



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 121/17

In the matter between:

**S.O.S SUPPORT PUBLIC  
BROADCASTING COALITION**

First Applicant

**TRUSTEES FOR THE TIME BEING OF THE  
MEDIA MONITORING PROJECT BENEFIT TRUST**

Second Applicant

**CAXTON AND CTP PUBLISHERS  
AND PRINTERS LIMITED**

Third Applicant

and

**SOUTH AFRICAN BROADCASTING  
CORPORATION (SOC) LIMITED**

First Respondent

**MULTICHOICE (PTY) LIMITED**

Second Respondent

**COMPETITION COMMISSION  
OF SOUTH AFRICA**

Third Respondent

**Neutral citation:** *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* [2018] ZACC 37

**Coram:** Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

**Judgment:** Kathree-Setiloane AJ (unanimous)

**Heard on:** 23 November 2017

**Decided on:** 28 September 2018

**Summary:** Competition Act 89 of 1998 — notifiable merger — Competition Commission — investigatory powers — Part B of Chapter 5 of the Competition Act

South African Broadcasting Corporation — Competition Tribunal — interpretation of court orders — admission of new evidence on appeal

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## ORDER

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On appeal from the Competition Appeal Court:

1. Leave to appeal is granted.
2. The appeal is upheld, and the Competition Appeal Court's order of 28 April 2017 is set aside and replaced with the following:
  - (a) It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.
  - (b) The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order, within 30 court days of this order.
  - (c) The first and second respondents are ordered jointly and severally to pay the costs of the application, including the costs of two counsel.
3. The appeal against the order of the Competition Appeal Court dismissing the applicants' application to adduce new evidence is dismissed with no order as to costs.

4. The applicants' application to adduce new evidence on appeal is dismissed with no order as to costs.
5. The Competition Commission's application to adduce new evidence on appeal is dismissed with no order as to costs.

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## JUDGMENT

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KATHREE-SETILOANE AJ:

[1] At issue is the interpretation the Competition Appeal Court gave on 28 April 2017 to its own order of 24 June 2016 concerning the powers of the Competition Commission (Commission). Behind that issue lies the question of the Commission's powers in a matter of considerable public importance, namely a controversial agreement between the public broadcaster, the South African Broadcasting Corporation (SABC), and MultiChoice (Pty) Limited (MultiChoice).

[2] The applicants – S.O.S Support Public Broadcasting Coalition (SOS Coalition), Media Monitoring Project Benefit Trust (Media Monitoring Trust) and Caxton and CTP Publishers and Printers Limited (Caxton) – seek leave to appeal against the order of the Competition Appeal Court which was handed down on 28 April 2017 (April 2017 order). This order clarified the meaning of the Competition Appeal Court's earlier order of 24 June 2016 (June 2016 order) which set aside a decision of the Competition Tribunal (Tribunal) that the Commercial and Master Channel Distribution Agreement (agreement) concluded between the SABC and MultiChoice on 3 July 2013 did not give rise to a notifiable merger.

[3] The SABC and MultiChoice are the first and second respondents in the application for leave to appeal, respectively. The SABC is the national public broadcaster in South Africa. MultiChoice is the largest private television broadcast

company in South Africa. The Commission, a regulatory body established in terms of section 19(1) of the Competition Act,<sup>1</sup> is the third respondent. The Commission supports the relief sought by the applicants in this application.

[4] SOS Coalition and Media Monitoring Trust are non-profit organisations that campaign for access to high quality public broadcasting that is in the public interest. Media Monitoring Trust is a member of SOS Coalition, which represents a broad spectrum of civil society stakeholders committed to the broadcasting of quality, diverse, citizen-oriented public interest programming that is aligned with the objectives of the Constitution and the Electronic Communications Act.<sup>2</sup>

[5] Their application for leave to appeal is supported by Caxton, a listed company which publishes and prints books, magazines and newspapers in South Africa. It is also involved in commercial printing and is exploring the potential expansion of its business into digital television and video content on South Africa's migration to digital terrestrial television (DTT).

[6] This application arises in the context of a pending, court-sanctioned, investigation by the Commission into whether the agreement constitutes a notifiable merger. Although concluded on 3 July 2013, the agreement only became public when it was later leaked.

[7] The agreement had a five-year term. The television channels licensed under the agreement included: (a) an entertainment channel to be developed and produced by the SABC for MultiChoice, and in respect of which MultiChoice would have exclusive distribution and marketing rights; and (b) free-to-air channels (FTA) to be transmitted by the SABC on its DTT platform, and in respect of which MultiChoice would have non-exclusive distribution and marketing rights. MultiChoice agreed in terms of the agreement to pay the SABC fees of more than R500 million over a period

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<sup>1</sup> 89 of 1998.

<sup>2</sup> 36 of 2005.

of five years, in exchange for which the SABC undertook that the entertainment channel, to be broadcast on the MultiChoice platform, would consist mainly of content from the SABC's substantial archive of programmes (SABC archive) and it would not encrypt any of its FTA channels on South Africa's migration to DTT.

### *Litigation history*

[8] The agreement has been the subject of a hearing at the Tribunal and three separate hearings in the Competition Appeal Court. The applicants consistently argued in both these fora that the agreement amounted to a notifiable merger as defined in the Competition Act.

### *In the Tribunal*

[9] In February 2015, the applicants bypassed the Commission and made an application directly to the Tribunal for an order compelling the SABC and MultiChoice to notify the agreement to the Commission. In the alternative, they sought an order that the Commission exercise its investigatory powers to determine if the agreement is notifiable as a merger.

[10] The Tribunal dismissed the applicants' application on 11 February 2016. The SABC challenged the Tribunal's jurisdiction on the basis that the Commission is the forum of first instance to investigate a merger or whether a transaction is a notifiable merger. The Tribunal held that although the parties to a notifiable merger should first approach the Commission, the failure to do so does not constitute a bar to the Tribunal's jurisdiction to hear such an application.<sup>3</sup> The Tribunal accordingly concluded that it had the authority to compel the parties to notify a transaction giving rise to a merger to the Commission.<sup>4</sup> On the merits of the application, the Tribunal found that the agreement did not give rise to a notifiable acquisition of control by

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<sup>3</sup> *Caxton and CTP Publishers and Printers Ltd v MultiChoice (Pty) Ltd*, unreported decision of the Competition Tribunal, Case No 020727 (11 February 2016) (Tribunal decision) at para 26.

<sup>4</sup> *Id* at para 27.

MultiChoice and that the *Plascon-Evans* rule<sup>5</sup> precluded it from granting the applicants any relief. The Tribunal refused to grant the applicants the alternative relief sought because they had not made out a prima facie case that the conclusion of the agreement between the SABC and MultiChoice constituted a merger.<sup>6</sup>

*In the Competition Appeal Court*

[11] The applicants appealed against the Tribunal’s decision to the Competition Appeal Court. On 24 June 2016, the Competition Appeal Court set aside the Tribunal’s decision that the conclusion of the agreement did not give rise to a notifiable merger and referred the transaction to the Commission. In doing so, it reasoned that “[i]t must be in the public interest for transactions involving the public broadcaster to be examined with a particular consideration of the purpose of the [Competition] Act” and that there was “a considerable lack of clarity on a number of factual aspects which were disputed”.<sup>7</sup> Although acknowledging that on the *Plascon-Evans* test the respondents’ version is preferred, the Competition Appeal Court sharply criticised the Tribunal for deciding the matter on its strict application, and for failing to invoke its wide inquisitorial powers to investigate the agreement.<sup>8</sup> In this regard, it stated that—

“the Tribunal is clothed with inquisitorial powers. A merger proceeding is not a trial in the ordinary civil sense of that word. The Tribunal should employ inquisitorial powers to interrogate evidential questions beyond the strict confines of *Plascon-Evans* to ensure that the full evidential complexity is available to it in order that it might come to a decision which advances the purposes of the [Competition] Act. Mergers are not a place for the accusatorial formation adopted by the Tribunal in all too many of its hearings. Again it regrettably failed to inquire in this particular case. There are many questions regarding disputed factual contentions which we have

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<sup>5</sup> In terms of which in motion proceedings the matter must in general be decided on the version of the respondent. See *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) at 638.

<sup>6</sup> Tribunal decision above n 3 at 111.

<sup>7</sup> *Caxton and CTP Publishers and Printers Ltd v MultiChoice (Pty) Ltd* 2016 JDR 1372 (CAC) (Competition Appeal Court judgment) at para 110.

<sup>8</sup> *Id.*

raised in this judgment which could have been better answered if an inquisitorial approach had been adopted and a more sustained line of questioning been implemented by the Tribunal in the hearing before it.”<sup>9</sup>

[12] The Competition Appeal Court described the case as being exceptional as there was “enough evidential doubt, coupled to a clear public interest component”, in the transaction that required “a less formalistic and more substantive approach to the enquiry”.<sup>10</sup> In conclusion, it stated:

“We are cognisant of the fact that the agreement has been entered into in July 2013 and that the matter must be brought to finality. Accordingly a restricted timetable must be employed for any relief granted. Furthermore, in the event that the Competition Commission files a report to the effect that the agreement does not give rise to a change of control in terms of the [Competition] Act, it would appear to be a fruitless exercise for the matter to be reheard by the Tribunal in the light of the exhaustive enquiry which has already taken place in this court and previously in the Tribunal.”<sup>11</sup>

[13] The Competition Appeal Court, accordingly, made the following order:

- “1. The order of the Tribunal of 11 February 2016 is set aside.
2. [The SABC and MultiChoice] are directed to provide the Competition Commission within 21 days of this judgment [with] all documentation including but not limited to all correspondence, board minutes, internal memoranda pertaining to the negotiation, conclusion, and implementation of the agreement of 3 July 2013.
3. The Competition Commission is directed within 30 days of the receipt of the aforesaid information and documentation to file a report with the Competition Tribunal recommending whether or not the agreement gives rise to a notifiable change of control.
4. In the event that the Competition Commission recommends that the agreement gives rise to a notifiable change of control which falls within the

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<sup>9</sup> Id.

<sup>10</sup> Id at para 111.

<sup>11</sup> Id at para 112.

definition of a merger in terms of section 12 of the [Competition] Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal to determine whether the conclusion of the agreement did entail such a merger as defined.”<sup>12</sup>

[14] In a separate concurring judgment, Vally AJA held that to make a definitive determination as to whether the agreement gave rise to a notifiable merger, “it would be necessary to have regard to more evidence than is presently available. The information that would shed more light on this important issue rests in the hands of MultiChoice and the SABC”.<sup>13</sup>

### *Approach to the Tribunal*

[15] Following the June 2016 order, the SABC and MultiChoice handed over a limited number of documents to the Commission but claimed that the bulk of the documents sought by the Commission either did not exist, could no longer be traced, or were not relevant. The Commission found itself unable to make a recommendation based on the limited documents received from the SABC and MultiChoice. It therefore wrote to the Tribunal on 4 October 2016 recording that the documents received were not sufficient for it to discharge its court mandated task. And that in order to give proper effect to the June 2016 order, it intended to interrogate relevant executives and board members of the SABC and MultiChoice who were involved in the negotiation, conclusion and implementation of the agreement. The Commission accordingly requested the Tribunal to issue a directive on whether it was entitled to conduct interrogations of this kind in order to give effect to the June 2016 order. The SABC and MultiChoice objected on the basis that the Tribunal had no jurisdiction to entertain the Commission’s request. The Tribunal declined the request for a directive on the same basis.

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<sup>12</sup> Competition Appeal Court judgment above n 7 at para 114.

<sup>13</sup> Id at para 52.

*Urgent application before the Competition Appeal Court (October 2016)*

[16] In the face of the impasse, in October 2016 the applicants, supported by the Commission, applied urgently to the Competition Appeal Court for the following relief:

- (a) Declaring that the Commission is authorised under the June 2016 order to exercise its powers of investigation under Part B of Chapter 5 of the Competition Act (which include powers to subpoena witnesses to appear before it).
- (b) Alternatively, to vary the June 2016 order to authorise the Commission to do so, or to issue a fresh order to this effect.

[17] The application was heard on 2 December 2016 and judgment was reserved. Subsequently, a Parliamentary inquiry commenced into the SABC's affairs. On 8 and 9 December 2016, representatives of the SABC, including current board member Mr Krish Naidoo and former group CEO, Mrs Lulama Mokhobo, testified before the inquiry regarding the conclusion of the agreement with MultiChoice. The applicants sought to introduce the transcripts from this inquiry on appeal to the Competition Appeal Court.

[18] On 28 April 2017, the Competition Appeal Court handed down judgment.<sup>14</sup> It held that its June 2016 order “did not and cannot be read to give the [Commission] powers in terms of section 49A of the Act”.<sup>15</sup> It also held that the order was “clear and unambiguous” and that it “expressly confined the source of the inquiry to be conducted by the Commission *exclusively* to documentation as set out in the order”.<sup>16</sup> (Emphasis added.)

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<sup>14</sup> *Caxton and CTP Publishers and Printers Limited v South African Broadcasting Corporation (SOC) Limited*, unreported judgment of the Competition Appeal Court, Case No 140/CAC (28 April 2017) at para 29.

<sup>15</sup> *Id* at para 31.

<sup>16</sup> *Id*.

[19] In relation to the meaning of its June 2016 order and the applicants' application to adduce further evidence, the Competition Appeal Court held that the Commission was not entitled to interview Mr Naidoo or Mrs Mokhobo. It held that "an order which would empower [the Commission] to conduct interviews with Mr Naidoo and Ms Makhobo falls outside of the scope of the order which was granted on 24 June 2016".<sup>17</sup>

[20] It is against this order – the April 2017 order – that the applicants seek leave to appeal.

### *This Court*

#### *Jurisdiction and leave to appeal*

[21] The Commission is a regulatory body established by section 19(1) of the Competition Act. The ambit of its investigatory powers under the Competition Act is central to this application for leave to appeal. This question is manifestly a constitutional issue.<sup>18</sup> There is a reasonable prospect of the appeal succeeding as well.

[22] Although the agreement between MultiChoice and the SABC ended in July 2018, this does not diminish the necessity for the Commission to investigate whether the agreement constitutes a notifiable merger. We were informed that the agreement may be renewed or a similar one may be concluded between the SABC and MultiChoice, having regard especially to the ongoing debates on encryption regarding South Africa's migration to DTT. It is essential, for this reason, that clarity be obtained from the competition authorities on whether the agreement constitutes a notifiable merger as defined in the Competition Act. Accordingly, the interests of justice require that leave to appeal be granted.

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<sup>17</sup> Competition Appeal Court judgment above n 14.

<sup>18</sup> *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (*Senwes*) at para 17.

*Issues for determination*

[23] The June 2016 order of the Competition Appeal Court directed the Commission to investigate whether the agreement constituted a “notifiable merger” as defined in the Competition Act. If it is found to be a notifiable merger as defined, then the SABC and MultiChoice would be in contravention of the Competition Act for failing to obtain approval for the merger, from the Commission, the Tribunal or the Competition Appeal Court, before implementing it.<sup>19</sup> This Court is, however, not required in the appeal to determine whether the agreement amounts to or gives rise to a merger. Based on the June 2016 order, that is a matter which the Commission must investigate.

[24] This appeal, by contrast, is concerned with the ambit of the powers of the Commission to investigate whether the agreement constitutes a merger as defined in the Competition Act. As is expected, there are two sharply divergent views on this issue. The SABC and MultiChoice contend that the Commission is limited to a “desktop study” of the documents produced by each of them. On their version, the Commission is precluded from exercising any further powers of investigation, coercive or non-coercive, and is barred even from interviewing willing witnesses including SABC board members who have made public statements on relevant issues.

[25] The applicants, supported by the Commission, argue that the Commission has available to it its full range of standard investigative powers, as set out in Part B of Chapter 5 of the Competition Act, which includes the ability to interview individuals who were involved in the negotiation and conclusion of the agreement. They contend that these powers are essential for the Commission to adequately fulfill its court-mandated task of investigating whether the agreement gives rise to a merger, in

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<sup>19</sup> Section 13A(3) provides:

“The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.”

particular, because of the lack of documents made available by the SABC and MultiChoice.

[26] Accordingly, the following issues arise for determination:

- (a) Does the Competition Act authorise the Commission to exercise its investigatory powers under Part B of Chapter 5 on whether the agreement constitutes a notifiable merger?
- (b) The proper interpretation of the June 2016 order by the Competition Appeal Court. In particular, does it permit the Commission to exercise its investigative powers under Part B of Chapter 5 of the Competition Act to discharge its obligations under the order?
- (c) If the June 2016 order does not have the meaning for which the applicants contend, should the Competition Appeal Court have: (i) varied the order to accord it that meaning, or (ii) issued a new order in the terms sought by the applicants, despite the Competition Appeal Court having discharged its function by determining the appeal before it?

[27] The SABC and MultiChoice contend that the first issue is not for determination on appeal, as it was neither raised by the applicants in the Competition Appeal Court nor determined by it. On the contrary, I consider this issue to be fundamental to the primary issue on appeal that is the proper interpretation of the June 2016 order and, in particular, whether it permits the Commission to exercise its investigative powers, under Part B of Chapter 5 of the Competition Act, to discharge its obligations under the order.

[28] The Commission gets its original investigative powers from the Competition Act and not the June 2016 order. Consequently, if the Commission may ordinarily exercise its investigatory powers in Part B of Chapter 5 in investigating

whether a transaction is a notifiable merger, then the only question remaining for determination is whether the June 2016 order precluded it from doing so.

[29] The new issue raised is a point of law that turns on the interpretation of the Competition Act. It is central to the primary question on appeal. It can prejudice no-one and no prejudice is claimed. It is accordingly in the interests of justice that this issue be determined on appeal.

*Are the powers in Part B of Chapter 5 available to the Commission to investigate mergers and transactions that constitute mergers?*

[30] The provisions of the Competition Act must be interpreted to give effect to their purpose in the context of the Act as a whole.<sup>20</sup> Section 1(2)(a) of the Competition Act demands that its provisions be interpreted in a manner consistent with the Constitution, and which give effect to the purposes of the Act set out in section 2. The purpose of the Act is “to promote and maintain competition in the Republic” to, amongst other things: (a) promote the efficiency, adaptability and development of the economy; (b) provide consumers with competitive prices and product choices; and (c) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.<sup>21</sup>

[31] In *Senwes*, this Court considered the statutory framework of the functions of the Commission and the Tribunal.<sup>22</sup> Echoing the long title of the Competition Act,<sup>23</sup> the Court observed that the Act was enacted—

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<sup>20</sup> *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

<sup>21</sup> Sections 2(a), (b) and (e) of the Competition Act.

<sup>22</sup> *Senwes* above n 18 at para 3 and *Competition Commission v Loungefoam (Pty) Ltd* [2012] ZACC 15; 2012 (9) BCLR 907 (CC); 2012 JDR 1119 (CC) at para 2.

<sup>23</sup> The long title of the Competition Act reads:

“To provide for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and related matters.”

“to provide for, among other matters, the establishment of the Competition Commission which is charged with the investigation of restrictive practices, abuse of dominant position and the evaluation and approval of mergers. It also established a Competition Tribunal whose responsibility it is to adjudicate these matters. The Act is aimed at promoting and maintaining competition. Some of its objectives are directed at addressing the inequalities and imbalances which were created by the apartheid order.

The Act seeks to promote a greater spread of business ownership so as to increase access to it by historically disadvantaged people. It sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved. It further seeks to provide consumers with competitive prices for goods and services. It prohibits trade practices which undermine a competitive economy.”<sup>24</sup> (Footnotes omitted.)

[32] As a specialist regulator, the Commission is tasked with, among other things, the regulation of mergers that have an anti-competitive effect in South Africa.<sup>25</sup> In terms of section 20(1) of the Competition Act, the Commission is independent, subject only to the Constitution and the law and must be impartial and perform its functions without fear, favour or prejudice. It is empowered to approve a proposed merger outright, approve it subject to conditions, or refuse merger approval where the proposed transaction will lead to a substantial lessening of competition, and cannot be justified by merger-specific pro-competitive gains or in the public interest.<sup>26</sup>

[33] Parliament has crafted a compulsory “self-notification” pre-merger regime. The Competition Act obliges parties to notify the Commission of proposed transactions when two jurisdictional facts are present: the first is where the proposed transaction meets the definition of a “merger” in section 12(1), and the second is

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<sup>24</sup> *Senwes* above n 18 at paras 3-4.

<sup>25</sup> In terms of section 21(1)(e) of the Competition Act, one of the functions of the Commission is to, “authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3”.

<sup>26</sup> Section 12A of the Competition Act, headed “Consideration of mergers” sets out the approach that the Commission is enjoined to follow when conducting a substantive analysis of a proposed merger.

where it meets the financial threshold for an intermediate or large merger.<sup>27</sup> Since merger approval gives the merged firm immunity from any future challenges, “firms are obliged to notify mergers before they are implemented and to delay implementation until they get regulatory approval”.<sup>28</sup>

[34] Section 12(1) of the Competition Act defines a merger as follows:

- “(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.
- (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through—
- (i) purchase or lease of the shares, an interest or assets of the other firm in question; or
  - (ii) amalgamation or other combination with the other firm in question.”

[35] Section 12(1)(b) provides that a merger may be achieved in any manner, including where one firm purchases or leases an interest or assets of another firm;<sup>29</sup> or when one firm acquires the ability to “materially influence” the policy of another firm.<sup>30</sup> These are the grounds on which the applicants contend the agreement gives rise to a merger.

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<sup>27</sup> Section 13A(1) of the Competition Act provides that a party to an “intermediate or large merger must notify the Competition Commission of that merger in the prescribed manner and form”. A merger is classified as an “intermediate” merger where the combined annual turnover or asset value of acquiring and target firms equals or exceeds R560 million, and where the turnover or asset value of the target firm equals or exceeds R80 million; a merger is classified as a “large” merger where the combined annual turnover or asset value of acquiring and target firms equals or exceeds R6.6 billion, and where the turnover or asset value of the target firm equals or exceeds R190 million.

<sup>28</sup> In *Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd* [2007] ZACT 83 (*Netcare*) at para 7.

<sup>29</sup> Section 12(1)(b)(i) of the Competition Act. See *Competition Commission v Edgars Consolidated Stores Limited* [2003] 1 CPLR 151 (CT) at para 37.

<sup>30</sup> Section 12(2)(g) provides that a person controls a firm if that person—

“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) to (f).”

See *Caxton and CTP Publishers and Printers Ltd v Media24 (Pty) Ltd* [2015] ZACAC (25 November 2015) at para 35ff, for a definitive exposition of the concept of material influence.

[36] Section 13A(1) and (2) of the Competition Act oblige parties to a notifiable merger (intermediate or larger mergers) to notify the Commission in the manner and form prescribed, and to furnish copies of the notification to any registered trade union representing a substantial number of the firm's employees, or to the employees concerned.<sup>31</sup> Section 13A(3) prohibits parties from implementing a merger until it is approved by the Commission, the Tribunal or the Competition Appeal Court, as the case may be.<sup>32</sup>

[37] A failure to formally notify the Commission of a notifiable merger attracts an administrative penalty under the Competition Act. Section 59(1)(d) empowers the Tribunal to impose an administrative penalty on parties to a merger that have—

- (a) failed to give notice of the merger;
- (b) implemented it in contravention of a decision of the Tribunal or the Commission;
- (c) implemented it contrary to any conditions imposed; and
- (d) proceeded to implement it without approval.<sup>33</sup>

Unlike other contraventions of the Competition Act, the legislature has imposed administrative penalties for “first time” contraventions of section 13A.<sup>34</sup>

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<sup>31</sup> The requirement to give notice only applies in respect of “intermediate” or “large” mergers, which are discussed in n 27 above.

<sup>32</sup> Section 13A(3) provides:

“The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.”

<sup>33</sup> Section 59(1)(d) must be read with section 59(2), which provides that an administrative penalty may not exceed 10% of the firm's annual turnover and its exports in the preceding financial year. See, for example, the recent settlement agreement approved by the Tribunal in the matter between the *Competition Commission and Fruit & Veg City Holdings (Pty) Ltd* [2015] 2 CPLR 553 (CT) in terms of which the Commission sought an order from the Tribunal against the parties to a series of transactions that should have been notified as a merger. The parties settled with the Commission, agreeing to pay a penalty for failing to notify the Commission as required. The Tribunal confirmed the settlement agreement.

[38] Section 13B of the Competition Act makes provision for merger investigations. It provides:

- “(1) The Competition Commission may direct an inspector to investigate any merger and may designate one or more persons to assist the inspector.
- (2) The Competition Commission may require any party to a merger to provide additional information in respect of the merger.
- (3) Any person, whether or not a party to or a participant in merger proceedings, may voluntarily file any document, affidavit, statement or other relevant information in respect of that merger.”

[39] Section 21(1)(c) and (2)(c) deal with the functions of the Commission. They provide:

- “(1) The Competition Commission is responsible to—  
...  
(c) investigate and evaluate alleged contraventions of Chapter 2;  
...  
(2) In addition to the function listed in subsection (1), the Competition Commission may—  
...  
(c) perform any other function assigned to it in terms of this Act or any other Act.”

[40] MultiChoice contends that the Competition Act, as presently framed, does not confer *any* of the powers contained in Part B of Chapter 5 on the Commission to investigate alleged contraventions of section 13A. It relies on section 21(1)(c), which it submits limits the Commission’s investigatory powers to alleged infringements of Chapter 2. The effect of the limitation, they posit, is that the Part B, Chapter 5 powers apply only to investigations conducted by the Commission into whether a firm is

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<sup>34</sup> This is in contrast to certain other contraventions listed in section 59(1)(b) where penalties may only be imposed “if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice”.

guilty of engaging in a “prohibited practice” under Chapter 2, for instance, price-fixing, market division, bid rigging or abuse of dominance.

[41] This argument is misplaced as the long title of the Competition Act, which plays a central role in the interpretative process, expressly states that the Commission is responsible for the investigation of mergers. Section 13B of the Act then assigns that function to the Commission. Accordingly although section 21(1)(c) of the Competition Act does not explicitly refer to mergers, that is an apparent omission which the proposed amendment to section 21(1) of the Competition Act intends to cure.<sup>35</sup> It seeks to do this by making it clear that the Act already includes that function.<sup>36</sup> However, this does not mean that the Commission presently lacks this power. On the contrary, this Court held in *NEHAWU* that “it is permissible to refer to a subsequent statute if it throws light on the meaning of a provision in an earlier statute”.<sup>37</sup>

[42] The omission in section 21(1)(c) is, in any event, not material because section 21(2)(c) of the Competition Act provides that “[i]n addition to the functions listed in subsection (1), the Competition Commission may . . . perform any other function assigned to it, in terms of *this* or any other Act”. Section 21(2)(c) read with section 13B put beyond question that the Commission is authorised to investigate notifiable mergers in Chapter 3 of the Competition Act. But does the power to investigate a notifiable merger also extend to whether a transaction constitutes a notifiable merger or gives rise to a notifiable merger? Sutherland comments that:

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<sup>35</sup> See Competition Amendment Act 1 of 2009 (Amendment Act).

<sup>36</sup> Id. Paragraph (c) of subsection (1) of the Competition Act currently reads: “[t]he Commission is responsible to . . . investigate and evaluate alleged contraventions of Chapter 2.” It is due to be substituted by section 5(a) of the Amendment Act to refer to “Chapter 2 or 3”. The Amendment Act will be put into operation by proclamation.

<sup>37</sup> *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 66.

“The competition authority, which would have the power to adjudicate an acquisition in terms of section 12A once it constitutes a merger, should always have the power to first determine whether it constitutes a merger.”<sup>38</sup>

[43] The power to investigate whether a transaction constitutes a notifiable merger stems from section 13A(1) and (3) read with section 59(1)(d)(i) of the Competition Act. Section 13A(1) obliges a party to an intermediate or large merger to notify the Commission of the merger. Section 13A(3) prevents prior implementation of a notifiable merger without the approval of the Commission, the Tribunal or the Competition Appeal Court. If the Commission finds that a notifiable merger has been implemented without approval, it must refer that transaction to the Tribunal for adjudication. Section 59(1)(d)(i) empowers the Tribunal to impose an administrative penalty on firms that fail to give notice of a merger or implement a notifiable merger without prior approval. The necessary implication of these provisions is that the Commission is authorised to investigate transactions to determine whether they constitute or give rise to a notifiable merger as defined in the Competition Act, and whether proceedings should be initiated in the Tribunal to impose appropriate penalties.

[44] What would it mean to merger regulation if the Competition Act is construed as not permitting the Commission to investigate transactions that may constitute notifiable mergers, or are suspected of being so but are implemented without notification? In a compulsory “self-notification” statutory regime, where parties to a transaction fail or refuse to notify the Commission of a merger, the Commission would be powerless to investigate whether it is notifiable or not. This would effectively leave the Commission at the mercy of parties to a transaction. If those parties notify the Commission of a merger, then it has the full range of investigative

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<sup>38</sup> Sutherland, *Competition Law of South Africa*, Issue 20, 10-23. In Issue 18, at paras 11.3.5.1, he expressed the similar view that section 13B “would seem to include the investigation of whether a notifiable merger has been implemented without approval, and whether a merger as implemented complies with the conditions for merger approval”.

powers. But if they refuse to notify the Commission, even intentionally, the Commission is powerless to investigate.

[45] Another consequence from this interpretation is that section 13A(1) and (3) of the Competition Act, which obliges firms to notify mergers and prohibits their implementation until investigated and approved by the Commission, would become superfluous. As would section 59(1)(c) which imposes administrative penalties on firms for breaching these obligations. Accordingly, if the Commission, a specialist regulator, tasked with enforcing the Competition Act, were found to be without powers to investigate transactions to enforce these provisions, this would emasculate the entire “edifice” of compliance that characterises the merger regime of self-notification under the Competition Act.<sup>39</sup> That would undermine the purpose of merger regulation which the Competition Appeal Court in *Bulmer* articulated as follows:

“The applicable sections of the Act thus provide a clear indication of the purpose of Chapter 3, namely that transactions which are likely [to] substantially lessen competition should be carefully examined by the competition authorities . . . It follows that the [Competition] Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pointer in favour of a broad interpretation to [section] 12 of the Act.”<sup>40</sup>

#### *Part B, Chapter 5 powers*

[46] Chapter 5 of the Competition Act, entitled “Investigation and Adjudication Procedures”, confers various powers on the Commission, including coercive powers to enable it to exercise its functions under the Competition Act. Part B of Chapter 5 confers powers of search and entry and summons on the Commission.

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<sup>39</sup> Above n 28 at para 7.

<sup>40</sup> *Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd / Distillers Corporation (SA) Ltd, Stellenbosch Farmers Winery Group (Pty) Ltd and The Competition Commission* [2001–2002] CPLR 36 (CAC) (*Bulmer*) at 357I–358C.

[47] These investigative powers apply to any investigation that the Commission may conduct in terms of the Competition Act. For instance, section 46(1)(b) provides for a judge of the High Court, regional magistrate or a magistrate to issue a warrant to enter and search any premises when there are grounds to believe that “anything connected with an investigation in terms of the Act is in the possession, or under the control of a person who is on or in those premises”. Section 49A also provides:

- “(1) *At any time during an investigation in terms of this Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject—*
- (a) *to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or*
  - (b) *at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.*
- (2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1) must answer each question truthfully and to the best of that person’s ability, but the person is not obliged to answer any question if the answer is self-incriminating.
- (3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offense charged.” (Emphasis added.)

[48] The purpose of the merger provisions, in particular section 13A(3) of the Competition Act, is to ensure that as many mergers as possible are examined by the Commission for anti-competitive conduct. Section 49A must be construed broadly to give effect to this objective. The powers of search and summons, as provided for in

sections 49 and 49A, are vital to the Commission’s power to investigate a merger. Contrary to the joint contention of the SABC and MultiChoice, nothing in the Competition Act suggests that these powers are reserved only for the investigation of prohibited practices in Chapter 2 of the Act.<sup>41</sup>

[49] The need to summons relevant information and documents from persons believed to be in possession or control thereof, as well as the need to summons persons with knowledge of relevant facts under section 49A of the Competition Act, are crucial to the powers of the Commission to investigate mergers and transactions that may give rise to a merger as defined. Any contrary interpretation would defeat the purpose of merger regulation under the Competition Act which is to maintain competitive market structure by ensuring “that transactions which are likely substantially to prevent or lessen competition should be carefully examined by the competition authorities”.<sup>42</sup>

[50] It is essential that where the Commission has grounds to believe that the parties to a merger have a motive not to notify a merger, it must investigate that merger and not accept their mere say-so.<sup>43</sup> Nor, in these circumstances, should the investigation be confined only to the documents submitted by the parties. Significantly, merger investigations are not meant to be rudimentary “desktop” evaluations of the documents submitted by the parties to a merger or a transaction giving rise to a merger. Legh argues that:

“Very few mergers are approved solely on the basis of the documents filed. The filings are generally followed by a series of questions from the Commission clarifying issues and verifying information provided. The person signing the merger documentation is under a duty to declare that the information disclosed is

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<sup>41</sup> Section 49A begins with the words “[a]t any time during an investigation in terms of this Act, the Commission may summon any person”. These opening words make it plain that the Commission may invoke these powers during any investigation in terms of the Act. This means that section 49 may be used by the Commission when investigating anything under the Act, including an alleged prohibited practice under Chapter 2 (for example price fixing or abuse of dominance) or a merger or a potential merger under Chapter 3.

<sup>42</sup> *Bulmer* above n 40 at 357J-358C.

<sup>43</sup> *Competition Commission v Tiso Consortium* [2004] 2 CPLR 354 (CT) at para 12.

comprehensive and correct and the provision of false information is an offence under [section 73(2)(d) of] the Act. . . . The Commission may require any party to a merger to provide additional information in respect of the merger [under section 13B(2)].”<sup>44</sup>

*Does the June 2016 order preclude the Commission’s statutory investigative powers?*

[51] The Commission’s investigative powers, both generally and in relation to merger control specifically, are sourced in the Competition Act itself. These powers were not conferred by the June 2016 order of the Competition Appeal Court, as the April 2017 judgment seemingly suggests. Thus absent any prohibition in the June 2016 order relating to the Commission’s use of its coercive and non-coercive statutory powers in carrying out its mandate under that order, the Commission’s statutory powers remain intact.

[52] Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order.<sup>45</sup> The well-established principles governing the interpretation of a court order were expounded in *Firestone*<sup>46</sup> and more recently endorsed in *Eke*:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”<sup>47</sup>

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<sup>44</sup> Legh “*Mergers and Merger Control*” Competition Law, ed. Martin Brassy et al (2016) at 259.

<sup>45</sup> See, for example, *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69, in the context of remedies for the infringement of rights contained in the Bill of Rights. See also *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 48; *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 14 and *Minister of Home Affairs v NICRO* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 74.

<sup>46</sup> *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); [1977] 4 All SA 600 (A) (*Firestone*) at 304D.

<sup>47</sup> *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 29. See also *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC).

[53] In respect of an order that is “clear and unambiguous”, *Firestone* enunciated:

“If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. . . . [N]ot even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.”<sup>48</sup>

[54] The June 2016 order must be interpreted in line with *Firestone* and *Eke* to ascertain the Competition Appeal Court’s intention from the reasons for the judgment and the order as a whole. A determination of the legal context within which the words in an order are used is also required.<sup>49</sup> The legal context here is the Competition Act and the investigative powers and duties that it confers on the Commission to effectively discharge its investigative responsibilities and reporting role to the Tribunal, in the context of the implementation of a suspected merger in contravention of section 13A(3) of the Act. The Commission’s mandate under the June 2016 order must be understood in this context.

[55] Applying these principles, I fail to see how the June 2016 order can be understood to have curtailed the Commission’s ability to exercise its statutory powers of investigation under Part B of Chapter 5 of the Competition Act. But the Competition Appeal Court found otherwise in its judgment of April 2017. There are, however, apparent discrepancies between its reasoning in the two judgments.

[56] In its June 2016 judgment, the Competition Appeal Court found that the public interest demanded that the Commission investigate the agreement, and it criticised the Tribunal for adopting a formalistic, as opposed to a substantive, approach by applying *Plascon-Evans*. In contrast, in its April 2017 judgment, the Competition Appeal Court held, regardless of the inadequacy of the documentary evidence furnished, that

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<sup>48</sup> *Firestone* above n 46 at 304E-F.

<sup>49</sup> See *Ex Parte Women’s Legal Centre: In Re Moise v Greater Germiston Transitional Local Council* [2001] ZACC 2; 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC) at para 11.

the Commission must complete its investigation simply on the documents before it, and without interviewing any of the individuals involved in the negotiation or conclusion of the agreement. The two approaches are incompatible.

[57] The Competition Appeal Court held that it is “in the public interest for transactions involving the public broadcaster to be examined with a particular consideration of the purpose of the Act”.<sup>50</sup> And it added that the factual disputes on the papers, regarding whether the conclusion of the agreement gave rise to a change of control, should not be determined within the strict confines of the *Plascon-Evans* test. It accordingly held that—

“[t]he Tribunal should employ inquisitorial powers to interrogate evidential questions beyond the strict confines of ‘*Plascon-Evans*’ to ensure that the full evidential complexity is available to it in order that it might come to a decision which advances the purposes of the Act. . . . There are many questions regarding disputed factual contentions which we have raised in this judgment which could have been better answered if an inquisitorial approach had been adopted and a more sustained line of questioning been implemented by the Tribunal in the hearing before it. [Additionally], as is evident from paras 49-50 of the judgment of SCA in the *e.tv* case . . . questions of encryption may well stifle competition.”<sup>51</sup>

[58] The Competition Appeal Court’s recognition that transactions involving the public interest be examined with a particular consideration for the purposes of the Competition Act, coupled with a need for a substantive rather than a formalistic approach, supports an interpretation of the June 2016 order that leaves the statutory investigative powers of the Commission intact.<sup>52</sup> There is no reason why an inquisitorial approach should exclude other investigative powers under the Act.

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<sup>50</sup> Competition Appeal Court judgment above n 7 at para 110.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at paras 110-1.

[59] Since the purpose of the June 2016 order was to reverse the deficiency of the Tribunal's order that was made without an investigation by the Commission, the Competition Appeal Court would have intended that the Commission undertake a similar exercise, however cursory. In the first place, an investigation of this kind has to be undertaken in terms of the Act and, if done on that basis, then the full suite of investigative powers conferred by sections 13A and 13B and Part B of Chapter 5 would apply. This interpretation follows by necessary implication from the Competition Appeal Court's judgment.

[60] The Competition Appeal Court's emphasis on the need for finality and expedition in its June 2016 judgment is consistent with this interpretation. Indeed, the best way to bring closure to the matter was for the Competition Appeal Court to allow the Commission to exercise its full suite of investigative powers (within the time allowed) to ensure that its recommendations to the Tribunal were based on the best available evidence. Absent express language to that effect, the fact that the order was an exceptional remedy was not a basis for the Competition Appeal Court to conclude that it stripped the Commission of its statutory investigative powers. There is simply nothing in the Competition Appeal Court's June 2016 judgment which precludes the Commission from exercising its statutory investigative powers. On the contrary, the Competition Appeal Court's reasons, in support of its order, imply that these powers are necessary to ensure the effectiveness of the order.

[61] The order itself is uncomplicated and written in plain language. There is no hint in the order to suggest that it prohibits the Commission from exercising its statutory investigative powers. Paragraph 2 of the order instructs the SABC and MultiChoice to hand over copies of *all* documentation to the Commission within 21 days. It gives the Commission access to a wide range of documents "including, but not limited to, all correspondence, board minutes, internal memoranda pertaining to the negotiation, conclusion, and implementation" of the agreement. Paragraph 3 of the order then directs the Commission to compile a report, within 30 days of receipt of

the documents, and file it with the Tribunal, setting out its recommendation on whether the agreement gives rise to a notifiable merger.

[62] There is nothing in either of these two paragraphs that implies that the Commission is obliged only to consider the documents supplied by the SABC and MultiChoice. Nor does it constrain the Commission from exercising its statutory powers, within the time allowed, to interview individuals with knowledge of the agreement, where the documentation furnished was incomplete and inadequate.

[63] On the contrary, paragraph 3 of the order envisages that the Commission may consider not only documentation in coming to its conclusion, but also “information”. Although paragraph 2 of the order does not expressly refer to “information”, it is implicit from paragraph 3 of the order, that “information” would form part of paragraph 2 of the order as well. For the most part, because “documents” are unlikely, on their own, to resolve the factual disputes that the Competition Appeal Court found to exist on the papers.<sup>53</sup>

[64] The order directs the Commission to conduct its investigation within 30 days of receipt of all the documentation from the SABC and MultiChoice. In its April 2017 judgment, the Competition Appeal Court misconstrues these timelines as being indicative of the apparently “limited” nature of the Commission’s investigation. This is wrong in law because the time periods in the order are consistent with the ordinary time periods for the investigation of mergers, being an initial 20 business days in respect of intermediate mergers, and an initial 40 business days in respect of large mergers.<sup>54</sup> It certainly seems to me that in formulating the timetable, the Competition Appeal Court recognised that there is a degree of urgency in having the

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<sup>53</sup> A key example of the disputed facts related to the issue of “encryption”, its timing, and the commercial relevance of the policy on encryption. This dispute and the others identified by the Competition Appeal Court in the April 2017 order may require investigation if they are to inform the Commission’s evaluation and determination on whether the agreement constitutes a notifiable merger. These issues are plainly relevant, but are unlikely to turn simply on documents provided by the SABC and MultiChoice, but may require relevant “information” as envisaged in paragraph 3 of the order.

<sup>54</sup> See sections 14(1) and 14A(1) of the Competition Act respectively.

Commission's investigation concluded quickly, not least because of the public interest in the agreement.

[65] The June 2016 order did not strip the Commission of its investigatory powers in Part B of Chapter 5 of the Competition Act. In fact, on the face of the order, the statutory investigative powers of the Commission in Part B of Chapter 5 of the Competition Act remain intact. The Competition Appeal Court, accordingly, erred in finding that the June 2016 order, read in the light of its reasons, "clearly and unambiguously" defined the Commission's investigative powers in compiling its report, and "expressly confined the source of its inquiry exclusively to the documentation set out in the order".<sup>55</sup>

*Applications to adduce new evidence on appeal*

[66] There are two applications to adduce new evidence on appeal in this Court and one that was dismissed by the Competition Appeal Court in its April 2017 order that require consideration. They are as follows:

- (a) The first is the applicants' application to introduce new evidence on appeal consisting of the Minister of Communication's testimony before Parliament's Standing Committee on Public Accounts (SCOPA) on 17 May 2017.
- (b) The second is the Commission's application to adduce new evidence on appeal that was brought after the hearing of the application for leave to appeal. It consists of a transcript of the proceedings of a meeting held on 6 June 2013 (June 2013 meeting) between members of the interim board of the SABC and representatives of MultiChoice, concerning the possible conclusion of a channel licensing agreement between the SABC and Multichoice.

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<sup>55</sup> Competition Appeal Court judgment above n 14.

- (c) The third is the appeal against the dismissal of the application in the Competition Appeal Court to adduce new evidence that consisted of the transcript of the testimony of a board member and a past CEO of SABC, which was given at a Parliamentary inquiry into the SABC on 8 and 9 December 2016. The Competition Appeal Court dismissed this application in the April 2017 order.

*Rules governing the admission of new evidence on appeal in this Court*

[67] Rules 30<sup>56</sup> and 31<sup>57</sup> of the Rules of this Court regulate the admission of further evidence on appeal in this Court. Rule 30 incorporates the approach under section 22 of the Supreme Court Act.<sup>58</sup> Section 22 has been interpreted by this Court in

<sup>56</sup> Rule 30 of the Rules of this Court provides:

“The following sections of the Supreme Court Act, 1959 (Act No. 59 of 1959), shall apply, with such modifications as may be necessary, to proceedings of and before the Court as if they were rules of their court.

| Section | Subject                                                                                                                                                                                                                                                                     |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 19bis   | Reference of particular matters for investigation by referee                                                                                                                                                                                                                |
| 22      | Powers of the court on hearing of appeals                                                                                                                                                                                                                                   |
| 32      | Examinations by interrogatories of persons whose evidence is required in civil cases                                                                                                                                                                                        |
| 33      | Manner of dealing with commissions <i>rogatoire</i> , letters of request and documents for service originating from foreign countries: Provided that this provision shall apply subject to the replacement of English or Afrikaans with the phrase “any official language.” |

<sup>57</sup> Rule 31 of the Rules of this Court, which is headed “Documents lodged to canvass factual material”, provides:

- “(1) Any party to any proceedings before the Court and *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
- (a) are common cause or otherwise incontrovertible; or
  - (b) are of an official, scientific, technical or statistical nature capable of easy verification.
- (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.”

<sup>58</sup> See also section 19 of the Superior Courts Act 10 of 2013, which is headed “Powers of court on hearing of appeals” and provides:

“The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—

*Rail Commuters'* as permitting the admission of new evidence in appeal cases only in exceptional circumstances.<sup>59</sup> There, this Court held:

“The court should exercise the powers conferred by section 22 ‘sparingly’ and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against it being admitted.”<sup>60</sup>

[68] The pivotal requirement in both rules is that the evidence sought to be admitted must be relevant to the issues to be determined by the Court. In terms of rule 31(1), a party may “canvas factual material that is relevant to the determination of the issues before the Court and does not specifically appear on the record”, subject to the facts being incontrovertible or capable of easy verification.

[69] When leave to admit further evidence is sought after the hearing of an appeal, and prior to the Court reaching a final decision, the Court will also consider whether it is in the interests of justice for the evidence to be placed before the Court.

### *Commission’s application*

[70] I will first consider the application to adduce new evidence which was brought by the Commission after the hearing of the application for leave to appeal.

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- (a) dispose of an appeal without the hearing of oral argument;
  - (b) receive further evidence;
  - (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
  - (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.”

<sup>59</sup> *Rail Commuters’ Action Group v Transnet Limited t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters’*).

<sup>60</sup> Id at para 41.

[71] Just short of a fortnight after the hearing of the application for leave to appeal (main application), the Commission filed an interlocutory application seeking leave to adduce new evidence on appeal.<sup>61</sup> The Commission took the view that the new evidence might have a bearing on the Court's decision in the main application, which was pending.

[72] The new evidence which the Commission seeks leave to adduce on appeal relates to the transcript of a meeting held between members of the interim board of the SABC and representatives of MultiChoice, on 6 June 2013, concerning the possible conclusion of a channel licensing agreement between the SABC and Multichoice (transcript). It was published by, amongst others, City Press Newspaper on 29 November 2017.

[73] The existence of the transcript apparently came to the attention of the Commission on 29 November 2017, when an article attaching the transcript was published online. On 28 November 2017, a journalist emailed a copy of the transcript to MultiChoice for comment. Before this, MultiChoice, in compliance with the June 2016 order, furnished the Commission with a note, prepared by one of its representatives who attended the June 2016 meeting, summarising the key issues discussed there.

[74] The SABC, too, had furnished a copy of the transcript to the ad hoc Parliamentary Portfolio Committee on Communications as part of its enquiry into the state of the SABC. As the SABC had explained, its failure to provide the transcript to the Commission in compliance with the June 2016 order was due to an oversight. The SABC nevertheless provided the Commission with the minutes of the board meeting at which the terms of the agreement were discussed and approved.

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<sup>61</sup> The hearing of the application for leave to appeal took place on 28 November 2017, and the application to adduce new evidence was made on 8 December 2017.

[75] In essence, the Commission's application is premised on two bases. The first is that the transcript (which the Commission refers to as "minutes") should be accepted into evidence, as it has a bearing on the merger investigation it must conduct and report on to the Tribunal, in accordance with the June 2016 order which this Court has to interpret in the main application. The second is that it is in the interests of justice that the minutes be accepted into evidence as they reveal the discussions that took place between the SABC and MultiChoice prior to the conclusion of the agreement, and mention documents that were possibly exchanged between the parties prior to its conclusion.

[76] The Commission maintains that the transcript raises matters which are known to both the SABC and MultiChoice and does not require a lengthy response from either of them regarding their relevance to the proceedings before this Court. And that none of the parties will suffer any prejudice if the transcript is admitted into evidence. Not surprisingly, the SABC and MultiChoice oppose the application with the vigour of voluminous answering affidavits, which direct their opposition to the Commission's failure to meet the higher threshold of exceptional circumstances for the admission of new evidence on appeal. They contend that, although the transcript may be relevant to the exercise which the Commission is required to perform in terms of the June 2016 order, it has no bearing on the determination of the narrow issues raised in the main application, namely the proper interpretation of the order.

[77] Lastly, they highlight a damaging concession made in the Commission's founding affidavit where it explains that the transcript is "not dispositive of the matters before this Court", but simply "shows the thinking of these two parties leading up to the conclusion of the agreement". However, on realising its folly, the Commission changed tack in its replying affidavit, alleging that—

"the evidence is dispositive of the fact that the SABC had in fact not complied fully with the order of the Competition Appeal Court and that the Commission requires access to further documents and information by way of investigation in order to meet its obligation under the June 2016 order."

The Commission cannot, of course, make out a new case in reply outside certain exceptional instances, none of which has been pleaded or applied to the present facts.

[78] Whether the existence of the transcript is evidence of the SABC's non-compliance with the June 2016 order is not an issue for determination in this appeal. The issues for determination turn on the proper interpretation of the June 2016 order. Its "manifest purpose" must be ascertained primarily from the language used and the Competition Appeal Court's reasons for making it.<sup>62</sup> The only extraneous considerations which are permissible in the interpretation of the order are those which contextualise it, including material known to the Competition Appeal Court when making it.<sup>63</sup> There is no place for the consideration of facts or material which came to light after the order had been handed down.

[79] The transcript which the Commission seeks to adduce on appeal was not before the Competition Appeal Court when it formulated the June 2016 order and subsequently interpreted it. It is therefore, not relevant. The relevant facts and argument were placed before this Court prior to the hearing of the matter on 23 November 2017. The SABC will suffer the prejudice of having new factual evidence adduced not only before the court of last instance, but after the hearing of the appeal. All the parties, the general public, and this Court have an interest in the finality of litigation. The admission of further evidence and further argument after the hearing of the appeal is inconsistent with this important principle. The Commission has also failed to meet the higher threshold of exceptional circumstances for the admission of new evidence on appeal. It is accordingly not in the interests of justice that the new evidence be admitted into the appeal record.

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<sup>62</sup> *Eke* above n 47 at para 29.

<sup>63</sup> See *Delmas Milling Co Limited v Du Plessis* 1955 (3) SA 447 (A) 454F-455A, cited with approval in *Firestone* above n 46 at 304D and *KPMG Chartered Accountants (SA) v Securefin Limited* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39.

*The December 2016 application*

[80] In the December 2016 application before the Competition Appeal Court, the applicants sought to adduce further evidence consisting of untested statements made, before a Parliamentary ad hoc committee, by a former board member of the SABC and its former CEO on the basis that it was relevant to the determination of the October 2016 application.

[81] That application was fundamentally misconceived, as it was based on the incorrect premise that evidence which came to light after a court order has been handed down, can somehow be considered relevant to the interpretation of that court order. The Competition Appeal Court was accordingly justified in dismissing that application in its April 2017 order.

*The November 2017 application*

[82] This misconception was perpetuated in the applicants' application to adduce new evidence at the hearing of the application for leave to appeal by this Court. They sought, in that application, to adduce a transcript of a parliamentary hearing conducted after the Competition Appeal Court had handed down its April 2017 order.

[83] As with the other two applications to adduce further evidence, the new evidence sought to be admitted here was not before the Competition Appeal Court when it made the June 2016 order and subsequently interpreted it. It is not an admissible consideration in the interpretation of that order. The transcript is not relevant – a pivotal requirement for the admission of new evidence on appeal to this Court. There are also no exceptional circumstances shown to justify the admission of the new evidence. This application must also fail.

*Relief*

[84] In *Hoërskool Ermelo* this Court held that the remedial powers envisaged in section 172(1)(b) of the Constitution to make a just and equitable order are not only

available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a), but also “in instances where the outcome of a constitutional dispute does not hinge on the constitutional invalidity of legislation or conduct”.<sup>64</sup> The power is sufficiently wide and flexible to enable a court of competent jurisdiction to formulate an order that is both appropriate and effective in resolving the underlying dispute, and ensuring that the defaulting party meets its statutory or constitutional obligations.

[85] The June 2016 order was ambiguous. The applicants were therefore justified in seeking clarity on its meaning in relation to the ambit of the Commission’s statutory investigative powers. The applicants and the Commission have made out a case for the declaratory relief sought in prayer 2 of the notice of motion. The relief is both appropriate and effective as it will enable the Commission properly to conclude its investigation in terms of the Competition Act, thus giving proper effect to its investigatory and reporting obligations under the June 2016 order read with section 13A(3) of the Competition Act. It may use its statutory investigative powers, both coercive and non-coercive, if it deems this necessary to compile its report.

[86] In *Rail Commuters*’ this Court emphasised the benefit of declaratory orders as a means of remaining sensitive to separation of powers concerns:

“It should also be borne in mind that the declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and Legislature, the decision as to how best the law, once stated, should be observed.”<sup>65</sup>

[87] The Competition Appeal Court accordingly erred in not granting the declaratory relief sought by the applicants in their notice of motion confirming that the Commission may exercise its statutory powers of investigation in this matter.

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<sup>64</sup> *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

<sup>65</sup> *Rail Commuters*’ n 59 at para 108.

[88] In the light of the relief granted, there is no need to consider whether the applicants and the Commission have made out a case for the alternative relief sought.

### *Costs*

[89] The Competition Appeal Court erred in granting costs against the applicants in the October 2017 application as well as in the application to adduce new evidence in that application. As indicated, the ambit of the Commission's powers to investigate the agreement between the SABC and MultiChoice is a question of great public interest that engages constitutional issues.<sup>66</sup> In the circumstances, no adverse order of costs was warranted. On the same principle, adverse costs orders are not warranted in the two applications to adduce new evidence brought by the applicants and the Commission respectively.

### *Order*

[90] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld, and the Competition Appeal Court's order of 28 April 2017 is set aside and replaced with the following:
  - (a) It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.

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<sup>66</sup> *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

- (b) The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order, within 30 court days of this order.
  - (c) The first and second respondents are ordered jointly and severally to pay the costs of the application, including the costs of two counsel.
- 3. The appeal against the order of the Competition Appeal Court dismissing the applicants' application to adduce new evidence is dismissed with no order as to costs.
- 4. The applicants' application to adduce new evidence on appeal is dismissed with no order as to costs.
- 5. The Competition Commission's application to adduce new evidence on appeal is dismissed with no order as to costs.

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