IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024 / 092117

(1) Reportable Yes
(2) Of interest to other Judges: Yes
(3) Revised: Yes

[redacted] 23/03/2026

Signature Date

In the matter between:

EMEDIA INVESTMENTS (PTY) LTD	Applicant
and	
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	First Respondent
MULTICHOICE (PTY) LTD	Second Respondent
MULTICHOICE SOUTH AFRICA (PTY) LTD	Third Respondent
SUPERSPORT INTERNATIONAL (PTY) LTD	Fourth Respondent
SOUTH AFRICAN BROADCASTING CORPORATION SOC LIMITED	Fifth Respondent
MEDIA MONITORING AFRICA	Sixth Respondent
SOUTH AFRICAN RUGBY UNION	Seventh Respondent

NATIONAL SOCCER LEAGUE	Eighth Respondent
NETFLIX INTERNATIONAL B.V.	Ninth Respondent

JUDGMENT

LABUSCHAGNE J

[1] The first respondent (ICASA) is in the process of conducting an ongoing market inquiry in terms of sec 67 of the Electronic Communications Act,36 of 2005, in respect of competition in the field of broadcast television. The applicant and the second respondent (MultiChoice) are participating in the market inquiry.

[2] MultiChoice submitted written submissions which contain information it regards as confidential. It requested ICASA to classify such information as indicated as confidential and ICASA, acting under its powers in terms of Section 4D of the ICASA Act,13 of 2000, proceeded to classify such information as confidential.

[3] The applicant contends that, in order for it to make meaningful submissions to the enquiry, it requires insight into the confidential information. However, it proposes a confidentiality regime which provides for the confidential information to be provided by means of limited disclosure to the applicant's legal representatives and experts.

[4] ICASA has adopted the position that the empowering Act, Section 4D of the ICASA Act, does not permit ICASA to enter into a confidentiality regime. It

however abides the decision of the court and accepts a draft order on the premise that the court finds that the court is entitled to order such a confidentiality regime. MultiChoice opposes the relief.

[5] A tailored draft order was agreed between eMedia Investments and ICASA (on the strict premise that it is limited to the facts of this matter and is dependent on the court finding that the court has the power to direct such a confidentiality regime) which was provided to the court after conclusion of the argument.

[6] The applicant's position is that the ICASA Act empowers ICASA to disclose information categorised as confidential in terms of Section 4D, subject to a confidentiality regime. ICASA disagrees and so does MultiChoice. The alternative argument is that the court possesses such a power.

BACKGROUND FACTS

[7] On 11 July 2016 ICASA launched an inquiry into subscription broadcasting services in terms of Section 67 of the Electronic Communications Act in order to assess the state of competition and market dynamics in the pay-television sector.

[8] MultiChoice made submissions and ICASA granted MultiChoice confidentiality over three sets of submissions.

[9] On 07 March 2025 ICASA granted MultiChoice confidentiality over written submissions dated 15 February 2024. Some 275 lines have partial or

complete redactions. The redactions have not been explained or categorised. The applicant contends that one can infer that the reductions concern MultiChoice's revenue, forms of operational funds, subscription numbers and costs.

[10] On 05 June 2025 ICASA granted MultiChoice confidentiality over written submissions dated 24 March 2025. Some 167 lines of the text have been redacted, either wholly or partially. eMedia, based on a contextual reading, contends that the reductions concern subscriber behaviour, effectiveness of competition, competition constraints, eMedia's "Openview" service and expenditure.

[11] On 22 August 2025 ICASA granted MultiChoice confidentiality over written submissions dated 04 August 2025. The redactions relate to a consumer survey conducted by MultiChoice, subscriber disconnections or downgrades, evidence of subscribers downgrading DStv subscriptions and taking up OTT subscription.

[12] There is a dispute between eMedia and ICASA whether ICASA's reliance on MultiChoice's confidential information resulted in a change in position on its part. ICASA contends that the information was assimilated in the course of an inquiry in progress and denies any change of stance based on such information.

IS ICASA EMPOWERED TO RELEASE CONFIDENTIAL INFORMATION SUBJECT TO A CONFIDENTIALITY REGIME?

[13] ICASA is a creature of statute, and its powers derive from a battery of statutes, including the ICASA Act 13 of 2000 and the Electronic Communications Act .

[14] In order to determine the powers of ICASA, a process of statutory interpretation needs to be embarked upon. It is trite that this process is a unitary process attributing meaning to the empowering provisions considering text, context and purpose.

THE TEXT OF THE ICASA ACT

[15] Section 4D of the ICASA Act sets out the process of determining confidentiality of documentary submissions. In terms of Section 4D(1) a person submitting information may make a written request that the information be treated confidentially.

[16] ICASA then has 14 days from receiving the request for confidentiality to make a determination whether or not confidentiality will be granted and to provide written reasons for such determination.

[17] Section 4D(3) allows the person who submitted information with a request for it to be treated as confidential, to withdraw such information if ICASA does not determine that the information is confidential.

[18] Section 4D(4) prescribes when ICASA must treat information as confidential. From the aforesaid statutory process, it is apparent that the issue of whether

that information is categorised as confidential or not is between the person submitting the request for confidentiality and ICASA.

[19] ICASA contends that that is the end of the process and the end of its powers. Once information is categorised as confidential, it is to be treated as confidential and may not be disclosed.

[20] eMedia contends that ICASA's power to disclose confidential information subject to a confidentiality regime arises from a conspectus of the Act, including Section 4C, and particularly Section 4C(5). The latter provision reads:

> "The person presiding at an inquiry may, after hearing representations from any person present at and connected to the inquiry and having regard to –
>
> (a) any reasonable apprehension of prejudice or harm to the person to be questioned;
>
> (b) the rights of reply and rebuttal of any person whose rights may be adversely affected; and
>
> (c) whether it is in the interest of the achievement of the objects of the inquiry determine that any part of the inquiry be held behind closed doors and direct that the public or any class thereof may not be present."

[21] eMedia interprets the aforesaid section as an indicator that, if meetings may be held behind closed doors, that information presented may similarly be removed from public scrutiny by a confidentiality regime.

[22] Textually, this is a bridge too far. Section 4C(5) pertains to **in camera** hearings where the circumstances for such hearings are warranted under the Act. It is a procedural step aimed at excluding public participation. It is not on the face of it a provision which deals with substantive evidence -ie, pertaining to disclosure of confidential information. A further indicator that Section 4C(5) cannot be assigned the meaning attached to it by the applicant, is the fact that it relates to proceedings which are chaired by a counsellor of ICASA. It does not relate to the powers of ICASA sitting as a plenary body.

THE CONTEXT OF SECTION 4D

[23] Section 4D of the ICASA Act is part of provisions governing ICASA's power to conduct inquiries.

[24] Sections 4B(3) and (4) grant third parties the right to inspect and obtain copies of written representations submitted in an inquiry. Since those subsections are however expressly subject to Section 4D, they do not permit the disclosure of confidential information.

[25] Section 4D operates as a mechanism for identifying confidential information and also provides a statutory limitation on third party access to such information. The section governs both the determination and protection of confidential information.

[26] As the purpose of Section 4D is to identify and protect confidential information, it is apparent that there is no express provision permitting disclosure of confidential information to third parties.

[27] The applicant argues with reference to related legislation, particularly the Competition Act (which does provide for confidentiality regimes) that such a power to disclose confidential information is implicit, particularly where the market inquiries pertain to the very issue of competition.

[28] The process of statutory interpretation does not entail interpreting a specific statute in the light of another. Statutes that deal with the same subject matter should be construed harmoniously, but limitations imposed in one Act cannot be ignored due to the absence of such limitations in another.

[29] Section 67 of the Electronic Communications Act governs competition matters in the context of the electronic communications industry. Section 67(4B) expressly defers to the confidentiality regime established by the ICASA Act:

> "Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section."

[30] The Electronic Communications Act does not curtail nor supplement ICASA's powers in terms of Section 4D of the ICASA Act.

THE COMPETITION ACT

[31] ICASA and the Competition Commission have concurrent jurisdiction over the Electronic Communications Sector. The Competition Act and the ICASA Act are related statutes in this sector. In terms of Part A of Chapter 5 of the Competition Act, Section 44 governs the right of informants to claim

confidentiality. Claiming confidentiality is similar to Section 4D(1) of the ICASA Act.

[32] However, in terms of Section 44(3) of the Competition Act, the Competition Commission may:

> "(a) Determine whether the information is confidential information; and
>
> (b) If it finds that the information is confidential, make any appropriate determination concerning access to that information."

[33] The powers of the Competition Commission to direct disclosure of confidential information subject to a confidentiality regime are express and are formulated in wide terms. Such a provision is not to be found in the ICASA Act.

PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000

[34] The provisions of PAJA apply where relevant and enabling legislation is silent on the subject of fair procedures. PAJA's provisions will therefore be read into an enabling statute where it is feasible, but not where the legislation is inconsistent with PAJA (*Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paragraph [101]).

[35] The provisions of PAJA regulations which deal with public enquiries, make no provision for confidential information. Chapter 2 governs public hearings and in this context the issue of confidentiality is mentioned. Regulation 15(1) provides for public participation in hearings, except:

"(a) legislation applicable to the hearing provides for the hearing to take place in closed session; or

(b) a matter is raised during the hearing which is –

(i) …

(ii) confidential in terms of legislation; or

(iii) of such a nature that its confidential treatment is for any other reason reasonable and justifiable in an open and democratic society."

[36] PAJA defers to other legislation on the issue of confidentiality. It consequently defers to Section 4D in the ICASA Act.

DOES ICASA HAVE IMPLIED POWERS TO RELEASE CONFIDENTIAL INFORMATION SUBJECT TO A CONFIDENTIALITY REGIME?

[37] The principle of implied powers does not permit such powers beyond what is necessary to achieve the purpose of the provision and all such powers remain subject to legality and rationality review (*Minister of Police v AmaBhungane Centre for Investigative Journalism* 2021 (3) SA 246 (CC), paragraph [64]; *Minister of Police and Others v Fidelity Security Services (Pty) Limited* 2023 (3) BCLR 270 (CC), paragraph [54]).

[38] The applicant contends, with reference to I*ndependent Communications Authority of South Africa v Open Heaven Community Radio* 2026 (1) SA 70 (SCA) that ICASA does have implied statutory power. That case is however distinguishable on the facts. The SCA found that a power to condone (not expressly provided for in the Electronic Communications Act) could be implied:

"… where condonation is not incompatible with public interest and if such condonation is granted by the body for whose benefit the powers were enacted."

[39] The SCA found that Section 19(2) of the ECA was enacted for the benefit of ICASA and therefore its power to condone a late application could be implied.

[40] By contrast, Section 4D of the ICASA Act was not merely enacted for the benefit of ICASA, but also for the benefit of the owner of confidential information.

[41] The ICASA Act does not provide for a right to withdraw confidential information by the person who submitted it, where such information is sought to be disclosed under a confidentiality regime. This right exists if ICASA refuses to classify information as confidential.

[42] The absence of such a check on the potential harm to be suffered by a person trusting that its confidential information would be treated as such, points away from an implied power to release confidential information in terms of the ICASA Act.

[43] It suffices to state that I agree with the interpretation of Section 4D advanced by ICASA and MultiChoice and find that the interpretation advanced by eMedia offends against the text, context and purpose of Section 4D of the ICASA Act. ICASA does not have the power to disclose confidential information to third parties.

THE COURT'S POWER TO ORDER DISCLOSURE OF CONFIDENTIAL INFORMATION SUBJECT TO A CONFIDENTIALITY REGIME

[44] As an alternative to its main proposition, the applicant contends that the court has the power to direct the release of confidential information subject to a confidentiality regime which protects competing rights. ICASA agrees. Both parties contend that this power arises from Section 172(1)(b) of the Constitution.

[45] Section 172(1)(a) of the Constitution is a provision which compels a court in constitutional matters to declare conduct which is inconsistent with the Constitution unconstitutional. Section 172(1)(b) then triggers a court's power to grant relief that is just and equitable in the circumstances. It is in this latter power that the applicant and ICASA find a constitutional basis for a court's power to direct the disclosure of confidential information, subject to a confidentiality regime. The rider however is that it must relate to exceptional circumstances.

RELEVANT CASE LAW

[46] Multichoice contends that sec 4D of the ICASA Act is not being challenged as unconstitutional. ICASA contends that it has not acted in breach of the Constitution in a constitutional matter.This is usually required before sec

172(1)(b) becomes operative. In light thereof, the question arises whether a just and equitable remedy in terms of Section 172(1)(b) may nevertheless be crafted.

[47] In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* the following is stated at paragraph [68] per Madlanga J:

> "[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.
>
> [69] What must be paramount is the relief that a court grants in the vindication of the rule of law. The effect of that is the reversal of the consequences of the constitutionally invalid conduct."

[48] However, where is there no unconstitutional conduct, does this principle find application?

[49] In *Head of Department: Mpumalanga Department of Education and Others v Hoërskool Ermelo* 2010 (2) SA 415 (CC) the Constitutional Court found that a declaration of constitutional invalidity was not always necessary for relief under sec 172(1)(b).

[50] In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (3) BCLR 259 (CC) at paragraph [210] the following is stated:

> "[210] However, this Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable. In Hoërskool Ermelo the Court said about a just and equitable remedy:
>
> 'The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.'
>
> [211] The power to grant a just and equitable remedy is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution. In Hoërskool Ermelo Moseneke DCJ declared:
>
> 'A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute

between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution'."

[51] In *Blind SA v President of the Republic of South Africa* 2025 (7) BCLR 757 (CC) the Constitutional Court stated:

"[41] In Hoërskool Ermelo, this Court held that in deciding on the remedy in a constitutional matter within the Court's power, the litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made'. The Court further held that the power to order just and equitable relief is available even though the case is not one in which a court makes a declaration of invalidity nor one in which the outcome hinges on constitutional invalidity. To do this, the Court reasoned, places substance over form."

[52] From the aforesaid it is apparent that the court has the power, even in the absence of the need to declare conduct unconstitutional in a constitutional matter, to formulate a just and equitable remedy. It is however a power to be exercised only in exceptional circumstances.

[53] The court therefore has the power in terms of Section 172(1)(b) to grant just and equitable relief in the absence of a constitutional challenge. MultiChoice contended that the absence of a constitutional challenge to Section 4D of the ICASA Act stands as a bar to the crafting of a Section 172(1)(b) remedy.

Whilst such a challenge to the constitutionality of the section under Section 172(1)(a) would normally be the trigger for the exercise of a court's powers under Section 172(1)(b), the Constitutional Court has opened the door to just and equitable relief in the absence of such a constitutional challenge.

[54] Having found that it is not necessary for Section 4D to be challenged before relief under Section 172(1)(b) becomes competent, the question is whether it is appropriate to grant such relief. It is axiomatic that relief under Section 172(1)(b) on the basis of justice and equity is not there for the asking. The facts and circumstances need to be exceptional.

[55] A consideration in favour of permitting a confidentiality regime in this case arises from the nature of the inquiry being conducted. It is a Section 67 inquiry in terms of the Electronic Communications Act, where the issue of competition and an inquiry into its ramifications is central to the process that ICASA has embarked upon. The comparative statutory position between ICASA and the Competition Tribunal comes into stark focus. The Competition Tribunal is empowered by statute to order a confidentiality regime whereas ICASA is not. This however appears to be a legislative choice.

[56] However, in order for ICASA to have the benefit of meaningful submissions in discharging its statutory role, the facts of this matter present circumstances where the inability of eMedia's experts and attorneys to assess confidential information may very well undermine the cogency of deliberations by ICASA in respect of the information before it in the inquiry. I regard the disparity of positions between ICASA and the Competition Tribunal as a consideration as

to why, on the facts of this matter, the court should exercise its powers to order a confidentiality regime.

[57] This is not to say that this is of general application in all matters pertaining to Competition inquiries. eMedia has asserted its interests in this particular inquiry as far as those identified portions of confidential information, accepted as such by ICASA, relates.

[58] The inability of eMedia to access (subject to a confidentiality regime) information required for its legal representatives and experts to digest and respond to, may undermine the fairness of the process followed in the inquiry. More importantly, it may adversely affect ICASA's deliberations on the cogency of material before it.

[59] I am therefore persuaded that the circumstances of this specific matter are exceptional and warrant an order providing for a protected disclosure of confidential information.

[60] The draft order drafted between eMedia and ICASA balances the interests of affected parties, particularly those of MultiChoice. I am satisfied that such an order is appropriate and agree with the proposed cost order.

CONCLUSION

[61] In the premises I make the following order:

1. This order shall apply strictly to the dispute between the parties in this matter and shall not in any way constitute precedent for the purposes of any other matter or process not considered by the court.

2. Subject to eMedia's attorneys signing the confidentiality undertaking annexed to this draft order marked **"A"**, ICASA is ordered to furnish the attorneys of eMedia with unreduced copies of the following documentation within 14 (fourteen) working days of this order:

   2.1 ICASA's supplementary discussion document for the inquiry into subscription television broadcasting services, published in Government Gazette (No. 51848) on 06 January 2025 ("2025 Draft Discussion Document");

   2.2 MultiChoise's 15 February 2024 Response to ICASA's November 2023 Questionnaire;

   2.3 MultiChoise's response to ICASA's 2025 Draft Discussion document published on ICASA's website on or about April 2025;

   2.4 MultiChoise's supplementary submissions in response to the 2025 Draft Discussion document (including Answers to Question Posed to MultiChoise by eMedia in advance of oral hearings of July 2025) that were filed on 4 August 2025.

3. On the copy of each document referred to in paragraph 1, ICASA shall mark or record that part of the document over which ICASA has previously granted confidentiality in terms of Section 4D of the ICASA Act ("confidential information").

4. Save for purposes of consulting with counsel or an independent expert, who will be required to sign the confidentiality undertaking annexed marked **"A"**, eMedia's attorneys shall not disclose the confidentiality information to any other party, including eMedia.

5. The confidential undertaking concluded in terms of this order shall be an order of court and any unauthorised disclosure of the confidential information shall constitute a violation of the court order.

6. Should eMedia dispute any claim to confidentiality and should the parties be unable to resolve such dispute, eMedia shall on notice to the first to fourth respondents and to any person having an interest therein, have the right to approach a Judge of the Pretoria High Court in Chambers for a ruling on the dispute.

7. eMedia shall be afforded a period of 60 (sixty) working days from the date of the provision of the information identified in Prayer 1 to make supplementary submissions to ICASA.

8. ICASA is directed not to take steps to finalise its inquiry unless and until the requested confidential information and submissions have been provided to eMedia's attorneys in terms of this order, eMedia

has had an opportunity to comment on the information within the period stipulated in paragraph 7 of this order, and ICASA has taken those submissions into account.

9. Each party is directed to bear its own costs.

[redacted]

____

LABUSCHAGNE J
JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR APPLICANT : ADV MAX DU PLESSIS SC

ADV PUDIFIN-JONES

ATTORNEY FOR APPLICANT : NORTON INC

COUNSEL FOR RESPONDENT : ADV STEINBERG SC

ADV RAMOGALE

ATTORNEY FOR RESPONDENT : MKHABELA HUNTLEY ATTORNEYS INC