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GENERAL NOTICE

NOTICE 597 OF 2010

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTIFICATION FOR CHANGE OF SHAREHOLDING AND NAME IN TELKOM MEDIA (PTY) LIMITED

REASONS FOR DECISION

27 May 2010

1. INTRODUCTION

In July 2008, ICASA took a decision to award an Individual commercial subscription broadcasting service licence to Telkom Media (Pty) Ltd. The licence was physically issued to Telkom Media (Pty) Ltd in August 2008. Subsequent thereto, Telkom SA Limited, a majority shareholder in Telkom Media took a decision to disinvest in Telkom Media by selling its shares to a third party, namely Shenzen Media South Africa (Pty) Ltd.

On 06 May 2009, ICASA was notified by Telkom SA Limited by way of a letter of its intention to sell its shares to Shenzen Media South Africa (Pty) Ltd.¹ In response to the said letter, ICASA sought clarity from Telkom SA Limited on the nature of the transaction between itself and Shenzen Media. The council of ICASA on the other hand took a resolution to appoint two (2) councillors, namely, Fungai Sibanda and Marcia Socikwa to attend to, on behalf of the Authority, the transaction on sale or transfer of shares by Telkom Media (Pty) Ltd to Shenzen Media (Pty) Ltd.

On 8 May 2009, ICASA represented by the three (3) aforementioned councillors, met with representatives from Telkom Media (Pty) Ltd to discuss and get a clear understanding on the nature of the transaction on sale of shares by Telkom Media to Shenzen Media. After deliberating on the matter, the following decisions were taken:

- That Telkom Media must submit to the Authority all necessary documentations relating to the transaction and transfer forms prescribed in terms of the Processes and Procedures Regulations, 2008 by no later than Friday, 15 May 2009; and
- That the documentation referred to above must include shareholder information of Shenzen Media South Africa (Pty) Ltd.

Telkom SA assured the meeting that Shenzen Media South Africa (Pty) Ltd is a company registered in accordance with the company laws of the Republic of South

¹ Letter dated May 2009 received from Telkom SA

Africa and that only twenty percent (20%) of the company is foreign-owned in line with the provisions of section 64 of the *Electronic Communications Act, 2005* (Act No. 36 of 2005).

On 15 May 2009, ICASA received from Telkom Media a notification of change of details in Telkom Media (Pty) Ltd (“Licensee”). The following documents/attachments were appended to the notification:

- Business Plan;
- Share Sale Agreement;
- Individual Broadcasting Service Licence;
- Round Robin Resolution passed by directors of Telkom Media (Pty) Ltd in respect of the share sale agreement and resignation of directors;
- Notification of transfer of ownership equity in the holder of the individual licence;
- Certificate of incorporation of Maxshell 109 Investments (Pty) Ltd (CM1);
- Certificate of change of name of company now called Telkom Media (Pty) Ltd(CM9);
- Memorandum of Association(CM2);
- Articles of Association of a company having a share capital;
- Contents of register of directors, auditors and officers (CM 29);
- Certificate of incorporation of Little River Trading 248 (Pty) Ltd (CM1);
- Certificate to commence business for Little River Trading 248 (Pty) Ltd (CM46);
- Certificate of change of name of company now called Shenzhen Media South Africa (Pty) Ltd (CM9);
- Memorandum of Association (CM2);
- Articles of Association (CM44); and
- Amendments to company information (CM22).

A request, in the notification, for confidentiality was made in respect of the business plan, Share Sale Agreement, licence obligation and the round robin resolution passed by the directors of Telkom Media (Pty) Ltd in respect of the share sale agreement and resignation of directors. The Authority transmitted a letter to Telkom Media

requesting motivation for its request for confidentiality in terms of section 4D of the ICASA Act, 2000 (Act No. 13 of 2000)².

2. LEGISLATIVE FRAMEWORK

Shenzhen Media South Africa (Pty) Ltd though a company registered in terms of the South African company laws one of its shareholders, Sino-African Development Group, is an entity registered in China (Hong Kong) and thereby triggers the provisions of section 64 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) that mainly deals with limitations on foreign control of commercial broadcasting services. Section 64 thus provides:

- (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 (20) Percent".
- (2) "Not more than twenty (20) percent of the directors of a commercial Broadcasting licensee may be foreigners".

Section 13 of the ECA deals with transfer of individual licences or change of ownership and thus provides:

- (1) An individual license may not be assigned, ceded or transfer to any other person without the prior written permission of the Authority.
- (2) An application for permission to assign, cede or transfer an individual license may be made to the Authority in the prescribed manner.
- (3) The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual license, in order to-
 - (a) Promote the ownership and control of electronic communications services by historically disadvantaged groups; or
 - (b) Promote competition in the ICT sector.
- (4) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, or the ownership or control of an individual license for

² Letter dated 19 May 2009 addressed to Telkom Media

broadcasting services in order to promote a diversity of views and opinions.

- (5) Regulations contemplated in sub-section (3) and (4) must be made-**
- (a) With due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and**
 - (b) After the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study”.**

In terms of regulation 3 of the Standard terms and conditions for Individual licences regulations³, a licensee must notify the Authority on the occurrence of changes to the licensee’s details and information. The said regulation 3 provides:

“A licensee must submit written notice to the Authority within seven (7) days of the occurrence of changes in respect of”

- (a) The board of directors of the licensee;**
- (b) The name of the licensee; and**
- (c) The shareholders’ agreement or similar agreement governing the affairs of the licensee”.**

Section 2 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) contains a few objects that may be appropriate for purposes of the transaction entered into and between Telkom Media and Shenzhen Media of South Africa. It is common cause that the primary object of the Act is to regulate the electronic communications in the Republic in the public interest. Section 2(w) of the ECA provides:

“ensure that the broadcasting services are effectively controlled by South Africans”.

This object re-affirms the limitations placed on foreign control of commercial broadcasting services in terms of section 64 of the ECA and the seriousness of the Legislature on the subject of control of broadcasting services by foreigners.

Section 2(v) of the ECA provides:

“ ensure that commercial and community broadcasting licenses, viewed collectively, are controlled by persons or groups of persons from diverse range of communities in the Republic”.

3. ANALYSIS OF THE NOTIFICATION

Telkom Media attached a litany of documents when it submitted on 15 May 2009 its notification of change of details in Telkom Media (Pty) Ltd to the Authority. This document will attempt to capture the salient parts of these documents that are necessary for purposes of the notification. In doing so, the Authority will tread with caution in putting on the public domain information that it has made a determination of confidentiality. We must be mindful that the Authority has acceded to the request of the licensee that the business plan, share sale agreement and the round robin resolution passed by the directors of Telkom Media (Pty) Ltd must be treated as confidential information.

The share sale agreement entered into and between Telkom SA Limited and Shenzhen Media South Africa (Pty) Ltd was concluded on 29 April 2009. The Authority was notified of this transaction by way of a letter dated 06 May 2009, from Telkom SA Limited⁴. The letter in a nut shell states that Telkom SA Limited wishes to advise that “it has negotiated the sale of its stake in Telkom Media and that an announcement will be made today in this regard”. The letter further states that “Telkom’s 75% share in Telkom Media and loan claims will be sold to Shenzhen Media South Africa (Pty) Ltd, which is a company registered in accordance with the laws of South Africa and that the minority shareholders were accordingly informed of the transaction”.

Upon receipt of the letter from Telkom SA Limited, the Authority arranged a meeting on 08 May 2009 whereat the parties agreed that Telkom Media (Pty) Ltd will submit a formal notification in terms of the applicable regulations before the Authority.

The notification received from the licensee reveals that 80% of Shenzhen’s shares are owned by Imbani Media (Pty) Ltd and the remaining 20% are owned by Sino-Africa Group (Pty) Ltd a foreign entity registered in Hong-Kong, Republic of China. The

⁴ Letter dated 06 April 2009 addressed to the Authority.

foreign ownership component of the Shenzhen Media's shareholding triggers the provisions of section 64 of the ECA that deals with limitations on foreign control of commercial broadcasting services. Media, be it print or television, is a powerful purveyor of ideas and values and plays a pivotal role in not only providing entertainment but also disseminating information networking and cultivating diverse opinions, educating and empowering the people to be informed citizens so as to effectively participate in the democratic process; preserving, promoting and projecting the diversity of Indian culture and talent⁵.

It is against this backdrop that the Legislature has deemed it appropriate and necessary that statutory limitations on foreign control of commercial broadcasting services be in place with a view to promote plurality of ownership that ensures citizens have access to a variety of sources of news, information and opinion. The mischief that the Legislature attempts to cure is, if foreigners were allowed unlimited control over commercial broadcasting services, that there is a potential danger of importing cultures and content that may be beamed in our televisions to the detriment of our own local cultures and content.

In *Caxton*⁶ the court in dealing with sections 64, 65 and 66 of the ECA remarked as follows:

“Much was made of ICASA’s obligation to apply relevant laws and regulate and monitor the broadcasting industry. One thing is clear: the aims of the relevant statutes, referred to earlier, are to firstly, prevent foreign influence in the broadcasting material and secondly, to control monopolies”.

The judicial pronouncement emphasises the critical importance of exercising control over foreign ownership in respect of commercial broadcasting services in the country. The Authority views its functions and responsibilities, particularly in terms of section 64 of the ECA, in a serious light given the remarks made by the learned Judge Claassen J when he stated:

⁵ TRAI, Consultation paper on media ownership New Delhi 23 September 2008

⁶ *Caxton CTP Publishers and Printers Limited v ICASA and Others* case no: 13300/08 TPD (unreported) at paragraph 27 page 20

“Suffice to say, I agree with Mr Symon that it (ICASA) has extraordinary wide powers to institute and execute investigations into any issue relating to a broadcaster or a proposed broadcaster regarding not only the normal requirements, but also specifically its control, shareholding and share capital”.

In order for the Authority to be able to apply its mind whether there is compliance with the provisions of section 64 of the ECA, it is incumbent upon the licensee to present to the Authority all the relevant facts with supporting documents thereto. The licensee attached a few documents when it submitted the notification on 15 May 2009 to the Authority. The articles of association and the memorandum of association submitted are worded in very generic terms and as a result do not assist the Authority in making a value judgement whether the licensee complies with the provisions of section 64 of the ECA. The Share Sale Agreement concluded and entered into between Telkom SA Limited and Shenzhen Media does not add any value to the Authority in making a finding that there is compliance with the provisions of section 64 of the ECA.

The purchase price that the parties agreed upon is defaced in the agreement. The Authority maintains that the purchase price is critical in considering the provisions of the shareholders agreement and the Funding agreements in an attempt to establish issues of ownership and control. The lack of the shareholders agreement, share certificates, access to share register and the funding agreements make it extremely difficult, if not impossible, for the Authority to ascertain whether there is compliance with the provisions of section 64 of the ECA.

It is trite that the Authority is obliged to enquire whether a licensee has complied with the provisions of section 64 of the ECA. In the words of Streicher J⁷ (as he then was) though he was dealing with section 48, 49 and 50 of the now repealed IBA Act, 1993 (Act No. 153 of 1993) it was stated:

“No discretion is entrusted to the third respondent (IBA) in this regard. Section 48(1)(a) and (b) stand on their own without any reference to the third respondent. Whether the limitations imposed by these sections are contravened

⁷ Oneshelf Trading nine (Pty) Ltd v De Klerk NO and Others 1997 (3) SA 103 at 114 H-115C

must be determined objectively.....The third respondent cannot refuse to enquire into that question. To determine that question is in its own jurisdiction but its decision is not conclusive”.

The court clearly sets out the role of the Authority when it comes to whether the licensee has complied or not with the provisions that relates to limitations of foreign control to commercial broadcasting services. The court went on to state that the test to the enquiry is an objective one.

The share sale agreement entered into between Telkom SA Limited and Shenzhen Media was concluded on 29 April 2009 and the Authority was advised of the transaction on 06 May 2009, though the formal notification and the necessary documents were submitted to the Authority on 15 May 2009. In terms of regulation 3 of the Standard terms and conditions regulations a licensee is mandated to notify the Authority in writing within seven (7) days of the occurrence of changes in respect of its board of directors, name and shareholders agreement or similar agreement that governs the affairs of the licensee.

The letter dated 06 May 2009 received from the licensee advised the Authority of the sale of shares and not changes in respect of directors and the shareholders agreement or similar agreement governing the licensee's affairs. Secondly, is the letter dated 06 May 2009 sufficient notification as contemplated in regulation 3 of the standard terms and conditions regulations or has it the capacity to interrupt the computation of the seven (7) days period pending the submission of the formal notification with the accompanying documents or annexures.

The Authority was advised or notified by the licensee on change of name and directors by way of a letter dated 06 August 2009 and no documents were appended thereto in order to support these changes. The Authority ordinarily expects the licensee to attach a certificate of change of name (CM9) issued by CIPRO in terms of section 49 of the Companies Act, 1973 (Act No. 61 of 1973) and a certificate of confirmation (CM27) issued by CIPRO in respect of appointment of directors. The importance and relevance of these certificates confirms the date on which the name change and the appointment of directors become effective. These certificates will, more importantly, assist the Authority to determine whether the licensee has notified

the Authority within the seven (7) days period prescribed in terms of regulation 3 of the Standard terms and conditions regulations.

The Authority published a notification of a sale and transfer of shares: Telkom Media (Pty) Ltd on 22 July 2009 in the Gazette. The notice was published in the public interests and to afford interested parties to submit written representations to the Authority.

It is noteworthy to state that the Authority received communications via the lawyers of the minority shareholders of Telkom Media (Pty) Ltd expressing their discontent on the sale of shares entered into between Telkom SA Limited and Shenzhen Media South Africa (Pty) Ltd. The dissatisfaction with the deal in essence was about the failure of Telkom SA Limited to consult the minority shareholders as well as access to the share sale agreement that was concluded between the parties. The initial reaction of the Authority was to communicate the issues raised by the minority shareholders to the licensee and get a response to the allegations made by the minority shareholders.

A response was received via the attorneys of the licensee (Super 5 Media) stating, among others, that the Authority has no jurisdiction to entertain shareholder disputes as there is a forum for such disputes and that there is or was no obligation in fact or law to consult the minority shareholders on the share sale agreement concluded between Telkom SA Limited and Shenzhen Media (Pty) Ltd SA and that there was no right of pre-emption that was agreed upon between the shareholders of Telkom Media (Pty) Ltd SA. On the subject of access to the share sale agreement it was pointed out that the commercial document was confidential and therefore access was denied to the minority shareholders.

4. REASONS FOR DECISION

The Authority had to come to a decision whether the licensee has complied with regulation 3 of the Standard terms and conditions regulations. The regulations in question makes it incumbent upon a licensee to submit a written notice to the Authority within seven (7) days of the occurrence of changes in respect of directors, name of the licensee and shareholders agreement or similar agreement that governs the affairs of the licensee. It is self-evident from the manner in which the regulation is worded that intention is to notify the Authority after the change had occurred in

respect of directors, name of the licensee and changes in the shareholders' agreement. The regulation in its current form and content does not in any way obligate the licensee to seek approval from the Authority before the changes occur.

The meaning of the words "**notification**" and "**notify**" are explained respectively in the Black's Law Dictionary⁸ as follows:

"A formal announcement of a legally relevant fact, action, or intent";

"To inform a person or group in writing or by any method that is understood".

The Authority has decided that there is compliance with regulation 3 of the regulations in so far as the sale of shares is concerned. The Authority is convinced that the letter dated 06 May 2009 is sufficient notice as contemplated in regulation 3 of the regulations and therefore there was compliance with the seven (7) days period prescribed in the regulations.

In as far as the changes that occurred in respect of the name and directors of the licensee, though the Authority was notified by way of the letter dated 06 August 2009 received from the licensee, such letter did not assist the Authority on whether the notice was submitted within the prescribed seven (7) days period in terms of regulation 3 of the regulations. The licensee has, in the Authority's view, substantially complied with the provisions of regulations 3 of the Standard terms and conditions regulations notwithstanding non-submission of the certificates of change of name and the confirmation issued by the office of CIPRO.

The Authority had to invoke the provisions of section 64 of the ECA upon a realization that one of the shareholders in Shenzhen Media South Africa (Pty) Ltd, Sino-Africa Group Limited was a foreign entity registered in Hong-Kong, Republic of China. In the notification it is stated that the foreign entity owns twenty percent (20%) of the equity shareholding of Shenzhen Media South Africa (Pty) Ltd. It must be noted that to merely state that there is a 20% equity shareholding for the foreign entity is not enough for purposes of regulatory over-sight on the part of the Authority. It is in fact the beginning of the enquiry for the Authority. In order for the Authority to apply its mind to the issue at hand it must be placed in possession of the share register

⁸ Seventh Edition, Bryan A. Garner- Editor in Chief

of the licensee, shareholder's agreement concluded and signed by all shareholders of the licensee as well as the articles of association and the memorandum of association. The funding agreement is another document that is critical to the Authority for it to exercise its obligations contemplated in terms of section 64 of the ECA. The Authority has made a request to the licensee to submit a shareholder's agreement that has been concluded between the shareholders of the licensee, but to no avail. It must be noted that the Authority has become aware of the challenges faced by the licensee with its minority shareholders and the delay in concluding the said shareholder's agreement.

It is perhaps appropriate at this stage to state the position of the Authority on the shareholder dispute between the licensee and its minority shareholders. It is the view of the Authority that it has no jurisdiction in law to get involved in disputes between shareholders of a licensee as this may be viewed in some quarters as undue influence to the commercial activities of a licensee. The Authority must at all times strike a balance between undue interference on commercial activities of a licensee and acting in the public interest. Besides, the companies Act⁹ contain statutory safeguards that protect the interests of minority shareholders in a company. It must however be emphasised that as a rule courts will not interfere in the domestic affairs of companies at the behest of discontented minority shareholder¹⁰. On the well-established principle that, save in exceptional circumstances, the courts will not interfere in the internal management, Trollip J¹¹ has this to say:

“By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder.....This principle of supremacy of the majority is essential to the proper functioning of companies”.

In light of the above, the Authority has decided not to intervene in the dispute between the licensee and its minority shareholders.

⁹ Act No. 61 of 1973 sections 257 and 258 of the Act, 1973.

¹⁰ Yende v Orlando Coal Distributors (Pty) Ltd 1961(3) SA 314 (W) at 316

¹¹ Sammel v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 678

If the Authority were to revert to the subject of section 64 of the ECA, the Authority maintains that the articles of association and the memorandum of association were interrogated by the Authority and the generic wording of these documents could not assist whether there is compliance with the provisions of section 64 of the ECA. Inasmuch as the Authority sympathise with the predicament the licensee finds itself, the Authority maintains and insists that the shareholder's agreement is of crucial importance for purposes of conducting an enquiry in terms of section 64 of the Electronic Communications Act, 2005 (Act No. 36 of 2005). Failure to secure the shareholder's agreement or similar instrument for purposes of section 64 of the ECA may be viewed as dereliction of duty on the part of the Authority, justifiably so. The strength of the shareholder's agreement is that it contains all the pointers that the Authority needs in making a decision whether or not a licensee has complied with the provisions of section 64 of the ECA. The Authority is however mindful that there are serious challenges faced by the licensee in respect of its minority shareholders that may possibly take a while before the parties may come to an amicable settlement. Equally, the Authority must play a balancing act and include into the equation its obligation to process license related matters without causing undue delays to the business/commercial activities of the licensees. It is against this back drop that the Authority has decided to issue the individual broadcasting service license to the licensee subject to the submission of the shareholder's agreement concluded between the shareholders of the licensee.

With reference to the issuance of the amended broadcasting service licence. It came to the attention of council in a council meeting held on 24 November 2009 that an amended broadcasting service license was issued to Super 5 Media without its authorisation or approval. After much discussion and deliberation on the matter in a council meeting held on 1 December 2009, council took a decision to withdraw the amended license and substitute it with a proper broadcasting service license.

The licensee was advised accordingly of these developments and was requested to return the amended license to the Authority. The individual broadcasting license was issued subject to the submission of the shareholders agreement within sixty (60) days of the issuance of the license. The Authority will not sit on its laurels unless and until there is positive proof that the licensee has indeed complied with the provisions of section 64 of the ECA.



PARIS MASHILE
CHAIRPERSON
ICASA
Date: 27/05/2010
