



## SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/16135

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

## JUDGMENT- SUMMARY

**SPILG, J:**

***Delict : Wrongfulness:***

***Duty of Care-*** Legal duty of care established where a lawfully licensed television station in a foreign country may suffer purely patrimonial loss because a satellite's broad area of transmission results in an encrypted signal of a television program being accessed in that other country via an inexpensive and readily available decoder;

***Boni mores: Comity of nations.***

- South Africa has undertaken numerous international obligations in respect of satellite broadcasting and the prevention of its reception in another country. It would be contradictory if common law notions of what constitutes boni mores ignores the international documents to which South Africa has subscribed
- Common law cannot ignore the reality of commercial development and exploitation internationally where they may impact on the lawfulness of that activity, particularly

*where South Africa is enjoined by regional bodies and accords to cooperate in the mutual economic development of the region. This does not elevate the foreign country's domestic law. Rather it is our own norms which include our relationship with fellow nation states whose territorial sovereignty we respect that is one of the factors that ought to influence us as to the boni mores of our society.*

- *On an application of the relevant factual considerations set out in the judgment the court found that Sentec's failure to secure the encryption of the SABC television signals, despite knowing that large numbers of cheap decoders were being used in Botswana to receive the signal in viewable form, was wrongful.*

**Fault-** *In casu the test of reasonableness must also take into account the special position held by Sentech and the specialist knowledge required to properly perform its functions under its enabling legislation. Accordingly the test is that of a reasonable man exercising the general level of skill and diligence required of someone engaged with those responsibilities. Durr v ABSA Bank Ltd applied.*

**Novus actus interveniens:** *The independent decision by viewers in Botswana to acquire a decoder, which is essential in order to watch the Sentech transmission of the SABC programs, did not amount to a novus actus. The intervention of the purchase of a cheap decoder that could allow a viewer to watch an encrypted transmission was anticipated and therefore foreseeable.*

**Conclusion:** *On an application of the relevant factual considerations set out in the judgment the court found that Sentec's failure to secure the encryption of the SABC television signals, despite knowing that large numbers of cheap decoders were being used in Botswana to receive the signal in viewable form, was wrongful.*

**Clear Right:** *Applying Plascon-Evans the applicant satisfied the requirements for establishing a clear right for final declaratory and mandatory orders on motion.*

**Evidence:     Market Research Survey;**

- *Market Research Survey of television viewership conducted at instance of a Statutory Regulator . Admissible under Section 3 (1)(c) of the Law of Evidence Amendment Act, 45 of 1988. Possible admissibility under common law hearsay exception discussed.*

**Practice: Motion proceedings:**

**Enquiry into damages:** *Advent of case-flow management and avoidance of repetition of issues already finalised also favour court granting enquiry in appropriate cases and adapted process of referral to trial. Cadac v Weber-Stephen applied.*