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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020727

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS	First Applicant
THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING PROJECT BENEFIT TRUST	Second Applicant
S.O.S SUPPORT PUBLIC BROADCASTING COALITION	Third Applicant

And

MULTICHOICE (PTY) LTD	First Respondent
SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED	Second Respondent
THE COMPETITION COMMISSION	Third Respondent

Panel	: Norman Manoim (Presiding Member) : Imraan Valodia (Tribunal Member) : Medi Mokuena (Tribunal Member)
Heard on	: 30 September 2015
Reasons Issued on	: 11 February 2016

Reasons for Decision

Introduction:

[1] This application concerns whether an agreement, entered into between first and second respondents, namely MultiChoice (Pty) Ltd ("MultiChoice") and the South African Broadcasting Corporation (SOC) Ltd ("SABC"), constitutes an intermediate merger which should have been notified as such to the Competition Commission ("Commission") in terms of section 13A(1) of the Competition Act, Act 89 of 1998 ("the Act")

[2] The agreement was entered into on 3 July 2013 and is termed the Commercial and Master Channel Distribution Agreement ("the Agreement"). As we discuss later in this decision, the applicants have put forward two self-standing bases for contending that the Agreement gives rise to a merger. The applicants have brought this application directly to the Competition Tribunal ("Tribunal") without first approaching the Competition Commission ("Commission") to investigate whether the Agreement constitutes a merger. This, as we discuss later, became an issue in the case.

[3] The applicants have sought the following relief:

(i) an order compelling the first and second respondents to notify the Commission of the acquisition of control;

(ii) Alternatively, an order which will require the Commission to investigate whether or not the Agreement gives rise to a merger and to file a report with the Tribunal of its findings;[1] and

(iii) A cost order against any respondent who opposed the application.

[4] The first and second respondents disputed that the Agreement gave rise to a notifiable merger and opposed the main application. Further, the SABC brought a dismissal application in terms of which it argued that the Tribunal does not have the jurisdiction under the Act to determine the main application. Pursuant to the dismissal application, the SABC sought a

[1] This relief was raised in the supplementary affidavit filed by the applicants, see page 341 paragraph 1 and 2 of the record.

dismissal of the main application, or alternatively, a declaration that the main application was *"premature"*, as the applicants' had bypassed the Commission.

[5] During the course of the hearing, a third issue arose in relation to the alternative relief; if the Tribunal did not grant the main relief, i.e. could not find that the Agreement constituted a merger, and was to refer the matter to the Commission for further investigation, what was the jurisdictional threshold for making such an order, assuming it was competent? Counsel for the applicants contended that the threshold for referring the matter to the Commission for investigation is a *prima facie* case that the Agreement constitutes a merger in terms of the Act. Given that this proposition had not been canvassed in heads of argument, both parties were provided an opportunity to make written submissions to the Tribunal after the hearing.

[6] This background explains why we have to consider the following three issues in these reasons:

- The Dismissal Application;
- The merits of the main application, in terms of which we consider whether the transaction in question constitutes a merger; and
- The prior jurisdictional fact/threshold for the Tribunal to grant the alternative relief sought by the applicants in the main application.

The Parties:

[7] The first applicant is Caxton and CTP Publishers and Printers Limited ("Caxton'). Caxton is a listed company involved in publishing and printing. However, according to its Chief Executive Officer, Terrence Moolman, the company is exploring the option of expanding its business into digital television content and video content to be delivered by various forms of digital media.[2]

[2] See founding affidavit of Mr Moolman, record page 10, paragraph 21.

[8] The second applicant is Media Monitoring Project Benefit Trust (also known as Media Monitoring Africa) ("MMA").

[9] The third applicant is the S.O.S Support Public Broadcasting Coalition.

[10] MMA is a member of SOS. The SOS coalition represents a broad spectrum of civil society stakeholders. These organisations have a public, rather than a commercial interest in broadcasting, more particularly when it concerns the public broadcaster.[3]

[11] The SOS coalition includes a number of trade union federations, including the Congress of South African Trade Unions and the Federation of Unions of South Africa. It also includes a number of independent unions, film and television production, non-government and community-based organisations.

[12] The first respondent is MultiChoice, a contracting party to the Agreement. MultiChoice is a wholly owned subsidiary of MultiChoice South Africa Holdings (Pty) Ltd ("MCSAH") which is 80% owned and controlled by MIH Holdings (Pty) Ltd. MIH Holdings (Pty) Ltd, and is owned and controlled by Naspers Limited ("Naspers").

[13] In South Africa, Naspers and its direct and indirect subsidiaries' business operations consist of multi-channel digital subscription television, 'DStv', and terrestrial subscription television M-Net. Naspers' business interests also include internet (e-commerce) offerings, communications, social networks, entertainment and mobile value-added services, print media and certain underlying technologies.

[14] MCSAH also owns and controls Electronic Media Network (Pty) Ltd ("M-Net") and SuperSport International Holdings (Pty) Ltd ("SuperSport"), the principal providers of paid entertainment and television content respectively in South Africa.

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[3] As they put in the papers, they have an interest in ensuring that broadcasting is committed to the broadcasting of quality, diverse, citizen-orientated public interest programming that is aligned with the objectives of the South African Constitution and the Electronic Communications Act, 36 of 2005 ("ECA").

[15] MultiChoice holds a commercial subscription television broadcasting service license in South Africa, which authorises it to operate a digital satellite television service on a subscription basis. M-Net holds an analogue subscription terrestrial television broadcasting service license. Relevant to this case however, is MultiChoice's digital satellite television service known as DStv.

[16] The second respondent is the SABC, a statutory public body. It is the national public broadcaster in South Africa regulated by the Broadcasting Act, 4 of 1999 and the ECA.

[17] The SABC is the holder of television broadcasting licenses, authorising it to provide two analogue public television broadcasting services (SABC 1 and 2), and an analogue commercial public television broadcasting service (SABC 3). Relevant to this case is the SABC's function in producing or acquiring content for television, and wholesaling this content either to other broadcasters it has in terms of the Agreement, or using the material for broadcast on its own channels.

[18] The third respondent is the Commission. The reason for its inclusion as a respondent is that it is the regulatory body charged, *inter alia*, with investigating mergers in terms of the Act, and in the case of intermediate mergers, of approving them.[4]

PART A

The Dismissal Application:

[19] The dismissal application was brought by the SABC. Its primary argument was that the Tribunal does not have jurisdiction under the Act to hear the main application as the Commission, which is the primary investigator of mergers, has been bypassed. It is worth noting that while MultiChoice raised

[4] Section 21(1)(e) read with section 14 of the Act.

this issue as a *point in limine* in its answering affidavit it did not pursue this point in argument.[5]

[20] At the outset, it is our view that raising the jurisdictional challenge, by way of a separate application, was entirely unnecessary and contributed to raising costs for all concerned. The issue as to whether or not the Tribunal has the jurisdiction to hear the main application could easily have been dealt with as a *point in limine* in its answering affidavit, as MultiChoice did. Nonetheless, in light of the arguments brought before us, we will consider whether the Tribunal's jurisdiction is dependent on the litigant first approaching the Commission.

[21] Section 27 (1) of the Act details the Tribunal's powers as follows:

(a) "adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in this Act;

(b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;

(c) hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it; and

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act"[6]

[22] The consideration of mergers is clearly a key function of the Tribunal's powers under the Act. However, our merger regime requires that mergers

[5] See page 363 of the record in paragraphs 14 and following under heading 'preliminary challenges'.
[6] Section 62(1) of the Act also provides that the Tribunal and Competition Appeal Court ("CAC") have exclusive jurisdiction in respect of certain matters which include the Tribunal's functions under section 27 (1).

first be notified to the Commission for investigation, before being considered by the Tribunal. In cases of non-compliance, the Act empowers the Tribunal to impose an administrative penalty in cases where firms have failed to comply with their obligations to notify a merger.[7] However, the Act does not expressly indicate that the Tribunal is empowered to compel firms to notify a transaction to the Commission, where it falls within the ambit of section 12, which provides for the consideration of mergers. The first and second respondents contended that the fact that mergers must first be notified to the Commission, indicates that the Commission is the forum of first instance for the investigation of mergers and that this extends to the question of whether a transaction constitutes a merger. The respondents thus argued that where the Commission is bypassed, it will be deprived of its investigative functions under the Act.

[23] In *Bulmer*[8], the Tribunal granted the applicants' relief and confirmed that it does have the jurisdiction to order parties to notify a transaction to the Commission where it amounts to a merger.[9] On appeal, the Competition Appeal Court ("CAC") upheld this decision, albeit for different reasons, and did not challenge the Tribunal's interpretation of its powers.[10]

[24] One needs to distinguish the case of applicants, who came before the Tribunal in respect of an order seeking enforcement of the Act's merger regime, from the circumstances of a complainant in respect of a prohibited practice. In the latter case the regime of the Act is clear. A complainant may not refer the complaint to the Tribunal for final relief, unless it has first complained to the Commission and the latter has non-referred the case. The Act requires the Commission to consider the complaint and sets out a time period for it to do so. No such regime of procedural certainty exists for the person complaining that a transaction that was not notified to the

[7] Section 59(1) (d) does empower the Tribunal with the power to impose a penalty on firms that have failed to notify mergers or implement mergers, without regulatory approval.
[8] *Bulmer SA (Pty) Ltd v Distillers Corporation (SA) Ltd* (1) [2000-2002] CPLR 338 (CT).
[9] *Ibid* para 457.
[10] *Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd* [2001-2002] CPLR 36 (CAC) ("*Bulmer CAC*").

Commission, is indeed a merger and should be notified. To deny such person a right to approach the Tribunal because the Act lays out no procedural regime as it does for mergers, would deny such a person a constitutional right of access to justice, particularly since, unlike with complaints, the Commission is not obliged to investigate whether a transaction constitutes a merger.

[25] In a recent case decided by the CAC[11], after argument in the present matter had been concluded, the CAC gave an order for a party to notify a transaction as a merger at the instance of one of the present applicants, Caxton. Although the court stated it would be desirable for matters first to be raised with the Commission, it nevertheless, on the basis of the urgency of the matter, decided relief was competent.[12] The court did not thus view the fact that a party had not first approached the Commission, as a prior jurisdictional requirement.

[26] We too would endorse the learned Judge's comments in that matter that parties should first approach the Commission. However, the failure to do so does not constitute a bar to our jurisdiction to hear such applications. In this case, it is apparent that the Commission was aware of the transaction from a complaint brought to it by the industry regulator, albeit on the basis that it was a prohibited practice, but it did not pursue the matter.[13] Since the Commission is expert in these matters it does not have to be bound by what an outside party defines an arrangement as. The simple fact is it was aware of the matter and remained passive. We do not criticize it for this choice; but only wish to highlight that it may have been reasonable for the applicants to conclude, that the Commission would not have been persuaded to take up their cause.

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[11] *Caxton & CTP Publishers and Printers v Media 24 (Pty) Ltd; Novus Holdings Ltd; Adbait (Pty) Ltd; Lambert Philips Retief and The Competition Commission,* Case number 136/CAC/Mar15 ("*Caxton v Media24 and Novus*")

[12] *Caxton v Media24 and Novus* page 26 paragraph 86.

[13] We say more about this later in this decision at page 33 paragraph 115, footnote 47.

[27] There is no reason to deviate from the legal precedent established in *Bulmer*. Thus the Tribunal has the jurisdiction to compel parties to notify a transaction, constituting a merger, to the Commission. Accordingly, the dismissal application fails.

PART B

The merits of the application:

[28] In the main application, the applicants allege that the Agreement entered into between the first and second respondents on 3 July 2013, gave rise to an intermediate merger under the Act, and should have been notified to the Commission for investigation. It is common cause that the Agreement has been implemented. The respondents deny the Agreement gives rise to a merger. The applicants contend that the Agreement alters the control structure of SABC's business in two ways:

(i) It provides MultiChoice with control over SABC's archived programs, which constitute a fundamental part of the SABC's broadcast television business and assets; and

(ii) It confers on MultiChoice control over SABC's television broadcast strategy, thereby providing it with the ability to materially influence the television broadcasting business of the SABC.

Relevant sections of the Act

[29] The Act sets out the definition of what constitutes a merger and since the concept of control is a key element of that definition it goes on to state when control is deemed. We set out below the relevant legislative provisions.

[30] In terms of section 12(1) a merger is defined as follows:

(a) '*For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.*

(b) *A merger contemplated in paragraph (a) may be achieved in any manner, including through-*

(i) *Purchase or lease of the shares, interests or assets of the other firm in question;*

(ii) *Amalgamation or other combination with the other firm in question.'*

[31] Section 12(2) then lists various forms of control as follows:

'A person controls a *firm* if that person-

(a) *beneficially owns more than one half of the issued share capital of the firm;*

(b) *is entitled to vote a majority of the votes that maybe cast at a general meeting of the firm, or has the ability to control the voting of the majority of those vote either directly or through a controlled entity of that person;*

(c) *is able to appoint or to veto the appointment of the majority of the directors of the firm;*

(d) *is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act no. 61 of 1973);*

(e) *in a case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;*

(f) *in the case of a close corporation, owns the majority of members' interest, or controls directly, or has the right to control the majority of the members' votes in the close corporation; or*

(g) *has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a)-(f).'*

[32] Section 13A makes it mandatory for parties, to an intermediate or large merger, to notify the Commission of that merger. Further, section 13A(3) states that parties to an intermediate or large merger, may not implement that merger until it has been approved, with or without conditions, by the Commission and the Tribunal or the CAC.

The Agreement

[33] Although the record in this case is lengthy, the crucial factual issues are brief. They relate to the effect of certain provisions of the Agreement. The remaining part of the record deals with propositions advanced by economic experts (one each for the applicants and respondents) and opinions by various deponents for the respective parties. In the end none of these opinions have been particularly useful in determining this matter, apart from, in some instances, providing background to the context in which the Agreement operates.

[34] The existence of the Agreement and its subsequent amendments, are not in dispute.[14] It is worth mentioning that the original agreement is not considered confidential any longer, as it was, we were advised, leaked and entered the public domain. The amendments have not had such unintended exposure and so those terms are still considered confidential, and have, where necessary, been dealt with obliquely in these reasons.

[35] If the Agreement is the central fact in this case, why has it led to such varying interpretation over its implications? There are three reasons. In the first place, it has been the subject of several amendments since the original conclusion. Second, it allows for material aspects to be determined by subsequent agreement between the parties. Third, its drafting is obtuse on many important aspects.

[14] The Agreement was concluded on 3 July 2013 and was amended again on three subsequent occasions; 4 August 2014, 11 August 2014, and 21 November 2014.

[36] The applicants advance two distinct and independent reasons for why the Agreement constitutes a merger.

[37] We will refer to the first reason as the '*asset transfer acquisition*'. Here the applicants' theory is that MultiChoice acquires an exclusive license to broadcast an entertainment channel composed of material from the SABC's archives. However, the acquisition of the rights to the archive is also accompanied by restraints imposed on the SABC, and by extension, third party competitors, which together make the acquisition one of '... *part of a business...*', as we go on to discuss.[15]

[38] The second is that MultiChoice has acquired strategic control over the direction of SABC policy, in respect of its stance on the digital terrestrial television ('DTT') policy. Here reliance is placed in the language of section 12(2)(g) of the Act and we will, for convenience, refer to this as the '*12(2(g) argument*'.

[39] The reason these two must be regarded as distinct is that in the first case, MultiChoice acquires control over assets and rights that were integrated with that of its own business. The question here is whether this acquisition amounts to control over "... *part of a business of another firm.*" In the second case, MultiChoice acquires certain rights in regard to a policy of the business of SABC – a part of the business that is not being transferred to it, but remains part of the ongoing business of SABC. Here the legal question is whether MultiChoice should be deemed to be a controller of the non-transferred SABC business, by virtue of section 12(2)(g). We consider these two questions separately.

Asset transfer acquisition

[15] See Applicant's main heads of argument paragraph 4.1.

[40] It is common cause between the parties that under the Act a transfer of assets may constitute a merger.[16] It is further not in dispute that the transfer of intellectual property rights may constitute a transfer of assets for this purpose. The first component of this argument then is to consider whether the rights transferred in terms of the agreement, suffice to constitute a merger.

Factual issues

[41] The applicants refer to three components of the Agreement for this first leg of their case. First, the agreement gives MultiChoice an exclusive licence to use certain SABC content to broadcast an entertainment channel on its DStv bouquet. The channel, called *Encore*, is to be assembled from archive material owned by the SABC. Second, SABC gives MultiChoice the non-exclusive right to broadcast a 24 hour news channel on its DStv bouquet. Third, MultiChoice is given the right to broadcast its own entertainment channel on SABC's bouquet, which will occur with the advent of digital terrestrial television, while SABC has granted MultiChoice the rights to broadcast its channels (at present SABC 1, 2 and 2), and any future channels on the MultiChoice bouquet. We will term these the '*FTA Rights*'.

[42] It is unclear from the applicants' argument, what reliance they place on the news channel and FTA rights, to conclude that the Agreement constitutes a merger. Indeed the emphasis of the argument has been on the entertainment channel and the archive. The Agreement does not prevent SABC broadcasting the news channel on its own channels and the applicants acknowledge this fact.[17]

[43] For this reason we confine our analysis, as did the applicants, to the question of whether the entertainment channel and associated ancillary

[16] See section 12(1)(b)(i) of the Act which says a merger may be achieved in any manner including the purchase or lease of assets.
[17] See founding affidavit, Record page 16, paragraph 47.

restraints, particularly as they constrain usage of the SABC archive, constitutes a merger.[18]

[44] The confusion over the ambit of the agreement has manifested itself most here. It is clear that when the applicants brought this application, their conception of the ambit of the restraint in respect of the archive was much greater than it in fact was. We see this in a comment made by Mr. Moolman in his founding affidavit.

"What is therefore contemplated in the Agreement is that the SABC's programme archives, the extent of which shall be commensurate in value with the fees payable for the entertainment channel under the Agreement, will be solely controlled by MultiChoice. During the term of the Agreement, the SABC is not entitled to use that content for itself, or to license it to any third parties, meaning that this content is no longer, notwithstanding it being the property of the public broadcaster, accessible by the general public broadcaster itself."[19]

[45] It was a major part of the applicants' case that SABC had sold the family silver. It had given up the rights to broadcast its valuable archive to its own viewers, let alone precluding itself from licensing it to anyone else. But this initial view was incorrect.

[46] As it emerged later in the papers, the restraint in respect of SABC, was only a temporary one. SABC could re-broadcast material that had been broadcast on *Encore*, but subject to a time delay. Given that this material was not fresh when broadcast on *Encore*, this time delay does not appear commercially significant in inducing viewers who are not yet with MultiChoice to become subscribers.

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[18] In their heads of argument the applicants state: " *We show that the exclusive licence granted to MultiChoice in respect of the SABC's Entertainment Channel licence and the associated entertainment content restraint, constitutes a merger for the purpose of the Act."* (Applicants main heads of argument, paragraph 18.3).

[19] Founding affidavit, record page 19, paragraph 54.

[47] Nor is it correct that the entire archive is frozen from SABC's use. Nor that MultiChoice, rather than SABC, selects what is broadcast on the channel. The factual situation, as described by Mr. Patel of MultiChoice, is more nuanced;[20] in that it is SABC which makes the initial selection, but MultiChoice has a right to veto material it considers does not conform to the standards it has for the channel.

[48] In interpreting the effect of the Agreement, we have to rely on a reasonable interpretation of its terms, including the effects of the amendments, and where the Agreement provides for a process of further agreement between the parties, we have to accept the respondents version on these facts, since the applicants have put up no version themselves on this working relationship.

[49] On this approach, we can conclude the following facts concerning the entertainment channel:

- MultiChoice has the exclusive right to broadcast the material that comprises the entertainment channel for a period of five years;
- The material is made up from the SABC archives;
- SABC is entitled to broadcast the entertainment channel on its own services, subject to a time delay from calculated from the date of broadcast by MultiChoice, and provided further, that it must be in the same format and schedule as broadcast by MultiChoice.[21]
- SABC however may not authorize any third party to use the material utilised on the Entertainment channel during the course of the Agreement;
- A clause in the Agreement restrains SABC from distributing a channel that is 'substantially similar' to the entertainment channel. The boundaries of what constitutes substantially similar, are not clear. The applicants give this phrase the widest possible meaning so they can contend that its effect is a far reaching sterilization of the archive.[22] The respondents contend for a much narrower meaning. "*It is the Entertainment channel as a holistic offering that*

[20] MultiChoice answering affidavit, page 374 – 375, paragraphs 59-63.
[21] The length of the time delay has been claimed as confidential information.
[22] See Applicant's main heads of argument in the main application page 20-21 paragraph 37.

is being protected from being replicated."[23] The respondents argue that the term "*substantially similar*" connotes a channel whose 'intrinsic' and 'essential'; features are similar to those of the Entertainment Channel.[24]

- The respondents contend that the Channel would utilize less than 1% of the archives content.
- The respondents contend that, other than stated above, the agreement does not confer on MultiChoice any control over the archive. [25]
- The choice of what content goes on the entertainment channel is made by the SABC, although MultiChoice has a right to veto content it deems not in conformity with the standard. This aspect of the agreement is less clear. The respondents comments on how this has operated in practice is that this is left to joint meetings.
- Advertising revenue sold on the channel goes to SABC not MultiChoice.

Legal and economic issues

[50] In order to establish whether what is being acquired constitutes a merger, the applicants need to establish that it constitutes a 'business' or 'part of a business' of the target firm.

[51] This arises from the definition of a merger set out in section 12(1)(a) of the Act as follows:

Section 12(1) (a) - For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

[52] The only case so far where we have had to deal with what constitutes a business, is that of *Edcon*.[26] In that case the Tribunal approved of the following policy approach enunciated by Hebert Hovenkamp, a leading

[23] See first respondent's heads of argument para 84 page 26-27.
[24] Applicant's main heads of argument paragraph 82. Paragraph 36-37.
[25] Applicant's answering affidavit paragraph 157, record page 400.
[26] *Competition Commission v Edgars Consolidated Stores Ltd* [2003] 1 CPLR 151 (CT).

United States antitrust scholar in coming to its conclusion. In the passage relied on in *Edcon,* Hovenkamp states: -

> *"Antitrust policy becomes concerned with partial asset acquisitions when the asset that changes hands represents a measurable and relatively permanent transfer of market share or productive capacity from one firm to another".*[27]

[53] There is no reason to depart from this approach and we will apply it to the facts of the present case.

[54] SABC operates at three levels of the broadcasting market. It is a producer or purchaser of original material for broadcast. This can be described as the upstream market. Downstream from that market, it operates as wholesaler of material to other broadcasters. Further downstream it operates as a broadcaster. For want of a better term, the latter can be described as a 'retail market'. In this latter market, firms compete both for viewers and for advertising. Both firms in this matter compete with one another to receive advertising which they then air in slots with their broadcasts. The situation differs in respect of viewers. In the case of MultiChoice, competing for viewers translates into revenue, as viewers are subscribers who pay a fee to receive an encrypted service. SABC, by contrast, is currently a free to air broadcaster. However, when the market becomes digital,[28] SABC will be entitled to broadcast channels on its own digital terrestrial or DTT service, and is likely to compete for viewers revenue in this market.

[55] If we revert to the definition in *Edcon,* the first question to ask in deciding whether the transaction constitutes a merger is whether there is a transfer of productive capacity. In the conventional understanding of what productive capacity is in this case, there is clearly no transfer. SABC's productive capacity is in the upstream market, and this is retained. As James Hodge, the economist for the respondents put it – there is no transfer of productive

[27] *Edcon* at paragraph 33, Herbert Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice, at 498.
[28] At a date presently uncertain.

capacity if the widgets, not the widget makers, are transferred. The applicants however argued, that the archive of the SABC should be thought of, as not the widgets on these facts, but the widget maker. As we understood this argument, although the production functions of the SABC were not being transferred, i.e. the studios and all that goes with them, the archive could be thought of as a stockpile from which the widgets, in this case the channels, could be made up and produced. Hence, thought of in this way, there was a transfer of productive capacity.

[56] On this argument then, whilst conceding that the archive is not the machinery to create the widgets, it is also more than just the widgets themselves. It is in essence a stockpile, from which the widget may be transformed into something, to which revenue can accrue downstream, namely the channel. Subtle as this distinction is, its claims fall down on two respects. First, there is no evidence of any industry practice that the possession of an archive constitutes productive capacity that can be thought of as a business. Second, even if it was, the claim falls on the specific facts of this case. MultiChoice denies that it has any right to re-sell the archives. It maintains that its rights are limited to sourcing the material for the *Encore* channel; nor, albeit subject to some restrictions, is the SABC precluded from later usage of material from Encore, or at any time from using its own archival material, provided that it is not "*substantially similar*" to that used on *Encore*. In this sense the widget stockpile analogy does not hold on the facts.

[57] We thus find that the rights to use some of the archive do not constitute the transfer to MultiChoice, of productive capacity that could be considered to be a business.

[58] The next question is whether there is a transfer of market share, and if so, at which level of the market. As we understand them, the applicants do not contend that there is a transfer of market share at the upstream levels of production or broadcasting. The question of transfer of market share

therefore relates only to the downstream or retail market, although as we explain, on the applicants' theory, this accretion is caused by a vertical dimension.

[59] The SABC archive, the applicants argue, is a valuable resource. Even though MultiChoice may only use a fraction of it for the *Encore* channel, the effect of the exclusivity is to foreclose it to rivals, whist the restriction on access by the SABC devalues the resource sufficiently, to make its subsequent value to the SABC of little commercial value. How does this fit into a theory of a transfer of market share? The applicants argue that content has value and that the control of content drives viewership. Thus by acquiring content exclusively, the transaction both deprives rivals of content and restrains the SABC from effectively exploiting it, thus driving viewers to MultiChoice and thus increasing its market share.

[60] However, the applicants also concede that licensing channel content to rivals is also typical of this industry, and that such transactions on their own, could not be considered as transfers of businesses. So what then makes this transaction different in a manner that alters its character? The applicants here rely on no single fact, but rather a mélange of facts from which they attempt to draw the inference that what is being transferred, constitutes a business. This has made their case difficult to understand.

[61] In *Edcon* it was very clear that the transfer of rights and assets would lead to the transfer of market share. The target firm had exited the market and it was clear from statements made by the acquiring firm, that with the purchase of the assets in question effectively a customer loyalty scheme, they would acquire the customers of the erstwhile target, and hence a probable transfer of market share to the acquirer. Since the target firm was defunct, its customers had to go somewhere and the facts showed that they would migrate to the firm that bought the loyalty scheme.

[62] But that inference is far less clear in the present case. The applicants argue that the entertainment channel is likely to appeal to a class of viewer who are not presently MultiChoice subscribers, namely those from lower income groups said to be SABC's primary target audience. The applicants come to the conclusion that:

"The Agreement ... is assisting MultiChoice in seeking to generate additional subscription and advertising revenues. It clearly has the effect of transferring market share, whether measured by viewership, subscription revenues or advertising revenues."[29]

[63] However, this conclusion is an inference without any supporting facts. Unlike in *Edcon*, where there was evidence from the acquiring firm as to the market share effect the agreement would lead to, no such evidence has been laid before us in this case. [30]

[64] First, the acquiring and target firms have not said as much, and in affidavits have disavowed this. The closest MultiChoice comes to making such a statement is a comment made by Mr. Patel that the value which MultiChoice has secured is to augment its bouquet offerings and thereby add value for its existing subscribers.[31] Second, merely because assets are being transferred does not suggest a transfer of viewers will follow. Indeed, at best, this is possible but not probable. What evidence is there that current SABC viewers, who are not already MultiChoice subscribers will, because of the transaction, become MultiChoice subscribers? On the applicants own version MultiChoice already offer viewers the choice of over 200 channels.[32] What is it about this channel that will cause the migration of viewers who have not already chosen to subscribe? The applicants do not offer any reason. The size of the existing DStv offering seems to favour Patel's enhancement argument than the applicants' market share increasing one.

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[29] Applicants' main heads of argument page 46, paragraph 93.
[30] See *Edcon op cit* paragraphs 54 -62.
[31] Multichoice answering affidavit page 404, paragraph 178.
[32] Founding affidavit, record page 12, paragraph 29.

[65] Unlike the *Edcon* customers, SABC viewers are not obliged to follow the transferred assets, as they retain their access to SABC. Further, even though some may want to view the material selected for *Encore*, on the respondents' version, SABC may re-broadcast this material subsequently. Of course it remains uncertain if it will. However, it is equally uncertain if this is sufficiently compelling an offering to make viewers sign up to DStv. On this fact the applicants would have an onus which they have not discharged.

[66] The next possible market share effect is that of a rival to both MultiChoice and SABC, for instance Top TV, or a new entrant in the digital market. Since no rival has joined the applicants cause, we have no evidence from a market participant on this point. The applicants speculate that the transaction hampers a new entrant by taking away a resource that would represent a market share opportunity to a rival in the downstream market. Even if a rival might have wanted to get rights to the archive, this does not make the loss of such an opportunity a business in the hands of MultiChoice. Even if the strategy of MultiChoice was to buy up scarce resources required by a competitor – a question of fact, we do not need to determine here – then that would be a question of whether a prohibited practice had been perpetrated.[33] This possibility does not make the transaction a business. Expressed differently, the fact that a transaction may have potentially anticompetitive consequences, does not by virtue of that alone, transform it into a potential merger.

[67] The problem of when asset transfers may constitute a merger has also been considered by other jurisdictions. Their tests are not that different to the one enunciated in *Edcon*. According to the EU Jurisdictional Notice[34], it is noted that under the European Merger Regulation:

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[33] See for instance section 8(d)(v) which prohibits a dominant firm buying up scarce supply of intermediate goods that are required by a competitor.

[34] European Commission Consolidated Jurisdictional Notice on the Control of Concentrations Between Undertakings, No 139/2004.

The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed. The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover. A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity.[35] (Our emphasis)

[68] In Canada, whose definition of a merger is substantially the same as in our Act, the Competition Bureau has, in its guidelines,[36] stated the following:'

"*Asset transactions (whether or not they are notifiable) that generally fall within the scope of section 91, include the purchase or lease of an unincorporated division, plant, distribution facilities, retail outlet, brand name or intellectual property rights from the target company. The Bureau treats the acquisition of any of these essential assets, in whole or in part, as the acquisition or establishment of a significant interest in that business. Further, acquiring a subset of the assets of a business that is capable of being used to carry on a separate business is also considered to be the acquisition or establishment of a significant interest in the business.*" (Our emphasis)

[69] To the extent that these tests may be wider than that in *Edcon*; i.e. '*transfer of a business with market turnover*' (EU) or '*capable of being carried on as a separate business*' (Canada), the present transaction would still not meet these tests.

[70] The applicants placed much reliance on one foreign authority to support their case. In *United States v Columbia Pictures Corporation*[37] a Federal district

[35], Jurisdictional Notice, paragraph 24.
[36] Canadian Bureau of Competition Law- Merger Enforcement Guidelines page 5 paragraph 1.13.

court had to decide, among other issues, whether an agreement constituted the acquisition of an asset for the purpose of section 7 of the Clayton Act. Under the agreement, Universal Studios granted a subsidiary of Columbia Pictures exclusive television exhibition rights to six hundred of its film titles produced before a certain date. The Court in this case however, was dealing with statutory language different from that of section 12 of the Act. The relevant provision of the Clayton Act states:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (Our emphasis)

[71] The case involved deciding whether the terms "acquisition" and "assets" in section 7, should be given a restrictive meaning or not. The Court decided that there was no warrant to adopt a restrictive meaning to this language. It appears that the court adopted a purposive approach to the interpretation of the legislation mindful of the fact that *"...proscribed transactions may be myriad in their variegation."* [38]

[72] As an approach to interpreting the threshold issue of whether something constitutes a merger, we have no quarrel with such an approach. However, the fundamental difference between *Columbia* and the present case is that the terms being interpreted involve different language. The threshold question in this case is what constitutes a business or part thereof. This is

[37] *United States v. Columbia Pictures Corporation,* 189 F. Supp. 153 (S.D.N.Y 1960).
[38] As it happens, the Court in Columbia concluded that there was not sufficient proof of a violation of the Clayton Act, as other elements of the definition had not been established on the evidence, regarding a substantial lessening of competition in any line of commerce.

not a term that appears in that section of the Clayton Act, nor does the court in *Columbia* discuss what constitutes a business as opposed to a bare asset.

[73] The case, for that reason, is not useful authority that can assist in this matter in determining whether the transaction constitutes a merger.

[74] A further criticism of the applicant's case, the respondents argued, is that the transaction is of limited duration. Recall that under the Hovenkamp definition approved in *Edcon,* the transfer need not be permanent but at the least *"relatively permanent"*. The present agreement lasts for five years, of which more than two have already elapsed, at the time of argument. It may well be that the Agreement will be renewed, but we cannot assume it will. On examples given in the case law and literature, the duration question is usually posited at a period of longer than five years, for it to have the character of relative permanence required to constitute a business.[39]

[75] Finally it is clear that the applicants appreciated they needed further evidence to make their case, even though this was never conceded by them. This is why, as part of their alternative relief, they seek discovery of certain documents from the merging parties. Most of these were not forthcoming, but presumably, the applicants had hoped to find in them some admission, that the transaction was about market share acquisition. Then the applicants, not having obtained full discovery, sought as their alternative relief that we should direct that the Commission investigate the matter further in the event we could not decide whether the transaction was a merger. We discuss this point later in these reasons, but it is mentioned now as it indeed demonstrates that the applicants had a theory of the transaction that was wanting in terms of evidence in the present record.

[76] We thus find that the transfer of assets does not amount to a business.

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[39] Even in *Columbia* the agreement under consideration was 14 years. In *EU Merger Control* by Rosenthal and Thomas mention is made that in the EU there have been cases where 12 years and 10 to fifteen have been held to be sufficiently long for this purpose, but in another a period of three years was held not to suffice. (See page 471.)

Section 12(2)(g) argument

[77] We now turn to a self-standing argument that the agreement gave MultiChoice the ability to control a key policy issue for the SABC for the purpose of section 12(2)(g).

[78] We first discuss the factual issues underpinning this argument, then the clause in question, and finally the appropriate legal test.

[79] Television broadcasting is expected to migrate to a digital terrestrial or DTT format. What this means is that the broadcasting signal, currently broadcast terrestrially requiring only an aerial and a television set, will now require the intermediation of another piece of technology, the set top box, whose function it is to decode the signal so that it can be watched on the television set. Government policy makers decided that approximately five million set top boxes would be supplied free of charge to those who met some means test, which in essence meant, those who could not afford to buy the set top box themselves.

[80] Crucial to this decision is which technology was to be selected. Should the signal be encrypted or unencrypted and should access be conditional or unconditional. The detail of the technical aspects of the choices does not need to concern us here. What is of concern is that the commercial advantage of that choice was bitterly contested between MultiChoice, which favoured unencrypted and unconditional access, and etv, its private broadcasting rival, which favoured the opposite. On it turned the issue of whether viewers, who already had an M-Net decoder, would need another device or set top box to view the other broadcaster's channels, which would include SABC. Or whether, if SABC went for unencrypted and open access, they could still be accessed using the existing MultiChoice set top box.

[81] According to the applicants, SABC had originally favoured encryption and conditional access and thus held a position opposed to that of MultiChoice.

However, according to the applicants they changed that position. The agreement contains a clause to this effect.

[82] The relevant provision is clause 4.3.1 which provides as follows:

"The SABC undertakes and agrees that all channel signals in respect of the SABC FTA channels, as transmitted by the SABC, on the SABC DTT platform, shall be broadcast or transmitted by or on behalf of the SABC, unencrypted and without any conditional access system, and shall always be available and receivable by the M-NET DTT set-top boxes distributed in South Africa throughout the term, without requiring anything other than the installation of an M-Net DTT set-top box".

[83] Although they have no other evidence on this point to rely on, the applicants ask us to infer that the change in stance was because of this agreement. In short, SABC was paid to change its mind.

[84] The legal proposition for this argument rests on interpreting section 12(2)(g), which, for convenience, we set out again below:

"A person controls that firm if that person has the ability to materially influence the policy of a firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."

[85] The applicants argue that for the purpose of this test, it suffices if MultiChoice is able to materially influence a key policy of the SABC.

[86] By virtue of other clauses in the agreement, MultiChoice can suspend or terminate the whole agreement if SABC were, once digital migration takes place, to encrypt one of its channels.[40] That right, argue the applicants, gives MultiChoice commercial or economic leverage over the SABC because it

[40] They rely on clause 7 of the Agreement, record page 84.

influences what technical choice it will make to reach their free to air channels, to 45 million viewers.

[87] They also argue that the choice of technical standard has a knock-on influence over the type of content. The applicants contend that to secure premium content, a broadcaster needs to be able to encrypt, to prevent the content leaking, presumably, to unintended viewers. The latter fact however, is contentious and denied by a Mr. Snodgras who is put up as an expert on these matters by the respondents.

[88] The respondents have raised several arguments to meet this 12(2)(g) or encryption case. The first two raised are questions of causation. The second is that even if there was a causal relationship between the policy choice and the agreement, it does not meet the 12(2)(g) test because of its limited scope and duration.

[89] Briefly the causation arguments are partly factual and partly legal. The first argument, mostly advanced by SABC, is to suggest that the applicants have drawn the wrong inferences on the factual chronology, and that properly considered, one will appreciate that the SABC came to its policy decision independently and out of consideration for its own commercial interest.[41] The legal argument was that the encryption issue is one for government not private determination between contracting parties.

[90] However, neither of these arguments answers the point of why the contracting parties inserted the clause in the agreement. If their contentions are correct, such a clause is superfluous. Presumably MultiChoice sought to protect itself, either in case of a re-consideration by SABC, at a time before the government's determination was clear, and second because, although this was to be a government decision, the influence of the SABC as the public broadcaster, would be a weighty one.

[41] See SABC's Answering Affidavit by Veronica Duwarkah, page 595, paragraph 51.

[91] We therefore will not decide the matter on the causation issue and go on to consider the remaining arguments raised by the respondents.

[92] Thus we are assuming that by virtue of this clause in the Agreement, MultiChoice has acquired influence over the access and encryption policy of the SABC. The key argument then is whether MultiChoice's influence over a specific area of company policy, suffices for the purpose of 12(2)(g).

[93] Section 12(2)(g) explains how to test whether the person has material influence. Recall that section is animated when the more traditional ones are not applicable. The test, as paraphrased by us, is:

'does the person have influence in a manner comparable to a person, who in ordinary commercial practice can exercise the element of control, or the controller of a general meeting or has the ability to exercise the control the board would have?'

[94] In ordinary commercial practice, such a person enjoys at least an ongoing form of control over the company, not merely a specific aspect of it. Secondly, we must bear in mind that we are dealing with a competition statute. Our emphasis on control is the ability to influence the competitive inclination of a company. This suggests again that control should only be inferred when the policy covers a wider ambit not a limited specific aspect, particularly in the context of a target firm whose business covers a range of other activities, which remain unfettered by the influence of the putative controller, as in the instant case with SABC.

[95] Further, there is a danger in giving this section too broad an application. Many outsiders may be able to influence a company on one aspect of its business, or at a particular finite moment in time. If such persons, typically lenders or suppliers with some market power over a customer to hold them to some terms, were thought of controllers for the purpose of merger control, then merger activity would be ubiquitous. The section has to be given some

sensible limitation as to both the scope and time of the policy matter in question.

[96] In this case, even if we accept for the applicants that the choice of a technical standard has strategic value and some knock on effect on how the SABC might behave in the market, it is both limited in scope and time. As far as scope is concerned, in relation to the whole business of SABC as a producer, wholesaler and broadcaster of television and radio, the scope is extremely narrow. As far as the time factor is concerned, it is equally limited. The Agreement, as noted above, is only in effect for five years, and given that we are not yet in the DTT environment, the effects in the market place may be of even shorter duration.

[97] As noted, we have not decided the section 12(2)(g) argument based on the causation argument of the SABC, which was that encryption and the conditionality of access are issues for the government to decide. On the present record, we do not have enough clarity on what issues will be determined by government policy and which will still be determined by industry players, assuming they still have some freedom of choice in these respects. However, to the extent that they do not, then the policy issue is not one of a *firm* as section 12(2)(g) requires, but that of government, bringing the issue outside of the ambit of that sub-section.

[98] Thus the agreement on encryption and access does not constitute control by MultiChoice over the SABC's business for the purpose of section 12(2)(g).

[99] The conclusion we reach then is that, on the present record, the applicants have failed to make out a case that the Agreement constitutes a notifiable merger. The applicants are thus unsuccessful on their main relief. We now turn to the alternative relief.

PART C

Alternative relief.

[100] In an amended notice of motion, the applicants introduced a prayer for alternative relief. This was on the following terms:[42]

(i) *directing MultiChoice and the SABC within 14 days of the hearing, to produce all documentation, including but not limited to all correspondence, board minutes, internal memoranda, pertaining to the negotiation, conclusion and implementation of the Agreement;*

(ii) *directing the Commission, within 30 days from the date upon which Multichoice and the SABC produce the aforesaid information, and having considered the information produced and any other relevant information available to it or requested by it, to file a report with the Tribunal recommending whether or not the Agreement gives rise to notifiable changes of control; and*

(iii) *directing a re-hearing of the matter by the Tribunal, to determine whether the conclusion of the Agreement entailed a notifiable change of control.*

[101] At the end of argument, the Tribunal panel asked the applicants if the alternative relief was to be granted, what the threshold jurisdiction was in order for the Tribunal to order such relief. Counsel for the applicants suggested if the panel could not find that the transaction was a merger on a balance of probabilities, it could make such an order if the applicants had shown a *prima facie* case that the agreement constituted a merger.

[102] At the request of both parties, given that this point had not been covered by either in their heads of argument, we allowed them to file additional heads of argument which they duly did. SABC for its part aligned itself with the legal submissions made by MultiChoice.

[42] See Record at page 341(undated). Set out again at paragraph 1 of the Respondent's supplementary heads of argument.

[103] MultiChoice filed its heads of argument first. The main relief, it argued, constituted a final mandamus. Since this was the case, the question then was whether the alternative relief could be regarded as an interim interdict. In common law, our courts have held that to grant an interim interdict the applicant must prove the existence of a *prima facie* right. .[43]

[104] According to MultiChoice the alternative relief was not sought to protect any right subject to final determination, and so was accordingly not an interim interdict. [44]

[105] The applicants submitted much fuller argument on this point. They did not seek to contend that what they were seeking was interim relief, but rather a *sui generis* remedy.

[106] The argument had two components. They first argued that in a number of instances, courts have been inclined to grant relief where only a *prima facie* case has been made out on the papers. Not only in interim relief cases, but also in applications to attach an asset to found or confirm jurisdictions, Anton Piller relief, summary judgment proceedings and more recently for the purpose of certification a class in a class action suit.

[107] Having sought to advance from these examples, that the *prima facie* standard is well known in our law and used in many types of proceedings, the applicants then argued why it was a more appropriate standard than the one for a final interdict in our proceedings.

[108] The applicants argued that the Tribunal is not a civil court but an administrative body with inquisitorial powers, whose primary purpose is to protect the public interest. Rules followed for final interdicts, such as the

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[43] As the applicants point out in their Supplementary heads of argument paragraph 12.1 relying on the well-known cases of *Webster v Mitchell* 1948 (1) SA 1186 (W) AT 1189 and *Setlogelo v Setlogelo* 1914 AD 221 at 227 .

[44] This view may be incorrect since the CAC decision in *Caxton v Media24 and Novus (supra footnote 11)* at paragraph 84, where the court acknowledges that there is no need for an applicant itself to show it would suffer damage if the interdict is granted. A non-notified merger would undermine the objects of the Act which prohibits the implementation of a merger without the approval of the Commission. Thus if this conclusion is correct to require an investigation pending such determination may well qualify as an interim interdict.

well-known *Plascon-Evans* rule, would be inappropriate to follow rigidly.[45] Thus if a *prima facie* case is made out, but the Tribunal is not satisfied it can grant final relief, it ought to require the Commission to investigate the matter further before rendering a final decision.

[109] The applicants then argued that the *prima facie* standard is not a demanding one and that the courts have held that even if an applicant's case is contradicted by the respondent that would not disentitle it to relief.

[110] The applicants *inter alia* relied for this contention on the recent Supreme Court of Appeal decision in the case of *Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd.*[46] That reading of the case is certainly correct as far as an approach to the facts is concerned. However, the court in that matter went on to discuss the manner in which one draws inferences from the facts to establish a *prima facie* case. It held that, save in exceptional cases, the evidence must consist of allegations of fact not mere assertions. In the words of Wallis JA:

> *"It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. . . . <u>While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory."</u>* (Our emphasis).

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[45] The Applicant's state at page 4 of their supplementary heads of argument that *"The so-called Plascon-Evans Rule" is applicable in motion proceedings before the courts. Its origin is the case of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A). The rule is that in order to succeed in obtaining final relief an applicant must show that they are entitled, on the balance of probabilities, to final relief on the facts alleged by them which are admitted by the respondent, together with the facts alleged by the respondent."*

[46] *Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd* 2013 (2) SA 213 (SCA) at para 39.

[111] If we follow this approach in this case, we come to the conclusion that the applicants have not made out even a *prima facie* case for relief. The factual issues not in dispute are the terms of the Agreement. When the applicants brought this case it was based on an interpretation of the original agreement.

[112] However, it is also not in dispute that the Agreement has since been amended. These amendments have served to dilute certain rights that the original agreement appeared to have conferred on MultiChoice. Most notable was the issue of whether the archive was sterilized from use by the SABC. It is now apparent that it is not.

[113] Thus the case for the applicants has to be assessed, not on the facts in dispute, but on whether the inferences it seeks to draw from the undisputed facts i.e. – the terms of the agreement as amended, are, on a balance of probabilities, following the approach of Wallis JA in *Children's Resource Centre*, the more reasonable ones in determining whether they give rise to a merger situation. We have explained above that they do not. Thus even on a *prima facie* standard as the threshold for the alternative relief, we find the applicants do not succeed. (Note that we do not need to decide in this decision whether the *prima facie* standard should be adopted. We leave this legal issue undecided, given that even if it was the standard, the applicants have not met it on the present record.)

'Mandla-Matla'[47]

[114] Finally the applicants argued that if we were not disposed to grant the above, we should consider granting the relief we granted in another matter in which Caxton was an applicant, which related to merger between a sister company of MultiChoice in respect of a newspaper called Mandla Matla. Here the facts were that Caxton sought a similar order from the Tribunal declaring a

[47] *Mandla-Matla Publishing (Pty) Ltd/ Natal Witness Printing and Publishing Company (Pty) Ltd* transaction ("the *Mandla Matla* matter").

transaction that had not been notified, was a merger. At the hearing of that matter the Commission advised that it was investigating the case prior to the application from Caxton, and that it had suspended the investigation pending the outcome of the application. By agreement with the parties at the hearing, the Tribunal gave an order requiring the Commission to finalise its investigation within a defined period and to report on it, failing which the application could be resumed. Those facts differ markedly from the present case. In the present matter the Commission, although it has not filed papers, advised at the hearing that it was not investigating the matter, and second, there has been no agreement for us to grant such an order. The *Mandla-Matla* case neither fits the present facts nor does its outcome serve as a precedent, and so we decline to grant such an order *in casu.*

[115] We therefore dismiss the prayer for the alternative relief.

COSTS

[116] We do not believe that in this case an award of costs is appropriate. This case concerns an important agreement in the broadcasting industry, in particular involving the public broadcaster and the largest private broadcaster in respect of assets that are the subject of public ownership. The case involved more than the narrow commercial interest of Caxton, but was supported by non-governmental organisations who act in the public interest. Given that the Commission, although apparently aware of the Agreement through a complaint from the industry regulator ICASA, had not acted to investigate the transaction's provenance, nor having been cited as a respondent, was it responsive. Thus the applicants were entitled to approach us for relief.[48] Were costs awards given too hastily in such instances, the role of the public, in alerting the authorities to possible infringements of the Act, might be chilled. Whilst this decision should not be read to say costs would never be awarded, we would be circumspect about doing so.

[48] ICASA filed a complaint with the Commission on 18 July 2014, alleging that the Agreement might contravene section 4 of the Act. This complaint, we are informed, was later withdrawn for reasons that have not been furnished.

ORDER

1) The application and the alternative application are dismissed.
2) There is no order as to costs.

Norman Manoim

11 February 2016
DATE

Imraan Valodia and Medi Mokuena concurring

Tribunal Researchers:	Derrick Bowles assisted by Ammara Cachalia
For the Applicant's	Adv G Marcus SC, Adv S Budlender, Adv G Marriott, Adv L. Kelly as instructed by Nortons Inc.
For the First Respondent:	Adv. D. Unterhalter SC, Adv. M. Norton as instructed by Werksmans Attorneys
For the Second Respondent:	Adv A. R. Bhana SC and Adv P.M. P Ngcongo as instructed by Cliffe Dekker Hofmeyr Attorneys