



EXHIBIT CC 21

AFFIDAVIT & ANNEXURES

AND

**SUPPLEMENTARY AFFIDAVIT
& ANNEXURES**

OF

LULAMA MOKHOB



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

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**IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR
INCLUDING ORGANS OF STATE ("THE COMMISSION")**

AN INVESTIGATION INTO THE SOUTH AFRICAN BROADCASTING CORPORATION

AFFIDAVIT

I, the undersigned,

LULAMA MOKHOBO

hereby declare under oath as follows:

1. I am an adult female currently residing at No. 12 Sharrow Road, Boskruin, Randburg, Johannesburg.
2. The content of this affidavit is true and correct and falls within my own personal knowledge, unless the contrary clearly appears from the context or is otherwise stated.
3. I have been approached by investigators associated to the Commission of Inquiry into Allegations of State Capture, Fraud and Corruption in the public sector and certain Organs of State ("the Commission") and have been requested to provide an affidavit as to my knowledge as to certain affairs which took place during my tenure as Group Chief Executive of the South African Broadcasting Corporation ("SABC").
4. In this regard, this affidavit contains my recollections of events spanning over two years and I must reiterate that at this stage I no longer work for the SABC

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and am not in possession of all documents I would require.

5. However, the investigators associated to the Commission have given me access to certain documents and this affidavit is drafted upon my recollection of the events in corroboration with the documents presented to me.
6. I joined the SABC during or about 16 February 2012 when I was appointed as the Group Chief Executive Officer.

TNA MEDIA

7. As I understand matters, one of the key issues I have been required to give evidence to relates to the dealings between the SABC and a company known as TNA Media (Pty) Ltd and more particularly, the distribution of The New Age (a newspaper owned and operated by TNA Media (Pty) Ltd) at the SABC and the broadcasting of what was later referred to as the "*breakfast shows*". I will henceforth refer to TNA Media (Pty) Ltd as "TNA Media" and to the New Age as "TNA".
8. At the time I was appointed I should mention that TNA Media was already delivering TNA newspaper to the SABC on a regular basis and furthermore there were already existing breakfast shows being broadcast in conjunction with the SABC.
9. The Divisional Management of SABC News decided to enter into a contract to govern a "joint broadcasting" agreement between TNA Media and SABC2's Morning Live show. The decision was communicated as an instruction to the then acting Head of Legal Services, Mr Thabang Mathibe, as an instruction for him (Mr Mathibe) to attend to the agreement. The signatories to the instruction

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were a certain Mr Patrick Mpila who was the acting General Manager for News, and Mr Mike Siluma as acting Group Executive of News on 24 February 2012.

10. It should be noted that in terms of section D9 of the Table of Authorities in the applicable SABC Delegation of Authority Framework of 2012, the Divisional Management of News acted within their delegated authority in their decision to enter into the TNA media agreement
11. It was ultimately the responsibility of the legal department of the SABC and more particularly Mr Thabang Mathibe to attend to the negotiation and drafting of a contract between the SABC and I presume a certain Mr Nazeem Howa ("Howa") of TNA Media. The contract was concluded on 13 March 2012, which I attach hereto as Annexure "LM001".
12. I confirm that I signed the agreement on behalf of the SABC and it was signed by Howa on behalf of TNA Media. From the signatures attached to the contract I can confirm that the witnesses were Messrs Hlaudi Motsoeneng and Jimmy Matthews on behalf of the SABC.
13. I can identify Mr Thabang Mathibe's signature, who was the Head of Legal Services of the SABC.
14. In terms of the contract it is recorded that TNA Media was desirous of hosting breakfast shows (defined as events) on a bi-monthly basis and would assign the live broadcasting rights to the SABC on an exclusive basis.
15. In turn, the SABC accepted the assignment and undertook to broadcast the event live on Morning Live.

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16. It was pertinently recorded in terms of the contract that neither the contract nor any terms and conditions contained therein would be construed as creating a partnership, joint venture, agency relationship or granting a franchise between the parties.
17. TNA media was further prohibited from contracting or incurring any liability on behalf of or in the name of the SABC or to bind the SABC to credit in any way whatsoever
18. In terms of the contract the duties and obligations of TNA Media were *inter alia* the following:
- 18.1 TNA Media would convene the events twice on a monthly basis or as mutually agreed between the parties in writing;
- 18.2 TNA Media would procure, book and pay for suitable venues for each of the events;
- 18.3 TNA Media would ensure pre-promotion of the events combined with alternative forms of marketing to ensure strong attendance which coincided with the SABC's on air promotion and TNA Media's paid for free classic advertising;
- 18.4 TNA Media would make available the venues of the SABC on the event dates for the events;
- 18.5 TNA Media would ensure the viable and professional invitation, ticketing and welcome process at the events;

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- 18.6 TNA Media would ensure bar and food arrangements would be made;
- 18.7 TNA Media would organise, manage and produce the events in accordance with acceptable industry standards;
- 18.8 TNA Media would make available sufficient space for proper and undisturbed conduct of the events for event personnel;
- 18.9 TNA Media would provide sufficient power including all power outlets, power connections and/or power generators as well as all other infrastructure as requested by the SABC to facilitate the success of the events;
- 18.10 TNA Media would ensure the exclusivity to SABC as the official broadcast partner of the events;
- 18.11 TNA Media would present itself (and procure the attendance of any subcontractor) to assist at such times as the exigencies and demands that the SABC may require to conduct the events subject to the provision of a purchase order from TNA Media;
- 18.12 TNA Media would timeously pay all amounts due to any subcontractors in respect of any services rendered by that subcontractor in terms of the agreement, if relevant. The SABC would not be held liable at all for the payment of any amounts due to such subcontractors under any circumstances whatsoever and any such subcontractor would have no claim against the SABC.
19. In turn, the obligations of the SABC were as follows:
- 19.1 The SABC would broadcast the events on SABC2 Morning Live;

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- 19.2 The SABC would use its best endeavours to promote, give exposure to or advertise the event on any platform as it deemed appropriate;
20. Further, TNA Media would indemnify and hold the SABC harmless against all and any liability which may arise as a result of any negligent wilful conduct act or omission by it and/or its subcontractors.
21. From the outset I must state that as I understood matters, at no stage was it envisaged that the SABC would invoice TNA Media for the services rendered by the SABC and furthermore it was not provided that the SABC would share in any profit made by TNA Media in the hosting of these events.
22. In terms of the relevant legislation and policies within the SABC I can record that it is not allowed that the SABC derive any payment from any particular party in the sponsorship of any news events due to the fact that this may limit and/or impede the impartiality and independence of the SABC.
23. I have further been able to determine that the amount ultimately spent by the SABC in facilitating these outdoor broadcasts amounted to some R20,326,980.00 over a few years (twenty million three hundred and twenty six thousand nine hundred and eighty Rand). However, seeing that I am no longer in the employ of the SABC, I would request that the SABC finance officials confirm this amount.
24. I can confirm that the events did not stay within the contract at the prescribed two events per month and suddenly escalated, in certain cases almost doubled. The decision to allow for the escalation was entirely within the purview of the News Division as per the assurance of its independence as enshrined in

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the 2012 SABC Editorial Policies. An analysis of the recordings as kept by line record at the SABC will confirm this.

25. I am aware that the contract was renewed in terms of a written agreement. The SABC legal department will be able to provide a copy of said agreement.
26. To the best of my recollection and at this stage I had already left the service of the SABC and it was clear that this agreement was ultimately concluded and signed by and on behalf of the SABC by Mr JB Matthews on or about the 20th February 2015.
27. I should also make mention of the fact that my initial involvement with this project was by virtue of the fact that it was quite clear that originally, there was no valid agreement between the parties regulating the relationship. In this regard it was imperative that a contract be put in place to regulate the relationship between the parties.
28. Any renewal of the contract would have fallen within the ambit of the responsibility of the head of the news department since this is a matter which related solely to news and as such would have been handled by *inter alia*, Mr JB Matthews, who at that stage was the acting Group Executive for news.
29. It was only up until I was presented with the facts by the investigators of the Commission that I became aware of the fact that TNA Media was charging the various state-owned enterprises it had engaged with and who were part and party of the various breakfast shows.
30. At no stage during my tenure was I informed about these facts or made aware of the fact that TNA Media was in fact charging rather handsome fees from the

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various state-owned enterprises.

31. I can furthermore confirm that at no stage during my tenure did the SABC receive any payment from TNA Media in relation to the breakfast shows.
32. The next aspect I would like to cover relates to the distribution of newspapers by TNA Media within the SABC.
33. As mentioned in the introduction to this affidavit I recorded that the distribution of newspapers by TNA Media originated prior to the date of my appointment.
34. Furthermore, during the course of my appointment I was never requested by the Board to consider the relationship with TNA Media regarding the newspapers. In fact, I wish to record that at that stage I believed that the newspapers were being delivered to the SABC by TNA Media without an expectation of remuneration and purely by virtue of the fact that there was a relationship between TNA Media and the SABC and relating pertinently to the breakfast shows dealt with above.
35. As such, I did not believe nor was I aware of any existing commercial relationship between TNA Media and the SABC regarding the newspapers or of the fact that the SABC was paying for these newspapers.
36. I have subsequently determined with the assistance of the investigations associated to the Commission that the amount expended by the SABC on these newspapers was the sum of approximately R930,873.61.
37. Once again, at no stage was I aware of any authorisation relating to the newspapers and/or the payment associated therewith.

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38. The finance division of the SABC should be able to provide a schedule of payments setting out what was paid by the SABC to TNA Media regarding these newspapers.

This is all I wish to declare at this stage.


DEPONENT

Signed and sworn before me at Linden SAPS this 22 day of August 2019 after the deponent declared that the deponent is familiar with the contents of this statement and regards the prescribed oath as binding on the deponent's conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS:

FULL NAMES:

CAPACITY:

ADDRESS:

7183269 201
Rembrandt

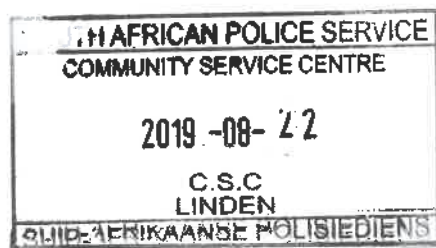
Tinkwalo Belinda Mbonkisi

CONSTABLE

30 boundary Road

Roosburg

Beindburg 2194





AGREEMENT

Between

THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD

and

TNA MEDIA (PROPRIETARY) LIMITED

SABC REFERENCE NUMBER: 00005606

A handwritten signature in black ink, appearing to read "Thabang Mathibane".

Thabang Mathibane
Group Executive (Acting) Legal Services

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Thabang Mathibe

Group Executive (Acting): Legal Services
5606 - N.Mbongo/ab - SABC / TNA Media (Proprietary) Limited – March 2012

Wm TB



1. THE PARTIES

- 1.1 The South African Broadcasting Corporation SOC Ltd, a public company with limited liability incorporated in terms of the provisions of the company laws of South Africa, and constituted in terms of the provisions of the Broadcasting Act, No. 4 of 1999, as amended, with registration number 2003/023915/06 and having its principle place of business at Radio Park Building, Henley Road, Auckland Park, Johannesburg, Republic of South Africa; and
- 1.2 TNA Media (Proprietary) Limited, a private company with limited liability and registered in accordance with the company laws of South Africa under registration number 2010/006569/07 and having its principal place of business at 52 Lechwe Street, Corporate Park South, Midrand, Republic of South Africa.

2. DEFINITIONS AND INTERPRETATION


- 2.1 In this Agreement, the following expressions shall bear the meanings assigned to them below:-
- 2.1.1 "Agreement" means the terms and conditions contained in this document including any schedules or annexure hereto;
- 2.1.2 "Business Day" means any day of the week except Saturday, Sunday and public holidays in the Republic of South Africa;
- 2.1.3 "Effective Date" means the date on which this Agreement shall become of force and effect which for the avoidance of any doubt is 1 March 2012, notwithstanding the Signature Date hereof;
- 2.1.4 "Events" means a series of events known as The New Age Breakfast Briefing brought to you by the SABC hosted by TNA, with a guest agreed to jointly by the Parties, held at various venues throughout the country, and on dates agreed to by the Parties;
- 2.1.5 "Morning Live" means a current affairs breakfast programme broadcast Monday to Friday from 06:00 until 08:00 on SABC 2;
- 2.1.6 "Parties" means SABC and TNA Media collectively, and "Party" shall be a reference to either of them;

Thabang Mathibane
Thabang Mathibane

Group Executive (Acting), Legal Services

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- 2.1.7 "SABC" means the Party described in clause 1.1 above;
- 2.1.8 "SABC 2" means a public television channel operating under a television broadcast licence granted to the SABC by the Independent Communications Authority of South Africa (ICASA) in pursuance of the provisions of the Broadcasting Act No. 4 of 1999, as amended, and the Independent Broadcasting Authority Act NO.153 of 1993, as amended, and the Electronic Communications Act No.36 of 2005, as amended, and may also mean SABC as the context requires;
- 2.1.9 "Services" means hosting of the Events as fully set out in this Agreement;
- 2.1.10 "Signature Date" means the date of signature of this Agreement by the Party signing last in time;
- 2.1.11 "TNA Media" means the Party described in clause 1.2 above;
- 2.1.12 "VAT" means the Value Added Tax payable in terms of the Value Added Tax Act 89 of 1991, as amended from time to time;
- 2.1.13 "Venues" means the locations to be identified and provided by TNA Media where the Events will take place.
- 2.2 The clause headings in this Agreement are for purposes of convenience and reference only and shall not be used in the interpretation of, nor to modify or amplify the terms and conditions of this Agreement nor any clause hereof.
- 2.3 Unless a contrary intention clearly appears from the context, words importing:
- 2.3.1 any reference to a gender includes the other genders;
- 2.3.2 any reference to the singular includes the plural and vice versa; and
- 2.3.3 any reference to natural persons includes legal persons and vice versa.
- 2.4 Where words and/or expressions are defined within the context of any particular clause in this Agreement, the words and/or expressions so defined shall bear the meanings assigned to such words and expressions in that clause, notwithstanding that such word and/or expressions have not been defined in this interpretation


Thabang Mathibe
 Group Executive (Ailing): Legal Services

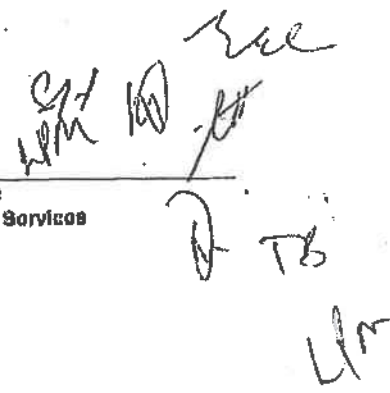
- 2.5 When any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day falls on a Saturday, Sunday or declared public holiday in the Republic of South Africa, in which case the last day shall be the next succeeding Business Day.
- 2.6 The use of the word "including" followed by a specific example or examples, shall not be construed as limiting the meaning of the general wording preceding it and the *eludem generis* rule shall not be applied in the interpretation of such general wording or such specific example or examples.
- 2.7 The *contra proferentem* rule is excluded and accordingly, no provision herein shall be construed against or interpreted to the disadvantage of any Party due to such Party having or being deemed to have structured or drafted such provision.
- 2.8 Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.
- 2.9 The schedules and annexure to this Agreement form an integral part hereof and words and expressions defined in this Agreement shall bear, unless the context otherwise requires the same meanings in such schedules and annexure which do not themselves contain their own definitions and provided that in the event of any conflict between the schedules and/or annexure and this Agreement, this Agreement takes precedence and shall apply.
- 2.10 If any provision in a definitions clause is a substantive provision conferring rights or imposing obligations on a Party, notwithstanding that it is only in the definition clause, effect shall be given thereto as if it were a substantive provision in the body of this Agreement.

3. INTRODUCTION

- 3.1 TNA Media is desirous of hosting the Events twice a month and assigning the live broadcast rights to the SABC on an exclusive basis.
- 3.2 SABC intends to accept the assignment and broadcast the Events live on Morning Live.


Thabang Mathibe

Group Executive (Acting); Legal Services


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3.3 The Parties hereby agree to regulate their relationship in accordance with the following terms and conditions.

4. TERM OF THE AGREEMENT

4.1 This Agreement shall commence on the Effective Date and shall remain in force for a period of 36 (thirty six) months subject to the right of either Party to terminate this Agreement by giving to the other Party 3 (three) months written notice of termination which may be given after the expiry of the first 12 (twelve) months, unless terminated earlier in terms of clause 15 of this Agreement.

5. GRANT OF RIGHTS

5.1 TNA Media hereby grants to SABC the rights to broadcast the Events live at the Venues on an exclusive basis as the host broadcaster and/or broadcast partner of the Events.

5.2 TNA Media further grants the SABC sub-naming rights for the Events, to be referred to as The New Age Breakfast Briefing brought to you by the SABC.

5.3 The SABC duly accepts the rights granted in accordance with the terms of this Agreement.

5.4 The SABC shall accordingly have the right to film, record and broadcast the Events live on SABC 2, Morning Live.

5.5 The SABC shall be entitled to repeat broadcasts at any time after the Events without restriction during the Term of this Agreement.

5.6 It is specifically recorded that the SABC shall broadcast 2 (two) Events per month and the SABC shall at all times have final editorial control.

6. NATURE OF THE PARTIES RELATIONSHIP

6.1 All obligations and duties of TNA Media specified herein shall be undertaken by TNA Media as principal at law.

6.2 TNA Media shall not hold itself out as a partner, an agent or an employee of SABC when contracting with any third party.

Thabang Mathibe
Group Executive (Acting): Legal Services


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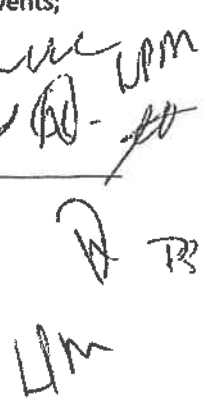
- 6.3 TNA Media is prohibited from contracting or incurring any liability on behalf of or in the name of any SABC or to bind SABC to credit in any way whatsoever.
- 6.4 Neither this Agreement, nor any terms and conditions contained herein, shall be construed as creating a partnership, joint venture, agency relationship or granting a franchise between the Parties.

7. DUTIES AND OBLIGATIONS OF TNA MEDIA


7.1 TNA Media shall:-

- 7.1.1 convene the Events twice on a monthly basis or as mutually agreed by the Parties in writing;
- 7.1.2 procure, book and pay for suitable Venues for each of the Events;
- 7.1.3 ensure pre-promotion of the Events combined with alternative forms of marketing to ensure strong attendance which coincides with SABC's on-air promotion and TNA Media's paid-for and free classic advertising;
- 7.1.4 make available the Venues to SABC on the Event Dates for the Events;
- 7.1.5 ensure viable and professional invitation, ticketing and welcome process at the Events;
- 7.1.6 ensure bar and food arrangements are made;
- 7.1.7 organize, manage and produce the Events in accordance with acceptable industry standards;
- 7.1.8 make available sufficient space for the proper and undisturbed conduct of the Events for Event personnel;
- 7.1.9 provide sufficient power including all power outlets, power connections and/or power generators as well as all other infrastructure as requested by SABC to facilitate the success of the Events;
- 7.1.10 ensure exclusivity to SABC as the official broadcast partner of the Events;


Thabang Mathibane


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- 7.1.11 ensure SABC is acknowledged as the official broadcast partner of the Events in all media communications relating to the Events which communications shall be submitted to the SABC for approval prior to printing or broadcast;
- 7.1.12 permit the placement of SABC branding in and around each Venue in the ratio of 33.3% (thirty three and a third percent) to SABC, 33.3% (thirty three and a third percent) to TNA Media and 33.3% (thirty three and a third percent) to the Event sponsor, (which Event sponsor will change from time to time and will be notified to the SABC in writing) of the total branding and branding space for Events and ensure that such banners placed shall continue to be displayed for the duration of the Events;
- 7.1.13 ensure that no sponsorship is obtained from any competitor media or broadcaster in respect of the Events without the prior written approval of SABC. Such prior approval shall stipulate the terms on which SABC agrees that such sponsorship may be obtained, so duly approved;
- 7.1.14 provide unobstructed access and egress access for SABC Event personnel to and from the Venues to enable SABC to conduct the Events from the Venues;
- 7.1.15 provide furniture as agreed to with SABC to install broadcast equipment;
- 7.1.16 ensure that the branding material supplied by the SABC in terms of clause 9.1.5 is adequately and correctly exposed in accordance with the directives of the SABC and subject to clause 7.1.12 above;
- 7.1.17 together with the SABC, procure logistical services, agree on the duration and content of the Events in accordance with SABC audience expectations;
- 7.1.18 agree on the guest speakers together with SABC at least (two) weeks prior to each Event. It is specifically recorded that such guest speakers shall not be limited to cabinet ministers but should rather reflect the South African business and political climate in its entirety, including provincial premiers and other prominent personalities or newsmakers;
- 7.1.19 comply with all SABC's reasonable instructions consistent with this Agreement;

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Thabang Mathibe
Group Executive (Acting) - Legal Services

- 7.1.20 present itself (and procure the attendance of any sub-contractor) to assist at such times as the exigencies and demands that SABC may require to conduct the Events subject to prior obtaining of a purchase order from TNA Media; and
- 7.1.21 timeously pay all amounts due to any sub-contractor in respect of any services rendered by that sub-contractor in terms of this Agreement (if relevant). SABC shall not be liable for payment of any amounts due to such sub-contractors under any circumstances whatsoever and any such contractor shall have no claim for same against SABC.

8. SECURITY AT THE EVENTS

- 8.1 TNA Media shall procure or provide adequate professional security officials from a reputable source for each Event, sufficient in number, taking into account the number of guests expected at the Events.
- 8.2 The function of the security officials shall be to secure the Venues and prevent or deal with any situation which could possibly threaten the safety of the guests, Event personnel and any SABC equipment installed at the Event.
- 8.3 TNA Media shall provide such security measures and shall take necessary precautions as the circumstances may dictate for the full duration of each Event, the lead up thereto and the completion thereof; in addition, same shall further be provided on a 24-hour basis at the Venues should it be necessary to leave any of the equipment delivered to/installed at the Venues prior to the commencement of, during or after the completion of the Events.
- 8.4 TNA Media shall ensure that it has arranged for complete supervision and control over access and egress from the Venues, parking and other restricted areas as well as the deployment of security staff in all such areas.

9. RIGHTS AND OBLIGATIONS OF SABC

- 9.1 SABC undertakes to do the following:-
- 9.1.1 broadcast the Events live on SABC 2 Morning Live;
- 9.1.2 use its best endeavours to promote, give exposure to or advertise the Event on any platform as it deems appropriate;

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- 9.1.3 cover the costs of television production to promote the Events;
- 9.1.4 cover travel and accommodation costs for SABC Event personnel unless otherwise arranged;
- 9.1.5 SABC shall direct the placement of its branding in and around the Venues in accordance with its branding plan and subject to clause 7.1.12 prior to the start date of the Event;
- 9.1.6 provide TNA Media with a list of guests to be given access to the Event;
- 9.1.7 manage the booking and scheduling of the airtime internally. SABC shall have the discretion as to which time slots to schedule the broadcast of the Events, taking into consideration newsworthiness and operational resource requirements;
- 9.1.8 provide to TNA Media a digital copy of the broadcast material from each Event at its own cost and further non-exclusive licence TNA Media to use parts of the broadcast on its website in accordance with the provisions of clause 17 below; and
- 9.1.9 script, direct, produce and pre-record all the promotional spots of the airtime. SABC will promote, give exposure to or advertise the Events in any manner it deems fit; the style, manner and extent of such exposure or advertising shall be within the sole discretion of SABC.

10. INSURANCE AND INDEMNITY

- 10.1 Each Party hereby indemnifies the other Party against any and all claims, damages, liabilities, actions, causes of action, costs and expenses (including legal fees), judgements, penalties of any kind arising out of any breach by the Indemnifying Party of any undertaking or warranty set out in this Agreement.
- 10.2 Save in the event of either Parties wilful conduct or negligence, the Parties hereby indemnify each other and hold each other and hold each other harmless against any and all claims, actions and judgments in respect of losses, damages, costs, claims, injuries to and/or death of persons and demands made against either Party in connection with this Agreement.

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Thabang Mathibe
Group Executive (Acting)

S606 - N.Mbongo/eb - SABC and TNA Media (Proprietary) Limited - March 2012

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- 10.3 TNA Media shall ensure that it and all sub-contractors appointed by it in terms of this Agreement (if any) shall take out and maintain for the duration of this Agreement and for such period as may be necessary thereafter, the necessary and adequate insurance to cover all risks that may arise in the performance of their obligations and duties arising from or in connection with this Agreement. Accordingly, TNA Media indemnifies and holds harmless and shall keep SABC indemnified and held harmless against all liability which may arise in the past, present and/or future as a result of any negligent or wilful act or omission by it and/or its sub-contractors as referred to herein.
- 10.4 Notwithstanding that TNA Media shall be entitled to sub-contract its duties and obligations as provided for herein, TNA Media shall at all times be and remain responsible for its duties and obligations as set out in this Agreement.

11. WARRANTIES AND UNDERTAKINGS

11.1 TNA Media warrants to SABC the following:-

- 11.1.1 the Venues where the Events are to take place are properly insured against any form of third party liability including but not limited to fire and personal injury and a copy of the Insurance Policy shall be provided to SABC on request;
- 11.1.2 the Venues have the necessary licences and authorisations to host the Events, and strictly adhere to the provisions of these licenses and/or authorisations, including but not limited to the holding of public events;
- 11.1.3 it has sufficient public liability insurance to cover any form of third party liability including but not limited to fire and personal injury and a copy of the insurance policy shall be provided to SABC on request;
- 11.1.4 the Venues conform in every respect to all health and safety standards, rules and regulations as required by law;
- 11.1.5 all power supplied by it in terms of this Agreement including but not limited to its connections, supply, cables and power points are be Certificate of Compliance (COC) compliant and;

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- 11.1.6 it specifically indemnifies the SABC for and against any claim whatsoever that may be instituted against it in the event that the Venues do not comply with requirements stipulated under the above clauses 11.1.5 and 11.1.6 respectively;
- 11.1.7 it is not a labour broker or personal service company, notwithstanding the 4th Schedule of the Income Tax Act, No 58 of 1962, as amended, the SABC is not required to withhold any tax in respect of any payment made in terms of this Agreement;
- 11.1.8 it shall procure that all sub-contractors and third parties providing services at the Events shall provide a written undertaking that they shall not proceed against the SABC in either contract or delict arising from any breach by TNA Media of its obligations to those sub-contractors in terms of any agreement entered into by TNA Media and its sub-contractors. TNA Media shall make copies of such contracts available to SABC on request; and
- 11.1.9 it will under no circumstances use the branding, logos, trademarks and intellectual property of SABC as contemplated in this Agreement, for any purpose other than that which is stipulated in this Agreement, and only with the approval of SABC.
- 11.2 The Parties further warrant to each other that it will not commit or cause any act to be committed or omit to do any of the following:-
- 11.2.1 harm in any way the trademarks, goodwill and reputation of either Party;
- 11.2.2 harm the business of either Party in any way; or
- 11.2.3 bring either Party's name into disrepute.
- 11.3 The Parties shall take all legal and practical steps required to ensure that the Events are successful.

12. GENERAL WARRANTIES

12.1  The Parties warrant that:

Thabang Mathibe
Group Executive (Acting): Legal Services

- 12.1.1 they hold and will obtain and maintain any and all such licenses, permits, approvals, authorisation, rights clearances, consents, exemptions, and registrations from any person, organisation, or authority as may be necessary to fulfil their obligations and warranties under this Agreement for the term hereof;
- 12.1.2 in the exercise of their rights and obligations under this Agreement, they shall ensure that all relevant laws, regulations, license authorisation, and permits are complied with;
- 12.1.3 all representations and warranties by them shall remain true and in force during the term of this Agreement;
- 12.1.4 they are duly authorised to enter into this Agreement and they are not bound by the provisions of any other Agreement, which could adversely affect compliance with the terms and conditions of this Agreement;
- 12.1.5 they shall not do anything that will be defamatory, injurious or in any way bring the reputation of the other Party, or any third party into disrepute or expose the Parties to any action, claim or demand by any third party arising out of any intentional or negligent act or omission on the part of any of the Parties or its employees, or any other person(s) acting under its authority with regard to the provisions of this Agreement; and
- 12.1.6 the signatories to this Agreement on behalf of the Parties are duly authorised to represent the Parties herein and to bind them hereto.

13. CONFIDENTIALITY

- 13.1 Neither Party shall disclose to any third party, any information relating to the provisions of this Agreement including, but not limited to, inter alia, the financial terms and conditions except:
 - 13.1.1 to the extent that it is necessary to comply with any law or court order; or
 - 13.1.2 as part of such Party's normal reporting or review procedures to its shareholders and/or auditors and/or its attorneys.



Handwritten notes and signatures:
 - "W. Lom" (signature)
 - "T.B" (signature)
 - "U.M" (signature)
 - "S.H" (signature)
 - "D" (signature)

14. FORCE MAJEURE

14.2 In the event that this Agreement cannot be performed or its obligations fulfilled for any reason beyond either Party's reasonable control as mentioned in clause 14.1 above for a continuous period of 10(ten) days, then either Party may, at its discretion, terminate this Agreement by notice in writing to the other Party at the end of that period. The normal effects of termination shall apply.

15.1 Should either Party ("the defaulting party") commit a breach of any of the provisions hereof, then the other Party ("the aggrieved party") shall be entitled to give the defaulting party 10 (ten) Business Days written notice to remedy the breach.

15.2 The aggrieved party shall be entitled to cancel this Agreement forthwith on written notice to the defaulting party upon the occurrence of any of the following events or circumstances:

15.2.1 if the defaulting party fails to comply with any of its obligations contained in this Agreement; or

15.2.2 If the defaulting party is provisionally or finally liquidated or placed under judicial management; or

15.2.3 if the defaulting party commits an act of insolvency or is sequestrated in the case of a natural person; or

Thabang Mathibe

Group Executive (Acting) Legal Services

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15.2.4 if the defaulting party ceases to carry on business, enters into any compromise or arrangement with its creditors or has a judgement granted against it, which remains unsatisfied for a period of 3 (three) days after the granting thereof, or

15.2.5 if any representation, warranty or statement made by a Party in the Agreement is incorrect in any material respect as at the date on which it is made, alternatively should any representation, warranty, undertaking or statement which is repeated under this Agreement ceases to be correct in any material respect on any date during the term of the Agreement.

15.3 The exercise of the rights by the aggrieved party is without prejudice to such other rights as the aggrieved party may have at law; provided always that, notwithstanding anything to the contrary contained in this Agreement, the aggrieved party shall not be entitled to cancel this Agreement for any breach by the defaulting party unless such breach is a material breach going to the root of this Agreement and is incapable of being remedied by payment in money or if it is capable of being remedied by payment in money, the defaulting party fails to pay the amount concerned within 14 (fourteen) Business Days after such amount has been determined, due notice of such determination and demand having been served on the defaulting Party by the aggrieved Party.

16. DISPUTE RESOLUTION

16.1 If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of arbitration. The reference to negotiation is a precondition to the Parties having the dispute resolved by arbitration.

16.2 A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this clause.

16.3 Within 10 (ten) Business Days following such notification, the Parties shall seek an amicable resolution to such dispute by referring such dispute to designated representatives of each of the Parties for their negotiation and resolution of the dispute. The representatives shall be authorised to resolve the dispute.

Thabang Mathibane

- 16.4 In the event of the negotiation between the designated representatives not resulting in an agreement signed by the Parties resolving the dispute within 15 (fifteen) Business Days thereafter, the Parties must refer the dispute for resolution by way of arbitration in accordance with the then current rules of the Arbitration Foundation of Southern Africa ("AFSA").
- 16.5 The periods for negotiation or arbitration may be shortened or lengthened by written agreement between the Parties.
- 16.6 Each Party agrees that the arbitration will be held as an expedited arbitration in Sandton in accordance with the then current rules for expedited arbitration of AFSA by 1 (one) arbitrator appointed by agreement between the Parties, including any appeal against the arbitrator's decision. If the Parties cannot agree on the arbitrator or appeal arbitrators within a period of 10 (ten) Business Days after the referral of the dispute to arbitration, the arbitrator and appeal arbitrators shall be appointed by the Secretariat of AFSA.
- 16.7 The provisions of this clause 16 shall not preclude any Party from access to an appropriate court of law for interim relief in respect of urgent matters by way of an interdict, or mandamus pending finalisation of this dispute resolution process.
- 16.8 The references to AFSA shall include its successor or body nominated in writing by it in its stead.
- 16.9 This clause is a separate, divisible agreement from the rest of this Agreement and shall remain in effect even if the Agreement terminates, is nullified or cancelled for whatsoever reason or cause.

17. INTELLECTUAL PROPERTY

- 17.1 The SABC shall own the intellectual property rights of all material broadcast from the Events.
- 17.2 Any use of material by way of publication, including radio, television or such other medium must acknowledge both Parties by way of displaying both Parties corporate identities in the case of television broadcast or mention SABC News and The New Age by name in the case of radio and print both Parties corporate identities in case of print.

Handwritten signatures and initials: "Mue", "Lam", "TB", and a large signature.

Thabang Mathibane
Group Executive (Acting)

5606 - N.Mbongo/eb - SABC / *Handwritten: 1801/2012* (Proprietary) Limited - March 2012

Handwritten signature: "Lam"

- 17.3 Any information provided by the SABC in terms of this Agreement shall not be used for commercial gain or purposes without a commercial agreement being entered into with the SABC.

18. NOTICES AND DOMICILIUM

- 18.1 The Parties choose *domicillium citandi et executandi* for the purposes of the giving of any notice, the payment of any sum, the serving of any process and for any other purpose arising from this Agreement, as follows:

18.1.1 With a copy to:

GE: Legal Services

GE: News and Current Affairs

15th Floor Radio Park Building

2nd Floor Television Building

Henley Road

Artillery Road

Auckland Park

Auckland Park

Johannesburg

Johannesburg

Fax No: 011 714-3437

Fax No: 011 714 3082

18.1.2 TNA Media

52 Lechwe Street

Corporate Park South

Midrand

Attention: Nazeem Howa

Fax No: 011 542 1100

or at such other address, not being a post office box or poste restante, of which the Party concerned may notify the others in writing.

- 18.2 Any notice given in terms of the Agreement shall be in writing and shall:-

- 18.2.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;
- 18.2.2 if posted by prepaid registered post be deemed to have been received by the addressee on the 7th (seventh) Business Day following the date of such posting;
- 18.2.3 If transmitted by facsimile be deemed to have been received by the addressee 1 (one) Business Day after the successful transmission thereof.
- 18.3 Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by one of the Parties from another including by way of facsimile transmission shall be adequate written notice or communication to such Party.
- 18.4 Either Party may change its *domicillium* by giving 14 (fourteen) Business Days written notice to the other Party.

19. CORRUPTION

TNA Media acknowledges that the SABC has a policy of zero tolerance towards corrupt activities. TNA Media hereby undertakes to report any knowledge of any corrupt activities involving the SABC or any of its employees to the SABC for the attention of the SABC's Group Executive: Legal Services agrees that if TNA Media is found at any time to have been a party to any act of corruption involving the SABC or any of its employees, or any attempt to commit a corrupt act (as defined in the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 as amended) with the SABC or any of its employees, that in addition to such relief available elsewhere in this Agreement or at law, the SABC may, upon notice in writing to TNA Media immediately terminate this Agreement without regard to the clauses on breach and termination.

20. GENERAL

20.1 Whole Agreement

This Agreement constitutes the whole of the agreement between the Parties relating to the subject matter hereof and save as otherwise provided herein no amendment, alteration, addition, variation or consensual cancellation will be of any force or effect


 Thabang Mafutha
 Group Executive: Legal Services
 5606 - 11th Avenue (Acting): Legal Services


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 W. M.


 L. M.

unless reduced to writing and signed by the Parties hereto or their duly authorised representatives.

20.2 Cession and Assignment

This Agreement shall be binding on the Parties hereto and their respective successors and, subject to this clause, the assignees. The Parties shall not be entitled to assign or otherwise cede the benefit or burden of all or any part of the Agreement without the prior written consent of the other Party which approval shall not be unreasonably withheld.

20.3 Severability


Should any of the terms and conditions of this Agreement be held to be invalid, unlawful or unenforceable, such terms and conditions shall be severable from the remaining terms and conditions which shall continue to be valid and enforceable. If any term or condition held to be invalid is capable of amendment to render it valid, the Parties agree to negotiate an amendment to remove the invalidity.

20.4 Waiver

No change, waiver or discharge of the terms and conditions of this Agreement shall be valid unless in writing and signed by an authorised representatives of the Parties against which such change, waiver or discharge is sought to be enforced, and any such change, waiver or discharge will be effective only in the specific instance and for the purpose given. No failure or delay on the part of a Party hereto in exercising any right, power or privilege under the Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

20.5 Authorised Signatories

The Parties agree that this Agreement shall not be valid unless signed by an authorised signatory of each of the Parties. A Party shall upon request furnish the other Party with such documentation as may reasonably be required by such Party to establish the authority of an authorised signatory.


Thabang Mathibane

Group Executive (Acting): Legal Services

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20.6 Applicable Law

The Agreement shall be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law.

20.7 No Collateral Terms and Conditions

The Parties agree that there are no other collateral terms or conditions to the Agreement, whether oral or written.

20.8 Signing in Counterparts

In the event that the Parties do not sign the same document, then this Agreement may be executed by each Party signing a counterpart, which counterparts together shall constitute one and the same Agreement.


Thabang Mathibe
Group Executive (Acting): Legal Services

THUS DONE AND SIGNED AT Auckland Park THIS 13th DAY OF MARCH 2012

AS WITNESSES



(Signature on behalf of South African Broadcasting Corporation SOC Ltd, News and Current Affairs, duly authorised)

1. T. Bulwala


Full Name: Lulama Mphahlele

2. M. M. M. M.

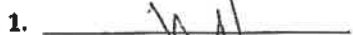
Designation: CEO

SIGNED AT JOHANNESBURG THIS 12th DAY OF MARCH 2012

AS WITNESSES



(Signature on behalf of TNA Media (Pty) Ltd, duly authorised)

1. 

Full Name: NAZEM HANA

2. 

Designation: CHIEF EXECUTIVE



THUS DONE AND SIGNED AT JOHANNESBURG THIS 12th DAY OF March 2012

AS WITNESS

1.



(Signature on behalf of South African Broadcasting Corporation SOC Ltd, Legal Department, duly authorised)

Full Name: Thabang Mathibe

Designation: Acting GE Legal and Regulatory Services:

THUS DONE AND SIGNED AT Auckland Park THIS 13th DAY OF March 2012

AS WITNESSES

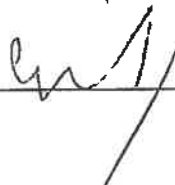
1.



(Signature on behalf of South African Broadcasting Corporation SOC Ltd, duly authorised)

Name: Lulema Mokhobo

2.



Position: Group Chief Executive Officer

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AFFIDAVIT

I, the undersigned,

LULAMA MAKHOB

do hereby make oath and state in English as follows:

1.

I am an adult female with Identity Number: [REDACTED] I am currently unemployed. I previously worked for Edutel, the now defunct educational radio and TV entity of the then Bop Broadcasting Corporation (10 years) as the head of educational TV and radio; ETV as a founding member and executive director (2 years); Urban Brew Studios as the Chief Executive Officer (5 years); and the SABC as Group Executive for Public Broadcasting Services (5 years). The SABC advertised the position of Group Chief Executive Officer in 2011. I successfully applied for this position, was appointed and commenced my employment on 16 January 2012. My stay at the SABC became untenable and I decided to leave. My last day at the corporation was 28 February 2014.

2.

I declare that the facts contained in this affidavit are within my own personal knowledge, unless I state otherwise or the context of the affidavit makes it clear that they do not. I declare that the information contained in this affidavit is true and correct, to the best of my knowledge and belief.

3.

On 06 August 2019, I was interviewed by Mr Arvind Baijnath and Mr Vhyldhum Kevin Reddy from the Special Investigating Unit ("SIU"). I was requested to submit a supplementary affidavit to my first affidavit, dated 08 August 2018, to address SIU further questions pertaining to the 2013 business agreement between SABC and Multichoice.

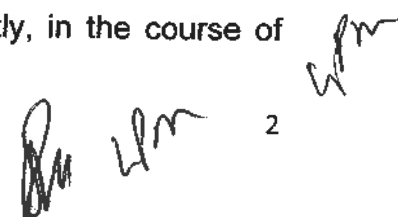
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4.

On 2 July 2013 I took emergency leave to attend to the medical needs of my gravely ill grand-daughter. I returned to work on Monday 8 July 2013. I became aware of the signing of the business agreement between SABC and Multichoice when the former chairperson: Mrs Ellen Tshabalala called me. The reason for her call was to accuse me of being derelict as I had not been available to attend the FIPT (Finance, Investment and Procurement subcommittee of the Board) meeting on 2 July 2013 where the business agreement between the SABC and Multichoice had to be concluded. I was obviously shocked at her attack and proceeded to give her the full details of my leave of absence. I had in any case expected that the contract would not be signed until the Board had heard all arguments from the differing parties within the SABC (i.e. those supporting the encrypted set top box provisions of the gazetted Broadcast Digital Migration Policy of 2008 and those against it). I was therefore taken aback when I was informed that the contract had in fact been signed, with arguments for anti-encryption winning over State policy.

5.

Mr Tiaan Olivier met me in my office on the morning of Monday 8 July 2013 and informed me of the signing of the contract. He rationalised that it (the contract) was a good deal as it guaranteed the SABC an income of over R500m over a period of 5 years. This was despite the fact that the contract placed the SABC in a precarious position from both a policy and future opportunity perspective, based on the plethora of other unreasonable clauses within it. A group executive meeting which was held on 10 July 2013 did not go into any discussion around the contract as informal discussions had been held with members within my direct reporting line. If my memory serves me well, these included Mr Sipho Masinga (GE Technology), Mr Zweli Mthembu (Head of Strategy), Ms Nelisiwe Nzimande (GM in GCEO's office), Ms Mbulu Nepfumbada (Head of Legal), Mr Phil Moilwa (GE Regulatory Affairs) and others. The Group Executive members did not formally discuss the signing of the contract because a legal opinion had been sought by the Chairperson from a certain Advocate Terry Motau SC on 3 July 2013. The opinion was not immediately made available to me (on the delivery date of 3 July 2013 which was the same date on which the MCA/SABC contract was signed). I have only recently, in the course of



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writing this affidavit, been granted access to the opinion by the investigators and am now properly appraised of its contents (**Annexure 1**) key of which are the following:

In paragraph 6 the Advocate Motau provides the disclaimer: *"It must be appreciated, as a point of departure, that this opinion does not seek to comment on the commercial rationale or otherwise of the agreement. This is left to the SABC and its officials with the relevant expertise to advise thereon"*. It should be noted that Mr Sipho Masinga, the then Group Executive of Technology and a highly qualified and experienced broadcast technology expert; Mr Zwelibanzi Mthembu a highly regarded ICT and DTT strategist and Head of Strategy in my office; My Itani Tseisi, the Group Executive of Risk and highly skilled finance expert; together with a number of key role players in the TV division were left out of the inner circle that justified the signing of the contract. It can therefore be argued that the advice for "officials with relevant expertise to advise thereon" was ignored.

Further in paragraph 12 the Advocate notes: *"However, having considered the terms of the must carry agreement, I got the distinct impression that there is some rationale in providing programs in an encrypted as opposed to unencrypted format. The latter may prove to be tricky, should the channels be broadcasted outside of the Republic of South Africa."* He raises an important point in this paragraph which shows his tacit disagreement with the negation of an important argument for encryption as expressed in the BDM 2008 Policy which states in paragraph 5.1.2 *"In addition the STBs will-5.1.2.2 have a control system to prevent STBs from being used outside the borders of South Africa and to disable the usage of stolen STBs"*. This leads to the conclusion that in ignoring the above-stated cautions, and by proceeding to sign the effectively flawed contract, Mr Motsoeneng and Mr Olivier acted unlawfully.

Background

On 15 May 2013 the MCA CEO, Mr Imtiaz Patel, wrote a letter to the SABC through Mr Hlaudi Motsoeneng, wherein he set out a series of conditions under which he believed the new SABC relationship on the 24-hour news channel would be governed. The letter was simply a proposal meant to get discussions started in earnest (**Annexure 2**). The Board appropriately engaged with the document, and mandated me to write a letter to Mr Patel, indicating the SABC's

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excitement at the prospect of finally getting the 24-hour news channel off the ground with the help of his company. The letter expressly stated the expectations that further engagements with the SABC would ultimately yield terms that would be mutually agreed by the two companies (**Annexure 3**). It subsequently became clear, when MCA presented the SABC with the draft contract that the terms expressed in the May 15th 2013 letter were not negotiated, and that they had been imposed in order to trigger a major policy shift in the digital TV transformation project. Mr Hlaudi Motsoeneng and Ms Ellen Tshabalala took the bait and the contract was signed on 3 July 2013. In the investigation of the legality of the contract, the Competition Commission concluded: *"Being able to influence a policy on encryption materially impacted the structure of the market in that it protected Multichoice's dominance in the PayTV market in that the STB Control would have significantly challenged the dominance of Multichoice particularly in lower LSM segments of the market"* (pg. 7 (17) of the Competition Commission Ruling of November 2018,). (**Annexure 4**) This was also in violation of section 2 (h) of the Broadcasting Act 4 of 1999 which reads: *"...ensure fair competition in the broadcasting sector"*.

7.

The signing of the contract effectively blocked the SABC from selling any of its news content to any other broadcaster for the duration of the contract. This type of exclusivity was patently wrong given the SABC's mandate to make content available to as broad a spectrum of audiences as possible, including selling its content to other broadcasters within and outside the borders of South Africa. The ability for the SABC to participate in the digital economy as a public broadcaster whose reason for existence was to serve the public, with a keen focus on the poor and marginalized was once again limited to that of merely being a linear broadcaster with some presence in the digital media which, sadly, is affordable only to those with access to airtime and data bundles (both expensive) and Wi-Fi, where available. The signing of this 2013 business agreement with Multichoice did prejudice the SABC.

The interim Board and the newly appointed board of September 2013 of that time quietly accepted the business agreement as a *fait accompli* and proceeded to

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oversee its implementation. I, as the chief accounting officer of the SABC, was similarly forced to take on my executive implementation oversight duties.

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The applicable provisions in the DAF

Page 2 paragraph. 2.4 of the applicable Delegation of Authority Framework (2012) states:

“Board committees are generally constituted with powers of recommendation only. However, subject to certain statutory limitations, the Board May, in its discretion, delegate decision-making authority in any area to one or more of the Board committees”

Therefore, unless the Board had made the determination that FIPT could approve the signing of the contract, which as far as I am aware was never made the act by Mr Motsoeneng and Mr Olivier in signing the contract was unlawful.

The Process

The following process should have been adopted in order to legitimise the so-called “new SABC position” on the non-encryption of DTT Set-Top Boxes, as it played itself out in the SABC/MCA Contract:

- 8.1. The Group Executive Committee should have to have been given the opportunity to engage in a proper interrogation of the arguments presented by Mr Motsoeneng and his team in arriving at a decision to proceed with MCA's condition precedent that the SABC should keep its channels unencrypted; and all SABC's channels on DTT should be accessible and available to MCA also without a conditional access system.
- 8.2. The interrogation would have included, inter alia, a risk assessment; legal and policy imperatives evaluation; financial evaluation; viability stress test and a thorough comparative study of other possible scenarios. Only once the Group

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Executive Committee had satisfied itself that the contract was sound could it be approved for submission as a recommendation to FIPT.

- 8.3. FIPT would in turn have to also satisfy itself that the Group Executive recommendation was sound and then forward it to the Board as a Board sub-committee recommendation.
- 8.4. The Board, as the highest accounting authority, would at that point have to decide whether to accept or reject the recommendation. It would only be on the Board's express approval and election of the signatories to the contract that it could indeed be signed as a legally binding document.

The failure to apply the above-stated process meant the contract was entered into unlawfully. (Annexure 5)

While it has been argued that the SABC received over R500m (R100m per annum over 5 years) and therefore there should be no argument against the non-encryption clause, the following remain true:

The stated revenues would be tiny compared to what the SABC would gain if it included a premium subscription content bouquet alongside its free-to-air channels in its DTT transponder space.

Consider the following scenario:

According to its 2019 Abridged Annual report, MCA South Africa currently has an active subscriber base of R7.4 million, up by R4 million from the end of the 2011 financial year (this is the same period over which the SABC dithered over its rightful place in the pay TV market). Based on an average of R322 monthly revenue per

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subscriber that MCA charges, its total revenue came to R40.4 billion over its 2019 financial year. **(2019 MCA Abridged Annual Report Annexure 6)**

If the SABC, through its vast footprint and high audience attraction value did go head-to-head with MCA, offering its subscribers a low R40 subscription per month, and it had only R4 million subscribers, it could raise monthly revenues of almost R160 million, and annually R1. 920billion.

Through the opportunity that was available to the SABC's encrypted DTT STB for the provision of a return path to enable every household to connect to e.g. Telkom's internet network, millions of South Africans would have wanted to opt in. This right is contained in the 2008 Digital Migration Policy paragraph 5.1.2 which reads *"the STBs will- 5.1.2.6 have a return path capability feature in the STB which enables the public to receive as well as send a message back, as opposed to only receiving messages. This feature enables the full and interactive provision of e-government services such as accessing, filling in and sending back government forms without the viewer leaving home or the place where the TV is located such as a school, health centre, police station, post office, Thusong centre or place of worship, and ; 5.1.2.7 capabilities to unscramble the encrypted signal so that only fully compliant STBs made or authorised for use in South Africa can work on the network."* (see from 10 below). Through that, all South Africans would be well on their way to fully participating in the digital economy without the added burden of using very expensive data bundles.

Consider a second scenario where Must-Carry regulations have been done away with and not entrenched as per the wishes of MCA in its contract with the SABC, and encryption is allowed and not prevented, also by MCA which described it as a "condition precedent", the SABC could syndicate and/or licence its channels to international broadcasters for fees around an illustrative value of R50 million per channel per annum. Given that there are 24 English-speaking countries within the continent alone, and many of them, including within the SADC region, have previously wanted access to SABC channels, the corporation could, through legal and negotiating instruments at its disposal, stand to generate revenues of R1.5 billion per annum from this strategy. This strategy is similar to the one applied by MCA, as it buys or licences complete channels from a myriad of local and

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international broadcasters and studios (e.g. Discovery channel; Comedy Central; BBC entertainment, BET, etc).

These illustrative figures are based purely on highly conservative estimates and could be much more. Some individuals within the industry have actually valued the channels at as much as R12 billion per annum.

The very badly thought through MCA/SABC agreement therefore put the SABC in completely subservient position, with no ability to execute any of the scenarios described above. Today the channel reports a technical insolvency position, which could have been averted if strategic minds made the decision on behalf of the SABC.

10

Policy and Government matters:

The 2008 Digital Migration Policy has, inter alia, made the following provisions which would have provided risk mitigation's for South Africa:

The STB's would have a control system to prevent them from being used outside South Africa. This was an important point given that international content supplier contracts specified the exact territory (RSA) within which their content could be viewed. Access by territories outside the Republic would have constituted a breach with penalties for the SABC.

The STB would be a tool for access to information and services by all South Africans. The spirit behind this was for all South Africans to have access to the internet, which would enhance the participation of the poor (especially students in poor communities where access to good educational content was severely limited) in the knowledge economy. The return path on the STB would enable email and other interactive capabilities, with great benefit for all citizens regardless of their financial standing.

The 2012 Digital Migration Policy Amendment added that the STB's would

- Have a control system to enable mass messaging (crucial for government e-services)

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- Have a robust control system that would benefit consumers by ensuring that they did not have to own multiple STBs for both current and future free-to-air broadcasting services. Essentially, 1 single STB would have the capacity to accommodate multiple broadcasters, in other words, it would be interoperable.

Failure to apply the above as influenced through the SABC's contract with Multichoice, the subsequent inexcusable loss of time in the country's digital migration process obviously caused by the lack of agreement on the Set Top Box policy provision (see the ETV and others versus the SABC, Multichoice and the Competition Commission as a third respondent case number 140/CAC/Mar16; and the latest Competition Commission findings on this matter) have robbed the over twenty million poor South Africans of freely participating in the knowledge economy.

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Today the Republic faced with the daunting task of implementing imperatives brought to bear by the advent of the 4th Industrial Revolution, and yet has missed the opportunity to create mass access to information and knowledge through a technology which, given a chance, could have worked for the SABC, the government, the communications sector in general and, most importantly, all the people of South Africa.

12

The Deponent declared the following in the presence of the under mentioned Commissioner of Oath:

CERTIFICATION

I know and understand the contents of this declaration.

I know and understand what it means to take the prescribed oath.

I have no objections to taking the prescribed oath.

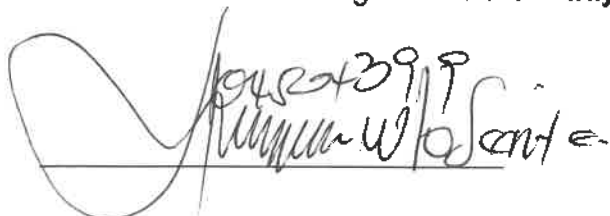
I consider the prescribed oath to be binding on my conscience.

I swear that the information set out or referred to in this affidavit is the truth, the whole truth and nothing but the truth, so help me God.

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Deponent Signature

I certify that the Deponent has acknowledged that she knows and understands the contents of this affidavit. This affidavit was signed by the Deponent and sworn to before me at ~~Randburg~~ ^{in Linden} on this the **day of August 2019**.


Commissioner of Oaths**Full name:**

SAMUEL SERIJE

Capacity:

WARRANT OFFICER

Name of Employer:

LINDEN SHPS

Address:

30 BOUNDARY ROAD
ROBINDALE
2195




1

**EX PARTE: SOUTH AFRICAN BROADCASTING CORPORATION
("SABC")**

In re:

**COMMERCIAL AND MASTER CHANNEL
DISTRIBUTION AGREEMENT**

OPINION

Lpm

A INTRODUCTION

- 1 Consultant is the South African Broadcasting Corporation SOC Limited ("the SABC") or ("Consultant").
- 2 The SABC is currently in discussions with Multichoice (Pty) Limited ("Multichoice") regarding the possibility of the parties entering into a Commercial Agreement and Channel Distribution Agreement ("the agreement").
- 3 Consultant seeks an opinion on legal issues which arise from the agreement.
- 4 I have been briefed with the following documents:
 - 4.1 The regulations regarding the extent to which subscription broadcasting services must carry the television programs provided by the public broadcast service licensee ("the must carry regulations").
 - 4.2 The must carry channel distribution agreement between Multichoice and the SABC ("the must carry agreement").
 - 4.3 Two draft copies of the agreement dated 27 June 2013, each containing separate comments by way of track changes, marked "for discussions only".
 - 4.4 An undated copy of the draft agreement marked "EXECUTION COPY".
 - 4.5 A letter dated 15 May 2013 from the Group CEO of Multichoice marked for the attention of Hlaudi Motsoeneng.

hpm

4.6 A copy of a letter dated 19 June 2013 from the SABC's Group Chief Executive to Multichoice's Group CEO.

4.7 A letter dated 20 June 2013 from the Group CEO of Multichoice to the Group CEO of the SABC.

B INITIAL COMMENT

5 It must be made appreciated, as a point of departure, that this opinion does not seek to comment on the commercial rationale or otherwise of the agreement. This is left to the SABC and its officials with the relevant expertise to advise thereon.

C ANALYSIS AND DISCUSSION

6 Due to the urgency with which the opinion is being sought, I shall not, in this opinion, outline a lengthy discussion indicating the basis for the conclusions reached. If the SABC requires an elaboration on the conclusions reached, I would suggest that a consultation be arranged through my instructing attorneys where a much more meaningful discussion can occur.

7 The first observation which one has made is that the agreement is not a product of, neither is it sought to be entered into in response to the imperative of the must carry regulations. In other words, it is purely a commercial decision taken by the parties, each of them intending to advance its commercial interests.

8 The guiding principle in agreements of this nature is that each party ensures and/or safeguards its commercial interests and this it does by ensuring that the terms of the agreement are consistent with such intention.

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- 9 I note that from the initial drafts, clause 3 dealt with the term of the agreement and provided for an option only exercisable by Multichoice. In the current draft, the option has been removed.
- 10 My view and suggestion is that a clause dealing with an option should be retained. However, the option should be exercisable by both parties. This may benefit the SABC should the agreement be found to be commercially viable, during its subsistence in that to renew and/or extend an agreement is easier than to renegotiate.
- 11 In addition, there is no downside for the SABC since it will retain the discretion or prerogative to exercise or not to exercise the right to an option.
- 12 I have not had the benefit of a consultation for purposes of preparing this opinion. However, having considered the terms of the must carry agreement, I got a distinct impression that there is some rationale in providing programs in an encrypted as opposed to an unencrypted format. The latter may prove to be tricky, should the channels be broadcasted outside of the Republic of South Africa, where issues of potential breach of intellectual property may arise.
- 13 I am merely raising this issue for the SABC's consideration. I am also mindful of the fact that Multichoice will possibly argue that it is the nature of the format and the exclusivity of the rights, which informs its price that it has offered. However, commercial considerations cannot and should not be the only yardstick by which advantages are measured. The SABC is entitled to contract on any terms on

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which it deems to be most beneficial and as such, my advice cannot travel into commercial considerations, save to raise other considerations at play.

- 14 In respect of clause 4.1.2 which deals with the time period in which the SABC undertakes and agrees for purposes of the Channel Commencement Date, I would suggest that the SABC creates a leeway or latitude to negotiate such date, in order to deal with unforeseen exigencies. My proposal would be that a new clause numbered "4.1.2.3" be included with words to the effect that "or such specified period as may be agreed between the parties".
- 15 Clause 15.2 sets out instances which would entitle Multichoice to terminate the agreement other than in circumstances relating to breach as contemplated in clause 15.1. It would be advisable for the SABC to also outline instances where the agreement would be terminable at any time and without liability to Multichoice, or where it would be entitled to suspend the agreement. This should be informed by the obligations which the SABC expects Multichoice to perform, the failure of which will render the agreement not capable of implementation.
- 16 In respect of dispute resolution mechanisms as stipulated in clause 17, the SABC may consider the need to incorporate compulsory mediation as a precursor to arbitration. This will outline the timeline and the process by which it should be done. The mediator can be a single individual, the advantage of course being the question of cost saving.
- 17 It is of course not inconceivable that the law may change in that the Independent Communications Authority of South Arica ("ICASA") may change the regulations

to provide that the contemplated 24 hours news channel is a must carry channel.

The consequence will be that Multichoice will not be obliged to pay for this channel.

- 18 Should this risk eventuate, the SABC will be faced with a situation that consequential costs such as those incurred to set up the news channel and the retrenchment of staff, will be a loss which it may incur.
- 19 The only way in which such a risk may be mitigated and/or taken into account, is for the SABC to factor it into its pricing.
- 20 The consequence will further be that the SABC should specify a price per channel, i.e. in terms of the two channels, which is the subject of the agreement. The reason is that it is unlikely that the entertainment channel can be declared as a must carry channel and as a result, the splitting and/or ring-fencing of the two channels may be vital.
- 21 I advise accordingly.

TERRY MOTAU SC
Duma Nokwe Chambers
SANDTON

3 July 2013

Lpm



15 May 2013

Attention : Hlaudi Motseneng
SABC
Radio Park
Henley Road
Auckland Park
2094

Dear Hlaudi

Proposed Partnership and Channel Supply Agreement between MultiChoice South Africa Group and SABC

Thank you for the constructive meetings and open dialogue we have had regarding the development of a mutually beneficial agreement between the SABC and the MultiChoice South Africa Group ("MCA").

As you are aware it is our intention that a wider partnership between the SABC and MCA is developed over time. We appreciate that the SABC has to fulfill its mandate as public broadcaster in South Africa, but at the same time, is the leading and most diverse free-to-air broadcaster operating in the country. MCA believe that building a partnership with the SABC will be beneficial to both organizations.

MCA's primary business is content aggregation, technology and platform development. MCA has an active subscriber base of some 4,5 million digital satellite households and provide access to some 20 million viewers in South Africa.

We believe that MCA can assist the SABC in enhancing on its mandate as public broadcaster and immediately expand its free-to-air broadcasting operations.

DTT in South Africa is currently in a mess, with risk for the all the existing broadcasters. Free-to-air broadcasters are faced with the challenge of advertising revenues being diluted over a number of free-to-air channels. PayTV broadcasters on DTT have limited capacity available which reduces the ability to provide an attractive multichannel pay offering to subscribers.

The SABC will have to invest in the content for its DTT platform, with advertising revenues only being generated much later once the free-to-air DTT platform and base has been established. We propose that the SABC and MCA work together to develop their respective DTT and/ or digital satellite platforms. This can take the form of co-operation agreements and channel supply agreements. This will provide the SABC immediate access to MCA's active digital satellite subscriber base with an opportunity to generate guaranteed channel revenue and advertising revenue from day one. This presents the SABC with substantial potential upside for success of its operations and the free-to-air DTT platform.

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We believe that the beginning of such a partnership can best be captured by the immediate conclusion of a commercially viable and mutually beneficial agreement between the organizations.

Accordingly, based on discussions and feedback from the SABC, MultiChoice wishes to enter into an agreement with the SABC based on the following proposal and on the assumption that both parties will be providing channels for their respective platforms.

Proposal:

SABC Channel Supply

1. The SABC will provide MCA with the following channels:
 - a. An exclusive entertainment channel (SABC Premium); and
 - b. A 24 hour news channel (SABC News).
2. In return for the delivery of the channels listed above by SABC, Multichoice will pay the SABC a flat fee of R500 million, payable over a period of 5 years;
3. The SABC will bear the full cost for the production of the channels.
4. The SABC shall retain all advertising generated on these channels;
5. The entertainment channel will be exclusive to MCA and MCA will be authorised to distribute the entertainment channel on all its distribution platforms;
6. The SABC news channel will be exclusive to MCA's satellite platform and MCA will be authorised to distribute the SABC News channel on all its distribution platforms. The SABC will however be allowed to distribute the SABC News channels on its own free-to-air DTT platform, subject to point nine below.
7. The details of the content on these channels will be discussed and finalised between the parties respective content divisions.
8. The initial term of the Agreement will be 5 years with an option for MCA to renew on same terms and conditions for a period of three further years.
9. The offer presupposes that all SABC Channels on its DTT platform will be made available to the public unencrypted, without a conditional access system and thereby incidentally receivable by the MCA DTT decoder.
10. MCA, the SABC and Sentech (if required), work together to promote carriage of all the SABC's free to air channels on the SABC free-to-air multiplex will be made available on the MCA satellite platform, subject to available capacity. This is in order to enable the SABC to generate advertising revenue from day one.

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MCA Channel Supply

1. MCA will supply the SABC with at least one free-to-air channel for its free-to-air DTT service. The free-to-air channel supplied by MCA will be an African / local movie and general entertainment channel.
2. Payment for the MCA free-to-air channel supplied by MCA to the SABC will be in the form of advertising revenue generated by the channel itself. MCA will bear the full cost for the production of the channel.
3. The deal will be for 5 years with an option for the SABC to renew on same terms and conditions for a period of three further years

Both parties shall use their best efforts to ensure that the channels on their respective portion of the multiplex are authorized by ICASA.

This offer represents the seriousness with which MultiChoice views the partnership with the SABC and accordingly we will make the necessary resources available to conclude all the agreements required to give effect to this as soon as possible. We also appreciate that this agreement/s will be subject to both parties board approval.

We remain at your disposal to further discuss this proposal in more detail. We will also welcome any further ideas to enhance our mutually beneficial relationship.

We look forward to a prompt and positive response.

Yours Sincerely



Imtiaz Patel

Group CEO, Multichoice South Africa





Office of the Group Chief Executive Officer
26th Floor, Radio Park, Henley Road
Auckland Park, 2094
Private Bag X1, Auckland Park, 2006
Johannesburg, Gauteng, South Africa
Tel +27 11 714-4889, Fax +27 11 714-4889
www.sabc.co.za

19 June 2013

Imtiaz Patel
Group CEO, Multichoice SA
PO Box 1502
Randburg
2125

Dear Imtiaz

The Board and Executive Management has duly considered MultiChoice's proposal regarding the SABC's 24 Hour News Channel and the Entertainment Channel and we are pleased to inform you of the decision to proceed in accordance with the proposal on the terms that will be agreed between the SABC and MultiChoice.

We look forward to a mutually rewarding relationship for the coming five year period.

Yours faithfully,

Lulama Mokhobo
SABC Group Chief Executive

Copy to: **Ms Z E Tshabalala**
Chairman of the SABC Board



BACKGROUND

1. This case has been before the Competition Tribunal ("Tribunal"), the Competition Appeal Court ("CAC") and the Constitutional Court.
2. The genesis of this matter arises from a commercial agreement entitled the "Commercial and Master Channel Distribution Agreement" concluded between the SABC and MultiChoice on 3 July 2013 ("the Agreement").
3. Application to the Tribunal
 - 3.1. The matter was brought directly to the Tribunal by Caxton and CTP Publishers and Printers Limited ("Caxton"), The Trustees for the time being of the Media Monitoring Project Benefit Trust, and S.O.S Support Public Broadcasting Coalition, (collectively Caxton and Others). The complaint raised by Caxton and Others at the Tribunal was that the Agreement constitutes an intermediate merger in terms of section 12(1) of the Competition Act 89 of 1998, as amended (the "Act"), which should have been notified as such in terms of section 13A(1) of the Act.
 - 3.2. On the evidence before it, the Tribunal concluded that the Agreement concluded between SABC and MultiChoice does not amount to a merger as contemplated in section 12(1) of the Act.
4. Appeal to the CAC
 - 4.1. Caxton and Others noted an appeal against the decision and order of the Tribunal to the Competition Appeal Court ("CAC"). On 24 June 2016 the CAC handed down its judgment in the matter and, on the evidence before it, concluded that the agreement concluded

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between the SABC and MultiChoice did not give rise to a notifiable merger as follows:

- 4.1.1. In respect of the Entertainment Channel complaint, that is, the contention that the agreement conferred control on MultiChoice over the SABC's archives, the CAC found that a license to exploit an asset for a limited period *"on its own and without more cannot constitute a merger transaction."*¹
- 4.1.2. Regarding the encryption complaint, that is, that the agreement conferred control over the SABC's policy on encryption, the CAC found that *"on analysis of the evidence provided, it could not be concluded that the agreement fell within the definition of a merger in terms of section 12 of the Act"*.²
- 4.2. The CAC then concluded that since this case concerns a public broadcaster and is a matter of public interest, a less formalistic and more substantive approach to the case was required.³ The CAC then issued an order:
 - 4.2.1. Setting aside the order of the Tribunal;
 - 4.2.2. Directing the SABC and MultiChoice *"to provide the Competition Commission within 21 days of this judgement of 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"*;
 - 4.2.3. Directing the Commission to *"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."*
 - 4.2.4. If the Commission recommends that *"the agreement gives rise to a notifiable change of control which falls within the definition of a merger in terms of section 12 of the Act, it is directed that a rehearing of the matter shall be conducted by the Tribunal"*

¹ Paragraph 48 of the judgment

² Paragraph 109 of the judgement.

³ Paragraph 11 of the judgement.

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to determine whether the conclusion of the agreement did entail such a merger as defined”.

- 4.3. It is in the context of the above order of the CAC that SABC and MultiChoice respectively, filed documents with the Commission on 25 July 2016, and the parties and the Commission had various interactions which gave rise to a dispute that was heard by the CAC and then the Constitutional Court.
- 4.4. The essence of the dispute related to the documents that were submitted by the SABC and MultiChoice which, in the Commission's view, were inadequate and therefore failed to meet the order of 24 June 2016. The Commission sought to use its investigative powers in terms of section 49B of the Act to interview the executives of both the SABC and MultiChoice and obtain the information which was clearly lacking from the documents submitted. The SABC and MultiChoice opposed the Commission's intention to interview their executives who had participated in the negotiation, conclusion and implementation of the agreement.
- 4.5. On 4 October 2016, the Commission dispatched a letter to the Tribunal seeking a directive on whether it is entitled to conduct interrogations of certain executives of the SABC and MultiChoice in terms of Part B of Chapter 5 of the Act. On 6 October 2016 MultiChoice responded to the Commission's letter and the SABC responded on 11 October 2016. Both MultiChoice and the SABC stated that the Commission does not have the powers to conduct interrogations in terms order of the CAC. On 11 October 2016 the Tribunal issued a directive stating that it does not have jurisdiction to issue directions for further conduct of the proceedings or for the further interpretation of the order of the CAC.

5. Application to the CAC

- 5.1. As a result of the dispute between the Commission and SABC and MultiChoice, on 13 October 2016 Caxton and Others brought an application before the CAC seeking an order the Court to interpret its 24 June 2016 order as permitting the Commission to use its investigative powers in terms of section 49B of the Act, or to issue a fresh order enabling the Commission to use its investigative powers.

- 5.2. The CAC held in its judgment of 28 April 2017 that its order – i.e. its order of 24 June 2016 – did not and cannot be read to grant the Commission powers in terms of s49B of the Competition Act. It held further that the order was clear and unambiguous and that it expressly confined the source of the inquiry to be conducted by the third respondent exclusively to documentation as set out in the order.
- 5.3. This meant that the Commission would have been limited to the documents furnished to it by MultiChoice and the SABC. Further that if there are any gaps in the documents furnished it could not request any of the executives of the two entities to explain the gaps in the documents. It also meant that the Commission could never subpoena any of the past or present employees and executives of the two entities to give oral explanations regarding the circumstances surrounding the conclusion of the Agreement.

6. Appeal to the Constitutional Court

- 6.1. Caxton and Others brought an application for leave to appeal to the Constitutional Court on 22 May 2017 concerning the ambit of the powers of the Commission in carrying out its investigation into the merger issue. The Commission supported the application for leave to appeal brought by Caxton and Others. Before the hearing of the matter by the Constitutional Court, Caxton and Others sought to withdraw the application for leave to appeal. The Commission wrote to the Constitutional Court stating that the application for leave to appeal should proceed as set down by the Constitutional Court. The Constitutional Court issued a directive that the matter would proceed as set down and oral arguments were presented by Caxton and Others, the Commission, the SABC and MultiChoice on 23 November 2017.
- 6.2. On 28 September 2018 the Constitutional Court handed down its judgment and order overturning the decision and order of the CAC. The Constitutional Court's order reads as follows:

"[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 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 costs of two counsel"

6.3. Pursuant to the order of the Constitutional Court the Commission invited various former and current executives of the SABC and MultiChoice to come and give evidence under oath.

6.4. The SABC and MultiChoice submitted further documents to the Commission arising from the oral testimony of the witnesses.

DOCUMENTS SUBMITTED BY MULTICHOICE

7. MultiChoice submitted various documents pursuant to the order of the CAC on 24 June 2016.

8. The documents submitted by MultiChoice did not contain business plans, Board Minutes or documents presented to the Board, or any strategic documents relating to the negotiation and conclusion of the Agreement.

9. The representatives of MultiChoice confirmed when they were giving oral evidence that such documents do not exist. The representatives of MultiChoice could not remember some of key information that the Commission requires to assess if the Agreement led to a merger.

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DOCUMENTS SUBMITTED BY THE SABC

10. The SABC submitted various documents relating to the negotiation, conclusion and implementation of the Agreement. The documents were analysed by the Commission. The documents submitted to the Commission show that there was a change in the policy of the SABC in 2013 which may have resulted from the negotiation and conclusion of the Agreement.

COMMISSION'S ANALYSIS

Entertainment Channel

11. The Agreement before it was amended was very restrictive in what the SABC could do with the content licensed to MultiChoice in respect of the Entertainment Channel. This led to further negotiations on the amendments to the Agreement. The amendments to the Agreement all relate to the Entertainment Channel. The amendments were effected before the launch of the Entertainment Channel in 2015.

12. On the basis of the evidence made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as completed in section 12(1) of the Act for, inter alia, the following reasons:

12.1. At all times the SABC had the final say on what went onto the channel. Thus the SABC set up the Entertainment Channel as it deemed fit in terms of content and scheduling; and

12.2. MultiChoice did not have access to the SABC archives and did not control the archives save to request certain programmes to be included on the channel.

Encryption

13. The position communicated by officials of the SABC showed that the policy of the SABC with regards to STB Control was vacillating from time to time.
14. The evidence provided to the Commission indicates that the policy of the SABC changed materially as a result of the Agreement.
15. The minutes of the SABC Board and other internal documents made available to the Commission do not point to a clear decision by the Board to support non-encryption prior to at least the signing of the Agreement in July 2013 and this is consistent with other evidence provided to the Commission. The minutes of the SABC Board and other internal documents provided to the Commission rather point to the existence of a stance supporting encryption at least up to after signature of the Agreement.
16. On a consideration of evidence before the Commission as a whole, the Agreement influenced the SABC's policy on encryption. The CAC in *Distillers Corporation South Africa Limited and Another vs Bulmer (SA) (Pty) Ltd*⁴ stated the following:

"It follows that the 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 pro-pointer in favour of a broad interpretation to section 12 of the Act".⁵

17. Being able to influence a policy on encryption materially impacted the structure of the market in that it protected Multichoice's dominance in the PayTV market in that the STB Control would have enabled new DTT entrants into the market that would have significantly challenged the dominance of MultiChoice particularly at lower LSM segments of the market.

CONCLUSION

18. In light of the above, the Commission concludes as follows:

18.1. In respect of the Entertainment Channel the Agreement, on the basis of the evidence

⁴ CAC Case Number 08/CAC/MAY01.

⁵ Ibid at at page 24.

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made available to the Commission it appears that the relevant clauses in the Agreement relating to the Entertainment Channel did not give rise to a merger as completed in section 12(1) of the Act; and

- 18.2. In respect of the encryption case, the Agreement the Agreement resulted in a notifiable change of control as envisaged in section 12(2)(g) of the Act.

RECOMMENDATIONS

19. In view of the fact that the Commission has concluded that the Agreement constitutes a merger as contemplated in section 12(1) of the Act, the Commission recommends that the following procedure should be followed in disposing of the matter:

- 19.1. The current application launched Caxton and Others which is currently before the Tribunal as a result of the 24 June CAC order, should be postponed sine die pending the processes mentioned below:

19.1.1. The Commission will call upon MultiChoice and SABC to file the transaction in terms of section 13A(1) of the Act as a merger; and

19.1.2. The Commission will exercise its rights in terms of the Act to initiate proceedings in the Tribunal against the SABC and MultiChoice as it has found that there has been a contravention of section 13A of the Act.

- 19.2. This recommendation is consistent with the judgement of the Constitutional Court that the 24 June 2016 CAC order does not limit the powers of the Commission to investigate cases where there is implementation of a merger before it is approved by the competition authorities as that power is derived from the Act. The application by Caxton and Others similarly does not take away the Commission's powers in terms of the Act to refer a prior implementation case where it has found that a merger has occurred.

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SABC SOC LIMITED

DELEGATION OF AUTHORITY FRAMEWORK

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1. LEGISLATIVE AND GOVERNANCE FRAMEWORK

The overall governance of the South African Broadcasting Corporation SOC Ltd (SABC or the Corporation) as the national public broadcaster and a public entity wholly owned by Government is broadly determined by various legislation, in particular the:

- Public Finance Management Act No.1 of 1999 ("PFMA"), as amended and the Treasury Regulations
- Broadcasting Act No. 4 of 1999, as amended
- Companies Act No. 78 of 2008, as amended
- Income Tax Act No. 58 of 1962, as amended
- Value Added Tax Act No. 89 of 1991, as amended
- Electronic Communications Act No. 36 of 2005
- ICASA licence conditions
- other relevant legislation applicable to the SABC

The SABC's internal governance documents, namely:

- The SABC's Memorandum of Incorporation
- Shareholder Compact and Materiality Framework, and

Various codes of corporate governance applicable to the Corporation, namely:

- King Code of Governance for South Africa 2009 (King III)
- Protocol on Corporate Governance for the Public Sector 2002 (the Protocol)

This Delegation of Authority Framework (DAF) seeks, within the parameters of the above framework, to create structured decision-making at all levels of the SABC in order to promote effective and efficient governance of the Corporation.

2. DECISION-MAKING STRUCTURES OF THE SABC

- 2.1 Control of the affairs of the SABC is vested in the Board of Directors appointed, on the recommendation of Parliament, in terms of the Broadcasting Act. The Board of Directors of the SABC is ultimately accountable and responsible for the performance and affairs of the Corporation. The Board derives its authority primarily from the Memorandum of Incorporation and the Broadcasting Act.
- 2.2 The detail of the Board's constitution, its role and responsibilities, and its reserved powers are set out in the Board Charter. The Board Charter forms an integral part of the governance framework of the Corporation.
- 2.3 The Board has created a series of Board Committees, in terms of the Board Charter, to assist it in the execution of its role. These committees may be permanent or may be constituted on an *ad hoc* basis to deal with specific issues. Board committees derive their authority from the Board. As a general principle, all matters, which fall within the ambit of authority of the Board, in respect of which the Board has not delegated authority must first be considered by the relevant Board committee to make a recommendation to the Board on the appropriate resolution. The flow of decision-making is explained in more detail in section 10 of this Delegation of Authority Framework.
- 2.4 Board committees are generally constituted with powers of recommendation only. However, subject to certain statutory limitations, the Board may, in its discretion, delegate decision-making authority in any area to one or more of the Board committees.
- 2.5 Each Board committee is constituted in accordance with terms of reference, which set out the rules of operation of the committee, its role and responsibilities, and its relationship to the Board. The current Committees of the Board and an overview of their roles are set out in the table in section 3 of this DAF.
- 2.6 Operational authority for the day-to-day running of the business is delegated by the Board to the Group Chief Executive Officer (GCEO) and to the Group Executive Committee (EXCO). The constitution of EXCO is determined by the Broadcasting Act and SABC's Memorandum of Incorporation. EXCO is collectively accountable to the Board.
- 2.7 The broad areas in respect of which operational authority is delegated by the Board to the GCEO and EXCO are defined, at a high level in the Board Charter, and are further expanded in the Terms of reference of EXCO.

30 October 2012

Page 2 of 69

3. BOARD COMMITTEES : SCOPE OF AUTHORITY

The following matrix sets out a summary of the scope of authority of each of the Board committees. It is included here in order to help the user identify the Board committee with authority, albeit primarily in an advisory capacity, in respect of any matter to be referred to the Board for decision. Please refer to each committee's full terms of reference for their detailed duties and responsibilities.

AUDIT (AUDCOM)	FINANCE INVESTMENT & PROCUREMENT (FIPCOM)	GOVERNANCE, NOMINATION & REMUNERATION COMMITTEE (GNRCOM)	NEWS (NEWSCOM)	PBS (PBSCOM)	PCS (PCSCOM)	RISK (RISCOM)	SOCIAL & ETHICS COMMITTEE SECCOM	TECHNOLOGY (TECHCOM)
Ensures the reliability of risk/internal control systems and the scope/effectiveness of the internal and external audit functions.	Evaluates and recommends to the Board the approval of the Corporation's annual budget. Evaluates new and existing business opportunities. Evaluates and advises the Board on all major capital projects. Advises the Board on the Treasury policy of the SABC.	Provides guidance to and oversees the work of the Human Capital Services. Assists the Board in defining the roles/responsibilities of executive management. Advises the Board on the adoption of a HR strategy for the Corporation. Ensures fair and appropriate HR policies are put in place. Ensures that the SABC, through its HR practices, attracts, retains and rewards experience and skills/expertise appropriately. Ensures that staff succession, training and development strategies are put in place. Constitutes interview panels for strategic appointments. Recommends policies on remuneration of employees for Board approval.	Ensures that the SABC's news and current affairs programming promote the values of democracy, non-racism, nation building, and empowerment and are in line with the SABC's Corporate goals. Assists the Board to determine the editorial direction of the SABC. Assists the Board to preserve the Corporation's editorial independence and integrity. Reviews the editorial policies of the SABC from time to time. Approves Business Plans above R50m to R100m	Ensures that the public broadcasting services provided by the SABC comply with the provisions of sections 11 and 27 of the Broadcasting Act. Ensures adequate funding of programmes and platforms. Approves Sports, Programming & Production Rights above R50m to R100m	Ensures that the commercial broadcasting services provided by the SABC comply with the provisions of section 10 of the Broadcasting Act. Ensures adequate funding of programmes and platforms. Approves Sports, Programming & Production Rights above R50m to R100m	Oversees the development of a risk assessment, including a fraud risk assessment strategy. Oversees the development of a risk management strategy. Regularly evaluates the status of key risks in the Corporation. Together with the Audit committee, reviews the efficiency of the framework of risk management and internal controls. Reviews and recommends the approval of the directors' statements on risk management and internal control in the annual report.	Ensures that UN Global Compact Principles are incorporated in the decision-making processes of the Board. Reviews and makes recommendations to the Board with respect to the Corporation's Social Economic Development (SED). Requests, as appropriate, engagement with the External Auditors or other stakeholders on the perspectives of the Corporation's SED programmes, performance and progress. Reviews the initiatives to embed the principles and practices of SED across the Corporation and the implementation of management	Ensures that the SABC employs appropriate technology to enable it to deliver on its mandate. Ensures that technology in use in the SABC properly supports the Corporation's strategic objectives. Oversees the adequacy and suitability of the current disaster recovery plan. Specifically considers the challenges posed by the broadcasting needs of the 2010 Soccer World Cup. Advises the Tender committee and the organisation generally on purchasing decisions insofar as they relate to technology acquisitions. Approves

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- 2.8 As stipulated in its terms of reference, EXCO is authorised to constitute further committees, with or without decision-making and recommending authority, to assist it in the execution of its operational role. In terms of this authority, EXCO has created, with Board approval, a series of operational committees, with specific focus areas and devolved decision-making and recommending authority within these areas. These committees derive their authority from EXCO.
- 2.9 Each of the committees is created by terms of reference approved by EXCO, which determines the rules of its constitution, the areas and limits of decision-making, and how monitoring by EXCO will occur. Again, as a general principle, matters which fall within the ambit of authority of EXCO, must first be considered by the relevant committee to make a recommendation to EXCO on the appropriate resolution. However, in contrast to the Board committees, the Clusters are entitled to exercise delegated decision-making authority. A table outlining the scope of authority of each of the committees is contained in section 4 of this DAF.

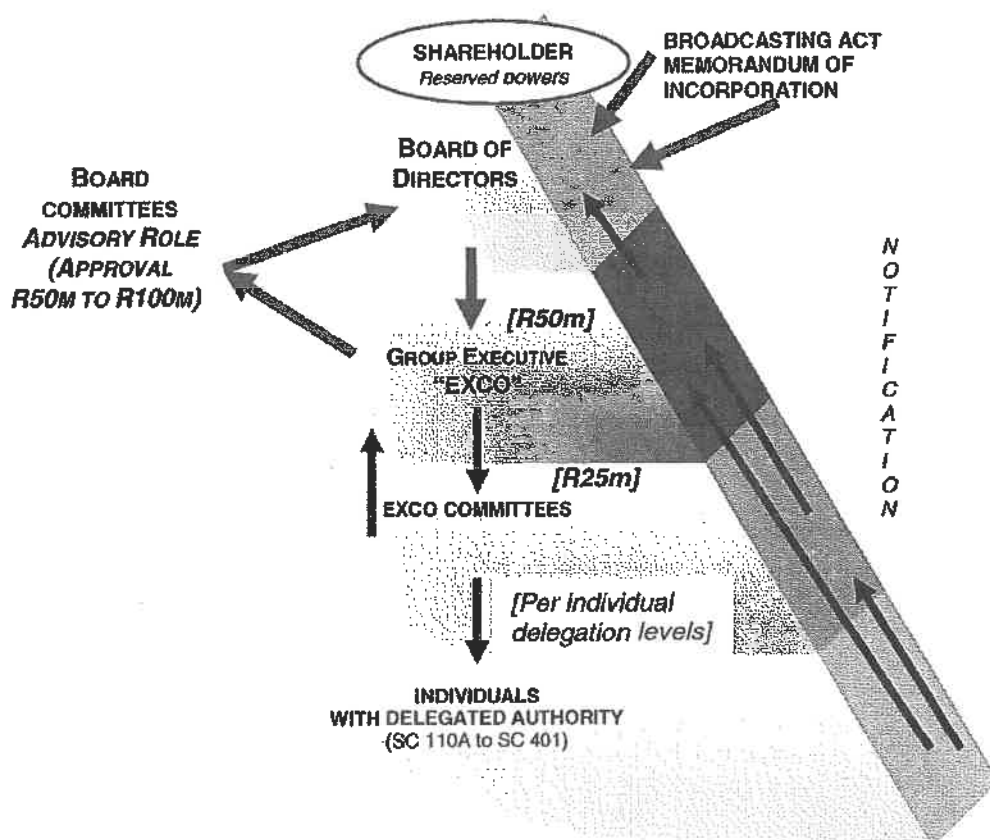


Figure 1 : DIAGRAMMATIC REPRESENTATION OF THE FLOW OF AUTHORITY & DECISION-MAKING

The figure represents the flow of delegated authority within the SABC. The green arrows indicate the flow of authority downwards from the Board to various levels in the Corporation. The red arrows indicate the flow of decision-making to committees, which act in an advisory role. The blue arrows represent the monitoring of the exercise of delegated authority by the authority from which that authority flows. Except for the limited powers reserved to the Shareholder in law and the MOI, the Board is the source of and is ultimately accountable for the devolution and monitoring of authority within the Corporation. "SC" in the diagram refers to scale codes.

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compliance and makes representations re: financial status of Corporation in Annual Report. Reviews the going concern basis of the SABC on a quarterly basis Reviews the quarterly and annual financial reports Reviews and monitors fruitless & wasteful expenditure and irregular expenditure on a quarterly basis	Corporation. Recommends approval of procurement policies and ensures compliance with same. Adjudicates over tenders, bids and makes recommendations to the Board. Enforces and continuously monitors adherence to the Broad based BEE Scorecard. Monitors and ensures that the Corporation strikes a fair balance between advancing the transforming agenda and acquiring goods and services at a competitive price. Advises the Board and the Corporation generally on Broad based BEE compliance and sound procurement practices. Approves Business Plans above R50m to R100m	Determines the parameters of executives' performance agreements. Determines and reviews remuneration and bonuses payable in terms of performance contracts. Makes recommendations to the Board on individual remuneration. Ensures that policies are in place to reward staff fairly and equitably. Ensures performance measurement measures are put in place. Ensures the annual report includes appropriate disclosure in respect of remuneration issues. Ensures proper governance of the Board and its committees Approves policy on Board Members' travel, transport accommodation and insurance costs	processes to ensure that the business understands the importance of SED Assist the Board in discharging its responsibility to ensure that Broad Based Black Economic Empowerment (BBBEE) is pursued and implemented throughout the SABC	Business Plans above R50m to R100m
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4. GROUP EXCO COMMITTEES : SCOPE OF AUTHORITY

The following matrix sets out a summary of the scope of authority of EXCO as well as its committees. Please refer to each forum's full terms of reference for its detailed responsibilities and to the delegation tables for its decision-making powers. As general principles:

- EXCO and its committees exercise decision making authority and can generally approve financial expenditure of up to R50m and R15m respectively.
- Committees are chaired by heads of division appointed by EXCO. Cluster heads have no additional authority besides that vested in them in terms of their own scale codes.
- Committees report on a monthly basis to EXCO and shall have their performance evaluated annually by EXCO.
- Each committee is responsible for ensuring proper governance and compliance within its own terms of reference.
- All instances of non-compliance with the committee's terms of reference (including any exceeding of the committee's authority) must be notified by the Chairman of the committee to EXCO.

EXCO	OPERATIONS COMMITTEE (INCLUDES NEWS COMMITTEE)	FUNDING COMMITTEE	TECHNOLOGY COMMITTEE	HCS COMMITTEE	GOVERNANCE AND COMPLIANCE	BID ADJUDICATION COMMITTEE
Constituted in terms of the Broadcasting Act, and is responsible for day-to-day running of SABC. Implements strategies and decisions adopted by Board. Approves expenditure up to R50m, recommends strategy, financial, risk management and internal control strategy and systems to the Board for approval. Delegates authority to its committees and other management committees and approves its terms of reference. Oversees compliance with the SABC's mandate and ICASA licence conditions. Formulates a policy framework and policies for Board approval. Oversees preparation of Annual Financial Statements and annual report for Board approval. Reviews Relevant Policies	Responsible for Initiating the TV and Radio programming strategy in accordance with mandate and licence conditions. Initiates strategies for News and Current Affairs programming. Initiates the acquisition / production of news and current affairs content for flighting on SABC platforms. Ensures implementation and compliance with the SABC's Editorial Policy. Recommends and implements strategies re: opening of local and foreign bureaux. Coordinates sale of SABC news material for use by other media companies. Ensures the implementation running of the 24 Hour News Channel Makes TV & Radio programming and scheduling decisions and	Approval of business plans and expenditure and authorisation of procurement for capital projects within delegated authority limits. Responsible to develop a strategy for collection of debts, and for exploiting of commercial opportunities. Manages risk and insurance related matters Oversees the external audit including the preparation of annual financial statements. Oversees writing-off of bad debts and stock. Authorises sale/ disposal of moveable assets up to relevant materiality levels. Oversees the budget process on behalf of EXCO. Recommends a funding plan for Board approval. Ensures that relevant policies within its area of responsibility are initiated, reviewed and submitted to	Manages the capital expenditure budget through its engineering services division. Advises on new technology acquisitions /Implements acquisition decisions on behalf of and in consultation with other relevant business units. Provide broadcast and non-broadcast solutions, technology/ infrastructure for the Corporation. Designs and implements an IT strategy for the Corporation. Provides advice on new or ad hoc broadcasting requirements. Ensures that relevant policies within its area of responsibility are initiated, reviewed and submitted to EXCO and Board for approval. Reviews the Committee's Terms of Reference and recommends to EXCO; Approves expenditure up	Initiates and manages progressive people empowering policies and programmes, and employee development, support and wellness policies and programmes for the SABC. Designs and implements talent attraction and retention strategies. Advise other committees on people-related issues. Set framework and policy to manage stakeholders. Guides liaison with internal and external stakeholders. Initiates and compiles policies relating to Performance Management and Performance Evaluations Reviews Relevant Policies and recommends to EXCO Ensures that relevant policies within its area of responsibility are initiated, reviewed and submitted to	Approval of standardised contract formats. Initiates legal settlements within its delegated authority. Ensures that relevant policies within its area of responsibility are initiated, reviewed and submitted to EXCO and Board for approval, in particular Procurement and Risk management policies. Oversee implementation of systems of procurement and risk management Design, recommendation to Board for approval and implementation of a governance framework for the Corporation. Develop strategy for management of intellectual property and copyrights. Monitors compliance with legislative framework. Reviews and monitors the clearing of internal and external audit issues	Considers the recommendations / reports of the Bid Evaluation Committee and depending on the authority of the Delegation of Authority Framework (DAF) makes: A final award; Recommendation to Group EXCO to make a final award; Another recommendation to the accounting officer / Group EXCO on how to proceed with the relevant procurement. The Bid Adjudication Committee must ensure that: all necessary bid documents have been submitted. disqualifications are justified and that valid and accountable reasons / motivations were furnished for the passing over of bids

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and recommends to Board Approves Terms of Reference of the EXCO Committees Approves expenditure above R25m up to R50m, recommends strategy, financial, risk management and internal control strategy and systems to Board for approval.	recommends scheduling strategy to EXCO. TV programme proposal evaluations, within its level of delegated authority. Local and Foreign TV programme commissioning and acquisition within its level of delegated authority. Negotiation of sports rights, including external production costs. Ensures that relevant policies within its area of responsibility are initiated, reviewed and submitted to EXCO and Board for approval. Reviews relevant Policies and recommends to EXCO. Reviews the Committee's Terms of Reference and recommends to EXCO; Approves expenditure up to R25m, recommends strategy, financial, risk management and internal control strategy and systems to EXCO for approval.	EXCO and Board for approval. Reviews the Committee's Terms of Reference and recommends to EXCO; Approves expenditure up to R25m, recommends strategy, financial, risk management and internal control strategy and systems to EXCO for approval.	to R25m, recommends strategy, financial, risk management and internal control strategy and systems to EXCO for approval.	EXCO and Board for approval Sets framework / guidelines to obtain mandate for Wage Negotiations Reviews the Committee's Terms of Reference and recommends to EXCO; Approves expenditure up to R25m, recommends strategy, financial, risk management and internal control strategy and systems to EXCO for approval.	Deals with matters relating to governance, ethics and compliance with legislation. Oversees the development of a risk assessment, including a fraud risk assessment strategy. Ensures the development of a risk management strategy. Regularly reviews the status of key risks in the Corporation. Ensures the efficiency of the framework of risk management and internal controls. Reviews the Committee's Terms of Reference and recommends to EXCO; Approves expenditure up to R25m, recommends strategy, financial, risk management and internal control strategy and systems to EXCO for approval.	scoring has been fair, consistent and correctly calculated and applied; cognisance has been taken of bidders' declarations of interest; Notify Group EXCO if a bid, other than the one recommended by the Bid Evaluation Committee, is approved by the Bid Adjudication Committee. Group EXCO or the delegated official may, after consideration of the reasons for deviation, ratify or reject the decision of the Bid Adjudication Committee Approves awarding of Tenders up to R15m. Reviews the Committee's Terms of Reference and recommends to EXCO;
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5. GENERAL PRINCIPLES OF DELEGATION OF AUTHORITY

The governance principles in terms of which, this DAF has been formulated and which inform the delegation of authority by the Board are set out below.

The authority delegated in this DAF shall be exercised only in connection with the management functions and within the scope of responsibility of each employee and/or committee subject to the laws, policies, practices and governance parameters of the SABC.

In as much as the DAF seeks to create structured decision-making at all levels of the SABC, it is an essential part of the risk management framework of the Corporation. Generally, individuals or forums empowered to exercise any decision-making authority in terms of this DAF must demonstrate, prior to exercising such authority, that they have fully considered the risks inherent in their proposed decision, that they have taken all reasonable steps to ensure that such risks are appropriately mitigated and that they are acting in the best interests of and for the sole benefit of the Corporation.

5.1 DELEGATION AND DECENTRALISATION OF AUTHORITY

- 5.1.1 In terms of the principle of decentralisation, the Board endorses the view that decisions are to be cascaded to the lowest practical level within the Corporation.
- 5.1.2 There must be a clear distinction between operational and policy-making functions. The Board provides overall strategic direction to the Corporation, establishes policies, monitors and evaluates management's performance. Management ought to be vested with sufficient authority to run the day-to-day operations of the Corporation within the parameters of the strategic direction approved by the Board.
- 5.1.3 For the purposes of this DAF, employees who are employed for a limited duration on contract will be empowered on the same basis as permanent employees. This excludes temporary staff and independent contractors.
- 5.1.4 Powers not expressly delegated shall remain vested with the Board unless such powers can be regarded as necessary or incidental to any power that is delegated in terms of this DAF. This DAF shall be interpreted restrictively such that, in the event of any doubt as to whether any power has actually been delegated by the Board, it shall be interpreted that such power has been retained unless the Board expressly resolves otherwise.
- 5.1.5 The principle of separation of powers is a primary underlying principle of this DAF. No individual may approve his/her own expenditure. In such instances, the approval authority is generally vested in the next higher level of authority.
- 5.1.6 No employee may approve personal expenditure for or on behalf of his/her line manager or any other person at a higher level of authority.
- 5.1.7 No delegated authority may be granted retrospectively and an invalid delegation of authority may not be validated by subsequent ratification.

5.2 DELEGATEES TO ACT IN A FIDUCIARY CAPACITY

- 5.2.1 All persons or committees exercising any delegated authority vested in them in terms of this DAF (hereinafter referred to as delegates) shall act in the best interests of and for the sole benefit of the SABC and not for any collateral purpose or for personal gain.
- 5.2.2 No delegation of authority may be exercised for any immoral or unlawful purpose.
- 5.2.3 All employees to whom authority is delegated in terms of this DAF are bound by Section 57(c) of the PFMA in terms of which they are required to take effective and appropriate steps to prevent any irregular expenditure, fruitless and wasteful expenditure and any under collection of revenue within their respective areas of responsibility.



MultiChoice South Africa Holdings
Proprietary Limited

Abridged integrated annual report 2019

PHUTHUMA NATHI

SHARE THE FUTURE

Integrated annual report to the shareholders of
Phuthuma Nathi Investments (RF) Limited
for the year ended 31 March 2019

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OUR PERFORMANCE

OUR PERFORMANCE AGAINST OUR MATERIAL MATTERS



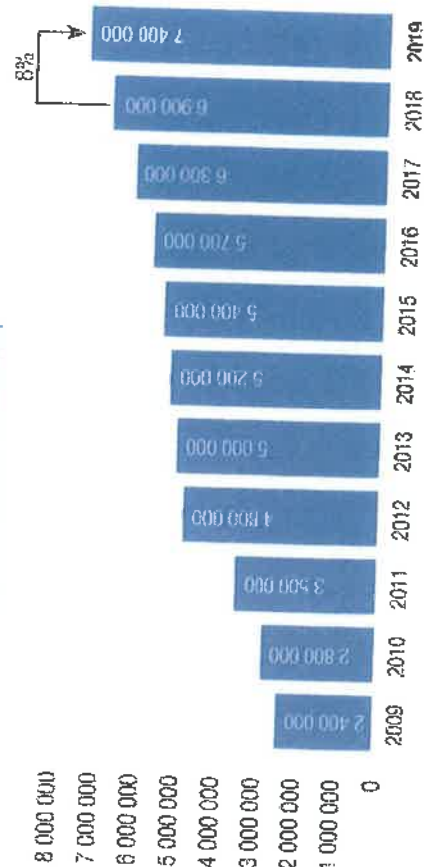
For a detailed review of our performance against our material matters refer to our website.

Overview

South Africa is one of the most attractive video markets on the continent due to several factors, including the size of its economy, the rising middle class, the position of TV as a platform, and the pay-TV penetration growth potential. MultiChoice South Africa caters for the entire spectrum of the market, from mass to premium, which also includes all genres of viewing preferences. Our customer-centric approach ensures that we operate a comprehensive video entertainment ecosystem that comprises traditional pay TV, OTT and other products such as movie rentals and ad-earning.

Despite a tough economic climate in South Africa, compounded by an uncertain political environment, we achieved subscriber growth of 511 500 subscribers, taking our total active subscriber base to 7.4m at the end of FY2019. Our DStv brand is a household name in South Africa and enjoys considerable customer support. We measure performance in customer satisfaction metrics with an increase in our Net Promoter Score (NPS), an industry-leading loyalty score. During FY2019 our consumer satisfaction score (CSAT), measured by customer surveys, improved to 76%.

MultiChoice subscriber growth (active subscribers)



Continuing our commitment to responsible business practices, we have implemented a robust framework to ensure that our business operations are aligned with the highest standards of ethical and environmental governance. This includes a commitment to transparency and accountability, as well as a focus on sustainable growth and innovation.

We continue to focus on growing our share of the mass market, while delighting and retaining our existing customer base with our entertainment offering. We also aim to maintain operational excellence and agility to continue to deliver strong returns and cash flow for our shareholders.

MultiChoice South Africa performance summary

Metric	Unit	FY2019	FY2018	FY2017	FY2016
Active subscribers	million	7.4	6.9	6.3	5.7
Revenue					
Revenue per subscriber	cent	322	335	345	339
Operating expenses	million	40.4	40.2	31.8	29.1
Operating profit	million	10.3	10.4	9.8	9.1



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