SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/16135

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12/11/2012
(PREVIOUS ORD 30/10/2012

In the matter between:

eBotswana (PTY) LTD Applicant

and

SENTECH (PTY) LTD First Respondent

SOUTH AFRICAN BROADCASTING CORPORATION LTD Second Respondent

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Third Respondent

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JUDGMENT

SPILG, J:

INTRODUCTION

1. The Applicant (*eBotswana)* is the only licensed private television broadcaster in Botswana whose programs may be watched by its citizens at no charge (termed *free-to-air)*. Under its national laws only

two other television services are entitled to transmit in Botswana. The one is BTV which is the State owned national free-to-air broadcaster. The other is Multichoice Botswana which is a subscription- based service. It has some 27 000 subscribers.

2. Accordingly within the national boundaries of Botswana they are the only two television services entitled to lawfully compete with eBotswana; and then it is only BTV which competes against it for viewers who do not have to pay to watch television programs.

3. Countries limit the number of enterprises that may conduct business in a particular industry and regulate how they may carry on such business by way of issuing licences. The number of available operating licences may be limited by factors such as the available resource (such as the frequency spectrum available in relation to telecommunications or broadcasting) , the projected size of the market and the revenue that might be generated (effectively by advertising in the case of free to air television or radio) relative to the start -up infrastructural and operating costs involved to make the operation commercially viable for a corporation wishing to apply and pay for the initial licence.

4. . The limited number of non-exclusive licences issued in a State regulated industry effectively guarantees the holder a monopolistic environment affording protection from undue competition with the pace of further entrants into the industry being determined by the regulating authority. This is particularly so if a country wishes to attract commercial

television networks. Correspondingly, aside from taxes collected out of revenues and the payment of annual fees, a premium is generally paid to acquire the initial licence which is valid for a number of years. A classic illustration is the regulated cellular telephone service in South Africa which limits entrance to the industry through the issue of licences. The enabling legislation permitted the issue of only two licences initially and then only much later permitted the issue of further licences on a staggered basis. See for instance *Basson t/a Repcomm Community Repeater Services v Postmaster-General* 1994 (3) SA 224 (SE) at 232 D and the works cited, Joffe J in *ITC1726* 64 SATC 236 at 240,van der Merwe J in *ITC 1772* 66 SATC 211 at 214 to 215 and *R v Maharaj* 1957 (1) SA 107 (A) at 110G-H.

5. It is common cause that the channels operated by the second respondent, the South African Broadcasting Corporation which is the national broadcaster (the "*SABC*"), are transmitted by signal via the satellites operated by the first respondent, Sentech (Pty) Ltd (*"Sentech"*). Since 2006 the SABC channels known as SABC 1, 2 and 3, are being transmitted via a signal from Sentech's satellite (referred to as the "*Vivid platform"*) over an area which spills into the southern region of Botswana. This is the most populated area in Botswana and includes the nation's capital Gaborone which is also its commercial centre, as well as Lobatse.

6. It is also common cause that the signal transmitted by Sentech's *Vivid platform* satellite can be received by television viewers in this region if

they acquire an inexpensive decoder which is readily available in Botswana and sold under the name Philibao decoder.

NATURE OF APPLICATION

7. eBotswana has launched motion proceedings with regard to Sentech's alleged failure to prevent pirate viewing based on a delictual action under the *actio legis Aquiliae*. It alleges that Sentech has a duty "... *to take all reasonable steps necessary to prevent pirate viewing in Botswana of the SABC1, SABC 2 and SABC 3 signal carried on the Vivid platform*". eBotswana claims that it is entitled to declaratory orders that Sentech's failure to take the necessary steps to prevent pirate viewing of the SABC channels in Botswana is unlawful and in breach of the duty of care allegedly owed to eBotswana and which renders Sentech liable to it for damages.

8. In addition mandatory orders are sought requiring Sentech to ensure that it takes the necessary steps, within three months of the grant of the order, to prevent pirate viewing of the SABC channels. The applicant also seeks an order that the quantum of damages allegedly suffered by it as a consequence of Sentech's failure to prevent such viewing stand over for later adjudication. Costs are also sought against Sentech.

9. The SABC was joined by reason of the interest it may have in the relief sought. This would include not only its potential interest in perpetuating the *status quo* but perhaps more significantly its interest in preventing

any loss of transmission to areas it is lawfully entitled to cover under its licence within the borders of South Africa should the orders sought by the applicant have that consequence. The Independent Communications Authority of South Africa ("*ICASA*") was also joined by reason of the interest it might have as the body responsible for regulating electronic communications, including television transmissions, in South Africa. Neither the SABC nor ICASA opposed the application.

THE ISSUES

10. The case is formulated under the *lex Aquilia*. The applicant must satisfy the court, in motion proceedings, that it has a clear right both to the declaratory and mandatory orders sought as well a clear right to an order entitling it to hold an enquiry into damages. In the present case the requirement for final mandatory relief that an injury is being committed or is reasonably apprehended forms part of the enquiry into whether the applicant enjoys a clear right under the Aquilian action. The final requirement of the absence of any other satisfactory remedy is in issue and will have to be considered separately, although the factual underpinning must be touched upon when considering the applicant's claim to a clear right.

11. By far the most important issue is whether the applicant has a claim recognised under the law of delict. If not, the requirement of a clear right will not be satisfied.

12. The issues go to the core of delictual liability and require the applicant to demonstrate on motion that the act or omission complained of was perpetrated by Sentech. Each element of the *actio legis Aquiliae* has been put in issue. Accordingly eBotswana must satisfy the court on motion;

    a. that the act or omission complained of is wrongful. Since wrongfulness cannot be presumed in the present case, as the alleged duty is not one owed to the general public and involves (on analysis) pure economic loss, the applicant must go further and allege and prove that Sentech owed it a legal duty of care to act in a particular way. See generally *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979(3) SA 824 (A) at 833D- 834A, Lillicrap, *Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985(1) SA 475 (A) at 497B and 498G-499A, and *Fourway Haulage v SA National Road Agency Ltd* 2009(2) SA 150 (SCA) at para 12 where the duty of care cannot be inferred. On omissions see *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957(2) SA 256 (A) at 261E-H, *Minister van Polisie v Ewels* 1975(3) SA 590 (A) at 596G-597E and *Minister of Safety and Security v van Duivenboden* 2002(6) SA 431 (SCA) at paras 12 and 19 ;

    b. that Sentech was at fault. Negligence is a substantially different enquiry from that required to establish wrongfulness (see *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000(1) SA 827 (SCA) at para 19 (p837G) and paras 21 to 22;

c. that the negligent conduct is in law sufficiently causally related to the damages allegedly suffered. Two sub-issues arise;

   i. whether the purchase of the decoder was a *novus actus interveniens.* In other words whether the independent decision by viewers in Botswana to acquire a decoder, which is a prerequisite in order to watch the Sentech transmission of the SABC programs, amounts to an event which intervened to completely sever the necessary link required in law (irrespective whether it is to be properly described as an element of factual or legal causation) for attaching liability between Sentech's conduct and the damages allegedly incurred. See *Road Accident Fund v Russell* 2001(2) SA 34 (SCA) at paras 20 and 25

   ii. the policy considerations of foreseeability of harm and remoteness of damages. These considerations tend to be examined at this stage of the enquiry, although not immutably so. The narrower requirement of legal causation serves to limit or curb the transgressor's exposure to claims of unlimited liability even where factual causation has been proven. See *International Shipping Co (Pty) Ltd v Bentley* 1990(1) SA 680 (A) at pp 700H -701G and *Sea Harvest* at para 22.

13. It should also be noted that eBotswana relies on the conduct complained of being not only wrongful but also unlawful. This suggested

that the applicant intended to rely independently on an infraction of the national laws of Botswana amounting to unlawfulness for purposes of our domestic law (compare *Callinicos v Burman* 1963(1) SA 489 (A) at 497H-498A and Harms *Amler's Precedents of Pleadings* (7th ed) at p258). No argument was developed on that basis. Accordingly it appears that the foreign national laws of Botswana would only have relevance in regard to determining whether the conduct complained of was wrongful according to our common law.

14. Sentech also raises the issue that the applicant's founding and replying affidavits contain hearsay and, also in relation to the replying affidavit, introduce new matter in reply. These issues are raised by way of an application to strike out. It is desirable to first deal with these issues.

HEARSAY

15. *Mr Suttner* on behalf of Sentech contends that a number of averments contained in the applicant's affidavits constitute hearsay. The applicant essentially relies on the contents of a study commissioned by the Botswana Telecommunications Authority (*"BTA"*) to support the following material allegations;

    a. SABC television programs are viewed by people living in Botswana who have purchased Philibao decoders sold by a large number of what are referred to as "*Chinese wholesale shops".*

b. This is made possible because the encryption and conditional access systems utilised by Sentech have been compromised since 2004;

c. eBotswana's viewership has been substantially affected because the SABC channels provide similar entertainment. Moreover advertisers are not purchasing advertising slots on eBotswana because they can reach essentially the same audience for the reasons already given.

16. Sentech's objection to the contents of the study being received into evidence is that the methodology adopted in conducting the survey is not divulged. In particular the formulation of the questions asked was not disclosed and it is therefore not possible to establish if they were fairly formulated. Another complaint is that the applicant has not established that the survey was scientifically conducted by a competent expert who is skilled in the field. Sentech also contends that the survey consists of conclusions without sufficient supporting primary facts, thereby rendering the survey unreliable. Sentech claims prejudice because it was unable to exercise its right to comprehensively test the veracity of eBotswana's case.

17. A number of other issues were raised regarding the failure to verify under oath the survey or its source and compilers. In reply the applicant produced an affidavit by the managing director of the company which conducted the survey. The affidavit also explained the terms of the

mandate it received from the BTA and to it is attached the report which sets out the methodology adopted to reach the conclusions. It also sets out that the survey involved 1000 face to face interviews and other identified means of gathering the data which formed the basis of the report and its key findings.

18. The late introduction of this affidavit in reply was also objected to. Ultimately this question resolves itself by reference to prejudice and the orderly function of the courts through adherence to its rules including the need to make ones case out properly in the founding affidavit. The survey was well identified in the founding affidavit and relevant extracts were attached. The issue is not one of making out a case or a new cause of action in reply. The survey was officially produced and the document itself could readily have been procured by Sentech if it seriously wished to challenge its authenticity. In the circumstances Sentech was well able to plead over. It elected simply to plead lack of knowledge. See *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) and *Replication Technology Group and Others v Gallo Africa Ltd* 2009(5) SA 531 (GSJ) at para 19.

19. The facts reveal that a professional market survey firm was officially appointed by the appropriate regulatory authority of a neighboring State to conduct a survey in a professional manner so that the authority could rely on it for the better performance of its regulatory functions and duties. The survey was of audiences countrywide to establish an accurate and comprehensive picture of the size, social and location

characteristics of both radio listeners and television viewers in Botswana. The survey was conducted with a sample group of 1000 television viewers and the method of questioning, of gathering and collating the data appears to have been undertaken by those experienced in conducting market surveys.

20. In terms of section 3(1) (c) and (4) of the Law of Evidence Amendment Act, 45 of 1988 hearsay evidence may be admitted if;

(1)(c) "the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section –

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

21. Mr *Budlender* on behalf of the applicant argued that it would be impossible to expect eBotswana to procure affidavits of all television viewers in Botswana who access SABC programs on their Philibao decoders.

22. The results of the survey claim that in September 2009 the market share based on television viewership was 16.3% for BTV, 44.7% for the three SABC channels , 14.8% for e.tv (South Africa) and 5.9% to GBC which is effectively eBotswana (and will be dealt with as such) . How access could be obtained to the encrypted SABC television services was also identified. Accordingly the purpose of the evidence is clear.

23. It appears from the Study that generally accepted survey research principles were applied and that the results appear to be used in a statistically correct manner. It also appears to be an objectively constructed survey designed and implemented to produce an accurate assessment of viewership trends. Moreover the sample of interviewees appears to be broad and together with the nature of the survey

reinforces the probability of its reliability and effectively eliminates the risk of insincerity or faulty memory. In addition there are adequate extraneous supportive facts to satisfy the general objective reliability of the research survey. The meeting of these requirements may well satisfy the ordinary admissibility of the market research survey. See *Hoechst Pharmaceuticals v The Beauty Box (pty) Ltd (in Liquidation) and another* 1987 (2) SA 600 (A) at 616I-617C and the cases there cited. Compare the various cases emanating in the United States including *Brunswick Corp. v Spinit Reel Co.* 832 F.2d 513 (10th Cir. 1987)and the principles extracted from them in *Corpus Juris Secundum* (2008) vol 31A, Evidence, paras 318 and 388. The head note in Para 388 reads:

> *"Survey evidence may be admitted as an exception to the heresay rule if the survey is material, more probative on the issue than other evidence, and if it has guarantees of trustworthiness"*

24. Nonetheless it is unnecessary for the purposes of this case to determine whether the survey may be received into evidence under a common law exception to the hearsay rule or is to be considered as hearsay for the purposes of applying section 3(1)(c) of the Law of Evidence Amendment Act.

25. In my view the probative value of the survey is high. It is reliable for a number of reasons which include the relatively simple questions that were required in order to elicit the information of television viewership and its spread, the size of the sample and the ready verification of where

the decoders could be acquired. It was readily simple for Sentech to procure evidence to gainsay the survey's findings if it existed. Finally the substantial size of SABC's market share of viewership leaves a very wide margin in case of error. Accordingly any distortions will not affect the overall outcome of SABC's market penetration into Botswana and whether eBotswana would be unaffected by it. The interests of justice would effectively be defeated if a court could not have regard to the results of the survey, leaving the actual weight to be attached for later consideration .

26. I am therefore satisfied that even if not all of the evidence sought to be introduced would be admissible under one of the common law exceptions to the hearsay rule, upon the application of the various requirements referred to in section 3(1)(c), the evidence relied upon and which is contained in the survey should be admitted in the interests of justice. See *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another (and two similar cases)* 1997 (1) SA 1(a) at 26B-27E. The application to strike out on this ground is therefore dismissed.

NEW MATTER

27. The new matter raised in the applicant's replying affidavit may be divided into additional evidence to support the survey's findings, confirmation of eBotswana's right to broadcast in Botswana,

confirmation regarding the conducting of the survey and also documentation emanating from Sentech or in respect of which it is an active party.

28. *Mr Suttner* in his heads of argument did not contend that Sentech was prejudiced by the introduction of these averments. On the contrary the complaint was that no explanation was tendered for not introducing it in the founding papers and also that no legal basis is set out to receive the evidence in reply. The short answer is that in view of the contents of the answering affidavit it was well within the ordinary procedural rules for the applicant to respond by introducing further corroborating facts. Even if certain of the averments could have been made in the founding affidavit, on its own that is no basis for excluding it from consideration. It is evident that Sentech would not have been able to challenge the averment or document produced. A common sense approach based on want of prejudice precludes their exclusion from consideration. Mr Budlender referred to two cases in point; *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C) at para 81 and *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at para 15.

29. Accordingly the application to strike out on this ground is dismissed.

THE FACTS

30. The applicant seeks final relief. Accordingly the evidence to be accepted by this court is determined by an application of the principles set out in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634E to 635C; effectively they are the facts presented by the respondent (including express or implied admissions of any of the applicant's facts) unless the respondent's version does not meet the threshold requirement of demonstrating a real, genuine or *bona fide* dispute of fact. See also *President of the Republic of South Africa and Others v M&G Media Ltd* 2011(2) SA 1 (SCA) at para 13. I proceed on this basis. Care must however be taken not to confuse issues of fact with the substantive legal issues raised.

31. I mentioned in the introduction that eBotswana holds a non-exclusive free-to-air licence issued in the Republic of Botswana. The licence entitles it to broadcast television programs within that country. There are only two other licences issued in Botswana, of which only one is also free-to-air, namely the licence issued to BTV. The other license is held by Multichoice, a subscription television service.

32. The SABC does not hold a licence to transmit its programs within Botswana. The licence it possesses is territorial and confined to South Africa. Sentech enjoys satellite transmission rights only within the borders of South Africa. This is pursuant to the provisions of the Sentech Act, 63 of 1996 read with the Electronic Communication Act, 36 of 2005. The Sentech Act is a piece of domestic legislation. Neither Sentech nor

the SABC claim rights under any Convention, Treaty or Protocol that entitles them to distribute or transmit the SABC broadcasting signal into another sovereign State. See also the definition of "*broadcasting distribution signal*" in section 1 of the Electronic Communication Act which superseded the Independent Broadcasting Authority Act, 153 of 1993.

33. The SABC signal distributed by Sentech's satellite is encrypted. The spillage over of the signal into Botswana is limited to a radius of 60kilometres.However that covers the most densely populated region in Botswana.

34. The Sentech encrypted signal may be viewed on a standard television through the installation of a suitable decoder. The satellite broadcasting signal used to transmit the SABC programs, known as the Vivid Platform, can be received by viewers who acquire the Vivid decoder. Some 465 000 South African viewers receive the encrypted satellite signal.

35. It is however common knowledge in the industry that the Philibao decoder (whether simply adjusted or otherwise) can also permit the viewing of Sentech's SABC television signal. The Philibao decoder is manufactured in China and can be bought off the shelf in Botswana. The decoder is relatively inexpensive and readily available at local wholesalers in Botswana. Sentech does not seriously challenge that its SABC signal has been pirated in this manner by Batswana viewers.

36. Although Sentech contends that eBotswana could readily have taken steps to prevent the sale or distribution of Philibao decoders in Botswana, realistically that is not possible, if only because the Philibao decoder is also used legitimately in that country. Moreover documentation reveals that the applicant has regularly engaged the National Broadcasting Board (NBB) of Botswana and its Secretariat, the BTA, regarding the illegal use of these decoders to receive the SABC programs. The facts reveal that the NBB has been powerless to act. It is also to be borne in mind that policing would be extremely difficult.

37. Sentech's documentation confirms that since late 2004 its Vivid platform encryption and conditional access systems have been compromised in respect of both e.tv and SABC transmissions and continue to be compromised in respect of the SABC channels. In the case of e.tv the problem was resolved. It is evident that the issue may be resolved by Sentech upgrading to a more sophisticated encryption system and replacing existing decoders or by moving the SABC signal to Sentech's first satellite link which utilises newer encryption software. According to Sentech the cost however of swapping out 65 000 decoders (on the assumption that they cannot be refurbished with a software or hardware component) is said to be over R70 million while nearly half a million viewers would be affected for a period of eight to twelve months while the swapping out process is implemented .

38. Despite the alleged prohibitive cost and number of South Africans who would be affected, in 2008 Sentech undertook to e.tv that it would remedy the piracy problem by mid-2009 and during 2009 undertook to the applicant that the problem would be remedied by mid-2010. Most significantly the Sentech Corporate Plan for 2011 to 2014 that was presented to Parliament stated that the piracy problem would be remedied by March 2011. The method identified for remedying the problem has been and remains upgrading the encryption technology used and swapping decoders.

39. It is evident that significant reduction in viewership affects advertising revenues. More so where that viewership is watching an alternate and similarly profiled set of television channels for which advertisers are presumably already paying for advertising slots. The only other free-to-air channel would naturally be affected. Nonetheless Sentech certainly does not suggest that the viewership gained by the SABC channels in Botswana was at the expense of only BTV. The only other lawful competitor in Botswana (ie holding a valid licence to transmit television programs) is the Multichoice subscription service. However it clearly caters for the more affluent and save possibly to a minor degree can be excluded from the equation on demographic grounds.

40. Since March 2009 eBotswana has repeatedly put Sentech on terms to remedy the situation and indicated the extensive loss of revenue being suffered by eBotswana.

WRONGFUL CONDUCT

41. Whether the type of conduct complained of is wrongful in order to attract delictual liability under the *lex aquilia* is preeminently a matter of law based on the specific considerations of each case. See *van Eeden v Minister of Safety and Security* 2003(1) SA 389 (SCA) at para 9. Delictual liability occurs where the law has historically recognised the existence of a duty of care owed by reason of the negligent act or omission of one person in relation to another. The case of bodily injury inflicted negligently consequent upon a motor vehicle accident is an obvious illustration. But delictual liability is not confined to those cases only. Our common law will attach liability in delict where it considers that a duty of care ought to be owed in the circumstances of the case.

42. Whether or not a duty of care arises in the particular circumstances is determined by the *boni mores* of society. It is not static. As the concept implies, it is molded by the contemporary values of society. In South Africa our societal values are also informed, where affected, by the Bill of Rights contained in the Constitution. See O'Regan J in *Rail Commuters Action group & Others v Transnet Ltd t/a Metro Rail & Others* 2005 (2) SA 359 (CC) at paras 76 to 88 and the body of earlier case law such as *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA), para 17; *Van Eerden v Minister of Safety & Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA)

at paras 10 to 12, pp 396C to 397B and *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at para 18.

43. The utilisation of satellites in order to receive and transmit data across vast areas is a relatively modern phenomenon illustrative of the global village in which we live. These advances however may impact on territorial sovereignty. Many international treaties, conventions and protocols resolve these issues. Nonetheless where they do not, our common law cannot turn a blind eye to the reality of commercial development and exploitation internationally where it may impact on the lawfulness of that activity, particularly where we are enjoined by regional bodies and accords to cooperate in the mutual economic development of our region. I wish to emphasise that this consideration does not elevate the foreign country's domestic law to a statutory injunction which our courts must apply. Rather it is our own norms which include our relationship with fellow nation states whose territorial sovereignty we respect that in my view is one of the factors that ought to influence us as to the *boni mores* of our society.

44. As stated by Corbett JA (at that time) in an article, it cannot be a parochial view. The article has been referred to subsequently in our case law and is entitled *"Aspects of the Role of Policy in the Evolution of our Common Law"* (1987) 104 SALJ at 67-68. See *Stewart and Another v PBotha and Anther* 2008(6) 310 (SCA) at para 8 and *Carmichele v Minister of Safety & Security* 2001(10) BCLR 995 (CC) at para 43. The relationship between South Africa and its neighboring states, including

Botswana, is close. We are both members of SADEC, a regional body concerned *inter alia* with the mutual economic upliftment and development of its member states. The facts of the present case bring to mind fishing in territorial waters of an adjoining state.

45. Nonetheless under our law we are required first to determine whether Sentech owed to eBotswana a legal duty of care, a duty which it is alleged arises to prevent the possible infliction of purely patrimonial loss to a lawfully licensed television station in circumstances where a satellite's broad area of transmission results in an encrypted signal of a television program being received in another country and where consumers in that country must still procure a suitable decoding devise in order to view that program.

46. If that is so then wrongfulness, as one of the requirements of delictual liability, is established provided that it is not too remote. But see Boberg in *The Law of Delict (vol 1)* at 104-5, 276, 381-382 and 447-448. See also *Sea Harvest* at 839D-E. The present methodology adopted places "*remoteness*" as an element of legal causation. Boberg's approach appears the more cautious overall and is effectively adopted in cases such as *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) (at para 798D) and *Fourway* (at para 24), In the present case both formulations will yield the same result but I would prefer to consider it under the question of wrongfulness in the sense of foreseeability of both the actual harm and of the manner in which it occurred. The issue of culpability will still involve (see Boberg at p381) an enquiry into

whether Sentech ought to have foreseen harm of the kind that actually occurred to eBotswana.

47. The classic pronouncement of what guides the courts in determining whether a duty of care arises is to be found *inter alia* in *Lillicrap* at p498I – 499A citing Fleming *The Law of Torts* (4th ed) at p139 which reads;

> "In short, recognition of a duty of care is the outcome of a value judgment that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

48. Save to add that the enquiry must take into account general considerations of reasonableness based on the convictions of the community as determined by the court it is not my intention to illustrate instances of the application of the principles. I have considered the cases mentioned earlier regarding the issue of determining when a legal duty of care arises and how courts are obliged to discharge their judicial function when considering the *boni mores* of society in a particular set of circumstances. I have sought to bear in mind the concerns expressed by Brand JA in *Fourway* at paras 17 to 23 as this is a case involving pure economic loss.

49. In my view Sentech's own indication that it would remedy the problem and was prepared to do so publically with timelines while fully aware of

the alleged cost implications indicates a recognition of some responsibility, even if not an obligation, to remedy the situation

50. Sentech has a general responsibility to provide secure encryption of its signals. This it accepts as part of its manifesto. Indeed in 2009 it had already migrated to a more sophisticated encryption system that cannot be de-coded by present generation Philibao decoders.

51. I have already alluded to the issue of comity of nations. It would be contradictory if our common law notions of what constitutes *boni mores* ignores the documents to which we as a nation have subscribed on the international platform and which we have undertaken to respect and adopt. There are numerous instances where South Africa has undertaken international obligations in respect of satellite broadcasting and the prevention of its reception in another country. See for instance Regulation 428A of the Radio Regulations implemented under the Convention of the International Telecommunication Authority which requires a signatory state (of which we are one) to adopt "*all technical means available*" to reduce the radiation of a satellite signal over another country. See also Recommendation no R (91) 14 on the Legal Protection of Encrypted Television Services which in its preamble notes that *"the organizations providing encrypted television services have the responsibility to use the best available encryption techniques"*. These sentiments are echoed in SADEC's regulation guidelines for Wireless Technologies' Policy and Regulation issued by the Communication

Regulators' Association of Southern Africa of which both South Africa and Botswana are members.

52. Sentech created the situation where its signal went beyond our national borders. The expedient of encryption , or similar technology, appears to be the only means of ensuring that Sentech's actions did not invade the legitimate rights of television service licence holders in a foreign state and effectively avoids directly broadcasting into that country in contravention of it's regulatory and revenue licensing legislation. It would be most surprising if such factors did not influence, let alone dictate, the necessity for encryption.

53. The reality of hacking into an encrypted system was also readily acknowledged as a risk of inadequate encryption. While very expensive global unscrambling decoders or the isolated risk of an electronic genius decoding the encrypted signal would have to be balanced against the cost of taking preventative measures as and when it arises, the present situation is endemic, the decoders are inexpensive, can be readily procured and are already enabled to unscramble the signal.

54. Sentech's documentation confirms that they had already planned to provide a more secure encryption system. Nowhere in Sentech's affidavit is it suggested that this was not budgeted for, particularly bearing in mind the specific time lines identified to Parliament.

55. There is no unlimited class of affected persons. There are only three potential claimants, as they are the only ones licensed and they have been readily identifiable since Sentech first became aware of the issue. I will deal with the question of *novus actus* separately. Suffice it that Sentech concedes in its documentation that readily available and cheap decoders which can unscramble encrypted signals are a well known phenomenon readily foreseeable. It is precisely because of this knowledge and risk that upgraded encryption systems are introduced.

56. In my view Sentech owed to persons in the position of eBotswana that hold valid television broadcast licences in Botswana to secure the encryption of the SABC television signals and that its failure to do so, knowing that large numbers of cheap Philibao decoders have been able to receive the signal in viewable form, is wrongful.

FAULT

57. Once it is established that Sentech's actions are wrongful it is necessary to determine whether Sentech was negligent in transmitting the signal into Botswana and that the damages sustained were foreseeable bearing in mind that a viewer there would still need to procure a decoder. It is to be noted that foreseeability is formulated as more properly falling within the ambit of causation. The issue involves considerations of the application of the abstract (or absolute) theory of negligence as opposed to the relative theory (*Sea Harvest* at para 21).

In *Sea Harvest* Scott JA indicated that *" in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving the issue".*

58. The acts or omissions of Sentech that are complained of are part of the factual enquiry and are determined on an application of *Plascon-Evans*. Once they are established it is necessary to determine whether the failure to take steps to limit the area of transmission to within the borders of South Africa or to otherwise prevent the signal from being decoded within the borders of Botswana was negligent. The issue of what constitutes negligence in the given circumstances is again a legal question.

59. In *Sea Harvest* at paras 21 to 22 the court considered the appropriate formula for establishing *culpa.* I have already referred to the SCA's reflections on the abstract as opposed to the relative theory of negligence. The court (at para 22) concluded that whichever approach is adopted there will always be grey areas that require a measure of flexibility and a need to limit the broadness of the enquiry where circumstances demand.

60. In the present case the test of reasonableness must also be informed by the special position held by Sentech and the specialist knowledge required in order to enable it to properly perform its functions under its enabling legislation and the broader scope of the Electronic

Communication Act. Accordingly the test is that of a reasonable man exercising the general level of skill and diligence required of someone engaged with those responsibilities. See *Durr v ABSA Bank Ltd* 1997(3) SA 448 (SCA) at 463G-J.

61. Sentech's documentation is replete with acknowledgements of the degree and extent of the risk created by the "hacking" of encrypted signals through decoders and the gravity of the consequences. Sentech has furthermore undertaken in various forums, including publically, to eliminate the risk. It has acknowledged its capability to do so. The question of cost is possibly again a factor, but Sentech appears to have taken it into account when informing Parliament that it would resolve the pirate viewing problem. See generally the requirements sumarised in *McIntosh v Premier, KwaZulu- Natal and another* 2008(6) SA 1 (SCA) at para 14.

62. The issue of foreseeability in relation to the need for viewers to first purchase Philibao decoders is answered by Sentech's acknowledgement that the procurement by members of the viewing public of these inexpensive decoders was foreseeable and not unexpected. See *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002(3) SA 688 (SCA) at para 33

63. In my view the requirements for establishing *culpa* have been met.

CAUSATION- FACTUAL AND LEGAL

64. Both the issues of whether the purchase of the decoder was a *novus actus interveniens* and the policy considerations of foreseeability of harm and remoteness of damages have been addressed, albeit under wrongfulness and culpability.

65. I would however emphasise that a *novus actus* is not satisfied simply because another event intervened. In the present case the intervention of the purchase of a cheap decoder that could allow a viewer to watch an encrypted transmission was anticipated and therefore foreseeable. The consequent damages to the holder of a lawful licence to broadcast television programs in neighboring States including Botswana could not have been un-anticipated by a person involved in this industry, such as Sentech.

66. Accordingly the requirements of both factual and legal causation are satisfied.

DAMAGES

67. The question of whether any damages have been suffered or continue to be suffered was not seriously in contention. In my view it is axiomatic that loss of advertising revenue would arise having regard to that sector's dependency on advertising revue which is affected by

viewership figures whether pursuant to dedicated market research or assumed.

68. For present purposes it is unnecessary to quantify such damages beyond a finding that the very large percentage of Batswana who view SABS programs suggests that there would be a significant loss of revenue to the lawful holders of television broadcast licences in Botswana, of which eBotswana is one.

THE ORDERS SOUGHT

69. The analysis undertaken in this judgment results in the requirements for a declaratory and mandatory order on motion being satisfied.

70. Insofar as the order seeking an enquiry into damages is concerned, the recent case of *Cadac v Weber-Stephen* 2011 (3) SA 570 (SCA) at paras 10-15 confirmed the extension of the remedy of an enquiry into damages beyond purely trademark infringement and that such relief could be competently claimed by way of motion in suitable circumstances. The advent of case- flow management reinforces, with respect, the suitability of such an order where the same judge is to be seized of a matter from inception with all the advantages intended to be garnered from "pre-trial" conferences and directions to narrow the issues and facilitate expeditious discovery.

71. This is an eminently suitable type of case to make such an order. In particular the applicant was entitled to enforce its rights to declaratory and mandatory relief expeditiously. It should not be expected to regurgitate in another set of pleadings every element of the case required now to be proved , save for quantum because it is illiquid. The opportunity for a defendant raising issues that have already been canvassed in the motion proceedings would also be avoided. The only issue is procedural, so as to ensure adequate pre-trial procedures, including discovery. It therefore appears appropriate in this case to adapt the process of a referral to trial.

72. I wish to take this opportunity of thanking both counsel for the assistance I received. In particular I had requested that the argument include issues of the relevance of international documents regarding satellite transmitted signals as I was concerned that the issue of society norms was broader. Both counsel provided me with an abundance of international accords and the like for which I am most grateful.

THE ORDER

73. It is for these reasons that I granted the following order on 10 February 2012;

1. It is declared that the first respondent is liable in delict for its failure to take all reasonable steps necessary to prevent pirate viewing in Botswana of the SABC 1, SABC 2 and SABC 3 signal carried on the Vivid

platform such failure being wrongful, negligent and in breach of its duty of care towards the applicant;

2. the first respondent is directed to take all reasonable steps necessary to ensure that viewers in Botswana are prevented, within three months of the date of this order, from pirate viewing the SABC 1, SABC 2, and SABC 3 signal carried in Vivid platform, provided that the first respondent may, on good cause shown, apply to this court to seek an extension of the period concerned;

3. The first respondent is declared to be liable to the applicant for the damages suffered by it since 25 March 2009 as a result of the first respondent's failure to take all reasonable steps necessary to prevent pirate viewing in Botswana of the SABC 1, SABC 2 and SABC 3 signal carried on the Vivid platform;

4. Quantification of the damages suffered referred to in paragraph 3 will stand over for adjudication in a damages enquiry and that;

   a. The applicant shall within 20 days of the date of this order serve upon the respondents and file a declaration particularising the damages allegedly suffered by it as a result of the first respondent's failure to take all reasonable steps necessary to prevent pirate viewing in Botswana of the SABC 1, SABC 2 and SABC 3 signal carried on the Vivid platform;

   b. The first respondent, if so advised, shall within 10 days of the service of the applicant's declaration, file a plea thereto;

c. The Uniform Rules of Court relating to discovery, inspection and all other matters of procedure shall apply to the determination.

d. The parties are authorised, on notice to the other party, and should it be required by one or both of them, to make application to the South Gauteng High Court to add to, or vary the above order so as to facilitate the conducting of the determination, and generally to make application for further directions in regard thereto;

5. The first respondent is to pay the applicant's costs.