

**ASSESSING THE INVESTIGATIVE POWERS OF
THE COMPETITION COMMISSION IN MERGER
REGULATION AND CHALLENGES POSED BY
THE DIGITAL ERA**

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

1 Introduction

The South African Competition Commission (the Commission) is celebrated as the most efficient and effective body in implementing competition law. The Commission is an independent and impartial body whose primary function includes investigating and prosecuting complaints raised against firms for failing to report notifiable mergers. Over the past decade, it has reviewed several mergers and successfully prevented many anti-competitive market structures (Blignaut, Ntshingila, and Hobson-Jones “Time to Overhaul the Merger Review Process?” 2016 16 *Without Prejudice* 37 12; Prins and Koornhof “Assessing the Nature of Competition Law Enforcement in South Africa” 2014 18(1) *Law Democracy and Development* 136 140; Kelly and Unterhalter (eds) *Principles of Competition Law in South Africa* (2017) 60).

While the Competition Act (89 of 1998) (CA) empowers the Commission to conduct investigations, the scope and extent of these investigative powers has been unclear. This question was the subject of protracted litigation between the parties in *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* ([2018] ZACC 37). In that case, the Constitutional Court was called upon to decide whether the Commission’s investigative powers included the authority to subpoena witnesses to appear before it. The decision of the court is a welcome addition to competition law jurisprudence insofar as it creates legal certainty concerning the powers of the Commission, especially in light of recent amendments to the Competition Amendment Act (18 of 2018) (CAA), which now broadens the scope of the Commission’s authority and powers. However, in light of some of the arguments that were brought up regarding missing documents, the case also serves as a warning of the challenges that the authorities may face in a more digital economy, especially relating to their exercise of investigative powers in the context of digital security, encryption and offsite storage of information. This note provides a chronological discussion of the facts, evaluates the court’s decision, highlights possible challenges to future investigations and provides concluding remarks.

2 Summary of the facts

On or about 3 July 2013, the South African Broadcasting Corporation (SABC) entered into a five-year channel licensing agreement with MultiChoice. The terms of the agreement were that the SABC undertook to develop and produce an entertainment channel for MultiChoice, which would consist mainly of content from the SABC's substantial archive of programmes and which MultiChoice would have exclusive rights to market and distribute. Furthermore, the SABC agreed to transmit free-to-air channels (FTA) on its digital terrestrial television (DTT) platform in respect of which MultiChoice would have non-exclusive marketing and distribution rights. In terms of the agreement, MultiChoice undertook to pay more than R500 million to the SABC over a period of five years (par 7). The applicants in the matter argued that the licensing agreement constituted a merger as defined by section 12 of the CA, and that the parties were obliged to notify the Commission of such merger, while the respondents opposed that view, resulting in a protracted legal battle.

In February 2015, the applicants made an application directly to the Competition Tribunal for an order compelling the SABC and MultiChoice to notify the Competition Commission of the agreement, alternatively, asking for an order that the Commission exercise its investigatory powers to determine if the agreement amounted to a notifiable merger (par 9). The tribunal dismissed the applicants' application on 11 February 2016, finding that the agreement did not give rise to a notifiable acquisition of control (see s 12(1)(a) of the CA) of the SABC by MultiChoice. The tribunal further refused to grant the alternative relief sought because the applicants had failed to make a *prima facie* case that the conclusion of the agreement constituted a merger (par 10).

The applicants appealed against the tribunal's decision to the Competition Appeal Court, which set aside the tribunal's decision on 24 June 2016. The Competition Appeal Court directed the SABC and MultiChoice to provide the Competition Commission with all documentation connected to the implementation of the agreement of 3 July 2013. The Competition Commission was directed to file with the tribunal within 30 days of receiving the information and documentation from the SABC and MultiChoice, a report recommending whether or not the agreement gave rise to a notifiable merger (par 13).

Under the directive of the Competition Appeal Court, the Commission lodged an investigation into whether the television licensing agreement entered into between the parties amounted to a notifiable merger as defined by the CA. In pursuance of the order, the SABC and MultiChoice handed over a limited number of documents, claiming that the bulk of the documents sought by the Commission either did not exist, could no longer be traced, or were irrelevant (par 15). The Commission could not make any determination based on the documents furnished by the parties and, as such, applied to the Competition Tribunal for an order authorising it to interrogate the executives and board members of the SABC and MultiChoice who initiated, negotiated and concluded the agreement. The application was objected to by the SABC and MultiChoice, who contended that the tribunal had no

jurisdiction to hear the matter. The tribunal conceded to the SABC and MultiChoice's objections and rejected the application for an order authorising the Commission to interview the SABC and MultiChoice executives and board members (par 15).

On an urgent basis, the Commission again approached the Competition Appeal Court for a declaratory order declaring that the Commission was authorised to exercise its investigative powers set out under Part B of Chapter 5 of the CA, which powers include powers to subpoena witnesses to appear before it (see s 49A of the CA). On 28 April 2017, the Competition Appeal Court held that its June 2016 order could not be construed as giving section 49A powers to the Commission. The Appeal Court further held that the June 2016 order expressly confined the Commission's source of inquiry to documentation only (par 18).

The applicants, supported by the Commission, appealed to the Constitutional Court against the April 2017 decision of the Competition Appeal Court. In the Constitutional Court, the applicants maintained that the Commission had powers to investigate notifiable mergers and that inherent in those powers was the ability to interrogate individuals involved in the negotiation and conclusion of the agreement. The SABC and MultiChoice contended that the Commission's powers to investigate were confined to a "desktop study" of the documents produced in the initial stages of the investigation; thus, it was barred from interviewing witnesses (par 24).

While the applicants, as well as the Commission, also sought an order to adduce new evidence that had come to light after initiation of the case in the tribunal in 2015, the pith of the matter and the focus of this comment was the interpretation of the CA concerning the investigative powers of the Competition Commission – specifically, whether the powers to investigate mergers in terms of section 21 of the CA read with the powers set out in Part B of Chapter 5 of the Act granted the Commission authority to conduct interviews and interrogation of witnesses in this particular matter. MultiChoice contended that the Act, as it was framed at the time, did not confer any of the powers contained in Part B of Chapter 5 on the Commission to investigate alleged contraventions of section 13A of the Act. It relied on section 21(1)(c) of the Act, which limited the investigatory powers to investigations of alleged infringements of Chapter 2 of the Act (par 40).

After considering the papers filed and the arguments presented, the court ruled in favour of the applicants in respect of the Commission's investigative powers. It made the following order:

- "1. Leave to appeal is granted.
2. The appeal is upheld, and the Competition Appeal Court's order of 28 April 2017 is set aside and replaced with the following:
 - (a) It is declared that the order handed down by the Competition Appeal Court on 24 June 2016 does not preclude the Competition Commission from exercising its non-coercive and coercive investigative powers in terms of Part B of Chapter 5 of the Competition Act 89 of 1998 for purposes of discharging its obligations under paragraph 3 of the June 2016 order.
 - (b) The Competition Commission is directed to file its report with the Competition Tribunal, as contemplated in paragraph 3 of the June 2016 order, within 30 court days of this order.

- (c) The first and second respondents are ordered jointly and severally to pay the costs of the application, including the costs of two counsel.” (par 90)

3 Evaluation of the court’s decision

3 1 *Functions and powers of the Competition Commission*

The functions of the Competition Commission are provided under Chapter 4 of the Act (s 21 of the CA). One of the functions of the Commission with which this note is concerned is the consideration of mergers in terms of Chapter 3 of the Act. The Commission is responsible for authorising, with or without conditions, prohibiting or referring mergers of which it receives notice (s 21(1)(e) of the CA). A merger occurs when one or more firms directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another firm (s 12(1)(1) of the CA). The establishment of direct or indirect control was at the heart of the matter in this case (see s 12(2)(g) of the CA).

In terms of section 11(5) of the CA, mergers may be categorised into small, intermediate or large. Parties to a small merger do not have to notify the Commission but may voluntarily do so (s 13(1) of the CA). A party to an intermediate or large merger must notify the Competition Commission of that merger in the prescribed manner and form (s 13A(1) of the CA). It follows that the parties may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17 (s 13A(3) of the CA). It is established that the Competition Commission is mandated to investigate intermediate and large mergers in terms of section 21(1)(e), read with section 12A(1) and section 13B of the CA. The fulcrum of the applicants’ initial 2015 case in the Competition Tribunal was that the SABC and MultiChoice had concluded a merger and had failed to notify the Commission in terms of section 13A of the Act. Emanating from the 2015 matter, the issue for determination in this particular case was whether the Commission had the power to subpoena individuals believed to have information material to the investigation into whether or not the SABC and MultiChoice had concluded a notifiable merger.

In determining the powers of the Commission, the court noted that “the Commission gets its original investigative powers from the Competition Act and not the June 2016 order” (par 28); and having established that the Commission’s powers were statutory, the only question left was to determine whether the Competition Appeal Court’s decision of June 2016 precluded the Commission from exercising its powers. The court held that the provisions of the CA must be interpreted to give effect to their purpose in the context of the Act as a whole. To this end, section 1(2)(a) of the CA demands that its provisions be interpreted in a manner consistent with the Constitution of the Republic of South Africa, 1996, and which gives effect to the purposes of the Act set out in section 2 (par 30). This approach is consistent with the purposive interpretation of statutes described by Sachs J

– that is, the need for judges not to follow the literal meaning of the words or grammatical structure of the sentence, but to be guided by the design or purpose that lies behind the statute (*S v Mhlungu* 1995 (3) SA 867 (CC) 916). Using this interpretive approach, the court dismissed MultiChoice's contention that section 21(1)(c) limited the Commission's powers to investigating contraventions of Chapter 2. It held that the long title of the CA stated that the Commission is responsible for the investigation of mergers. Section 21(2)(c) read with section 13B put beyond question that the Commission is authorised to investigate notifiable mergers in Chapter 3 of the CA (par 42).

The court held further that the power to investigate whether a transaction constitutes a notifiable merger stemmed from section 13A(1) and (3) read with section 59(1)(d)(i) of the CA. The sections imply that the Commission is authorised to investigate transactions to determine whether they constitute or give rise to a notifiable merger. Regarding the powers under Part B of Chapter 5, the court held that the investigative powers apply to any investigation that the Commission may conduct in terms of the CA, including a merger investigation (par 47). The purpose of section 13A(3) of the CA is to ensure that the Commission examines as many mergers as possible. In that vein, section 49A had to be construed broadly to give effect to that objective. The powers of search and summons granted in sections 49 and 49A were thus vital to the Commission's powers to investigate a merger (par 48).

Concerning the investigation, it was not meant to be a rudimentary "desktop" evaluation of the documents submitted by the parties to a merger or a transaction giving rise to a merger (par 50). The Commission's investigatory powers were not granted by the June 2016 order, and in the absence of any prohibition in the June 2016 order relating to the Commission's use of its coercive and non-coercive statutory powers, the Commission's statutory powers remained intact (par 51). The court found that the Competition Appeal Court erred in finding that the Commission's investigative powers in compiling its report were "expressly confined exclusively to the documents set out in the order" (par 65). Therefore, the Commission had powers to exercise its statutory powers of investigation in the matter (par 87). The authors agree with the reasoning of the court in declaring the powers of the Commission and add that the Commission is a creature of statute. Therefore, the powers and limitation of its authority are found in the enabling statute i.e., the CA. In this case, the CA gives the Commission powers to subpoena witnesses in terms of section 49A. Why the respondents raised a lack of investigative powers as an issue in the first place confounds the mind as they should have been aware of the nature and effect of statutory powers granted to the Commission.

3.2 *Separation of powers*

The Competition Appeal Court held that its June 2016 order did not and could not be read to give the Commission powers in terms of section 49A of the Act. It further held that the order was "clear and unambiguous" and that it "expressly confined the source of the inquiry to be conducted by the Commission *exclusively* to documentation as set out in the order" (par 18).

As alluded to in 3.1 above, the authors concur with the Constitutional Court's decision that the investigative powers of the Commission stemmed from a statute and not from a court order. It is submitted that a court order that restricted or sought to restrict the statutory powers of the Commission would amount to an unwarranted breach of the "separation of powers" doctrine.

The doctrine of separation of powers clearly provides that the legislature promulgates the law, the executive designs policies to implement and enforce the law, and the judiciary interprets and applies the law. Therefore, the judge must apply the law and not make it. The authors are mindful of the fact that a complete separation of powers might not be attainable as there have to be checks and balances between the different branches of government, lest one branch exercise its powers unconstitutionally (see Maqutu "When the Judiciary Flouts Separation of Powers: Attenuating the Credibility of the National Prosecuting Authority" 2015 18 *Potchefstroom Electronic Law Journal* 2672 2674; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 37; *Ex Parte: Chairperson of the National Assembly, In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) par 109).

The Commission's powers to investigate and summon witnesses are spelt out by the legislature in Chapter 5 of the CA. Thus, in its investigation, the Commission is confined to the already-existing powers. If the Commission were to exceed the powers afforded to it by statute, the courts would then be required to intervene. This was not the case in the matter at hand; in this case, the Commission's prayer to subpoena witnesses was well within the ambit of its powers granted by section 49A of the Act. There was thus no need for the Competition Appeal Court to overstep its function and attempt to make a new law for the Commission. The Competition Appeal Court is mandated to review the tribunal's decisions, consider appeals from the Tribunal (s 37(1) of the CA), and not conduct investigations on behalf of the Commission or curtail statutory powers of the Commission. The Competition Appeal Court has no mandate to investigate complaints or mergers and was not involved in the Commission's initial investigation; it was, therefore, not in a position to direct which evidence should or should not have been examined by the Commission. Langa J once stated:

"It is a necessary component of the doctrine of separation of powers that courts have a Constitutional obligation to ensure that the exercise of power by other branches of government occurs within Constitutional bounds; but even in these circumstances, courts must observe the limits of their powers." (*Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) par 33)

The Constitutional Court's decision *in casu* expunged the decision of the Competition Appeal Court and, in so doing, prevented the creation of an improperly founded precedent.

4 Digitalisation as a potential challenge to the Commission's investigative powers

The case clarified the powers of the Commission in the traditional context and also augmented the challenges that technological developments have

brought insofar as investigations by the competition authorities are concerned. Digitalisation and the development of advanced technologies have given rise to a significant change in the manner in which data is obtained, stored and preserved. In previous years, an individual would memorise the contents of an incriminating document and thereafter destroy, hide or lock it in a safe. However, in this digital day and age, especially in the corporate world, documents containing trade secrets, clientele lists, or company agreements containing sensitive information are usually kept as electronic documents on a computer's hard drive. To restrict access, passwords or passcodes are used. Most documents containing incriminating information or company secrets are stored in an encrypted format that would require an encryption key to decipher. A further level of security would be encrypting a document and storing it in the cloud by way of a cloud-based server. Only the cloud server user would be aware of such a server and/or document (Theophilopoulos "Electronic Documents, Encryption, Cloud Storage and the Privilege Against Self-Incrimination" 2015 132 *South African Law Journal* 596 599). In the face of these technological advancements, the efficiency of the Commission's investigations rests upon the successful collection and processing of digital evidence and interviews with individuals who are believed to know the passcodes, passwords or encryption keys to such evidence.

It is submitted that although access to encrypted documents or digital evidence was not an issue specifically raised in this case, it might as well have been, owing to documents being reported as missing or non-existent (par 15), a standard consequence of encryption. This argument is supported by Kerr's explanation of the nature of digital evidence. He suggests that there are often two steps to searching for and retrieving evidence when dealing with digital evidence. The first step is to search for the physical device, whereas forensic investigators in the second electronic step would search the physical device for information or data (Kerr "Search Warrants in an Era of Digital Evidence" 2005 75 *Mississippi Law Journal* 85 86). Where evidence is stored on a physical device and is encrypted and the second search is not conducted at all or not properly, this may result in reports of missing or non-existent documents and/or information. In light of the above possibilities, the question then arises: what powers does the Commission have in a situation where documents and other data are stored on a physical device but are encrypted, therefore appearing as missing or non-existent?

It is argued that the Constitutional Court decision confirming the Commission's investigative powers also empowers the Commission to interrogate witnesses in connection with encrypted documents. Kathree-Setiloane AJ held that even though the Competition Appeal Court had interpreted its order as limiting the investigation to documents, the Commission's statutory investigative powers remained intact (par 65). The Commission, it is suggested, had and has the authority to interrogate witnesses where documents provided by parties do not provide enough information, are missing or are secured through passwords, passcodes or encryption keys. The authors proffer that the powers to subpoena documents and/or witnesses include the power to retrieve passwords, passcodes or encryption keys, as the case may be, in order to access the information contained in those documents. This would particularly be the

case where a witness voluntarily discloses to the authorities that documents exist that are secured by password, passcode or encryption key. In other instances, the Commission may realise during their investigation that gaining access to a document on the physical device requires a password or passcode. It is worth noting that at present, the South African common or statutory law is insufficient to deal with the conflict between the privilege against self-incrimination and compelling an individual to provide a password, passcode or an encryption key in order to gain access to electronic documents that would incriminate them. It is our submission that this could have been the case with the documents reported as incomplete, missing or non-existent, and may pose a challenge for the Commission in conducting its investigations in future unless a pronouncement is made specifically in relation to digital data encryption. The authors predict that data and/or document encryption and access to such documents will soon be the centre of litigation in competition forums and in our courts generally.

It is also worth noting that the advent of the Protection of Personal Information Act (4 of 2013 (POPIA)) and its standards regarding accessing and processing any personal information belonging to another person, coupled with the challenges of digitalisation such as encryption, may also pose a challenge to the investigative powers of the Commission. In terms of POPIA, a person or company in South Africa that can obtain, handle or store the personal information of another individual, whether in the context of their employment or as a service provider, is required to take steps to protect the confidentiality of this information. Section 5(*h*) and (*i*) of POPIA permit a data subject to institute a complaint to the Regulator or commence civil proceedings for any interference with their personal information. Considering the provisions of POPIA insofar as individuals have a right to protection of their personal information and confidentiality, the authors foresee the possibility that “malicious compliance” with POPIA may be used as a defence to frustrate and delay investigations by the Commission.

For instance, were the Commission to subpoena certain documents in line with its confirmed investigative powers, a firm might raise the defence that the requested documents (encrypted or otherwise) contain the personal information of their employees, clients and or suppliers, and that complying with the subpoena would thus violate provisions of POPIA. However, it is important to stress that section 6 provides that POPIA does not apply to processing personal information by or on behalf of a public body where the purpose of disseminating personal information is the detection or prevention of crime or investigation and proof of an offence. As a consequence, it is submitted that the Commission, which is a public body whose investigations serve the public’s interest, should be able to access personal information that would otherwise be protected under POPIA, where it has reasonable suspicion about or preliminary evidence of conduct in contravention of the CA.

Another issue that has been highlighted by the advent and application of POPIA is that of jurisdictional conflict. With specific reference to POPIA, where the Commission is in the middle of an investigation and has subpoenaed documents, individuals may stymie the investigation by instituting complaints to the Information Regulator or even commencing civil

proceedings regarding section 5, and then refusing to comply with the subpoena citing the *sub judice* principle. While the example of POPIA is used, various industry regulators are responsible in different sectors where the Commission may institute investigations, thereby raising questions of jurisdiction, overlapping functions, and duplication of administrative processes. For example, in the *SABC/MultiChoice* case, both entities were regulated by the Broadcasting Complaints Commission of South Africa (BCCSA); the Commission had also recently conducted a data market enquiry within the telecommunications industry, where the Independent Communications Authority of South Africa (ICASA) is the regulatory body; and lastly, the Commission had also conducted investigations in the banking sector, where the Financial Sector Conduct Authority (FSCA) is the primary regulatory body.

While the possibility of duplication of investigations or complaints and the conflict between the Commission and industry regulators is real, it must be borne in mind that the South African legal system recognises the principle of concurrent jurisdiction (Ngwepe “Serving Two Masters: Concurrent Jurisdiction Between the Competition Commission and the Independent Communications Authority of South Africa: Notes” 2003 120(2) *South African Law Journal* 243). The CA confirms this principle and provides that insofar as the Act applies to an industry or sector that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapters 2 or 3 of the Act, the Act must be construed as establishing concurrent jurisdiction in respect of that conduct (s 3(1A)(a) of the CA). The CA also provides for the establishment of procedures to manage areas of concurrent jurisdiction and to foster cooperation with industry regulators (s 82(3) of the CA). The Commission has been proactive in this regard and has gone on to conclude Memoranda of Understanding (MOUs) with various industry regulators to facilitate the cooperation contemplated by the Act (<https://www.compcom.co.za/mou-with-sector-regulators-in-south-africa/>). Therefore, in matters where there may be conflicting powers or duplication of processes, the above MOUs will be cardinal to the resolution of same.

5 Conclusion

The issue for determination by the court was not a complex one insofar as the law regarding statutory powers is unambiguous, and neither was the decision controversial; however, it cannot be trivialised. The investigative powers of the Competition Commission, which ensure its efficacy, were being challenged, and the apex court’s confirmation of the Commission’s powers serves two main goals. First, it restated that where a court, tribunal or Commission is a creature of statute, its powers and authority are governed by statute and nothing else. The confirmation of the Commission’s powers enabled the Commission to conduct a full and further investigation into the *SABC/MultiChoice* agreement, whereafter it deemed the parties to have concluded a merger in terms of section 12 of the Act. Secondly, the judgment confirms the principle of separation of powers by admonishing the Competition Appeal Court for attempting to limit powers granted to the Commission by statute. The principle was further evidenced by the court’s

steering clear of the parties' primary dispute, namely whether SABC and MultiChoice had indeed concluded a merger.

As an unintended consequence, while restating the law and creating legal certainty through the confirmation of the Commission's powers, the judgment also highlighted a key issue that is noteworthy in the digital era and in the advent of the Fourth Industrial Revolution relating to the search, seizure, preservation and presentation of digital evidence in future investigations. Although the court's decision was a victory for the applicants and the Commission, the Commission still has its work cut out in conducting investigations in the digital era. Given the ever-increasing prevalence of technology and the advent of data encryption and securing documents through cloud servers, the Commission might face challenges in exercising the investigative powers confirmed by the court.

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