of the Act proscribes engagement in any broadcasting or rebroadcasting activity without a valid licence but in section 31(4)(d) of the Act permits the Minister to prescribe categories of licences that may be obtained, which in section 31(3) of the Act are collectively referred to as broadcasting or rebroadcasting licence as may be the case. In other words, it does not matter what categories the Minister may prescribe, which has in any case has not been done, the same are in fact broadcasting licences. The kind of power conferred upon the Minister in section 31(4)(d) of CAP 72:03 would, in terms of section 2 of the Statutory Instruments Act, CAP. 01:05 be exercisable in the form of subsidiary legislation and would need to be consistent with the enabling Act as required in section 5(2) of CAP 01:05, reading:

> *"5(2) A statutory instrument shall not be inconsistent with the provision of the enactment under which it was made, or any Act and any such instrument shall be void to the extent of the inconsistency."*

62. Section 6(2)(h) and (i) of the Act gives the power to issue licences to the Board in the following terms:

> *"(2) Notwithstanding the generality of subsection (1), the Board shall ---*
> *(h) process applications for and issue, licences, permits, permissions, concessions and authorities for regulated sectors as may be prescribed;"*

63. The foregoing provision of the enabling Act merely empowers the Board to issue a prescribed licence but not the power to prescribe a licence. As stated before section 31 prescribes a broadcasting or rebroadcasting licence. This state of affairs is reinforced in section 32 of the Act that directs the issuing of a broadcasting or rebroadcasting licence and nothing else upon meeting the necessary conditions in the following terms:

> *"32. (1) Subject to the availability of frequencies, and subject to the provisions of subsection (2), the Board may, on receipt of an application for a broadcasting or re-broadcasting licence, if it is satisfied that the applicant has fulfilled all the requirements for a grant of licence, issue a licence to the applicant.*
> *(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."*

64. The argument presented by the Applicant should really collapse on its face if the **ICT** Policy document is read properly. I think pages 9 and 10 of the document [**Pages 527 and 528 of Vol II of bundle of documents**] really settle the issue. Here three major licencing categories are listed as Network Facilities Provider (NFP), Services and Applications Provider (SAP) and Content Services Provider (CSP). The first group are said to be those who "***own, operate or provide any form of physical infrastructure used principally for carrying service and application and content,***" the 2nd

group are said to use the facilities of the former to "***provide all forms of services and applications to the end users,***" and such "***may be based on speech, sound, data, text and deliver a particular function to the end user***" but not for "***broadcasting purposes;***" the 3rd group are expected to "***provide content material in the form of speech or other sounds, text, data, images, whether still or moving solely for broadcasting (t.v and radio) and other information services,***" and it is stated categorically that "***subscription TV falls under this category.***" This means that the Applicant as a subscription management service provider falls under this 3rd category along with those providers engaged in the subscription tv. However, the foregoing discussion focuses on service providers as distinct from licence types and it is only at paragraphs 5 on pages 10 to 15 of the document [**Pages 528 – 533 Vol. II Bundle of Documents**] that licence types are dealt with. Therein it is stated that the various types of licences may be issued under each of the categories stated above. In the part of the table provided, dealing with the 3rd category, it is specifically made clear that the issuance of a broadcasting licence would entail the various broadcasting licences and an undertaking to deal with that separately is being

made. Paragraph 6, on page 14 of the document [**Pages 532 -533 Vol. II Bundle of Documents**], summarising the licensing procedure, in part, reads:

> *"The procedure that will be followed in the implementation of the licensing framework is that:*
> - ***Any operator will be allowed to choose to be in more than one category but should be expected to obtain applicable licenses of all the categories they choose to operate in.***
> - ***There shall be no distinctions between say mobile or fixed services, satellite or terrestrial services, data or voice services, etc. Instead licensees will be categorized based on whether they are Network Facilities provider, Service and Application Providers or Content services providers.***
> - *Direct interconnectivity between all network operators will be permitted, and indeed mandated.*
> - *Cross-subsidization between the various license categories will not be allowed. Operators with significant market power the Authority will require them to implement accounting separation in order to structure their operations and submit distinct operational accounting returns to BOCRA as part of their quarterly and annual compliance returns for auditing purposes.*
> - *With the exception of areas where there exists natural limitations (for instance spectrum availability), the market will determine the number of licensees.*
> - *Radio Spectrum availability and allocation shall be considered independent of availability and issuance of other licences. This means that issuance of network facilities licence or service and application licence shall not automatically guarantee spectrum allocation. Type Approval shall also be considered independent of issuance of other licenses."*
>
> [**My Emphsis**]

65. A very useful account of how **DStv** broadcasting service is made in the supporting affidavit, deposed to by the Regional Director, Southern African Region of the MultiChoice Africa, filed on behalf of the Applicant at paragraphs 11 to 31 [**Pages 588 to 596 Vol. II Bundle of Documents**]. The averments demonstrated how the

entire process of the broadcasting of **DStv** is so complex, cutting across country boundaries and involving numerous players of varying technical skills and resources as well as having to contend with regulatory authorities in different countries. Although the purpose of the allegations being made was to demonstrate that MultiChoice Africa cannot meet the demands of regulatory authorities in each country where its signal is broadcast, it served, from my point of view, to justify why regulators such as the Respondent would have an interest in not only the content of what is availed to the members of the public in Botswana but also the nature of the tariff structure, the quality of the equipment being used and the effect of the broadcast material in Botswana Society and Economy.

66. The perimeters of such regulatory control are set out in the legislation. The Respondent, in response to the challenges of technological development and convergence of technology has come up with the **ICT** Policy. The enabling Act predetermined the tasks to be carried out, and include the monitoring of the level of investment, the quality, the nature of the services, the promotion of competition and the fair pricing of services, the promotion of

efficiency and economic growth and even the distribution and accessibility of the services throughout the country as well as to "promote and facilitate convergence of technology" as per section 6(2)(x) of the Act. In section 37 of the Act, an obligation is imposed on the licensee to warn the viewers of the programme being broadcast where it is not suitable for the children. The Broadcasting Regulations also in regulation 12 provide further protection for the children and further standards in regulation 11. I reproduce regulations 11 and 12 below:

> *"11. A licensee, or any employee thereof, shall not broadcast any matter which, measured by contemporary community standards –*
> *(a) offends against good taste or decency;*
> *(b) contains the frequent use of offensive language, including blasphemy;*
> *(c) presents sexual matters in an explicit and offensive manner;*
> *(d) glorifies violence or depicts violence in an offensive manner;*
> *(e) Is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community.*
> *12(1) A licensee shall ensure that due care is exercised in order to avoid content which may disturb or be harmful to children when the licensee broadcasts programmes at times where a large number of children may be expected to be watching or listening to radio or television programmes.*
> *(2) A licensee shall, when determining whether a large number of children are watching or listening to any programme, take into account any available audience research carried out, as well as the times that programmes are broadcast.*
> *(3) The content of programmes which may disturb or be harmful to children includes offensive language, explicit sexual or violent material, music containing sexually explicit lyrics or music containing lyrics which depict violence."*

67. Anyone who wants to have a stake in the broadcasting process that is intended to be received in Botswana and sets up a network that

will make the broadcasting material accessible by the members of the public in Botswana, acting either alone or in cooperation with others would be caught up by the regulatory regime established for Botswana. If anyone wants to make money out of the people of Botswana by engaging in a broadcasting activity in Botswana such person would bring himself or herself or itself if a corporate body under the jurisdiction of the Botswana Regulatory Regime and the only thing that remains is to pigeonhole the activity in the overall regulatory regime. The question is not where you are situated but that your deliberate and calculated actions are impacting the Botswana society and economy.

68. Having said all the above, I must nevertheless address the specific contentions of the Applicant that effectively go against what we discussed above, namely, regulation by proxy. I have no slightest hesitation in agreeing that if it true that is what is intended by the Respondent it will be inappropriate. However, for one to come to that conclusion, one has to find as a fact that the Applicant is not engaged in a broadcasting activity and that any broadcasting that is targeting Botswana is done solely by **MCA**. In other words, one must come to the conclusion that the Applicant is not part of a

broadcasting organisation that makes the broadcast material accessible to the members of the public in Botswana, not in general terms but through an activity qualifying as a broadcasting activity that is happening here in Botswana. Whoever is carrying out that activity within the jurisdiction cannot escape regulation in the manner involved here.

69. I think the Applicant is misrepresenting the position of the Respondent as clearly the demand to submit the tariff is directed to the Applicant, the last chain link in the process of broadcasting **DStv** television and it is the latter who avails the necessary devices and enables same to receive the broadcast material and renders it capable of consumption in Botswana. Of course the Applicant will need the cooperation of persons beyond the jurisdiction to meet the standards put up by the regulatory authorities here, and those persons such as **MCA** would in turn need the Applicant or substitute to continue to make money in Botswana. The Respondent raised the issue of the relationship between the Applicant and **MCA** merely to demonstrate that what was being sought is feasible and reasonable in the circumstances of this case but in my view it was not necessary even to raise the point. The

truth is that the Applicant is engaged in a broadcasting activity and it is the one that chose the persons to associate with or cooperating partners to render **DStv** television broadcasting lawfully in Botswana. This in my view was a business decision and if the Applicant's business partners or associates refuse to play the ball by providing the necessary assistance, business in Botswana will be lost to both and that is a choice facing all businesses.

70. It shall of course be recalled that in the previous legal battle between the Applicant and the Regulating Authority, the Applicant's contention that was validated by the Court of Appeal was that in terms of the then existing statutory framework there was no requirement for it to be licenced to offer its services. In the case at hand, there is in existence a new statutory framework in terms of which the Applicant admits is required to be and is licenced to offer the subscription management service. What is being contested is whether or not the offering of such a service amounts to broadcasting. In this sense therefore, there has been a fundamental change of not only the facts but legislation as well since the first legal battle took place.

71. It cannot be denied that the broadcasting of **DStv** not only targets Botswana audience but has impact or effect in Botswana as well and that happens not inadvertently but as a result of the direct and indirect actions of the Applicant, which actions are by operation of law irrebuttably deemed to be a broadcasting activity (Broadcasting Services). But when such actions are viewed along with the actions of **MCA** and other business associates, the two having been brought together by their mutual interest to exploit the Botswana Market profitably in the area of television broadcasting in the cost effective and efficient manner, the joint business undertaking falls squarely and naturally within the scope of the Act, and the manner in which the Respondent chose to deal with the arrangement is both practical and reasonable.

72. In the situation posed by the instant litigation, where there are a number of activities forming a part of the whole process called broadcasting whereby some of such activities occur, or have effect, in Botswana whilst others occur beyond the borders of Botswana or it is even difficult or impossible to distinguish the two sets of activities, any interpretative approach that seeks to segregate and demarcate the varies activities performed by each of the business

associates should be disfavoured especially in the light of an otherwise clear, all embracing and flexible regulatory regime dealing with a continuously evolving industry whose future cannot be calculated with mathematical exactitude. Such an approach in my view is not only sterile and too formalistic but fails to appreciate the complexity of the subject matter of the regulatory regime.

73. Modern technological development in the area of internet, information and technology and the convergence of technology in the communications sector have pushed the bar too high for the regulators as the old forms of regulation and control became obsolete, and even the jurisprudence of many countries had to catch up in dealing with the new challenges. Nearer home, the example is offered by the case of ***e-Botswana (Pty)Ltd v Sentech (Pty) Ltd and Others*** **(2013) 6 SA 327** (GSJ). This case deals with the broadcasting actions of an entity in South Africa but which had adverse effect on the business of another entity in Botswana. A Botswana registered company, e-Botswana (Pty) Ltd that was licenced to carry out free to air broadcasting in Botswana brought an action in South Africa claiming damages for loss of advertising business against Sentech (Pty) Ltd that was operating a satellite

that transmitted the broadcasting signal of the South African Broadcasting Corporation that had spill-over into parts of Botswana. Although the broadcast material was encrypted, viewers in Botswana could deploy a cheap Chinese decoder named Philibao to decipher the signal to view the programmes. It was common cause that the encryption was not complicated and was easy to break. Though the foregoing case does not deal with a regulatory regime per se, it serves to demonstrate how the actions of one person in one country may have an adverse effect in another country. At paragraph 43-44 pages 339-340, the following is stated:

> *"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.*
> *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. P Botha 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 neighbouring 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".
[**My Emphasis**]

74. A further reference, illustrating the actions of a person in one country having effect in another in the area of regulatory control is illustrated by the dispute in ***Casino Enterprises (Pty) Ltd (Swaziland) v. The Gauteng Gambling Board and Others*** **2011 (6) SA 614 (SCA) 8** involving internet gambling. Gambling facilities in Swaziland were rendered accessible to the residents of Gauteng Province through internet and advertising was placed on the radio broadcast in South Africa to attract Gauteng patrons. The court upheld the submission to the effect that the gambling by the residents of Gauteng was taking place in South Africa even though the gambling centre was in Swaziland and declared the organization of such gambling illegal in terms of the existing legislation. It was held, at paragraphs 30 and 36, pages 625 to 626, as follows;

"[30] In this Act 'gambling' is defined in s 1 as follows:
'"gambling" means the wagering of a stake of money or anything of value on the unknown result of a future event at the risk of losing all or a portion thereof for the sake of a return, irrespective of whether any measure of skill is involved or not and encompasses all forms of gambling and betting, but excludes the operation of a machine contemplated in

subsection (3) or (4): Provided that the responsible Member may, on the recommendation of the board, declare certain games of skill not to be gambling;'.
From this definition it is clear that the essence of 'gambling' under the GGA is, as under the NGA, the staking of a consideration on an uncertain future event.
[31] So also the aims which the provincial legislation seeks to achieve, as spelled out in the preamble to the GGA accord in substance with those that inform the interpretation of the NGA.
[32] There is an obvious concurrence in reasoning between the two Acts as to when gambling can properly be said to take place.
[33] Having determined that gambling takes place when a player places a stake upon an uncertain chance it becomes necessary to decide whether and, if so, at what point in the course of the operations described in para 20 that fulfilment is achieved. In my view the key facts are those contained in paras 2.19(a), 2.20 and 2.21 of the summary.
[34] ***According to these facts the stake is irrevocably placed on the outcome of the player's chosen gambling game (and the gamble is under way) at the moment that he or she activates the 'Spin' button (or its equivalent). The fact that any or all of the actions described by Prof Hazelhurst may occur in Swaziland after or as a consequence of that activation is, it seems to me, irrelevant to the central issue as none of those actions changes the reality that the player at his or her computer has in South Africa committed himself or herself to staking money on the chance. That takes place where the player is (in South Africa) and not in Swaziland.***

[35] Such an interpretation satisfies the aims of the statute: the prospective player is 'seduced' in South Africa, he or she takes and activates the crucial decision to gamble here, he or she is impoverished here; the internet casino intrudes upon the field of licensed operators here and it does so without payment of dues to the State. ***The legislature is concerned with substance, not form, and if gambling takes place in South Africa it is of no consequence what means are employed to facilitate it and whether those means are employed outside the country.***
[36] ***Moreover the appellant 'makes' such games 'available' to prospective players in South Africa. The purpose of the Act is to control the effect of gambling on South Africans in South Africa whatever the source of the temptation may be.*** *In so far as the intention of the appellant is to use the internet casino to introduce South Africans to the 'delights' of direct gambling from their homes (or places of business) it places no strain upon the ordinary meaning of the expression to treat the placing and maintenance on the web of an internet casino which is readily accessible to such persons as acts of making gambling available in South Africa. The appellant's advertising on its web-site informs the interested viewer that 'In just a few easy steps you can start playing all your favourite casino games from the comfort of your own home' and Imagine being able to enjoy all your favourite slot machine*

games in your own personal cozy abode where you can just relax and be at home.'
Although these statements no doubt contain some hyperbole, they also identify an essential truth in what the appellant is doing: the opportunity to gamble is being offered to the would-be player wherever it finds him or her with a computer link to the internet, which usually means in the home or office". [**My Emphasis**]

75. I am further persuaded by, and identify myself with, the sentiments expressed at paragraphs 23 to 25 of the judgment in relation to the proper approach to the interpretation of a regulatory law dealing with an activity having partial extra-territorial effect or impact, namely, that internet gambling (like satellite broadcasting) knows no country boundaries, with its impact or effects being experienced for beyond the originating country. This in turn attracts regulators in other countries whose call of duty is to put in place a machinery for the protection of their respective populace. But because an ever evolving technology is at stake, any interpretative methodology worthy of acceptance must bear in mind the purpose of the remedial measures and permit the flexibility and elasticity thereof by adopting a broad and redemptive construction as opposed to a rigid and restrictive one so as to give effect to the intended purpose of the regulatory statute. I reproduce paragraph 23 to 25 on pages 623-624 below;

"[24] Counsel for the respondents referred to dicta in judgments from the United States concerning internet gambling. In The People of the State of

New York v World Interactive Gaming 185 Misc. 2d 852, 714 N.Y.S. 2d 844 the Attorney-General applied inter alia to interdict the respondent from operating within or offering to residents of New York State gambling over the internet. ***The central issue was whether the State could enjoin a foreign corporation legally licensed to operate a casino offshore from offering such gambling to internet users in New York. The State constitution contained a prohibition against unauthorised gambling. The Court said (at para 9):***

'Respondents argue that the Court lacks subject matter jurisdiction, and that Internet gambling falls outside the scope of New York state gambling prohibitions, because the gambling occurs outside of New York state. However, under New York Penal Law, if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred [See, Penal Law § 225.00(2)]. Here, some or all of those funds in an Antiguan bank account are staked every time the New York user enters betting information into the computer. It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within the New York state.

Wide range implications would arise if this Court adopted respondents' argument that activities or transactions which may be targeted at New York residents are beyond the state's jurisdiction. Not only would such an approach severely undermine this state's deep-rooted policy against unauthorized gambling, it also would immunize from liability anyone who engages in any activity over the Internet which is otherwise illegal in this state. ***A computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents actively targeted New York as the location where they conducted many of their allegedly illegal activities. Even though gambling is legal where the bet was accepted, the activity was transmitted from New York.*** *Contrary to respondents' unsupported allegation of an Antiguan management company managing GCC, the evidence also indicates that the individuals who gave the computer commands operated from WIGC's New York Office. The respondents enticed Internet users, including New York residents, to play in their casino.'*

Although as the extract makes clear, the New York statute was in terms different from those under consideration here, the practical policy that underlies the dictum is equally valid in the Republic, vis-a-vis the need to counter potentially harmful communications generated and transmitted from beyond the country's borders. The question is whether such reasoning can be reconciled with the terms of the NGA and the GGA".

[My Emphasis]

76. The 3rd South African case is more directly relevant to the subject matter of the current case and I am mindful that the same was distinguished in the earlier Court of Appeal decision in the matter brought by the Applicant against the predecessor to the Respondent. I am of the view that the facts and the law have since changed fundamentally as to justify a relook at the case, namely, ***OtherChoice (Pty) Ltd v Independent Communications Authority of SA and Multichoice E Africa (Pty) Ltd*** **case no. 19718/2003** **(OtherChoice)** (Unreported) and the judgment was delivered on 21 April 2006, the decision of the Transvaal Provincial Division. In that case a company based in Spain called Don't Panic Television (**Don't Panic tv**) transmitted an encrypted signal conveying pornographic television programmes to a satellite that in turn beamed the signal as per its foot print within Southern Africa including South Africa. The Applicant made available at a fee smart cards to the South African public that had been enabled in advance to decrypt the broadcast programmes. The 1st Respondent being the Regulating Authority objected to the Applicant's action on the ground that it was illegal. The Applicant sought a declaratory order to the effect that its action was not required to be licenced in terms of the existing law. The relevant

statues were the Broadcasting Act, No. 4 of 1999 and the Independent Broadcasting Authority Act, No 32 of 1998.

77. Bearing in mind that the statues from different jurisdictions regulating a similar subject matter are not always word for word, I am of the opinion that the provisions considered in that case especially section 32 of the Independent Broadcasting Authority read together with the other relevant provisions bears a resemblance of Botswana legislation that is too close and of such a manner that it cannot be ignored. I am saying this with the temerity and dread as I may be perceived to have ventured in an area definitively pronounced upon by a superior court. However, it is my understanding of that decision that permits me to hold as I do herein. That provision of the South African Act reads:

> "*Subject to the provisions of section 33(2),* ***a person shall not provide*** *broadcasting signal distribution* ***unless provided under and in accordance with a licence issued to that person by the Authority*** *under this chapter*"
> [**My Emphasis**]

78. Save for the use of the phrase "***broadcasting signal distribution***" in the South African statute, section 31(1) of CAP 72:03 bears the same meaning as the underlined words above but therein the

words, "broadcasting or rebroadcasting activity" are used instead. In my mind I cannot see any useful distinction between the phrase, "***broadcasting distribution***" in the South African legislation and the phrase, "***broadcasting or rebroadcasting activity***" in our legislation. The court in the South African case put the inquiry on page 3 of the judgment as follows:

> "…. ***The applicant is in essence seeking a finding that, by selling the smart cards, it is not providing broadcasting signal distribution***…."
> [**My Emphasis**]

79. The other provision that was referred to, is section 39 of the Independent Broadcasting Act that reads as follows:

> "*Subject to the provisions of this Act,* ***a person shall not broadcast service unless such service is provided under and in accordance with a broadcasting license issued to that person by the Authority*** *under this Chapter*" [**My Emphasis**]

80. The arising issue was put as follows at page 4 of the judgment:

> "*As regards section 39,* ***the essential finding that the Applicant seeks is that it is not providing a broadcasting service****, a term that is also defined in the relevant statutes*" [**My emphasis**]

81. The court proceeded to consider the definition of the word broadcasting in the 2 statutes holding in the end that the meaning was the same in both acts, and focusing in the end on section 42 of the Independent Broadcasting Authority Act. I reproduce from paragraph 2 pages 6-8 of the judgment:

> *"The Broadcasting Act defines "broadcasting as "any form of unidirectional telecommunications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities, whether carried by means of radio or any other means of telecommunication or any combination of the aforementioned, and 'broadcast' is construed accordingly". "Telecommunications" is defined as "any system or method of conveying signs, signals, sounds, communications or other information by means of electricity, magnetism, electro-magnetic waves or any agency of a like nature, whether with or without the aid of tangible conductors, from one point to another, and the derivative noun 'telecommunication' must be construed accordingly".* ***It is clear that Don't Panic TV, assisted by the applicant is broadcasting into South Africa. Similarly, the two entities are providing a broadcasting service because that term is defined as "any service which consists of the broadcasting of television or sound broadcasting material to the public, sections of the public or to subscribers to such a service ...".***
> *For the applicant Mr Van Rooyen contended that Don't Panic TV nevertheless does not require a licence for its activities and that, for that reason, the applicant's activities are not unlawful. The argument is based on what counsel contended is the proper construction of section 34(1) of the Broadcasting Act that provides as follows: "****All signal distribution services and broadcasting services, whether through terrestrial frequencies, satellite or telecommunication facilities within the borders of the Republic or from the Republic to other countries will be required to hold a licence issued by the Authority.****"*
> *Counsel for the applicant contended that the words "within the borders of the Republic" qualify "terrestrial frequencies", "satellite" and "telecommunication facilities". Thus, so the argument went, only services that originate within the borders of the Republic need to be licensed. I do not think that, applying the ordinary canons of construction, the subsection can be read as contended for.* ***Clearly, terrestrial frequencies and satellites are not situated within the borders of any country. The words "within the borders of the Republic" qualify the words "All signal distribution services and broadcasting services". What the section seeks to regulate are services that are rendered within the borders of the Republic and***

also services that originate within the borders of the Republic albeit that they are rendered in another country."
[My Emphasis]

82. I pause here to note that the Applicant's position in the instant case is slightly different though somewhat electric. The Applicant at first glance appears to stop at the allegation of a complaint against what is seen as regulation by proxy but a fair reading of the Applicant's papers especially the supporting affidavit of the **MCA** goes further to assert that the broadcasting is done beyond the borders of this country and it is believed that is achieved by omitting words which were part of the definition of the word, "***broadcasting***" including "***satellite***" through which distribution of the broadcasting signal is made, **DStv** had been taken out of the loop and placed beyond the reach of the regulators. I have already spent considerable time and space in addressing the true meaning of all the phrases bearing the word "***broadcasting***" and how the same interact and I therefore need not repeat myself here, save to state that in the Botswana legislation the focus is on any broadcasting activity at any stage of the broadcasting process, that in turn must have effect or impact in Botswana. The statement on

page 8 of the judgment in the South African case at paragraph 2 applies with equal force in our set-up as it did in that case:

> *"...By requiring a person who renders a service in this country to be licensed albeit that that person is in a foreign country while rendering the service our legislation is not prescribing to that person what he or she may do in the foreign country.* ***The legislature is prescribing what the effect of what the person does may be in this country...."***
> **[My emphasis]**

83. The court in the South African case came to the conclusion that the **Don't Panic TV**, the Spanish Company, and the Applicant were both required to have a broadcasting licence to render the broadcasting service.

84. In the result the relief sought was refused, first, because the relief was discretional, and secondly, the selling of the smart cards in issue was illegal in so far only a licenced person could deal in the same. There is a slight twist in the facts before me. The Applicant is licenced to carry out a broadcasting or rebroadcasting activities in Botswana and our legislation determines that the activity being undertaken by the Applicant is the offering of a broadcasting service. There is therefore no need for extraneous evidence to establish this fact. I have stated above that the joining together of

the Applicant's telecommunication system as defined in the Act with that of the **MCA** form a broadcasting system during which the broadcasting equipment (decoders, smart cards, etc) is joined together, and information is passed from one end to the other through the deployment of "***Information and Communication Technologies***" by means of electronic communication with the result that a broadcasting service is jointly rendered to the public or a part thereof upon prior payment of a fee for the ultimate enjoyment of the parties involved, and it is this entire process that the Act defines as a broadcasting process.

85. The role and place of a smart card and a decoder was described at page 5 of the Judgment in the following terms in the South African case referred to above:

> *"The parties presented affidavits by several experts explaining the nature and function of the smartcard that the applicant sells. The experts do not agree but I shall proceed on the assumption that Redlinghuys, who attested to an affidavit on the applicant's behalf, is correct. According to Redlinghuys the smartcard is part of the television viewer's receiving equipment as are, for instance, the viewer's dish antenna and his decoder.* ***The smart card is a plastic card that "has embedded into it some microelectronics such as a microprocessor, memory chips and other micro components. This component contains (an) entitlement message ... and when inserted into the (decoder), will communicate with the Entitlement Control Message ... contained in the incoming received (and encrypted) signal to 'unlock' the (decoder) and pass the signal on to a normal TV set for viewing".*** *The Don's Panic smartcard is pre-activated for a specified time and the purchaser needs only to insert it into the decoder in order for him to receive the decrypted programme for the specified time. To sum up,*

without the smartcards that the applicant sells no member of the public can view the Don't Panic TV programmes in South Africa. ***There is no doubt that by selling the smartcards, the applicant plays an indispensable part in the process of making the programmes available in intelligible format to the South African public. Therefore, if Don't Panic TV may not lawfully broadcast the programmes in South Africa, the applicant would be acting unlawfully.*** *The first question thus is whether Don't Panic TV may lawfully broadcast in South Africa."* [**My Emphasis**]

86. I have no doubt in my mind that it will be attributing stupidity to the Legislature and ascribing absurdity to the legislation to interpret the Botswana legislation in a manner suggesting that Parliament could have intended to permit a person offering subscription management service in Botswana to facilitate an unlicenced broadcasting service in Botswana. I cannot think of an outcome that will effectively and immediately bring down the regulatory framework. What would be the purpose of requiring the persons offering broadcasting services to the public or a part thereof in Botswana to be licenced and allow others based outside the country to broadcast freely in Botswana without any form of supervision in the very controlled sector? There is a canon of interpretation that says any construction that leads to absurdity or unreasonably harsh results ought to be disfavoured. In ***Stevens No and Others v Barclays Bank of Botswana*** **[2010] 4 BLR 462 (CA)** at 466 D-E it was held:

"Importantly, ***the court can go beyond the plain meaning of statutory language when not doing so would effectuate an 'absurd' result****. However, there is no such absurdity here. Here again, South African law is instructive. In S v Munoko 1965 (3) SA 281 SWA at p 28 (citing Garment Workers' Union (Western Province) and Others v Industrial Tribunal and Minister of Labour 1963 (4) SA 775 (A) at p 784G), the court addressed the question of when a provision is so unclear as to require going beyond plain language: '... the law requires reasonable and not perfect lucidity and the possibility that cases may arise in which it would be difficult to apply the provision in question is not a reason for holding that it is not reasonably clear."*[**My Emphasis**]

87. In ***Moshoka v. The State*** **[1999] 1 BLR 172 (HC)** at 178, Aboagye J. quoted the following words made in the South African case of ***State v. Van Der Merwe*** **(4) SA 310 (EDC)**:

> *"...Equally it is not necessary to cite authority for the proposition that one should not give to a statute, particularly a penal statute, an interpretation which produce a manifestly, absurd result...."*

88. In the South African case of ***State v. Melk*** **1988 (4) SA 561 (A)** at 562I, it is stated:

> *".... It is also a fundamental principle of statutory interpretation that the Legislature does not intend absurd result...."*

89. In yet another South African case of ***University of Cape Town v. Cape Bar Council and Another 1986*** **(4) SA 903 (A)** at 909-H, it is stated:

> *"Another canon of construction is that a statute should be construed in a manner which would avoid inconsistent or absurd results.... A similar rule is that a manner which avoids the unequal or discriminatory*

treatment of the persons, affected by it ..." [citation of authorities omitted]

90. It shall be understood that the canon of interpretation that seeks to avert absurdities is usually employed where there is ambiguity in circumstances where one possible meaning would lead to absurd results and the other would best serve the objects of the statute. However, in circumstances where the meaning is clear, the legislative intent must be given effect regardless of the results. It was stated in ***Mzwinila v. The State*** **1987 BLR 382 (CA)** at page 389 as follows:

> "*...It seems to this court that, where the literal reading of a statute, and a penal statute processes an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament.... Lord Coleridge J., in A-G v Beauachamp (1920) 1 K.B 650, put it quite shortly in these words (----, at page* 655): unquestionably, when one is construing a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction which satisfies these rules make the enactment intelligible, and especially if it carries out the obvious intention of the legislature as gathered from a general perusal of the statute, that grammatical construction ought not to be departed from"

90. The Applicant has sought to demonstrate that the regulatory regime as advocated for by the Respondent does not accord with the international trend, and the European Convention on Trans-Frontier Television enacted on 5 May 1989 and enforced on 1 May 1993 is waived as the evidence of how to deal with cross border

broadcasting. I think that conclusion is based on a misunderstanding of the convention in question. Least I am taken to have disregarded this contention I will address same albeit briefly to avoid lengthening further an already long judgment. The reading of that convention points to the existence of several exceptions to what has come to be termed Television without Frontiers as stated in the Council of Europe Directive no. 89/552 of 3 October 1989 as amended in 2002. For instance, Articles 59 and 60 of the convention deal with the avoidance of the laws of a member state by domestic entities who purport to be established in another member state and then broadcasting from the latter state to the former. This kind of scenario was the subject in ***TV10 SA v. Commissariaat Voorde Media***, case C 23/93 determined by the Court of Justice of the European Communities on 5 October 1994. The other exception in Article 10.1 relates to local content whereby a certain percentage of the broadcast material must be reserved for European Works, a proposition that has been viewed by the United States as engagement in protectionism. A more thorough treatment of the latter can be found in an article entitled, "***European Cultural Protectionism and the Socio Economic Forces that will Defeat it***" by Craig R Karpe, Indiana

International and Comparative Law Review Vol. 5.2 May 1995, Indiana University School of Law. Further see the following articles by J.D Donaldson, "***'Television Without Frontiers': The Continuing Tension Between Liberal Free Trade and European Cultural Integrity***", Fordham International Law Journal, Vol. 20, Issue 1, ©1996 Iey Electronic Press; A.M Schejter, "***People Shall Dwell Alone": The Effect of Transfrontier Broadcasting on Freedom of Speech and Information in Israel***", 31 N.C.J. International Law & Commercial Regulation 337 (2005), Available at: http://scholarship.law.unc.edu/ncilj/vol31/iss2/1. A further exception is a provision in Article 10b is intended to promote media pluralism within the country receiving extraterritorial broadcasting signal; there is also the issue of the regulation of pornographic and violent material, among others, the purpose of which is intended to maintain social and moral standards within each member state in Article 7, reproduced below:

> *"Responsibilities of the broadcaster:*
> 1. *All the items of programme services, as concerns their presentation and content, shall respect the dignity of the --- being and the fundamental rights of others. In particular, they shall not:*
>   a. *Be indecent and in particular contain pornography;*
>   b. *Give undue prominence to violence or be likely to incite to racial hatred.*

2. *All items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them.*
3. *The broadcaster shall ensure that news fairly presents facts and events and encourage the free formation of opinions"*

92. The foregoing rules of the European convention bear a marked resemblance to our Broadcasting Regulations dealing with the same subject matter, I reproduce clause 10 to 13 of the Broadcasting Regulations **CAP. 72:04**:

*"**10.** (1) Except as otherwise stated as a specific licence condition, a licensee shall broadcast programmes with a minimum local content of 20 percent of all programmes for television broadcasts, and a minimum local content of 40 percent of all programmes for radio broadcasts.*
(2) The provisions of sub-regulation (1) shall not apply to news broadcasts.
(3) Except as otherwise stated as a specific licence condition, local news shall constitute the majority of a licensee's news broadcast content.
***11.** A licensee, or any employee thereof, shall not broadcast any matter which, measured by contemporary community standards —*
(a) offends against good taste or decency;
(b) contains the frequent use of offensive language, including blasphemy;
(c) presents sexual matters in an explicit and offensive manner;
(d) glorifies violence or depicts violence in an offensive manner; or
(e) is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community.
***12.** (1) A licensee shall ensure that due care is exercised in order to avoid content which may disturb or be harmful to children when the licensee broadcasts programmes at times where a large number of children may be expected to be watching or listening to radio or television programmes.*
(2) A licensee shall, when determining whether a large number or children are watching or listening to any programme, take into account any available audience research carried out, as well as the times that programmes are broadcast.

(3) The content of programmes which may disturb or be harmful to children includes offensive language, explicit sexual or violent material, music containing sexually explicit lyrics or music containing lyrics which depict violence.

***13.** (1) A licensee, its employees or agents shall report news and information accurately, fairly and impartially.*

(2) A licensee shall ensure that news and information are broadcast and presented in a balanced manner, without any intentional or negligent departure from any facts through distortion, exaggeration, misrepresentation, material omissions or through excessive summarising or editing.

(3) A licensee, its employees or agents shall broadcast a fact fairly, having regard to its context and importance".

93. I referred to the case of ***TV10 SA v. Commissariaat voor de Media***, case C-23/93, Judgment delivered on 5 October 1994 a reference to the European Court of Justice under Article 177 of the EEC Treating by a Netherlands Court conscious of the fact that the system under review in that case is totally different from our experience. I did so to demonstrate that the Applicant's attempt to find refuge under European arrangement is unjustified and that the European Convention actually corroborates the efforts of the regulators in Botswana to regulate the broadcasting services. I am proceeding to make reference to some portions of that judgment with the same spirit. The facts, reduced to the bare minimum are that **TV10** was a Luxembourg registered commercial broadcasting company that was established in that country with a view to broadcast by satellite into the Netherlands. The Regulator in the