Embodied in the foregoing definition is "***the transmission or reception of information***" and the use of "***information and communication technologies***", both of which have been defined above at paragraph 27. As regard the word, "information", it comprises, among other things, managerial, personnel, marketing, product and service records of whatever format. The term "information and communication technologies" comprises, among other things, computers, telecommunications enabling "***the collection, processing, transportation and delivery of information and communication services to users.***"

RULES OF CONSTRUCTION

38. The rules regarding statutory interpretation are well known and authority abound in this regard. Our starting point as already demonstrated above in paragraph 27 is the Interpretation Act wherein rules of construction are specifically provided. In sections 26 to 31, among others, provide for liberal, purposive and utilitarian construction of an enactment as a whole including subsidiary legislation made in terms thereof provided the latter is read subject to the former. I reproduce the said provisions below:

"26. Liberal construction
Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.
27. Positive interpretation favoured
In the construction of an enactment, an interpretation which would render the enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect.
28. Use of present tense
An enactment shall be construed as always speaking and if anything is expressed in the present tense it shall be applied to the circumstances as they occur, so that effect may be given to the enactment according to its true intent and spirit.
29. Construction of Acts and instruments as a whole
(1) An Act or instrument shall be construed as a whole.
(2) Where provisions of an Act or instrument are inconsistent and the inconsistency cannot be resolved by construing the enactment as a whole, a provision which appears later in the enactment shall prevail over an earlier provision.
30. Construction of enactments as one
Where an enactment provides that it is to be construed as one with an earlier enactment, every part of each enactment shall be construed as if the two enactments were one.
31. Construction of instruments
(1) An instrument shall be construed subject to the Act under which it is made.
(2) Subject to subsection (1), the Act and the instrument shall be construed as one."

39. I also reproduce sections 33 and 34 of CAP. 01:04:

"33. General expressions qualified by particulars
Where an enactment qualifies a general expression by providing that it shall include a number of particular matters or things, any matter or thing which is not expressly included is by implication excluded from the meaning of the general expression.
34. Similar and analogous terms
(1) Where an enactment lists two or more terms of a similar kind, followed by a term which in its literal sense has a meaning not limited to that kind, the latter term shall be construed to be so limited, by implication.
(2) Where terms capable of analogous meanings are associated together in an enactment their respective meanings in the enactment shall be construed by reference to their association and may be limited accordingly."

40. I now turn to the common law to review how authorities have dealt with the above principles and some additional common law principles of construction relevant to statutory interpretation. The purpose of statutory construction is to ascertain the meaning of the relevant provision of the law. In so doing you are determining the intention of the Legislature as expressed by the text and context of the statute. In the ***Attorney-General v. Dow*** **1992 BLR 119 (CA)** at 177 – 178, it was stated as follows:

> *"What has become known as Lord Wensleydale's "golden rule" was enunciated in Grey v. Pearson (1857) 6 H.L. Cas. 61 at p. 106:*
> *"We are to take the whole statute together and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency . . . so to as to justify the Court in placing on them some other signification, which, though less proper, is one which the Court thinks the words will bear."*
> *Solomon J.A. in Dadoo Ltd. & Others v. Krugersdorp Municipal Council 1920 A.D. 530 at pp. 554-5 said:*
> *"**prima facie the intention of the Legislature is to be deduced from the words which it has used. . . .it is admissible for a court in construing a statute to have regard not only to the language of the Legislature, but also to its object and policy as gathered from a comparison of its several parts, as well as from the history of the law and from the circumstances applicable to its subject-matter.** And if, on considerations of this nature, a court is satisfied that to accept the literal sense of the words would obviously defeat the intention of the Legislature, it would be justified in not strictly adhering to that sense, but in putting upon the words such other signification as they are capable of H bearing." (The emphasis is mine.)*
> *In Attorney-General, Transvaal v. Additional Magistrate for Johannesburg 1924 A.D. 421 at p. 436 Kotze J.A. relying on English law said:*
> *"'**A statute' says Cockburn, C.J., 'should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.**' The Queen V. Bishop of Oxford (4 Q.B.D. at 261). To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort. It is, in the*

language of Erle, C.J.: 'the ultima ratio, when an absurdity would follow from giving effect to the words as they stand'."
In Ditcher v. Denison (1858) Moo 11 P.C.C. 324 at p. 357: the Privy Council advised:
"It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use."
In Wellworths Bazaars Ltd. v. Chandler's Ltd. and Another 1947 (2) S.A. 37 (A) Davis A.J.A. at p. 43 said: "a Court should be slow to come to the conclusion that the words are tautologous or superfluous.""
[My Emphasis]

41. On a fair and liberal interpretation so as to attain the objects and spirit of a statute see; **Botswana Employees Union v. Barclays Bank of Botswana Ltd 1995 BLR 459 (CA)**; ***Hika v. The Attorney-General & Another*** **[2012] 1 BLR 1042 (CA)** at 1046;

In ***Molefe v The Attorney-General*** **1994 BLR 301 (CA)** at 306 wherein it is stated:

"It is perhaps necessary to say that when confronted with a statutory provision as it relates to a dispute before him, the function of a judge is to do everything possible to discover the intention of the legislature, and that intention is expected to be deduced from the language used. ***Where the language used is clear and admits of only one meaning then, generally speaking, no problem arises. Whatever path that clear and unambiguous language leads must be followed by the judge, no matter whatever the result may be.*** *See Cartledge v. E. Jopling & Sons Ltd. [1963] A.C. 758. But as Parker B., said in the old case of Becke v. Smith (1836) 2 M. & W. 191, at 195:*
"It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

Another principle of statutory interpretation that must be borne in mind is that a statute dealing with a general matter which is not of a particular science or art will prima facie be presumed to use words in their popular sense as they are understood in common language. See Clerical, Medical and General Life Assurance Society v. Carter (1889) 22 Q.B.D. 444; 58 L.J.Q.B. 224. As Pollock B. pointed out in Grenfell v. Inland Revenue Commissioners (1876) 1 Ex.D. 242 at p. 248, if a statute contains language which is capable of being construed in a popular sense, such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense. ..."

Another principle of statutory interpretation that must be mentioned is that a statute can take away rights, common law or otherwise, only by expressed words or words which are so clear as not to leave any doubt as to the intention of the legislature. As has been held in London & North West Railway v. Evans [1893] 1 Ch. 16; 67 G L.T. 630, rights, whether public or private, are not to be taken away or even hampered, by mere implication of language used in a statute.

These are not meant to be an exhaustive enumeration of the principles governing statutory interpretation but are meant to serve as guides in the interpretation of the particular statutory provisions concerned in this case. However, finally, it must be mentioned as set down earlier in this judgment that our Interpretation Act, section 26, provides that:

"Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.""

[My Emphasis]

42. Amissah P. in the ***President of the Republic of Botswana & Others v. Bruwer & Another*** **1998 BLR 86 (CA)** at 93, restating the ordinary and literal interpretation rule held as follows:

"Whether or not the title or interest claimed in section 9 must be one which is "compensatible" must be determined by reference to section 9. In interpreting that section, I think we should bear in mind the cardinal rule in the interpretation of statutes that, as stated by Craies on Statute Law (see 7th ed. 1971) at p. 64 statutes,

"should be construed according to the intention expressed in the Acts themselves. ***If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.***"*

It seems to me that the appellants do not seek to construe section 9 as it stands. I think they do not do so because on the face of it that section as recited above, clearly allows "any person holding or claiming any interest or title in any property" described in an acquisition notice who disputes the legality of the proposed acquisition to apply to the High Court to determine the dispute. The applicant under the section may not hold the land which is the subject matter of the proceedings; he is not confined to holding the title or having an interest in the land. From a reading of the section, it seems to me sufficient if he only has a claim to the title or interest in the land. The respondents in this case obviously claim an interest in the property. The claim is neither, flimsy, bogus or vexatious, and should merit a hearing by a court under section 9 of the Act, unless it could be shown that the word "claim" in the section bears a meaning different from its ordinary meaning."
[My Emphasis]

43. Applying the ordinary, plain, usual or the literal meaning of the words of a statute to ascertain the legislative intent is really a common sense approach as persons engaged in a social intercourse would ordinarily make use of words as customarily understood unless the context otherwise suggests. Here words are used in their setting and context to mean what such words usually mean without the aid of any extraneous material or history unless there is some ambiguity or absurdity. In the instant case, the legislation defined some key words and phrases including "***broadcasting***", "***broadcasting service***" and "***subscription management service***", but there is no definition of the phrase "***broadcasting activity***" used in Section 31(1) of CAP. 72:03, that reads:

"31. (1) A person shall not carry out any broadcasting or rebroadcasting activity unless he or she has a valid licence issued by the Board."

44. The foregoing provision requires anyone engaged in any broadcasting activity or rebroadcasting activity to seek and obtain a valid licence from the Respondent. The use of the word, "broadcasting" gives essence to the kind of activity intended to be regulated under Section 31(1) of the Act. Other than the words referred to at paragraph 37 above, the others bearing the word, "broadcasting" are as follows: "***broadcasting equipment***" and "***broadcasting system***", and it is my opinion that such words derive their substance from the word, "***broadcasting***". In my humble opinion, such activity as is intended in Section 31(1) of the Act must be an activity in the "***process***" called broadcasting. The very definition of "***broadcasting***" envisages a "***process***" and the various broad categories or stages of that "***process***" are listed above. An activity is a specific deliberate behaviour or effort contributing towards the end result and an impetus that triggers the next in progression to move along the entire process. It is envisaged that the activities would be interrelated or interconnected in a manner such that there is reciprocity in bringing about desired result which in the context of this case is

the taking of a finalized signal format embodying coded **DStv** subscription television programmes from the point of origin beyond our borders and its conveyance to a broadcast target area in Botswana by means of electronic communications with the intention that it be intelligibly viewed by a prior approved audience or viewership in Botswana who qualified themselves by payment of a subscription fee. The Act itself has given us a meaning of the key terms being used and the entire undertaking of the interlinked activities is viewed as a process, which is collectively called "***broadcasting***". I have earlier alluded to the meanings of "***broadcasting equipment***", "***electronic communication***", "***information***" and "***information and communication technologies***" and all these are different activities in the process of broadcasting.

45. It will be an error in my view, to regard "***broadcasting***" as a single event where the legislation speaks of a process involving interrelated and reciprocal activities forming a systematic whole. I must of course qualify my views by subjecting the same to whatever the Court of Appeal may have said in an earlier case of ***Chairman of National Broadcasting Board v MultiChoice***

***Botswana (Pty) Limited* [2007] 2 BLR 866 (CA)** if the facts in that case are identical to the current dispute as submitted on behalf of the Applicant. This will be in line with the principles of our courts' structural hierarchy and precedent, which generally require that the decisions of a court of higher hierarchy bind the lower courts and that earlier decisions of the courts must rule similar subsequent facts. I will discuss this case later in the course of this judgment. Whilst I will no doubt defer to such decision if it is applicable to the facts in the instant case, I do not understand our constitutional dispensation to be compelling me to behave like a robotic machine that is incapable of thinking outside the box.

46. In the current legislation, the question of whether the Applicant's activity in enabling the members of the public in Botswana or a part thereof or the subscribers to a subscription broadcasting service in Botswana amounts to a broadcasting activity is not open to debate as by the operation of law engagement in subscription management service is termed a broadcasting service. This is what the definition of the phrase in section 2, reproduced above says, and it is not open to any person let alone the court to proffer any facts that supposedly contradict the definition. We are dealing

here not with a rebuttable presumption. According to that definition one is engaged in offering a broadcasting service if the service being offered entails the broadcasting of television or sound material or the rendering of "***subscription management services to the public or sections of the public or the subscribers to such service.***" The only other question in my view is whether such exercise, namely, the offering of a broadcasting service in the manner described by the Act is a "***broadcasting activity***" envisaged in section 31(1) of the Act. I think it cannot be seriously debated whether engagement in a broadcasting activity is broadcasting as section 31 in subsections 1 and 3 the two phrases are used interchangeable in the sense that the carrying out of a broadcasting activity in 31(1) of the Act requires one to apply for a broadcasting licence in terms of section 31(3) of the Act. I have been asked on behalf of the Applicant to find as was found in the earlier case between the Applicant and the predecessor to the Respondent cited above that the activity undertaken by the Applicant is not broadcasting. I regret to say that I am unable to accept the invitation tempting as it is. The Court of Appeal there was dealing with a materially differently worded statute. For instance, there the terms "***broadcasting***" and "***broadcasting***

service were different from the definitions in the current legislation. Those definitions can be found on page 870 of the judgment. The focus of the definition of broadcasting was the transmission of television or radio by means of terrestrial transmitters or satellite, cable or optical fibre whereas the current definition recognise not only the convergence of technology but also a process made up of several intermediary activities forming a system. Likewise, the term "***broadcasting service***" was confined to a "***single defined service which consists in the broadcasting of television or sound material***" and mentioned no subscription management service as is the case in the current legislation. The 3rd reason why the current legislation is different from the legislation there considered is that the definition of broadcasting equipment has been broadened to include devices used in the transmission and broadcasting services inclusive of monitors, set top boxes and receivers, that is the kind of goods that the Applicant handles on a daily basis and if I may add, which devices are enabled at the Applicant premises by attaching same to its network that together with the network of **MCA** form a "***broadcasting system***". The fact that section 85 the Act makes it mandatory for the kind of devices handled by the Applicant to be

subject to approval by the Respondent at the risk of heavy penalties on a failure to comply points in clear terms to their critical link in the process of broadcasting. The phrase "broadcasting system" in the current legislation was also not in the old Act. Also the phrases "***electronic communication***", "***information***" and "***information and communication technologies***" are the addition of the current legislation and most importantly the definitions thereof bring about a totally different and new picture pointing to the new and changed legislative intent.

47. Lord Coulsfield, J.A. giving the opinion of the Court of Appeal in that case at 873 – 874 captured the then existing legislative framework as follows:

> *"In my opinion, the definitions of 'broadcasting' and 'broadcasting services' have a primary meaning which, for the purposes of the present case at least, is clear and simple.* ***'Broadcasting' is the action of transmitting a signal by the various means identified in the definition. 'Distribution' equally, in the context, refers to distribution by the means identified in the definition, namely by terrestrial, cable, satellite or optical fibre.*** *That is the straightforward reading of the words, as the judge a quo held, and it is consistent with the way in which the regulations in pursuance of the Act are framed. Over and over again the regulations require the holder of a broadcasting licence to do or control something which can only be done by a person who controls directly what goes out over the air. On the other hand, there is nothing in the Act or regulations which can be used in a straightforward way to regulate the actual activities of the respondent. That was effectively conceded by the appellant's acceptance in the course of argument that the use of a licence to attempt to control those activities could be described as a 'blunt instrument'. The real thrust of the appellant's argument, therefore, is that the meaning to be given to the definition should be one which gives effect to the objects and purposes of*

the Act, even if that should involve some extension of the normal meaning of the words used. There is ample precedent for that approach to the interpretation of a statute, in an appropriate case, and I can see that there is force in the argument that it should be applied in this case. ***If the issue were concerned with the treatment of a person who, in some way, however indirectly, contributed to putting together the package to be transmitted or making and transmitting the signal, it might be appropriate to ask whether that person's contribution was so integral to the process that he should be considered to be a broadcaster.*** *However, one of the dangers of trying to expand the natural meaning of words in a statute is that it can result in bringing into the ambit of the statute situations for which the statute cannot properly cater. That seems to me very much the case here.* ***The terms of the licence issued by the Board and the regulations which would apply to the respondent as a licence-holder are, in my view, quite inappropriate to the activities of the respondent and its contribution to the process. It does, therefore seem to me that some line has to be drawn between putting together the package of material to be broadcast and making and transmitting the signal, on the one hand, and making or participating in the arrangements which enable person to receive it, on the other****. That was really conceded by the Board when it was accepted that, for example, the provision of satellite dishes and decoders would not fall within the definition of broadcasting. In my view, the activities of the respondent, extensive as they are, are all activities in the process of enabling subscribers to receive broadcasts, not part of the activity of broadcasting as defined in the Act."*

[**My Emphasis**]

48. I think it is not hard to see that when the Telecommunications Act, CAP. 72:03, Postal Services Act and the Broadcasting Act, CAP. 72:04 were first enacted technology in the area of telecommunications, postal services and broadcasting was just evolving and developing more or less along independent lines. The convergence of technologies in the three sectors of the communications sector is a much recent development that has

attracted the interests of legislators and regulators. This development has meant that the process of regulation has become complex and therefore calling for legislative reform and the result in Botswana was the enactment of the Communication Regulatory Authority Act and the abolition of the prior existing separate pieces of legislation. The convergence of technologies and the introductions of new technology which do not fit the old regulatory framework necessitated a rethinking of new terminology and methods of control and regulation. There is a major shift from focus on mere legal entities (legal persona) but at activities that may cut across communication sectors. The term like "***broadcasting system***" tries to capture the phenomena whereby more than one legal persons or individuals may actually network their equipment in such manner that the equipment become a single broadcasting system. One of such parties may only be concerned with the "***information***" which is defined in the Act to include several activities such as the collection of data, payments and marketing etc. and that "information" is transmitted by means of "***electronic communication***" through "***network interconnection***" to another person in another country or location who also performs certain activities to complete the entire

"***broadcasting process***", and the entire arrangement gives rise to a "***broadcasting organisation***". I have reproduced the definitions of almost all of these concepts save for "***network interconnection***" that is defined as:

> *""network interconnection" means the linking of two or more electronic communications networks, electronic communication services, broadcasting services, physically or logically, but does not include terminal equipment;"*

49. What is interesting is that even the Court of Appeal in the previous litigation involving the same parties did recognise the possibility of an entity being involved in the manner envisaged above. That is clear from the quotation reproduced above at paragraph 44. In the current legislation the question of whether or not the Applicant is engaged in a broadcasting activity is put beyond dispute by the Act itself in the manner the activity is classified.

50. The Applicant's counsel argued that section 31(4)(d) of the Act, reproduced below, envisages different classifications between **"broadcasting licences"** and **"subscription management service licences"** and that the Applicant has been issued with the latter licence. The Section relied upon reads:

> *"(d) the classification of broadcasting licences, subscription management service licences and the applicable conditions thereto."*

51. The argument goes further and it is contended that the Act itself defines broadcasting and subscription management service differently. The argument of the Applicant's counsel looks quite formidable at casual glance. This is so especially when you factor in other provisions such as section 90 subsections 1(a) and 2 of the Act. This provision talks about the setting up of "***tariffs and other charges including price caps or other price controls for different classes or categories of service or products and for different areas for the regulated area.***" The Broadcasting Regulations, Statutory Instrument, S.I. 21 of 2004 as amended by S.I. 21 of 2010 made in terms of the repealed Broadcasting Act, CAP 72:04 and preserved by CAP 72:03 to the extent of compatibility with the Act seems to buttress this argument in the manner the terms "***broadcaster***" and "***broadcasting licence***" are defined:

> *""broadcaster" means any person who composes or distributes television or radio programme services for reception by subscribes to such services or members of the public;"*

52. In my view the Applicant's argument is merely attractive but offers no help as it fails to deal with the very clear terms of the new legislation. The Act says subscription management service, and this involves a number of activities, some of which contribute

directly and are key to the process of broadcasting and therefore amounting collectively to engagement in a broadcasting activity requiring a licence in terms of section 31(1) of the Act. More importantly however, the very terms of section 31 regards subscription management service as a broadcasting activity. Of course the Act envisages the possibility of different levels of contribution towards the process of broadcasting and the categorization will only serve to differentiate these and perhaps reflect that differentiation in terms of the fees chargeable by the Authority. For instance, the Applicant's intervention is at the end of the process of broadcasting and is basically employed by the dominant party, namely, MultiChoice Africa, on whom it is solely dependent for work and income. I think it is a bad argument to say that because MultiChoice Africa as a dominant party can abandon the Applicant at any time and use alternative entities to cause the broadcast signal to reach consumers in Botswana, then the latter is not getting a critical input from the former. In my view just as a limb is not a person and can be dispensed with in cases of serious ill health, it does not make a limb not part of the overall whole called a person. The very fact that MultiChoice Africa will need some identity to continue the work that was done by the

Applicant is enough testimony that the latter is in fact engaged in a critical activity in the process of broadcasting. In the end, we do not need to hypothesize but to appreciate the real existing state of affairs, namely, the fact that the Applicant is engaged in a broadcasting activity and bears its existence on that activity alone. After all, technology evolve and no one can rule out the possibility of the work being done by the Applicant being rendered redundant by technological advancement and should that happen it will be up to the regulating authorities to move parliament to pass a catch up legislation.

53. The bottom line, however, is that the Minister has not passed any regulation for the classification of broadcasting licences and subscription management licences as well as the differentiation of the conditions applicable to each as envisaged by section 31(4)(d) of the Act. There is therefore only one type of licence in terms of section 31(1) of the Act, namely a licence for engagement in a broadcasting activity or rebroadcasting activity. In terms of section 32(2) of the Act reproduced below, the Respondent has the power to attach conditions thereto as it has done:

> *"32(2) A licence issued under subsection (1) may be issued subject to such conditions and restrictions, including geographical restrictions, as*

the Board may consider necessary, and such conditions and restrictions shall be endorsed on the licence."

54. Section 86 of the Act makes it clear that there are dire consequences for failure to abide by such conditions which include suspension or revocation of the licence. The Respondent has chosen to call the Applicant's licence subscription management licence but that does not change the nature of the licence. Another broadcasting activity may be called satellite broadcasting or terrestrial broadcasting or internet television etc. but in the end the result is that each of such activities amount to broadcasting and the change of the deployed technology is irrelevant. There is only one provision for the application for and issuance of, a broadcasting or rebroadcasting licence in section 31 as read with section 32(1). The application is done pursuant to subsection 3 of section 31 of the Act that reads:

"An application for broadcasting or re-broadcasting licence shall be made to the Board in a prescribed manner."

55. The other leg of the Applicant's argument is derived from the allegations made at paragraphs 58 to 66 of the supporting affidavit filed on behalf of the Applicant:

"58 The composition and distribution of the DStv service take place outside Botswana. The DStv broadcasting signal is taken from its point of origin in South African and Europe, and conveyed to the

broadcast target area (being the IS20 footprint) by means of satellites situate in space, outside the jurisdiction of the Republic of Botswana. No broadcasting of the DStv service takes place in Botswana.

59. *As the Court of Appeal held, MultiChoice Botswana's activities "extensive as they are, are all activities in the process of enabling subscribers to receive broadcasts, not part of the activity of broadcasting as defined in the [Broadcasting] Act".*
60. *Although the definitions of "broadcasting" in the Act and the Broadcasting Act differ, this principle has not changed.*
61. *There is nothing in the Act to suggest that the Act applies to broadcasts from outside of Botswana into Botswana or that the Act has extraterritorial application.*
62. *To the contrary, section 10(1)(b) of the Broadcasting Act was not carried over into the Act, notwithstanding the near-wholesale repetition of the Broadcasting Act as the broadcasting chapter in Part VI of the Act. Previously section 10(1)(b) of the Broadcasting Act made it a function of the National Broadcasting Board (the Authority's predecessor) to –*
"exercise control over and to supervise broadcasting activities, including the relaying of radio and television programmes from places in and out of Botswana to places in and outside Botswana.
63. *The Act does not contain any provision similar to section 10(1)(b) of the Broadcasting Act or any other provision to suggest that the Act applies to broadcasting activities undertaken outside Botswana.*
64. *Nor is there any statutory provision which empowers the Authority to license and regulate MultiChoice Africa through its SMS provider, MultiChoice Botswana.*
65. *A key feature of the Act was to introduce the concept of a "subscription management service", which the Act defined as meaning "provision of service operated to enable consumption of a subscription broadcasting service". But a subscription management service licence is a standalone licence which authorises a person to provide subscription management services. The Act does not provide for a foreign broadcasting service such as the DStv service to be licensed and regulated through a Botswana SMS provider, as BOCRA contends.*
66. *The Act provides for a licence category for SMS services in their own right. The Act does not permit or contain any provisions to suggest that a foreign broadcaster may be licensed through an SMS licensee."*

56. The above statements fail to appreciate that the new legislative framework has moved away from attempting to regulate the process of broadcasting by controlling the physical location of

transmitters to emphasis on the effect of broadcast material on the area targeted irrespective of the form of technologies deployed or the origin of the signal. In other words, the focus of regulation is not on the origin of the signal but on the broadcast target area. The place of origin is not even mentioned in the new legislation and by introducing a new phrase, "***broadcasting organisation***", a number of entities, cutting across national boundaries are captured as long as their joint efforts have effect in Botswana and not merely confined to outer space beyond the jurisdiction of this country by impacting the members of the public in this Republic as intended by the broadcasting organisation. It was open for the Legislature to go for a narrow word such as an 'individual" or "person" but the word, "***organisation***" was preferred instead, that has a much broader meaning. The Shorter Oxford English Dictionary, 6th Edition, 2007, Oxford University Press defines the word "***organisation***" as follows:

> *"Organisation: (1)* ***a.*** *The action of organizing or the condition of being organized as a living being; connection and coordination of parts for vital functions and processes. Also, the way in which a living being is organised; the structure of (any part of) a living organism; constitution.*
>
> ***b.*** *An organised structure, body, or being; an organism.*
>
> ***c.*** *The fact or process of becoming organised or organic;* **MEDICINE** *the conversation of a fibrin clot into fibrous tissue during the healing of a wound.*

(2) ***a.*** *The condition of being organised; the way in which something is organised; coordination of parts in an organic whole; systematic arrangement.*

b. *The action of organising or putting into systematic form; the arranging and coordinating of parts into a systematic whole.*

c. *An organised body, system, or society".*

The Advanced English Dictionary and Thesaurus, MobiSystems, Inc. 2008 – 2018 and The Wordweb Software 8.11, Antony Lewis 2017 share the following definition:

"Organisation: (1) The persons (or committees or departments etc.) who make up a body for the purpose of administering something.
"he claims that the present organisation is corrupt"
(2) A group of people (or business, etc.) who work together for an explicit purpose, with organised rules and structure
(3) An organised structure for arranging or classifying.
"he changed the organisation of the topics"
(4) An ordered manner; orderliness by virtue of being methodical and well organised.
"his compulsive organisation was not an endearing quality"
(5) The act of organising a business or an activity related to a business.
"he was brought in to supervise the organisation of a new department"
(6) The activity or result of distributing or disposing persons or things properly or methodically.
"his organisation of the work force was very efficient"
(7) The act of forming or establishing something
"the organisation of a PTA group last year"

57. I think I will not be making an overkill if I make a reference to another policy document attached to the papers, "***ICT Licensing Framework .... Botswana***", dated September 2015 issued by the

Respondent at page 6 – 10 appearing in Volume II, pages 523 – 528:

> *"The main objective of the 2006 Policy Directive was* ***to usher in a "technology and service neutral" licensing framework*** *that would facilitate fulfilment of user demands by introducing Public Telecommunications Operator (PTO) licensees which allowed service providers to build wireline, wireless and satellite infrastructure and provide voice, data and internet services at both national and international level.* ***The main challenge with the multi-service license was that it created anti-competitive incentives in the market and required constant regulatory intervention to adjust behaviours of the market players.***
> *In addition, technological convergence in the telecommunications and broadcasting markets is hastened by the growth of broadband networks, since the higher speeds and larger capacities of broadband create new opportunities for operators to offer an array of services, including voice, data, and video.* ***Therefore, the licensing framework should support the technological convergence that is being experienced in broadband networks worldwide where operators offer Internet, voice and video through a single platform commonly known as "triple-play".***
> *The previous framework had limitations in creating opportunity for seamless broadband services. The disadvantages of the previous framework are summarized as follows:*
>
> - *It has limitations the concepts of open access as it remained technologically oriented and it encouraged anti-competitive behaviours.*
> - *It was very difficult to accommodate new technology and services in the previous framework without altering it. For example, the framework is unable to accommodate GMPCs and MVNOs without the introduction of specific license categories.*
> - *Broadcasting regulation and several other new technologies struggles to fit in within the ambit of the framework.*
>
> *2 OBJECTIVES OF THE LICENSING FRAMEWORK*
> ***The purpose of the new framework is to close market gaps that have existed in the previous framework and provide a more conducive environment for market growth and improvement of the welfare of the society taking into account convergence of technologies and evolution to Next Generation Networks.***
> ***The framework will primarily achieve the following:***
> ***Efficiency of Convergence:*** *multiple services would be delivered on single network or platform embracing convergence of networks, services and technologies. This factor will drive efficient use of networks through economies of scope.*

Technology neutrality: *networks will not de distinguished by technology, rather they shall be licensed as networks capable of delivering multiple and multimedia products.*

Ease of market entry and increased competition: *new innovative service providers will be accommodated in the market and this will create stimulus for increased competition.*

Ease of market entry and increased competition: *new innovative service providers will be accommodated in the market and this will create stimulus for increased competition. Of particular importance are those service providers who provide solutions relevant in emerging markets like Botswana.*

Consumer choice: *as more players and more applications and products are introduced in the market, consumers will be able to shop for suitable solutions.*

Diversification: *specialised application providers will be able to participate and bring in diversification away from traditional communications.*

Economic Inclusion: *with unbundling of licences, SMMEs will be granted opportunity to become service providers within small niche markets.*

Open Access: *recognizing that broadband is an evolving phenomenon with constantly changing and expanding demands; and in order to create enabling conditions for an advanced, universally accessible information infrastructure that promotes social and economic inclusion, it is necessary for the regulatory regime to address the structural constraints in the market arising from the dominance of a number of vertically integrated operators. Re-structuring the market to enable greater wholesale access to networks by service providers, will go a long way to creating a more competitive services sector, which is likely to enhance quality and drive down prices. The National Broadband Strategy clearly indicate the need for shift in the regulatory regime in order to provide a more holistic and long-term solution to technology convergence and the use of broadband. The key principles explained below are key features of open access that will promote broadband networks and they are embraced in the licensing framework:*

- *Openness – at the infrastructure level, with open access for multiple services, providers are enabled to compete on shared platforms; at the level of government and its regulatory agencies there will be commitment to open governance and open data; openness in policy formulation through consultation and public participation.*
- *Service neutrality – no preference is given to any particular type of service or technology, while ensuring the use of common standards and protocols that enable interoperability;*
- *Universality – universal access to broadband services through even more provisioning of services, including a focus on services in undeserved and underserviced areas and communities;*

- *Equality – address the digital divides between those with the resources and capabilities to access and optimally use the full range of broadband services.*
- *Efficiency – within a competitive market, enabling the sharing of infrastructure to avoid unnecessary duplication;*
- *Transparency and accountability – by sector institutions and operators, policy and regulatory certainty to enable public and private investment;*
- *Innovation – creating conditions for innovation throughout the ICT ecosystem from policy and regulation to services and applications, and from networks to users and skills and capacity building;*
- *Complementarity – leveraging top-down coordination and bottom-up initiatives, public and private resources, fixed and wireless technologies, and different tiers of government; and*
- *Future-proof – ensuring that policy choices are flexible enough to accommodate technological progress, neutral enough to withstand technology and market shifts and resilient to value dilution.*

3 SCOPE OF LICENSING FRAMEWORK

The licensing framework covers broadcasting systems, broadcasting systems, broadcasting service, subscription management services, electronic communications, telecommunication service and telecommunication systems as interpreted in the Communications Regulatory Authority Act, No. 19 of 2012. ***The licensing categories fall under the broad areas of System license, Service license, Broadcasting and Rebroadcasting Licenses as provided for in the Communications Regulatory Authority Act****, No. 19 of 2012. The broadcasting license category is dealt with separately. Radio Spectrum and Postal services are not covered in this framework and are governed by a different framework.*

4 LICENSE CATEGORIES

The licensing framework will have three major licensing categories as follows:

4.1 Network Facilities Provider (NFP)

These are licensees who shall own, operate and provide an form of physical infrastructure used principally for carrying service and applications and content. Customer premises equipment are not included in the description of network facilities. The infrastructure may include fixed links, radio communication transmitters, satellites and satellites station, submarine cable, fibre/copper cable, towers, switches, base stations. The facilities are for own use or for availing to other licensed operators on commercial basis. Private Telecommunications Networks shall fall in this category and shall further be specified in the appropriate license type to distinguish them from major networks.

4.2 Services and Applications Provider (SAP)

These are non-infrastructure based service providers and they will provide all forms of services and application to end users using

infrastructure of the Network Facilities Provider. The services and application s may be based on speech, sound, data, text and images and they deliver a particular function to the end user. The services and applications shall not be for broadcasting purposes.

4.3 Context Services Provider (CSP)
The licensee will provide content material in the form of speech or other sounds, text, data, images, whether still or moving solely for broadcasting (TV and radio) and other information services. For avoidance of doubt, subscription TV falls under this category. State broadcasters shall not require license to operate. This licensing category will be dealt with separately.

5. LICENSE TYPES
There will be various types of licences under the three license categories. It is important that a simple and implementable licensing structure is designed showing the various licences under each category. The licence type structure provides further guidance on how specialised operations should be licensed and it also creates opportunity for Small, Medium and Micro Enterprises to participate at various levels, largely at regional level and in the services and applications provider category. The licence type structures are summarised in the table below:"

[**My Emphasis**]

58. The foregoing policy document reproduced immediately above was attached to the Applicant's replying affidavit to demonstrate that even the Respondent regards the subscription management service as distinct from broadcasting. I reproduce paragraphs 38 to 39 of the Applicant's combined replying affidavit:

"38 The Authority has recognised that subscription management services are distinct from broadcasting activities, and must be licensed separately:

38.1 The Authority's "ICT Licensing Framework in Botswana", September 2015 (attached as "RA4", differentiates between licence categories for broadcasting and SMS. Paragraph 3 says:
"SCOPE OF LICENSING FRAMEWORK
The licensing framework covers broadcasting system, broadcasting service, subscription management services, electronic communications, telecommunication service and

telecommunication systems as interpreted in the Communications Regulatory Authority Act, No. 19 of 2012. The licensing categories fall under the broad areas of System licence, Service license, Broadcasting and Re-broadcasting Licences as provided for in the Communications Regulatory Authority Act, No. 19 of 2012. The broadcasting license category is dealt with separately. Radio Spectrum and Postal services are not covered in this framework and are governed by a different framework." (my emphasis)

38.2 *The Authority's Annual Report, 2017 says that "The SMS licence is issued to a service provider whose sole responsibility is to enable consumers to access broadcasting content that is packaged by another party and is not necessarily being broadcast from Botswana." (emphasis added) I attach an excerpt of the Authority's Annual Report as "RA5".*

38.3 *In its letter to MultiChoice Botswana date 19 November 2015 (attached to the founding affidavit as FA5), the Authority recorded that it "is mandated to licence and regulate Subscription Management Services" in line with the Act, pursuant to which the Authority invited "MultiChoice Botswana (Pty) Ltd" to apply for the SMS licence. It was clear that the Authority sought to regulate only MultiChoice Botswana, and its licence application confirmed that it provides only subscription management services.*

39. *I am therefore advised and submit that the Authority's attempt to regulate the DStv service indirectly, by imposing conditions relevant to broadcasting activities on MultiChoice Botswana, exceeds the Authority's statutory powers and results in unlawful and impermissible regulatory over-reach. Argument in this regard will be addressed at the hearing."*

59. I think the Applicant is reading too much into the ICT Policy document but even if what is claimed by the Applicant is correct, the Respondent would simply have misunderstood the Act. The Act is very clear that the subscription management service is a broadcasting service, and it is an activity in the process of broadcasting, admittedly at the tail end of things, namely, the reception of the transmitted broadcasting signal. The broadcast

signal is there in the air and it cannot be seen by the members of the public in Botswana at their will and desire; it is inaccessible in the ordinary course of life even with special devices for the reason that it is coded and encrypted save perhaps for persons in possession of highly sophisticated devices such as happened here a couple of years ago as was widely publicized in the local newspapers with the infamous Chinese decoder named and styled ***"Philibao"***. In the end, it is the machinery set up by the Applicant that can lawfully enable the members of the public to enjoy the broadcast material. It's none other than the Applicant who embarks on an aggressive marketing to create interest in the broadcast material and a stable customer base here in Botswana, and not only does the Applicant receive payment from the subscribers to the **DStv** services but has also set up customer care centres to cater for the subscribing members of the public and such centres are the sole place where reception devices are joined to a broadcasting network and enabled to receive the broadcast signal and render same viewable and/or enjoyed by anybody in Botswana who happens to be in the vicinity of such devices. The Applicant's attempt to extricate itself from the process of

broadcasting is best answered with the endless wisdom of the scripture in 1 Corinthians 12:15 – 22:

> *"15 Now if the foot should say, 'Because I am not a hand, I do not belong to the body,' it would not for that reason stop being part of the body.*
> *16 And if the ear should say, 'Because I am not an eye, I do not belong to the body,' it would not for that reason stop being part of the body.*
> *17 If the whole body were an eye, where would the sense of hearing be? If the whole body were an ear, where would the sense of smell be?*
> *18 But in fact God has placed the parts in the body, every one of them, just as he wanted them to be.*
> *19 If they were all one part, where would the body be?*
> *20 As it is, there are many parts, but one body.*
> *21 The eye cannot say to the hand, 'I don't need you!' And the head cannot say to the feet, 'I don't need you!'*
> *22 On the contrary, those parts of the body that seem to be weaker are indispensable..."*

60. I am of the view in any case that the ICT Policy document actually fairly operationalizes the Act. It sheds light on the problems experienced with the Old Licensing regime, called "***the Multi-service licences***" that is viewed as "***anti-competitive***" and demanding close monitoring; further it recognises "***technological convergence in the telecommunications and broadcasting markets and how the new technologies such as broadband networks***" have opened new opportunities with the result that operators can incorporate internet, voice, data and video in a single platform." It is envisaged by the policy document that licensing regulation must move away from being technology focused as technological innovation and development is taking place at a fast

pace such that the regulatory framework lack behind and often being called upon to make adjustment to accommodate unforeseen developments. It is stated for instance that "***Broadcasting regulation and several other new technologies struggle to fit within the ambit of the framework***". The objective of the new regulatory framework is to accommodate "***multiple services [to] be delivered on a single network or platform embracing convergence of networks, services and technologies***". Networks are "***licenced as ... capable of delivering multiple and multimedia products***" and it is intended that new and specialized players would not only be encouraged to come on board but also to bring about innovation and development of the industry with the result that cooperation and teamwork would be fostered.

61. The document proceeds to list the various services offered in the industry on page 9 not as a classification but a mere narration. The categorization appears at line 5 of paragraph 1 on page 9 of the document [**Page 527 Vol. II, Bundle of Documents**]. It is here that possibly ambiguity is introduced but really the intention is to convey the spirit of section 31 of the Act wherein a broadcasting licence is envisaged. We may recall that section 31(1)