

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of meeting: 5 August

Case number: 36 /2010

SECOND COUNCIL REFERENCE: SUPER 5 MEDIA OWNERSHIP AND CONTROL COMPLIANCE WITH SECTION 64 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 (ECA) INCLUDING RELATED MATTERS

Complaints and Compliance Committee

P Delport	(Acting Chairperson)
S Thakur	(CCC Member)
N. Ntanjana	(CCC Member)
T. Ramuedzisi	(CCC Member)
J.C.W. Van Rooyen SC	(Councillor)

JUDGMENT

PROF P DELPORT

[1] On the 29th June 2010 the Complaints and Compliance Committee issued its judgment in the inquiry as to whether Super 5 Media (Pty) Ltd complied with section 64 of the Electronic Communications Act 2005 (“ECA”). The conclusion which was reached after a hearing was that Super 5 Media (Pty) Ltd complied with section 64 of the ECA.

¹ In terms of s 17C of the ICASA Act 13 of 2000 as amended

The section limits foreign interests in and excludes direct or indirect control by a foreigner of a broadcaster licensed in terms of the ECA.² It is clear from the ICASA Act that a finding by the CCC that a licensee is in compliance, is final and is not referred to the Council of the Authority for confirmation.³ This approach is supported by the Constitutional Court.⁴ Only when non-compliance is found by the CCC a recommendation to Council as to sanction is made.

[2] On the 15th July 2010 a letter from attorneys Edward Nathan Sonnenbergs was received by the Chairperson of ICASA. The attorneys act on behalf of Videovision Home Entertainment (Pty) Ltd and MSG Afrika Media (Pty) Ltd. They state that the clients are, collectively, 25% shareholders in Telkom Media (Pty) Ltd. Telkom Media transferred its shares in May 2009 to Shenzhen Media, the owner of the Broadcaster which is presently called Super 5 Media (Pty) Ltd.

[3] The attorneys contend:

² Section 64 of the ECA provides as follows:

(1) *A foreigner may not, whether directly or indirectly—*

(a) exercise control over a commercial broadcasting licensee; or

(b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty percent.

(2) *Not more than twenty percent of the directors of a commercial broadcasting licensee may be foreigners.*

³ See *MCU v Radio Mafisa* (CCC case 1/2007).

⁴ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) (2008 (4) BCLR 384)

- (a) that Telkom Media's sale of shares to Shenzhen Media was invalid as a result of a breach of contract with the minority shareholders; that the meeting in which the resolution to change the name to Super 5 Media was not valid, since proper notice had not been given; and that the meeting in which recapitalization was decided upon could not validly have resolved to do so.
- (b) Contraventions of the Companies Act are also alleged.
- (c) Two allegations concerning amendment of the licence and ICASA's omission to publish this are also made.⁵
- (d) An allegation that Shenzhen "may" have contravened section 64(1)(a) of the ECA in that the foreign shareholder is in direct or indirect control of the broadcaster, Super 5 Media. In so far as section 64(2) is concerned, it is contended that "it is not clear whether this prohibition has been contravened."

[4] The alleged breach of contract, irregularities or invalid acts does not fall within the jurisdiction of the CCC. The CCC also does not have jurisdiction as to whether ICASA has acted regularly or in accordance with the relevant legislation. Neither does it have jurisdiction as to offences in terms of the Companies Act. All these matters fall within the jurisdiction of the Courts.

⁵ "Telkom and Shenzhen are obliged to apply to ICASA to amend Telkom Media's I-BS licence (it is not clear whether this has been done)" and ICASA must publish the application to amend in the Government Gazette for public comment, and thereafter has the discretion to hold a public hearing (this has not been done)"

[5] This brings us to section 64 of the ECA. It is clear that the attorneys are unaware of the finding of the CCC on 24 June that Super 5 Media is in compliance with section 64.

The CCC accordingly finds:

1. That the CCC has no jurisdiction to pronounce on the alleged irregularities or omissions as set out in 3 (a), (b) and (c) above. These are matters for the Courts.
2. That the CCC has recently held that Super 5 Media is in compliance with section 64.
3. That a hearing in this matter is, accordingly, not necessary.



P DELPORT

5 August 2010

ACTING CHAIRPERSON

Councillor van Rooyen and Members Ntanjana, Thakur and Ramuedzi concur with the above judgment.