

I, the undersigned,

CALVO PHEDI MAWELA

make the following statement under oath.

INTRODUCTION

- 1 I am the Group Chief Executive Officer of MultiChoice Group Limited. Its head office is at MultiChoice City, 144 Bram Fischer Drive, Randburg, South Africa. I am based at MultiChoice's offices at 18th Floor Shatha Tower, Dubai Media City, United Arab Emirates.
- 2 The facts contained in this affidavit are, to the best of my knowledge, true and correct and, unless otherwise indicated, within my personal knowledge or based on information obtained in the course of my employment, including information derived from documents or records under my control.
- 3 Where I make legal submissions, I do so on the advice of MultiChoice's legal advisors and I believe such advice to be correct. Where I deal with technological aspects of digital migration, set top boxes and encryption, I rely on my qualifications and experience in broadcasting engineering.¹ I also refer to

¹ I obtained a BSc. Electrical Engineering (Light Current) from the University of Durban-Westville (now the University of KwaZulu-Natal) in 1999, and began working as an engineer in training at Sentech Limited in 2000. In 2004 I was appointed as Manager: Broadcasting Spectrum at the Independent Communications Authority of South Africa, where I worked until 2006, when I was appointed as the General Manager: Regulatory Affairs at Orbicom, a company in the MultiChoice group which provides broadcasting signal distribution and related technical services. I am registered as a Professional Engineer with the Engineering Council of South Africa and I am a member of the South African Institute of Electrical Engineers.



1

the confirmatory affidavits of Gerhardus Jacobus Van Eeden (MultiChoice's Chief Technology Officer), Mr Carl Hibbert of Futuresource Consulting and Dr Peter Siebert, an independent broadcasting technology expert.

THE PURPOSE OF THIS AFFIDAVIT

- 4 The purpose of this affidavit is to respond to the evidence of Mr Yunus Carrim,² Mr Lawrence Kruger³ and Ms Lulama Mokhobo,⁴ and particularly their suggestions that MultiChoice might have improperly influenced government and the SABC in the set top box encryption debate.
- 5 MultiChoice is committed to co-operation with the Commission and welcomes the opportunity to set the record straight. Mr Carrim, Mr Kruger and Ms Mokhobo repeatedly misconceived the facts and made unfounded accusations which have been propagated in the public domain.
- 6 I shall devote much of this affidavit to a description of the nature and evolution of the set top box encryption debate. The background to the debate was government's decision to provide set top boxes to poor people free of charge. The issue was whether these free set top boxes should have an additional decryption capability. I shall describe the evolution of the debate and the

² Mr Carrim submitted an affidavit to the Commission dated 30 January 2020 and testified on 25 February 2020.

³ Mr Kruger submitted an affidavit to the Commission dated 21 August 2019 and testified on 12 September 2019.

⁴ Ms Mokhobo submitted an affidavit to the Commission dated 22 August 2019, a supplementary affidavit dated 24 September 2019 and a second supplementary affidavit dated 16 October 2019, and testified on 4 September 2019 and 26 February 2020.

changes in government policy on this issue from time to time. I shall also describe MultiChoice's unwavering opposition to the addition of a decryption capability in the free set top boxes. I shall demonstrate, however, that MultiChoice at all times acted entirely properly in its opposition to decryption capability. The suggestions that it improperly influenced government and the SABC are devoid of any truth.

7 I shall thereafter deal more specifically with the evidence of Mr Carrim, Ms Mokhobo and Mr Kruger, and address specific accusations they have made.

AN OVERVIEW OF MULTICHOICE

8 MultiChoice provides pay broadcasting services to subscribers in 50 countries in sub-Saharan Africa⁵ on a variety of technological platforms.

9 MultiChoice offers pay broadcasting services to South African audiences through two subscription broadcasting licensees, namely Electronic Media Network Limited ("M-Net") and MultiChoice (Pty) Ltd.⁶

10 MultiChoice Group Limited listed on the Johannesburg Stock Exchange on 27 February 2019 and was unbundled from Naspers Limited on 4 March 2019. It is one of South Africa's significant tax payers and directly employs 4250

⁵ This includes the adjacent Indian Ocean islands.

⁶ MultiChoice also provides satellite, terrestrial, mobile and Internet audiovisual entertainment services to subscribers in numerous jurisdictions in sub-Saharan Africa.



people across the country, with some 10 000 more employed indirectly throughout the value chain.

- 11 MultiChoice is committed to empowerment, transformation and the development of its employees. MultiChoice South Africa has a level 1 B-BBEE status and 88% of its employees are black.
- 12 MultiChoice makes a significant contribution through its Phuthuma Nathi share scheme, as a result of which black South Africans own 25% of MultiChoice South Africa and more than 90 000 previously disadvantaged South Africans have received R10.4 billion in dividends since the inception of the scheme.
- 13 MultiChoice makes a lasting impact on the communities in which it operates, including through significant contributions to social development programmes.
- 14 In 2012 MultiChoice established the MultiChoice Enterprise Development Trust as a vehicle for its investment into local industries, to help drive transformation in South Africa through funding, mentorship and skills development. Since its inception, the Trust has invested over R180 million in over 25 black-owned businesses.⁷ In February 2020 MultiChoice launched the MultiChoice Innovation Fund, an enterprise development fund aimed at empowering

⁷ I annex as "M1" a media release following the launch of the MultiChoice Innovation Fund dated 21 February 2020. It is an enterprise development fund administered by the MultiChoice Enterprise Development Trust, which is aimed at empowering qualifying small-medium enterprises in the Information and Communications Technology industry.



qualifying small-medium enterprises in the Information and Communications Technology industry.⁸

THE EVOLUTION OF GOVERNMENT POLICY

Overview

- 15 The issue of STB decryption capability arose in the context of South Africa's preparation for "digital migration", the process by which all countries in the world have been migrating their terrestrial television broadcasting services (as distinct from satellite television broadcasting services)⁹ from the analogue system of transmission to a new system of digital terrestrial broadcasting known as digital terrestrial television.
- 16 South Africa's terrestrial television broadcasters are the SABC, e.tv, M-Net and a number of community broadcasters.¹⁰ The SABC, e.tv and the community broadcasters are free-to-air broadcasters in that their broadcasts are accessible to all. M-Net is a pay-TV broadcaster. Its signals are encrypted to limit access

⁸ MultiChoice is embarking on regional seminars to extend the reach of the Innovation Fund to black entrepreneurs across the country and to provide a platform to identify business prospects, understand unique challenges and highlight various funding and business development opportunities. The first such seminar took place in Durban on 20 and 21 February 2020, when MultiChoice hosted entrepreneurs in partnership with the KwaZulu Natal Department of Economic Development, Tourism and Environmental Affairs and Trade and Investment KwaZulu Natal. More information about the MultiChoice Innovation Fund is available at <https://www.multichoice.com/innovation-fund/>.

⁹ Satellite television broadcasting services were already digital.

¹⁰ South African community broadcasters include Soweto TV, Cape Town TV, Bay TV, One KZN, Tshwane TV and North West TV.



to its broadcasts to its subscribers. The subscribers have access to the encrypted signals via a decoder¹¹ by which the signal is unscrambled.

- 17 All terrestrial television broadcasters in the past transmitted their signals by analogue transmission. In the current stage of digital migration, known as the "dual illumination period", the free-to-air broadcasters broadcast their signals in both analogue and digital format. When digital migration has been completed, analogue broadcasting will cease. Viewers of free-to-air broadcasting services will either require a television set with an integrated digital tuner or, if they still have an old analogue television set, they will require an STB to convert the digital signal into an analogue signal.
- 18 More than a decade ago, government estimated that about eight million households would need STBs. The estimated cost of an STB was about R600. It would be beyond the reach of about five million households. Government decided to subsidise their STBs. It initially contemplated a partial subsidy but ultimately decided that it should bear the full cost of the STBs. This meant that government would procure five million STBs, pay for them, and distribute them free of charge to the poorest households.
- 19 The only purpose for which government decided to subsidise five million STBs for the poorest households, was so that they could continue using their old analogue TV sets after termination of their analogue transmissions, and would

¹¹ In this affidavit I use the term "decoder" in relation to the set top boxes used by pay-TV broadcasting services, to distinguish them from the set top boxes used to convert free-to-air digital terrestrial broadcasting signals which are pertinent to the issue of STB decryption capability.



CPM

not be cut off from receiving free-to-air television services. All that is required for this purpose is a very basic STB that does no more than to convert digital into analogue signals.

- 20 The inclusion of decryption capability was not necessary to migrate from analogue to digital broadcasts, and would add significant complexity and costs. It would also entrench STBs as a permanent feature of free-to-air broadcasting in South Africa, when they were only ever expected to have a temporary "bridging" function until analogue TV sets were replaced by digital TV sets. It was on these grounds that government ultimately decided that the inclusion of decryption capability in the subsidised STBs was unnecessary and inappropriate.
- 21 This was the position held at an early stage of the debate by e.tv, the SABC and M-Net. MultiChoice was consistent in its public opposition to STB decryption capability. Its opposition from the outset was motivated by the conviction that incorporating decryption capability in the government-subsidised STBs would be financially and technologically disastrous, and take South African television broadcasting backwards.¹² It also highlighted its concern that

¹² MultiChoice did not oppose the inclusion of a decryption capability in the government subsidised satellite STBs which are used as part of the satellite gap filler system. The intention of the satellite gap filler system is (a) to provide transmission of the free-to-air digital terrestrial channels in the areas of the Northern Cape where due to the Square Kilometre Array project no terrestrial transmissions which may cause interference are permitted and (b) to provide universal access to free-to-air digital terrestrial television channels in areas of South Africa which are not covered by the digital terrestrial network. The reason for non-opposition in this case is that unlike the free-to-air terrestrial broadcasting environment, STBs are a feature of the satellite broadcasting environment. In the case of satellite STBs there is no "policy discretion" that can be exercised around the inclusion of decryption capability. Satellite STBs must have decryption capability due to the footprint of the satellite beam to prevent broadcast of content into other countries where the broadcaster does not hold a broadcasting licence or alternatively does not hold the territory rights for the content being broadcast. The number of government subsidised satellite STBs and satellite dishes compared to



incorporating decryption capability in the government-subsidised STBs would give commercial broadcasters an unfair competitive advantage at public expense. It did so even at a time when M-Net (in the MultiChoice group) was the only licensed pay-TV broadcaster which would be able to gain a first mover advantage if a decryption capability was included in the STBs.

22 The SABC indicated as early as 2008 that it favoured a control system for STBs which did not include decryption capability, and despite some vacillation in the years that followed, its position ultimately settled against STB decryption capability. It is important to emphasise that the "control system" the SABC proposed was merely a facility to prevent a government-subsidised STB from functioning on a different network. It was an uncontroversial proposal. It did not include a decryption capability.

23 e.tv made a fundamental about-turn on the issue. Having initially advanced extensive and compelling arguments against the inclusion of decryption capability in the subsidised STBs, e.tv changed course and campaigned vigorously for the inclusion of decryption capability. It did so in order to pursue its own commercial ambition to enter the pay-TV market. If the subsidised STBs incorporated decryption capability, e.tv would be able to launch a pay-TV service without incurring the cost of providing decoders: it could piggyback its own encrypted service on the back of the infrastructure provided and paid for by government.

free-to-air terrestrial STBs and antennas, also does not impose an undue financial burden or create a commercial advantage for a commercial broadcaster.



24 As will appear from the outline which follows, the debate commenced with consensus among all broadcasters against STB decryption capability and ended with e.tv as its sole proponent. By 2012 Government had made a clear decision against STB decryption capability, and maintained that position, notwithstanding Minister Carrim's efforts to reinstate STB decryption capability in government policy during his brief ten-month tenure as Minister of Communications.

The turnover of ministers

25 Government policy on the inclusion of a decryption capability in the subsidised STBs developed over a long period beginning as early as 2002. The process was marked by uncertainty, delays and a lack of continuity as a result of a very high turnover in the office of Minister of Communications. There have since 2002 been eleven incumbents:

25.1 Ivy Matsepe-Casaburri: June 1999-April 2009;

25.2 Manto Tshabalala-Msimang: April 2009-May 2009;

25.3 Sipiwe Nyanda: May 2009-October 2010;

25.4 Roy Padayachee: November 2010-October 2011;

25.5 Dina Pule: October 2011-July 2013;

25.6 Yunus Carrim: July 2013-May 2014;

25.7 Faith Muthambi: May 2014-March 2017;



- 25.8 Ayanda Dlodlo: March 2017-October 2017;
- 25.9 Mmamoloko Kubayi-Ngubane: October 2017-February 2018;
- 25.10 Nomvula Mokonyane: February 2018-November 2018; and
- 25.11 Stella Ndabeni Abrahams: November 2018 to-date.¹³

The lead-up to the 2008 Policy

- 26 In October 2002, the Digital Broadcasting Advisory Body, appointed by the Minister of Communications, highlighted the need to ensure the lowest possible cost of STBs and specifically recommended that "conditional access" should not be a specification.¹⁴
- 27 In a report published by the Digital Broadcasting Migration Working Group on 17 November 2006, one of the key requirements identified for the development of digital terrestrial television was a low-cost entry level STB.¹⁵
- 28 The SABC was the only participant in the process leading to the Working Group Report which recorded its dissent in respect of an "entry level" STB. The SABC

¹³ Minister Ndabeni-Abrahams was suspended on 8 April 2020 for two months. Minister in the Presidency, Mr Jackson Mthembu, acted as the Minister of Communications during her suspension.

¹⁴ South African Digital Broadcasting Advisory Body, Final Report, October 2002, pp 43 and 44, (annexed as "M2").

¹⁵ Working Group Report, p 26. See also pp 102 – 103, where the Working Group highlighted the key factors identified in Europe as impacting on the successful take-up of DTT, including "*low cost and widely available STBs*" (Final Report for the European Commission: Public Policy Treatment of Digital Terrestrial Television in Communications Markets, Analysis, 26 August 2005). Relevant extracts of the Working Group Report (referred to here and elsewhere in this affidavit) and its Appendix C are attached as annexure "M3".



at the time was of the view that a "dormant" conditional access or "CA" system could potentially be used for the collection of SABC licence fees.¹⁶

29 e.tv was opposed to STB decryption capability on a range of grounds, including the increased costs that it would entail. It recorded its own detailed opposition to the SABC's view.

30 Pertinently, e.tv included among its concerns two competition-related issues. First, that including conditional access in the STBs "*ultimately provides an automatic market of 7.7 million households for pay-TV operators in circumstances where they would otherwise not have such access*".¹⁷ Second, that the incorporation of conditional access in the subsidised STBs would result in South Africa effectively adopting a conditional access standard using a particular conditional access system, and "*in effect the government would be subsidising the profits of a single CA provider in circumstances where CA is unnecessary for the purposes of digital migration*".¹⁸

31 e.tv's first competition concern was clearly directed at M-Net which was then (as it still is) the only licensed pay-TV broadcaster which would be able to gain a first mover advantage if a decryption capability was included in the STBs. The

¹⁶ The SABC later realised that using encryption to switch off viewers for non-payment of SABC TV licences would be at odds with its public mandate and the universal service and access provisions in the SABC editorial policy, not to mention a potential licence violation as one of the key legislative distinctions between a free-to-air broadcasting licence and a pay-TV licence is that one requires the payment of a fee for viewing and the other does not. Thus it no longer persisted with its preference for a dormant conditional access system.

¹⁷ Working Group Report Appendix C: Individual Working Group Member Positions on the Selection of a Basic Minimum Standard for the Subsidised STB (*Working Group Report Appendix C*), p 3

¹⁸ Working Group Report Appendix C, p 3



second competition concern also implicated M-Net, which might obtain an advantage if the conditional access used in the STBs was provided by Irdeto, a conditional access provider which provided the conditional access system for MultiChoice and was owned by the Naspers Group. This prompted M-Net to add a statement to the Working Group Report noting and agreeing with e.tv's concerns and stating:

"[W]ithout debating the veracity of the statements made about the advantages that could accrue to M-Net if CAS was embedded in the basic free-to-air STB, [we] agree that it could cause a perception in the market that such a step would be to the benefit of any commercial broadcasting licensee in South Africa".¹⁹

32 In the period which followed, there was some support for a basic "control system" to be incorporated in the government-subsidised STBs for security purposes, but by 2008 the terrestrial broadcasters (in particular the SABC, e.tv and M-Net) were unanimous in their view that -

32.1 the STBs should not incorporate decryption capability;

32.2 there should be no encryption of free-to-air broadcasting signals in the digital terrestrial television environment; and

¹⁹ Working Group Report Appendix C, p 6. The statement was a joint statement of M-Net and Orbicom, another company in the MultiChoice Group which provides broadcasting signal distribution services.



32.3 the conditional access technology used by subscription broadcasters to encrypt their signals and restrict access to their content was not appropriate for free-to-air broadcasting services.

33 In a comprehensive submission to government in March 2008 e.tv set out its view that the inclusion of decryption capability in STBs –

33.1 raised "*critical constitutional, economic, financial and competition issues*";²⁰

33.2 was "*highly unusual and untested in comparable jurisdictions*"²¹ and not contemplated by any other country embarking on digital migration;²²

33.3 was "*unnecessary for digital migration*",²³ "*wholly unsuited to free-to-air television*",²⁴ and "*fundamentally changes the nature of free-to-air television broadcasting*";²⁵

33.4 was not necessary to address any of the concerns which had been raised to justify it;

33.5 would add complexity and expense to the entire digital migration process, increasing the cost of STBs and adding the "*extensive costs*" of "*viewer management systems and call centres*";²⁶ and

²⁰ e.tv submission to the Department of Communications on the Draft Short-Form Specifications for the Basic Free-to-Air DTT Set Top Box, 17 March 2008 (the 2008 e.tv submission), para 2.5 (annexed as "M4").

²¹ The 2008 e.tv submission, para 3.1.3

²² The 2008 e.tv submission, para 2.5

²³ The 2008 e.tv submission, para 5.2

²⁴ The 2008 e.tv submission, para 2.3

²⁵ The 2008 e.tv submission, para 2.3



33.6 would cause unnecessary complications when digital TV sets were introduced into the market.²⁷

34 The SABC, which at the time took the view that STBs should have some form of conditional access, explained in a letter to the Department of Communications on 16 May 2008 (annexed as "M5"), that what it had in mind was not "a conditional access system along the lines of the traditional, costly systems used for pay-TV", but a form of "STB control" which did not include decryption capability but addressed certain public interest objectives which included: (a) preventing subsidised STBs leaving South Africa; (b) being able to turn off stolen STBs; and (c) allowing for messaging so that TV licence fee reminders could be sent. The SABC emphasised that "[t]he encryption of services is not required" and made the following recommendation in respect of government policy (my emphasis):

"The policy should specifically state that there will be no encryption of free-to-air services on the DTT platform."

35 In the first Request for Proposals issued by the SABC and e.tv on 24 June 2008 for an STB control solution (annexed as "M6"), it was expressly specified that what was required was a low cost solution appropriate to a free-to-air market, with no encryption of signals.

²⁶ The 2008 e.tv submission, para 5.2

²⁷ The 2008 e.tv submission, para 3.2.1.3



36 At a workshop held by the South African Bureau of Standards on 20 August 2008 to discuss the specifications for STBs, there was unanimity that STBs should have a secure and robust control system that would protect the subsidised STBs without encryption of services.²⁸

37 On 7 August 2008 government took a decision to provide ownership support, covering up to 70% of STB retail costs, for five million of the poorest TV-owning households. At the time, it was estimated that the cost of this support would amount to R2.4 billion, to be allocated from the Universal Service and Access Fund of South Africa.²⁹

The 2008 Policy

38 On 8 September 2008 Minister Matsepe-Casaburri gazetted the Broadcasting Digital Migration Policy³⁰ to "*inform and guide*" the digital migration process.

39 The Policy provided that STBs would have –

39.1 "*a control system to prevent STBs from being used outside the borders of South Africa and to disable the usage of stolen STBs*";³¹

²⁸ The SABC noted that STB Control could be achieved through certain hardware specifications, security requirements and the inclusion of STB Control software, but that full-blown decryption capability/conditional access was not required. "STB Control" would therefore "*not be a conditional access system in the traditional sense of the term*".

²⁹ The Universal Service and Access Fund was established under section 87 of the Electronic Communications Act, 2005 ("the ECA"). It is funded by contributions made by licensees under the ECA in terms of section 89 of the ECA.

³⁰ Government Gazette No. 31408, Notice No. 958, 8 September 2008, published in terms of section 3(1) of the Electronic Communications Act. The key provisions in the Policy, and the various amendments made to the Policy between 2012 and 2015, which are outlined below, are summarised in the table which is Appendix A to this affidavit.



- 39.2 a "return path capability" feature which would enable the provision of "e-government services";³² and
- 39.3 "capabilities to unscramble the encrypted broadcast signals so that only fully compliant STBs made or authorised for use in South Africa [could] work on the network".³³

The 2012 Policy

- 40 In an amendment to the Policy by Minister Pule on 7 February 2012, the reference to decryption capability in the STBs was removed. The amended Policy provided that the STBs would have "a robust STB control system", but no longer contained a reference to "*capabilities to unscramble... encrypted broadcast signals*".³⁴
- 41 The Department of Communications, in a presentation to the Portfolio Committee on Communications on 18 February 2014, described the amendment as follows:

"In 2012, an amendment to the BDM Policy was gazetted to soften the use of the STB Control System. For example, Encryption was dropped

³¹ 2008 Policy, para 5.1.2.2

³² 2008 Policy, para 5.1.2.6

³³ 2008 Policy, para 5.1.2.7. Emphasis added.

³⁴ The 2012 Policy simply referred to a robust free-to-air STB Control system to achieve the objectives of protecting government's investment in STBs, in line with the consensus reached by the TC 74 working committee members. Paragraph 5.1.4 of the 2012 Policy stated:

"The national standard will include a robust free-to-air STB Control System to ensure that only conformant Set Top Boxes can work in the electronic communications network in South Africa".



but STB Control maintained to ensure that STBs conform to SABS (South African Bureau of Standards) standards".³⁵

- 42 The reference to a return path capability in STBs was also removed from the Policy in 2012.
- 43 On 1 June 2012 the South African Bureau of Standards approved the first iteration of the South African National Standard: Set-top box decoder for free-to-air digital terrestrial television (annexed as "M7"), which noted the need for "control means ... to prevent subsidised STB decoders from being used outside South Africa", and provided that the STB decoder control specification could be obtained by manufacturers from the incumbent terrestrial free-to-air broadcasting service licensees. The STB National Standard did not refer to a control system with decryption capability.

Minister Pule's 2013 proposal

- 44 On 21 May 2013 Minister Pule announced in Parliament that she had taken a decision to review the policy on the "STB control system" itself (which had been retained as a requirement in the 2012 Policy), "to make this system not mandatory". I annex an excerpt from Minister Pule's Budget speech as "M8".³⁶

³⁵ Presentation to the Portfolio Committee on Communications: Broadcast Digital Migration Amendments Gazetted on 6 December 2014, 18 February 2014, slide 8. Emphasis added.

³⁶ Minister of Communications 2013 budget Speech and Responses by ANC, DA and IFP, 21 May 2013. On the fourth page of the speech Minister Pule said: "We have taken a decision to review the policy on the STB control system as one way of fast tracking the rollout of Digital Terrestrial Television (DTT) to make this system non-mandatory".



45 On 19 June 2013 the Department of Communications indicated that a proposed amendment of the Policy to make STB control non-mandatory would be gazetted for public comment in the next few weeks.³⁷

Minister Carrim's 2013 proposals

46 Before Minister Pule took steps to amend the Policy to give effect to this decision, she was replaced by Minister Carrim on 10 July 2013.

47 Minister Carrim, in a letter dated 23 August 2013 (annexed as "M10"), invited stakeholders to participate in round table discussions to "*try to secure a degree of consensus*" on the issue whether STBs should have "*a control capability*" or not.

48 By this time e.tv had for its own commercial reasons switched its position and was now strongly advocating the inclusion of decryption capability in the government-subsidised STBs. During the round table discussions Minister Carrim appeared to MultiChoice's representatives to be predisposed to e.tv's view on STB decryption capability, and unwilling to interrogate whether the grounds on which e.tv had previously opposed STB decryption capability had fallen away.

49 On 6 December 2013, Minister Carrim published for comment proposed amendments to the Policy (annexed as "M11") which envisaged that a "control

³⁷ Letter from Minister Pule to the SABC, DTT STB Control, 19 June 2013 (annexed as "M9")



system" for STBs would be mandatory, but that its use by broadcasters would not be mandatory. The written comments made in response to the 2013 proposed amendments reflect a common understanding that Minister Carrim's reference to a "control system" meant a control system incorporating decryption capability.

50 With the exception of e.tv, all the terrestrial television broadcasters opposed the mandatory inclusion of a control system with decryption capability in the subsidised STBs. e.tv's position was a reversal of the views which it had strongly promoted in the 2008 e.tv submissions.

51 The SABC recommended that the "control system" in STBs should be non-mandatory and that *"the Department should subsidise the standard box, which has no conditional access, which box the SABC supports and will be using"*. The SABC also made the point that *"[t]here is no basis for the Department to pay for conditional access because by so doing it will be paying for commercial broadcasters, which would be in contravention of the [Public Finance Management Act]"*. The SABC's submission is annexed as "M12".

52 Act-SA, on behalf of all seven community television broadcasters in South Africa (Soweto TV, Cape Town TV, Bay TV, One KZN TV, Tshwane TV, North West TV and Bara TV), expressed its disappointment at the proposed amendments requiring all free-to-air STBs to have "STB control", describing it as *"a system which benefits only the chosen few who have vested interests in a*



short-term technology which has no added value to the poor".³⁸ Act-SA's submission is annexed as "M13".

53 M-Net canvassed comprehensively the flaws in the various arguments in support of STB decryption capability, and the costs that would be added to every part of the broadcasting value chain if this was required. M-Net's submission is annexed as "M14".

54 In addition to the broadcasters, the National Association of Manufacturers of Electronic Components, representing black-owned small, medium and micro enterprises in the electronics industry, made a submission on the 2013 proposed amendments (which is annexed as "M15") in which it submitted that the inclusion of a control system with decryption capability would have numerous adverse consequences for its members, and articulated its continuing opposition to any form of conditional access or decryption capability in the STBs on the grounds, among others, that the requirements for manufacturers to produce STBs with decryption technology would prejudice emerging black manufacturers entering the market.

55 In May 2014, Minister Muthambi replaced Mr Carrim as Minister of Communications. At that stage Mr Carrim had not yet amended the 2012 Policy and had only solicited the views of stakeholders on his proposed amendments. (Mr Kruger's statement in his evidence before the Commission that "we got a

³⁸ Act-SA submission on the 2013 proposed amendments, 3 January 2014



totally new policy which we took to Parliament and they passed the policy"³⁹
was clearly wrong.)

The 2015 Policy

- 56 On 13 March 2015 the Department of Communications announced that government had decided to provide full funding for the five million subsidised STBs, thus replacing the partial subsidy approved in 2008.⁴⁰
- 57 On 18 March 2015 Minister Muthambi published a range of amendments to the Policy. Among the amendments was the express provision (following the removal of the reference to decryption capability from the Policy in 2012) that the government-subsidised STBs would not incorporate decryption capability, and that individual broadcasters could decide for themselves if they wished to encrypt their broadcasting content, in which case they would be responsible for the associated costs.
- 58 The 2015 Policy stated that the government-subsidised STBs must have a control system to prevent them from functioning in non-South African networks.⁴¹

³⁹ Kruger Transcript, p 121

⁴⁰ The Department of Communications' 13 March 2015 press release stated that "*The Universal Service and Access Agency of South Africa (USAASA) is finalising the criteria of TV households that will benefit from government's 100% subsidised STBs*". Also see *Press Release: Minister Faith Muthambi takes the first TV households registration process to Keimoes, Northern Cape, 2 Oct, 29 September 2015*; and the South African Government's Broadcasting Digital Migration page, at <https://www.gov.za/about-government/government-programmes/digital-migration> (Last visited 15 April 2020).

⁴¹ 2015 Policy, para 5.1.2.2. In a presentation to the Parliamentary Portfolio Committee on Communications on the Policy on 10 March 2015 (annexed as "M16") the Department of



59 The encryption amendment was contained in clause 5.1.2(B)(a) of the Policy, which reads as follows:

"The STB control system for the free-to-air DTT STBs shall ... not have capabilities to encrypt broadcasting signals for the subsidised STBs".⁴²

60 The encryption amendment was accompanied by a further new clause, clause 5.1.2(c), which provides as follows:

"Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content".⁴³

61 The 2015 Policy recorded that the Minister had made the encryption amendment expressly taking into consideration the submissions made by stakeholders on the 2013 proposed amendments.⁴⁴

Communications explained that "control system does not mean a conditional access system nor does it mean an encryption of the signal to control access to content by viewers".

⁴² Emphasis added.

⁴³ This accorded with the Working Group Report, which recommended that "broadcasting service licensees should be allowed to roll out the CA system of their choice in more advanced STBs that can be offered in the market" (Working Group Report, p 27, annexure M3).

⁴⁴ 2015 Policy, opening paragraph. This was not unusual. Minister of Communications Roy Padayachee published draft amendments to the Policy in August 2011, and following a cabinet reshuffle in October 2011 the new Minister Dina Pule completed the amendment process without further public consultation.



QPM

62 In a statement issued on 13 March 2015, Minister Muthambi's amendments were explained as follows:

"Government has assured parliament that Cabinet's endorsement of an inclusion of a 'control system' aims to protect its multi-billion rand investment in the STBs from use outside of South Africa and that broadcasters who seek conditional access related to encryption of their broadcast content may do so at their own cost. Our responsibility is to protect the STB that government is making an investment in. The issues beyond the box or the encryption of the signal is not our domain. Those who want to encrypt the signal or content so that they give rights to watch certain programmes can do that and they can make their investment in that area".⁴⁵

63 The key provisions in the 2008, 2012 and 2015 iterations of the Policy are summarised in the table which is **Appendix A** to this affidavit.

The review of the 2015 Policy

64 In April 2015 e.tv launched an application in the North Gauteng High Court to review and set aside the encryption amendment in the 2015 Policy on the grounds that it was unlawful, irrational, unreasonable and procedurally unfair.

⁴⁵ Media statement, *Government to Gazette Broadcast Digital Migration (BDM) policy*, Department of Communications, 13 March 2015, quoted in *Electronic Media Network*, para 16.



65 The e.tv application was finally determined by the Constitutional Court. It dismissed the application on 8 June 2017.⁴⁶ In determining the principal issues - the reviewability of ministerial policy and the encryption amendment - the Court made the following observations and findings which are pertinent to the Commission's evaluation of the witnesses' evidence.

66 The Court noted that e.tv had initially had the "*strongly-held position*" that the incorporation of decryption capability in STBs was "*wholly unsuited for free-to-air television*":

"e.tv was very much involved in the consultative process triggered by Dr Matsepe-Casaburri and described the role it played in policy-formulation, as crucial. Its strongly-held position at the time was that the incorporation of a decryption facility in set top boxes was 'wholly unsuited for free-to-air television'. It lamented its intended introduction into a free-to-air terrestrial environment on the basis that it 'fundamentally changes the nature of free-to-air television broadcasting' and 'removes the control over access to free-to-air television from the viewer/citizen to the broadcaster, transmission provider or a third party'. e.tv also said decryption capabilities raised 'critical constitutional, economic, financial and competition issues'. It decried the exorbitant costs that would be occasioned by the incorporation of decryption capabilities into set top boxes. It labelled that policy 'direction' as uncompetitive. That in its view would effectively

⁴⁶ *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* 2017 (9) BCLR 1108 (CC) ("*Electronic Media Network*")



mean that 'government would be subsidising the profits of a single [conditional access] provider' in circumstances where conditional access is unnecessary for the purposes of digital migration. Finally, e.tv maintained that the basic set top box ought not to include decryption capabilities so as to curb production and incidental maintenance costs particularly because it was a bridging mechanism intended to allow analogue terrestrial television to receive digital signals. The SABC and M-Net agreed."⁴⁷

- 67 The Court pointed out that e.tv had subsequently made a "180° about turn from its previous strongly-held and motivated position",⁴⁸ and that, because e.tv's original position had now been adopted by the Minister of Communications, e.tv was "aggrieved and litigating".⁴⁹

"We are now virtually grappling with e.tv's own battle of ideas. Its position is particularly striking in that it has been able to articulate quite forcefully at times persuasively, two diametrically opposed viewpoints. Initially, against the inclusion of decryption capabilities in set top boxes in order to save the taxpayers' money, avoid enriching individual entities at government expense and promote competition, but later in favour of the inclusion of decryption capabilities in government-supplied set top boxes. The latter is now said to be done for the

⁴⁷ *Electronic Media Network*, para 10

⁴⁸ *Electronic Media Network*, para 14

⁴⁹ *Electronic Media Network*, para 10



promotion of competition and the advancement of the best interests of the public..."⁵⁰

68 The Court was plainly sceptical of e.tv's claim to be pursuing STB decryption capability in the public interest. e.tv had acknowledged in an affidavit before the Court that it was *"the only FTA broadcaster whose stated plans would be hindered by the [encryption amendment]"*. As the Court explained:

"Now only e.tv, of all free-to-air broadcasters, wants to encrypt if only, to paraphrase e.tv's words, government can effectively subsidise its preferred business decision or strategy. This subsidy takes the form of government procuring set top boxes into which decrypting gadgets are incorporated. e.tv would then pay only for the signal unscrambling device. This would spare it the costs of paying for its own set top box equivalent."

69 It was concerning, the Court said, that e.tv *"seeks to ride on the back of a government project to realise its entrepreneurial vision"*,⁵¹ to *"harvest more profit"* by having decryption capability incorporated into the STBs designed to benefit financially challenged households. The Minister's policymaking authority is *"a constitutional power not to be lightly dislodged by a clamour for consultation, actuated by commercial interests masked with the appearance of the advancement of public interest"*.⁵²

⁵⁰ *Electronic Media Network*, para 45

⁵¹ *Electronic Media Network*, para 54

⁵² *Electronic Media Network*, para 27



70 Pertinently, the Court found that the encryption amendment was substantively rational. The Minister's objective was "to save costs while at the same time enabling broadcasters to decide freely whether to encrypt and decrypt their digital signals at their own expense".⁵³ The purpose of the policy "was to relieve government of the exorbitant costs that would be necessitated by the inclusion of decryption capabilities".⁵⁴ The policy was not centred around individual players in the broadcasting industry.⁵⁵

71 The Court was accordingly not persuaded by e.tv's contention that the encryption amendment was irrational on the ground that "it would not be a commercially viable proposition [for e.tv] to encrypt signals unless the [Policy] require[d] set top boxes to have inbuilt decryption capabilities".⁵⁶

STB DECRYPTION CAPABILITY WAS MISGUIDED

Introduction

72 Government's decision that, as a matter of policy, the subsidised STBs should not incorporate decryption capability, was amply supported by the evidence. It showed that STB decryption capability was unnecessary, undesirable, and entirely at odds with global practice, and would have significant and enduring

⁵³ *Electronic Media Network*, para 78

⁵⁴ *Electronic Media Network*, para 80

⁵⁵ *Electronic Media Network*, para 80

⁵⁶ *Electronic Media Network*, para 78. The minority of the Court did not consider the issue of substantial irrationality because it found that the process which the Minister had followed to formulate the encryption amendment had been procedurally irrational (para 126).



adverse consequences for television broadcasting, government and consumers.

73 The inclusion of decryption capability in the government-subsidised STBs was not required to serve any of the purposes advanced by its proponents. Indeed, it is evident that the only reason why e.tv departed from its initial position to campaign for STB decryption capability was to allow it to enter the pay-TV market without incurring the expense of its own decoders. MultiChoice understandably raised an objection to the incorporation of decryption capability in the subsidised STBs as a means of giving a particular commercial broadcaster a competitive advantage at public expense. That would not have been the facilitation of competition, but improper favouritism.⁵⁷

74 Before canvassing the adverse implications of STB decryption capability and the groundless claims made for its benefits, I refer to the conclusion reached by e.tv in the 2008 e.tv submission (annexed as "M4"), in which e.tv highlighted the key principles which underpinned its opposition (at that time) to incorporating decryption capability (what it referred to as "conditional access" or "CA") in STBs.

75 I quote its conclusion in full, to illustrate that the bases on which MultiChoice consistently opposed STB decryption capability, and the grounds upon which

⁵⁷ As the Constitutional Court stated in the e.tv application: "Now only e.tv, of all free-to-air broadcasters, wants to encrypt if only, to paraphrase e.tv's words, government can effectively subsidise its preferred business decision or strategy" (*Electronic Media Network*, para 81).



government decided against STB decryption capability, were objectively justified.⁵⁸

"5. Conclusion

5.1 e.tv's position on the basic free-to-air STB for DTT is based on the following principles:

- 5.1.1 Allowing the consumer the greatest possible choice. This is based on the principle that the consumer is being compelled to purchase a box to continue to watch free-to-air television.*
- 5.1.2 Ensuring that the box is as low-cost as possible to ensure that as many people as possible can afford it. This is based on the fact that most South Africans simply cannot afford to buy a box and will need to be subsidised in one way or another.*
- 5.1.3 Limiting government's exposure to high subsidy costs. Once again, the cheapest possible box will achieve this purpose as in this case more people will be able to purchase the STB and the cost of the subsidy will be lower.*
- 5.1.4 Making the STB (including repairs, maintenance and upgrades) the responsibility of the consumer as would be the*

⁵⁸ As the Constitutional Court observed in the e.tv application: *"Minister Muthambi has virtually gone back to the position that e.tv and others unanimously and eloquently argued for at first, as a sensible and cost-effective policy decision". (Electronic Media Network, para 53, my emphasis).*



case with a normal television set. The box is merely a bridging mechanism to allow analogue television sets to receive a digital signal – when digital television sets are available on a large scale, the box will no longer be required. The notion of such a basic box is in line with international experience including the United Kingdom.

5.2 In this context, the inclusion of CA in the basic free-to-air STB runs contrary to all of the above-mentioned principles. It is unnecessary for digital migration, it adds costs to the STB, it adds extensive costs to broadcasters and transmission operators by requiring enormous (for 8 to 10 million households) subscriber/viewer management systems and call centres (in the absence of additional revenue streams), it inhibits consumer choice and increases the subsidy cost to government.

5.3 e.tv submits that, given the tight timeframes for digital migration and the short period of dual illumination, South Africa should adopt tried and tested approaches in successful digital migration markets such as the United Kingdom. This includes making the basic free-to-air STB simple and affordable so that there is a minimal delay in the production and take-up of DTT STBs."

The cost of STB decryption capability

76 The cost implications of STB decryption capability would have been significant.



30

AM

- 77 The STB hardware would have been more costly, because it would have had to be adapted to accommodate decryption software. The software cost would also be added. STB decryption capability would have increased the cost of an STB for: (a) government, in respect of the subsidised STBs; (b) consumers buying an unsubsidised STB; and (c) consumers having to replace subsidised or unsubsidised STBs.
- 78 The technical complexity added by decryption capability would also have increased the risk of STB malfunction, giving rise to higher maintenance and repair costs for the consumer, as well as the higher risk of STB replacement.
- 79 In addition, there would have been significant costs associated with the daily maintenance and management of the encryption system, including the implementation of subscriber management systems to manage the user database and a call centre to address activations, de-activations, technical support and queries.
- 80 Encrypted systems are also vulnerable to piracy and hacking, and require costly software and anti-piracy upgrades on an ongoing basis to ensure the integrity of the system. Pay-TV operators have to deal with hacking on a continuous basis and at great cost. In 2001 it cost MultiChoice \$7.50 per subscriber to secure its full content subscription system that had been hacked. If a decryption system embedded in the subsidised STBs were to be hacked,



this would require the upgrade of the decryption system and a swop-out of all the affected STBs in the market.⁵⁹

81 The SABC estimated that if decryption capability were to be included in the subsidised STBs, the initial once-off cost of five million STBs would be increased by R137.3 million and annual costs of R561.9 million (R2.8 billion over five years) would be incurred for royalties for encryption software and management systems.⁶⁰

82 If no free-to-air broadcaster had elected to use the decryption capability in the STBs, the ongoing costs would fall to be carried by government. In the 2008 e.tv submission this was a key concern:

"e.tv is deeply concerned that the addition of extensive operating costs by the unnecessary inclusion of CA in the basic free-to-air STB will be passed to broadcasters. As a free-to-air broadcaster which is entirely dependent on advertising revenue and which has no access to public or state funding e.tv is concerned at the implications on the future of its business of the unnecessary inclusion of CA in the basic free-to-air STB."⁶¹

⁵⁹ This is demonstrated by the *eBotswana* case highlighted in Part B of this affidavit. Of central concern to e.tv (as a free-to-air broadcaster) was who will take responsibility for upgrading the STB control system – potentially at the cost of millions – if security is compromised or the STB control software fails.

⁶⁰ SABC Affidavit in the e.tv application, dated 12 May 2015 ("SABC Affidavit"), para 26.4.1 and 26.4.2

⁶¹ 2008 e.tv submission (annexure M4), para 4.1.1.4.



83 If decryption capability had been incorporated in the subsidised STBs and used by a broadcaster such as e.tv, only some of the associated costs would have been carried by e.tv alone. The risk of STB maintenance, repair and replacement costs, arising from increased complexity, would have been carried by consumers, along with the inconvenience of interruptions and swop-outs following any hacking or failure of the encryption system itself.

Permanent dependency on STBs

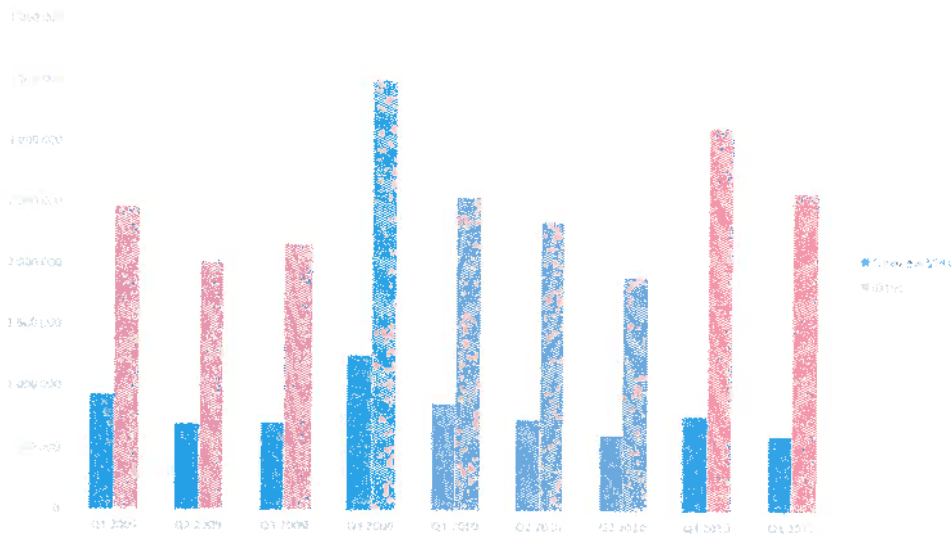
84 Ultimately, STB decryption capability would have made consumers permanently dependent on STBs and made STBs a permanent feature of broadcasting in South Africa. Viewers who had digital TV sets would indefinitely require STBs to receive the services of free-to-air broadcasters which had opted to use encryption. This is because the in-built digital tuner in digital TV sets only converts digital signals for viewing in standard or high definition formats. It is not capable of decryption. Consumers would have had to continue to use (and maintain and replace) STBs in perpetuity, with the concomitant unnecessary costs of doing so.

85 STBs were always meant to be a temporary solution in the free-to-air digital terrestrial television environment and have been employed as such in other jurisdictions.⁶²

⁶² A 2002 study for the European Commission referred to the need for dual illumination to allow "consumers to equip themselves gradually with compatible digital receivers, before analogue turn-off" (Digital Switchover in Broadcasting, A BIPE Consulting Study for the European Commission (Directorate General Information Society), Final report, 12 April 2002).



86 Research commissioned by MultiChoice in 2013 showed that by that time STB sales were already declining in the United Kingdom as a result of the inclusion of digital tuners in all new TV sets.⁶³ In MultiChoice's presentation to the round table discussions convened by Minister Carrim in September 2013, it provided evidence that the sales of digital TV sets or "IDTVs" overtook sales of STBs in the United Kingdom in 2009, as depicted in the graph below, evidencing the decline in demand for STBs as the demand for digital TV sets rose.⁶⁴



- OFCOM monitored sales up to Q1 2011, prior to ASO in 2012
- IDTVs overtook STBs in 2009

87 In a presentation to the Parliamentary Portfolio Committee on Communications on the Policy on 10 March 2015 (annexed as "M16")⁶⁵ the Department of

⁶³ This was included in the Futuresource research, which I refer to in para 129 below

⁶⁴ MultiChoice presentation, Round Table Discussion: STB Control, 11 September 2013 (annexed as "M17"), slide 10

⁶⁵ See para 58.



Communications confirmed that *"STBs are a transitional tool to enable migration from analogue to digital television"*.⁶⁶

88 On 6 November 2019, the Portfolio Committee itself stated its concern that *"too much money was being spent on DTT whereas Set-Top-Boxes had become redundant"*.⁶⁷

89 On 9 March 2020 the Deputy Minister of Communications, Ms Pinky Kekana, investigated the status of digital migration in the Free State and stated in an SABC News interview:

"Remember, now we are dealing with the remaining set top boxes that must be distributed in the post offices. That's what we are doing. But, we are gradually also introducing IDTV. There are four households where we are going to put IDTV for our people to start to see that you can even migrate just buying the ID television".⁶⁸

90 The Universal Service and Access Agency of South Africa has opted to subsidise digital TV sets (rather than STBs) for the remaining 3.2 million

⁶⁶ Slide 12

⁶⁷ Report of the Portfolio Committee on Communications on the 2019/20 1st Quarter Performance and Expenditure Report of the Department of Telecommunications and Postal Services (DTPS), dated 22 October 2019; Parliament of the Republic of South Africa, Announcements, Tablings and Committee Reports, Wednesday 6 November 2019, item x, p 30 (annexed as "M18")

⁶⁸ Challenges faced by digital migration hinder the issuing of spectrum: Deputy Minister Kekana, SABC News, 9 March 2020 (Available at

<https://www.youtube.com/watch?v=5MnfbFKvp3o&feature=youtu.be>)



indigent households in the digital migration programme. On 15 June 2020 the Agency published an invitation for bids for the procurement of digital TV sets.⁶⁹

- 91 Viewers already using digital TV sets will not need to use STBs at all. As has happened globally, digital TV sets have become widely available and affordable as a result of technological development and government action.
- 92 The three major television manufacturers – Samsung, LG and Hisense – already manufacture digital TV sets locally. All of the television sets currently manufactured and sold in South Africa by Hisense, Samsung and LG (except for Samsung's 32" and 40" models) already have integrated DVB-T2 tuners, meaning that the vast majority of the television sets currently sold in South Africa have the capability of receiving digital terrestrial television transmissions through a built-in digital tuner, and do not require an STB. Approximately 1.1 million new television sets are sold per annum in South Africa, suggesting that the total television market is already 60% to 70% ready for digital terrestrial television.

STB decryption capability is not necessary

- 93 In the face of all the adverse implications of STB decryption capability, e.tv claimed in the e.tv application that it was required for four main purposes: first, to enable free-to-air broadcasters to protect their content from piracy; second, to enable free-to-air broadcasters to obtain high definition content; third, to

⁶⁹ Invitation for bids: Appointment of a panel of South African registered suppliers to supply or supply and install locally produced 32" integrated digital televisions (IDTV's) on a voucher system to beneficiaries, USAF-IDTV/02/2020, 15 June 2020 (extract annexed as M19).



prevent the import and sale of cheap, poor quality STBs; and fourth, to enable Internet access, messaging and e-government services.

94 Some of these reasons were repeated by Mr Carrim and Mr Kruger in their evidence to the Commission. Ms Mokhobo added a further alleged benefit: that STB decryption capability would enable children to access educational programming.

95 But, as other stakeholders have demonstrated, and as e.tv itself contended before its change of position, STB decryption capability is not required for any of these purposes.

Protecting content against piracy

96 The piracy of television broadcasting content is prevented by the incorporation of technology such as High-Bandwidth Digital Content Protection, a form of digital copy protection which prevents unauthorised copying of content.⁷⁰ The STB National Standard was amended in 2013 to require the inclusion of

⁷⁰ HDCP stands for High-Bandwidth Digital Content Protection, a copy protection scheme to eliminate the possibility of intercepting digital data midstream between the source to the display (e.g. between a pay-TV decoder and a television). It is a form of digital copy protection developed by Intel Corporation to prevent the copying of digital audio and video content as it travels across connections to the TV set. The format designed by Intel and licensed by Digital Content Protection, LLC using an authentication and key exchange procedure before video and audio is presented. Products compatible with the HDCP scheme such as DVD players, satellite and cable HDTV set-top-boxes, as well as few entertainment PCs requires a secure connection to a compliant display; the process often described as the handshake. HDCP does not require encryption of broadcasting content to work. (The goal of on-air encryption is to enforce conditional access in the pay-TV context to prevent piracy, which is not a requirement in the free-to-air context). Macrovision protection is another copy protection product sold by Macrovision Corp.



HDCP,⁷¹ and the Department of Communications included the HDCP requirement in its Request for Proposals for the five million subsidised STBs.

97 Encryption of the broadcasting signal does not on its own protect against copying of content. Even in the conditional access system used by subscription broadcasters, which encrypts the signal when it is broadcast and decrypts the signal for subscribers who are authorised to receive the service, unauthorised copying of content is prevented by the additional mechanism of controlling HDCP settings and ports in the decoder. In the case of free to air STBs, DVD/Blu-ray players and game consoles, which are without conditional access systems to control HDCP, HDCP functions independently to prevent copying.

98 Mr Kruger's evidence to the Commission, that "*the reason that networks encrypt their networks is first of all to protect the content*" against copying, is therefore incorrect. It appears from his evidence that Mr Kruger confused the digital terrestrial environment with the digital satellite environment. Internationally, free-to-air digital satellite signals may be encrypted in order to restrict the reception of content to territories for which the broadcaster has the rights, because satellite footprints generally cover multiple countries and "spill over" to areas where the broadcaster does not have the rights.⁷²

⁷¹ SANS 862:2013, Edition 2.1, Amendment 1 of 2013, paras 4.4.2.5, 4.4.3.7.2, and 4.12.3,

⁷² Unlike the limited coverage of terrestrial transmitters, each satellite normally covers a large number of countries which its signals reach (called a satellite "**footprint**"), which enables the transmission of the same broadcasting service to multiple countries simultaneously. It is the satellite provider (e.g. IntelSat) which determines the footprint of its satellite. A satellite cannot be "programmed" so that signals do not reach a certain area in its footprint. The signals transmitted from a satellite are accessible in the entire footprint of the satellite. For example, IntelSat's IS20 satellite covers Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. A satellite broadcaster uses encryption to limit the channels that subscribers in a particular geographical area may view to the geographical area (i.e. the particular country) for which the rights



99 It was this situation which came before the courts in 2012 when eBotswana successfully sued Sentech after Sentech's encryption system had failed and its channels were broadcast into Botswana, resulting in unlawful competition with the eBotswana channels.⁷³ For reasons which I outline in Part B of this affidavit, Mr Kruger misconstrued the High Court judgment in that case, and his account of it revealed his misunderstanding of fundamental broadcasting concepts.

100 It is accordingly not correct, as Mr Kruger suggested, that "*most major movie houses are insisting that broadcasters encrypt their content so that you can't copy these things*".⁷⁴ I elaborate on the requirements of "movie houses" below.

Obtaining high definition content

101 Encryption of signals and STB decryption capability is not required to enable free-to-air broadcasters to obtain high definition content.

have been cleared. If a broadcaster broadcasts content to a territory for which it has not cleared the rights, it will infringe the intellectual property of the owner of the rights, and will be liable to pay damages to the rights owner. It may also be exposed to liability to legitimate broadcasters in the territory, whose advertising revenue is reduced by unlawful competition from unlawful broadcasting services/content for which the rights have not been cleared.

⁷³ *eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others* 2013 (6) SA 327 (GSJ) ("*eBotswana*")

⁷⁴ Kruger Transcript, p 101



102 The majority of free-to-air terrestrial broadcasters worldwide broadcast their signals unencrypted and nevertheless obtain and broadcast high definition content from international studios and other sources. These broadcasters include –

102.1 in the United Kingdom, the public broadcaster, the BBC, and public commercial broadcasters ITV and Channel 5;

102.2 in the USA, the public broadcaster PBS, and commercial broadcasters ABC, NBC and CBS; and

102.3 in Australia, the public broadcaster ABC and commercial broadcasters Seven Network, Nine Network, Network Ten and SBS.

103 As is evident from the attached letters from leading studios CBS Studios International (annexure "M20") and The Walt Disney Company Limited (annexure "M21") –

103.1 CBS, a leading supplier of programming to the international television market, does not require encryption of its programming (in respect of standard definition or high definition content) for free-to-air linear broadcast over analogue or digital terrestrial networks.

103.2 Walt Disney, another leading supplier of programming to the international television market, when licensing programming content (including high definition content) in the sub-Saharan region, does not typically require encryption of that content on free-to-air linear channels distributed over an analogue or digital terrestrial television network.



104 There is accordingly no truth to the allegation made by Mr Kruger in his evidence to the Commission that media houses insist on encryption of content by free-to-air broadcasters.⁷⁵

Preventing the import and sale of poor quality STBs

105 Encryption of signals and STB decryption capability is not required to prevent the importation and sale of cheap, poor quality STBs to the public.

106 Internationally, consumers are protected against poor quality products by less costly and less complex measures than encryption. In South Africa, this objective is addressed by a range of conformance measures to protect consumers against poor quality products, including –

106.1 the adoption of the STB National Standard;

106.2 the certification of compliant products; and

106.3 consumer education on the risks of purchasing STBs which are not certified.

107 In its recent invitation for bids to supply digital TV sets, the Universal Service and Access Agency of South Africa addressed quality and conformance imperatives by requiring the digital TV sets to (a) contain a built in DVB-T2 standard digital tuner, (b) conform to the South African National Standards/SABS Standards and SABS co-ordinating specifications (CKS),

⁷⁵ Kruger Transcript, pp 101 and 109



(c) conform to applicable International Organization for Standardization (ISO) specifications, (d) have the necessary National Regulator for Compulsory Specifications (NCRS) electro-technical letter of authority (LOA), and (e) be ICASA approved and labelled as accredited by ICASA.⁷⁶

108 There is no substance to Mr Carrim's suggestion that without encryption of signals and STB decryption capability South African television households could find themselves with STBs with no after-sale support, leaving the Department of Communications in a "*logistical nightmare*".⁷⁷ In any event, even with encryption, STB owners could find themselves without after-sale support if their STB supplier (including a local supplier appointed by government tender) exited the market (assuming the STB supplier would even provide after-sales support).

Protecting the local manufacturing industry

109 Mr Kruger's allegation, that encryption was required to protect the local manufacturing industry, is at odds with the World Trade Organisation's injunction against technical standards being used to create a barrier to entry to a market.⁷⁸

⁷⁶ Invitation for bids: Appointment of a panel of South African registered suppliers to supply or supply and install locally produced 32" integrated digital televisions (IDTV's) on a voucher system to beneficiaries, USAF-IDTV/02/2020, 15 June 2020 (annexed as "M19"), pp 8 and 9

⁷⁷ Carrim affidavit, para 40.2

⁷⁸ In the 2008 e.tv submission (annexure "M4") e.tv noted that "*it is contrary to South Africa's trade obligations to design a specification in such a manner as to block imported goods from competing with locally manufactured products*" (para 3.2.1.2) and that a closed system which shut out foreign imports would be unlawful and in breach of South African trade agreements (para 3.2.1.3).



110 In any event, the following more effective mechanisms, compliant with WTO obligations, have been introduced to benefit local STB manufacturers:

110.1 The Department of Trade and Industry has imposed an import duty of 15% on all imported STBs.⁷⁹

110.2 The Preferential Procurement Regulations provide for the designation of sectors for local production and manufacture. National Treasury was tasked to issue instructions, circulars and guidelines to all organs of state, with specific reporting mechanisms to ensure compliance with such designation.⁸⁰ In September 2012 Treasury issued a circular stipulating that the minimum threshold for local production and content for the set top boxes sector is 30%.⁸¹

110.3 The Department of Communications decided that the tender for the manufacture of the subsidised STBs would only be awarded to local manufacturers with satisfactory B-BBEE scores based on the stipulated minimum threshold for local production and content for the STB sector.⁸² (The same pre-evaluation condition has been applied to bids

⁷⁹ Report No. 409, Review of the General Rate of Customs Duty on Reception apparatus for Television not Designed to Incorporate a Video Display or Screen (Set Top Boxes) with a Value for Duty Purposes not Exceeding R5 000, International Trade Administration Commission of South Africa (ITAC), 9 November 2012, para 26.

⁸⁰ Preferential Procurement Regulations, 2011, published under Notice No. 502, Government Gazette no. 34350, 8 June 2011 (regulation 9, under the heading "local production and content"). The 2011 Regulations were repealed and replaced by the Preferential Procurement Regulations, 2017 (published under Notice No. 32, Government Gazette no. 40553, 20 January 2017) which deal with local production and content in regulation 8.

⁸¹ Invitation and Evaluation of Bids Based on a Stipulated Minimum Threshold for Local Production and Content for the Set Top boxes Sector, National Treasury, 26 September 2012, and updated on 20 December 2019 (annexed as **M22A** and **M22B**)

⁸² The benefits for local manufacturers were highlighted in an article entitled *Set-top box Producers set the Record Straight*, IT Web, 7 June 2018 (annexed as "M23").



in response to the recent invitation of the Universal Service and Access Agency of South Africa for bids for the supply of digital TV sets.⁸³⁾

Mass messaging and government information

111 Encryption of signals and STB decryption capability are not required for mass-messaging.

112 The STB National Standard includes the technical capability, through the royalty-free MHEG-5 system, to offer application services which will allow government information to be conveyed to citizens on a one-to-many basis. MHEG-5 does not require encryption in order to deliver information and services as applications to the free-to-air STBs. Nor do broadcasters require encryption in order to provide access to MHEG-5 information and service applications.

113 An STB, which is not connected to the Internet, is a non-viable mechanism for addressing unique messages to a specific individual (called "unique addressability") as it is impossible for an unconnected STB to be authenticated against an individual. One can address a unique message to a specific STB,

⁸³ Invitation for bids: Appointment of a panel of South African registered suppliers to supply or supply and install locally produced 32" integrated digital televisions (IDTV's) on a voucher system to beneficiaries, USAF-IDTV/02/2020, 15 June 2020 (annexed as M19), pp 4, 6, 9 – 13 and 65 - 70. Annexure B of the bid invitation document contains National Treasury's 20 December 2019 circular, which specifies the minimum 30% threshold for local production and content. Although the treasury circular refers to STBs, it is included as a condition for the bids in respect of the digital TV sets. In addition, the invitation requires bidders to indicate the percentage that they will be sub-contracting to exempted micro enterprises or qualifying small enterprises (p 11).



but once the message is on the STB it can be viewed by anyone who has access to that STB. There is no privacy.

114 Moreover, if STBs were to be used to send messages from an operator to a particular STB via the broadcast signal, a very costly subscriber management system would be required in order to keep track of contact details and STB addresses. The addressability system would provide the interface between the subscriber management system and the STB. The support structure required to achieve such addressability would be expensive to implement and maintain.

115 An STB which is not connected to the Internet is not a personal device, but rather a household device, which consumers do not regard as a communication vehicle. The inclusion of decryption capability in an STB does not create a return path (i.e. decryption capability does not create an Internet connection). Since an unconnected STB (unlike a mobile phone) has no return path, delivery of personal messages cannot be effected and viewers cannot respond to the message received, or use the unconnected STB for e-transactions. Mobile phones, on the other hand, have proven to be the best device to address consumers, being personal, mobile, and equipped with a return path for two-way communications. There are 14.4 million TV households in South Africa, 55% of which are analogue free-to-air viewers, with the remainder being satellite-based.⁸⁴ In contrast, there are over 96 million mobile cellular phone connections.⁸⁵

⁸⁴ Broadcast Research Council of South Africa BRC TAMS Update October 2018.

⁸⁵ ICASA's Report on the State of ICT Sector in South Africa, March 2020, p 38 (annexed as "M24")



116 Mr Kruger's evidence on this issue was inaccurate and misleading. His suggestion that the Department of Home Affairs could use a conditional access based messaging system to notify citizens when their ID books are ready for collection,⁸⁶ since, as he put it, the Department of Home Affairs doesn't know how to notify people if they don't have a post box, is out-of-date and impractical.

117 The Department of Home Affairs already sends individual SMS notifications to ID book applicants.⁸⁷ In 2007, five years before Mr Kruger was appointed technical advisor to the Department of Communications, the Department of Home Affairs launched a turnaround programme which, among other things, established an SMS system using SMS notifications (for which "smart phones", connected to the Internet are not required) and a call centre, which "*spared millions of South Africans from waiting in queues and saved them time and money.*"⁸⁸

Educational programming

118 Ms Mokhobo alleged that STB decryption capability would enable children to access educational programming, because they could be taught via television,

⁸⁶ Kruger Transcript, pp 152 and 153

⁸⁷ GSMA Intelligence, January 2019 indicated that there is a total of 98.05 million total mobile subscriptions in South Africa. Also see *Mobile Subscriber Numbers in South Africa – MTN vs Vodacom*, My Broadband, 9 May 2019 (annexed as "M25").

⁸⁸ *White Paper on Home Affairs*, Department of Home Affairs, Republic of South Africa, 18 February 2019, pp 14 and 67.



including using personal video recorder (PVR) functionality for children to record and watch educational programming later.⁸⁹

119 Encryption is not necessary for the provision of educational programming. Indeed, part of the SABC's public broadcasting mandate is to "include significant amounts of educational programming".⁹⁰ The SABC already provides educational programming and does not require encryption in order to do so.⁹¹

120 On 15 June 2020 the Universal Service and Access Agency of South Africa invited bids to procure digital TV sets for indigent Grade 12 learners to ensure that matriculants who do not have television sets or STBs are not left behind in their studies due to the COVID-19 pandemic and end up not being ready to write and pass their final grade 12 examinations. The purpose for which the Agency seeks to procure these digital TV sets is precisely to enable those learners to receive educational content broadcast digitally by the SABC. The invitation does not require the digital TV sets to contain a return path or decryption capability.⁹²

⁸⁹ First Mokhobo Transcript, p 118; Second Mokhobo Transcript pp 28 – 30; and Mokhobo's Second Supplementary Affidavit, paras 22 and 44.

⁹⁰ Broadcasting Act, 1999, section 10(1)(e).

⁹¹ In March 2020, in response to the COVID-19 pandemic, the SABC added a dedicated educational channel. This did not require encryption. The joint media statement by the SABC and the Department of Basic Education, *Basic Education and SABC launch Coronavirus COVID-19 TV and radio curriculum support programmes for learners*, 8 April 2020 is annexed as "M26".

⁹² Invitation for bids: Appointment of a panel of South African registered suppliers to supply or supply and install locally produced 32 inch integrated digital televisions (IDTV's) for the 2020 indigent matriculants, USAF-IDTV/03/2020, 15 June 2020 (extracts annexed as M27), pp 4 - 6. The invitation states: "The scope of the project is to procure, distribute and install digital TVs ('IDTVs') to indigent Grade 12 learner's households for the purpose of receiving educational material via digital broadcasting network services" (p 5). (Also see *More than 100,000 matrics are in line for free TVs, thanks to a coronavirus plan*, Getty, Business Insider South Africa, 15 June 2020 (annexed as M28)



121 In any event, the purported "interactive learning" benefits suggested by Ms Mokhobo would not have arisen from STB decryption capability because, contrary to Ms Mokhobo's evidence to the Commission,⁹³ STB decryption capability does not provide Internet connectivity.

122 As I explain elsewhere, Internet connectivity would require a return path channel in the STB. This is not a requirement in the STB National Standard for STBs, and it has not been required since government's 2012 Policy.⁹⁴

123 PVR functionality is also not a requirement, in either the STB National Standard or the Policy, for the basic STB. The subsidised STBs, whether or not they incorporated decryption capability, would not have connected to the Internet and would not have provided the educational benefits described by Ms Mokhobo.

e.tv's motive

124 In June 2016 technology consultant Andrew Fraser was quoted as saying:

"e.tv's argument [for encryption capability] is based on misinformation and red herrings. There is only one reason for a broadcaster to push

⁹³ Mokhobo's First Supplementary Affidavit, p 7.

⁹⁴ The Policy has not provided for a return path since February 2012. Ms Mokhobo quoted from the 2008 Policy, which initially provided for a return path, but Minister Pule deleted the requirement for a return path in February 2012 because it was prohibitively costly. Nor is it a requirement in the Universal Service and Access Agency of South Africa's June 2020 invitations for bids.



for encryption for a broadcaster – the introduction of pay-TV services."⁹⁵

125 As e.tv ultimately acknowledged in the e.tv application, it was *"the only broadcaster whose stated plans would be hindered by the [encryption amendment]"*.⁹⁶ This was because e.tv's group of companies, eMedia, holds both a free-to-air broadcasting service licence and a subscription broadcasting licence and wished to use the five million subsidised STBs to enter the pay-TV market without having to fund its own decoders. The Constitutional Court explained:

*"e.tv would want to be able to harvest more profit, in the same way it accused others of seeking to do in its representations to the Minister Matsepe-Casaburri policy proposals. This it seeks to achieve by having decryption capabilities incorporated into the government-supplied set top boxes designed to benefit financially challenged households. This is the same government subsidisation of profits of a single conditional access provider, it complained about in its comments on the Minister Matsepe-Casaburri policy proposals. It has in effect branded the position it previously embraced and fought for as irrational."*⁹⁷

126 The inclusion of decryption capability in the subsidised STBs would indeed have assisted broadcasters to establish pay-TV television broadcasting

⁹⁵ *Expert: TV encryption is 'anti-consumer'*, Tech Central, 23 June 2016 (annexed as "M29").

⁹⁶ e.tv's replying affidavit in the e.tv application, dated 18 May 2015 (annexed as "M30"), para 52.6.

⁹⁷ *Electronic Media Network*, para 55.



services (if they had the requisite licence, as eMedia does and the SABC does not) without investing in their own decoders. But as I have explained, this would have been at the expense of (a) government, which would have paid a premium for this technology; and (b) the individual purchasers and owners of STBs, since this facility would increase not only the initial cost, but also the maintenance and replacement costs of STBs.

127 As Minister Muthambi said in the e.tv application -

"It is not the policy of government to incur costs to ensure that the broadcaster that chooses to encrypt must, effectively, be subsidised by government from the public purse to facilitate competition".⁹⁸

STB decryption capability at odds with global practice

128 A requirement of decryption capability in STBs in the free-to-air digital terrestrial television environment was, at the time that the 2015 Policy was introduced, almost unprecedented internationally.

129 In 2013, M-Net engaged Futuresource Consulting Limited, an independent specialist research and consulting firm which provides services to a range of industry sectors, including the broadcasting sector, to identify whether any other countries in the world, which had embarked on digital migration, had mandated the encryption of free-to-air terrestrial television broadcasting signals

⁹⁸ First Respondent's Answering Affidavit in the e.tv application, 8 May 2015, para 3.14.



or the inclusion of decryption capability in STBs. Futuresource reported as follows:

129.1 More than 150 countries worldwide had commenced or completed digital migration and, with the exception of the Ukraine, none had required the encryption of free-to-air terrestrial broadcasting signals. The Ukraine had done so only because its platform provider had aspirations to enter the pay-TV market.

129.2 The possibility of requiring encryption was debated, but rejected, in countries such as the United Kingdom, the Netherlands and Singapore, for reasons which included the cost implications and the inappropriateness of encrypting public broadcasting services.

129.3 In most jurisdictions the free-to-air terrestrial STBs which had been introduced to the market did not contain decryption capability.⁹⁹

130 Pertinently, a few months later, the Ukraine removed encryption in order to lower the cost of STBs. Experts identified a number of shortcomings in the digital migration process in the Ukraine, including the encryption of channels that should have been offered free-to-air, resulting in an increase in the cost of receivers. On 17 July 2014 the Ukrainian regulator prohibited the encryption of

⁹⁹ Futuresource also pointed out that certain countries, such as Malaysia, Uganda and Kenya, had provided for the optional inclusion in STBs of a "smart card reader" or "DVB-CI (Common Interface) slot, which allows for the optional introduction of encryption, but did not require the encryption of free-to-air services, and free-to-air services had continued to be broadcast unencrypted.



free-to-air terrestrial television signals in order to reduce the cost of receivers.¹⁰⁰

131 Mr Kruger testified that "*everyone is putting in encryption*", and cited as examples Mozambique, Namibia, Mauritius and Kenya.

132 Aside from confusing the encryption of free-to-air terrestrial television broadcasting signals with encryption in (a) satellite broadcasting; (b) subscription broadcasting; and (c) technology for interpersonal communications such as WhatsApp and email, Mr Kruger's evidence on encryption in the terrestrial context failed to distinguish between –

132.1 countries where government policy has required decryption capability in free-to-air terrestrial STBs; and

132.2 countries where government policy has permitted the inclusion of decryption capability in free-to-air terrestrial STBs, to be implemented at the discretion of operators, for their own commercial reasons and at their own cost.

¹⁰⁰ Ukrainian call for DTT consultation, BroadbandTV News, 22 July 2014 (<https://www.broadbandtvnews.com/2014/07/22/ukrainian-call-for-dtt-consultation/>). See also *Ukraine: DTT problems and solutions*, BroadbandTV News, 26 February 2014 (<https://www.broadbandtvnews.com/2014/02/26/ukraine-dtt-problems-and-solutions/>). In 2012 the Tribunale Amministrativo Regionale per il Lazio, an Italian administrative court in Rome, found the Italian public service broadcaster (RAI) guilty of having violated its public service charter by encrypting its free-to-air TV channels, making it impossible for Sky Italia to carry RAI channels on its platform. In its decision, the court emphasized the significance of public service content which must be "*universally accessible via all technology*" (Tribunale Amministrativo Regionale per il Lazio (Sezione Terza Ter), n. 6320, 11/07/2012 (TAR Lazio Decision n. 6320, 11 July 2012)), summarised in Iris Legal Observations of the European Audiovisual Observatory, IRIS 2012-8, p 21 (annexed as "M31").



133 Since the 2015 Policy was published, the only African country which to my knowledge has required encryption as a matter of policy is Ghana, which released its final Digital Terrestrial Television Broadcasting Policy on 3 March 2020. This policy mandates the encryption of all free-to-air services to support the collection of a Digital Access Fee.¹⁰¹ Free-to-air broadcasters in Ghana have been unanimous in their opposition to the proposed encryption, and the matter is the subject of review proceedings brought by the Ghana Independent Broadcasters Association.¹⁰²

134 Some African countries have permitted (but not required) operators to introduce terrestrial STBs containing decryption capability. However, this has been implemented at the discretion of operators, for their own commercial reasons and at their own cost.

134.1 In respect of Mozambique, Mr Kruger failed to explain to the Commission that the position in Mozambique is distinguishable, as the network operator appointed in Mozambique (Star Times Software Technology), has partnered with the government. StarTimes provides subscription broadcasting services in Mozambique, and therefore opted to include conditional access systems for its own commercial benefit.

¹⁰¹ Paragraph 7.4 of the Ghanaian Policy provides: "All licenced FTA broadcasters (i.e. satellite, terrestrial and any other type of licensed FTA broadcaster) will be required to encrypt their signals to support the collection of the Digital Access Fee".

¹⁰² The Ghana Independent Broadcasters Association represents about 250 media and broadcasting companies in Ghana. It has instituted proceedings to review and set aside the Minimum Requirements for Reception of Digital Terrestrial and Satellite Television Services published by the National Communications Authority pursuant to Ghana's Digital Terrestrial Television Broadcasting Policy, insofar as the decision seeks to block the content of free-to-air digital television using a conditional access system. The application is annexed as "M32". Amongst other things, the application notes that the Association's members provide free-to-air television services which are broadcast unencrypted, and the requirement to encrypt free-to-air signals is accordingly irrational.



am

134.2 Namibia's policy guidelines provide that all terrestrial STBs must be able to decode free-to-air broadcasting services, and that conditional access systems may be implemented by broadcasters at their discretion.¹⁰³ STB decryption capability was not required as a matter of government policy. As is clear from the presentations of the Namibian Broadcasting Corporation and the Communications Regulatory Authority of Namibia annexed as "M36" and "M37" respectively, the Namibian Broadcasting Corporation opted to include conditional access technology in STBs to allow for future pay-TV (although its pay-TV ambitions have not been realised) and to support the collection of TV licence fees.

134.3 In Mauritius, free-to-air terrestrial broadcasting services are broadcast unencrypted. Mauritius was one of the first African countries to complete its digital migration. It did not require encryption of free-to-air services. The presentation of the Mauritius ICT Authority (annexed as

¹⁰³ Clause 13 of Namibia's Digital Terrestrial Television Policy Guidelines: Communications Act, 2009 (published under notice number 316, Government Gazette 5346, 21 November 2013) makes it clear that decryption capability in digital terrestrial television STBs is optional, at the discretion of broadcasters. It provides:

"All DTT STBs, regardless of whether they are manufactured locally or imported into Namibia, must ... be able to decode free-to-air broadcasting services. Broadcasters may implement conditional access systems provided that the STBs are able to decode free-to-air services as well". A copy of the Namibian Policy is annexed marked "M33")

The proposed Regulations Setting out Minimum Technical Standards for Set-Top-Box Decoders which were gazetted on 19 April 2013 for public comment (under notice number 111, Government Gazette of Namibia number 5179, annexed as "M34") proposed a form of STB control that fell short of decryption capability, namely that the STBs should contain control features allowing decoders to be disabled to prevent them from being used outside the Republic of Namibia, by way of a unique Namibian DTT identification number (Draft Reg. 7(1) read with para 1 of Schedule 2). However, this was omitted from the final Regulations Setting out Minimum Technical Standards for Set-Top-Box Decoders which were gazetted on 6 December 2013 (under notice number 475, Government Gazette of Namibia number 5357) (Annexed as "M35"). There is no requirement for any form of STB control (either with or without encryption) or a unique Namibian identification number in the Namibian STB standards.



"M38") is silent on encryption.¹⁰⁴ Mr Kruger's allegation that free-to-air services are encrypted in Mauritius is also at odds with Minister Carrim's statement on 20 December 2013, citing the Mauritian experience concerning STBs (ostensibly the lack of encryption) as a reason why the Department of Communications motivated for STB decryption capability.¹⁰⁵

134.4 In Kenya, free-to-air terrestrial broadcasting services are not encrypted. They are broadcast unencrypted and are receivable by all terrestrial STBs.¹⁰⁶ Terrestrial pay-TV operators in Kenya which wish to carry free-to-air channels on their own networks are permitted to carry them within their multiplexes and to encrypt those channels. Otherwise, all pay-TV operators receive the free-to-air terrestrial television channels within the same coverage area automatically.

135 Of these countries, only Namibia and Mozambique have introduced STBs containing decryption capability, but both of those were (a) as a result of

¹⁰⁴ The Digital Switchover: The Mauritian Experience, Trilock Dwarka, Chairman, ICT Authority – Mauritius, November 2011.

¹⁰⁵ *Digital Television: On Set Top Box Issues*, Statement by Minister Carrim, 20 December 2013 (annexed as "M39"), p 2, where Minister Carrim stated:

"we considered dropping control altogether, but the main obstacles were ... (ii) Concerns that the South African market will be flooded by cheap low quality STB imports that will not be fully functional and undermine the local manufacturing industry and the prospect of jobs. Just note this, from the Chairperson of the Information and Communication Technologies Authority of Mauritius as an example: 'the single most important lesson one can learn from the Mauritian experience is the one concerning the STB chaos'..."

¹⁰⁶ The Report of the Task Force on Migration of Terrestrial Television from Analogue to Digital Broadcasting in Kenya, July 2007 (annexed as "M40") recognised that "FTA services do not cater for any encryption system and typically any set top box that complies with the DVB-T standard should be able to receive the signal. The advantage of such a system is that set-top-boxes are reasonably priced and can reduce the barrier to entry when set top boxes are to be funded or subsidized. ... The cost of the set top box poses the most critical barrier to entry in terms of getting the viewers to accept a digital switchover process." (Report of the Task Force on Migration of Terrestrial Television from Analogue to Digital Broadcasting in Kenya, July 2007, para 6.6.1.)



commercial decisions (not government policy) and (b) to further the pay-TV ambitions of the operators concerned, at the operators' discretion and cost.

136 In South Africa, of course, the issue of STB decryption capability arose in relation to the five million STBs which the government had decided to subsidise. To my knowledge (and according to the Futuresource research) this was not a factor in the determination of policy on STB functionality anywhere else in the world.

MULTICHOICE'S LOBBYING

Introduction

137 MultiChoice's open and unambiguous opposition to STB decryption capability was well known and has been well-documented. It embarked on a vigorous campaign against STB decryption capability, and remained consistent in its position. It did so in order to protect the interests of its subscribers, the broadcaster sector, and the public, as well as its commercial interests in ensuring fair competition. At all times, MultiChoice engaged in lobbying that was both lawful and appropriate.

Lobbying in a democracy

138 South Africa's constitutional democracy is representative and participatory in its nature. Stakeholder and public participation is constitutionally mandated, and an entrenched feature of policy and legislative processes.



139 The National Assembly, National Council of Provinces and Provincial Legislatures are required to "*facilitate public involvement in the legislative and other processes of the [Assembly, Council or Legislature] and its committees*".¹⁰⁷ Public participation extends beyond the legislative process. The National Executive, public administration, and organs of state have a constitutional obligation to encourage and facilitate public participation in policy-making, and to respond to the issues raised in these processes.¹⁰⁸

140 These constitutional imperatives give effect to (a) the constitutional principle of legality, which requires, among other things, that all exercises of public power must be substantially and procedurally rational; and (b) the right to lawful, reasonable and procedurally fair administrative action,¹⁰⁹ which requires that decision-makers adhere to the principle of *audi alteram partem*. Consultation is required in respect of any decision which materially and adversely affects the rights of any person, or of the broader public.¹¹⁰

141 South Africa has therefore developed a fluid but effective advocacy environment. Public participation includes the submission of written and oral

¹⁰⁷ The obligation is contained in section 59(1)(a) in respect of the National Assembly, section 72(1)(a) in respect of the National Council of Provinces, and section 118(1)(a) in respect of the provincial legislatures. The Constitution also specifies at section 42(3) that the National Assembly, which is elected by the people, must ensure "*government by the people under the Constitution ... by providing a national forum for public consideration of issues*".

¹⁰⁸ Section 195(1)(e) provides: "*People's needs must be responded to, and the public must be encouraged to participate in policy-making.*" The principles apply to the administration in every sphere of government, organs of state, and public enterprises (section 195(2)).

¹⁰⁹ Section 33 of the Constitution.

¹¹⁰ See section 33 of the Constitution and sections 3 and 4 of the Promotion of Administrative Justice Act, 3 of 2000.



OPM

representations in respect of proposed legislation and policy,¹¹¹ direct engagement between stakeholders and decision-makers, and indirect engagement through petitions and media campaigns.

142 The over-arching term "lobbying" describes direct and indirect engagements between the state and private parties with the aim of influencing legislation, policy or administrative decisions.¹¹²

143 MultiChoice is acutely aware that, while lobbying contributes towards a responsive democracy and better decision-making, it can also be abused.

144 There are no laws prohibiting lobbying or regulating the different forms of lobbying. There are, however, a number of legislative provisions that seek to ensure that lobbying and participation in legislative and policy decision-making fall within the bounds of what is constitutionally acceptable:

144.1 The Executive Members Ethics Act¹¹³ and Code and the Parliamentary Code of Ethics prohibit members from receiving any payment, gift or

¹¹¹ Section 4 of PAJA provides for notice and comment procedures, public enquires or any other fair but different procedure.

¹¹² The OECD defines lobbying as *"the oral or written communication with a public official to influence legislation, policy or administrative decisions..."*. OECD, Recommendation of the Council on Principles for Transparency and Integrity in Lobbying, OECD/LEGAL/0379. The full definition is:

"Lobbying, the oral or written communication with a public official to influence legislation, policy or administrative decisions, often focuses on the legislative branch at the national and sub-national levels. However, it also takes place in the executive branch, for example, to influence the adoption of regulations or the design of projects and contracts. Consequently, the term public officials include civil and public servants, employees and holders of public office in the executive and legislative branches, whether elected or appointed."

¹¹³ Executive Members Ethics Act, 82 of 1998



benefit from a third party in order to adopt a particular view or position.¹¹⁴

- 144.2 All engagements with the state are subject to anti-corruption legislation. The Prevention and Combatting of Corrupt Activities Act¹¹⁵ prohibits the abuse of power or a position of authority for private gain. It is an offence to influence another person to act in a manner that is illegal, dishonest, unauthorised or biased.
- 144.3 Corporations (and other organisations) are also subject to the provisions of the Companies Act¹¹⁶ and the Competition Act.¹¹⁷
- 144.4 All decisions must comply with the statutory requirements that they are lawful, reasonable and procedurally fair. This prohibits, for example, bias by decision-makers, or reliance on irrelevant considerations.

¹¹⁴ The Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ("*Parliamentary Code of Ethics*") provides that no MP may lobby for reward, benefit or gifts, for an immediate family member or business partner. Members must act in good faith and in the best interest of good governance and act in all respects in a manner that is consistent with the integrity of their office or the government. Members may not act in a way that is inconsistent with their position, expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests or receive remuneration for any work or service other than for the performance of their functions as member of the executive. The Executive Code provides that Members may not solicit or accept a gift or benefit which: is in return for any benefit received from the Member in the Member's official capacity, constitutes improper influence on the Member, or constitutes an attempt to influence the Member in the performance of the Member's duties.

¹¹⁵ Prevention and Combatting of Corrupt Activities Act, 12 of 2004

¹¹⁶ Companies Act, 71 of 2008

¹¹⁷ Competition Act, 89 of 1998



Public participation in the broadcasting sector

- 145 Participation by stakeholders is particularly important in a licensed and highly regulated industry such as broadcasting. Stakeholders must have a say in how, when, why and to what extent their businesses are regulated by the state.
- 146 As broadcasting licensees, M-Net and MultiChoice must comply with a range of broadcasting legislation, regulations and licence conditions. The expansive and complex regulatory framework exposes MultiChoice to significant risk, as well as an onerous and costly compliance burden. Regulation and licence conditions impact on the majority of decisions and activities of broadcasters, including the content which broadcasters carry, advertising restrictions, and what licence fees are to be paid.
- 147 For this reason, the content and impact of government regulation and public policy has become a matter of material strategic concern for most corporations, and a key imperative for MultiChoice.
- 148 The need for MultiChoice to engage the administration and participate in new policy or regulation was heightened during the period of political volatility commencing from 2009. The frequent removals and appointments of ministers of communications meant a lack of continuity, uncertainty and delays.
- 149 An enabling and stable legislative, regulatory and policy framework is critical to the growth and viability of licensees in a highly regulated sector. The broadcasting sector requires certainty and predictability in order to make the



necessary medium and long-term plans and investments. In this sense, lobbying is a commercial imperative.

MultiChoice's regulatory affairs department

150 MultiChoice, like other licensed entities in the sector, has a dedicated regulatory affairs department which consists of lawyers, economists, political scientists and stakeholder managers. The regulatory affairs function involves ensuring compliance with existing regulations and licence conditions, responding to public consultation processes, the review of existing regulations, making proposals on the formulation of new regulations, as well as stakeholder management and lobbying in respect of existing and new legislation and regulations.

151 The regulatory affairs department's key function is to contribute to the creation of an enabling and appropriate regulatory framework that is conducive to the continued growth and viability of the broadcasting sector including MultiChoice.

152 MultiChoice's overall approach is one of proactive and positive engagement. It provides input into relevant industry discussions, and contributes constructively to any debates with reference to international best practice and other expert input. The objective is not only to identify problems, but to propose solutions. This includes sharing international policy and regulatory benchmarking and research with stakeholders, including through government working groups such as the Digital Broadcasting Migration Working Group, the Digital Dzonga and the ICT Policy Review Panel.



Engagement with key stakeholders

153 MultiChoice engages frequently with government and regulatory bodies such as the Department of Communications, the Ministry of Communications, the Portfolio Committee on Communications in the National Assembly and ICASA. This list increases where an issue extends to a different government department like the Department of Trade, Industry and Competition.

154 Lobbying is issue driven, and so may involve all or some of these institutions. Its primary purpose will also vary depending on the identity of the institution and the issues at stake. Lobbying may inform, educate in some instances, explain a position and/or debate a position taken by government or a regulator on an issue.

Collaboration within the industry

155 Broadcasters usually engage in individual lobbying, but at times collaborate with other broadcasters or entities who hold the same view in respect of an issue.

156 MultiChoice co-operates with relevant third parties if and to the extent that their interests are aligned on a particular issue. Collaboration between parties is a well-established civil society lobbying strategy in South Africa. It effectively advances a position by demonstrating the broader consensus for particular views. For example, various stakeholders in publishing, music, filmmaking and other creative sectors have recently come together in opposition to the



Copyright Amendment Bill.¹¹⁸ When government invited comments on the schedule of services to be phased in as per the COVID-19 risk adjusted strategy, it required input to be submitted through representative associations of sectors, business organisations/federations and trade unions, rather than individual representations.¹¹⁹

157 This collaboration involves sharing ideas and information, discussing strategy, and collaborating on written and oral submissions in response to invitations to comment on policy, legislative amendments, regulations, and issues papers.

158 The fact that MultiChoice may collaborate with one party on a particular issue, does not preclude them from opposing one another on another issue. For example, MultiChoice co-operated with e.tv in opposing the sudden change by government from adopting the DVB-T standard for digital broadcasting transmission to proposing its replacement with the ISDB-T standard, but we were (after initial consensus) on opposite sides of the encryption debate.¹²⁰

¹¹⁸ The Coalition for Effective Copyright comprises the Music Publishers Association of South Africa, the Independent Black Filmmakers Collective, the Publishers Association of South Africa, Academic and Non-Fiction Authors of South Africa, Printing SA, Recording Industry of South Africa, RiSA Audio Visual, Dramatic, Artistic, Literary Rights Organisation, Visual Arts Network of South Africa, the Writers Guild of South Africa, Audio Militia, Trade Union for Musicians of South Africa and the South African Creative Practitioners in Unity. (MultiChoice is not a member of the Coalition). The Coalition has made written and oral submissions, held industry workshops, published articles in the press, petitioned the President not to sign the Copyright Amendment Act, and embarked on a march together with the Musicians Association of South Africa and the Trade Union for Musicians of South Africa in August 2019 in an effort to reopen engagement with Government on the Copyright Amendment Act. More information about the Coalition is available at <https://copyrightcoalition.wordpress.com/>.

¹¹⁹ Request for Comments: Draft Framework for Sectors, A Schedule of Services to be phased in as per the COVID-19 Risk Adjusted Strategy. 25 April 2020, pp 1 and 23

¹²⁰ Government proposed changing the then digital terrestrial television transmission standard from DVB-T (until then the default standard supported by all broadcasters, which had been adopted in the 2008 Policy) to the Japanese standard (ISDB-T), which would have created instability and caused further delays.



MultiChoice also co-operated with NAMEC in opposing encryption, but we were on opposite sides in the DVB-T versus ISDB-T standards debate.¹²¹

159 MultiChoice ensures that its relationships with other industry stakeholders do not inhibit them from independently taking a position on industry issues. For example, in 2017 and 2018 MultiChoice supported Cape TV as part of MultiChoice's enterprise development and corporate social investment, including covering Cape TV's technical upgrade costs and replacing its equipment after a robbery, at a cost of over R3 million. MultiChoice's support for Cape TV has not inhibited Cape TV from making submissions to ICASA in its inquiry into subscription broadcasting services in South Africa which were contrary to MultiChoice's interests, including criticising MultiChoice's alleged "dominant position in the television broadcast sector".¹²²

160 Media Monitoring Africa is an organisation established to promote ethical and fair journalism, responsible media, informed citizenry and democracy. MultiChoice has supported, and continues to support MMA by, amongst other things, sponsoring its initiatives to promote disadvantaged children's potential future participation in the media industry. MultiChoice's support has not deterred MMA from aligning itself with e.tv in the e.tv application and with Caxton in the Caxton application, and making submissions adverse to MultiChoice's interests, including in ICASA's inquiry into subscription

¹²¹ NAMEC objects to DVB-T2 decision, 6 January 2011, annexed as "M41".

¹²² Cape Town TV submission to Inquiry into subscription television broadcasting services in South Africa, on 4 December 2017 (annexed as "M42").



broadcasting services in South Africa, the review of the Must Carry Regulations and the Review of the Sports Broadcasting Services Regulations.

161 MultiChoice also engages with industry bodies such as the National Association of Broadcasters. Where broadcasters' interests are aligned, these bodies lobby on behalf of the industry as a whole.

162 I note just one example of collaboration in lobbying around digital migration matters. The DTT Rules of Operation Committee (a co-ordinating body formed by broadcasters and broadcasting signal distributors involved in digital migration) made a proactive proposal for amendments to ICASA's Digital Migration Regulations, 2012 to the Joint Spectrum Advisory Group (an industry group established by the Digital Migration Regulations). The JSAG Policy Committee, whose members are e.tv, SABC and MultiChoice, drafted proposed regulations and an explanatory memorandum for JSAG which in turn was to propose these regulations to ICASA officials to submit to the ICASA Council for their consideration. The Policy sub-committee felt that these proposed amendments were necessary amendments to the Digital Migration Regulations. JSAG adopted the proposal and draft regulations were submitted to ICASA officials to take to Council.

Lobbying government stakeholders

163 MultiChoice's primary method of participation and lobbying is through the consultation processes initiated by the Department of Communications, the Legislature or the regulator, ICASA. MultiChoice almost without exception



responds to invitations for comment on matters that affect the broadcasting sector.

- 164 When responding to a paper issued by the Minister or ICASA, a set of draft regulations or a draft bill before the Portfolio Committee, the written submissions follow a standard structure. MultiChoice will offer its assessment of the proposal, and the extent to which MultiChoice agrees or disagrees with the proposal. If it disagrees, MultiChoice will identify the key issues and make suggestions as to how the difficulties can be resolved.
- 165 When making submissions, actual draft regulations or legislative amendments may be proposed using the legislative style of "strike out" for a deletion and underlining for an insertion.
- 166 I mention four concrete examples.
- 167 The first is the finalisation of the Electronic Communications Act, 2005 before the Portfolio Committee. This draft "Convergence Bill" involved an extensive overhaul of the underlying legislation and was South Africa's response to convergence between broadcasting and telecommunications. The entire ICT industry, including broadcasting, was invited to make written submissions. The industry, the Department of Communications and the Portfolio Committee then worked closely and until the early hours of the morning in Parliament to fashion what is now known as the ECA.



168 Multiple drafting proposals were exchanged between industry players to build consensus, and between industry and the Department of Communications both on a collective and individual basis. Where there was a particular sticking point for a sub-sector like broadcasting, the chairperson of the Portfolio Committee would task that sub-sector and the Department of Communications to attempt to resolve the matter. A specific case in point was the relationship between section 192 of the Constitution and the power of a Minister to give a binding policy direction to ICASA. Broadcasters believed that the draft in the bill violated section 192. The current clause in the ECA relating to policy directions was fashioned through this interaction. In this process all parties were aware that the Portfolio Committee was the final arbiter on any submission made and would instruct the Department of Communications as to what representations made to it were acceptable and those it would reject.

169 The second example is the representations which MultiChoice made individually in 2010 to ICASA on the procedures of ICASA's Complaints and Compliance Committee. These representations included marked up changes as well as a clean version of the regulations with the changes we proposed.

170 The third example is a set of proposed regulations which MultiChoice handed up to ICASA during its hearing on the Must Carry regulations in 2007, after the SABC had proposed a draft regulation. Similarly, in 2017 the SABC also



proposed amendments to the Must Carry regulations, proposing insertions and deletions in a letter addressed to ICASA.¹²³

171 MultiChoice has also engaged government on the impact of the Copyright Amendment Bill and the Performers Protection Amendment Bill. It has done so through written and oral submissions to Parliament, and collaboration with the National Association of Broadcasters and other industry players.

172 MultiChoice's engagement with government stakeholders is not limited to its response to public invitations or requests for comments. MultiChoice proactively engages relevant officials or institutions on particular issues, decisions, or proposed decisions that have the potential to affect MultiChoice or the broadcasting industry.

173 MultiChoice and other industry players request meetings, have discussions in person or telephonically, send information such as international articles or expert opinions, and make written or oral representations to government stakeholders. In some cases, ministers engage directly with industry officials to request information, solicit views or clarify issues. Ministers adopt their own communication and engagement style. Some ministers readily take calls from stakeholders and call stakeholders from time to time. On a practical level, newly appointed ministers benefit from open and direct communication, and information-sharing, with industry players who have both specialist and historical knowledge of issues. These engagements facilitate a better

¹²³ The SABC's 2007 submission was in the context of an ICASA inquiry, whereas the SABC's 2017 submission (annexed as "M43") was unsolicited.



understanding of the areas of contention, and more efficient and informed decision-making.

174 Discussions and meetings with the relevant decision-maker often occur after MultiChoice has submitted its written representations. MultiChoice may lobby as an individual company or together with other entities that share the same view.

175 One example of this form of engagement, as well as collaboration within the industry, took place in relation to the transmission standards debate in 2010.

176 Government proposed changing the then standard for digital terrestrial television transmission from DVB-T (until then the default digital broadcasting transmission standard supported by all South African broadcasters) to the Japanese standard ISDB-T.¹²⁴ The DVB-T standard had already been adopted in the 2008 Policy and in 2005 as a South African National Standard by the South African Bureau of Standards. Broadcasters were concerned that a change in the standard would create instability and cause further delays.

177 Broadcasters did not believe that the Director General at the time understood what the change meant for broadcasters and the negative impact it would have. e.tv proposed to a few entities, that included MultiChoice, that there would be value in appointing a specialist consultant/lobbyist, namely Mr Yunis Shaik, to

¹²⁴ On 29 and 30 April 2010, the Department of Communications held a DTT Standards Symposium, beginning what the industry referred to as the great ISDB-T vs DVB-T standards debate. A lobby group of Japanese government delegates and Brazilian companies had proposed adoption of the hybrid Japanese-Brazilian ISDB-T standard (which at the time had only been commercially adopted in Brazil) instead of the European DVB-T standard.



interface directly with the Minister. MultiChoice accepted the proposal and thereafter, together with e.tv and the other entities involved, met on several occasions with Mr Yunis Shaik. Parties discussed how best to approach the Minister, and provided information to Mr Shaik on what the impact of a change of standard would have on the broadcasting sector and what delays it would cause. The purpose of the meetings was to enable Mr Shaik to engage with the Minister in an informed manner as hitherto he had not been familiar with the debate. Mr Shaik, after engaging with the Minister, arranged a meeting between broadcasters and other interested parties with the Ministry for an open dialogue with the Minister.

178 Another example is MultiChoice's engagement with the Minister of Communications in respect of the President's decision, shortly after the 2014 national elections, to split the Department of Communications into two departments: (a) the Department of Telecommunications and Postal Services (headed by Minister Siyabonga Cwele) and (b) the Department of Communications (headed by Minister Faith Muthambi).

179 The Department split ran counter to the international trend to converge telecommunications and broadcasting and the government's own policy, legislative, regulatory and licensing changes supporting convergence over the previous two decades.¹²⁵ The Department split prompted an industry outcry.¹²⁶

¹²⁵ This included (a) combining the former departments to create a single Department of Communications headed by a single Minister of Communications in 1999, (b) replacing the former Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority with ICASA through the enactment of the Independent Communications Authority of South Africa Act, 2000, and (c) the enactment of the Electronic Communications Act 2005 (which started out as the "Convergence Bill", 2003) which repealed the Telecommunications Act, 1999 and the Independent



Gm

180 Leaving aside the regressive nature of the Department split, the proclamation which was published to give effect to the decision effectively created two Ministries of Communications and two Ministries of Telecommunications and Postal Services, with both Ministers being allocated statutory powers, functions and duties in respect of both (a) broadcasting and (b) telecommunications. This would create significant uncertainty. MultiChoice made representations to Minister Muthambi detailing the difficulties arising from the proclamation and setting out MultiChoice's proposals on how they could be resolved.

181 In his affidavit, Mr Carrim referred to a media article which alleged that Ms Mack, MultiChoice's Group Executive for Regulatory and Policy Affairs, drafted a crucial government document on the relocation of broadcasting policy powers to the newly created separate Ministry and Department of Communications.¹²⁷

182 The contention is incorrect. MultiChoice made representations to the Minister to advocate its position on a matter which materially affected its rights, as it is constitutionally entitled to do. Some of MultiChoice's proposals were accepted, but the majority were rejected.

Broadcasting Authority Act, 1993 and amended the Broadcasting Act, 1999 and the ICASA Act. The main purpose of the ECA was to "*promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors and to provide the legal framework for convergence of these sectors...*".

¹²⁶ The sector's response to the Department split is conveniently summarised on the website of Ellipsis, which provides specialised legal advice and services to the telecommunications, broadcasting and related industries. I annex a copy of the relevant Ellipsis web page as "M44", which highlights key aspects of industry and government's response to the Department split.

¹²⁷ Carrim's Affidavit, para 131.



183 Such engagement and participation is constitutionally endorsed and ultimately leads to better decision-making, law and policy.

MultiChoice's lobbying on the encryption debate

184 Mr Carrim suggested that MultiChoice had engaged in improper lobbying in the encryption debate. This is simply not true.

185 MultiChoice embarked on a vigorous campaign against STB decryption capability. I have described the reasons why MultiChoice believed that STB decryption capability was unnecessary and undesirable, would have enduring adverse consequences, and was not the appropriate choice for South Africa.

186 MultiChoice lobbied government stakeholders, collaborated with industry stakeholders who held the same position and used the media to publicise its position.

187 MultiChoice actively engaged in the consultation processes on the various aspects of the digital migration project and later the encryption debate:

187.1 MultiChoice officials participated in various advisory groups, such as the Digital Broadcasting Advisory Body, the Digital Dzonga and the Digital Broadcasting Migration Working Group.



- 187.2 M-Net and Orbicom¹²⁸ made written representations on the draft Broadcasting Digital Migration Strategy for South Africa and the draft Broadcasting Digital Migration Implementation Plan for South Africa on 5 April 2007.¹²⁹
- 187.3 M-Net and Orbicom made presentations to the Portfolio Committee on 17 June 2008 and 21 September 2011 (annexed as "M45" and "M46").
- 187.4 M-Net made written representations prior to the publication of the 2012 Policy (on 30 September 2011) (annexed as "M47").
- 187.5 On 3 January 2014, M-Net made comprehensive submissions on the proposed amendments to the Policy published by Minister Carrim. Those submissions are annexed as "M14".
- 187.6 On 11 September 2013 MultiChoice participated in the round table discussion on STB control arranged by Minister Carrim. MultiChoice's presentation is annexed as "M17". MultiChoice also made a written submission dated 9 September 2013, annexed as "M48".
- 187.7 M-Net made written and oral representations on the various iterations of the Digital Migration Regulations prescribed by ICASA, including on 7 November 2008, 23 January 2009, 30 April 2009, 2 October 2009, 10 November 2009, 10 November 2011, 22 March 2012, 30 July 2012,

¹²⁸ Orbicom is a company in the MultiChoice group which provides broadcasting signal distribution and related technical services.

¹²⁹ To avoid burdening this affidavit unnecessarily, I have not annexed all of these submissions, but they are available to the Commission upon request.



27 August 2012 and 14 September 2012.¹³⁰ M-Net also made submissions on a range of ancillary regulatory processes.

188 MultiChoice also identified third parties with whom its interests were aligned, such as free-to-air community broadcasters (represented by Act-SA) and STB manufacturers (NAMEC). MultiChoice openly co-operated with them in preparing submissions and engaging with the media. This co-operation included discussing strategy, commenting on drafts, engaging in and with the media, and publishing an open letter to Minister Carrim together with NAMEC. Although MultiChoice cooperated closely with these parties, (a) it did so openly and (b) each of them had adopted positions against STB decryption capability before MultiChoice began co-operating with them.

189 Third parties such as Act-SA and NAMEC joined in the debate in their own interests.

190 NAMEC was formed on 29 October 2009 at the Set Top Box colloquium in order to ensure the participation of black, small to medium business in the digital migration process and the ICT sector in general. NAMEC's stated primary objective was to lobby and advocate for black SMMes' participation in the ICT sector. MultiChoice learnt that NAMEC opposed STB decryption capability as early as 2011 when NAMEC held a press conference announcing its stance.

¹³⁰ To avoid burdening this affidavit unnecessarily, I have not annexed all of these submissions, but they are available to the Commission upon request.



191 Similarly, Act-SA was established in 2013 as a voluntary association representing all community television licensees. It consistently opposed STB control and made presentations to the Department of Communications explaining its concerns from the perspective of community broadcasters. Act-SA participated in the round table discussion convened by Minister Carrim in September 2013.

192 MultiChoice also publicised its position in the encryption debate in the media.

192.1 In March 2014, MultiChoice published an open letter to Minister Carrim together with NAMEC and Act-SA. MultiChoice took the view that Mr Carrim's proposals advanced narrow commercial interests, rather than being in the interests of our nation.

192.2 MultiChoice procured a newspaper advertisement and made these statements openly and with the support of Act-SA and NAMEC as co-authors thereof. It resorted to this action only after it had exhausted all attempts to engage with the Minister to obtain a fair hearing for its views.

193 MultiChoice's lobbying was directed at persuading the Minister not to adopt STB decryption capability. It did not seek at any time to attack the person of the Minister or lobby for the appointment or removal of a particular Minister of Communications.

194 Whenever a new Cabinet is constituted (after every national election), there is always speculation as to its composition. MultiChoice and its officials did not



know who would be appointed as Minister of Communications after the 2014 national elections. In particular, it had no knowledge of whether Minister Carrim would be reappointed after the 2014 national elections and, if not, who would succeed him.¹³¹ MultiChoice had not lobbied for him not to be appointed, or proposed any particular successor. It certainly had no role in the political decisions of the former President.

195 It is important to note that other industry players were also lobbying for their preferred position on STB decryption capability. Mr Carrim points out that e.tv campaigned for STB control (with decryption capability) with members of the executive, the ANC Parliamentary Communications Study Group and "perhaps" members of the Communications Subcommittee of the National Executive Committee of the African National Congress).¹³² Mr Carrim casts no aspersions on this lobbying.

196 MultiChoice accepts that there are competing interests within the broadcasting industry, and that its competitors will often hold views which differ from its own. The fact that e.tv supported encryption did not impact on the commercial relationship between the parties. MultiChoice and e.tv continued to robustly (and successfully) negotiate the renewal of the eNCA contract.

¹³¹ In fact, MultiChoice had begun legal preparations to review Minister Carrim's draft Policy in anticipation that he would be reappointed and would gazette a final policy along the lines of his 2013 draft.

¹³² Carrim's Affidavit, para 197.



THE SABC AGREEMENT

Introduction

197 The SABC Agreement¹³³ is a commercial contract between the SABC and MultiChoice, for the licensing of rights in respect of television channels for a term of five years.¹³⁴

198 In terms of the SABC Agreement:

198.1 MultiChoice acquired the right to distribute and market specific subscription and free-to-air television channels developed, produced and made available by the SABC.¹³⁵ These channels are: the Entertainment Channel,¹³⁶ the News Channel,¹³⁷ and the SABC free-to-air digital terrestrial television channels.¹³⁸

¹³³ The SABC Agreement is annexed to the affidavit submitted by Ms Lindiwe Vuyelwa Bayi to the Commission marked "Master Channel Distribution Agreement dated 03 July 2013".

¹³⁴ Insofar as it is suggested that the SABC Agreement binds the SABC in perpetuity, this is incorrect. The SABC Agreement has since been renewed.

¹³⁵ In terms of the SABC Agreement, MultiChoice acquired, for a specified period of time, rights to distribute and market certain subscription television (Entertainment and News) and free-to-air (the SABC Digital FTA) channels owned, packaged and/or operated by the SABC (Clauses 4.2.1 and 4.3.3 of the SABC Agreement).

¹³⁶ An entertainment channel to be developed and produced by the SABC for MultiChoice, and in respect of which MultiChoice will have, subject to qualifications, exclusive distribution and marketing rights.

¹³⁷ A 24-hour news channel to be developed and produced by the SABC for MultiChoice, and in respect of which MultiChoice will have, subject to qualifications, exclusive distribution and marketing rights.

¹³⁸ The free-to-air channels to be transmitted by the SABC on its digital terrestrial television platform and in respect of which MultiChoice will have non-exclusive distribution and marketing rights.



198.2 The SABC received fees in consideration for the rights to broadcast and distribute the Entertainment Channel and the News Channel,¹³⁹ and was entitled to all revenue received from sales in respect of advertising and sponsorship on all of its channels.¹⁴⁰ The SABC also acquired the right to distribute a MultiChoice free-to-air terrestrial entertainment channel.¹⁴¹

199 The core provisions of the SABC Agreement are supported by a range of ancillary provisions such as agreement on the generic format and content of the new channels; marketing of the licensed channels; and technological requirements for the exercise of the rights acquired in respect of the licensed channels.

200 One such technological requirement was that the SABC's free-to-air digital terrestrial broadcasting signals should not be encrypted for the duration of the Agreement (the encryption constraint).

201 It has been suggested - in the public domain, in the evidence of the witnesses to the Commission, and in proceedings before the competition authorities - that the SABC Agreement, and the encryption constraint in particular, required or unduly influenced the SABC to oppose the inclusion of decryption capability in

¹³⁹ SABC Agreement, clause 5.

¹⁴⁰ SABC Agreement, clause 12.1.

¹⁴¹ A free-to-air entertainment channel to be provided by MultiChoice to the SABC for distribution on the SABC digital terrestrial television platform, and in respect of which the SABC will have non-exclusive distribution and marketing rights.



the government-subsidised STBs. But, as I shall demonstrate, there is not a shred of truth to this accusation.

202 The SABC Agreement, concluded during the term of office of an interim SABC Board, survived the scrutiny of two subsequent Boards: the Board appointed in September 2013, which considered and debated the agreement before proceeding with its implementation; and the Board appointed in October 2017, which resolved to renew the Agreement in August 2018.

Negotiation of the SABC Agreement

203 MultiChoice is always seeking to supplement its bouquets of TV channels to add value to its offering to its subscribers. Over the years, MultiChoice carried a number of SABC channels and concluded channel licensing agreements with numerous local and international channel providers.

204 The SABC Agreement arose out of discussions between MultiChoice and the SABC as far back as 2010 on the possibility of the SABC producing a 24 hour news channel for MultiChoice to broadcast on DStv.

205 It was a longstanding aspiration of the SABC to produce a 24 hour SABC news channel. MultiChoice always believed that it would be beneficial to have another local 24-hour news channel on the DStv platform, to enhance diversity in the provision of news to its subscribers.



206 MultiChoice and the SABC concluded two agreements for an SABC news channel in 2012.¹⁴² Those agreements were not implemented due to what we were told were funding and logistical difficulties experienced by the SABC in producing the channel.

207 Following a resumption of discussions regarding an SABC news channel early in 2013, the parties successfully negotiated the SABC Agreement.

208 MultiChoice submitted a written proposal to the SABC on 15 May 2013, setting out the key terms of the proposed agreement, based on discussions and feedback from the SABC. The MultiChoice proposal, which included the encryption constraint, was unequivocal.

208.1 MultiChoice indicated that it wished to enter into an agreement with the SABC "*based on the following proposal*".¹⁴³ Under the heading "*Proposal*", there followed numbered paragraphs setting out the terms of the proposal.¹⁴⁴

208.2 The encryption constraint was set out in paragraph 9 of the MultiChoice proposal as follows:

"The offer presupposes that all SABC channels on its DTT platform will be made available to the public unencrypted, without a conditional

¹⁴² Channel Distribution Agreement between the SABC and MultiChoice dated 8 February 2012 and Channel Distribution Agreement between the SABC and MultiChoice dated 21 August 2012.

¹⁴³ Letter from MultiChoice to the SABC: Proposed Partnership and Channel Supply Agreement between MultiChoice South Africa Group and SABC, 15 May 2013 ("*MultiChoice's proposal*"). p 2.

¹⁴⁴ MultiChoice's proposal, p 2.



access system and thereby incidentally receivable by the MCA DTT decoder."¹⁴⁵

208.3 MultiChoice made it clear that it was making an "offer",¹⁴⁶ and that it appreciated that the agreement would "*be subject to both parties' board approval*".¹⁴⁷

209 I understand from documents made available by the Commission that members of what was then an interim SABC Board met with SABC's management on 6 June 2013 for a briefing on the MultiChoice proposal. Representatives of MultiChoice and the SABC met later that day to discuss the MultiChoice proposal.

210 A transcript of the meeting of 6 June 2013 between MultiChoice and the SABC was attached to Mr Carrim's affidavit (as annexure C; I refer to this as "the SABC transcript"). The Commission provided MultiChoice with a copy of the audio recording of the meeting on 24 June 2020. MultiChoice noted some omissions and inaccuracies¹⁴⁸ in the SABC transcript and accordingly procured

¹⁴⁵ MultiChoice's proposal, p2, para 9 (my emphasis).

¹⁴⁶ MultiChoice's proposal, p3, third last paragraph.

¹⁴⁷ MultiChoice's proposal, p3.

¹⁴⁸ While some of the errors are minor, others are substantive. For example, at page 5 of the SABC transcript, Mr Patel is recorded as saying that conditional access is "*the*" very important issue, when in fact he said that it is "*a*" very important issue. At page 7 of the SABC transcript, Mr Patel is recorded as saying that clause 9 (of MultiChoice's proposal) "*will*" be a stumbling block, whereas in fact he said that it "*won't*" be. At page 9 of the SABC transcript, Ms Mokhobo is recorded as saying that the timing for the SABC to revert to us regarding MultiChoice's proposal "*will be entirely dependent on how the meeting today concludes*". Ms Mokhobo in fact said that it "*will be entirely dependent on how the meeting today concludes at the DOC*". Further, in his oral testimony Mr Carrim made much of Mr Patel's query as to whether the meeting was being recorded, suggesting that Mr Patel had something to hide (see Carrim transcript at 109). Mr Patel recalls that he made this request for two reasons: first, because he would then want to ensure that he did not use expletives in his communication; and secondly, because he would not want to make any defamatory statements



a professional verbatim transcription which I attach as annexure "M49". For the sake of convenience, I also annex a marked-up version of the SABC transcript as annexure "M50", reflecting the substantive corrections (we have omitted the verbal fillers ('ums' and 'ahs') in the comparison). I rely on the professional transcript procured by MultiChoice in my discussion of the meeting below.

211 It is evident from the transcript of the meeting that (a) the MultiChoice proposal was welcomed by the SABC's representatives; (b) the only concern raised by some SABC representatives was that the SABC might not be able to comply with the encryption constraint if government policy were to introduce mandatory encryption of free-to-air broadcasting signals; and (c) the SABC undertook to seek clarity on government policy before reverting to MultiChoice on this issue.

212 The professional transcription records that Ms Mokhobo (the Group CEO of the SABC at the time) opened the meeting as Chairperson by saying:

"...we are very, very excited and and hugely grateful that eh MultiChoice has come forward with such a robust proposition, unlike the one that we had before. We are sensing urgency, we are sensing commitment to the public broadcaster and for us, uhm, it's going to be wonderful to be able to provide the the country and in terms of our

concerning any of the SABC's competitors. Both of these recollections of Mr Patel are borne out by the professional transcript. At page 3 of the professional transcript, after Ms Mokhobo confirms that the meeting is being recorded (followed by laughter), Mr Letele (who is aware of Mr Patel's propensity to use expletives in his communications) says amidst the laughter "So no swearing". In relation to the second point, at page 7 of the professional transcript (which also appears in the SABC transcript), Mr Patel states that "I have to be careful about my wording" and says that the inclusion of conditional access "is motivated by certain particular forces who have their own particular agendas ... and are prepared to use government money to do that".



*previous agreements even the rest of Africa, in terms of our previous carriage agreement, be able to provide our news all over the place."*¹⁴⁹

213 Ms Mokhobo raised her concern about consistency between the Agreement and government policy. In her words:

*"There are two particular clauses that are contained in your proposal letter which err pose a bit of a challenge for the SABC, and they pose a challenge not because of uhm anything other than policy provisions, government policy provisions."*¹⁵⁰

*"Now, given the fact that the SABC is a government owned entity, and this decision really is a government decision, the SABC has no power over it. Uhm how do you propose we move forward? We cannot tell government that if they've made a policy provision that speaks to conditional access, we are not going to do conditional access, we cannot do that. We are owned by a shareholder who is driving this processes."*¹⁵¹

214 After some discussion, Ms Mokhobo said:

"I think this was much easier than I thought it was going to be. [laughter] So the only area that we we are proposing to yourselves, that we come back to you on, is clause nine. As it is this afternoon, there is

¹⁴⁹ Professional transcription of meeting of 6 June 2013, p 2.

¹⁵⁰ Professional transcription of meeting of 6 June 2013, p 6. (my emphasis)

¹⁵¹ Professional transcription of meeting of 6 June 2013, p 7.



a meeting that's due to take place at the DOC which is discussing precisely the DTT matter. Eh, we may actually be able to come back to you much sooner."¹⁵²

215 After further discussion, Ms Mokhobo said:

*"Okay. Thank you very much. If there is nothing else, can I thank you very much for coming through and we will come back to you with finality on clause nine."*¹⁵³

216 MultiChoice enquired about anticipated timeframes for the SABC to revert, to which Ms Tshabalala responded on behalf of the SABC:

*"Erm, the matter is going to be escalated to the board meeting which is taking place on the 12th which is next week. ... And the finality will be next week. ... So we can take it from there."*¹⁵⁴

217 MultiChoice sought clarity: *"So we will hear from you after the board meeting?"*¹⁵⁵ The SABC confirmed that it would,¹⁵⁶ and Ms Tshabalala reiterated:

¹⁵² Professional transcription of meeting of 6 June 2013, p 17.

¹⁵³ Professional transcription of meeting of 6 June 2013, p 24.

¹⁵⁴ Professional transcription of meeting of 6 June 2013, p 24-25.

¹⁵⁵ Professional transcription of meeting of 6 June 2013, p 25.

¹⁵⁶ Professional transcription of meeting of 6 June 2013, p 25.



"Ja Chair, we can just give you the comfort eh that we are taking the matter there and we will also express urgency into the matter so that when it goes to the board on the 12th there's a resolution".¹⁵⁷

218 Mr J Matthews (SABC Acting Head of News) added:

"We're we're quite keen to get going um and and so the, we're confident that on the 12th the board will give us the nod. ...".¹⁵⁸

Conclusion of the SABC Agreement

219 On 19 June 2013 Ms Mokhobo wrote to MultiChoice (copying Ms Tshabalala).

The letter (annexed as "M51") reads:

"The Board and Executive Management has duly considered MultiChoice's proposal ... 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".¹⁵⁹

220 In a letter dated 20 June 2013 (annexed as "M52") - which Ms Mokhobo inexplicably did not disclose in her affidavit or her testimony to the Commission – MultiChoice replied to Ms Mokhobo's letter of 19 June 2013 as follows (with my emphasis):

"Dear Lulama

¹⁵⁷ Professional transcription of meeting of 6 June 2013, p 26.

¹⁵⁸ Professional transcription of meeting of 6 June 2013, p 26.

¹⁵⁹ Emphasis added.



PM

Thank you for your letter dated 19 June 2013.

We are delighted that your board has agreed to the broad terms as contained in our letter of 15 May 2013. We are in the process of drafting the agreement on this basis. I am informed our legal teams have already been in contact and will liaise on the finalisation of the documentation as soon as possible.

We share your excitement about this mutually rewarding project."

221 Ms Mokhobo did not respond to MultiChoice's letter of 20 June 2013, nor did she give any indication to MultiChoice that it had misunderstood the purport of her letter.

222 The parties proceeded to draft the SABC Agreement in accordance with the terms of the MultiChoice proposal. The initial draft agreement was circulated by MultiChoice to the SABC on 27 June 2013. The SABC made comments on 30 June 2013. After some discussion via email, further versions of the draft were circulated on 3 July 2013, and the Agreement was signed later that day.

Commercial rationale of the encryption constraint

223 There was a clear commercial rationale for the inclusion of the encryption constraint in the SABC Agreement.

223.1 In terms of the SABC Agreement, MultiChoice acquired the non-exclusive right to distribute and market the SABC free-to-air



CPM

terrestrial channels. It intended to distribute and market those channels to its existing subscriber base, including its M-Net subscribers.

223.2 MultiChoice's M-Net subscribers at that time received a terrestrial signal through an analogue decoder, and would require a new digital decoder to receive the same signal after digital migration.

223.3 If the SABC encrypted its free-to-air digital terrestrial channels, M-Net subscribers would be unable to access those channels with their new M-Net decoder. They would only be able to access those channels if they purchased a separate free-to-air terrestrial STB incorporating decryption capability to decrypt the channels.

223.4 MultiChoice sought to avoid a situation where its subscribers were compelled to buy two separate set top boxes: a decoder to receive M-Net channels, and a free-to-air STB to receive the free-to-air SABC channels. A typical subscriber would not want to go through the cost and inconvenience of two STBs.

224 From a commercial perspective, MultiChoice could not accept a situation where it had purchased the distribution and marketing rights to SABC's free-to-air digital terrestrial television channels, but:

224.1 its terrestrial M-Net subscribers could not receive those channels because they were encrypted; and

224.2 its terrestrial M-Net subscribers had to purchase an additional STB to decrypt those channels.



225 Such a situation would significantly impact MultiChoice's value-offering, threaten its relationship with existing subscribers, and dissuade prospective subscribers.

226 It would have been commercially irresponsible for MultiChoice not to protect the value of its acquisitions under the SABC Agreement. The only way of ensuring this protection was by requiring the SABC to undertake that it would not encrypt its free-to-air terrestrial channels. The SABC's free-to-air channels are required to be (and are) freely available to all South Africans, in line with the SABC's broadcasting licence (which authorises it to provide a free-to-air broadcasting service) and its statutory public mandate to "*service the needs of all South African society*".¹⁶⁰

227 The encryption constraint ensured that M-Net subscribers would be in the same position that they were in the analogue environment, as they would be able to continue to receive the same SABC free-to-air channels which they were receiving in the analogue environment. This benefit would also accrue to the subscribers to any other subscription broadcaster licensed on the digital terrestrial platform in the future.¹⁶¹

228 The SABC's decision to accept the terms of the SABC Agreement did not have any adverse commercial consequences and ensured that its channels were

¹⁶⁰ Broadcasting Act, 1999, s2(l).

¹⁶¹ ICASA has already stated its intention to license new subscription television broadcasters on the digital terrestrial television platform on DTT Mux 3.



received by a wider audience, thereby enhancing the SABC's ability to build a brand and to derive greater revenue, including advertising revenue.

229 As explained by the SABC's Group Executive: Television Ms Verona Duwarkah in the Caxton application, the SABC concluded that the SABC Agreement and the encryption constraint accorded with the SABC's commercial requirements and its obligations as a public broadcaster, and served the public interest.

*"SABC evaluated the proposed undertaking in favour of MultiChoice and considered it to be commercially acceptable within the context of its own position and its obligations as a public broadcaster. The SABC is a public broadcaster and its mandate is to reach and serve the largest possible audience in South Africa in the most cost-effective and efficient manner. The ...cost implications of encryption and conditional access informed its decision in this regard."*¹⁶²

The launch of the SABC News Channel

230 The SABC News Channel was launched on 1 August 2013. In a television interview on the same day, Ms Mokhobo welcomed the launch as a significant milestone for the SABC and a personal achievement.

"Peter Ndoro (PN): ... joining me now is the Group Chief Executive Officer of the SABC, Lulama Mokhobo. A very good evening to you, a historic moment, you must be quite proud?"

¹⁶² SABC answering affidavit, para 28.



Lulama Mokhobo (LM): *Extremely proud, and good evening Peter and the viewers. You know it's been a long long long time coming. When I started here last year it was one of my big things to tick off and I am so happy that it has happened now.*

PN: *So has it been a highlight then definitely for your tenure so far?*

LM: *Oh yes absolutely. I have been here only 18 months and to finally arrive where the team is strong and are ready and we are moving and they are doing this for me...*

PN: *Take us through the process that took us to this point. What's been the journey?*

LM: *Peter, the journey has been one fraught with problems ... mainly financial issues, where we knew what we wanted to do, we knew we had the capability, but there was never enough money to do it. And ultimately when MultiChoice came forward and said 'guys you know as a private company we feel an obligation to support the SABC, to support a public broadcaster and we would love to work with you. Come let's talk.' So, we had a team of very strong negotiators I must say, constituted, led by Hlaudi and they boxed it all together. And I was quite amazed at how quickly they were able to come back with results."¹⁶³*

¹⁶³ Interview with Lulama Mokhobo, SABC GCEO, *Lulama Mokhobo on the SABC news 24 hour channel launch*, 1 August 2013, available at

<https://www.youtube.com/watch?v=ZuGnZQ4bQY8&feature=youtu.be> This interview will be made available to the Commission on a flash drive, together with a video which has been produced by MultiChoice and which contrasts Ms Mokhobo's evidence at the Commission with this and other



231 As is evident from his speech at the official launch of the News Channel, Mr Carrim expressed unconditional support for the "public-private" partnership between MultiChoice and the SABC, and highlighted the benefits which the channel would bring to the SABC, the industry and the general public.

"Of course, there are questions being raised about the public broadcaster's decision to launch the new 24-hour news channel on pay TV. As we in the Department of Communications have been informed about the SABC's case, it is that the pay TV platform would afford the SABC access to decision makers who largely consume TV content via the Dstv platform.

The platform would also offer a new option for advertisers looking to sell their products to the lucrative market that pay TV subscribers represent. The channel has a chance of accessing those revenues, ensuring that it remains viable and sustainable. We also hope that the SABC will use this opportunity to win back most of its market share and its audience, and, over time, grow in strength. So we wish the SABC well!

... Understandably, there are concerns about the financial sustainability of the new 24-hour channel and the implications of the contract the SABC has with MultiChoice.

contemporaneous public statements she made at the time of the launch of the channel ("the Mokhobo contradictions video").



Am

These are difficult economic times and the national budget is stressed. So the concerns are understandable. We have had public-private partnerships (PPPs) for many years now in our new democracy. We have to learn the lessons from them, drawing on the strengths of those that have worked and avoiding the weaknesses of those that have failed."¹⁶⁴

A second SABC board approved the agreement

232 On 25 September 2013, the interim SABC Board's term came to an end when Acting President Kgalema Motlanthe appointed 12 new non-executive members to the SABC Board. It is apparent from evidence given to the Parliamentary Portfolio Committee on Communications in December 2016¹⁶⁵ that the new SABC Board considered and debated the terms of the SABC Agreement before proceeding with its implementation.

¹⁶⁴ 'SABC's 24-Hour News Channel: Here we are! Let's make it work!', Speech by Minister Yunus Carrim, 31 July 2013 (annexed as "M53"). The video of this speech will be made available to the Commission on a flash drive.

¹⁶⁵ Testimony by Mr Krish Naidoo at hearings of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board, 9 December 2016. Mr Naidoo, a practising attorney testified that he had assessed the legality of the SABC Agreement and had, towards the end of 2013, advised the SABC Board that the contract was unlawful. In light of Mr Naidoo's concerns, the then Chairperson of the Board proposed that a second opinion be sought, which ultimately contradicted Mr Naidoo's opinion (Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board, 24 February 2017, ATC 170224, para 8.1.4.).



CPM

A third SABC board approved the agreement

233 On 16 October 2017, a new SABC Board was appointed for a five-year term.¹⁶⁶

The new Board renewed the SABC Agreement on 14 August 2018.¹⁶⁷

234 The substantial equivalent of the encryption constraint in the SABC Agreement was included in the back to back Must Carry Channel Distribution Third Amendment Agreement between MultiChoice and the SABC.¹⁶⁸

235 In an interview regarding the renewal of the SABC Agreement the Group CEO of the SABC, Mr Madoda Mxakwe, said the following:

"This deal for us it was important to make sure that we get it right and ensuring that it makes commercial sense but also to make sure we look at all of the governance issues inasfar as it is concerned".

236 In response to the question: *"Is it a clean deal? Is it good for South Africans, good for the SABC?"*, Mr Mxakwe responded:

*"Certainly it is. The Board has ensured that good governance is in place for this deal, so we're very confident that it is".*¹⁶⁹

¹⁶⁶ From March to September 2017, the SABC had an interim Board appointed by the President.

¹⁶⁷ The renewed SABC Agreement is annexed as LVB005 to the affidavit submitted by Ms Lindiwe Vuyelwa Bayi to the Commission.

¹⁶⁸ This back to back agreement was also concluded on 14 August 2018 and is annexed as LVB001 to the affidavit submitted by Ms Bayi to the Commission.

¹⁶⁹ Interview with Madoda Mxakwe, *SABC, MultiChoice deal explained: Madoda Mxakwe*, 14 August 2018, available at <https://www.youtube.com/watch?v=Ssn8yeaz3Ag>. A transcript of the interview is annexed as "M54". The video of the interview will be made available to the Commission on a flash drive.



The competition proceedings

237 In February 2015, Caxton and CTP Publishers and Printers Limited, the MMA and the S.O.S Support Public Broadcasting Coalition applied to the Competition Tribunal to have the SABC Agreement declared an unnotified merger on the grounds that, in terms of the Agreement, MultiChoice acquired control, as envisaged in section 12 of the Competition Act, 1998, over (a) the SABC's archive of entertainment programmes (the SABC archive); (b) the SABC's policy in respect of the encryption of its free-to-air digital terrestrial television channels; and (c) the SABC's public policy in respect of STB decryption capability.

238 Key findings and observations made by the competition authorities in the proceedings which followed are pertinent to an evaluation of the far-reaching claims which have been made by the witnesses in respect of the SABC Agreement.

The Competition Tribunal

239 The Competition Tribunal dismissed the Caxton application.¹⁷⁰ The Tribunal found that the SABC Agreement did not give rise to a notifiable merger, and that the applicants had not made out even a prima facie case that the SABC Agreement constituted a merger.

¹⁷⁰ *Caxton and CTP Publishers and Printers and Others v MultiChoice (Pty) Ltd and Others* [2016] 1 CPLR 307 (CT) (*Caxton (CT)*)



240 In doing so the Tribunal made the following pertinent findings and observations:

240.1 First, that Caxton's initial conception of the ambit of the Agreement in respect of the SABC archive was "*much greater than it in fact was*".¹⁷¹

The Tribunal noted:

*"It was a major part of the applicants' case that the SABC had sold the family silver. It had given up the rights to broadcast its valuable archive to its own viewers, let alone precluding itself from licensing it to anyone else. But this initial view was incorrect."*¹⁷²

240.2 Second, that the SABC had estimated that the entertainment channel contemplated in the SABC Agreement would utilise less than 1% of the content of the SABC archive.¹⁷³

240.3 Third, that the issue of government policy, as opposed to the policy of a firm, was not one which fell within the control envisaged in section 12(2)(g) of the Competition Act.¹⁷⁴

¹⁷¹ *Caxton (CT)*, para 44

¹⁷² *Electronic Media Network*, para 45

¹⁷³ *Caxton (CT)*, para 49

¹⁷⁴ *Caxton (CT)*, para 97



The Competition Appeal Court

241 On appeal, the Competition Appeal Court found that, on the evidence before it, the SABC Agreement did not give rise to a merger on any of the grounds advanced by the applicants.¹⁷⁵

242 In respect of the applicants' contention that MultiChoice had acquired control over the SABC archive, the Competition Appeal Court said:

*"A licence to exploit an asset for a limited period on its own and without more cannot constitute a merger transaction. If it were so, it would mean that all licensing agreements of this nature would constitute mergers."*¹⁷⁶

243 Based on the test developed to apply to an asset transfer or acquisition, it found that *"there is no basis by which to conclude that part of the business that was conducted by [the SABC] was now run by [MultiChoice]"*.¹⁷⁷

244 On the contention that MultiChoice had acquired control over the SABC's policy on encrypting its own channels, the Competition Appeal Court held that the SABC itself *"took a decision to limit its strategic options contractually. It may decide to opt out of the agreement but if it does it must face the consequences*

¹⁷⁵ *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice (Pty) Ltd and Others (Caxton CAC)*, [2016] ZACAC 2

¹⁷⁶ *Caxton CAC*, para 48

¹⁷⁷ *Caxton CAC*, para 55



of a breach".¹⁷⁸ A party which undertakes certain obligations in a contract which may constrain its future strategic direction, does not confer upon the other party the power to influence its future strategic policy.¹⁷⁹

245 On the contention that the SABC Agreement gave MultiChoice control over the SABC's public policy on STB decryption capability, the Court held, dispositively, that this contention was based on an incorrect interpretation of the Agreement:

*"The agreement per se does not prevent [the SABC] from adopting a public policy supporting encryption. What it does it to constrain it from encrypting the free-to-air for the duration of the agreement."*¹⁸⁰

246 Moreover, the Court held, *"the effect of government policy is not a matter located within s 12(2)(g) [of the Competition Act]"*.¹⁸¹

247 The Court, in any event, noted that the evidence on the papers did not establish a change in policy by the SABC as a result of the SABC Agreement.

"The proposition that [the SABC] supported encryption prior to the agreement is not as clearly evident from the papers as the appellants have suggested. What the papers show, though, is a process involving discussions between government and various stakeholders, including the broadcasters where in the process of these discussions

¹⁷⁸ Caxton CAC, para 83

¹⁷⁹ Caxton CAC, para 81

¹⁸⁰ Caxton CAC, para 92

¹⁸¹ Caxton CAC, para 94

broadcasters changed views at different points in time. There is no clear indication, that prior to the signing of the agreement, the [SABC] took a decision different to that which is contained in the agreement".¹⁸²

248 The Court concluded that, since the SABC Agreement involved the public broadcaster, it was in the public interest that the Competition Commission (which had not had an opportunity to consider the matter as a result of the applicants having directly approached the Competition Tribunal), should have an opportunity to consider the matter and express its view.

249 The Court therefore directed MultiChoice and the SABC to provide the Competition Commission with certain documents to enable it to "*file a recommendation with the Competition Tribunal whether or not the agreement gives rise to a notifiable change of control*".¹⁸³ If its recommendation was that the Agreement did give rise to a notifiable change of control, a rehearing of the matter was to be conducted by the Tribunal "*to determine whether the conclusion of the Agreement did entail such a merger*".¹⁸⁴

¹⁸² *Caxton CAC*, para 87

¹⁸³ *Caxton CAC*, para 114

¹⁸⁴ *Caxton CAC*, para 114



The Competition Commission

250 Following its investigation, mandated by the Competition Appeal Court, the Competition Commission reported on 9 November 2018¹⁸⁵ that in its view:

250.1 the SABC Agreement did not give MultiChoice control over the SABC archive, as the SABC at all times had the final say over what went into the entertainment channel which the SABC would produce for MultiChoice, and MultiChoice did not have access to the SABC archive or control the archive;¹⁸⁶ and

250.2 the SABC Agreement influenced the public position adopted by the SABC on STB decryption capability,¹⁸⁷ resulting in a change of control giving rise to a merger.¹⁸⁸

251 The Competition Commission confirmed, in its report and in public statements, that the SABC Agreement did not give MultiChoice control over the SABC archive, as the SABC at all times had the final say over what went into the

¹⁸⁵ Confidential Report on whether the conclusion of the commercial and master channel agreement resulted in a merger between the South African Broadcasting Corporation (SABC) Limited and MultiChoice (Pty) Ltd, 9 November 2018 ("CC Report"); *Competition News*, Competition Commission South Africa, Edition 62, March 2019, pp 11 – 17 (annexed as "M55"); Media release, *Commission Finds that the Agreement between SABC and MultiChoice enabled MultiChoice to Influence the Strategic Direction of the SABC*, 12 November 2018 (annexed as "M56").

¹⁸⁶ CC Report, paras 183.1; 183.2 and 212.1.

¹⁸⁷ It is evident from the Competition Commission's factual findings and conclusion (paras 192; 195; 207; 208; 209 of the CC Report) that it was the SABC's public stance on STB decryption capability and not its internal decision whether or not to encrypt its own signals, which was the issue over which MultiChoice was found to have acquired control.

¹⁸⁸ CC Report, paras 207 to 212.



entertainment channel which the SABC would produce for MultiChoice, and MultiChoice did not have access to the SABC archive or control the archive.¹⁸⁹

252 The allegation that MultiChoice acquired the SABC archive, or any control over it, has thus finally been put to rest, and it is surprising that Mr Carrim still persisted with this allegation in his evidence to this Commission.

The Competition Tribunal again

253 Arising from the Competition Commission's report, the Caxton application will be referred back to the Competition Tribunal for a further hearing on the issue whether the Agreement influenced the SABC's public position on STB decryption capability and, if so, whether such "influence" gave rise to a merger.

254 This matter is still pending and I am advised and believe that the Tribunal is unlikely to find that this was the case because –

254.1 the Competition Appeal Court expressly found that on a proper interpretation the Agreement, it "*does not prevent [the SABC] from adopting a public policy supporting encryption*"; and

254.2 the Competition Appeal Court and the Competition Tribunal both held that government policy, as opposed to the policy of a "*firm*", is not a

¹⁸⁹ *Competition News*, Competition Commission South Africa, Edition 62, March 2019, pp 11 – 17 (annexed as "M55"); Media release, *Commission Finds that the Agreement between SABC and MultiChoice enabled MultiChoice to Influence the Strategic Direction of the SABC*, 12 November 2018 (annexed as "M56").



matter which falls within the merger control provision in section 12(2)(g) of the Competition Act.

The encryption constraint did not determine the SABC's position

255 The SABC Agreement did not impact in any way on the SABC's right to advocate or support the inclusion of decryption capability in STBs as a matter of public policy.

256 In the first place, the encryption constraint in the SABC Agreement is limited in scope:

256.1 It applied only to the SABC free-to-air channels broadcast digitally on the SABC's terrestrial platform for the duration of the SABC Agreement.¹⁹⁰ Channels broadcast on a digital free-to-air basis on any other platform were not touched.¹⁹¹

256.2 The SABC was not precluded from deciding at any time to encrypt any subscription channels which it might wish to broadcast.

256.3 The SABC was at all times free to support the inclusion of decryption capability in set top boxes and thereby seek to keep open the option of (a) encrypting its free-to-air signals after the term of the SABC Agreement, and (b) encrypting subscription channels should it obtain a licence to enter the pay-TV market.

¹⁹⁰ SABC Agreement, clause 4.3.1 read with the definitions in clauses 1.1.25 and 1.1.23.

¹⁹¹ Inasmuch as the Competition Commission Report took a different view, that view was based on an incorrect interpretation of the encryption constraint clause.



257 Secondly, the SABC position, when the SABC Agreement was concluded, already opposed STB decryption capability.

257.1 The SABC articulated its opposition to a control system with encryption in submissions to the Department of Communications on 16 May 2008.¹⁹²

257.2 In a Request for Proposals issued by the SABC on 24 June 2008 in respect of control system software for STBs, the specifications required a low-cost, low-maintenance solution appropriate to a free-to-air service, capable of preventing subsidised STBs from leaving South Africa, and capable of turning off stolen STBs, with no encryption of broadcast signals.

257.3 On 30 January 2013, five months before the SABC Agreement was signed, and before any negotiations were entered into in respect of the Agreement, the SABC's Chair Dr Ben Ngubane informed the Minister of Communications, Minister Pule, that the SABC had taken a decision "to exclude the functionality known as Conditional Access from the STB Control system" for the following reasons:

"The SABC strongly believes that the activation of the Conditional access will be in violation of its Public Broadcasting mandate. It is therefore our view that all South African citizens

¹⁹² The SABC wrote a letter to the Department of Communications on 16 May 2008 stating its view that STB control "need not be a conditional access systems along the lines of the traditional, costly systems used for pay-TV", that "a software-based solution may suffice" and suggested "reformulating the issue as one of STB control" (Letter from the SABC to Themba Phiri, Department of Communications, 16 May 2008, annexure "M5").



should have the right to receive and impart information and ideas through our broadcasting services."

257.4 Dr Ngubane's letter (annexed as "M57"), which concluded with a request that the Department of Communications should communicate this decision to all relevant stakeholders, was copied to the Deputy Chairperson of the SABC Board, one non-executive director, and executive director Ms Mokhobo.¹⁹³

258 It appears, that after the conclusion of the SABC Agreement, two apparently different (and contradictory) positions were communicated by the SABC to government within a period of weeks. If the SABC Agreement is alleged to have influenced the SABC's position, it is not clear which of these positions it determined.

259 In a letter dated 26 July 2013 (annexed as "M58") the SABC Chairperson Ms Tshabalala advised the Minister of Communications that the SABC "supports the implementation of STB control as originally envisaged in partnership with the other FTA broadcasters" and attached a motivation bearing the same date (annexed as "M59") which was signed by both Mr Motsoeneng and Ms Mokhobo.

260 Mr Carrim understood this letter to convey the SABC's support for STB control including decryption capability (a conclusion which would defeat, rather than

¹⁹³ Letter from Dr Ben Ngubane, Chairperson of the SABC Board, to Minister Pule, 30 January 2013 (copied to Ms Mokhobo, Mr Thami Ka Plaatjie and Mr Lumko Mtimde), referred to in para 18 of the SABC's answering affidavit in *Caxton and Others v MultiChoice and Others*, 5 May 2015.



support, his theory that the SABC Agreement – which was negotiated by Ms Tshabalala and Mr Motsoeneng and concluded just a few weeks earlier – induced the SABC to oppose decryption capability).

261 In a letter dated 12 August 2013 (annexed as "M60"), Ms Tshabalala advised Mr Carrim that "[w]e do not support the inclusion of STB control going forward", which Mr Carrim understood to mean that the SABC no longer supported STB control including decryption capability.

262 In an SABC interview on 31 October 2013, Ms Mokhobo herself communicated the SABC's non-encryption position on the same rationale that underpinned Dr Ngubane's communication of that position in January 2013:

"It is very critical that every citizen in the country gets SABC unencumbered and the encryption of the signal could potentially cause harm where people perhaps get switched off inadvertently or deliberately and therefore unable to get SABC signal. As you know being a public broadcaster, it's very important that there is access by everybody in whatever shape or form to SABC channels. And therefore, the whole idea of encrypting our signal has fallen by the wayside."¹⁹⁴

¹⁹⁴ Interview with Ms Mokhobo, *The SABC says it will not support conditional access of the DTT set top boxes*, 31 October 2013, available at

https://youtube.com/watch?v=C_OFHonsSJI&feature=youtube. A transcript of the interview is annexed marked "M61". A copy of the video will be made available to the Commission on a flash drive. It will also feature in the Mokhobo contradictions video on the flash drive.



The encryption constraint did not influence government policy

263 The encryption constraint was also consistent with government policy on STB decryption capability at the time that the SABC Agreement was negotiated and concluded.

264 The 2012 Policy in force at the time did not require STB decryption capability or the encryption of free-to-air broadcasting channels.

265 Minister Pule, as I have indicated, removed the reference to decryption capability in STBs which was found in the 2008 Policy, and on 21 May 2013 announced in Parliament that she had taken a decision to review the policy on the "STB control system" itself, "*to make this system non-mandatory*".

266 In a letter dated 19 June 2013 (annexed as "M9"), just weeks before the Agreement was signed, Minister Pule advised the SABC that a proposed amendment of the Policy to make STB control non-mandatory would be gazetted for public comment in the next few weeks.¹⁹⁵

267 Finally, I point out that the SABC Agreement provides for the eventuality that future regulatory changes may require the SABC's digital terrestrial signals to be broadcast on an encrypted basis, in which case the new regulatory requirements would prevail.¹⁹⁶

¹⁹⁵ Letter from Minister Pule to the SABC, DTT STB Control, 19 June 2013 (annexed as "M9").

¹⁹⁶ SABC affidavit, para 29, referring to clause 20.2 of the SABC Agreement.



268 MultiChoice did not coerce or induce the SABC to adopt any particular policy position in respect of STB decryption capability, nor did the SABC Agreement influence government policy.¹⁹⁷ Both MultiChoice and the SABC were aware, at all relevant times, that the issue, whether the government-subsidised STBs should include decryption capability, was a decision to be made by government. As the SABC stated, "*the establishment of the regulatory regime for DTT roll-out is not within the SABC's power, whatever its views regarding the merits or demerits of encryption and conditional access may be*".¹⁹⁸

The SABC Agreement benefitted both parties

269 MultiChoice and the SABC engaged in robust negotiations to conclude the SABC Agreement. It is a mutually beneficial commercial agreement, and successfully built on the existing relationship between MultiChoice and the SABC.

270 MultiChoice acted responsibly in the negotiations, with due regard to the fact that it was contracting with a state entity. The price paid by MultiChoice for the rights which it acquired was fair.¹⁹⁹

¹⁹⁷ As we pointed out above: As the Competition Appeal Court found in the Caxton application, "*the agreement does not per se prevent [the SABC] from adopting a public policy supporting encryption. What it does is to constrain it from encrypting the free-to-air [channels] for the duration of the agreement.*" Judgment, para 92.

¹⁹⁸ SABC's answering affidavit in *Caxton and Others v MultiChoice and Others*, 5 May 2015, para 16.

¹⁹⁹ Mr Carrim in his evidence made the contradictory claims that the fee paid in terms of the Agreement was too high and too low (See Carrim transcript, p 103 and p 105).



Cm

271 As I have indicated, the SABC Agreement was endorsed and later renewed by subsequent SABC Boards, including the Board upon which Mr Krish Naidoo – who raised concerns about the process followed in the signature of the SABC Agreement – served.²⁰⁰

272 MultiChoice and the SABC both benefitted from the SABC Agreement.

273 MultiChoice acquired –

273.1 permission to market and distribute a local news channel (the News Channel) and a niche entertainment channel (the Entertainment Channel), which enhanced MultiChoice's local news and entertainment offerings respectively, added value for MultiChoice's existing subscribers and promoted retention of subscribers, thus making obvious commercial sense;

273.2 a DStv channel on the SABC free-to-air terrestrial platform to showcase MultiChoice content to free-to-air audiences; and

273.3 access to the SABC free-to-air digital terrestrial television channels for M-Net subscribers, without inconveniencing its subscribers.

274 I pause to reiterate that MultiChoice did not acquire the SABC archive, control over the SABC archive, or the rights to any content in the SABC archive.

²⁰⁰ See paras 232 and 233 above. Mr Naidoo testified that towards the end of 2013 he advised the SABC Board that the SABC Agreement was unlawful. However, Mr Naidoo was a member of the SABC Board which renewed the Agreement in 2018.



275 MultiChoice acquired exclusive²⁰¹ licensing rights in respect of the Entertainment Channel, which the SABC was to produce incorporating content from the SABC archive. MultiChoice does not own the content or the channel, or have the right to determine the specific content to be incorporated in the Entertainment Channel. The content of the Entertainment Channel is only drawn from the SABC archive and used by the SABC to compile the channel. While MultiChoice is entitled to be consulted regarding its content, scheduling and programming requirements, the SABC has full editorial control.

276 This was confirmed by Mr Mxakwe, then Group CEO of the SABC, in an interview after the renewal of the SABC Agreement in August 2018.²⁰² The Competition Commission, in communicating the principal "findings" in its report of 9 November 2018, specifically noted that the SABC had the final say on what went into the Entertainment Channel and that MultiChoice had no access to the SABC archive.²⁰³

277 The SABC has estimated that the annual content required to package the Entertainment Channel comprises less than 1% a year of the total content of the SABC archive.²⁰⁴ The SABC Agreement does not affect the availability to the SABC of more than a fraction of the SABC's archival content.

²⁰¹ In order to prevent diluting the value to MultiChoice, the SABC agreed to certain so-called "holdbacks". Holdbacks are standard practice in the broadcasting industry, to prevent the value of the exclusivity to the broadcaster being reduced by the channel supplier broadcasting the same content to other audiences at the same or similar time, for example.

²⁰² See paras 235 and 236 above.

²⁰³ See para 237 above.

²⁰⁴ *Caxton (CT)*, para 49



278 The SABC acquired –

- 278.1 the opportunity to monetise content that was lying fallow;
- 278.2 the opportunity to test and showcase its ability to create a news channel for its platform;
- 278.3 a fair price;
- 278.4 the opportunity to broadcast the News Channel once it launched its digital terrestrial television platform;
- 278.5 the expansion of its footprint to sub-Saharan Africa and the adjacent islands, with the potential commercial benefits of such expansion;
- 278.6 more eyeballs directed to its channels;
- 278.7 with more viewers, the ability to generate advertising revenue. (All of the advertising revenue from the News and Entertainment channels, as well as the SABC free-to-air digital terrestrial television channels accrues to the SABC). The advertising revenue which accrues to the SABC is significant, since the broadcasting of these channels on DStv gives the SABC access to millions of households, to which it would not otherwise have access. MultiChoice conservatively estimates that the News Channel (SABC News) currently generates approximately R22 million gross advertising revenue (annualised) and that the Entertainment Channel (SABC Encore) generates approximately R3.8 million per annum. None of this advertising revenue accrues to MultiChoice.



Am

279 I note that the alleged payment of a bonus to Mr Motsoeneng²⁰⁵ was not part of the SABC Agreement and MultiChoice had no role in this internal SABC matter.

280 The SABC Agreement, and the launch of the channels, were publicly welcomed and celebrated by a wide range of institutions and individuals, including Mr Carrim and Ms Mokhobo.²⁰⁶ There was no reason for MultiChoice to suspect that the SABC Agreement was not supported by the SABC, the Department of Communications, or the industry.

MultiChoice believed that the SABC Board approved

281 MultiChoice entered into the SABC Agreement in good faith and on the understanding that the SABC's representatives had obtained the necessary approval from the SABC Board and Executive Management, and held the requisite authority to negotiate and conclude the SABC Agreement.

282 MultiChoice had no knowledge of any of the internal irregularities that are now alleged to have occurred. In fact, MultiChoice relied on Ms Mokhobo's personal assurance that the SABC Board and Executive Management had accepted MultiChoice's proposal before the SABC Agreement was signed.

283 As I have explained, the meeting between the SABC and MultiChoice on 6 June 2013 adjourned with a clear understanding on both sides that the SABC would seek its Board's approval of the only aspect of the MultiChoice proposal

²⁰⁵ Carrim's Affidavit, para 120.

²⁰⁶ See paras 230 and 231 above.



cm

which was in contention, namely the encryption constraint, and revert to MultiChoice in that regard.

284 The SABC's response on 19 June 2013 stated that "*the Board and Executive Management*" had considered MultiChoice's proposal and that there had been a "*decision to proceed in accordance with the proposal.*"²⁰⁷ MultiChoice understood from the SABC's response on 19 June 2013 that the SABC Board had considered and approved the MultiChoice proposal, including the encryption constraint.

285 MultiChoice understood the phrase "*on the terms that will be agreed between the SABC and MultiChoice*" to refer to operational terms beyond those essential terms on which its proposal was specifically premised.

286 Ms Mokhobo conceded, in her testimony to the Commission, that if she had intended to convey that the encryption constraint was not accepted by the SABC, she should have said so specifically.²⁰⁸ However, it is clear from the events which followed, that that was not her intention.

287 MultiChoice responded the next day expressing its pleasure that "*your board has agreed to the broad terms as contained in our letter of 15 May 2013*".²⁰⁹ This statement was a clear indication that MultiChoice had understood Ms

²⁰⁷ See para 219 and Annexure "M51".

²⁰⁸ Second Mokhobo Transcript, p 92.

²⁰⁹ See para 220 and Annexure "M52".



Mokhobo's letter to say that the Board had accepted its proposal, including the encryption constraint as the final issue in contention.

288 Ms Mokhobo did not respond to this letter, nor give any indication to MultiChoice that Mr Patel had misunderstood the purport of her letter.

289 When entering into the Agreement, both the SABC and MultiChoice represented, warranted and undertook to the other that it had the requisite power and authority to enter into the Agreement and to perform fully its obligations thereunder.²¹⁰

290 In these circumstances, MultiChoice reasonably believed that the SABC representatives were properly authorised to conclude the Agreement and that the SABC Board had considered and approved the terms of the Agreement.

POOR WITNESSES

Introduction

291 Much of the evidence of Mr Carrim, Ms Mokhobo, and Mr Kruger consisted of unsubstantiated speculation and hearsay, based on what they had apparently gleaned from media reports and from other people. It is evident from the extensive errors and falsehoods highlighted in this affidavit that the witnesses' testimony did not provide a credible or reliable account of the facts.

²¹⁰ SABC Agreement, clause 13.1, quoted in Mokhobo's Second Supplementary Affidavit, para 42.



Bm

292 Mr Kruger moreover gave his opinion on a range of technological issues, relying on his engineering expertise. But, he made fundamental errors on some of the most basic technological issues.

293 Without claiming any technological expertise, Mr Carrim and Ms Mokhobo also ventured a range of opinions on complex technological issues, and demonstrated obvious misunderstanding of key concepts.

294 Specific technological issues which were misrepresented or misconceived in the evidence to the Commission are highlighted in the table which is Appendix B to this affidavit, and in the confirmatory affidavit of Dr Peter Siebert.

295 Contemporaneous public statements made by Mr Carrim and Ms Mokhobo shortly after the conclusion of the SABC Agreement – in which Mr Carrim welcomed the SABC's partnership with MultiChoice and Ms Mokhobo extolled the virtues of non-encryption - directly contradict aspects of their evidence before the Commission. MultiChoice has documented these contradictions in two video clips which will be provided to the Commission on a flash drive.

Mr Carrim's evidence

296 Mr Carrim served as the Minister of Communications for only ten months from 10 July 2013 to 24 May 2014.²¹¹

²¹¹ Carrim's Affidavit, para 4.



297 His testimony traversed events both before and long after he held office, and was based predominantly on hearsay and speculation. Serious allegations against MultiChoice were introduced with statements such as -

297.1 "Mr Kruger told me that...";²¹²

297.2 "I was informed" (by unstated persons);²¹³

297.3 "read in the media that ...";²¹⁴,

297.4 "understand that...";²¹⁵

297.5 "it was reported" that...;²¹⁶

297.6 "at least four (unnamed) members informed me";²¹⁷

297.7 "I was told (by unnamed persons) that";²¹⁸

297.8 "It has been alleged that Naspers/MultiChoice...";²¹⁹

297.9 "there were also constant allegations that...";²²⁰ and

297.10 "commentators and politicians suggested that ...".²²¹

²¹² Carrim's Affidavit, para 130

²¹³ Carrim's Affidavit, para 107

²¹⁴ Carrim's Affidavit, paras 108 and 181

²¹⁵ Carrim's Affidavit, para 109

²¹⁶ Carrim's Affidavit, paras 111 and 235

²¹⁷ Carrim's Affidavit, para 180

²¹⁸ Carrim's Affidavit, para 181

²¹⁹ Carrim's Affidavit, para 126

²²⁰ Carrim's Affidavit, para 130

²²¹ Carrim's Affidavit, para 5



298 Mr Carrim conceded that he had prepared his affidavit (over approximately six months) without full access to the necessary documents,²²² and had used media articles and drawn on those aspects of the articles that were, in his view, "relevant to [his] actual experiences of the digital migration process".²²³ (Many aspects which he drew from media articles in fact related to events which occurred when he was not in office.)

299 His evidence comprised vague, general and speculative assertions such as his absurd statement that MultiChoice's officials "*in my view, were in some or other way and to some or other degree, involved in a form of 'regulatory capture'*".²²⁴

300 Mr Carrim advanced firm views on the benefits which STB decryption capability would have brought to South Africa, while acknowledging that he is not a technical expert on these issues. Indeed his views reveal an alarming lack of understanding of both the basic concepts and the implications of STB decryption capability.

301 Mr Carrim has no personal knowledge of the circumstances surrounding the negotiation and conclusion of the SABC Agreement. Indeed, Mr Carrim conceded that he has no personal knowledge of any fraud or corruption in respect of the SABC Agreement.

²²² Carrim's Affidavit, para 12

²²³ Carrim's Affidavit, para 13

²²⁴ Carrim's Affidavit, para 265



*"Even though there were persistent allegations and counter-allegations of corruption, I cannot attest to having any personal knowledge of any fraud and/or corruption in respect of the SABC/MultiChoice Agreement."*²²⁵

302 Mr Carrim offered views on the effects of the SABC Agreement which demonstrated an insurmountable lack of knowledge and understanding of the terms of the SABC Agreement. He made the obviously incorrect allegations that in terms of the SABC Agreement, the SABC agreed "to support MultiChoice's position on encryption of set top boxes",²²⁶ and:

*"I believe that this clause was included to ensure that the SABC change its policy from support to opposing STB control. In addition, the clause would also ensure that the SABC exerts pressure on the government to also change its policy".*²²⁷

303 These views are moreover at odds with his own statement published on 20 December 2013, where Mr Carrim said the following:

"The SABC does not want to use a control system. So the agreement with MultiChoice will not be affected. Our advice is that the commercial agreement only deals with the encryption of SABC channels and not

²²⁵ Carrim's Affidavit, para 225

²²⁶ Carrim's Affidavit, para 119

²²⁷ Carrim's Affidavit, para 113



with whether the STBs that are used for viewing SABC services have a control system or not."²²⁸

304 Also at odds with his previous utterances is his conviction, in his evidence to the Commission, that the SABC Agreement was bad for the SABC. As is evident from the transcript (annexed as "M53") of his speech at the official launch of the News Channel in August 2013, Mr Carrim at that time expressed unconditional support for the "public-private" partnership between MultiChoice and the SABC, and the advantages which the Agreement would have for the SABC and the public.

305 Most significantly, Mr Carrim repeated before the Commission the already debunked myth that the SABC Agreement entailed "*essentially selling the crown jewels of the SABC to MultiChoice, namely its archives,*"²²⁹ and that MultiChoice had "*full and exclusive access to the invaluable archives of the SABC*".²³⁰ He did so in circumstances in which he must have known that this was not true: both the Competition Tribunal and the Competition Appeal Court found that this was not the case, and the Competition Commission, in a report to which Mr Carrim himself made ample reference in his evidence, concluded in November 2018 that MultiChoice did not acquire control over the SABC archive, and had no access to the archive.²³¹

²²⁸ *Digital Television: On Set Top Box Issues*, Statement by Minister Carrim, 20 December 2013 (annexed as "M39"). Emphasis added.

²²⁹ Carrim's Affidavit, para 119

²³⁰ Carrim's Affidavit, paras 115 and 105

²³¹ CC Report, paras 183 and 212.1



306 This misrepresentation casts serious doubt on the credibility and reliability of Mr Carrim's evidence as a whole.

307 I respectfully submit that Mr Carrim's admitted lack of personal knowledge, coupled with his misunderstanding and misrepresentation of the facts, leaves his evidence devoid of any credibility.

Mr Kruger's evidence

308 Mr Kruger was employed by the Department of Communications as a technical advisor to the Minister of Communications from January 2012 to July 2014.

309 His testimony before the Commission went beyond facts of which he could claim personal knowledge, and even his evidence on facts which should have been within his knowledge was inaccurate and unreliable. I cite the following examples.

310 First, Mr Kruger told the Commission that the policy of Minister Pule was encryption.²³² But as I have indicated, Minister Pule removed the reference to STB decryption capability from the Policy in February 2012 and on 21 May 2013 announced in Parliament that she had taken a decision to review even the policy on an "STB control system" and to make it "*not mandatory*" as a way of "*fast tracking the rollout of [DTT]*".

²³² Kruger Transcript, pp 121, 145



311 Second, in respect of the policy proposals which Minister Carrim developed in 2013, but which were never adopted, Mr Kruger told the Commission:

*"in fact we even got a new policy, a totally new policy which we took to Parliament and they passed the policy..."*²³³

312 Third, Mr Kruger testified that digital migration in Mozambique had commenced in January 2018 and "*took two years*",²³⁴ suggesting that South Africa is lagging far behind. In fact, as I explain later in this affidavit, the digital migration process in Mozambique commenced in 2010 and is still not complete.

313 Fourth, Mr Kruger's opinion as to why South Africa is "lagging behind" revealed a surprising ignorance about the conclusion of the STB decryption capability debate after he left the Department of Communications in July 2014. Apparently not knowing that that debate ended with the promulgation of the 2015 Policy and the Constitutional Court's dismissal of e.tv's challenge to that policy on 8 June 2017, Mr Kruger told the Commission:

"in my opinion the only thing holding up the roll-out of the broadcasting digital migration in South Africa, even today is this question about encryption and set top box control".²³⁵

314 Fifth, MultiChoice did not at any time propagate the "disinformation" that STB decryption capability would have the consequence that viewers of free-to-air

²³³ Kruger Transcript, p 121

²³⁴ Kruger Transcript, pp 96, 97, 126, 127, 151

²³⁵ Kruger Transcript, p 100. Emphasis added.



services would have to pay to receive those services, as Mr Kruger repeatedly stated in his evidence.²³⁶

315 Sixth, Mr Kruger stated that "*everybody is putting in encryption*", and I have explained in an earlier section of this affidavit why that assertion was incorrect.²³⁷

316 Despite claiming to have expertise in respect of the technological issues involved in digital migration, Mr Kruger made several very basic errors regarding encryption and STB decryption capability.

317 He made the erroneous claim that "*one of the requirements of Digital broadcasting technology is that every viewer requires a Set Top Box/Decoder to receive the digital signals*".²³⁸ This is not correct. As I have indicated, STBs were a transitional measure in the early stages of digital migration, to convert digital signals into analogue signals for viewing on analogue TV sets. But this would apply only to viewers who do not have a digital TV set. The vast majority of the television sets currently sold in South Africa have the capability of receiving terrestrial transmissions through a built-in digital tuner and do not require an STB to receive free-to-air signals. Government itself has recognised that STBs are being overtaken by technological advances as digital TV sets become more readily available.

²³⁶ Kruger Transcript, pp 102 and 107

²³⁷ I deal with this in paragraphs 128 to 136 under the heading "STB decryption capability at odds with global practice".

²³⁸ Kruger's Affidavit, para 23



318 Mr Kruger confused the STBs which are required to convert analogue signals to digital, with the STBs or "decoders" used in the subscription television broadcasting environment, claiming that the market for STBs *"has grown exponentially, to the extent that even MultiChoice have released up to four new decoders over the past two years"*.²³⁹ STBs or "decoders" have a different function in the pay-TV context, where they serve additional functions over and above converter functionality (for example, to ensure that access to the pay-TV content is made available only to paying subscribers, and to record, pause and rewind live TV).

319 Mr Kruger confused fundamental concepts relating to STB decryption capability. He stated in his affidavit:

"it is common practice for most technologies using networks to be fully encrypted e.g. WhatsApp, YouTube, emails etc and many DTT networks are now incorporating STB control systems for the above reasons²⁴⁰ and other network requirements which STB control system can provide e.g. Mozambique, Namibia, Mauritius, Kenya".²⁴¹

²³⁹ Kruger Transcript, p 103

²⁴⁰ Kruger said that encryption is to prevent unauthorised 'tapping/copying' of programmes and that encryption also prevents any terrorist/sabotage groups from intercepting frequencies and inserting propaganda onto the network and causing mayhem (Kruger's Affidavit, paras 31 and 32).

²⁴¹ Kruger's Affidavit, para 33; Kruger Transcript, p 144



320 However,

320.1 it is not correct to compare private inter-personal communications, such as WhatsApp and emails, to the encryption of free-to-air terrestrial broadcasting signals;

320.2 encryption serves a different function in the free-to-air digital satellite context, where encryption is used to restrict the reception of content to territories for which the broadcaster has cleared the rights;²⁴² and

320.3 encryption again serves a different function in the subscription broadcasting context (whether satellite or terrestrial), because subscription broadcasters require a technological solution to prevent piracy. Subscription broadcasters use encryption to ensure that their pay-TV service is available only to persons who have paid the requisite subscription fees.

321 Mr Kruger also provided the Commission with a completely misleading "example" of the pros and cons of encryption in his account of the litigation involving Sentech and broadcasting in Botswana. He told the Commission that:

321.1 Sentech transmitted "*totally unencrypted*" signals in Botswana, leading the Botswana government to take legal action against Sentech, as a result of which Sentech was ordered to pay compensation to the

²⁴² This is because satellite footprints (unlike terrestrial footprints) generally cover multiple countries and may "spill over" into territories for which the broadcaster does not have rights.



Botswana government and to put in a conditional access system and fully encrypt all signals.²⁴³

321.2 Before Sentech purchased a set top box control system, "*STBs were being stolen and sold in Botswana*" and "*citizens of Botswana were watching SABC and eTV programmes for free*".²⁴⁴

321.3 Sentech purchased a set top box control system to encrypt all TV/Radio signals, and hence users in Botswana could no longer view SABC and e.tv programmes.²⁴⁵

322 Mr Kruger made multiple errors in these assertions. In fact, as is evident from the judgment of the High Court in *eBotswana*:

322.1 *eBotswana* (a sister company to e.tv), and not the Government of Botswana, launched the proceedings.

322.2 The case did not involve free-to-air terrestrial broadcasting transmissions, but satellite broadcasting transmissions.

322.3 Sentech did have a conditional access system in place, to transmit the signals comprising Sentech's "Vivid" service encrypted. This is common in the free-to-air digital satellite environment, where encryption is used to restrict the reception of content to territories for which the broadcaster has the rights, because satellite footprints (unlike terrestrial

²⁴³ Kruger Transcript, pp 98 and 99

²⁴⁴ Kruger's Affidavit, para 34

²⁴⁵ Kruger's Affidavit, para 35



footprints) generally cover multiple countries and may "spill over" into territories for which the broadcaster does not have rights.

322.4 In this instance the purpose of Sentech's encryption was to restrict the reception in intelligible form of the satellite signals comprising Sentech's "Vivid" service to viewers in South Africa, because the intellectual property rights had only been cleared for South Africa.²⁴⁶

322.5 But due to Sentech's failure to update and maintain the conditional access system, the system was compromised and the signals were "spilling over" into Botswana, allowing viewers in Botswana to view (among other channels) the SABC's free-to-air channels (the signals of which were carried on Sentech's satellite free-to-view platform) by using an inexpensive decoder readily available in Botswana, called a "Philibao" decoder, which was able to exploit the compromised Sentech conditional access system to access the content in Botswana.²⁴⁷

322.6 Sentech was ordered to pay damages (not a fine) to eBotswana (not the Botswana government)²⁴⁸ because pirate viewing of SABC 1, 2 and 3 had compromised eBotswana's advertising revenue (as the only licensed private television broadcaster in Botswana whose programmes could be watched free-to-air) since advertisers were able

²⁴⁶ Para 33 of the *eBotswana* judgment states:

"The SABC signal distributed by Sentech's satellite is encrypted. The spillage over of the signal into Botswana is limited to a radius of 60 kilometres".

²⁴⁷ *eBotswana*, para 35

²⁴⁸ *eBotswana*, para 73, point 1 of the order



to reach the same audience on the SABC channels which were unlawfully available in Botswana.

323 What Mr Kruger conveyed as an example of encryption being required to prevent "*STBs being stolen and sold*", was in fact an instance where the risk of an encryption system – if not properly maintained and upgraded – was highlighted. Thus the Court noted that "*[t]he reality of hacking into an encrypted system was ... readily acknowledged as a risk of inadequate encryption*".²⁴⁹

324 The costs which might be associated with inadequately maintained encryption systems were also demonstrated. The Court noted that one of the options available to Sentech to remedy the cross-border signal spillage was to upgrade to a more sophisticated encryption system and replace existing decoders. It would cost Sentech more than R70 million to swap out 65 000 decoders and nearly half a million viewers would be affected for eight to twelve months while the swapping out process was implemented.²⁵⁰

325 The costs of maintaining and upgrading conditional access systems, their vulnerability to hacking if they are not properly maintained, and the costs and inconvenience of replacing STBs if the system is compromised, are some of the very reasons why broadcasters such as MultiChoice and the SABC opposed the use of STB decryption capability in the subsidised STBs.

²⁴⁹ *eBotswana*, para 53

²⁵⁰ *eBotswana*, para 37



Ms Mokhobo's evidence

326 Ms Mokhobo was the Group CEO and an executive member of the Board of the SABC from 16 February 2012 to 28 February 2014.²⁵¹

327 She testified on a wide range of issues relating to the SABC, including the circumstances in which the SABC Agreement was concluded and the position of the SABC at various times on STB decryption capability.

328 Without having any technological expertise, Ms Mokhobo offered her views on key technological issues (including the alleged benefits of STB decryption capability), and in doing so demonstrated a fundamental misunderstanding of the STB technology.

329 Most irresponsibly, Ms Mokhobo misled the Commission with her categorical testimony that STB decryption capability would give poor people Internet connectivity. Testifying that an STB with decryption capability would have a return path that would enable "a citizen sitting anywhere in the country for as long as they had a TV set" "to search for information on the Internet using that box",²⁵² Ms Mokhobo said in reply to a question by the Chairperson of the

²⁵¹ First Mokhobo Transcript, pp 60 and 109; Mokhobo's Affidavit, para 6; and Mokhobo's Supplementary Affidavit, para 1. Prior to that, she worked as the Group Executive for Public Broadcasting from 2005 to 2010. Ms Mokhobo did not indicate where she worked between 2010 and 2012. According to Mokhobo's Linked In profile, (a) she was the Group Executive: SABC from September 2005 to August 2010, (b) she was the Group CEO from January 2012 to February 2014, (c) In the interim period she was Chairman of the Board of Miranda Mineral Holdings Ltd (from 2010 to 2012), and (d) she is now co-owner of LeLuTan Productions (Pty) Ltd. Mokhobo also indicated that she worked for e.tv as a founding member and executive director for two years (Mokhobo's Affidavit, para 1).

²⁵² Second Mokhobo Transcript, p 26

Commission, that young people "would have their own Internet café at home".²⁵³

330 That is manifestly incorrect. Ms Mokhobo ought to have known, or at least ought to have taken the trouble to find out, that the "return path" which she said would enable Internet connectivity through decryption capability was excluded from the STB specifications in the Policy as early as February 2012 because of its exorbitant cost, and was never part of the STB National Standard specifications for STBs. STB decryption capability would not have resulted in Internet connectivity for STB owners. I deal more fully with this issue below.²⁵⁴

331 Ms Mokhobo's testimony revealed a misunderstanding of key clauses of the SABC Agreement, and in particular the encryption constraint, which she incorrectly perceived as a requirement that the SABC should adopt a public policy position supporting STB decryption capability.

332 There were also inconsistencies in her evidence regarding the sequence of events following the conclusion of the SABC Agreement. As Mr Carrim testified, the SABC Board Chairperson Ms Tshabalala informed him by letter dated 12 August 2013 that the SABC did not support STB decryption capability, and

²⁵³ Second Mokhobo Transcript, p 27

²⁵⁴ See paragraphs 414 to 417 under the heading "STB decryption capability would not give Internet access". Similarly uninformed was Ms Mokhobo's statement that STBs are not a temporary measure because "You still need a decoder box from MultiChoice in order to see their signal. So I am not sure where they were coming from there" (First Mokhobo Transcript, p 119). The MultiChoice service requires a decoder with decryption capability because it is a satellite subscription broadcasting service which is vulnerable to piracy and satellite spill over. She also erred fundamentally in saying that digital TV sets or "IDTVs" are not yet available (First Mokhobo Transcript, p 119).



in a letter dated 23 August 2013 Mr Carrim invited key stakeholders to a round table discussion on STBs on 10 September 2013.

333 Ms Mokhobo told the Commission in her second round of evidence that when she and Ms Tshabalala attended that meeting, *"the SABC had still not taken the position that there would be no Set Top Box control"*²⁵⁵ and that she was taken by surprise and *"shellshocked"* at that meeting when Ms Tshabalala stated that the SABC had agreed that there would be no Set Top Box control.²⁵⁶ In her first round of evidence, however, Ms Mokhobo testified that she *"remembered vividly"* the letter written by Ms Tshabalala informing Mr Carrim that the SABC was not going to support set top box control.²⁵⁷

334 Much of Ms Mokhobo's evidence was directed at distancing herself from the SABC Agreement. In this she downplayed the key role which she herself had played in the discussions and negotiations which resulted in the SABC Agreement, which arose from the previous agreements concluded in 2012 regarding a 24-hour SABC News Channel, a project driven by Ms Mokhobo.

335 Ms Mokhobo publicly welcomed the SABC Agreement and the launch of the News Channel as a significant milestone for the SABC and a personal achievement.²⁵⁸

²⁵⁵ Second Mokhobo Transcript, p98

²⁵⁶ Second Mokhobo Transcript, pp 98-99

²⁵⁷ First Mokhobo Transcript, p 136

²⁵⁸ Interview with Ms Mokhobo, *SABC GCEO, Lulama Mokhobo on the SABC news 24 hour channel launch*, 1 August 2013, available at



336 At a meeting between the SABC and MultiChoice on 6 June 2013 to discuss MultiChoice's proposal for the SABC Agreement (which included the proposed encryption constraint), the professional transcript records that Ms Mokhobo opened the meeting as Chairperson by saying:

"...we are very, very excited and hugely grateful that eh MultiChoice has come forward with such a robust proposition, unlike the one that we had before. We are sensing urgency, we are sensing commitment to the public broadcaster and for us, uhm, it's going to be wonderful to be able to provide the the country and in terms of our previous agreements even the rest of Africa, in terms of our previous carriage agreement, be able to provide our news all over the place."

337 Pertinently, it appears from minutes made available to MultiChoice by the Commission that at three crucial meetings – two on 6 June 2013 and one on 12 June 2013 - the only concern which Ms Mokhobo raised regarding the encryption constraint was that the SABC would not be able to comply with it if government policy introduced mandatory encryption of free-to-air broadcasting signals.

338 At a briefing meeting held between SABC Board members and SABC "management" at 12:30 on 6 June 2013, in order that "management" (which included Ms Mokhobo) could advise the Board members regarding the MultiChoice proposal, the only concern expressed by Ms Mokhobo related to

<https://www.youtube.com/watch?v=ZuGnZQ4bQY8&feature=youtu.be>. See para 230. This interview will be made available to the Commission on a flash drive.



the anticipated changes in the "must carry" provisions. She made no comment on the encryption constraint.

339 At the meeting later that day with MultiChoice, Ms Mokhobo raised her concern about consistency between the Agreement and government policy.

"There are two particular clauses that are contained in your proposal letter which err pose a bit of a challenge for the SABC, and they pose a challenge not because of uhm anything other than policy provisions, government policy provisions."²⁵⁹

"Now, given the fact that the SABC is a government owned entity, and this decision really is a government decision, the SABC has no power over it. Uhm how do you propose we move forward? We cannot tell government that if they've made a policy decision that speaks conditional access, we are not going to do conditional access, we cannot do that. We are owned by a shareholder who is driving this process."²⁶⁰

340 At a special meeting of the SABC Board held on 12 June 2013, Ms Mokhobo reported that what had been agreed at the "previous meeting" was that *"until there was a clear pronouncement from the Minister in this regard, the SABC could not commit to clause 9"*.²⁶¹ The minutes recorded that *"[t]he GCEO cautioned the Board that, whatever decision was taken, if there was an*

²⁵⁹ Professional transcription of meeting of 6 June 2013, p 6 (my emphasis).

²⁶⁰ Professional transcription of meeting of 6 June 2013, p 7.

²⁶¹ Minutes of meeting of 12 June 2013, p 4.



intention by the DoC to change the current Broadcasting Digital Migration (BDM) Policy, it had to be in writing for the SABC's own protection".²⁶²

341 This narrow concern that the SABC Agreement should be consistent with government policy is starkly at odds with the impression given by Ms Mokhobo in her evidence to the Commission: that she was vehemently opposed to the encryption constraint on the grounds that it would deprive the public of the benefits of encryption.

342 Another consistent theme in Ms Mokhobo's evidence was that the SABC Agreement, and in particular the encryption constraint, was not properly considered by the SABC Board or Group Executive, and that signature of the SABC Agreement was hurriedly effected while she was away on leave as she was opposed to the encryption constraint.

343 The facts, as I have already set them out, tell a different story.

344 Ms Mokhobo attended a meeting of the SABC and MultiChoice on 6 June 2013, when the key elements of the MultiChoice proposal of 13 May 2013 were comprehensively discussed. The meeting ended with Ms Mokhobo herself thanking the MultiChoice representatives for the meeting and promising that the SABC would come back to them on the encryption constraint (the only outstanding matter). Ms Tshabalala and Mr Mathews noted that the issue would go to the Board at its next meeting on 12 June 2013.

²⁶² Minutes of meeting of 12 June 2013, p 4.



345 It was once again Ms Mokhobo herself who wrote to MultiChoice on 19 June 2013, stating:

"The Board and Executive Management has duly considered MultiChoice's proposal ... 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".²⁶³

346 When MultiChoice replied to that letter, expressing its pleasure that "your board has agreed to the broad terms as contained in our letter of 15 May 2013", Ms Mokhobo did not respond to this letter or take any steps to advise MultiChoice that this was not the case.

347 It is therefore inexplicable that she told the Commission that she was "taken aback" when she was informed that the SABC Agreement had been signed, "with arguments for anti-encryption winning over State policy".²⁶⁴

348 It is also wholly inadequate for Ms Mokhobo to have stated that she "should have been more specific" in her letter of 19 June 2013,²⁶⁵ and made it clear that there was not agreement within SABC on the terms proposed by MultiChoice. Especially in the light of MultiChoice's response to her letter, in which it was evident that MultiChoice understood that the SABC had agreed to conclude the SABC Agreement on the terms outlined in its proposal, it was Ms Mokhobo's

²⁶³ Emphasis added.

²⁶⁴ Mokhobo's First Supplementary Affidavit, para 4.

²⁶⁵ Second Mokhobo Transcript, p 92.



personal and professional duty to inform MultiChoice, if indeed the SABC Board had not agreed to MultiChoice's offer, including the encryption constraint. As is evident from her own statements at the 6 June 2013 meeting, she knew that this was the only outstanding issue that stood in the way of an agreement being concluded.²⁶⁶

349 Another contention strongly advanced by Ms Mokhobo was that the SABC Agreement caused the SABC to depart from its alleged previous support for STB encryption. As I have shown, the SABC's position on this issue fluctuated from time to time, and even did so after the conclusion of the SABC Agreement. As I have indicated,²⁶⁷ Ms Mokhobo herself communicated the SABC's non-encryption position, and the reasons for it, in an SABC interview in October 2013, closely following the reasoning furnished by Dr Ngubane ten months earlier in January 2013.

350 Ms Mokhobo persistently alleged a causal link between the SABC Agreement and the SABC's opposition to STB decryption capability which was not borne out by the terms of the SABC Agreement or any other evidence.

351 In the light of the internal and external inconsistencies in Ms Mokhobo's evidence, and her erroneous statements and assumptions in respect of the

²⁶⁶ After some discussion at the 6 June 2013 meeting, Mokhobo said:

"I think this was much easier than I thought it was going to be [laughter]. So the only area that we are proposing to yourselves, that we come back to you on, is clause nine. As it is this afternoon, there is a meeting that's due to take place at the DOC which is discussing precisely the DTT matter. Eh we may actually be able to come back to you much sooner" (Professional transcription of meeting of 6 June 2013, p 17.

²⁶⁷ See para 262 above.



SABC Agreement and STB decryption capability, I respectfully submit that her evidence as a whole was unreliable.

352 The Commission will draw its own conclusions from Ms Mokhobo's manifest evasiveness on issues which pertained to her own conduct:

352.1 First, Public Protector Advocate Thuli Madonsela's finding²⁶⁸ that Ms Mokhobo ought to face disciplinary proceedings for her role in approving irregular increases to Mr Motsoeneng's salary, in respect of which Ms Mokhobo maintained that the Public Protector had "*completely misunderstood*" how the salary increase came about.²⁶⁹

352.2 Second, the issue of why she had been paid a sizeable severance package, in respect of which Ms Mokhobo could not recall the sum of close to R6 million without being taken to the relevant documents, and claimed that "*Parliament was totally misinformed*" when advised that the package was between R8 million and R11 million.²⁷⁰

352.3 Third, the timing of her resignation from the SABC (between the publication of the Public Protector's provisional and final reports on 15 November 2013 and 17 February 2014 respectively), which ensured that she did not face the disciplinary proceedings recommended by the

²⁶⁸ A Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC), Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 1994, Report No 23 of 2013/2014, 17 February 2014.

²⁶⁹ First Mokhobo Transcript, p 101

²⁷⁰ First Mokhobo Transcript, pp 112-113



Public Protector.²⁷¹ Ms Mokhobo denied that she resigned in order to avoid disciplinary proceedings, claiming that she had put in her resignation before the Public Protector's provisional report (which recommended that she be disciplined) was published. However, she also said that she had served three months' notice²⁷² before leaving the SABC on 28 February 2014,²⁷³ and if that is so, she must in fact have resigned at the end of November 2013, two weeks after the publication of the provisional report and a few days after submitting her own response to the provisional report on 29 November 2013.

353 The issue of the timing of Ms Mokhobo's resignation has particular importance in evaluating the reliability of her testimony on STB decryption capability and the encryption constraint in the SABC Agreement. Her answer to the allegation that her resignation was driven by impending disciplinary proceedings, was that her resignation had in fact come about because of her vehement and principled opposition to STB decryption capability, and repeatedly "*locking horns*" on this issue with SABC Board Chairperson, Ms Tshabalala. Indeed, she offered this narrative in her first round of testimony (which was not focused on the SABC Agreement) in direct response to the Chairperson of the Commission's close questioning on the circumstances of her departure from the SABC.²⁷⁴

²⁷¹ First Mokhobo Transcript, pp 101-102; 109; 114

²⁷² First Mokhobo Transcript, pp 108, 109 and 130; Mokhobo's First Supplementary Affidavit, para 1

²⁷³ SABC Annual Report 2013/2014, pp 15, 18, 71, 73 and 141. Adv. Thandi Norman SC (evidence leader at the Commission) confirmed that in terms of Ms Mokhobo's settlement agreement with the SABC her last day at the SABC was 28 February 2014 (First Mokhobo Transcript, p 109).

²⁷⁴ First Mokhobo Transcript, p 127 and Mokhobo's Second Supplementary Affidavit, para 52



354 As I have indicated, the minutes of internal SABC Board and management discussions which have been made available to MultiChoice do not record any such vehement or principled opposition by Ms Mokhobo to the encryption constraint in the SABC Agreement. The only concern she appears to have raised was that the SABC must first be satisfied that encryption was not going to be mandated by government policy.

SPECIFIC ACCUSATIONS

Introduction

355 The witnesses made allegations on a range of issues, some of which went beyond the issues identified in the Commission's Rule 3.3 notices. I confine my response to allegations which are relevant to the issues identified in the Rule 3.3 notices and within the Commission's Terms of Reference. My failure to address each and every adverse allegation should not be construed as an admission.

MultiChoice did not delay digital migration

356 Both Mr Carrim and Mr Kruger sought in their evidence to attribute the delay in South Africa's digital migration to MultiChoice.²⁷⁵

²⁷⁵ Carrim's Affidavit, para 266 and Kruger Transcript, pp 97, 100 and 138



357 They did so incorrectly and unfairly. The delay was in fact attributable to a range of factors wholly unrelated to MultiChoice's position on STB decryption capability.

358 In fact, both witnesses' accusations are surprising, in the light of Mr Carrim's own acknowledgement in the past regarding government's responsibility for the delay, and Mr Kruger's comments blaming e.tv for the delay.

359 In Mr Carrim's invitation to stakeholders, dated 23 August 2013, to attend a roundtable discussion on STB control, he said:

"There have been many delays in the digital migration process, and the Ministry of Communications accepts its fair share of the responsibility".

360 Key reasons for the delay in digital migration include the following:

360.1 South Africa had 11 Ministers of Communications since 2009, which caused regulatory and political instability, disruptions delays, lack of continuity and inconsistency.

360.2 It took over four years for ICASA to finalise the digital migration framework regulations which would allow broadcasters to start the migration. ICASA first published draft regulations in 2008,²⁷⁶ which it

²⁷⁶ ICASA first published the draft Broadcasting Digital Migration Framework Regulations on 3 October 2008 for public comment (Draft Broadcasting Digital migration Framework Regulations, published under Notice No. 1240, Government Gazette No. 31490, 3 October 2008).



finalised in 2010,²⁷⁷ but then repealed in 2011.²⁷⁸ It published the final Digital Migration Regulations on 14 December 2012.²⁷⁹

360.3 The 2008 Policy adopted the DVB-T transmission standard, on which digital migration in South Africa had been based since inception. In April 2010 the Department of Communications (under Minister Nyanda) suddenly proposed changing to the entirely different ISDB-T standard, which had only been commercially adopted in Brazil.²⁸⁰ This derailed digital migration until January 2011, when Minister Padayachee reverted to DVB-T.²⁸¹

360.4 The Department of Communications split in 2014, and the ensuing confusion as to which Minister was responsible for key issues relating to digital migration, gave rise to further delay.

²⁷⁷ Digital Migration Regulations, 2010, published under Notice No. 97, Government Gazette no. 32956, 15 February 2010

²⁷⁸ ICASA repealed the 2010 regulations 19 months later and published a new set of draft Digital Terrestrial Television Regulations for comment, restarting the debate on the digital migration regulatory framework, citing multiple reasons for its decision (Explanatory Memorandum on the Repeal of the Digital Migration Regulations and the Publication of the Draft Digital Terrestrial Television Regulations for Public Comment, published under Notice No. 680, Government Gazette No. 34642, 28 September 2011).

²⁷⁹ Digital Migration Regulations, 2012, published under Notice No. 1070, Government Gazette No. 36000, 14 December 2012.

²⁸⁰ DVB-T was the most widely adopted digital terrestrial television transmission system in the world, with more than 150 million receivers sold in more than 40 countries. DVB-T had been selected in South Africa by 2008 after a lengthy process that began in 2002. It had been trialed and proven to work in South Africa. A switch to ISDB-T would have required ISDB-T transmitter equipment and STBs to be developed specifically for South Africa. An additional R2.2 billion in government subsidies would have been required. Adopting ISDB-T would have prejudiced the local manufacturing industry, because the market for STBs produced in South Africa would forever be restricted to those few countries which had adopted ISDB-T. The technical differences between ISDB-T and the first generation DVB-T standard were marginal. DVB-T2 (the second generation standard) was far superior to ISDB-T, delivering 50% more channels. Adopting ISDB-T would not have been sustainable. A shift to ISDB-T would have required the STB National Standard to be redone, as it is an entirely different transmission standard.

²⁸¹ As DVB-T2 was a second generation DVB-T standard, it required minor amendments be made to the STB National Standard which had been based on the first generation DVB-T standard.



360.5 The Minister was required to gazette the digital switch-on date (the date on which digital transmission would commence in parallel with the ongoing analogue terrestrial transmission) in order for the migration to commence. However, the dual illumination period (the period during which there would be analogue and digital terrestrial transmission until the "analogue switch off") only commenced on 1 February 2016.²⁸²

360.6 Additional delays arose from the failure of the Universal Service and Access Agency of South Africa to purchase the required number of STBs, and litigation by STB manufacturers against the Agency in relation to the award of the tender in respect of the subsidised STBs. The Agency ultimately only invited bids for digital TV sets for the remaining 3.2 million indigent households on 15 June 2020.

361 To the extent that the STB decryption capability debate contributed to the delay, responsibility for that debate cannot be attributed to MultiChoice.

362 STB decryption capability was not necessary for digital migration. It was seized upon by e.tv to serve its "*entrepreneurial vision*".²⁸³

²⁸² Digital Migration Regulations, 2012: Declaration of the performance period and start of the dual illumination period, published under Notice No. 87, Government Gazette No. 39642, 1 February 2016.

²⁸³ The Constitutional Court criticised e.tv's desire to "*reposition itself for greater commercial benefit*" and to "*depend or seek to rely on government resources or set top boxes in the furtherance of its private commercial interests*", and said that it "*is concerning that it [e.tv] seeks to ride on the back of a government project to realise its entrepreneurial vision*" (*Electronic Media Network*, paras 27, 51, 54 and 57). This should be noted in the context of Mr Kruger's allegations on pp 117 to 118 of the Kruger Transcript, about e.tv and the SABC's positions on set top box control.



363 It was not MultiChoice, but e.tv, which turned to the courts in order to impose its desired position in respect of decryption capability, and in so doing occasioned a lengthy delay in the implementation of the 2015 Policy.²⁸⁴ e.tv litigated twice in respect of STB control: (a) in 2012, when it successfully challenged the Minister's decision (based on Mr Kruger's advice) to instruct Sentech to assume responsibility for STB control; and (b) in 2015 in the e.tv application, which the Constitutional Court ultimately resolved against e.tv in June 2017.²⁸⁵ The Constitutional Court itself remarked that "e.tv's actions threaten to stall unduly the full-scale rolling-out of set top boxes for which the nation has been waiting for about ten years".²⁸⁶

364 In February 2020 the Department of Communications recognised that there were many reasons for the delay, including the encryption debate and private sector commercial interests, but also including (a) unintended consequences of the Policy, such as high end STB technical specifications resulting in high STB production costs; (b) poor awareness and programme visibility; (c) project management deficiencies; (d) state owned enterprise and external stakeholder management challenges; and (e) disjointed implementation.²⁸⁷

²⁸⁴ *Electronic Media Network*, para 54

²⁸⁵ Kruger incorrectly alleged that "there is a second [Constitutional?] court case on now" (Kruger Transcript, p 115)

²⁸⁶ In addition, from 2008 to 2012 the SABC and e.tv could not agree how to implement STB control, and failed to appoint a service provider.

²⁸⁷ Presentation to the Parliamentary Portfolio Committee on Communications on the Implementation of the Broadcasting Digital Migration Policy, Department of Communications, 4 February 2020, slide 5, annexed as "M62".



365 On 6 July 2020 the National Planning Commission identified the digital migration process as one of two "*striking examples of what appears to be institutional failure*". It noted that "[T]he rapid turnover of ministers and directors general, as well as the splitting of the Communications Ministry into two departments – one for Communications, and another for Telecommunications and Postal Services – exacerbated already extensive delays in meeting the digital migration deadline of July 2015, which remains uncompleted. This uncertainty has undermined a decade of convergence legislation and regulations, leaving critical policy and regulatory actions in limbo."²⁸⁸

366 The National Planning Commission continued:

"The failure of the process of broadcast digital migration, as well as a debacle over the release of high-demand spectrum, are two of the more striking examples of what appears to be state failure that inevitably leads to wasted opportunity costs for the economy. Weak political appointments and lack of leadership have consistently plagued the DoC, DTPS, ICASA, and USAASA, all of which have been paralysed by corruption, mismanagement and suspensions of senior personnel. Some of these problems relate to the erosion of ICASA's independence.

...

²⁸⁸ National Planning Commission Draft Paper: Digital Futures: South Africa's Digital Readiness for the Fourth Industrial Revolution, 6 July 2020 (extracts referred to here and below annexed as "M63"), p iv.



*The further conflation of political and economic interests around commercial opportunities within the sector, such as set-top box manufacturing or arguably spectrum policy, together with ideological rigidity or self-interest by decision-makers in some instances, have sometimes overridden the outcomes of public processes and indeed empirical evidence. This has resulted in institutions and organisations within the communication portfolio being immobilised by intra and inter-departmental tensions and unnecessary litigation absorbing significant amounts of tax payers' money on both sides, mostly without the outcome of procedural or legal clarity."*²⁸⁹

367 MultiChoice had no incentive to delay digital migration. The delays had a uniquely negative impact on M-Net and its subscribers, because the aging analogue technology used by M-Net and its subscribers became expensive to maintain and repair. M-Net stopped selling analogue STBs in 2004 with the knowledge that they would become redundant.

368 On multiple occasions MultiChoice and M-Net voiced concerns about the impact of the delay on its existing analogue infrastructure, the increasing maintenance and repair costs, and the difficulty for M-Net to grow in this environment.²⁹⁰

²⁸⁹ National Planning Commission Draft Paper: Digital Futures: South Africa's Digital Readiness for the Fourth Industrial Revolution, 6 July 2020, pp 15 and 16.

²⁹⁰ I annex as examples M-Net's presentation to ICASA on the draft Broadcasting Digital Migration Regulations on 28 November 2008, M-Net's DTT readiness presentation to ICASA dated 28 November 2012, and a letter from Mr Patel to former Minister Carrim dated 26 July 2013 (annexed as "M64", "M65" and "M66").



369 A final factor that is often ignored is that government has continuously underestimated the complexity and length of time digital migration takes, compared to the digital migration process in other countries.

370 In the United Kingdom (arguably one of the most successful jurisdictions to complete its digital migration), digital migration commenced in 1998 and it took almost a decade before it was ready to start a pilot analogue switch-off test in October 2007, which was then followed by a phased analogue switch-off commencing in the next year. It then took another five years for analogue switch-off to take place region by region until digital migration in the United Kingdom was completed in 2012.²⁹¹

Digital migration in Mozambique did not take two years

371 Mr Kruger contrasted South Africa's digital migration delays to Mozambique, where he alleged that digital migration commenced in January 2018 and would be completed in December 2019.²⁹²

372 In fact, digital migration commenced in Mozambique in at least 2010 and is not complete.²⁹³

²⁹¹ The UK launched digital terrestrial television in November 1998 with a mixed model of unencrypted free-to-air and encrypted subscription channels. The DTT Pay-TV broadcaster, OnDigital, had problems from the start, one of which was a hackable insecure encryption system, and by May 2002 the consortium operating the Pay-TV channels had gone off-air. The rights to the Pay-TV multiplexes reverted to the regulator and were picked up by the Freeview consortium which dropped the failed Pay-TV model and launched with free television and radio channels only on 30 October 2002. By 2005 all the free-to-air channels had joined the consortium operating under the "Freeview" brand. The United Kingdom's Freeview platform is regarded as the benchmark for a successful digital migration to a vibrant free-to-air digital terrestrial broadcasting platform (without encryption). *Digital Terrestrial Television in the UK*, enacademic, <https://enacademic.com/dic.nsl/en/wiki/739166#History>.

²⁹² Kruger Transcript, pp 96, 97, 126, 127, 151



373 Like South Africa, Mozambique is a signatory to the International Telecommunications Union Agreement²⁹⁴ in terms of which states in 2006 committed to migrating all existing analogue terrestrial television broadcasting services to digital by June 2015. Mozambique adopted a digital terrestrial television transmission standard on 7 December 2010. On 28 December 2011 it established the National Commission for Migration to Digital Broadcasting, whose main objective was to implement and manage digital migration.²⁹⁵ It approved its Digital Migration Strategy in 2014, launched an international tender to rollout the digital terrestrial television network in 2016, and held a digital migration project launch ceremony on 19 March 2017.²⁹⁶

374 On 15 April 2015 the Mozambican regulator²⁹⁷ made a presentation to the Southern African Development Community (SADC) Digital Broadcasting Migration Forum (annexed as "M69") in which it (a) stated that "[t]he process of implementation of digital broadcasting in Mozambique **has already started with various activities**";²⁹⁸ (b) illustrated the relevant activities; and (c)

²⁹³ In February 2020 and April 2020 the Mozambican regulator confirmed that the digital migration process is still underway (ARECOM Newsletters issue no. 13, 30 January 2020, p 3 and issue no. 16, 27 April 2020, pp 4 - 5 (annexed as "M67A" - the original Portuguese article - and "M67B" - an English translation).

²⁹⁴ The agreement is known as the RRC-06 Agreement.

²⁹⁵ By order of the Minister of Transport and Communications of 28 December 2011.

²⁹⁶ 60 government digital terrestrial television transmission sites were planned, of which 45 are installed and only 36 are operational. Another 20 sites were planned to be built by 2020. (*Digital Migration: Analogue Blackout in December – Mozambique*, Club of Mozambique, 22 July 2019, (Annexed as "M68").

²⁹⁷ The INCM has since been replaced by ARECOM.

²⁹⁸ Emphasis in original.



anticipated that it would meet the country's digital migration objectives by the International Telecommunications Union's deadline.²⁹⁹

375 Like 11 other SADC member states,³⁰⁰ Mozambique missed the International Telecommunications Union's June 2015 deadline.³⁰¹ In August 2019 Mozambique's Digital Migration Commission acknowledged the delay and highlighted the challenge of ensuring that signal converters are available and accessible throughout the country.³⁰²

376 It remains to be seen if and when Mozambique will complete its migration.

MultiChoice opposed STB decryption capability for good reason

377 Mr Carrim and Mr Kruger alleged in their evidence that MultiChoice opposed STB decryption capability (what they called "STB control") to defend its market position.³⁰³

378 Mr Carrim also alleged that MultiChoice benefitted when the policy on STBs

²⁹⁹ Implementation of Digital Broadcasting in Mozambique. Fifth SADC Digital Broadcasting Migration Forum, 15 April 2015, slides 10 – 14.

³⁰⁰ By the end of 2017, only four of the 15 SADC member states had completed the digital migration process. According to Balancing Act's *Analogue to Digital Broadcasting Migration Africa Report*, 3rd ed., 2018, only 29 of 56 African countries are expected to complete the migration by the end of 2020, due to the scale and cost of the process (*83 million African households to have access to Digital Terrestrial Television by the end of 2020, but will they actually be consuming it?*, Balancing Act, 15 November 2018 (Annexed as "M70").

³⁰¹ *Mozambique: Deadline for Digital Migration will be Missed*, Balancing Act Africa, 15 April 2015 (Annexed as "M71").

³⁰² *III CONTEL: Alcançados Objectivos Desejados* (CONTEL III: Achieves Desired Objectives), 5 September 2019 (Annexed as "M72A" - the original Portuguese article - and M72B - an English translation).

³⁰³ Carrim's Affidavit, paras 123, 124, 186 and 250.



with control was jettisoned,³⁰⁴ and that the absence of STB control was advantageous to MultiChoice because it ensured that the -

378.1 *"FTA DTT platform was weak and chaotic" (including being flooded with cheap imported STBs, with no common user interface, and no ability to do e-government services);³⁰⁵ and*

378.2 *"M-Net DTT STB would onboard the FTA channels without the need for agreement with the FTA broadcasters, in so doing, entrenching M-Net as the dominant terrestrial platform in the country."³⁰⁶*

379 But these contentions are wholly unfounded.

380 STB decryption capability was a misguided proposition with far-reaching adverse implications. MultiChoice had sound reasons for opposing STB decryption capability, in the interests of M-Net subscribers, free-to-air viewers and the public purse, and in the interests of fair competition. Including decryption capability in government-subsidised STBs would have significantly increased the costs for government and consumers and would have made STBs a permanent feature of broadcasting in South Africa.

³⁰⁴ Carrim's Affidavit, paras 251 and 277

³⁰⁵ Carrim's Affidavit, para 124.1

³⁰⁶ Carrim's Affidavit, para 124.2



381 As the Constitutional Court stated in the e.tv application:

*"The plight of the poor, and the costs for the inclusion of decryption capabilities to the taxpayer ranked very high on the list of the grounds for opposing Minister Carrim's proposals. All other broadcasters argued quite forcefully that it was for the advancement of the commercial interests of only e.tv to include decryption capabilities and not at all in the best interests of the poor and broader public."*³⁰⁷

382 MultiChoice had no incentive to weaken the terrestrial platform. On the contrary, consumer confidence in the new terrestrial platform is essential to the take up of the service.³⁰⁸

383 In any event, the decision not to include decryption capability in the government-subsidised STBs does not weaken the terrestrial platform. As I have explained, non-encryption does not result in the country being flooded with cheap imported STBs and encryption would not enable e-government services.

384 It is correct that non-encryption of free-to-air broadcasting signals ensures that the *"M-Net DTT STB would onboard the FTA channels without the need for agreement with the FTA broadcasters,"* to the extent that this means that M-Net decoders would be able to incidentally receive the free-to-air digital terrestrial

³⁰⁷ *Electronic Media Network*, para 51

³⁰⁸ As the Working Group Report found, *"DTT requires that a range of stakeholders need to be brought together. This includes policy makers, regulators, content providers, network owners, etc"* (Working Group Report, p 100).



Am

television signals. This is precisely why MultiChoice opposed encryption and the very purpose of the encryption constraint in the SABC Agreement.

385 But it is not correct that this would entrench M-Net as the dominant terrestrial platform in the country.

MultiChoice did not wage a campaign against Mr Carrim

386 Mr Carrim made unsubstantiated allegations that MultiChoice embarked on a campaign to malign him, lobbied against his reappointment,³⁰⁹ and knew about ministerial changes before they were announced.

387 For example, Mr Carrim alleged (based on hearsay) that ahead of the President announcing the new Cabinet after the May 2014 elections, there was a "*party in Sandton*" at which I (Mr Mawela), Mr Motsoeneng and other key figures celebrated that Mr Carrim would not be reappointed,³¹⁰ and that on another occasion Ms Mack mentioned that Ms Muthambi would be the new Communications Minister.³¹¹

388 I deny that MultiChoice waged a campaign against Mr Carrim. MultiChoice believed, and maintains, that Mr Carrim's proposals advanced narrow commercial interests, over the best interests of our nation. MultiChoice said this openly, as its right to freedom of expression entitles it to do, in the newspaper

³⁰⁹ Carrim's Affidavit, paras 149 and 246

³¹⁰ Carrim's Affidavit, para 156

³¹¹ Carrim's Affidavit, paras 155, 156 and 157



advertisement which it procured, supported by Act-SA and NAMEC, in March 2014, after it had exhausted all attempts to engage with the Minister to obtain a fair hearing for its views. It is absurd to be accused of surreptitiously colluding with Act-SA and NAMEC when these engagements were very open and public.

389 This was also the view of the Constitutional Court, which found that "*it was for the advancement of the commercial interests of only e.tv to include decryption capabilities and not at all in the best interests of the poor and broader public*".³¹²

390 MultiChoice's opposition to Mr Carrim's proposals was not personal. MultiChoice did not embark on a campaign to malign or remove him.

391 MultiChoice did not know that Mr Carrim would not be reappointed or that Minister Muthambi would succeed him after the 2014 national elections. MultiChoice and its officials only found out about the changes when the President announced the new cabinet on 25 May 2014.

392 I did not attend a "*party in Sandton*" with Mr Motsoeneng "celebrating" that Mr Carrim would not be reappointed. Nor am I aware of such a party having taken place. Mr Carrim's allegations are baseless hearsay.

393 Ultimately, it is not clear what Mr Carrim intended to convey with this set of allegations. He himself acknowledged in his evidence that "*[w]hatever lobbying*

³¹² *Electronic Media Network*, para 56



took place, it was President Zuma who decided on who he wanted as the Minister of Communications, and if he wanted to keep me on, he would have. So it would be quite silly for me to blame those who might have lobbied him".³¹³

The Black Business Council opposed STB decryption capability

394 Mr Carrim contended that the Black Business Council supported his draft policy.³¹⁴

395 In fact, the Black Business Council did not support decryption capability. A multi-stakeholder workshop was held on 16 April 2013 to discuss whether or not encrypted STBs were the best option for South Africa. At the workshop, a resolution was passed to the effect that the requirement for STB decryption capability should be scrapped from government policy in its entirety. The resolution was signed by the Black Business Council, as well as the MK Military Veterans' Association, the Progressive Woman's Movement of South Africa, the Congress of Traditional Leaders, the SA National Civic Organisation, Electronic Components (Pty) Ltd and other organisations.

396 NAMEC and its social partners³¹⁵ met under the auspices of the Black Business Council on 18 November 2013 and resolved not to support the inclusion of conditional access in the STBs.³¹⁶

³¹³ Carrim's Affidavit, para 263

³¹⁴ Carrim Transcript, p 83

³¹⁵ This included the MK Military Veterans Association, the South African National Civic Organisation, the Congress of Traditional Leaders of South Africa and the Progressive Women's Movement of SA).

³¹⁶ NAMEC said this in a letter to Minister Carrim dated 25 November 2013 (annexed as "M73").



397 I also annex as "M74" and "M75" two press clippings citing the Black Business Council's opposition to encryption.

MultiChoice did not mislead the public

398 Mr Kruger's allegation that MultiChoice spread disinformation or misled the public that they would have to pay for the free-to-air terrestrial channels or that the end user would not get the channel free³¹⁷ is false. MultiChoice did not argue that viewers would have to pay to receive the free-to-air channels.

399 MultiChoice did argue, correctly, that somebody would have to pay for the conditional access system and related costs, including the upgrade, maintenance, royalties and operational costs of the conditional access system, and the inclusion of conditional access in the free-to-air STB, and that private commercial interests should not be funded by the public purse.³¹⁸

400 This was also the view of the Constitutional Court in the e.tv application, where it noted:

"It must be said that M-Net, unlike e.tv, does not at all depend or seek to rely on government resources or set top boxes in the furtherance of its private commercial interests. It funds its chosen business model. And so must e.tv fund its preferred new business plan. It is concerning

³¹⁷ Kruger Transcript, pp 106, 107 and 148; Kruger Affidavit, para 125

³¹⁸ M-Net dealt with the cost implications in detail in paragraphs 44 to 49 of Annexure A of its 3 January 2014 submission on Minister Carrim's proposed amendments (annexed as "M14").



CPM

*that it seeks to ride on the back of a government project to realise its entrepreneurial vision."*³¹⁹

The SABC would not have benefitted

401 The witnesses suggested that STB decryption capability would have enabled the SABC to increase its revenue by entering the pay-TV market.

402 Mr Carrim alleged that "*[t]he aim was also for the SABC to, in the long term, incrementally launch a Pay-TV service to improve the SABC's financial situation and gradually begin to compete with MultiChoice.*"³²⁰

403 Ms Mokhobo echoed this, and provided rudimentary scenarios estimating that the SABC could generate over R1.9 billion in subscription revenue per annum.³²¹

404 MultiChoice did not argue that the SABC could not become a pay-TV operator, as Mr Kruger alleged.³²² However, the challenges which the SABC would face to do so, were not acknowledged by the witnesses.

405 The SABC cannot simply provide a subscription broadcasting service, because it is not a licensed subscription broadcaster. It is a licensed public broadcaster, mandated by legislation to provide broadcasting services to all South Africans.

³¹⁹ *Electronic Media Network*, para 54

³²⁰ Carrim's Affidavit, para 186

³²¹ Mokhobo's Supplementary Affidavit, pp 6 - 8

³²² Kruger Transcript, p 125; Kruger's Affidavit, p 41



It is therefore inappropriate for the SABC's public broadcasting services to be encrypted. If the SABC wished to provide a subscription broadcasting service, it would have to apply to ICASA for a subscription broadcasting service licence and it would have to raise funds for these commercial ambitions from a source other than the public purse.

406 Mr Kruger downplayed the costs of STB decryption capability, stating that all that the SABC needed was "*to put a little chip in*" which costs R29, but can generate millions.³²³

407 Mr Kruger correctly estimated that the incremental cost of adding encryption capability to STBs is roughly \$2 (or R30 at R15:\$1). This may seem like a low amount, but for over 5 million boxes (being the number of STBs which government is subsidising for the poorest households) the initial cost would have been R150 million at R15:\$1. This is only the initial cost (that would have been carried by the taxpayer).

408 The SABC itself would have incurred the significant ongoing operating and maintenance costs (which I have outlined above) associated with decryption capability in STBs.

³²³ Kruger Transcript, pp 125 and 128



Am

409 Mr Kruger advised the Minister in 2012 to use the conditional access system used by Sentech. However, Mr Kruger's testimony failed to indicate that:

409.1 It was this conditional access system that the High Court in the *eBotswana* case found to be materially compromised, which would have cost millions to upgrade and swap out, and which resulted in Sentech being ordered to pay eBotswana damages.³²⁴

409.2 The Minister's direction that Sentech should establish and operate the STB control system (which was later set aside by the High Court in the 2012 e.tv case) required Sentech to upgrade its conditional access system to implement the STB control mechanism,³²⁵ for which Sentech required additional government funding.³²⁶

410 Mr Carrim played down the cost of STB decryption capability, stating that "*we evolved a policy that said, those who want to use control, they can use it, but they will have to pay appropriately for the extra, at that stage equivalent of 18 to 20 Rands on the STB Control System.*"³²⁷ This ignored both the volume and the ongoing costs of STBs.

411 An encryption system requires annual maintenance and has ongoing costs for maintenance and royalties to the encryption suppliers. Encrypting the free-to-air

³²⁴ See para 322.

³²⁵ Sentech's agreement with the conditional access service provider was for a satellite free-to-view platform with a smaller audience than terrestrial television.

³²⁶ Sentech presentation to the Select Committee on Labour and Public Enterprises, 15 August 2012, slides 18 to 22

³²⁷ Carrim Transcript, p 65



terrestrial signals (which do not require encryption because they are meant to be free) would have required extensive back-end systems and investments in support structures like call centres. The cost of maintaining a call centre of 1,000 people to service these requirements is about R300 million per year.³²⁸

412 The SABC would also have to acquire and pay for subscription broadcasting / pay per view rights. It cannot simply use free-to-air broadcasting rights to broadcast content like the Rugby World Cup,³²⁹ as Mr Kruger suggested, to provide a subscription or pay per view service. The SABC's content costs would increase significantly in order for it to do so.

413 The rudimentary pay-TV scenarios put forward by Ms Mokhobo³³⁰ over-simplify the pay-TV business case and fail to take into account the above mentioned considerations. Ms Mokhobo did not adduce any evidence to suggest that she or the SABC had conducted any assessment of the financial or business plans, modelling, research or analysis required to launch a pay-TV operation, as would be expected of a Group CEO of a broadcasting corporation.

STB decryption capability would not give Internet access

414 The witnesses created the false impression that STB decryption capability would allow poor people to access the Internet without a computer.

³²⁸ Although call centres may be required anyway (even in a non-encryption environment) they would have to provide far more support to consumers if there were encryption and would therefore be far costlier.

³²⁹ Kruger Transcript, p 125

³³⁰ Mokhobo's Supplementary Affidavit, pp 6 - 8



A handwritten signature in black ink, appearing to be 'C. M.', is written over the bottom right portion of the seal.

415 Mr Kruger described a conditional access system as a "computer".³³¹

Ms Mokhobo alleged that the inclusion of decryption capability in STBs would create a return path in STBs, including the ability to connect to the Internet, going so far as to suggest that it would –

415.1 create an Internet café in every home;³³²

415.2 enable consumers to "do whatever they needed to do using the STBs without even having to go and buy a computer";³³³ and

415.3 enable children to access educational content.³³⁴

416 Underscoring these allegations are the misconceptions that –

416.1 the Policy requires a return path;

416.2 if an STB contains decryption capability it will have a return path which would enable connectivity;³³⁵ and

416.3 the purported benefits would arise from the inclusion of decryption capability.

³³¹ Kruger Transcript, p 97, where Mr Kruger stated: "*The actual equipment used to do set top box control is called a conditional access system. In simple terms it's a computer with a lot of software and a lot of capabilities, you can either implement some of them or all of them*". Also see pp 104, 108, 109, 110, 130 and 140 of the Kruger Transcript, where Mr Kruger referred to a conditional access system as a "computer" and para 27 of Kruger's Affidavit where he said that "*A STB control system is in essence a computer...*".

³³² First Mokhobo Transcript, p 117; Second Mokhobo Transcript, p 27; and Mokhobo's First Supplementary Affidavit, p 7

³³³ First Mokhobo Transcript, p 117

³³⁴ First Mokhobo Transcript, p 118; Second Mokhobo Transcript, p 28 and Mokhobo's Second Supplementary Affidavit, paras 22 and 44

³³⁵ First Mokhobo Transcript, p 118; Mokhobo's First Supplementary Affidavit, p7 and Mokhobo's Second Supplementary Affidavit, para 23



417 Each of these contentions is incorrect.

417.1 The Policy does not require a return path. This was not a requirement in the STB National Standard, and has not been required by the Policy since its amendment in 2012.³³⁶

417.2 The return path requirement in the 2008 Policy was abandoned because the STB National Standard could not achieve a low cost affordable STB that included such a capability. Including a return path would have (a) increased the STB cost and (b) required consumers to pay for fixed data/Internet access on an ongoing basis (e.g. for fixed line or Wi-Fi Internet access to the STB). Most South African households cannot afford a basic STB, let alone a data package to support a return path.

417.3 A conditional access system is not a computer, and decryption capability does not provide Internet access. A conditional access system allows a channel to be encrypted and decrypted by STBs which have the necessary rights to view the content, and allows the STB to be switched on or off by a third party. Conditional access systems are designed to function in the absence of a return path. Decryption capability does not provide a return path or Internet connectivity. It is merely a component to ensure secure access.³³⁷

³³⁶ The Policy has not provided for a return path since February 2012. Ms Mokhobo quoted from the 2008 Policy, which initially provided for a return path, but Minister Pule deleted the requirement for a return path in February 2012 because it was prohibitively costly.

³³⁷ SSL stands for Secure Sockets Layer, a cryptographic protocol used for network traffic.



417.4 An STB which is not connected to the Internet cannot be used as an "Internet café", for interactive learning or for e-transactions.³³⁸

417.5 An STB equipped with a return path (which will come at an unreasonable additional STB cost and ongoing data charges) will be able to perform simple services such as text messages and self-service interactions, but it lacks the necessary processing power and memory required to function as a computer.

The Must Carry Regulations

418 Mr Carrim misconstrued the position regarding Must Carry Regulations and any purported link between must carry obligations and STB control.³³⁹

419 Mr Carrim alleged that:

419.1 Subscription broadcasters (such as MultiChoice) unfairly take free-to-air programmes for free, re-broadcast them and use them to build market share, thereby acquiring two revenue streams, namely subscriptions and advertising.³⁴⁰

³³⁸ It is a misperception that an STB with conditional access can be used to transact electronically (e-commerce). The type of encryption used for a conditional access system in the broadcasting context is different to the encryption used for private communications and authorisations in the e-commerce context. A conditional access system encrypts and decrypts the television signal. Once that signal is decrypted, any person who has access to the STB can view it on a television screen. In contrast, bank transactions require a *completely different* type of encryption that ensures private communications and authorisations. Accordingly, the decryption capability used by a conditional access system on an STB cannot be used to transact electronically.

³³⁹ Carrim's Affidavit, paras 93 to 101

³⁴⁰ Carrim's Affidavit, para 93



Cm

419.2 If the advertising revenues were split between free-to-air broadcasters, it would significantly improve the financial position of the SABC and e.tv.³⁴¹

419.3 MultiChoice benefits financially from the Must Carry Regulations while the free-to-air broadcasters are disadvantaged, and South African free-to-air broadcasters are effectively cross-subsidising DStv.³⁴²

419.4 M-Net and DStv gain market share on the back of the popular free-to-air channels.³⁴³

420 In fact:

420.1 Must Carry Regulations are a restriction on subscription broadcasters.³⁴⁴

420.2 The Must Carry Regulations are driven by a central public interest principle of universal access articulated in the White Paper on Broadcasting Policy, 1998 to ensure that public broadcasting programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television.

³⁴¹ Carrim's Affidavit, para 97

³⁴² Carrim's Affidavit, paras 98 and 100

³⁴³ Carrim's Affidavit, para 100

³⁴⁴ ICASA prescribes Must Carry Regulations under section 60(3) of the ECA, which is under the heading "Restrictions on subscription broadcasting services".



- 420.3 The objective of the must carry obligations is to make public service broadcasting programming universally available to all citizens, by requiring subscription broadcasting licensees to simulcast on their subscription television broadcasting platforms the free-to-air public broadcasting channels broadcast by the SABC.³⁴⁵
- 420.4 The Must Carry Regulations extend SABC coverage reach and have ensured that the SABC is able to provide universal coverage to citizens.
- 420.5 The SABC exclusively derives all of the advertising revenue from the must carry channels carried on DStv, regardless of whether audiences view the must carry channels via the Sentech or DStv platforms.
- 420.6 As a result of the larger audience which the SABC gains through viewers watching SABC on pay-TV platforms such as DStv, the SABC is able to offer advertisers more eyeballs, and command higher advertising revenues, all of which accrue only to the SABC. The value of the portion of advertising revenue earned by the SABC due to SABC 1, 2 and 3 viewership over the DStv platform pursuant to the

³⁴⁵ The existing must carry obligations are designed to enable the public broadcasting service to meet its extensive statutory universal coverage and public interest obligations in line with its public broadcasting mandate. For example, the National Integrated ICT Policy Green Paper, 2014 (Notice No. 44, Gazette No. 37261, 24 January 2014) stated:

"Policies that focus on these issues are aimed at ensuring prominence of public interest content across all platforms. They include, for example, obligations requiring subscription broadcasters to carry public broadcasting content services ...

What are called 'must carry rules' requiring, for example subscription broadcasters to re-transmit public broadcasting services, are prevalent in a number of countries and are aimed at ensuring that audiences have easy access to public interest content. They are intended to ensure that audiences do not have to switch platforms to access such content." (Para 8.12.1, pp 65 – 66 of the Green Paper (pp 69 – 70 of the Gazette))



Must Carry Regulations is estimated to be approximately R569 million per annum.

420.7 People do not subscribe to pay-TV in order to watch free-to-air programming. They have no incentive to do so as the programming is available for free (including on YouTube).

420.8 ICASA conducted a regulatory impact assessment in 2018/2019, which found that:

420.8.1 The Must Carry Regulations are effective in ensuring that public broadcasting television services are universally accessible to the public.³⁴⁶

420.8.2 The Must Carry Regulations have enabled the public, who ordinarily would not have access to public television broadcasting programmes due to coverage deficiencies, to access public broadcasting television programmes.³⁴⁷

420.8.3 The Must Carry Regulations have been beneficial to all stakeholders and to the public.³⁴⁸

420.8.4 The argument that subscription broadcasting licensees have experienced subscriber growth as a result of the popularity of the SABC channels is unsubstantiated.³⁴⁹

³⁴⁶ Regulatory Impact Assessment Report on the Must Carry Regulations, ICASA, 19 March 2019 ("*Must Carry RIA Report*") (annexed as "M76"), p 12

³⁴⁷ *Must Carry RIA Report*, p 22

³⁴⁸ *Must Carry RIA Report*, p 18



421 Mr Carrim alleged that the encryption of free-to-air broadcasting signals would allow free-to-air broadcasters to assert the right to control the use of their own signals and, where appropriate, to charge pay-TV broadcasters for the re-transmission of their content and to be compensated for the value which they are adding to the pay-TV platform.³⁵⁰

422 It is particularly problematic for Mr Carrim to muddy the waters of the encryption debate with the Must Carry Regulations, as they are two separate issues.

423 The encryption of the free-to-air terrestrial broadcasting signals would have rendered –

423.1 South Africans unable to access the free-to-air channels without an STB with the necessary decryption capability; and

423.2 M-Net subscribers unable to access the free-to-air broadcasting channels without purchasing a second STB with the decryption capability.

424 In contrast, broadcasting free-to-air signals unencrypted means that the free-to-air signals are incidentally received on the terrestrial pay-TV decoders, without the inconvenience and expense of acquiring a second STB.³⁵¹

³⁴⁹ *Must Carry RIA Report*, p 17

³⁵⁰ Carrim's Affidavit, para 94

³⁵¹ In this event, pay-TV broadcasters such as M-Net do not simulcast the free-to-air channels – they are simply "picked up" by the STB.



425 Broadcasting the SABC free-to-air digital terrestrial television channels unencrypted accordingly achieves the exact universal service objectives which-

425.1 underscore the Must Carry Regulations;

425.2 prompted the SABC to reject STB decryption capability; and

425.3 Ms Mokhobo celebrated in her 2013 SABC3 interview (echoing Dr Ngubane's communication) in which she observed that it is inappropriate for the SABC's public broadcasting service to be encrypted because "*being a public broadcaster, it is very important that there is access by everybody in whatever shape or form to SABC channels.*"³⁵²

426 The encryption constraint in the SABC Agreement has the effect of promoting the achievement of universal service objectives.

CONDONATION

427 MultiChoice and its officials request condonation for the delayed filing of this affidavit.

428 In terms of the Rule 3.3 notice received by MultiChoice and its officials on 4 February 2020, MultiChoice was required to provide a response to Mr

³⁵² Interview with Ms Mokhobo, *The SABC says it will not support conditional access of the DTT set boxes*, 31 October 2013.



Am

Carrim's evidence and exercise their rights under Rule 3.3.6 within two weeks of receipt of the notice, i.e. by 18 February 2020.

429 On 17 February 2020, Webber Wentzel, the attorneys representing MultiChoice, wrote a letter to the Commission, attached as annex "M77". In this letter, our attorneys recorded that:

429.1 It had been noted that both Ms Mokhobo and Mr Kruger made allegations of unlawful or improper conduct against MultiChoice in relation to the same issues during their testimony before the Commission in November 2019. MultiChoice did not receive Rule 3.3 notices in respect of these witnesses and were accordingly not given prior notice that the testimony of those witnesses might implicate them.

429.2 MultiChoice intended to exercise its entitlement to answer the allegations by providing the Commission with a consolidated affidavit responding to the evidence of all three witnesses, which addressed the evidence of Mr Carrim, Ms Mokhobo and Mr Kruger.

429.3 In order to properly respond to the allegations, MultiChoice needed to consult with a number of people with the necessary technical expertise and personal knowledge of events that took place several years ago. Some of those people are based outside of South Africa.

429.4 MultiChoice would accordingly be in a position to provide its consolidated response to the evidence of Mr Carrim, Ms Mokhobo and Mr Kruger by the end of March 2020.



430 On 21 February 2020, in response to Webber Wentzel's letter of 17 February 2020, the Commission provided the affidavits and annexures of Mr Carrim, Ms Mokhobo and Mr Kruger to MultiChoice. This was the first time MultiChoice had sight of the full affidavits and annexures.

431 As indicated above, on 21 February 2020, the Commission emailed a further Rule 3.3 notice to Webber Wentzel, in which MultiChoice and Mr Patel were called upon to respond to the evidence of Ms Mokhobo, this time by 6 March 2020.

432 On 21 February 2020, the Commission's evidence leader, Ms Thandi Norman SC, invited Webber Wentzel and MultiChoice's Group General Counsel, Mr Brandon Foot, to a meeting. During this meeting, Adv. Norman SC informed Webber Wentzel and Mr Foot that the Commission was amenable to MultiChoice filing a consolidated affidavit in which it would respond to the allegations made against it by the end of March 2020, subject to providing a brief condonation application.



433 Mr Carrim and Ms Mokhobo presented their evidence to the Commission on 25 and 26 February respectively. On 28 February 2020, Webber Wentzel wrote to the Commission to indicate that its client would respond to the new allegations in the consolidated affidavit. Webber Wentzel also requested various documents and information concerning MultiChoice, referred to in the oral evidence of Mr Carrim and Ms Mokhobo. Webber Wentzel's letter is annexed as "M78". The documents requested were:

433.1 the supplementary affidavit of Mr Carrim;

433.2 the affidavit of Ms Theresa Geldenhuys including minutes of SABC board meetings which appeared to be attached to this affidavit (including minutes of the SABC board meeting of 2 July 2013);

433.3 the affidavit of Mr Krish Naidoo;

433.4 the affidavit of Prof Cecil Petros Lawrence;

433.5 the affidavit of Ms Lindiwe Vuyelwa Bayi;

433.6 the affidavit of Mr Tiaan Olivier;

433.7 the audio recording of the meeting held on 6 June 2013 between the interim board of the SABC and MultiChoice; and

433.8 the transcripts of the evidence of Mr Carrim and Ms Mokhobo (which at the time were not available on the website of the Commission).

434 On 3 April 2020, after no response to its letter of 28 February 2020 was received, Webber Wentzel sent a further letter, annexed as "M79", in which it



again requested the documents referred to in its letter of 28 February 2020, which were required in order for MultiChoice to fully and comprehensively respond to the allegations made against it before the Commission. Webber Wentzel noted in this letter that while it had indicated that our consolidated response would be filed by the end of March 2020, this had been delayed as a result of the delay in providing us with the requested documents, and due to the COVID-19 pandemic. In regard to the latter, Webber Wentzel noted that MultiChoice's senior management was engaged in managing the MultiChoice business in light of the implications of the COVID-19 pandemic and its declaration as an essential service provider. Moreover, the submission, which was at an advanced stage of preparation, could only be delivered by hand (and not electronically) after the lockdown period, because it would have voluminous annexures and a flash drive, and because the deponents to the affidavits would not be able to depose to their affidavits until the lockdown period is over.

435 The Commission responded to MultiChoice in a letter of the same date, in which it apologised for not sending various documents earlier and attached Mr Carrim's supplementary affidavit, Ms Theresa Geldenhuys' affidavit, and copies of some annexures thereto (certain SABC board and committee minutes). It also stated that the audio recording of the meeting between the SABC and MultiChoice of 6 June 2013 was available at the Commission's offices and could only be provided after the lockdown period had ended.

436 On 6 April 2020, in a further letter from the Commission to Webber Wentzel (annexed as "M80"), the Commission attached the affidavit of Ms Lindiwe Vuyelwa Bayi. It stated that it was not able to provide the affidavit of Prof



Am

Lawrence as he had not testified yet before the Commission and his evidence does not implicate MultiChoice. The Commission further stated that the affidavit of Mr Tiaan Olivier had recently been received and should it implicate MultiChoice, a rule 3.3. notice would in due course be sent to it. The letter was silent on the affidavit of Mr Naidoo. The Commission indicated that the audio recording would be made available to us on or about 17 April 2020, after the lockdown period.

437 Despite the fact that the vast majority of the annexures to Ms Geldenhuys' affidavit, and the affidavits of Mr Naidoo, Mr Olivier and Prof Lawrence, have not been made available to MultiChoice, a decision was taken to nevertheless file this affidavit as expeditiously as possible after receiving and considering the audio-recording of the SABC/MultiChoice meeting (which would be available after lockdown), on the basis that there may be a need to supplement the response of MultiChoice and its officials in due course. I enclose in this regard a letter from MultiChoice's attorneys to the Commission dated 10 April 2020 as annexure "M81". I also enclose the response from the Commission to this letter, dated 15 April 2020, as annexure "M82", in which the Commission states that it looks forward to receiving our submissions after the lockdown period.

438 The lockdown period was in fact not lifted on 17 April 2020 and was further extended in regulations until 30 April 2020. However, an "Alert Level" approach was then adopted in regulations promulgated on 29 April 2020. The country is currently at 'Alert Level 3', which effectively extended the lockdown period. The Commission's offices remained closed during April, May and the first half of June 2020.



A handwritten signature or set of initials in black ink, appearing to be 'Am' or similar.

439 On 4 June 2020, Deputy Chief Justice Zondo held a media briefing during which he announced that the Commission's staff were expected to return to the office on 15 June 2020, for the first time since the lockdown had been instituted. Accordingly, on 15 June 2020, our attorneys wrote to the Commission inquiring whether they could now arrange for a copy of the audio-recording of the SABC/MultiChoice meeting to be furnished to MultiChoice. I attach a copy of this letter as annexure "M83".

440 On 18 June 2020, the Commission responded to our attorney's letter of 15 June 2020 stating that the audio-recording requested had been furnished to the Commission by the SABC and arrangements could be made for its collection. The Commission's e-mail is attached as annexure "M84". Our attorneys then made arrangements to collect the audio-recording from the Commission on 24 June 2020. After our advisers listened to the audio-recording in the following days, and discrepancies were noted between the transcript prepared by the SABC and the audio-recording, our attorneys briefed a professional transcription service to prepare a verbatim transcript of the audio-recording. This process was finalised on 23 July 2020.

441 Following receipt of the professional transcript, revisions were made to this response. In addition, our attorneys had in July 2020 received the pleadings in the legal proceedings in Ghana concerning digital migration, which necessitated further revisions to this response. Further documents issued in June and July 2020 - such as the National Planning Commission Draft Paper and the bid invitation for IDTVs of the Universal Service and Access Agency of South Africa - were also incorporated. Once the revisions were made, counsel's



input was then sought and this response was finalised as expeditiously as possible.

442 As indicated in our lawyer's letters referred to above, the evidence against MultiChoice is extensive and covers technical and complex matters. It spans many years and involves numerous policy changes and various court cases related to digital migration. Since receipt of the rule 3.3 notices above, MultiChoice and its officials have acted as expeditiously as possible to prepare our response, including consulting counsel. The COVID-19 pandemic and lockdown period (including the extensions thereof) has unfortunately further delayed matters.

443 As will in any event be evident from the content and length of this affidavit and its annexures, this has required many months of preparation.

444 It is submitted, with respect, that the belated filing of this response has caused no prejudice to the Commission.

445 I accordingly request that condonation be granted for the delayed delivery of this response.

CONCLUSION

446 For all the reasons set out in this affidavit, I respectfully submit that there is no evidence that MultiChoice or its officials have been involved in any improper



conduct, still less conduct which amounts to fraud or corruption in respect of state-entities.



CALVO PHEDI MAWELA

THUS SIGNED AND SWORN TO AT DUBAI on this the 28 day of July 2020, the deponent having sworn that he knows and understands the contents of this affidavit, that the oath which he has taken in respect thereof is binding on his conscience, and that the contents of this affidavit are both true and correct.

COMMISSIONER OF OATHS

Commissioner of Oath
South African Consulate General
Dubai, United Arab Emirates
Date:..... SOUTH AFRICAN CONSULATE GENERAL

28 JUL 2020
DUBAI

Full names:

NONTLE BEJA
(Consul Administration)

Designation:

Address:

SOUTH AFRICAN CONSULATE GENERAL
Chalid Bin Al Waleed Rd.
New Sharaf Bldg. 3rd. Floor
DUBAI - DUBAI - U.A.E.

