusionary act that impedes eMedia, as MultiChoice's only credible competitor, from expanding or participating in the market in which it operates, in contravention of section 8(1)(c) of the Act. The restriction is intended to and has the effect of harming Openview's reputation and goodwill, and thereby reduces its ability to participate and expand in the basic satellite market; and to enter and compete in the premium satellite market (where premium sport is particularly important).

42. Further, eMedia alleged that the sub-licensing agreements amount to a restrictive vertical agreement that substantially prevents or lessens competition in the relevant markets, in contravention of section 5(1) of the Act.[10]

[10] Section 5(1) states that an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement

43. eMedia furthermore contended that by denying the SABC's viewers access to premium sports events on the Openview platform, the impugned restriction violates the right to freedom of expression as enshrined in section 16 of the Constitution – which includes the right to receive information. In particular, eMedia argued that Openview's viewers have the right to receive broadcasting, information and entertainment from the SABC in circumstances where such viewers have paid their television licences.

44. eMedia also alleged that the impugned restrictions contravene section 4 of the Act. This aspect of the case was abandoned at the hearing, and we therefore do not deal with it in these reasons.

MultiChoice's case

45. MultiChoice described eMedia's application as eMedia's latest attempt to free ride on investments made by MultiChoice in acquiring broadcast rights to sporting events.

46. MultiChoice contended that as a subscription broadcaster it needs to persuade viewers to pay a subscription. In order to do so, a subscription broadcaster is compelled to invest in sufficiently distinctive content to differentiate its offering from free-to-air broadcasters. MultiChoice further contended that content that is widely

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can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs its anti-competitive effect.

available via competing services is unlikely to be the reason that a consumer chooses to subscribe to a particular service.

47. To differentiate itself, MultiChoice argued that through SuperSport, it invests a significant amount of money in acquiring exclusive broadcasting rights on the terms offered by sports federations or their agents, which typically include obligations relating to broadcast quality, marketing and promotion of content. In doing so, SuperSport assumes a significant upfront commercial risk that the amounts it invests in such content, will be justified by the returns it obtains therefrom.

48. MultiChoice also submitted that by its very nature, non-exclusive content dilutes the ability of a subscription service provider to differentiate its offering from those of competitors, and thereby to attract and retain paying subscribers.

49. Put succinctly, MultiChoice argued that exclusivity is the best way that it can ensure a return on its investment in the rights it acquires and that allowing the SABC to further sub-license the sporting content will dilute the exclusivity of the broadcasting rights, which will in turn affect its return on investment.

50. To buttress its free riding argument, MultiChoice contended that nothing precludes eMedia and the SABC from making similar investments and bidding for broadcasting rights in competition with MultiChoice.

51. MultiChoice denies that the impugned restriction violates section 16 of the Constitution. It contended that a constitutional argument does not assist eMedia because nobody has a constitutional right to watch live sports events.

52. Furthermore, MultiChoice denies that the restriction is targeted at eMedia. It contended that inclusion of the restriction was originally precipitated by a breach of a previous sub-license agreement when the SABC made Premier Soccer League matches available to Telkom One, which was then a third-party owned and operated service competing with MultiChoice.

The SABC's case

53. The SABC was largely supportive of eMedia's case. It contended that MultiChoice's conduct is anti-competitive, unjustifiable and contrary to the national interest and as a result must be sanctioned.

The requirements for interim relief: section 49C

54. The granting of interim relief is governed by section 49C of the Act.[11] The Tribunal's approach to interim relief is well established[12] and we do not repeat that approach here It suffices to mention the following.

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[11] Section 49C(2)(b) states that the Tribunal: "may grant interim relief if it is reasonable and just to do so, having regard to the following factors: (i) the evidence relating to the alleged prohibited practice; (ii) the need to prevent serious or irreparable damage to the applicant; and (iii) the balance of convenience."

[12] See York Timbers Ltd v SA Forestry Company Ltd (15/IR/Feb01) [2001] ZACT 19 (9 May 2001).

55. Section 49(2)(b) of the Act provides that the Tribunal may grant interim relief *"if it is reasonable and just to do so"*. In deciding whether it is "*reasonable and just*" to grant interim relief, we have regard to three aspects prescribed by the Act:

55.1. *prima facie* evidence of a prohibited practice, even if open to some doubt.[13]

55.2. the need to prevent serious or irreparable harm to the Applicant.

55.3. the balance of convenience.

56. While the requirement to show a *prima facie* case of a prohibited practice is mandatory[14], the above elements can be weighed off to determine whether it would be reasonable and just to grant interim relief. These three elements are not individually decisive but are interrelated.[15]

57. It is important to highlight that it is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention.[16] A successful applicant is only required to make out a *prima facie* case, and not to establish its case on a balance of probabilities.[17]

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[13] Business Connexion (Pty) Ltd v Vexall (Pty) Ltd and Another (182/CAC/Mar20) [2020] ZACAC 4; [2020] 2 CPLR 490 (CAC) (15 July 2020), at par 27

[14] The Bulb Man (SA) Pty Ltd v HADECO (Pty) Ltd (81/IR/Apr06) at 18, eMedia Investments Proprietary Limited South Africa v MultiChoice Proprietary Limited and Another (201/CAC/JUN22) [2022] ZACAC 9; [2022] 2 CPLR 23 (CAC) (1 August 2022)

[15] See Natal Wholesale Chemists v Astra Pharmaceutical Distributors [2001] ZACT 7 (12 March 2001)).

[16] GovChat Proprietary Limited and another v Facebook Inc. and others Case No: IR165Nov20, at par 20; also see Makarenge Electrical Industries (Pty) Ltd t/a Wilec v Allbro Proprietary Limited and another, Case No: IR095Oct21, at par 54.

[17] Africa People Mover (Pty) Limited v Passenger Rail Agency of South Africa and Others Case No.: IR028May19, at par 70 - 71.

58. In applications for interim relief disputes of fact often arise. As the CAC[18] has recently reminded, the Tribunal should not be unduly detained by disputed facts to the extent that it cannot fulfil its function to make factual determinations when deciding applications for interim relief. Where appropriate the Tribunal should take a robust view of the evidence. Where an applicant puts forward facts which cannot be seriously disputed at the interim stage, that should facilitate the determination of interim relief. The Tribunal must apply an objective standard to the facts, to facilitate the determination of the matter.

The context within which this matter ought to be decided

59. We now turn to deal with the issue of the context within which this matter must be adjudicated. This was the subject of much debate between the parties at the hearing.

60. eMedia implored us to adopt a constitutional approach to considering and adjudicating this matter. During oral argument, eMedia argued that MultiChoice's conduct implicates section 16[19] of the Constitution of the Republic of South Africa, 1996 which protects the right to information.

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[18] eMedia, at par 81.

[19] Section 16 of the Constitution states that: *Freedom of expression 16. (1) Everyone has the right to freedom of expression, which includes —*
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to—
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

61. It argued that restrictions placed on the broadcasting of sports events limit the constitutional rights of viewers to freedom of expression. It contends that by denying the SABC's viewers access to the SABC's broadcasts of sub-license premium sporting events on the Openview platform, the impugned restriction violates the right to freedom of expression as enshrined in section 16 of the Constitution.

62. MultiChoice argued, *inter alia*, that nobody has a constitutional right to watch live sports events, which rights are subject to copyright. MultiChoice argued that if there is a constitutional duty to provide sports broadcasts, that duty would vest with the State, and not private entities such as MultiChoice.[20] Further that, if such duty lies with private parties, then it not only lies with MultiChoice but similarly with eMedia and other broadcast service providers.

63. In our view, the context relevant in considering this matter is (i) the constitutional lens through which the Act must be applied, and which calls for a transformative and context sensitive approach; (ii) the broadcasting digital migration occurring in the industry; and (iii) MultiChoice's historical market position.

64. The CAC in *eMedia*[21], referencing the Constitutional Court's *Mediclinic*[22] decision, held that:

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[20] Transcript, p.119 - 122.
[21] CAC Case No. 201/CAC/JUN22.
[22] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another [2021] ZACC.

[82] The basis of the power to grant interim relief must also be contextualised within the jurisprudential framework of the (sic) Competition Act.

[84] It follows therefore that these are the guidelines this Court and indeed the Tribunal must follow when applying the provisions of the Competition Act. The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Competition Act and apply a context-sensitive approach (our emphasis). This is a striking feature that must be considered in this application. Unless this transformative approach is applied even at an interim stage of proceedings, then the historical and insidious unequal distribution of wealth in South Africa will continue. Guidance can be gleaned on the proper jurisprudential application of the Competition Act by following the dictum by Jafta J in Matatiele where he explained the principles of constitutional interpretation which involves a combination of a textual approach and a structural approach. "Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.

[85] It follows therefore that in granting or refusing interim relief or indeed any relief the jurisprudential and transformative context of the Competition Act must be considered (our emphasis).

Our Approach

65. The role of sports to inspire, unite and encourage nation building cannot be gainsaid. President Nelson Mandela once said: *"Sport has the power to change the world. It has the power to inspire. It has the power to unite people in a way that little else can. Sport can awaken hope where there was previously only despair."*[23]

66. In this regard, section 60 of the ECA bears mention. Recall that section 60 of the ECA prohibits a subscription broadcasting service provider from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sports events.[24]

67. What section 60 of the ECA seeks to achieve is to ensure that subscription broadcasting service providers (such as MultiChoice) who have acquired the right to broadcast sports events, make national sporting content available to the public.

68. In our view, this requirement underpins the importance of access to national sporting content as a matter of national interest.

69. It is also worth mentioning that South Africa is in the process of digital migration which is intended to take effect on 31 December 2024.

70. As part of the digital migration process, television and radio broadcasts will transition from analogue to digital technology and frequencies. This means that in order to

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[23] Speech by former President Nelson Mandela in the year 2000 at the inaugural Laureus World Sports Awards.

receive digital broadcasts, older analogue television sets require a set-top box, which is a device that transforms digital transmissions to analogue transmissions, allowing the signal to be received on analogue televisions. As a result, analogue televisions will not display information received from digital frequencies unless equipped with a device capable of converting digital broadcasts to analogue transmissions.

71. Crucially, as a result of the process of digital migration, analogue television broadcasting will be terminated. This means that by the end of 2024, the principal television broadcasters in South Africa, via satellite transmission, will be MultiChoice, eMedia and to a limited extent the SABC.

72. In five provinces, analogue signal has been discontinued (the Free State, Limpopo, Mpumalanga, the Northwest and the Northern Cape). In these provinces, households cannot access SABC programming by way of analogue signal and require a digital terrestrial television-ready television, or a DStv or Openview decoder.

73. Of further relevance is MultiChoice's historical and current market position. MultiChoice, through its DStv product introduced in 1995, is synonymous with digital television broadcasting in South Africa. It has been so since 1985 when MultiChoice, through M-Net, was established as the first pay-tv station in South Africa and the first privately owned television platform from 1986.[25]

[25] MultiChoice AA, at par 290.

74. In *eMedia*, MultiChoice concedes its dominance in the basic satellite market.[26] The CAC states that "*MultiChoice in its well-entrenched dominant position loses sight of the fact that its position will remain entrenched*" and in relation to digital migration that "*MultiChoice's overwhelmingly dominant position and the lack of realistic alternatives means there is a limitation on broadcasting services available to channel and content providers*".[27] We are guided by the CAC's position which suggests clearly that there are characteristics of this industry as a whole that make it especially likely that MultiChoice will remain as the market leader for some time to come.

75. In this context, we are dealing with an incumbent operator that has faced limited rivalry for a number of decades. Relatively smaller participants, such as eMedia, seek to compete for a share of the digital television broadcasting industry, and have made some progress in this regard. However, it cannot seriously be disputed that MultiChoice is the predominant operator in this arena. As such, removing strategic and other barriers to entry and expansion and encouraging competition in such markets is especially important and ultimately for the benefit of consumers.

76. It is against this contextual background that we assess this matter.

OUR ANALYSIS

Relevant markets

[26] At par 61.
[27] CAC Case No. 201/CAC/JUN22, at par 102 and 106.

77. eMedia submitted that MultiChoice's conduct contravenes section 8(1)(d)(i), section 8(1)(d)(iii) and section 8(1)(c) of the Act. In order to succeed under either of these sections, eMedia must establish that MultiChoice is *prima facie* a dominant firm in the relevant market(s).

78. In its founding affidavit and heads of argument, eMedia advanced two relevant markets within which it alleges MultiChoice is dominant:

    78.1. The upstream market for the acquisition, broadcasting and sub-licensing of premium sports content. eMedia asserts that MultiChoice's dominance in this market stems from the fact that MultiChoice has over time, and on an ongoing basis, secured exclusive rights for broadcasting in South Africa and that no other broadcaster in South Africa has been able to meaningfully compete against MultiChoice in obtaining such rights.

    78.2. The downstream market for satellite broadcasting services, in relation to which the CAC in *eMedia* notes MultiChoice's concession of dominance in the basic satellite market.

79. eMedia contended that MultiChoice leverages its dominance upstream (where it acquires and supplies premium sports content, and where the anti-competitive conduct occurs) downstream in the satellite broadcasting services market (where it is also dominant and faces competition from eMedia, and where the harm to eMedia arises).

80. MultiChoice criticised the market definitions advanced by eMedia. It asserted that eMedia had failed to perform and demonstrate the exercise of market definition with the requisite degree of precision. It argued that the markets advanced by eMedia do not exist.

81. It raised two points regarding the upstream market. First, that if there was a market for the acquisition and supply of premium sports, nothing precludes the SABC from bidding for these rights. Secondly, that eMedia had failed to define what is meant by premium sports content or to identify any objective characteristics that delineate such content from other "non-premium" sports rights. We first consider the issues relating to the upstream market.

82. In our view, MultiChoice has not put, in serious doubt, eMedia's *prima facie* definition of the upstream market for the acquisition and supply of premium sports content.

83. It is not in dispute that as a subscription service provider MultiChoice acquires and supplies sports content upstream (which it broadcasts downstream through its DStv platform); and that no other broadcast service provider has meaningfully been able to compete with MultiChoice in this regard.

84. As to the distinction between sports and other content, MultiChoice in essence argued that sporting content is substitutable with other types of content. We are not persuaded that sporting events of the nature we are concerned with in this application, from the perspective of a consumer or viewer, can be substituted with other offerings such as non-sporting content.

85. Recall that MultiChoice itself argued that to differentiate itself from its competitors, it invests a significant amount of money in acquiring exclusive sport broadcasting rights. This in our view supports eMedia's submission that sport programming, from a demand side perspective, *prima facie* is not substitutable with other forms of content such as movies. In any event, there is likely to exist a large subset of consumers for whom sport programming is especially important and in high demand, which in itself creates the commercial incentive for MultiChoice to make the very large investments in this content that it claims to do in order to differentiate itself.

86. At the hearing we were referred to a draft finding of the Independent Communications Authority of South Africa's ("ICASA") inquiry into subscription television broadcasting services[28]. We note that as part of its findings, ICASA characterised content into three broad markets (i) sports; (ii) entertainment; and (iii) news. It furthermore found that sport, of all other forms of content, is said to have the strongest reputation for drawing larger audiences (viewership).

87. The above suggests that there is an upstream market for the acquisition of sports rights in which MultiChoice likely faces limited competition. During the hearing, counsel for MultiChoice indicated that other than the SABC no other party acquires these rights.[29]

88. MultiChoice, however, also said that it does not acquire all sports rights and that eMedia and the SABC can bid for them. However, the point in our view, is that once

[28] The SABC AA, Annexure A, p.63.
[29] Transcript, p.172, lines 18 – 22.

these rights have been acquired, MultiChoice likely exercises market power (the power to control prices, to exclude competition and to behave to an appreciable extent independently of competitors, customers or suppliers[30]) over specific rights for specific events.

89. On whether there are further delineations within the market for sports rights, eMedia argued that the market can be defined narrowly or broadly. From a broad perspective the market includes the rights to various sporting events. On a narrow approach to market definition, it argues that the right to each sporting event (once acquired) is a separate relevant market.[31]

90. In this regard, MultiChoice pointed out that there are specific sports events to which it holds rights and those for which it does not hold rights and that eMedia has not suggested a test to determine which events are premium and which are not.

91. In our view, whether sports content is premium or non-premium, from a demand perspective, depends on consumer preferences. Not all consumers would be interested in the same sports events and value these in the same way.

92. For example, ICASA in its draft inquiry finding into subscription television broadcasting services[32] notes that premium content is a fluid concept, that it is dependent on the circumstances prevailing at a particular point in time in a market,

[30] As defined in section 1 of the Act.
[31] eMedia RA, at par 68.
[32] The SABC AA, Annexure A, at par 1.3.

and is specific to a geographical area, given the culture and preferences of the population at that specific point in time.

93. In our view, because of these customer preferences that differ, and may differ over time, what is premium and non-premium sports content cannot be rigidly defined. From an end consumer perspective, each sporting event is distinct (for example, soccer, rugby, cricket, netball and others) and furthermore the rights to each event are distinct and subject to their own agreement with the rights owner. Where a party secures all of the rights to a specific sports event, then it typically becomes the sole custodian of those rights for the relevant territory and can prescribe the terms of any sub-licensing agreement.

94. It is furthermore instructive that the impugned restriction in the sub-license applies to sub-licensed sports content and does not distinguish between premium and non-premium sports content.

95. We therefore conclude, for purposes of this interim relief application, *prima facie* that the rights to each individual sporting event likely constitute a separate relevant market from a competition perspective.

96. Regarding the downstream market for satellite broadcast services, we pause to mention that once the sports rights are acquired, the sports content is flighted. Indeed,

as the CAC in *eMedia* held, the channels are acquired for MultiChoice "*to use the channels and not to pack them away*".[33]

97. MultiChoice contended that competition in the downstream market extends well beyond competition between providers of satellite broadcasting only. It argued that there have been numerous notable entrants making use of the internet to provide their streaming services (e.g., Netflix, Disney+, etc), which has also enabled rights holders to provide their services directly to consumers, in competition with traditional broadcasters.

98. Furthermore, MultiChoice argued that the SABC can also continue to monetise all its other content across any services it so wishes, including Openview, particularly the other sports content and its local content productions. It argued that the local content (such as Muvhango, Uzalo, Generations and Skeem Saam) remains extremely popular amongst viewers and is highly sought after by advertisers.[34]

99. We are not persuaded by these arguments.

100. We have already dealt with (non) substitutability of sports contents with local content. Regarding the alternatives postulated by MultiChoice, *prima facie,* these are costly and not widely accessible to everyone. In order to access these alternatives, viewers require access to affordable internet and digital devices such as smartphones, smart televisions and/or laptops. In any event Netflix and Disney+

[33] At par 112.
[34] MultiChoice AA, at par 193.

(as suggested by MultiChoice) do not broadcast sporting content, or certainly have not done so in South Africa.

101. We therefore conclude *prima facie* that there is a market for satellite broadcast services.

102. Having defined the two relevant markets, it bears mention that from an economics perspective, in a leveraging case such as this, it is sufficient that there is dominance in at least one of the relevant markets.

Dominance

103. eMedia alleged that MultiChoice has an estimated market share of more than 90% in the acquisition and supply of premium sporting content in South Africa.[35] It contended that while some premium sports content is available on the SABC and the internet, this is extremely limited. Moreover, certain of the sports content that is available on the SABC (such as the Rugby and Cricket World Cups and other premium sporting fixtures) is available only through sub-licencing arrangements with MultiChoice, which means that MultiChoice exercises control over these arrangements.

[35] eMedia FA, at par 98.

104. eMedia also argued that MultiChoice's dominance stems from the fact that over time it has secured exclusive rights for virtually all premier sports and no other broadcaster has been able to compete for these rights.

105. MultiChoice submitted that eMedia has provided no basis for its computation of the 90% market share in the acquisition and supply of sports content since it is not clear whether this is computed on the number of events, amount paid, or other denominator. MultiChoice also denies that it has acquired sports rights over time and submitted that these rights are contestable at regular periods of time.

106. As indicated, the rights to each individual sports event *prima facie* constitute a separate relevant market. Given the nature of the market we are concerned with here, in our view, each right acquired likely confers market power on the acquirer of the sports rights.

107. We find therefore that *prima facie* MultiChoice has market power in the acquisition and supply of sports content, irrespective of whether it is premium or non-premium sports content. We are further of the *prima facie* view that by virtue of its current market position and size, MultiChoice likely holds a distinct brand, reputation and financial advantage in the current and future acquisition of sports content over rivals in South Africa.

108. We further note that the interdictory relief in our order only applies when MultiChoice has already acquired such rights or acquires such rights during the interim period covered by our order, which period may be extended.

109. In regard to the broadcast satellite market eMedia estimates MultiChoice's market share to be in the region of 70% because MultiChoice has a presence in at least 8 million households in South Africa compared to 3 million households for eMedia.[36]

110. eMedia contends that market power is reinforced by the fact that there is limited switching between DStv and Openview. This is because households that have purchased one decoder and chosen one satellite platform are unlikely to easily purchase another, and given that MultiChoice is the incumbent, it has significant first mover advantages over (potential) competitors.

111. MultiChoice denies that it is a dominant satellite broadcaster in South Africa and that it accounts for approximately 70% of households that watch satellite television. It contended that competition occurs between providers of audio-visual services across a range of business models (free or paid) and distribution mechanisms (analogue, satellite, terrestrial, and over the internet) [37] and is not limited to satellite services. It includes competition for advertising.

112. To make this point, MultiChoice contended that there are numerous notable entrants making providing streaming services such as Netflix, Disney+ etc which have also enabled rights holders to provide their services directly to consumers in competition with traditional broadcasters such as F1TV, FIFA+.

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[36] Ibid, at par 107.
[37] MultiChoice AA, p.103, at par 325 – 327.

113. As indicated above, the alternatives proffered by MultiChoice are *prima facie* costly and not widely available. Significantly, however, the number of households with basic satellite services has not been seriously disputed by MultiChoice.

114. We note further that eMedia's estimation of MultiChoice's market share of 70% in the market for satellite broadcasting services is guided by ICASA's approach which determines a 'basic' satellite television market and thus removes 1.3 million so-called 'premium tier subscribers' on the Premium and Compact Plus packages included in MultiChoice's overall subscriber base. Our interpretation is that adding these premium packages to the estimation would not alter the broad conclusion that DStv is the dominant player in South Africa in satellite television.

115. MultiChoice submitted that ICASA's conclusions do not take into account changes that have occurred in the provision and consumption of retail audio-visual services due to the proliferation of Over The Top services.[38] However, even assuming increased competition from other services such as streaming, basic satellite services remain an important route for LSM 5-7 consumers to access content, and for whom streaming services are not a realistic option.

116. If MultiChoice wished to prevail over eMedia, MultiChoice was, under these circumstances, required to produce its own facts which cast serious doubt on eMedia's version. In our view, MultiChoice has in essence left eMedia's averments on market definition and dominance substantially unchallenged by not adducing

[38] Over the Top (OTT) services refer to any type of video or streaming media that provides a viewer access to movies or TV shows by sending the media directly through the internet. Some of the most popular OTT providers include Netflix, Amazon Prime Video etc.

competing facts. As held by the CAC in *eMedia*, we are not required to take a definitive view of the relevant markets at interim relief stage. On the facts before us, eMedia has put up facts which are not seriously disputed.

117. We conclude that eMedia has provided, on a *prima facie* basis, sufficient facts to support its position on MultiChoice's dominance.

Is there prima facie evidence of a prohibited practice?

118. Applying section 49C, we must first establish whether there is *prima facie* evidence of a prohibited practice. We turn to this below.

Section 8(1)(d)(i) – requiring or inducing a supplier or customer not to deal with a competitor

119. In terms of section 8(1)(d)(i), a dominant firm is prohibited from engaging in the exclusionary act of requiring or inducing a supplier or customer to not deal with a competitor unless the dominant firm can show pro-competitive benefits that outweigh any anti-competitive effects of the act.

120. An exclusionary act is defined in section 1 of the Act as "*an act that impedes or prevents a firm from entering into, participating in or expanding within markets*". Participate is defined as referring to "*the ability of or opportunity for firms to sustain themselves in the market, and participation has a corresponding meaning.*"

121. eMedia argued that it competes with MultiChoice in the satellite broadcasting market. It argued that the restrictive clause requires the SABC not to deal with it (eMedia) as it would in the ordinary course. Recall eMedia and the SABC have a Carriage Agreement in terms of which eMedia has a right to transmit the SABC's channels (including channel 2 on which the Rugby World Cup was transmitted) on its Openview platform.

122. eMedia contended that through the restrictive clause, MultiChoice prescribes the terms on which the SABC as a customer of MultiChoice in relation to the sub-licensing of premium sports can transmit its programming via third-party platforms, specifically Openview, a competitor of DStv. In so doing, MultiChoice, according to eMedia, dictates the manner in which (and whether or not) millions of viewers of the SABC content are able to access certain sports programming.

123. eMedia further argued that the restrictive clauses undermine its goodwill in the market. This is because customers who have purchased Openview set-top boxes cannot view sporting content on the SABC channels carried by Openview because of the restriction. As a result, MultiChoice's market share will rise, and this will entrench its dominant market position. Absent effective competition, eMedia argued that MultiChoice will ultimately be able to increase its prices to the detriment of customers.

124. MultiChoice disputes that its conduct amounts to an inducement for the purposes of section 8(1)(d)(i) of the Act. It argued that eMedia's case fails to satisfy the requirements of section 8(1)(d)(i) in two respects.

124.1. First, MultiChoice denies that it and eMedia compete for the SABC's business. It argued that it sub-licenses broadcasting rights to the SABC whilst eMedia on the other hand carries SABC channels on its Openview platform.

124.2. Second, MultiChoice denies that the restrictive clauses require the SABC not to deal with eMedia. MultiChoice argued that on the contrary, the SABC in fact deals with eMedia by means of the Carriage Agreement concluded between the SABC and eMedia.

125. As to the arrangement between MultiChoice and the SABC, MultiChoice notes that the SABC acquired the sub-license for its use only not for third-party platforms. Had the SABC acquired rights not limited only to own use, the price charged to the SABC would have been higher.

Foreclosure

126. It is common cause that the restriction precludes the SABC from flighting the relevant sports events on the Openview platform. The question is whether there is *prima facie* evidence that this restriction is substantial or significant in terms of foreclosing the market to rivals, or whether it leads to consumer harm.[39] It is to this that we turn next.

[39] Apollo Studios (Pty) Ltd and another v Audatex SA (Pty) Ltd and another, case number IR198Mar23, at par 56.

127. In *Computicket*,[40] the CAC made it clear that it is not necessary to show that the alleged conduct completely foreclosed rivals from entering or accessing the relevant market. It is sufficient to show that the conduct prevents or impedes a firm from expanding in the market.

128. eMedia argued that approximately 2.6 – 3.2 million South African households are denied access to watching sports content on SABC channels that are carried by Openview under the Carriage Agreement. That is, despite purchasing the Openview set top box, a large proportion of consumers, at least 20% - 25% of SABC's viewers, would be excluded from consuming sporting content that has been paid for by the SABC with the intention of it being broadcasted through its own channels and its other routes to market such as Openview in this case.

129. MultiChoice disputes the number of viewers who are allegedly accessing sports content on the SABC channels. It estimates the viewership of SABC channels on Openview nationally as 6% (in 2019) and 15% (in 2023) based on Television Audience Measurement Survey Data ("TAMS").[41] Furthermore, MultiChoice avers that these consumers are not completely foreclosed from accessing the sports content. It argued that these consumers can access this content on the SABC's platforms such as the SABC's website and through the SABC's SABC Plus streaming service, or DStv. We note, as discussed above, that these alternative

[40] Computicket (Pty) Ltd v The Competition Commission of South Africa Case Number: 170/CAC/Feb19 (23 October 2019) at par 87.
[41] MultiChoice AA, at par 65.2.1 and 65.2.2.

platforms rely on consumers having access to reliable internet services that they can afford.

130. There is clearly a dispute of fact regarding the number of SABC viewers that access its content using Openview. The CAC enjoins us where a dispute of fact arises in interim relief proceedings, to take a robust view, applying an objective assessment of the available facts to facilitate the determination of the matter.[42]

131. For our purposes, in the context of interim relief proceedings, we consider that on a *prima facia* basis the available evidence points to Openview being an important route for the SABC to reach its viewership, who access content through basic satellite services and for whom streaming services are not a realistic option.

132. We cannot dismiss the SABC's version that between 20-25% of its viewership is reached through the Openview platform as it is in the best position to determine this using its own data. Even if the SABC's estimation of 20-25% were overstated, MultiChoice's own estimate of 6-15%, is in our view still significant especially in a context where viewers will increasingly have fewer options to access sports content in future in light of the digital migration process

133. MultiChoice argued that having an Openview set-top box does not mean consumers are using it to watch SABC channels.[43]

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[42] At par 81.

[43] MultiChoice AA, at par 214.5. TAMS is an independent body composing of research committees which conduct radio and television audience measurement research used by media planners. According to MultiChoice, it is used by eMedia and the SABC to sell advertising on their channels (at par 214.6).

134. In its answering affidavit in the High Court, MultiChoice provided the TAMS data referred to above on the viewership of the SABC channels across platforms. This data indicates that in the period 1 April 2022 to 31 March 2023, the number of consumers who watched SABC 2 through Openview was 22%. This, in our view, is a significant number. Further, the number of consumers who watched SABC Sport through Openview in the same period was 63%. This data is provided by MultiChoice itself.[44] We consider this information to be *prima facie* a useful indicator of the importance, of Openview as a broadcasting partner of the SABC.

135. We further note that we are dealing here with consumers who purchased the Openview set-top box with the understanding that (i) they will be able to consume the SABC's content via the Openview platform; and (ii) they only pay to purchase the set-top box and are not required to pay any monthly subscription fees as they would need to on other platforms. To access this content on DStv or other platforms requires consumers to either purchase another set-top box to access the content or invest in data or internet services at an additional cost, to consume sports content.

136. MultiChoice further argued that eMedia is not impeded or prevented from growing in the market because (i) its set-top box activations have increased by 19% per annum from 2019 to 2023; and (ii) during the same period, eMedia quadrupled its advertising revenue.[45] This however ignores the important aspect of the likely harm of the alleged conduct to eMedia's brand position and reputation as a smaller player

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[44] MultiChoice AA, Annexures AA13, p.167. See also MultiChoice AA, at par 259.
[45] MultiChoice AA, at par 133.1.

competing in a highly concentrated market, as well as its ability to further grow and expand in this market.

137. In the latter regard, eMedia contended that its goodwill has been impacted by the impugned restriction because consumers are less likely to choose the Openview platform over MultiChoice's DStv platform in circumstances where the Openview platform is unlikely to provide them with premium sports content.

138. To demonstrate the harm to its goodwill, eMedia referred us to various complaints made by members of the public to the Broadcasting Complaints Commission.[46] These complaints relate to members of the public accusing eMedia and the SABC of false advertising by advertising Rugby World Cup games and failing to flight those games on the Openview platform.

139. What these complaints demonstrate is that by not being able to flight premium sporting content, eMedia's goodwill is *prima facie* being affected. In our view, without goodwill, eMedia's ability to increase its customer base will be impacted and as a consequence, its ability to grow and enhance competition in the market will *prima facie* be significantly impacted.

140. Although an applicant is not required to demonstrate both foreclosure and consumer harm, eMedia, relying on the same facts, has argued that the impugned restriction leads to both foreclosure and consumer harm. We have already found that by

[46] eMedia FA, Annexure R, p. 211 – 217.

imposing this restriction, eMedia has *prima facie* been foreclosed to a significant degree.

Consumer harm

141. As earlier mentioned, eMedia explained that a significant share of the SABC's viewers access the SABC's content, specifically sports content, on the Openview platform. What this means is that as a result of the impugned restriction, a sizable number of SABC viewers are unable to consume premium sporting content carried on the SABC channels on the Openview platform.

142. MultiChoice argued that consumers are able to view other content or programmes as a substitute to premium sporting content. We have already made the point that this argument is untenable, at least for consumers who demand sporting content, or in instances where events of national sporting interest occur, and we do not repeat our views here.

143. It is not disputed that once the process of digital migration has been completed, the SABC will be almost completely reliant (if not completely reliant) on third party broadcasters (such as eMedia and MultiChoice) to transmit its programming via satellite transmission.

144. What this means is that should MultiChoice persist with imposing the impugned restriction, then 20% to 25% of the SABC's viewers (being those carried on Openview) will not have access to premium sporting content which, absent the

restriction, they would otherwise be able to view on the Openview platform. In our view, this *prima facie* establishes likely substantial consumer harm.

145. In the circumstances, our view is that eMedia has demonstrated that the imposition of the impugned restriction *prima facie* has anti-competitive effects.

146. It appears to us that, *prima facie*, consumers are likely to be harmed by the restriction, and will continue to be harmed if the impugned restrictions are not removed.

What is the correct counterfactual?

147. To challenge eMedia's allegation that its goodwill has been affected and that it has suffered harm as a result of the restriction, MultiChoice argued, as noted above, that eMedia has grown exponentially by increasing its viewership (by 19% in the period 2019 – 2023), set-top box activations and advertising revenue in recent years.

148. In our view, the appropriate counterfactual is not whether eMedia has grown despite the alleged conduct. Rather, the appropriate counterfactual is to consider both present and future competition, in light of the historical context of MultiChoice's predominant position in the industry as detailed above. Therefore, the relevant counterfactual includes eMedia's relative ability to grow and expand and strengthen market competition, absent the impugned restriction, in competition with a very strong incumbent. In other words, the counterfactual is the extent to which eMedia,

absent the restriction, can grow and expand currently and in the future to compete in the market.

149. Recall that MultiChoice argued that if eMedia wants access to sporting rights, it should bid for the rights in competition with MultiChoice. This argument ignores the context of the matter and the markets in question, wherein a number of the rights to sporting events are presently already secured by MultiChoice under agreements with the content owners. In addition, while there may be competition in future, this depends to a large extent on the presence of strong rivals in the market with the subscriber base and financial and other resources to contest for these rights. To ignore this context, is to ignore the fact that MultiChoice has a much stronger market position acquired over time to make the required investments and that competitors are likely to take some time to acquire any market positions of significance (evidenced in part by the durability of MultiChoice's position in these markets). In the interim, with the restrictions in place SABC viewers who have purchased the Openview set-top box will not have access to the sporting content.

150. In our view, eMedia has established *prima facie* proof of a prohibited practice. It has furthermore *prima facie* demonstrated likely foreclosure effects as well as harm to consumers.

151. In terms of section 8(1)(d)(i), once there is a showing of a *prima facie* prohibited practice, the onus shifts to MultiChoice to justify that the restriction has pro-competitive gains.

152. This leg of the inquiry requires of us to consider whether there are any technological, efficiency or pro-competitive gains which outweigh the anti-competitive effects of MultiChoice's conduct.

MultiChoice's justification

153. MultiChoice effectively raised two justifications: (i) eMedia wants to free ride on MultiChoice's investment because it has not paid for the rights; and (ii) exclusivity drives the commercial value of the rights that it has purchased and as a result, warrants the imposition of the impugned restriction.

154. MultiChoice alleged the following gains to it as a market participant:

154.1. The impugned restriction enables it to differentiate its product offering from the product offerings of other retail audio-visual service providers. It contends that the impugned restriction does not prevent competition between MultiChoice and other providers; on the contrary, so argued MultiChoice, it promotes competition between MultiChoice and those providers by enabling MultiChoice to offer its subscribers content that is not available elsewhere. The impugned restriction therefore offers pro-competitive gains in the retail market in which DStv competes with Openview and other rival offerings.

154.2. Rights owners maximise revenue from the sale of broadcasting rights to create financial stability and to develop, improve and promote their

sporting codes, with revenues maximised through exclusive rights sales. As such, interference with the impugned restriction would not only undermine the pro-competitive benefits referred to above, but it would have negative knock-on effects for sports bodies.

155. MultiChoice contended that it has negotiated sub-licenses with the SABC which grant the SABC the right to broadcast the sports events in question only on its own services and cannot be made available by the SABC on any third-party owned service. According to MultiChoice, this is necessary for it to protect the substantial upfront investment it has made in acquiring the sports rights. As a provider of paid-for retail audio-visual services, it needs to offer content that is different to the content offered by other broadcasters. If the same content is available for viewing at no cost on a free-to-air platform, consumers would be unwilling to pay, or continue to pay, to watch that content.

156. eMedia denies that it is trying to free ride on MultiChoice's investments. It argued that:

156.1. It is not trying to broadcast premium sporting content on its own channels but is simply seeking to enforce its existing contractual relations with the SABC (which in the ordinary course require the SABC to make content available on its SABC channels, available in the same format on Openview).

156.2. While it suffers harm to its goodwill as a result of not being able to flight the SABC channels as transmitted to other SABC viewers, it does not derive any

revenue directly from carrying the SABC's channels in their unaltered form. It does not derive any subscription revenue because it is a free-to-air broadcaster. It also does not derive any of the advertising revenue generated on the SABC channels as this all accrues to the SABC.

156.3. During the 2019 Rugby World Cup, the SABC was able to flight its channels without any alterations on the Openview channel.

156.4. In relation to the 2023 Rugby World Cup, the rights were sub-licensed to the SABC at a substantial price.

157. MultiChoice is correct in its assertion that its commercial imperatives require that it recoups the investment that it made by purchasing the broadcasting rights in question. However, in the same token, it is important to consider whether those commercial imperatives outweigh the anti-competitive effects of the impugned restriction. In our view, they do not.

158. It is trite that a dominant firm, given its position in the market, has a higher responsibility than its smaller rivals not to allow its conduct to impair (future) competition in the market.[47]

159. In *eMedia,* the CAC stated that the balance between competition harm and commercial harm requires an objective approach. This is important in the South

[47] The Competition Commission v South African Airways (Pty) Ltd, Case No.: 18/CR/Mar01 at par 302 – 303 where Michelin v Commission Case No. C-322/81 was quoted as instructive.

African context where the Act seeks to redress the imbalances of the past as the preamble provides. The CAC went further to state "*that Competition jurisprudence requires an approach that looks beyond the entitlement of a dominant firm to decide with whom they wish to do business and that the terms of their business dealings must be unfettered.*"[48]

160. While we are not here concerned with a refusal to deal case, in our view, the consideration remains the same. Sight should not be lost of the likely effects of the impugned restriction in terms of foreclosure and consumer welfare. We have already made our findings on foreclosure and consumer welfare and need not repeat them here. However, it is important to restate that the *prima facie* effect of the impugned restriction is that a sizable number of the SABC's viewers are denied access to sporting content as a result of the impugned restriction. Added to that is the *prima facie* harm suffered by eMedia to its goodwill which impacts its future ability to grow, expand and compete in the market. It is against this harm that MultiChoice's commercial imperatives must be weighed. It is for this reason that in our view, on a *prima facie* basis, MultiChoice's justifications do not outweigh the anti-competitive effects of its conduct.

161. MultiChoice's justifications must also be understood within the context of its history. In eMedia, the CAC found that MultiChoice has been a dominant firm in the market for decades and that its dominance will not change in the near future. This context is an important reminder that consideration must be given to MultiChoice's

[48] CAC Case No. 201/CAC/JUN22 at par 96.

entrenched dominant position when assessing the effects of the impugned restriction. In other words, the impugned restriction and the need for intervention by this Tribunal must be understood within the context of MultiChoice's dominant position that, as the CAC observed in eMedia, has subsisted over decades. It noted further that "*MultiChoice in its well-entrenched dominant position loses sight of the fact that its position will remain entrenched. It does not have to preserve this position at the expense of a black owned medium sized competitor like eMedia that was gaining traction in the basic satellite market.*"[49]

162. eMedia contended that the restriction also affects its ability to participate effectively in the market as a black owned platform provider. Recall participation refers to the ability or opportunity of a firm to sustain itself in the market. MultiChoice pointed out that eMedia has been growing, as discussed above.

163. We pause to mention that the Act enjoins us to specifically consider small and medium sized firms and black firms in particular and their ability to participate in the market. In this case, we have found that the restriction *prima facie* restricts eMedia's customers from accessing premium sport, such as the 2023 Rugby World Cup, which as discussed is a matter of national interest. The restriction *prima facie* impacts the consumer welfare of 20-25% of the SABC's viewers who have paid their license fees. It also *prima facie* affects a medium sized black owned firm. In our view, it is the type of harm to competition and that has an effect against a black owned firm that the Act is concerned with. The CAC in eMedia expressed this as

[49] At par 102.

follows: "*... The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Competition and apply a context-sensitive approach. This is a striking feature that must be considered in this application. Unless this transformative approach is applied even at an interim stage of proceedings, then the historical and insidious unequal distribution of wealth in South Africa will continue.*"[50]

164. As mentioned, while the restriction applies to the Rugby World Cup it also applies to future sports events as listed above. The evidence suggests that eMedia currently is the only credible competitor of MultiChoice. While MultiChoice is entitled to a return on its investments, as a well-entrenched dominant firm whose position will likely remain entrenched, it does not have to preserve its position, as the CAC held: "*...at the expense of a black owned medium sized competitor like eMedia gaining traction in the basic satellite market.*" [51]

Conclusion on prohibited conduct

165. In conclusion, we find that eMedia has established a *prima facie* case of prohibited conduct on the part of MultiChoice in that MultiChoice's imposition of the impugned restriction amounts to MultiChoice inducing or requiring the SABC not to deal with eMedia. eMedia has *prima facie* satisfied the requirements of section 8(1)(d)(i).

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[50] At par 84.
[51] At par 102.

166. Based on our above assessment, we find that MultiChoice has failed to establish that any efficiency or pro-competitive gains are likely, on a *prima facie* basis, to outweigh the anti-competitive effects of the impugned restrictions.

167. Our assessment above, while done in the context of section 8(1)(d)(i) is also relevant for purposes of section 8(1)(c). eMedia has, *prima facie*, shown that the anti-competitive effects of the restriction likely outweigh any pro-competitive benefits (the reverse onus under 8(1)(c)). MultiChoice has failed to show that the pro-competitive benefits of the restriction outweigh their anti-competitive effects under section 8(1)(d)(i).

168. Our finding thus rests on sections 8(1)(d)(i) and 8(1)(c). We do not deal further with section 8(1)(d)(iii) as eMedia did not seriously pursue this part of the case.

169. In regard to section 5(1), it is not disputed that for the purposes of the sub-licencing agreements, the SABC and MultiChoice are in a vertical relationship. In terms of the licencing agreements, MultiChoice sub-licenses rights to the SABC (a licensor and licensee relationship).

170. For the reasons already set out in relation to the section 8 case, we find that *prima facie*, the impugned restriction likely stands in contravention of section 5(1) of the Act. There is a vertical agreement that *prima facie* has the effect of substantially preventing or lessening competition, and as explained above, MultiChoice has not provided convincing evidence of technological, efficiency or pro-competitive gains that outweigh the anti-competitive effect.

171. We turn now to consider the remaining grounds in section 49C.

The need to prevent serious or irreparable harm to the applicant

172. In *Business Connexion*, the CAC noted that the requirement to demonstrate serious or irreparable harm is a party specific enquiry.[52] Here we ought to concern ourselves with the damage to the competitive position of the Applicant (in this case eMedia). eMedia relies on three primary points to make out a case under this rubric.

173. First, it argued that the net effect of the restrictive clauses is that the SABC is unable to discharge its public mandate. eMedia contends that this particularly affects viewers who are in provinces that have already been subjected to digital migration from analogue signalling to digital signalling. eMedia argued that this is an important consideration because viewers who had already subscribed to Openview are now restricted from accessing premium sporting content.

174. Second, the continued enforcement of the restrictive clauses inflicts harm on eMedia because its inability to display premium content, despite its carriage agreement with the SABC, affects its credibility and goodwill. This is because a large proportion of the SABC's viewers consume its content through Openview. As earlier mentioned, eMedia presented various complaints from members of the public who lodged complaints with the Broadcasting Services Commission

[52] At par 21.

concerning eMedia's inability to display 2023 Rugby World Cup games, for example.

175. Recall that these complaints accused eMedia and the SABC of false advertising that Openview subscribers will be able to consume premium sporting content on Openview, via the SABC's channels. As such, eMedia contends that it if loses these customers, it is unlikely to win them back.

176. In its defence MultiChoice argued that under section 49C eMedia must demonstrate the need to prevent serious or irreparable harm to it. In this application, eMedia sought, amongst other things, to demonstrate harm to the SABC.

177. In relation to harm to eMedia itself, MultiChoice critiques eMedia for failing to establish that its ability to remain and grow as a viable competitor within the market will be seriously or irreparably threatened. As indicated, the counterfactual is the extent to which eMedia could grow and expand absent the restriction. Furthermore, eMedia has provided evidence of customers who lodged complaints regarding access to sports content. That, in our view, impacts on eMedia's credibility and goodwill in the market. It has not been seriously disputed that customers who would switch between eMedia and DStv are likely to only switch once. Therefore, it appears to us that once these customers switch, eMedia is unlikely to get them back.

178. It is important to mention that the harm in question under a section 49C assessment need not have already occurred as held by the CAC in *the Competition Commission v South African Airways (Pty) Ltd*.[53] It is enough to demonstrate the potential harm. In our view, eMedia has done so.

Balance of convenience

179. The balance of convenience concerns the weighing of the prejudice to be suffered by the Applicant (eMedia) and the prejudice to be suffered by the Respondent (MultiChoice).

180. In our view, the restriction *prima facie* significantly constrains eMedia's ability to compete in the market. As a broadcaster that carries the SABC channels, its credibility, and by extension, goodwill is impacted if it cannot flight the same content that the SABC flights on other platforms. The harm to eMedia's market position and credibility has been shown to have been adversely affected by its inability to flight some of the 2023 Rugby World Cup matches, and this would likely pertain with imminent sporting events of national interest in 2024, for example. This harm arises in a market in which consumers are likely to weigh the offering of smaller competitors primarily against that of the well-established brand, DStv, and make switching decisions on this basis.

[53] Case No.: 18/CR/Mar01.

181. It should be recalled that MultiChoice does not sub-license this content to the SABC for free, and that the SABC paid a substantial amount to MultiChoice for access to the rights. In addition, MultiChoice argued that if it were obligated to remove the restrictive clauses, it is possible that it would have to increase the amount it charges the SABC under sub-license agreements. Therefore, MultiChoice still has an opportunity to recoup its return on investment.

182. The weighing up of the balance of convenience does not depend solely upon a consideration of the interests of the immediate parties and should include consideration of the broader objectives of the Act.[54] The preamble to the Act highlights the importance of access by consumers to goods and services: "*provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire*", and the purpose of this Act is to promote and maintain competition in the Republic in order to *inter alia* provide consumers with competitive prices and product choices.

183. As we have found, South African viewers of sports events of national interest *prima facie* are negatively impacted by the impugned conduct. Removing the restrictions in the sub-licensing agreements will ensure that a greater number of South Africans have access to sports events of national importance.

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[54] National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Proprietary). Limited and others Case No: 68/IR/Jun00, at p.14. See also Business Connexion, at par 17 and 31.

184. In our view, the balance of convenience favours the granting of interim relief in eMedia's favour.

02 July 2024

Ms Mondo Mazwai **Date**

Concurring: Mr Andreas Wessels and Professor Thando Vilakazi

Tribunal Case Managers:	Ofentse Motshudi and Sinethemba Mbeki
For the Applicants:	Adv Max Du Plessis SC with Adv Gavin Marriot assisted by Adv Sarah Pudifin-Jones, Adv Lebohang Phaladi and Adv. Daniel Sive Instructed by Nortons Inc.
For the First to Third Respondents:	Adv Wim Trengove SC with Adv Alfred Cockrell SC assisted by Adv Pranisha Maharaj-Pillay, Adv Michael Mbikiwa, Adv Tidimalo Ngakane Instructed by Werksmans Attorneys
For the Fourth Respondent:	Adv Paul Farlam SC instructed by ENS Africa

184. In our view, the balance of convenience favours the granting of interim relief in eMedia's favour.

Ms Mondo Mazwai — **02 July 2024**
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