

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: []

In the matter between:

eMEDIA INVESTMENTS PROPRIETARY LIMITED

First Applicant

PLATCO DIGITAL PROPRIETARY LIMITED

Second Applicant

and

MULTICHOICE SA HOLDINGS

(PROPRIETARY) LIMITED

First Respondent

MULTICHOICE (PROPRIETARY) LIMITED

Second Respondent

**SUPERSPORT INTERNATIONAL PROPRIETARY
LIMITED**

Third Respondent

THE SOUTH AFRICAN BROADCASTING

CORPORATION (SOC) LIMITED

Fourth Respondent

THE COMPETITION COMMISSION

Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

PHILIPPA RAFFERTY

do hereby make oath and state that:

1. I am the Group Executive Legal and Regulatory of eMedia Investments (Proprietary) Limited (“**eMedia**”).
2. I am duly authorised to make this application and to depose to this affidavit on behalf of eMedia and Platco.
3. The facts set out below fall within my personal knowledge (unless the context indicates the contrary) and are true and correct. Where I make legal submissions, I do so on the advice of eMedia’s and Platco’s external legal advisers.
4. This is an application for interim relief, made in terms of section 49C of the Competition Act, 89 of 1998 (the “**Act**”). Prior to the filing of this application, eMedia has lodged a complaint against MultiChoice relating to the conduct that is the subject of this application with the Competition Commission in terms of section 49B(2)(b) of the Act. A copy of the CC1 form is attached as **Annexure A**.

A. THE PARTIES

5. The first applicant is eMedia Investments Proprietary Limited (“**eMedia**”), a company registered in South Africa having its principal place of business at 4 Albury Road, Dunkeld West, Johannesburg, South Africa.
6. eMedia and its subsidiaries are a South African media group with holdings in a variety of broadcasting, content and production businesses. The group operates, inter alia, as a content producer, a content aggregator, and a free-to-air broadcaster.

7. The second applicant is Platco Digital Proprietary Ltd ("**Platco**"), a company registered in South Africa, having its principal place of business situated at 4 Albury Road, Dunkeld West, Gauteng.
8. Platco is a subsidiary of eMedia which owns and operates the Openview platform. This is a direct-to-home, free satellite platform and infrastructure that distributes radio and television services to viewers in South Africa.
9. The first respondent is MultiChoice SA Holdings Proprietary Limited ("**MultiChoice South Africa**"), a company registered in South Africa, having its principal place of business at 144 Bram Fischer Drive, Ferndale, Randburg, South Africa.
10. The second respondent is MultiChoice Proprietary Limited ("**MultiChoice**"), a company registered in South Africa, having its principal place of business at 144 Bram Fischer Drive, Ferndale, Randburg, South Africa.
11. The third respondent is SuperSport International Proprietary Limited ("**SuperSport**"), a company registered in South Africa, having its principal place of business at 144 Bram Fischer Drive, Ferndale, Randburg, South Africa.
12. For the sake of brevity, we will refer to the entire MultiChoice Group collectively as "**MultiChoice**" unless it is necessary to differentiate between the various specific members of the MultiChoice Group. The ultimate holding company of the MultiChoice Group is MultiChoice Group Limited, which also has its registered address at 144 Bram Fischer Drive, Ferndale, Randburg, South Africa.

13. MultiChoice and its affiliates are vertically-integrated, operating at all levels of the broadcasting value chain in South Africa and in certain African jurisdictions. MultiChoice operates as a content aggregator and also operates as the largest satellite broadcaster in South Africa, through its satellite platform, DStv.
14. The fourth respondent is the South African Broadcasting Corporation SOC limited (“**the SABC**”), a state-owned company duly established in accordance with the laws of the Republic of South Africa with its registered address situated at corner Henley and Artillery Road, Radiopark, Auckland Park, Johannesburg, South Africa.
15. The SABC, the national public broadcaster, has a number of free-to-air terrestrial channels (most notably SABC1, SABC2 and SABC3) that are broadcast throughout South Africa using various third-party owned platforms. These platforms include:
 - 15.1. those provided by Sentech (SOC) Limited¹ (“**Sentech**”) being analogue signal, digital terrestrial transmission (“**DTT**”) and satellite (DTT gap-filler),

¹ The Sentech Act of 1996 was intended to provide for the transfer of all of the shares held by the SABC in Sentech (Pty) Ltd to the State and for the conversion of Sentech into a public company, Sentech Limited. Sentech is now Sentech (SOC) Limited and has the State as its sole shareholder. It is, accordingly, a third-party platform insofar as the SABC is concerned. The role of Sentech in relation to the SABC was described in recent proceedings in the High Court (discussed further below), as being “*Sentech is an electronic communications network service licensee that provides signal distribution. It is the state-owned common carrier broadcasting signal distributor. Sentech has a duty to provide broadcasting signal distribution to broadcasting licensees, upon request, in terms of s62(3) of the Electronic Communications Act 36 of 2005 (the ECA). It has a specific obligation in terms of s62(3) of the ECA to carry public broadcasting services and provide signal distribution for public broadcasting services.*” MultiChoice/SuperSport alleged that “*The SABC, through Sentech, achieves nationwide coverage through a combination of terrestrial and satellite broadcasting signal transmissions*”. This is not correct in the sense that the Openview restriction precludes SABC viewers from watching the relevant sporting events if they do not have the relevant receiving equipment (such as set-top boxes,

15.2. Openview (operated by Platco) in terms of a Signal Distribution and Carriage Agreement (“**the Carriage Agreement**”); and

15.3. StarSat and DStv pursuant to the Must Carry Regulations.²

16. The fifth respondent is the Competition Commission, a statutory body established under the Competition Act, 1998 (“**the Act**”). No relief is sought against the Competition Commission in this application.

B. EXECUTIVE SUMMARY

17. This application for interim relief arises from MultiChoice’s abuse of its dominant position and the unlawful exercise of its market power in contravention of the relevant provisions of section 8 of the Competition Act in relation to certain sub licensing arrangements, which it has concluded with the SABC in respect of premium sports events. The anti-competitive and unlawful restriction contained in the sub-licensing agreements between SuperSport/MultiChoice and the SABC also results in contraventions of sections 4(1)(b)(i) and 5(1) of the Competition Act.

18. MultiChoice is dominant in many aspects of the television broadcasting sector in South Africa, including in respect of the provision of pay television (“**pay-TV**”) subscription services (both basic and premium) to consumers and the provision of broadcasting services to channel providers. MultiChoice also has

etc), but does reflect the role played by Sentech in relation to the broadcasting of the SABC channels (i.e. analogue, DTT and satellite).

² ICASA Must Carry Regulations, 2008 (published in Government Gazette No. 31500 on 10 October 2008,

market power as an acquirer of television content in South Africa; particularly premium sports content, for inclusion in its channels.

19. The key focus of this case is MultiChoice's control over, and dominance in relation to, the acquisition and onward supply (including sub-licensing) of premium sports content for television viewing, including in respect of free-to-air broadcasting.
20. MultiChoice (through SuperSport) has, over time, secured exclusive rights for the broadcasting of most major sporting events in South Africa. As part of this strategy, MultiChoice acquired *inter alia* the exclusive rights to broadcast the 2023 Rugby World Cup and the 2023 Cricket World Cup, the FIFA Women's World Cup, the 2021 CAF Final, the All Africa Cup of Nations (2024), the rugby Currie Cup, as well as the Premier Soccer League in South Africa and the UEFA Champions League.
21. In relation specifically to the 2023 Rugby World Cup, following the intervention of the Minister of Sport, Arts and Culture, on the eve of the kick-off of the Rugby World Cup, MultiChoice and the SABC entered into a sub-licence agreement pursuant to which the SABC was authorised to broadcast the Springbok games and certain of the knock-out matches on its channels. It did so by broadcasting the relevant rugby matches as part of its SABC2 Channel.
22. However, the rugby sub-licence agreement included a provision which had the effect of preventing the SABC from transmitting the relevant matches over eMedia's Openview platform. The relevant clause reads as follows:

*“The Broadcast Rights which may be exercised by THE SUB-LICENSEE are the rights to broadcast the Licensed Matches (specified in clause 6 below) in full on a maximum of (1) one single occasion within the Licensed Territory during the Licensed Period in the Licensed Languages on any one of its existing Free to Air domestic terrestrial television channels, known as SABC 1 or SABC 2 or SABC 3 or SABC Sport and including on SABC’s wholly-owned and operated OTT Platform known as SABC Plus only (subject to geo-blocking to the Territory) and sabc sport.com (subject to geo-blocking to the Territory). **For the avoidance of doubt the SUB-LICENSEE may not transmit or make available the Licensed Matches on any third party owned or operated platform.** THE SUB-LICENSEE is obliged to exercise the rights granted herein. The Parties agree that the broadcast on pay broadcaster’s platforms of any of the SABC channels as part of the Must Carry Regulations shall not constitute a breach of the provisions of this Agreement. No other pay platform, which does not qualify to carry THE SUB-LICENSEE’s television channels in terms of the Must Carry Regulations, may carry the Event and THE SUB-LICENSEE shall ensure that such broadcast shall not occur on any such other pay platforms” (my emphasis).*

23. Through this clause (and analogous clauses imposed in other sub-licensing agreements) SuperSport/MultiChoice prescribes the terms on which its competitor (the SABC) can transmit its programming via third-party platforms and in doing so dictates the manner in which (and even whether or not)

millions viewers of SABC content are able to access certain programming that is the subject of these agreements.

24. The practice in relation to the Cricket World Cup 2023 has repeated a similar, and by now familiar, pattern of conduct. It has been reported in the media on 5 October 2023 (the day of the opening game) that SuperSport/MultiChoice had also acquired the rights to broadcast the 2023 Cricket World Cup and concluded a sub-licence agreement with the SABC in terms of which the SABC may broadcast all of the Cricket World Cup matches in which the South African national team participates, as well as the semi-final, final and closing ceremony of the tournament. However, the media statement of the SABC indicates that the agreement once again contains the Openview restriction. Indeed, shortly after becoming aware of the fact that the sub-licence agreement concluded with the SABC in respect of the Cricket World Cup also contained the Openview restriction, eMedia through its attorneys approached SuperSport/MultiChoice to request an undertaking that MultiChoice would not enforce the restriction. MultiChoice declined to provide the undertaking and indicated that it would persist with the restriction. A copy of the relevant correspondence in this regard is attached hereto as **Annexure B**.
25. It also became apparent from correspondence disclosed by SuperSport/MultiChoice in the parallel High Court proceedings that the imposition of this restriction forms part of a practice on the part of SuperSport/MultiChoice.
26. While this restriction may appear at face value to apply to a range of third-party owned or operated platforms, in practice it has been selectively applied

by SuperSport/MultiChoice in a South African context to apply **only** to the Openview platform owned by eMedia. The restrictions that have been imposed in the sub-licence agreements are, therefore from a South African perspective, targeted at one platform only - Openview. As appears from emails between the SABC and SuperSport/MultiChoice (discussed below), the SABC recognises that Openview is "*the only other large platform*". We therefore refer to it as the **OpenView restriction**.

27. eMedia is aware that the Openview restriction is included in the sub-licensing agreements concluded between SuperSport/MultiChoice and the SABC in respect of each of the Rugby and Cricket World Cup tournaments as well as other premium sporting events that I have set out above. eMedia does not have access to the each of the sub-licensing agreements that have been concluded between the SABC and SuperSport/MultiChoice in relation to other premium sporting events, but it is clear that these do, or will, incorporate similar anti-competitive restrictive provisions. eMedia calls on the SABC and SuperSport/MultiChoice to provide all of the relevant sub-licence agreements in respect of all premium sporting events to the applicant's attorneys and to the Competition Tribunal and Commission, subject to an appropriate confidentiality regime, for purposes of ventilating the issues in this case.

28. MultiChoice's conduct in this regard should be seen in the context of the previous complaint that the SABC filed with the Competition Commission in relation to MultiChoice's conduct concerning other premier sporting events. A copy of a summary received by eMedia from the Commission is attached as **Annexure C**. The Commission's summary of this complaint was:

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- “1. On 12 July 2022, the Competition Commission of South Africa received a complaint from the South African Broadcasting Corporation (“SABC”) against SuperSport International Proprietary Limited, relating to possible anti-competitive and exclusionary conduct.*
- 2. The complaint concerns the anti-competitive conduct engaged in by SuperSport in respect of sports broadcasting, and in particular the acquisition of exclusive broadcast rights to premium sports events. The alleged conduct may have the effect of foreclosing SuperSport’s rivals, including the SABC, from being able to compete effectively in the downstream market for the broadcast of premium sports events – particularly in relation to rugby and soccer events.*
- 3. The SABC submits that SuperSport has an exclusive license to broadcasting rights for South Africa’s PSL matches for the period 2019 to 2024. Notably, SuperSport has continuously held the exclusive licence to the PSL broadcast rights since 2012.*
- 4. Furthermore, although SuperSport and the SABC already have in place a sub-licence agreement that authorises the SABC to broadcast PSL matches, the cost of this Free-To-Air sub-license is excessive, and SuperSport is alleged to have restricted the SABC’s broadcasting rights – for example, the SABC may only broadcast PSL matches on SABC 1, 2, and 3 (i.e., not on SABC Sport) and only via terrestrial platforms.*
- 5. The SABC claims that it is not able to select the PSL games that it wishes to broadcast, as it is alleged that the selection of games that the SABC is able to broadcast is determined independently by SuperSport*

(with the PSL also requiring SuperSport to sub-license a limited number of identified games to SABC).

6. The SABC submits that SuperSport's restriction on the broadcasting of PSL matches by the SABC constitutes anti-competitive foreclosure, and is, therefore, a contravention of sections 8(1)(c) and 8(1)(d)(ii) of the Act.

7. In addition, the SABC submits that the PSL and SuperSport are in a vertical relationship and their long-term, exclusive licensing agreement that harms competition in the broadcasting market through anticompetitive foreclosure, thereby contravening section 5(1) of the Act. The SABC also submits that the inclusion of the restriction in this sub license agreement between SuperSport and the SABC constitutes a contravention of section 5(1) of the Act."

29. The SABC complaint appears to relate to agreements between SuperSport and each of PSL and the South African Rugby Union.
30. While the Openview restrictions contained in the agreements between SuperSport/MultiChoice and the SABC in respect of the PSL matches may not be identical to the Openview restriction, the SABC complaint is indicative of the fact that MultiChoice seeks to prescribe to the SABC the manner in which it can broadcast sports programming for which it has secured television rights.
31. Given the pattern to which we have already referred, it is highly likely that SuperSport/MultiChoice will include the Openview restriction in future sub-licence agreements with the SABC in relation to sporting fixtures of national

importance, given that this forms part of what MultiChoice has conceded to be a regular and repeated practice on its part.

32. The insertion of the Openview restriction in the relevant sub-licence agreements is not therefore a once off event, but in fact appears to be an ongoing practice between SuperSport/MultiChoice and the SABC (“**the practice**”). Indeed, in recent correspondence to the Deputy Judge President of the High Court in Johannesburg in the parallel High Court proceedings dealing with delictual, contractual and public policy issues, SuperSport/MultiChoice appears to rely on the existence of the practice as a basis for resisting the special allocation of a judge to determine the application in the High Court on an urgent basis (this application is discussed further below).
33. Furthermore, as appears from correspondence between the SABC and SuperSport/MultiChoice, which I discuss further below and which was disclosed in the High Court proceedings, MultiChoice states unequivocally that this is the practice that it has followed repeatedly, as a matter of routine.
34. This confirms that the inclusion of the Openview restriction forms part of an ongoing pattern of conduct by MultiChoice and will continue absent the intervention of the Competition Authorities.
35. Importantly, there are a number of national sporting events that will take place in the near future that will also be very likely to be subject to the very same Openview restriction. These include:

- 35.1. The Africa Cup of Nations (soccer) – the last tournament was held in 2022. The next tournament is scheduled to take place in January 2024 with qualifying games involving South Africa currently taking place.
- 35.2. The All Africa Games which have been postponed and are now scheduled to take place in March 2024.
- 35.3. The CAF Champions League – an annual soccer club competition with qualifying fixtures currently taking place.
- 35.4. The CAF Confederations Cup – an annual soccer event in which teams from South Africa participate.
- 35.5. The COSAFA Cup an annual event which was last held in Durban in July 2023 and involved the South African National team.
- 35.6. The ICC T20 Cricket World Championships, the last of which was held in 2022 and the next of which will be held in March 2024.
- 35.7. The MTN8 which is an annual soccer event.
- 35.8. The Nedbank Cup – an annual soccer tournament.
- 35.9. The Paralympics, the last of which was held in 2022 with the next Paralympics scheduled to take place in August 2024.
36. It seems likely that the SABC will seek to sub-licence television rights from SuperSport for the All-Africa Cup, which is scheduled to take place in January 2024 as South Africa has qualified. It is also possible that a South African team may qualify for the CAF tournaments and also that the SABC may seek

to sub-licence the T-20 Cricket World Cup depending on how the South African national team is performing. Should it do so, there is little doubt, in view of the practice, that MultiChoice will insist on the inclusion of the Openview restriction in the sub-licence agreements.

37. Insofar as the effects of the Openview restriction are concerned, it is important to note that households having an Openview decoder are, in the ordinary course, required to pay their television licences, and are able to access unexpurgated programming on the SABC channels. However, the Openview restriction has the effect of depriving them of the ability to do so.

38. The effect of the Openview restriction is that the premium sporting events forming part of the relevant SABC channels are not included in the feed of the relevant channels when transmitted via the Openview platform. They are included in the feed of the channels transmitted on other third-party platforms such as Sentech's platforms (analogue, DTT and satellite), StarSat (a competing satellite platform) and DStv. However, it should be pointed out that:

38.1. StarSat only reaches a negligible number of viewers in South Africa (approximately 450 000 subscribers);

38.2. DTT only reaches a small proportion of the population (those who have DTT enabled televisions or set-top boxes) currently and there are no further set top boxes available in retail outlets. Furthermore, DTT is not able to broadcast more than a limited number of high-definition channels because of spectrum constraints and a significant proportion of the DTT set top boxes that have previously been distributed by the State are understood no longer to be operational. DTT is, therefore, unlikely to be

a viable option in the future given the limited number of set-top boxes that have been rolled out, and the fact that no additional set-top boxes are currently available and the limitations of the platform and its cost to broadcasters;

- 38.3. Insofar as the analogue signal is concerned, South Africa is currently in the process of digital migration, with a final Analogue Switch-Off date having been proclaimed for 31 December 2024. Five provinces have already had their analogue transmission switched off, and viewers in these provinces have no access to analogue free-to-air broadcasting to access the SABC. As a result, millions of South African households in those provinces have no means to access the free-to-air television channels of the public broadcaster, the SABC, other than through a DStv or an Openview decoder or to some extent through DTT.
39. The SABC also has a website and a streaming service, but this is likely to reach only a small proportion of its viewership given the logistics and costs associated with streaming.
40. It follows that only DStv and Openview offer any meaningful basis to reach a significant number of viewers apart from the SABC's own analogue transmission. This means that when the SABC's analogue transmitters are switched off in the remaining provinces where they currently operate (in just over a year at the end of December 2024), the only platforms of any significance are likely to be Openview and DStv. The SABC described Openview as "*the only other large platform*" in its correspondence with SuperSport/MultiChoice.

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41. Based on recent figures from AC Nielsen, there are approximately 2.6 million households (although there are approximately 3.2 million Openview set top boxes in circulation) that actively watch television channels (including the relevant SABC channels) on the Openview platform. As such, the SABC is potentially able to reach between approximately 2.6 million households (which is likely to be approximately 8.3 million viewers) and approximately 3.2 million households, and a sizeable proportion of its viewership through the Openview platform. In the case of SABC2, approximately 25% of the SABC's audience accesses the SABC channels through Openview. In the case of SABC3, this figure is 30%.
42. Cutting the SABC off from 25% - 30% of its audience (and potentially a much larger potential audience who may wish to watch the premium sports events in question) affects the SABC's revenue generating ability. It should also be noted that more people are currently watching Rugby World Cup matches on the SABC than on DStv (which is the primary broadcaster of the event). In this way, the practice harms competition and results in a deterioration in the offering available to South Africa households.
43. Furthermore, the practice gives rise to substantial damage to Openview's goodwill; and consequently its ability to compete with MultiChoice. As Openview is the only broadcaster capable of imposing any sort of competitive constraint on MultiChoice, harm to it is harm to competition. The harm is set out in detail below.
44. MultiChoice's imposition of the Openview restriction is fundamentally anti-competitive, and interferes with the extant contractual relationship between

eMedia and the SABC. It is also for the reasons explained below not competition on the merits, but rather simply an attempt to harm a competitor by denigrating its offering and causing harm to its goodwill. The conduct of SuperSport/MultiChoice undermines consumer welfare in various respects not least of which is that it prevents ordinary South Africans from being able to access SABC content through the Openview platform in circumstances where this may be the only feasible option for them to access such content.

45. In regard to abuse of dominance, MultiChoice's conduct is a classic case of requiring a customer (the SABC, as a sub-licensee of the Rugby World Cup and the Cricket World Cup) not to deal with a competitor of MultiChoice (being eMedia/Openview). The conduct is also generally exclusionary and also constitutes a restrictive vertical practice. The restrictions imposed by MultiChoice serve no purpose other than to seek to harm Openview. As noted above, MultiChoice's DStv platform, and eMedia's Openview platform are the only substantial satellite television broadcasting platforms, and following the completion of the analogue switch off process, are likely to be the only two substantial television broadcasting platforms in South Africa. Accordingly, this conduct will give rise to anti-competitive effects in the satellite television broadcasting markets in which eMedia and MultiChoice compete. This conduct will not only harm current Openview subscribers, but will create further uncertainty for the many millions of current analogue subscribers for whom DStv and Openview will be the only substantial competitors. This will directly and substantially harm the only viable competition that exists in this market, between the rival satellite television broadcasting platforms, DStv and Openview.

46. This harm to competition is particularly of concern where (as in this case) competition in the relevant market has already been harmed by MultiChoice's dominance, and its far superior financial position, which has ensured that there is limited, if any, credible competition for premium sports content, particularly if the original rights' holders to such sports content choose such a blunt mechanism for the allocation of those rights amongst local channel providers as exclusive rights for each territory.
47. This choice of such a blunt instrument allows SuperSport/MultiChoice to acquire all of the rights to premium sporting events (in breach of the relevant regulations issued by ICASA), including the free-to-air rights (even in circumstances where MultiChoice itself does not own or operate a free-to-air platform), and then exploit this position to the detriment of Openview and the SABC. By doing so, MultiChoice has the ability to dictate how the free-to-air rights are used – including across which platforms they can be distributed. In this case, in exercising these powers, it places the sub-licensee (the SABC) in a position where it is induced to breach the terms of the contract that it has with Openview for the distribution of the SABC2 channel and SABC3 channel.
48. A blunt auction of exclusive rights for each territory could conceivably be a permissible practice for the original rights holders, who simply seek to maximise their returns, and who are not local competitors at any level of the industry supply chain.
49. However, it is an entirely separate matter for a local competitor, in particular a firm that is dominant not only at the upstream level as channel provider, but also satellite broadcaster, to impose its own restrictions on local competitors,

so as to directly harm competition. This is particularly the case where SuperSport/MultiChoice has entered into a sub-licence agreement with the national broadcaster, the SABC. In these circumstances, SuperSport/MultiChoice no longer has exclusive rights in this respect and should not dictate to the national broadcaster as to how it reaches its audience.

50. It also undermines the position of the SABC that is hamstrung in its ability to monetise the significant investment it has made in securing these rights as it is effectively cut off from 25% - 30% of its normal audience.
51. This occurs in circumstances where SuperSport/MultiChoice is fully aware of the contract between the SABC and eMedia. Having sub-licensed the rights at what would appear likely to be a significant premium (premised on the public statements of the SABC and third parties), SuperSport/MultiChoice contractually limits the ability of the SABC to transmit its channels in unexpurgated format across the platforms that it normally uses by precluding it from using a platform through which it reaches 25% - 30% of its viewership.
52. While the sub licensing agreements appear to be of a vertical nature as they involve the licensor (SuperSport/MultiChoice) granting certain rights to the licensee (the SABC) subject to specific conditions, they also have a horizontal dimension. In this regard it should be appreciated that SuperSport/MultiChoice and the SABC expressly regard themselves as horizontal competitors of one another more broadly, and are direct competitors in the activity of acquiring content for the production and provision of channels. As a result, SuperSport/MultiChoice and the SABC are in a horizontal

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relationship with one another and the restrictive covenant relating to the so-called “*Openview restriction*” also amounts to the fixing of a trading term in contravention of section 4(1)(b)(i) of the Competition Act.

53. From a horizontal perspective, the Openview restriction constitutes a repeated agreement between two competitors (SuperSport/MultiChoice and the SABC) in terms of which they agree that a third party platform owned by a competitor will not be utilised for transmitting certain content of the SABC channels and thereby denigrating the Openview platform. This will directly harm competition between Openview and MultiChoice’s DStv’s platform.

C. BACKGROUND FACTS

54. On 9 March 2021, Platco entered into the Carriage Agreement with the SABC. A redacted copy of this agreement is attached as **Annexure D**.
55. Platco is a wholly owned subsidiary of eMedia, and operates eMedia’s Openview platform and manages the distribution of eMedia’s “*e-channels*”. Openview is a free to view direct to home satellite platform for the distribution of television and radio channels directly to customers.
56. Clause 5 of the Carriage Agreement provides as follows:

“5.1 Subject to the terms and conditions of this Agreement, and with effect from the Signature Date, the Supplier³ hereby grants to Platco, a personal, non transferable and non exclusive licence and right to:

³ The Supplier is the SABC.

5.1.1 *receive the Services at the Designated Location;*

5.1.2 *broadcast and market the Services on the Openview platform;*

5.1.3 *market the distribution of the Services on the Openview platform;*

5.1.4 *distribute the Services to all Platco's customers in the Territory and facilitate end-users' accessing the Services as part of the Platco DTH Platform; and*

5.1.5 *use the Supplier's applicable trademarks (as the case may be) to market the Platco DTH Platform.*

5.2 *The Services shall be included as part of the Openview offering in the Territory by means of free to view Satellite Television in the Territory throughout the Term."*

57. The "Services" are defined in the Carriage Agreement as *"the content comprising of the SABC TV Channels and SABC Radio Stations"*.

58. Accordingly, the SABC has granted eMedia/Platco a contractual right to transmit the SABC TV channels and SABC radio stations on the Openview platform. This means, lest there be any doubt, that eMedia/Platco has a contractual entitlement to transmit the relevant SABC channels on the Openview platform in the same format as they are transmitted on other platforms, such as analogue or DStv. This includes the SABC2 channel, on

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which the Rugby World Cup matches are currently being broadcast and the SABC3 channel, on which the Cricket World Cup is currently being broadcast.

59. The term of the Carriage Agreement, which was signed in March 2021, is five years from the signature date. Accordingly, the Carriage Agreement only terminates in March 2026 and is currently still in force.
60. SuperSport/MultiChoice secured the exclusive rights to broadcast and stream the Rugby World Cup which is currently taking place in France and the Cricket World Cup which is currently taking place in India, including the free-to-air rights.
61. Importantly in this regard, it should be noted that MultiChoice is not licensed as a free-to-air broadcaster, but nevertheless has secured all of the free-to-air broadcast rights for these events.
62. A sub-licence agreement relating to the Rugby World Cup was concluded between SuperSport/MultiChoice and the SABC following the intervention of the Minister of Sport, Arts and Culture (and various sponsors). The sub-licence agreement which was ultimately concluded, allowed the SABC to broadcast sixteen of the Rugby World Cup matches including the Springbok matches, the quarter- and semi-finals, and the final match of the tournament.
63. On 7 September 2023, the SABC published a statement in which it stated that it and MultiChoice had concluded a sub-licence agreement that allowed the SABC to broadcast the sixteen Rugby World Cup matches.
64. However, the announcement stated that the SABC is precluded from transmitting the Rugby World Cup matches via the Openview platform,

*“...because of the restrictive conditions that MultiChoice is placing on the sub-licensing agreement for the Free-to-Air rights for the RWC 2023”. The SABC added that it “*regrets this irrational decision by MultiChoice*” and that it “*hopes that in the interest of nation building and social cohesion, MultiChoice will remove this restrictive condition to enable all South Africans to get behind the Boks* (emphasis added). A copy of the SABC’s statement is attached marked **Annexure E**.*

65. Similarly, on 5 October 2023, the SABC issued a media statement stating that it and MultiChoice had concluded a sub-licence agreement in relation to the Cricket World Cup in terms of which the SABC would be permitted to broadcast the matches in which the South African team participated, as well as the semi-final, final and closing ceremony. However, as with the right to broadcast the Rugby World Cup, the SABC announced that, “*regrettably, MultiChoice has restricted the broadcast of the Cricket World Cup 2023 on the OVHD (eMedia Platform)*”. It added that “*the SABC has formally logged a complaint with the Competition Commission regarding this behaviour of MultiChoice*” (emphasis added). A copy of the SABC’s media release is attached marked **Annexure F**.

66. In the parallel High Court proceedings, SuperSport/MultiChoice attached the redacted version of the correspondence between it and the SABC preceding the conclusion of this sub-licence agreement. A copy of these emails and letters is attached as **Annexure G**.

67. The letter of 7 June 2023 from Marc Jury of SuperSportMultiChoice to Ian Plaatjes of the SABC in respect of the negotiations for the television rights for

the Cricket and Rugby World Cups includes the statement that *"Please note that consistent with our other sub-licence agreements, there rights can be exploited on all SABC wholly-owned and operated television platforms"*. This is consistent with the fact that there is a *"practice"* on the part of SuperSport to include the Openview restriction in its sub-licence agreements with the SABC. The position was made clear in the further letter from Mr Jury to Mr Plaatjes dated 18 August 2023 where it was stated that *"For the sake of clarity, such matches may be broadcast on the SABC Sport's Channel and be carried on its own SABC OTT platform, but may not be carried on third party owned platforms"*. (Emphasis added.)

68. In an email dated 27 August 2023, Mr Plaatjes wrote to Mr Jury noting *"I am extremely disappointed and believe we were misled. Good faith and open book negotiations cannot be one way. It is disingenuous to ignore the fact that SS has already locked up the sponsorship market around this property months ago, making it impossible for the SABC to adequately monetise the RWC at this late stage. You further want to block the SABC Sport Channel from the only other large platform of OVHD, further stifling the SABC to monetise this. This uncompetitive restriction has a further negative impact on our revenue as we must now displace our schedule and forego the already guaranteed revenue on the current schedule"* (emphasis added).
69. Mr Jury responded (by way of a legally crafted email headed *"Legally Privileged and Confidential"* despite the fact that there was clearly nothing legally privileged about the email) dated 31 August 2023 noting that *"You have also at all times been aware of the fact that any proposal by us excluded your*

wish to have this content carried on third party-owned platforms which are not owned and operated by yourselves and with whom the SABC has chosen to enter into commercial transactions. This has been our approach for years and the SABC could and should have planned accordingly” (emphasis added). This emphasises three points – first, MultiChoice is well aware of the contract between the SABC and Openview. Second, that the practice of imposing the Openview restraint is of an entrenched nature. Third, that the SABC is being forced to agree to this restriction (with MultiChoice (its competitor), despite the fact that this is contrary to the SABC’s wishes in relation to the platforms that it wants to utilise in order to broadcast its channels and to reach the maximum number of viewers.

70. SuperSport/MultiChoice’s insertion of the Openview restriction in the sub-licence agreements that it concluded with the SABC in essence precludes the SABC from complying with its contractual obligations to transmit SABC2 and SABC3’s unexpurgated content on the Openview platform in terms of the Carriage Agreement. It also precludes the SABC from reaching a substantial proportion of its normal viewership. A critical issue in this regard is that once the SABC has secured and paid for sub-licensing rights from Super Sport/Multichoice in respect of particular events, it should be at liberty to utilise the platforms that it has contracted with in order to transmit and distribute its channels. However, SuperSport/Multichoice wants to be able to control precisely which third-party platforms the SABC uses to distribute and transmit its channels.

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71. The net result of the Openview restrictions is the consequent unjustifiable limitation of the fundamental rights and interests of between approximately 2.6 million and 3.2 million South African households that will not be able to watch the rugby or cricket (should they wish to do so) as a result of the Openview restrictions imposed by SuperSport/MultiChoice. This will also apply in relation to other sporting fixtures sub-licensed to the SABC subject to the Openview restriction.
72. The unexpurgated SABC2 and SABC3 channels are, as a result of the Openview restriction, being carried on competing satellite platforms such as StarSat and DStv and the analogue transmission of the SABC channels. The relevant Rugby World Cup and Cricket World Cup matches are also being broadcast by the SABC on DTT – Sentech’s digital platform. It should be emphasised in this regard that none of these other third-party platforms are subject to similar restrictions like the Openview restriction and none of these platforms have paid SuperSport/MultiChoice in order to transmit the SABC’s channels which include the broadcast of the Rugby and Cricket World Cup matches. This underscores the fact that SuperSport/MultiChoice has singled out Openview and that its conduct in imposing the Openview restriction is intended to harm Openview.
73. On 8 September 2023, eMedia addressed a letter to the CEOs of MultiChoice and MultiChoice South Africa, and the Acting CEO of SuperSport.⁴ A copy of the letter is attached as **Annexure H**.

⁴ The letter was copied to the Ministers of Sport, Arts and Culture, Communications and Digital Technology, Trade and Industry and Competition, as well as to the Competition Commissioner.

74. In the letter, eMedia requested MultiChoice to remove the restriction placed on the SABC in relation to the SABC's broadcast of the Rugby World Cup and to permit the SABC to broadcast the matches via the Openview platform, calling for a response from MultiChoice by no later than 5pm that day.
75. When no response was received from MultiChoice by the stipulated deadline, eMedia addressed a further letter to MultiChoice on 9 September 2023. In the letter of 9 September 2023, eMedia recorded that it had not received a response to its letter of 8 September 2023 and expressed its concern that, in circumstances where several million households stood to be deprived of the ability to watch the Rugby World Cup, MultiChoice believed that it can ignore correspondence and behave in a manner which demonstrated a disregard for the interests of ordinary South Africans. A copy of this letter is annexed as **Annexure I**.
76. eMedia indicated further in the letter of 9 September 2023 that MultiChoice's actions are entirely consistent with the market power that it wields and the abuse of the market power that it has demonstrated vis-a-vis the SABC in relation to various sporting events of national importance. eMedia pointed out to SuperSport/MultiChoice that it has an opportunity to act in the national interest by reconsidering its position and adopting an approach which is in keeping with the national interest and which will enable ordinary South Africans to have access to the Rugby World Cup matches.
77. It bears emphasis that SuperSport/MultiChoice subsequently implausibly claimed that it had not received these letters, despite the fact that the first letter was also widely publicised. It did not dispute that it was aware of these letters,

but it nevertheless failed to respond to the letters in any form let alone acknowledge receipt of them. This type of high-handed conduct is entirely consistent with a company that believes that it will not be brought to account for its actions and is for all intents and purposes immune from regulatory scrutiny. Attached as **Annexure J** are reports that demonstrate that the emails were delivered to MultiChoice. In addition, on 8 September 2023, an article was published on TechCentral which attached what it described as the "open letter" to MultiChoice (being the letter of 8 September 2023). A copy of this article is attached as **Annexure K**. MultiChoice chose simply to ignore this letter that was expressly addressed to its CEO and the Acting CEO of SuperSport.

78. A further letter (**Annexure L**) was written to MultiChoice on 21 September 2023 and this letter, as well as MultiChoice/SuperSport's reply dated 22 September 2023 (**Annexure M**), have been included for the sake of completeness.
79. A request for the sub-licence agreement in respect of the rights to broadcast the Rugby World Cup was refused by SuperSport/MultiChoice (the relevant letters are attached as **Annexures N and O**).
80. Nortons (eMedia's attorneys) sent a further letter to SuperSport/MultiChoice in relation to the Openview restriction in relation to the Cricket World Cup requesting an undertaking that the Openview restriction would not be enforced. MultiChoice responded to indicate that it would enforce the Openview restriction and would not provide the undertaking requested.

81. Finally, by way of background it is important to point out that MultiChoice and its subsidiaries have been involved in various competition matters.
82. In this regard I understand that MultiChoice is the respondent in the long running case relating to its alleged acquisition of control over the SABC. On 12 November 2018, the Competition Commission published a press statement (a copy is attached as **Annexure P**) in which it recorded that following an investigation conducted by it pursuant to an order of the Constitutional Court, it had concluded that MultiChoice had acquired control over the SABC in being able to determine how the SABC would broadcast to its viewers without first having obtained the approval of the Competition Authorities. It concluded that this course of conduct had the effect of protecting MultiChoice's dominance in the pay-TV market.
83. This matter has still not been finalised and the Competition Tribunal is yet to determine the merits of the matter.
84. MultiChoice is also currently a respondent in a complaint referral by eMedia and was a respondent in two interim relief applications by eMedia in relation to the decision no longer to carry four specific eMedia channels. The interim relief application has involved two hearings before the Competition Tribunal and two hearings before the Competition Appeal Court.
85. The issue of MultiChoice's dominance in the context of sports rights is also one which has repeatedly arisen. On 5 February 2019, the Competition Commission issued a press release (attached as **Annexure Q**) in which it stated that:

*“The Competition Commission has decided not to refer to the Competition Tribunal for prosecution the complaints against Multichoice South Africa (Pty) Ltd (“Multichoice”) and Supersport International (Pty) Ltd (“Supersport”). Between 2012 and 2017, the Commission received various complaints of abuse of dominance against Multichoice and Supersport. Following its investigation, the Commission has decided not to prosecute because there are no reasonable prospects of success and a regulatory intervention would be more effective. This notwithstanding, **there is potential market failure in this market** owing to the following factors, amongst others:*

- The highly concentrated nature of the subscription television market;*
- High barriers to effectively enter the market and the inability of other existing firms to expand in the market;*
- A lack of credible alternative buyers for premium sports rights other than the incumbent (Multichoice);*
- u) and some content suppliers; and*
- A lack of credible alternatives to which individual consumers can turn to should they wish to switch away from the incumbent (Multichoice).*

Whilst the Commission is concerned of the likely market failure, it is of the view that there can be more targeted regulatory interventions to foster competition and make this market competitive. In this regard, the Commission has taken note of the inquiry into subscription broadcasting services currently being conducted by the Independent Communications

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Authority of South Africa (“ICASA”), which covers a greater scope than the complaints received by the Commission. The Commission will continue to contribute to the inquiry and support the work of ICASA in line with the terms of the existing Memorandum of Understanding between the two regulators”.
(my emphasis)

86. MultiChoice is also a respondent in a complaint that was made by the SABC specifically in relation to television rights in relation to sporting events. This complaint was initiated in July 2022 (and has been discussed above).
87. It is plain that the issues relating to competition law considerations in respect of sporting television rights and exclusivity issues in particular is a long-standing issue of concern insofar as MultiChoice is concerned.

D. MULTICHOICE’S DOMINANCE

88. MultiChoice is the beneficiary of a State-conferred monopoly position that allowed it to achieve a dominant position in the satellite TV industry in South Africa.
89. It was the first pay-TV station in South Africa (M-Net) and the first privately owned television platform – from 1986. This licence was granted prior to the advent of democracy in South Africa.
90. MultiChoice launched DStv, the first digital satellite pay-TV platform outside of the United States of America, in 1995.
91. MultiChoice’s integrated annual results for the year ending 31 March 2023 record that it has approximately 9.3 million active subscribers (with a growth

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of approximately 300 000 in the past year). MultiChoice has 6 million more active subscribers than its closest competitor, Openview, which has approximately 3.2 million set-top boxes in circulation, and according to the BRC 2.6 million active viewing households. DStv has a far larger number of decoders in the market than its 9.3 million active viewing households.

92. Despite the entry of competitors over the years, MultiChoice is overwhelmingly dominant in many aspects of the television broadcasting sector in South Africa.
93. For purposes of the present application, it is important to note that MultiChoice is dominant as a channel provider, including its activities in relation to the acquisition, and sub-licensing of premium sports content in South Africa and is also the dominant satellite television broadcaster in the country, broadcasting its own channels as well as the channels of third-party channel providers and selling bouquets of channels to subscribers.
94. It should also be noted that if one has regard to MultiChoice's balance sheet and the resources at its disposal (relative to the other television broadcasters in South Africa), no other broadcaster in South Africa currently has the resources to be able to compete effectively with it. Multichoice's latest financial results indicate that its South African turnover was approximately R41.6 billion and the profits which it derived from its South African operations was approximately R4.9 billion. Multichoice also has a significant and very well-resourced shareholder in the form of the French conglomerate Groupe Canal+ which I understand has a shareholding of approximately 30% in Multichoice.

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95. By contrast, the SABC is in a heavily loss-making position and is in an increasingly precarious financial position with its losses having increased by approximately 387% from a loss of R248 026 000 in 2022 to a loss of R1 207 491 000 in 2023. The SABC clearly does not have the financial or other resources to be in a position to compete effectively with Multichoice. While eMedia is in a much better financial position than the SABC, its turnover and profit are significantly lower than those of Multichoice.
96. Crucially, it should be appreciated that because of the process of digital migration, analogue television broadcasting is for the most part in the process of being terminated in South Africa. In this regard the SABC has already switched off its analogue transmitters in five provinces and by the end of 2024 all analogue television broadcasting (apart from the limited analogue broadcasting that will take place through Sentech on the DTT platform) will be terminated. This means that by the end of 2024 the principal television broadcasters in South Africa will be MultiChoice, eMedia and to a much more limited extent Sentech, through DTT. The SABC is almost completely reliant on these third-party broadcasters in order to transmit its programming in the absence of owning its own platform.
97. Accordingly, MultiChoice already has market power in the television broadcasting sector as a whole in South Africa and this will only become further entrenched as the deadline for terminating all analogue television broadcasting by the end of 2024 approaches. MultiChoice's financial muscle is particularly relevant in the context of the acquisition, licensing and broadcast of premium sporting events in South Africa. As a first mover, it has secured

the overwhelming majority of upper LSM viewers and, therefore, it has an entrenched position in relation to the acquisition of television rights to premium sporting fixtures.

(i) the acquisition, broadcasting and sub-licensing of premium sports content

98. This matter relates to the acquisition and onward supply (sub-licensing) of the rights to broadcast premium sports events. MultiChoice is a dominant firm in relation to the acquisition and supply of premium sports content in South Africa, with a market share (in eMedia's estimation) of more than 90%.
99. While some premium sports content is available on the SABC and the internet, this is extremely limited. Moreover, certain of the sports content that is available on SABC (such as the Rugby and Cricket World Cups and other premium sporting fixtures) is available only through sub-licencing arrangements with SuperSport/MultiChoice, which means that SuperSport/MultiChoice exercises control over these arrangements.
100. MultiChoice appears to acquire both the free-to-air and the pay-TV rights to various premium sports content, despite the fact that it is only a pay-TV operator and does not operate a free-to-air service. Its strategy appears to have been predicated on securing all of the available broadcast rights for the majority of premium sport events in order that it can control and dictate the terms on which it licenses free to air rights for these events.
101. MultiChoice's dominance in relation to the acquisition and onward supply of premium sporting events stems from the fact that it has over time secured exclusive rights for the broadcasting in South Africa and in certain African

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jurisdictions of most of the major sporting events and sports leagues. SuperSport/MultiChoice have secured exclusive broadcasting rights for virtually all of the premier sporting events in recent times and no other broadcaster in South Africa has been able to compete meaningfully with SuperSport/MultiChoice in securing such rights as a consequence of the fact that SuperSport/MultiChoice has significantly more resources to spend on securing these rights than any other broadcaster in South Africa. As a result, it exerts market power in relation to the acquisition of premium sports broadcasting rights as well as in respect of the sub-licensing of such rights.

102. SuperSport/MultiChoice has secured the exclusive broadcasting rights (including both free-to-air and subscription rights) in respect of South Africa for both the Rugby World Cup and the Cricket World Cup as well many other premium sporting events on an ongoing basis.

103. It did so without complying with the relevant regulatory regime instituted by ICASA as set out in section 60 of the Electronic Communications Act and ICASA's regulations in this regard. Section 60(1) of the Electronic Communications Act requires that: "*Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority.*" Both the Rugby World Cup and the Cricket World Cup are designated national sporting events of public interest (as are the other premium sporting events listed

above).⁵ The Openview restriction is clearly in breach of section 60(1) as it hinders the free-to-air broadcasting of national sporting events.

104. The purpose of ICASA's regulations is clearly to enhance the ability of South Africans to watch sporting events of national importance and thereby to enhance consumer welfare. These are similar principles to those that underscore the relevant provisions of the Competition Act.
105. Firms that acquire the rights to broadcast premium sports content do so by supplying that content to firms in the channel provision market. The firms in this market package channels and either supply them to broadcasters or use broadcasters as a distribution service through which they (the channel providers) reach viewers. SuperSport is the overwhelmingly dominant provider of packaged premium sports content. The SABC has acquired the rights to some premium sports content, but its market share in relation to the acquisition of premium sport content will be dwarfed by MultiChoice.
106. As noted, channel providers require a distribution service to reach viewers and thereby generate advertising revenue from their channels.⁶ eMedia and MultiChoice both provide distribution (transmission) services to the SABC in respect of their channels. MultiChoice also provides these services to eMedia in respect of eMedia's news and entertainment channels.⁷

⁵ See GNR 275 of 7 April 2020, Sports Broadcasting Services Regulations, GG 33079.

⁶ They may adopt another business model, which is to supply their channel to the broadcaster for a fee and allow the broadcaster to generate the advertising revenue. This is not a business model that applies on the facts of this case, however.

⁷ The Commission will be aware that these services are currently provided to eMedia only as a consequence of the grant of an interim interdict against MultiChoice that requires it to carry eMedia's channels on DStv.

(ii) satellite broadcasting services

107. Broadcasters, being distributors of channels (and content) compete for viewers and/or subscribers. Historically, competition authorities have found that there is a distinct market for satellite broadcasting services. MultiChoice is the dominant satellite broadcaster in South Africa, accounting for approximately 70% of households that watch satellite television:

107.1. MultiChoice is virtually a monopoly provider of broadcasting services in the premium satellite market. It is also dominant in the basic satellite market. The current market shares in the basic satellite market may be calculated by removing the 1.3 million premium tier subscribers (which includes subscribers to the Premium and Compact Plus packages) from MultiChoice's total subscriber base. Doing so results in the following market shares:

Platform	Households	%share of households
DSTV	8,000,000.00	69%
Openview	3,115,472.00	27%
STARSAT	450,000.00	4%
Total household numbers	11,565,472.00	100%

107.2. Even if it were to be found that all satellite-based platforms compete with each other, across all their packages, MultiChoice's dominance would be greater than if the relevant market was based on ICASA's basic satellite market. MultiChoice is therefore dominant in the satellite broadcasting market, irrespective of how it is defined.

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108. MultiChoice's market power is further reinforced by the fact that there is limited switching between DStv and Openview – households who have purchased one decoder and chosen one satellite platform are not likely to easily purchase another, and given that MultiChoice is the incumbent, former-monopoly holder in the market, it has a significant first mover advantage against which eMedia must contend. Accordingly, shares based on the number of television viewers are likely to underestimate MultiChoice's market power because the large number of viewers on the DStv platform are likely to be sticky, and unwilling to change to another basic satellite TV platform. Furthermore, advertisers are likely to be willing to pay a premium to reach this specific, large, and stable group of satellite TV viewers.
109. In summary, MultiChoice is a dominant firm and has market power as a channel provider in particular in the acquisition and sub-licensing of premium sporting events in South Africa, in the provision of satellite television broadcasting services (whether considered in regard to premium or basic satellite TV broadcasting, or all satellite TV broadcasting) and in respect of television broadcasting more generally in South Africa. Moreover, MultiChoice holds a substantial advantage over its rivals given the extent of its financial resources and entrenched dominant position. These positions of dominance, which have already led to limited competition in each of these markets, are all the more relevant in the context of the process of digital migration which will result in the termination of analogue television broadcasting in South Africa by December 2024.

E. THE ANTI-COMPETITIVE EFFECT OF THE OPENVIEW RESTRICTIONS

110. The SABC which is the counterparty to the sub-licensing agreements with SuperSport in respect of the Rugby and Cricket World Cups, has repeatedly highlighted the anti-competitive nature of the Openview restriction in its answering affidavit in the parallel High Court proceedings.
111. In paragraph 5 of the SABC's answering affidavit in the parallel High Court proceedings the chief operating officer of the SABC stated that: "the SABC considers SuperSport to have acted profoundly anti-competitively (in the sense of infringing the Competition Act) with regard to the sub-licensing of sports broadcast rights. As the SABC has also stated publicly, it considers the sublicensing restrictions imposed by SuperSport to be unjustifiable and contrary to the national interest. Allowing World Cup rugby matches which are broadcast on SABC2 to be viewed on the eMedia Openview platform would moreover benefit the SABC..." It further emphasised this point at paragraph 22 of the answering affidavit, noting that "the SABC has made no bones about the fact that it considers the sublicensing restrictions imposed by SuperSport to be unjustifiable and anti-competitive. The SABC has also made it clear that it fervently wishes, in the interests of the country, that SuperSport would agree to relax those restrictions" (my emphasis).
112. Moreover, the SABC asserted (at para 20 of its answering affidavit in the High Court proceedings) that it is "common cause between the applicants and the SABC that the SABC does not itself want to deprive Openview of the right to World Cup Rugby matches, but is constrained to do so by the restriction" (my emphasis). It is clear from the statements made by the SABC under oath in

the parallel High Court proceedings that the SABC considered the Openview restriction to be “*unjustifiable and anti-competitive*” and against the interests of the country.

113. In the heads of argument filed on behalf of the SABC in the parallel High Court proceedings, it was stated that:

“20. ... As the SABC has mentioned, it is public knowledge that the SABC considers the “Openview restriction” which is the target of prayer 3 to be anti-competitive (in the sense of infringing the Competition Act), and that the SABC has in fact laid a complaint with the Competition Commission, which is still pending, against similar restrictions in earlier agreements with SuperSport. The SABC also regards that restriction as unjustifiable and contrary to the national interest. ...” (my emphasis)

114. In other words, from the SABC’s perspective, the Openview restrictions imposed by SuperSport restrict the SABC’s ability to broadcast its channels to the widest audience it is able to reach and is clearly detrimental to the SABC. It is also clear that the SABC has encountered similar restrictions in earlier agreements with SuperSport.

115. The net result of the Openview restrictions is that the SABC is limited in being able to broadcast its channels to all of the viewers that it wishes to reach and, in turn, its Openview viewership is precluded from being able to access the SABC channels. This clearly not only affects the SABC’s competitiveness but also undermines consumer welfare by precluding potentially hundreds of thousands of viewers from being able to access sporting content of national interest.

116. It is self-evident that given the SABC's limited financial resources and its precarious financial position that it should be in a position to be able to maximise the extent to which it can reach viewers across the country when it procures sub-licensed rights to premium sporting events from Super Sport/Multichoice. However, the OpenView restriction precludes the SABC from being able to maximise its investment and to be able to reach the maximum number of viewers to whom it can possibly transmit its programmes in South Africa. Harm to the SABC is clearly adverse to competition in the television broadcasting sector in South Africa.
117. Similarly, harm to Openview is harm to competition in the satellite television market in South Africa, because Openview is the only viable constraint on MultiChoice currently (and into the future). Furthermore, once digital migration has been completed, Openview is likely to be the only viable competitor to Multichoice in the television broadcasting sector as a whole.
118. From eMedia and Openview's perspective, the Openview restrictions result in a significant loss of goodwill which impacts Openview's ability to compete effectively as a platform as against MultiChoice's broadcasting and distribution platforms and other competing third-party platforms.
119. Reputation and goodwill are fundamental to competition in almost all markets. The greater the goodwill (including reputation) that a firm has, the greater is its ability to compete. Where goodwill and reputation are tarnished that undermines the ability of the firm to attract custom and the competitive constraint that it imposes on its rivals weakens.

120. Damage to goodwill on the scale being inflicted on Openview through the Openview restriction brings about a substantial lessening of competition between Openview and DStv.
121. When major events of the magnitude and significance to South Africans of the relevant Rugby and Cricket World Cup matches are being carried on all the other platforms which broadcast the SABC channels, but not on the Openview platform, this creates substantial uncertainty for consumers. The platform loses a substantial amount of credibility with viewers who correctly question why this SABC content is available on all the other third-party platforms, but not on the Openview platform. This directly impacts the relationship between the platform, its viewers and its stakeholders in the long run, impacting goodwill. The irritation of viewers at being denied access to the Rugby World Cup matches being distributed on SABC2 is palpable and reflected in various complaints to the Broadcast Complaints Commission of South Africa (attached as **Annexure R**).
122. By not carrying SABC content like the relevant Rugby World Cup and Cricket World Cup matches, the Openview platform is seen as less valuable by the public, diminishing its reputation and goodwill.
123. The point, simply, is that consumers will come to realise that they cannot get, and never will have confidence that they will get (given the pattern of conduct), access to premium sporting events broadcast on the SABC through Openview.
124. Consumers that consider premium sport to be important, of which there are significant numbers in South Africa, are far less likely to choose Openview

over DStv, StarSat and even DTT as a consequence of the Openview restriction (as they are able to access these sporting events on SABC via other platforms but not via Openview). Even those consumers that have already chosen Openview may conceivably be more inclined to switch to other platforms as a result of the Openview restriction.

125. There can be little doubt that a significant proportion of adult South Africans consider the broadcast of sporting events of national interest to be an important part of television viewing. That is why MultiChoice insists upon the Openview restriction. It is also part of an ongoing strategy of MultiChoice to undermine the competitive position of its sole meaningful competitor in relation to the provision of satellite broadcasting services.
126. Many viewers rely on the Openview platform due to their constrained financial circumstances – once a viewer has purchased an Openview decoder, there are no monthly subscriptions to pay.
127. When such viewers are unable to watch the relevant Rugby World Cup and Cricket World Cup matches, it leads to dissatisfaction and resentment towards the Openview platform, impacting its goodwill negatively.
128. The Openview platform's viewers made their investments in Openview set top boxes in the knowledge that the SABC channels would be flighted on the Openview platform in unexpurgated form, and having the reasonable expectation that any future content secured by the SABC (such as Rugby and Cricket World Cup content and similar national sporting events), would be flighted on the Openview platform when these events are broadcast on the relevant SABC channels. Instead, when viewers accustomed to viewing the

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SABC channels on the Openview platform attempted to watch the rugby and cricket they found themselves unable to do so and complained about their inability to do so.

129. MultiChoice's motivation is clear. Its conduct is intended to send a message to channel providers and to viewers that key public interest programming that the SABC has secured the rights for and paid for will not be available on the Openview platform, despite the fact that the SABC's channels are available on the platform in the ordinary course.
130. This conduct starkly reveals the power of MultiChoice to determine what SABC content will be carried on rival platforms. It also has the effect (as explained above) in limiting the ability of the national broadcaster to reach 25% - 30% of its usual audience and thereby to monetise the investment that it has made in securing these rights.
131. The express wording of clause 4 of the sub-licence agreement reflected in the MultiChoice answering affidavit in the parallel High Court proceedings, which contains the Openview restriction, confirms that the SABC is prohibited from transmitting, or making available, the relevant Rugby World Cup matches on the Openview platform, including the quarter- and semi-finals, and the final match of the tournament.
132. Notably, neither MultiChoice nor the SABC in the High Court matter pointed to a single other "*third party owned platform*" that carries the SABC channels, which is prohibited from broadcasting the Rugby World Cup Matches. There is none. Clause 4 is carefully worded so that it catches only Openview in its net.

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133. MultiChoice also did not in its answering affidavit in the parallel High Court proceedings deny that eMedia would suffer harm to its goodwill if the Openview restriction is enforced. The only engagement that MultiChoice offered on the question of eMedia's goodwill in the answering affidavit was to state (at paras 191.5 and 6): "*eMedia complains that it would lose goodwill and market share if its customers switch to other providers because they cannot access content which those competitors invested in acquiring. This is not competition*".
134. The point MultiChoice misses is that eMedia will suffer harm to its goodwill and that will result in muted competition between eMedia and MultiChoice in the satellite market. MultiChoice offered no tenable commercial justification for the Openview restriction.

The free rider argument

135. SuperSport/MultiChoice's purported justification for the Openview restriction is premised on the notion of "*exclusivity*" and the contention that Openview is a so-called "*free-rider*". It argues that eMedia did not pay for the rights in respect of either the Rugby or Cricket World Cups and, therefore, that it is seeking opportunistically to obtain the ability to broadcast these rights free of charge.
136. This argument is misplaced for various reasons.
- 136.1. First, eMedia is not seeking to broadcast the Rugby or Cricket World Cup matches on any of its own channels, but is simply seeking to enforce the

existing contract which it has with the SABC to carry and transmit the SABC channels in unexpurgated form on the Openview platform.

136.2. Second, while Openview suffers harm to its goodwill, as a result of the SABC channels not being provided to it in the form in which they are provided to every other platform, eMedia does not derive any revenue directly from carrying the unexpurgated SABC terrestrial channels on its platform. It does not earn any subscription revenue (as it is a free-to-air platform). It also does not derive any of the advertising revenue generated on the SABC channels (as this all accrues to the SABC).

136.3. Third, MultiChoice's free rider argument is opportunistic and self-serving. StarSat and Sentech are both third party platforms that are not owned by the SABC and these two platforms also carry the SABC2 Channel including the Rugby World Cup matches and the SABC3 channel including the Cricket World Cup matches, without making any payment to SuperSport/MultiChoice do so. In other words, if SuperSport/MultiChoice's free rider argument was consistently applied, then other third-party platforms that carry the SABC channels which broadcast the Rugby and Cricket World Cup matches should also be paying SuperSport/MultiChoice in order to transmit the relevant SABC channels that broadcast these matches. The fact of the matter is that none of these third-party platforms pay any amounts whatsoever to SuperSport/MultiChoice in this regard. The free rider argument is simply an attempt at an *ex post facto* justification to seek to defend the Openview restriction.

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- 136.4. Fourth, when the 2019 Rugby World Cup final was broadcast on SABC, there was no Openview restriction and the SABC was able to broadcast it to its entire viewership including those watching via Openview.
- 136.5. Fifth, the rights have been sub-licensed to the SABC at a price. It can be assumed (given the demands apparently made in 2019 for US\$28 million – see the Parliamentary Monitoring Group report attached as **Annexure S**) that these rights were sub licensed for a significant amount of money. But the SABC is then precluded from being able to reach its entire audience. This undermines the financial position of the SABC (the national broadcaster) and is a matter of considerable national importance. The SABC is a loss-making state-owned enterprise that is plainly being exploited by a highly successful corporate entity. This is simply corporate greed writ large.

The misplaced exclusivity argument

137. The “*exclusivity*” argument on which the free-rider argument is based is also misplaced.
138. SuperSport contends that the Openview restriction in relation to the Rugby World Cup was justified, premised on what it described as the “*value of exclusivity*” of the broadcasting rights that it purchased from World Rugby. It said that this exclusivity has a significant commercial value which would be diminished if SABC2 were to be carried on Openview and were to include the rugby matches.

139. This proposition is incorrect. There are at least two possible meanings to the term exclusivity.
140. First, there is what might be called "*true exclusivity*". True exclusivity would mean that SuperSport had purchased the rights to broadcast the Rugby and Cricket World Cup matches in South Africa to the exclusion of any other broadcaster. If SuperSport had purchased true exclusivity the only platforms on which anyone could view the World Cup would be on the relevant DStv bouquets that include the relevant SuperSport channels.
141. No doubt MultiChoice would have liked to purchase true exclusivity from the likes of World Rugby. It did acquire true exclusivity in relation to the non-Springbok matches and these are not broadcast on SABC2. But there are two reasons why it could never have done so in relation to the Springbok matches and the relevant knock-out matches:
- 141.1. First, true exclusivity is illegal. It is expressly prohibited by section 60 of the Electronic Communications Act.
- 141.2. Second, World Rugby required the purchaser of broadcast rights to conclude a sub-licence contract with a national free-to-air broadcaster to broadcast 24 of the matches, including all of the Springbok matches, in South Africa "*in order to achieve the objective of reaching the greatest possible audience*". It is likely that the International Cricket Council would have a similar provision in the agreement with SuperSport/MultiChoice in relation to the broadcast of Cricket World Cup matches in South Africa.

142. SuperSport has not purchased true exclusivity in the case of the World Cup Rugby matches in relation to the Springbok games and the knockout rounds. The form of exclusivity it purchased from World Rugby is what will be called “*attenuated exclusivity*”. It works like this:
- 142.1. The World Cup is available on SuperSport to all subscribers to its premium bouquet.
- 142.2. The relevant World Cup matches are available throughout South Africa, free-to-air, on the SABC2, on DTT, free-to-air, SABC websites, the StarSat platform, and the DStv lower priced decoders (and should also be available to the approximately 2.6 million to 3.2 million households that are able to access SABC via the Openview platform).
143. Given the fact that SuperSport/MultiChoice has entered into a sub-licence agreement with the SABC in relation to the Cricket World Cup, the same consideration applies in relation to the Cricket World Cup. It would apply too in relation to other sporting events where SuperSport/MultiChoice imposes the Openview restriction as a condition to entering into a sub-licence with the SABC.
144. The only place where any “*exclusivity*” remains is for those viewers who access SABC2 and SABC3 through the Openview platform.
145. This is not, in truth, “*exclusivity*”. It is the straightforward exclusion of one rival platform, to the prejudice of viewers who rely on Openview to access SABC2 and SABC3. It also does not constitute competition on the merits but is rather

a manifestation of a strategy to undermine the position of a fledgeling competitor through denigration and undermining its goodwill.

146. The only value to MultiChoice of attenuated exclusivity is that its enforcement diminishes the Openview platform (MultiChoice's only viable competitor) in the eyes of television viewers in South Africa.
147. The Openview restriction achieves this purpose by ensuring that SABC viewers who access SABC2 and SABC3 on the Openview platform (and only those who depend on Openview to access SABC2 and SABC3) receive an inferior viewing experience relative to every other SABC2 or SABC3 viewer in the country. Instead of the Rugby World Cup, SABC2 viewers on Openview are shown recorded provincial matches. Similarly, SABC3 viewers who access SABC3 on the Openview platform, instead of being able to watch World Cup cricket matches receive alternative entertainment channels. This practice also applies to other premium sporting fixtures that are subject to the Openview restriction.
148. In other words, the true value to SuperSport/MultiChoice of attenuated exclusivity lies in the fact that it infringes the applicants' right to goodwill, and diminishes its relative competitive position. In other words, the value to MultiChoice which arises from "*exclusivity*" relates exclusively to damage to a competitor.
149. SuperSport/MultiChoice could not admit that this is the only value to it of the Openview restriction, because South African law does not regard this kind of "*value*" as worthy of protection. It is the very definition of unlawful competition.

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But it is the only value which can possibly reside in attenuated exclusivity. This is plainly anti-competitive.

F. APPLICATION OF THE PROVISIONS OF THE COMPETITION ACT TO MULTICHOICE'S CONDUCT

150. In relation to the broadcast of both the Rugby World Cup and the Cricket World Cup (and in relation to the sub-licensing of other premium sporting events), despite the Carriage Agreement, SuperSport/MultiChoice has sought to place the unjustifiable Openview restriction on the SABC preventing it from broadcasting the matches to its entire viewership by seeking to preclude the SABC from including these matches in the content of the SABC2 and SABC3 channels transmitted over Openview.
151. Deploying the Openview restriction to prevent premium sports content that the SABC has acquired from SuperSport/MultiChoice through sub-licensing arrangements from being broadcast on the SABC channels via Openview is clearly not confined to the Rugby and Cricket World Cup matches.
152. This is plainly both an historical and an ongoing practice on the part of SuperSport/MultiChoice and intended solely to prejudice Openview, its only meaningful competitor in relation to satellite television transmission in South Africa. It does so (it has not denied this in the parallel High Court proceedings) to undermine the competitive position of Openview. It has effectively conceded that there is a "*practice*" in this regard.
153. In other words, in relation to the Cricket and Rugby World Cups SuperSport/MultiChoice has contractually compelled the SABC to remove the

Rugby and Cricket World Cup content on the SABC2 and SABC3 channels when transmitting these channels over the Openview platform, when this content is available on every other third-party platform in South Africa. It does so, despite the fact that the SABC has a contractual obligation to Platco in terms of which it is required to transmit the SABC2 and SABC3 channels over the Openview platform, and the fact that the SABC reaches a sizeable proportion of its audience through the Openview platform.

154. The insertion of the Openview restriction or a restriction of a similar nature in the various sub-licensing agreements concluded between SuperSport/MultiChoice and the SABC results in a contravention of the following sections of the Competition Act:

Section 8(1)(d)(i) – Requiring or inducing a supplier or customer not to deal with a competitor

155. Section 8(1)(d)(i) of the Competition Act prohibits a dominant firm from engaging:

“in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other procompetitive gains which outweigh the anticompetitive effect of its act:

- (i) *requiring or inducing a supplier or customer to not deal with a competitor...”*

156. In relation to the various sub licensing agreements concluded between the SABC and SuperSport in respect of premium sports events including the Rugby and Cricket World Cups, SuperSport/MultiChoice is supplying the match broadcast

content to the SABC for inclusion by the SABC on SABC2 and SABC3 channels. Accordingly, the SABC is in this respect a customer of SuperSport/MultiChoice.

157. In terms of the Carriage Agreement concluded with the SABC, eMedia/Platco has a contractual right to transmit and distribute the content of the SABC2 and SABC3 channels on the Openview platform.

158. eMedia and Openview are competitors of MultiChoice and its subsidiaries and this has been clearly acknowledged by MultiChoice on various occasions. In the answering affidavit to the referral of the eChannels case to the Tribunal, MultiChoice describes Openview as (*inter alia*)⁸:

158.1. "an effective competitive constraint on DStv in the basic satellite market" (paragraph 158 of the Answering Affidavit in the referral) (my emphasis);

158.2. One of "DStv's rivals" (paragraph 177 of the Answering Affidavit in the referral) (my emphasis); and

158.3. "Openview is one of DStv's direct competitors" (paragraph 178 of the Answering Affidavit in the referral) (my emphasis).

159. However, at the insistence of SuperSport/MultiChoice, the two sub-licensing agreements between the SABC and SuperSport/MultiChoice in respect of the Cricket and Rugby World Cups, contain the Openview restriction which precludes the SABC from transmitting the Rugby World Cup and Cricket World Cup matches as part of the SABC2 and SABC3 channels, respectively, over the Openview platform. This is also likely to be the case in respect of the other sub-

⁸ Under case number CRP052Jul23.

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licensing agreements relating to premium sports events, which the SABC has concluded with SuperSport/MultiChoice as reflected in the correspondence between the SABC and SuperSport/MultiChoice in relation to the conclusion of the sub-licence in relation to the Rugby World Cup.

160. Accordingly, the relevant sub licence agreements between SuperSport/MultiChoice and the SABC require the SABC not to deal with a competitor of SuperSport/MultiChoice (in the distributions/ satellite broadcasting market/s), being Openview, on the same basis as the SABC deals with any other third-party platform. In other words, the Openview restriction is effectively an “inducement” or contractual requirement that results in the SABC not being able to deal with Openview as it would in the ordinary course. This is made plain by the SABC in its various press announcements and statements under oath in the parallel High Court proceedings where it clearly indicated that the Openview restriction prevented it from including the relevant sport content in the feed provided to Openview. The SABC stated in paragraph 8 of its answering affidavit in the parallel High Court proceedings that the relief compelling the SABC to provide an unexpurgated feed “*would involve the SABC contravening its sub-licensing agreement with agreement with SuperSport ... and accordingly being in breach of that agreement, thereby jeopardising the SABC’s rights thereunder*”.

161. There is no legitimate justification for the restrictions. To the contrary, the restrictions serve no purposes other than to harm Openview, which is SuperSport/MultiChoice’s only meaningful competitor in the satellite broadcasting market/s and more generally in the television broadcasting industry in South Africa.

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162. The Openview restriction was clearly not requested by the SABC. Accordingly, it is clear that the only reason for the inclusion of the Openview restriction is an attempt to harm eMedia as a rival satellite broadcaster in South Africa – effectively undermining its ability to impose any restraint on SuperSport/MultiChoice in the premium satellite market (or part of the market) and inhibiting its growth in the basic satellite market (or part of the market). The restrictions were intended solely to harm a much smaller challenger platform by inducing or requiring the SABC to breach the Carriage Agreement.
163. As explained above, through the Openview restrictions, MultiChoice will harm the reputation of Openview - in the eyes of a significant customer (the SABC), advertisers who will be aware of the vulnerable position held by Openview as the SABC can be compelled to limit the programming that it broadcasts through the Openview channel because of the significant market power held by MultiChoice, as well as consumers who will believe that they are disadvantaged purely by virtue of the fact that they have elected to access the SABC channels via the Openview platform. The Openview restriction undermines the goodwill of Openview and the way in which this challenger platform is perceived in the market. Put differently, the Openview restriction is intended to denigrate the offering of a competitor.
164. If Openview is hobbled as a competitor, MultiChoice's market share will rise accordingly, and its dominant position in the satellite broadcasting market/s and the television broadcasting market more generally, will be further entrenched. That outcome is clearly to the detriment of consumers and competition.

165. Absent effective competition from Openview, MultiChoice will ultimately be able to increase the prices of its bouquets or avoid having to compete more vigorously by maintaining or increasing the quality of its bouquets.
166. Consumers will therefore be forced to pay more to see the television that they have come to watch daily. The harm to consumer welfare, in particular amongst lower LSM groups, is therefore manifest.
167. There is no efficiency or other pro-competitive benefit associated with the OpenView restriction. It is a **naked anti-competitive** restriction and, in the context of the overwhelmingly dominant position held by MultiChoice, gives rise to a contravention of section 8(1)(d)(i). The restrictions have the effect of unjustifiably limiting the expression of rights of between approximately 2.6 and 3.2 million South African households who will not be able to watch the Rugby World Cup or the Cricket World Cup matches on the SABC via Openview (should they choose to do so) as a result of the Openview restriction and, in future, other sporting events with national significance to which SuperSport has secured television rights and which it has sub-licensed rights to the SABC or will do so in future. The Openview restrictions, and MultiChoice's conduct in insisting on the inclusion of the restrictions in the sub-licence agreements with the SABC, are clearly contrary to the public interest.

Section 8(1)(d)(iii) - Forcing a buyer to accept a condition unrelated to the object of a contract

168. Section 8(1)(d)(iii) of the Competition Act stipulates that it is prohibited for a dominant firm to:

“engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other procompetitive gains which outweigh the anticompetitive effect of its act:

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract.”

(emphasis added)

169. In addition to a contravention of section 8(1)(d)(i), the Openview restrictions imposed by MultiChoice also constitute a contravention of section 8(1)(d)(iii) of the Competition Act.
170. There is no objective justification for the Openview restrictions imposed by MultiChoice. The restrictions have no rational relationship to the granting of the sub licence to the SABC and are entirely unrelated to the object of the contracts between SuperSport/MultiChoice and the SABC (which in the case of the Rugby and Cricket World Cups is to ensure that the majority of ordinary South Africans are able to view the Rugby World Cup and Cricket World Cup matches). It is, therefore, clear that MultiChoice’s conduct contravenes section 8(1)(d)(iii). In fact, the Openview restrictions are not only unrelated to the object of the contract, but entirely at odds with it.
171. The only platform of any significance over which the SABC transmits its channels which is subject to the Openview restriction contained in the sub-licence agreements is Openview. SuperSport/MultiChoice has not imposed a similar restriction on any other of the third-party platforms which broadcast the SABC channels, including StarSat and DTT.

172. The conclusion that the Openview restrictions is not justifiable is fortified by the fact that the restrictions contained in MultiChoice's contracts with the SABC are *contra bonos mores* and, therefore, unenforceable because they would have the effect of an unjustifiable limitation of the expression rights of the approximately 2.6 to 3.2 million South African households who will not be able to watch the rugby and cricket and other premium sporting events on the SABC channels via Openview (should they wish to) as a result, and unfairly and unjustifiably discriminates between those who access SABC free-to-air broadcasting via analogue signal, DTT, DStv, StarSat or via Openview.

173. Given the fact that SuperSport/MultiChoice has sub-licensed the SABC to broadcast the relevant Rugby and Cricket World Cup matches, there is no incremental benefit to SuperSport/MultiChoice in contractually limiting the ability of the SABC by the Openview restriction to transmit the unexpurgated content of its SABC2 and SABC3 channels on Openview. Put differently, the Openview restrictions do not constitute a legitimate protection of a protectable interest. They are nakedly anti-competitive restrictions that are simply intended to harm the goodwill of the much smaller challenger platform.

174. In other words, there is no basis on which such unlawful restrictions could be rationally related to the sub-licence agreements concluded between the SABC and SuperSport in respect of the broadcast of the Rugby World Cup and Cricket World Cup matches.

Section 8(1)(c) - Exclusionary Act

175. Section 8(1)(c) provides that it is prohibited for a dominant firm to "*engage in an exclusionary act, other than an act listed in paragraph (d), if the anticompetitive*

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effect of that act outweighs its technological, efficiency or other procompetitive gain”.

176. The Competition Act defines “*exclusionary act*” as an “*act that impedes or prevents a firm from entering into, participating in or expanding within a market.*”

177. It should also be borne in mind that eMedia has a black shareholding in excess of 50%.

178. MultiChoice’s conduct falls within the scope of section 8(1)(c) because the conduct is exclusionary as defined in the Competition Act.

179. As explained above, the conduct undermines the competitive position of eMedia and is intended to harm, eMedia. The Openview restriction means that the only significant television distribution platform in South Africa that is not in a position to receive the unexpurgated content on the SABC2 and SABC3 channels when they broadcast the Rugby World Cup matches and Cricket World Cup matches and other premium sporting content, where they are sub-licensing arrangements between the SABC and SuperSport/MultiChoice, will be Openview.

180. All of the other significant third-party platforms which transmit the SABC channels will receive the unexpurgated content and will broadcast the relevant sporting events. This clearly undermines Openview’s ability to participate effectively and efficiently as it would otherwise do in the ordinary course.

181. As a result, Openview’s credibility and goodwill with both viewers and channel providers will be irreparably damaged as a result. Individuals who have Openview boxes will no doubt question the utility of having these boxes if sporting events of national importance are available on all other third-party platforms

which transmit the SABC channels, except for Openview. In other words, the Openview restriction is designed intentionally to undermine Openview's ability to provide a platform service to its customers and to provide channel content to viewers and, therefore, limits its ability to participate effectively in the relevant market as a platform provider. There is no other explanation for the inclusion of the Openview restrictions, given the fact that there is no exclusivity that inures in the sporting content after the sub licence agreement was concluded with the SABC.

182. Furthermore, there are no efficiency, technological or pro-competitive gains associated with the Openview restriction, which effectively seek to prevent the SABC from broadcasting content that forms part of the SABC2 and SABC3 channels on Openview, notwithstanding that Openview is lawfully entitled to transmit that content and has a contractual obligation with the SABC to do so.

183. As explained above, there are, in these circumstances, no efficiency benefits that arise from the Openview restriction. The Openview restriction also undermines consumer welfare for a range of reasons including that it precludes television licence holders that have purchased Openview decoders from accessing the SABC channels (that are carried on Openview) from being able to view the unexpurgated SABC channels. Also, through undermining the Openview platform, MultiChoice shores up its overwhelmingly dominant position which ultimately undermines consumer welfare.

184. SuperSport/MultiChoice's conduct in imposing the Openview restrictions on the SABC is, therefore, a clear contravention of sections 8(d)(i), and/or 8(1)(d)(iii), and/or 8(1) of the Competition Act.

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Section 5(1) – Prohibited vertical agreement

185. In addition to the contraventions of section 8 of the Competition Act, MultiChoice's conduct also constitutes a contravention of section 5(1) of the Act.
186. The agreements concluded between the SABC and SuperSport/MultiChoice are of a vertical nature (although as indicated they also have a horizontal dimension) in that they involve the licensing of particular rights (free-to-air rights) by a licensor to a licensee: MultiChoice is the holder of the exclusive broadcasting rights in respect of the Rugby World Cup and the Cricket World Cup and the SABC is the sub-licensee of those rights. Put differently, MultiChoice is a supplier of content and the SABC an acquirer of that content.
187. It has already been explained for the detailed reasons set out above that the Openview restriction gives rise to significant anti-competitive effects on the basis that it limits the SABC's ability to broadcast its channels to the public and viewers who watch its channels and also results in the SABC being in breach of its transmission and distribution agreements with Openview. It also undermines Openview's goodwill and credibility with both channel providers and viewers, and creates uncertainty in the minds of the viewer. In other words, the Openview restriction results in a substantial lessening of competition in two different ways. First, it impairs the SABC's ability to broadcast its channels to the widest possible audience and attract the highest number of viewers, thereby diminishing the SABC's ability to compete with MultiChoice for viewers and advertising revenue. Second, the Openview restriction impairs Openview's goodwill and credibility as a platform provider and therefore undermines its ability to compete with

MultiChoice as an alternative platform provider. On this basis the Openview restriction, gives rise to a substantial prevention or lessening of competition.

188. There are also (as explained above) no technological, efficiency or other procompetitive gains resulting from the restrictions in the agreements concluded between MultiChoice and the SABC.

189. MultiChoice is dominant in all of the relevant markets and, therefore, the conduct in question falls squarely within the scope of section 5(1) of the Competition Act.

190. Accordingly, the agreement also gives rise to a contravention of section 5(1) of the Competition Act.

Section 4(1)(b)(i) of the Competition Act

191. In the complaint referral proceedings before the Competition Tribunal relating to the decision by MultiChoice not to enter into a further agreement with eMedia to carry the four eMedia channels that were previously transmitted on DStv⁹, MultiChoice sought repeatedly to claim that it competed with the SABC in its answering affidavit in those proceedings:

191.1. ***“MultiChoice's business has for some time faced significant competition not only from Openview and the SABC but also from OTT operators, including global giants such as Netflix, Amazon and Disney+.”***¹⁰

⁹ Under case number CRP052Jul23.

¹⁰ Paragraph 32 of MultiChoice's answering affidavit in the complaint referral.

191.2. *"In the case of television advertising, MultiChoice continues to face significant competition for advertising revenue from the SABC and eMedia, and others"*¹¹.

191.3. *"Competitors, such as the SABC and eMedia, commission original content and package their own channels, which they then broadcast"*¹² (my emphasis).

192. So too, in the recent parallel High Court proceedings, the SABC stated on oath that SuperSport/MultiChoice is *"a direct competitor of the SABC"*.

193. The SABC and the MultiChoice group are competitors of one another from a broadcasting, advertising and channel content perspective, as well as actual or potential competitors in relation to procuring rights to broadcast premium sporting events.

194. As such, the sub licence agreements also involve a horizontal dimension in that they involve agreements between competitors (whether actual or potential) and, accordingly, they fall within the scope of section 4 of the Competition Act.

195. The various sub-licence agreements contain a material restriction in the form of the Openview restriction, as to the platforms that the SABC may use to reach its viewers for purposes of broadcasting certain content on its various channels. The restriction plainly affects the quality and the nature of the programming that is made available to a section of the SABC's viewership (the viewers of the SABC channels which receive the channels via Openview).

¹¹ 160.2 of MultiChoice's answering affidavit in the complaint referral.

¹² Paragraph 255.3 of MultiChoice's answering affidavit in the complaint referral.

196. To put this simply: MultiChoice, a competitor of the SABC (and eMedia) has concluded an agreement with the SABC that the SABC may not transmit programmes that form part of its channels to SABC viewers who view these channels via one specific platform (Openview). This aspect of the agreement determines the quality and nature of the SABC's programming (by excluding certainly highly desirable programmes and effectively forcing the SABC to replace it with less desirable programming) that is available on the various platforms that broadcast the SABC channels.
197. This results in the fixing of a trading term as between parties in a horizontal relationship, as it prescribes the platforms which the SABC is entitled to use for purposes of broadcasting certain content on its channels and the programming which it is entitled to broadcast in respect of the sub-licensed rights (i.e. the manner in which it trades and distributes its services).
198. The Openview restraint is, for the reasons discussed above, not reasonably required (from a competition law perspective) for the conclusion and implementation of the sub-licence agreements. For the same reasons, the Openview restraint is also disproportionate.
199. Accordingly, the restraint is a naked restraint and, therefore, a clear contravention of the prohibition against agreements, understandings or concerted practices between parties in a horizontal relationship that involve the fixing of trading terms.
200. A person with management authority who causes a firm to contravene or acquiesces in a firm contravening section 4(1)(b) of the Competition Act faces potential criminal penalties since 1 May 2016 and forms part of the prohibition

against cartel conduct, that the Tribunal has described as being amongst the most egregious of the potential contraventions of the South African Competition Act.

G. CONCLUSION IN RELATION TO THE VARIOUS CONTRAVENTIONS OF THE COMPETITION ACT AND OPENVIEW'S PRIMA FACIE RIGHT

201. I am advised that in interpreting the relevant provisions of the Competition Act and giving effect to them, the preamble to the Competition Act provides that one of the key objectives of the Act is to “*restrain particular trade practices which undermine a competitive economy*”. It is self-evident from the assessment above of the various contraventions of the Competition Act occasioned by the Openview restriction, that it is an anti-competitive trade practice which undermines competition in the television broadcasting sector and which should be restrained as soon as possible.
202. The Openview restriction is a barely disguised attempt by SuperSport/MultiChoice to undermine the competitive position of its only viable domestic competitor in the television broadcasting industry in South Africa and more particularly in relation to satellite television broadcasting market/s.
203. It is a clearcut attempt to exert its unquestionable market power to reduce consumer welfare in a manner that undermines the imperative of nation building. As recognised by the Minister of Sport, Arts and Culture, “*rugby plays a critical role in nation building and social cohesion*”. eMedia submits that the Cricket World Cup is no different. The same also applies in relation to other sporting events of national significance (as recognised by the fact that they are included

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in the regulations promulgated in terms of section 60 of the Electronic Communications Act).

204. Not only is MultiChoice's conduct in the form of the Openview restriction unconscionable from a competition law perspective, but it also undermines the ability of the SABC to comply with its contractual obligations to eMedia.

205. This conduct on the part of MultiChoice gives rise to no pro-competitive, efficiency or technological benefit. The Openview restriction is simply a naked restraint that is aimed at harming Openview.

206. For the reasons set out above, the Openview restriction constitutes an abuse of dominance under sections 8(1)(d)(i); 8(1)(d)(iii), and/or 8(c) of the Competition Act, and/or a contravention of section 5(1) of the Competition Act. It also constitutes a contravention of section 4(1)(b)(i) of the Competition Act.

H. **URGENCY, IRREPARABLE HARM, BALANCE OF CONVENIENCE AND NO OTHER REMEDY**

Urgency

eMedia acted reasonably in launching these proceedings on 16 October 2023

207. As set out above, this application concerns the practice which has developed between MultiChoice and the SABC, in terms of which MultiChoice grants to the SABC a sub-licence to broadcast sporting events of national interest and importance, but does so subject to the "Openview restriction" which prohibits the SABC from providing the relevant sports event feed to its viewers which access the SABC channels on the Openview platform.

208. It is clear that the practice of including the Openview restriction in sub-licence agreements related to the broadcast of premium sporting events is ongoing, but this application has been triggered by two particularly egregious examples of the practice, with significant deleterious to the rights of ordinary South Africans to view the Springboks and the Proteas contest the Rugby and Cricket World Cups respectively.
209. In both instances, MultiChoice has insisted on the inclusion of the Openview restriction in the sub licensing agreement relating to the broadcast of the Rugby and Cricket World Cup matches by the SABC, which precludes the SABC from providing the feed of the two sporting events to Platco to transmit the World Cup events on the relevant SABC channels via the Openview platform.
210. The first agreement concluded between MultiChoice and the SABC relates to the sub licensing of the right to broadcast certain of the Rugby World Cup matches (sixteen matches in total including all games in which the Springboks were playing as well as the quarter-finals, semi-finals and the final match). eMedia first became aware of this agreement and the restrictive provision contained in the agreement on 8 September 2023 when the SABC issued the media release which has been described in detail and quoted above.
211. The second agreement relates to the Cricket World Cup. eMedia first became aware on Thursday, 5 October 2023 that the SABC had concluded a sub licensing agreement with MultiChoice that contained a similar restrictive provision on Openview being able to carry the relevant SABC content relating to the Cricket World Cup.

212. As soon as eMedia became aware of the first agreement it wrote to MultiChoice the same day (8 September 2023) drawing attention to the restrictive and overtly anti-competitive actions of MultiChoice, stating that MultiChoice's conduct contravened the Competition Act, and seeking an urgent undertaking from MultiChoice that the restriction on the SABC providing the feed of the relevant rugby matches to Platco for broadcast on the Openview platform, would be removed by the close of business on that day.
213. As explained above, MultiChoice did not respond to the letter, and eMedia addressed a further letter to MultiChoice the following day (9 September 2023). MultiChoice did not respond to the second letter either and appears to have adopted the approach that it would simply ignore the correspondence altogether. (As set out above, MultiChoice later sought to suggest that it had not received the letters but, for the reasons already explained, this is highly improbable.)
214. Accordingly, MultiChoice was expressly on notice from 8 September 2023 that eMedia regarded the Openview restriction as anti-competitive and that it had been requested to not enforce the restriction. MultiChoice as the principal instigator of the Openview restriction was required to take the necessary steps to ensure that its conduct was lawful, to respond to reasonable questions relating to its conduct, as opposed to continuing to adopt an anti-competitive approach. This is particularly the case when one takes into consideration the fact that MultiChoice employs, on a full-time basis, a range of people who have significant experience and insights into competition law related matters, including the former Chief Legal Counsel of the Competition Commission, as well as a former senior economist at the Competition Commission, amongst others. In short, it has all

the necessary expertise and experience to advise it on competition law related issues and is able to address these issues at short notice.

215. In addition to the letters addressed to MultiChoice, eMedia took other proactive steps to seek to address the anti-competitive conduct of MultiChoice, including the following:

215.1. eMedia's attorneys addressed a letter to the SABC on 9 September 2023 (a copy is attached as **Annexure T**) setting out why it was of the view that the arrangements between MultiChoice and the SABC were anti-competitive. However, despite the fact that the SABC subsequently admitted in the parallel High Court proceedings that the arrangements were anti-competitive and despite having issued various press releases in which it stated that MultiChoice's conduct was patently anti-competitive, the SABC declined to jointly approach the competition authorities in an attempt to resolve the competition concerns which eMedia had raised in the letter, and which the SABC had independently expressed in its press release.

215.2. eMedia filed a complaint with ICASA on 18 September 2023.

215.3. eMedia instructed its attorneys to address a letter to MultiChoice on 21 September 2023 as set out above, together with details of the response received from MultiChoice.

215.4. On 24 September 2023, eMedia's legal representatives addressed a letter to MultiChoice and the SABC requesting that they provide a copy of the sub-licensing agreement in respect of the Rugby World Cup to eMedia's

legal representatives. MultiChoice wrote back to eMedia's attorneys, refusing the request. The SABC did not respond to the request.

216. eMedia initially elected to pursue civil proceedings against the SABC and MultiChoice through the parallel High Court proceedings. In this regard eMedia launched urgent proceedings on 26 September 2023 in the High Court seeking declaratory and interdictory relief in relation to inter alia the SABC's breach of its agreement with Platco and MultiChoice's deliberate interference in the contractual arrangements between the SABC and Platco. The urgent application was launched two business days after eMedia's attorneys had addressed a letter to MultiChoice in a final attempt to resolve the matter (bearing in mind that 25 September 2023 was a public holiday).
217. Notably, in the parallel High Court proceedings, MultiChoice stated at paragraph 174 of its Answering Affidavit filed on 3 October 2023, MutliChoice stated: *"Before this court, the applicants make a range of competition law allegations. While I address some of those below, the Competition Commission and/or Competition Tribunal are the appropriate fora for such matters to be considered."*
218. The High Court heard the urgent application on 10 October 2023 and struck the matter from the roll indicating that eMedia should have approached the court sooner, while nevertheless acknowledging that the matter is currently urgent.
219. Accordingly, eMedia has initially sought to pursue its contractual and other common law remedies, on the basis that this could potentially result in a swift and efficient resolution of the matter.

220. Unfortunately, given the approach taken by the High Court on the issue of urgency, it has not been possible to resolve the civil proceedings expeditiously.
221. During the course of pursuing the parallel High Court proceedings, the SABC announced the conclusion of the second agreement with SuperSport, which came to eMedia's attention approximately two business days prior to the date on which the High Court application was set down.
222. Given the fact that the hearing of the High Court proceedings was at that stage imminent, it was not possible for eMedia to deal simultaneously with this issue from a competition law perspective.
223. On 10 October 2023, eMedia sought undertakings from SuperSport/MultiChoice that it would not enforce the Openview restriction in respect of the SABC's broadcast of the Cricket World Cup. On 11 October 2023, SuperSport /MultiChoice declined to provide the undertaking and indicated that it would continue to enforce the restriction.
224. eMedia proceeded as quickly as possible to launch these proceedings before the Competition Tribunal, once it became clear that SuperSport/MultiChoice was intent on continuing the anti-competitive practice in respect of the Openview restriction.

eMedia will not get adequate redress in a hearing in the ordinary course

225. Viewers of Openview in South Africa are facing an ongoing and very significant diminution of their rights to watch the unexpurgated SABC channels should they so desire during the course of the Rugby and Cricket World Cups, and in relation

to the other premium sports events, where the Openview restriction is being imposed against them.

226. Insofar as the status of the relevant World Cup events are concerned:

226.1. the Rugby World Cup has now progressed to the stage where the with the semi-finals (South Africa vs England and Argentina vs New Zealand) are to be played on 20/21 October 2023, and the final will take place on 28 October 2023. It is in respect of these later matches (semi-finals and finals) that viewership is highest; and that the opportunity for nation-building and unity behind the national team is greatest; and

226.2. in relation to the Cricket World Cup, there are still numerous games due to be played in the next month (with South Africa due to play on 17, 21, 24, and 27 October, and on 1, 5, and 10 November 2023, with the semi-finals due to be played on 15 and 16 November, and the final to be played on 19 November 2023).

227. With each day that passes, Openview subscribers who are only able to access the SABC channels via the Openview platform are at risk of missing more of the Rugby and Cricket World Cup games in which South Africa is scheduled to play.

228. However, this application is not concerned only with these two tournaments. It relates to a number of future events as well, including tournaments starting in January (as detailed above).

229. It is accordingly necessary for this application to be heard as soon as reasonably possible in order to ensure that, if eMedia is correct that the Openview restriction is anti-competitive and unlawful, its rights, and the rights of the 2.6 to 3.2 million

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households with active Openview decoders will be effectively vindicated through the interdictory relief sought and to limit the extent to which they are denied access to premier sporting events that have been sub licensed to the SABC.

230. It is not feasible for eMedia to wait for the Commission to investigate the complaint which eMedia has lodged with it in relation to the Openview restriction, given the significant time periods involved in such Commission investigations. In another application filed by eMedia against MultiChoice in the Competition Appeal Court earlier this year, in which eMedia sought a declarator that section 49C(5) of the Competition Act was inconsistent with the Constitution and invalid to the extent that it fails to provide for more than one extension of an interim relief order, the Competition Commission filed an affidavit in which it stated that *“abuse of dominance complaint investigations and the accompanying complaint referral proceedings entail a complex factual, legal and an economic inquiry and typically take a considerable period before they can be finalized”*.

231. The Commission explained that an inevitable consequence is that complaint investigations and referral proceedings often exceed 12 months. The Commission referred to a sample of ten abuse of dominance cases which it had investigated and the timelines from the date of the referral to a hearing by the Tribunal in order to demonstrate the lengthy nature of these cases. The sample of 10 cases referred to by the Commission in its affidavit demonstrated that these cases can take up to 7 or more years to reach the hearing stage.

232. Furthermore, in light of the SABC’s statements under oath in the High Court that it regards the Openview restriction as *“profoundly anti-competitive (in the sense of infringing the Competition Act)”* it is clear that a public institution that is required

to act in a lawful fashion is being forced to do otherwise, because of the fear that MultiChoice will terminate the sub-licence agreement with it if the SABC seeks to resist the anti-competitive conduct by MultiChoice. This fear is plausible and credible given that in the course of the parallel High Court proceedings, MultiChoice brought a counter application to terminate the sub-licence agreement in its entirety if the High Court found that the Openview restriction was unlawful.

233. The net result is that the SABC is unable to discharge its public mandate of broadcasting nationally to all its viewers and finds itself in the invidious position of having to abide by an unlawful agreement, despite openly acknowledging that provisions of the agreement are patently anti-competitive.

234. It is inherently prejudicial to the rule of law and media freedom for an organ of state such as the SABC to be forced to abide unlawful conduct. Organs of state, such as the SABC, are bound by the Constitution's provisions on media freedom, and should be encouraged to discharge their mandates to the country, not threatened when they seek to do so. The threat by MultiChoice to enforce its anti-competitive conduct – and thereby prevent the SABC from enabling viewership through the Openview channel – renders the matter urgent on its own.

235. In these circumstances, where hundreds of thousands of Openview viewers are potentially being prejudiced by being unable to access the content on SABC2 and SABC3, which are broadcasting the World Cup matches and similar premium sporting events going forward as outlined above and where the SABC cannot as a result fulfil its public, statutory and constitutional mandate, the matter

is inherently urgent. The urgency is accentuated by the imminent analogue switch off.

Irreparable harm

236. In relation to the irreparable harm which will be suffered if the interim relief is not granted, eMedia wishes to make three primary submissions in this regard (some of which overlap with the analysis of anti-competitive effects above).
237. First, the net effect of the Openview restriction is that the SABC is unable to discharge its public mandate of broadcasting its content to all SABC viewers on a national basis and that its competitive offering is diminished. As set out above, as a consequence of the digital migration process the SABC had switched off various of its transmitters in five provinces and viewers in those provinces rely on the likes of Openview to be able to access SABC programming. The Openview restriction means that hundreds of thousands of SABC viewers in those provinces are unable to access the SABC Rugby and Cricket World Cup content as well as other premier sporting events that have been sub-licensed to the SABC. This amounts to a breach of their constitutional rights of access to information and also amounts to arbitrary and discriminatory conduct in breach of the Constitution, and a clear diminution of competition in the relevant market.
238. Second, the ongoing enforcement by MultiChoice of the restriction which it has imposed on the SABC is inflicting harm on the applicants including harm to their competitive position in the market as the only meaningful competitor to MutliChoice:

- 238.1. When major events of the magnitude and significance to South Africans such as the relevant Rugby World Cup and Cricket World Cup matches or other premier sporting events are being carried on all the other platforms which broadcast the SABC channels but not on the Openview platform, the platform loses a substantial amount of credibility with viewers, who correctly question why this SABC content is available on all the other platforms such as StarSat, DTT, but not on the Openview platform. This directly impacts the relationship between the platform, its viewers and its stakeholders in the long run, impacting its goodwill. The irritation of viewers at being denied access to the Rugby World Cup matches being distributed on SABC2 and the Cricket World Cup matches on SABC3, is palpable and reflected in various complaints to the Broadcast Complaints Commission of South Africa.
- 238.2. Many viewers rely on the Openview platform due to their constrained financial circumstances. When such viewers are unable to watch the relevant Rugby and Cricket World Cup matches or other relevant sporting events, it leads to dissatisfaction and resentment towards the Openview platform, impacting its goodwill and position in the market negatively.
- 238.3. The Openview platform's viewers made their investments in Openview set top boxes in the knowledge that the SABC channels would be flighted on the Openview platform, and having the reasonable expectation that any future content secured by the SABC (such as for example the Rugby and Cricket World Cup content), would be flighted on the Openview platform. Instead, when viewers accustomed to viewing the SABC Channels on the

Openview platform attempted to watch the rugby and cricket they found themselves unable to do so, and complained about their inability to do so.

238.4. MultiChoice's thus far successful strategy of inhibiting the Openview platform from carrying the relevant SABC content including the relevant Rugby and Cricket World Cup matches has caused such viewers distress and damaged their view of the Openview platform's brand. This is especially so where all other SABC viewers who access the SABC content via platforms other than Openview, have access to the Rugby and Cricket World Cup games and other sporting events that are sub-licensed to the SABC. The ongoing nature of the practice of imposing the Openview restriction has a compounding effect as it is not simply one major sporting event, but appears to be in relation to many sporting events of national significant that have a sizeable following.

239. Third, there will be irreparable harm to the rule of law if the SABC is not prevented from acting in direct contradiction to the requirements of the Competition Act; its contractual obligations to eMedia; its constitutional obligations to promote access to information, and its legislative mandate to inform, educate and entertain the public of South Africa.

240. The SABC has admitted that it considers the Openview restriction to be anti-competitive. Yet, out of fear and in the face of MultiChoice's insistence, the SABC allows itself to conclude a contract containing that very anti-competitive restriction, and it does so again and again. The public broadcaster should not be bullied into having to accept anti-competitive arrangements in this way.

241. Such conduct would not be condoned by a hapless private party appearing before the Tribunal having entered into a series of anti-competitive agreements stating "*I had no choice; the other party is a bully*". The Tribunal would have little sympathy. How much more egregious is the position when the party in question is the SABC – a state-owned enterprise responsible for providing millions of South Africans access to events of national importance?
242. An interdict is required to prevent this irreparable harm to competition and the rule of law. That harm is constitutional harm, occasioned ongoingly by anti-competitive conduct. It is the antithesis of what the Competition Act allows, and the Competition Appeal Court and the Constitutional Court have stressed that the competition authorities must be astute to ensure that when they apply the Competition Act, they do so in a manner that vindicates the Constitution.
243. The very purpose of the SABC's agreement with SuperSport/MultiChoice in respect of the Rugby World Cup, that was negotiated following the intervention of the Minister of Sport, Arts and Culture and significant corporate sponsors, is to provide all South Africans with such access in the national and public interest. But the agreements entered into with MultiChoice undo that aim. They differentiate between different kinds of SABC viewers, without any rational basis: the sole basis for differentiating between these classes of SABC viewers is the mode by which they view the SABC channels.
244. MultiChoice's motivation is clear. Its conduct is intended to send a message to channel providers and to viewers that key public interest programming will not be available on the Openview platform, despite the fact that the SABC's channels

are available on the platform in the ordinary course. It also reveals the power of MultiChoice to determine what will be carried on their rival platform.

245. The criteria of reasonableness and the *boni mores* of society are inconsistent with MultiChoice's unacceptable interference with the Carriage Agreement, and MultiChoice's attempt to prevent the matches from being broadcast on SABC through Openview is anti-competitive and unlawful. This is particularly clear given that the restriction also has the consequence of infringing the fundamental rights of hundreds of thousands of South Africans to obtain information from the SABC channels through the Openview platform. It is a naked restraint with the sole purpose of harming the competitive position of Openview, and it is willing to effect that restraint by sacrificing the rights of the public to media access and freedom of information.

246. Furthermore, the SABC is the public broadcaster. It exists in order to fulfil the public's rights of access to information and expression. The SABC is statutorily required to include national sports programming in its public service (s 10(1)(i) of the Broadcasting Act). In fulfilment of these statutory and constitutional duties, the SABC obtained the right to broadcast the matches to the public, yet it is being denied the ability to fulfil its correlative public duty because of the "*patently anti-competitive*" sub-licensing agreement concluded with MultiChoice arbitrarily and ongoingly prevents only those SABC viewers who access the SABC channels via the Openview platform from viewing the Rugby and Cricket World Cup.

Balance of convenience

247. I have demonstrated above that competition will be irreparably harmed should the relief sought in these interlocutory proceedings not be granted. I have further

shown that such relief must be granted on an urgent basis, because every broadcast of a premium sports event that is subjected to the unlawful and anti-competitive Openview restriction results in:

- 247.1. further diminution of the goodwill that resides in the Openview platform and Openview's competitive position, as a consequence of viewers not being able to access SABC content which is available on other platforms on which the SABC channels are transmitted and carried;
 - 247.2. potentially hundreds of thousands of television viewers who rely on Openview to access the SABC channels not being able to access the full SABC content in respect of premium sporting events which is available on other platforms which carry the SABC channels, harming their consumer experience; and
 - 247.3. the further (impermissibly obtained) entrenchment of MultiChoice's dominance in the satellite television and broadcasting market, as well as the television broadcasting sector as a whole.
248. On the other side of the scale, SuperSport/MultiChoice would not suffer any significant prejudice (or any prejudice at all) were the relief to be granted. SuperSport has already divested itself of any true exclusivity it may have had in relation to the sports content in question. It does so when it concludes sub licensing agreements with the SABC which permit the broadcasting free-to-air of the sports matches in question. As the SABC has made clear in its press-releases, the aim of these sub licensing agreements are to ensure that all South Africans can watch sports events of national importance and interest.

249. In the premises, the balance of convenience clearly favours the granting of the interim relief sought.

No alternative remedy

250. eMedia's complaint against MultiChoice is grounded in sections 4(1)(b)(i), 5(1), 8(1)(c) and 8(1)(d)(i) and (iii) of the Competition Act. That complaint, and this interlocutory application pending the finalisation of the complaint, falls squarely within the jurisdiction of the Competition Authorities. There is no other tribunal or forum that has the jurisdiction to determine whether the Openview restriction constitutes a breach of those sections and, at the interlocutory stage, whether eMedia has made out a prima facie case for interim relief. That is not the question that is before the High Court, nor would the High Court have any jurisdiction to determine it. There is accordingly no question that this Tribunal, and no other forum, has the jurisdiction to determine the issues raised herein.

251. There is also no prospect of an extra-judicial resolution of the issues. eMedia engaged with both SuperSport/MultiChoice and the SABC before launching these proceedings (as I am advised a responsible litigant is required to do), and sought undertakings that the Openview restriction would not be enforced. MultiChoice and the SABC refused to provide such undertaking.

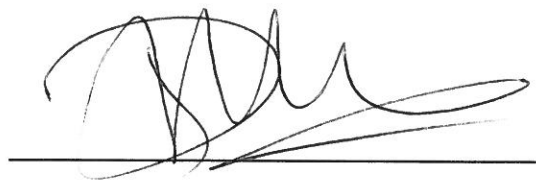
252. There is thus no alternative remedy available to eMedia in relation to the relief that is sought in these proceedings.

253. It should be noted that the Openview restriction appears to be an ongoing pattern of conduct by MultiChoice and the SABC, and it is likely that MultiChoice's anti-competitive conduct will be repeated in relation to future important sporting

events of national interest. MultiChoice's *modus operandi* is evident from the manner in which it concluded agreements with the SABC in relation to the Rugby World Cup and the Cricket World Cup, in both instances acquiring both the subscription and free to air rights for the broadcast of significant sporting events long in advance of the actual events and then concluding last minute deals with the SABC to sub licence the right to broadcast the content shortly before the start of the tournament, while imposing unreasonable and anti-competitive restrictions on the SABC. If MultiChoice is allowed to continue in this vein, it will continue to apply the Openview restriction in relation to future sporting events of national significance in respect of which it acquires the broadcast rights and cause increasing harm to the public interest through further undermining its only meaningful competitor, Openview.

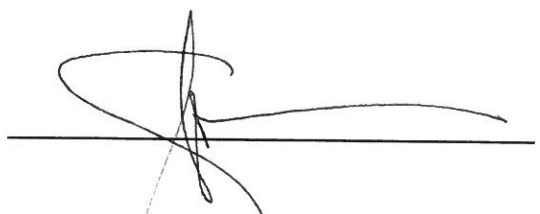
254. Media therefore seeks an order in terms of the Notice of Motion.

SIGNED AT Dunkeld West ON THIS 16th DAY OF October 2023.

A handwritten signature in black ink, appearing to read 'P. Rafferty', written over a horizontal line.

PHILIPPA RAFFERTY

Signed and sworn to before me at Dunkeld West on 16. October 2023, the deponent having acknowledged that he knows and understands the contents of this affidavit and that it is true and correct, and that he has no objection to taking this oath and regards this oath as binding upon his conscience and has uttered the following words: "I swear that the contents of this affidavit are correct, so help me God".



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DESIGNATION

CAPACITY

