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A comparative study of legislation and regulations establishing ownership ceilings, audience size, market share and geographic markets in the South African print media sector

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FOREWORD

The research component of this study is part of an on-going programme funded by the RAITH Foundation, “Advancing the right to freedom of expression for all by 2015”. The self-regulatory system is lacking with particular emphasis on achieving aspects of source diversity in the print media. The print media in South Africa has succumbed to growing trends of concentration amongst existing stakeholders in the media, this has resulted in a select few dominating the industry and leaving little or no prospect for the potential and smaller role players to access and participation in the industry. The paper takes a look at regulatory frameworks and legislation that forms part of the law of general application which impacts on media and in particular print media. The paper presents a comparative analysis of legislation and regulations that impact ownership ceilings, audience size, market share and geographical markets. This will be done in an attempt to show the extent of problems emanating from concentration of the media, including the collusive and monopolistic behaviour prevalent in the print media industry.

Phenyo Butale

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INTRODUCTION

This paper is going to take an in depth view into the legislative and regulatory mechanisms used to monitor and guide the print media sector in South Africa. More specifically the paper aims to find the similarities and differences between the legislative and regulatory frameworks that have an impact on the print media sector in South Africa. By taking a closer look at these mechanisms one will be able to see their effectiveness in creating and maintaining a print media which reflects the views and needs of society and is responsive to the prevailing social situation. It is important that the media reflect the views and values of all in society as the press is ideally, supposed to be the voice of the nation and the print media sector is no exception. The areas of focus will be the legislation and regulation which have an effect on the establishment of ownership ceilings, audience size, market share and geographic markets.

DEFINITION OF KEY TERMS

Media transformation

Media transformation involves many different aspects of change and diversity within the various forms of print media in South Africa. For this paper media transformation will relate to the control and ownership of the main companies participating in the print media sector in South Africa. Tied into this will be the effect it may have on the diversification of content in print media. According to a research report into print media ownership and control, commissioned by the Media Development and Diversity Agency (MDDA) in 2009, 'in post 1994 South Africa, the print media landscape has not transformed much in terms of ownership and control and is still majority owned and controlled by white shareholders¹. The problem of this power concentration is that it tends to cause the homogenisation of media content, the prioritisation of the views of an elite minority, and the dominance of commercial interests over the public interest, all in all, these negative effects on the diversification of content and can result in a poorly informed public.²

Geographic markets

These are locations of the consumers of the print media sectors products. These are analysed according to geographic location, economic and social welfare of the area in particular. In South Africa, these are divided into provinces, and commercial and residential areas which are divided into rural versus urban areas. An example of the geographic market of the largest newspaper in the country, the Daily Sun is seen below;

"Daily Sun is the biggest daily newspaper in South Africa. With over 322 324 sales and a readership of 5 554 000 in Gauteng, Limpopo Province, Mpumalanga and Northwest Province, the national expansion of the paper to KwaZulu-Natal, Free State, Northern Cape, Western Cape and Eastern Cape will add to the existing circulation".³

¹ MDDA (2009). MDDA Submissions. Trends of Ownership and control. Available from <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20%20Final%20-%2015%20June%202009.pdf> (Accessed 27 August 2012)

² Duncan, J. (2011). The print media transformation dilemma. http://www.academia.edu/2033700/The_print_media_transformation_dilemma (Accessed 02 09 2013)

³ <http://www.media24.com/en/newspapers/emerging-markets/daily-sun.html>

Audience size

The audience size refers to the number of people over the age of 15 years, expressed as a percentage of the total population, who consume the products created in the print media industry.⁴

Ownership ceilings

Ownership ceilings represent restrictions put in place to prohibit individuals or investors from holding shares in a company above a set threshold. This restriction applies to acquisition and shareholding control over companies operating in the South African print media sector.

⁴ SAARF (2013) lsm

BACKGROUND TO THE STUDY

During the apartheid era the government had a heavy handed approach towards the media's stance on media policies and much of the monitoring imposed by government amounted to censorship.⁵ The apartheid government had strict regulations put in place to ensure that the media promoted their views and policies.⁶ They did this by enacting legislation that prohibited the press from reporting on an array of matters and this had the effect of censorship on the media particularly print media.

However a notable positive change, post 1994 is that the government no longer has influence in the print media industry⁷, government influence of media came to an end in print media and it became independent of state control.⁸

The print media sector then developed a regulatory system which was self-regulating, which meant that they were in charge of monitoring themselves and ensuring that a pluralistic and independent media sector is maintained.⁹ The Constitution of South Africa which was passed in 1996 also confirmed freedom of the press. Other pieces of legislation were promulgated to ensure an independent and pluralistic media industry which accurately reflected the diverse society in which we live.¹⁰ The country also ratified a number of international declarations¹¹ which promote and call for a media sector which is independent of the state and which reflects the views of all society, one of which is the UN/UNESCO Windhoek Declaration.¹²

⁵ MDDA (2009). MDDA Submissions. Trends of Ownership and control. Available from <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20%20Final%20-%2015%20June%202009.pdf> (Accessed 27 August 2012)

⁶ MDDA (2012). MDDA Submission: Transformation of print and digital media in South Africa. A written submission to the Print and Digital Media Transformation Task Team (PDMTTT) <http://www.mdda.org.za/%20Transformation%20of%20print%20and%20digital%20media.html> (Accessed 28 August 2013)

⁷ MDDA (2012). MDDA Submission: Transformation of print and digital media in South Africa. A written submission to the Print and Digital Media Transformation Task Team (PDMTTT) <http://www.mdda.org.za/%20Transformation%20of%20print%20and%20digital%20media.html> (Accessed 28 August 2013)

⁸ *ibid*

⁹ Press Freedom Commission report. 2012. <http://www.presscouncil.org.za/Reports/View/press-freedom-commissions-report-5> (hereinafter "PFC report") (Accessed 27 August 2012)

¹⁰ *ibid*

¹¹ List international declarations to which SA is a signatory

¹² Declarations of Windhoek. 'Declarations on Promoting Independent and Pluralistic Media' 03/05/1995.

The self-regulatory mechanism in print media

Currently the print media sector is not governed by any statutory legislation but there are a number of regulatory systems and related legislation which have an influence on the operations of the print media sector.¹³ The print media sector in South Africa has progressed substantially from the apartheid era to the current democratic age, however, there still lurks non satisfaction in certain areas hence there have recently been some proposed changes to the current regulatory system in the print media sector. The ideas this report makes out have the potential to further change the way in which the print media sector in South Africa is regulated.

Media transformation and diversity

The control and ownership of the print media remains largely in the hands of four major companies which are predominantly white owned and controlled.¹⁴ The main companies in this sector are Avusa, Naspers (through Media24)¹⁵, Caxton and CTP Group and the recently acquired Independent News and Media now Sekunjalo Independent News and Media ; Source, 2013. Of these four major companies only Avusa had a major shareholding by previously disadvantaged individuals at 51%. The take-over of Independent News and Media by Sekunjalo Consortium has also changed the shareholding and control of that group. The other two major companies remain white controlled. There have been regulations put in place such as the BEE Charter and the transformation Charter to promote racial transformation in the control and ownership of enterprises/ companies such as print media companies, but these have had little impact on the sector.¹⁶ The Media Development and Diversity Agency Act 14 Of 2002, also aims to promote the transformation of the ownership and control of companies in the print media sector to reflect the South African demographic. The lack of transformation in this sector gives rise to the possibility of collusive behaviour

¹³ Press Freedom Commission report. 2012. <http://www.presscouncil.org.za/Reports/View/press-freedom-commissions-report-5> (hereinafter "PFC report") (Accessed 27 August 2012)

¹⁴ MDDA. (2009). MDDA Submissions. Trends of Ownership and control. Available from <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20%20Final%20-%2015%20June%202009.pdf> (Accessed 27 August 2012)

¹⁵ Ibid

¹⁶ Ibid

between the four main players in the print media sector,¹⁷ who together take up 88% of the market share in the circulation sector.¹⁸

Justification of the study

The press is said to be the voice of the nation and gives a voice to the voiceless, this means that the media industry must reflect and be inclusive of as many cultural, societal and political views as possible. There is a need for all communities and different sectors of our society to have a print media which represents their views and opinions and also informs them on matters of importance to them and the country as a whole. In order to achieve this kind of press the print media sector needs to be governed by laws and regulations which promote a pluralistic and independent press.

Although the print media sector in South Africa has progressed substantially from the apartheid era to the current democratic age, it is apparent that challenges facing the self-regulatory mechanism have presented with negative dynamics, especially where the distribution of ownership and control of print media stakes or entities are concerned. It has become clear that there is a problem of firstly a concentration of power of a few individuals in the total stake of the print media industry which leads to collusive trade practices by these individuals.

Our regulatory and legislative processes have done little to address the potential of collusive behaviour by the four major players in the print media sector. There is the Competition Act which prohibits collusive behaviour between competing companies in the same market. In the print media industry there are four major players who together have the majority market share in the print media industry and this environment is conducive for monopolistic behaviour to occur.

This paper serves to identify the problem areas within the legislative and regulative framework which allow for such a collusive environment to occur.

¹⁷ Vick, C. (2013). Freedom of the press belongs to those who own one. Available from <http://www.dailymaverick.co.za/opinionista/2013-03-01-freedom-of-the-press-belongs-to-those-who-own-one/> Accessed: 9/06/2013

¹⁸ Ibid

The MDDA issued a report on research on the trends in media ownership and control.¹⁹ This kind of research is important in that it sheds light on the landscape of the media sector currently and the ownership and control of media companies has an impact on the diversity of the media sector. Print media is by far the largest section of media in South Africa (in terms of the number of titles and ownership) and yet it is the most unregulated.

Issues of editorial independence are of particular importance in the operation of any print media company. Therefore there has to be a separation of roles between shareholders, management and editors.

The report finds that there are four major companies which control the print media industry in that together they have the majority market share in the print media sector. Most of the major companies have their main offices concentrated in one area of the country which is Gauteng and only one of the major companies is based in the Western Cape. This paper will later show how this geographical situation of these companies affect geographical markets that the print media services.

These four major companies are Independent News and Media, Avusa, Caxton and CTP which are based in Gauteng and Naspers which is based in the Western Cape. Besides these four major companies there are a number of smaller independent publishing companies who also form part of the print media industry in South Africa (MDDA: Trends of ownership and control). Independent Media players consist of community news and small commercial newspapers. Major media players' influence can also be seen in this space through acquisition of shares (large or small) in these independent publishing concerns.

In the last decade there has been a surge in popular journalism or tabloid papers and this is amidst extreme pressure on revenue. Daily newspapers have also seen a moderate to extreme decline in circulation. There has been an increase in black readership in the English daily newspapers which effectively bridges the disparity in editorial preference between black and white. Overall newspaper circulation is on decline in the country and revenue in this industry is under extreme pressure (OMD

¹⁹ MDDA (2009). MDDA Submissions. Trends of Ownership and control. Available from <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20%20Final%20-%2015%20June%202009.pdf> (Accessed 27 August 2012)

2013 SA media facts blueprint). The concentration of power in only the major stakeholders as explained means they can drive the trends in ways that ensure that their revenue streams are maintained even if this is to the exclusion of certain areas while focusing on distribution of areas or audience sizes and geographical markets that will best serve their economic interest such as commercial and urban settlements with middle to high income earners. This is undesirable for media transformation as the ideals of media transformation are inclusive of reaching as wide an audience as possible and informing more people regardless of location to ensure their participation in an open democracy.

OVERVIEW OF SOUTH AFRICAN PRINT MEDIA

The print media industry in South Africa is governed through a self-regulating mechanism that is administered by the Press Ombudsman and Press Council of South Africa.²⁰ There is no State enacted regulation or legislation that regulates the industry directly. The Press Code of Conduct is the main regulatory enactment that guides rules to which print media is to conform. Since the code is not state enacted or official legislation, it cannot be said to be the law of general application. It is rather an informal regulatory system set out by the media industry to regulate its own conduct.

It is clearly apparent that the self-regulation mechanism has some gaps within it for instance the regulation of economic elements relating to control and ownership of media enterprises. This has enabled media company owners to procure as a large a stake in the industry as they can possibly contain, resulting in a few major participants or owners in the industry.

Parameters for a review of legislation and regulations governing print media

Therefore, in the absence of formal state legislation governing, print media as with any other entity should conform to state enacted legislation that has a direct effect on its operation. This paper will focus on legislation or regulations that have a direct effect or impact on ownership ceilings, audience size, market share and geographic markets in the South African media industry/sector.

²⁰ The Council and the Ombudsman are an independent co-regulatory mechanism set up by the print media to provide impartial, expeditious and cost-effective adjudication to settle disputes between newspapers and magazines, on the one hand, and members of the public, on the other, over the editorial content of publications. The mechanism is based on two pillars: a commitment to freedom of expression, including freedom of the press, and to excellence in journalistic practice and ethics. See more at: <http://www.presscouncil.org.za/>

LEGISLATION AND REGULATIONS IMPACTING PRINT MEDIA

The Constitution of South Africa

The Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) is an appropriate point of departure in dealing with legislation or regulations as the supreme law of the country. It serves as a guiding document from which all rights emanate. Hence laws are enacted to protect those rights.

Section 16 of the Constitution affords all who live in the Republic, the right to freedom of expression.

The right as set out in s 16 (1)(a)(b) specifically includes –

- a. Freedom of press and other media;
- b. Freedom to receive or impart information or ideas.

Therefore, it follows that the Constitution serves as a guide to how the right is to be exercised and any conduct that is antithetical to the right as set out, is an infringement of the right, and further negates the advancement of the right.

The Competition Act

The Competition Act 39 of 2000 (“The Competition Act”) refers to the issues on ownership and control in general which also includes print and other media organizations. One of the acts objectives, as set out in its preamble, is to facilitate an economy that is open to greater ownership by a greater ownership by South Africans. This is in order to, amongst other things;

- a. Afford all South Africans an equal opportunity to participate fairly in the national economy; and
- b. Provide for markets in which consumers can have access to and freely select, the quality and variety of goods and services they desire; as well as
- c. Regulate trade practices that undermine a competitive economy.

The purpose of the Act is thus to promote and maintain competition, in order to;

- a. Promote the efficiency, adaptability and development of the economy ...

Part A of the Act deals with restrictive practices, in section 4 of the Act restrictive horizontal practices are set out as follows:

1. An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –
 - a. *it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or*
 - b. *It involves any of the following restrictive horizontal practices;*
 - (i) *Directly or indirectly fixing a purchase or selling price or any other trading condition;*
 - (ii) *Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services.*

A look into these provisions immediately gives one a sense of how the set up as it stands in the print media industry is in violation of these provisions. The concentration of power in a select few major media companies has the effect of preventing and lessening the competition in the market as it allows the major player to orchestrate means to close out budding media companies. Further the concentration of power amongst only these companies allows them in collusion to engage in anti-competitive behaviour such as; fixing purchase and selling prices or even trading conditions as well as driving markets by allocating customers, suppliers, territories, or specific types of goods and services as lamented to by online newspaper the Daily Maverick.²¹

Interesting to note is that from November 2010 probe by the Competition Commission has been in the process of investigating the four major players of the print media

²¹ Vick, C. (2013). Freedom of the press belongs to those who own one. Available from <http://www.dailymaverick.co.za/opinionista/2013-03-01-freedom-of-the-press-belongs-to-those-who-own-one/> Accessed: 9/06/2013

industry as referred to above, for the possible breach of S 4 (a) and (b) (i)(ii) of the Act as reported by the Daily Maverick.²² The outcome of the investigations carries the potential of a positive implication for the advancement of freedom of expression in South Africa.

Media Diversity and Development Agency Act

A piece of legislation that highlights in its ideals the need for transformation in the media is the Media Diversity and Development Agency Act 14 of 2002 (“The MDDA Act”). The Act’s core mandate is to establish an Agency that will work to “Redress exclusion and marginalisation of disadvantaged communities and persons from access to the media and the media industry and promote media development and diversity by providing support primarily to community and small commercial media projects”.²³

The objectives of the Act seek to promote development and diversity in line with S16 (1)(a)(b) of the Constitution for the purpose to –

- i. Encourage ownership and control of, and access to, media by historically disadvantaged communities as well as by historically diminished indigenous language and cultural groups.

The mandate of the Act clearly recognizes the need to give access to participation in the media industry by formerly marginalised groups or communities. Previously disadvantaged groups are still not adequately represented in ownership and in turn, access to participation in the media industry particularly through ownership of print media entities and The MDDA Act seeks to address this by encouraging ownership and control by historically disadvantaged communities.

Broad Based Black Economic Empowerment Act

The redressing exclusion and marginalisation of disadvantaged communities falls in line with the mandate of the Broad Based Black Economic Empowerment Act (‘BEE Act’) 53 of 2003, read with the Broad Based Black Economic Empowerment Strategy of 2003. The Broad Based Black Economic Empowerment Act, the former legislation aims to;

²² Ibid

²³ Preamble of the Media Diversity and Development Agency Act 14 of 2012

- promote the achievement of the constitutional right to equality,
- increase broad-based and effective participation of black people in the economy, and
- promote a higher growth rate, increased employment and more equitable income distribution; and
- establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services.²⁴

Broad Based Black Economic Empowerment Strategy

The Strategy attempts to set out a framework for the implementation of the BEE Act. It is evident that this Act's sole mandate is to redress the inequalities borne to an economy that does not have the free participation of all of society which has its historical rooting in the former apartheid regime, instead of a concentration of power in the same people or groups. The print media industry is not exempt from the operation of this Act and therefore should strive to ensure that it recognises and incorporates the provisions of the Act in its operations.

The BEE Codes of Good Practice of 2007

The Codes provide a standard framework for the measurement of broad-based BEE across all sectors of the economy. The codes give a detailed description of how an entity's BEE scorecard or how the company fares in the incorporation of BEE laws in their make up as an economic entity. The combined impact of these three BEE provisions is only one of the ways in which the goal of media diversity will be achieved. It is key that the print media industry does away with the inequities in participation and ownership of it that are evident currently. This is important for the realization of transformation in the sector which would naturally extend to issues of media pluralism and content diversity.²⁵

The Companies Act

Acts like the Companies Act 71 of 2008 ("The Companies Act") allow all people

²⁴ Preamble to the Broad Based Black Economic Empowerment Act 53 of 2003

²⁵ S22 of the Constitution of the Republic of South Africa Act 108 of 1996

natural and juristic as well as organs of state to incorporate a company. In its S 13 (1) it states –

- (1) One or more persons, or an organ of state may incorporate a profit company, and an organ of state, a juristic person, or three or more persons acting in concert, may incorporate a non-profit company.

This should be no different with print media companies and the closing out of smaller role or potential role players through monopolistic behaviour or what the Competition Act refers to as horizontal practices, can be argued to be an indirect infringement of such role players rights to exercise this right will without a doubt contribute positively in media diversity and alleviate the severe implications of ownership ceilings, which would in turn promote the reach of print media to greater geographical markets, reach larger audience sizes and allow even participation in the market share of the media industry.

Skills development Act 97 of 1998 (“The Skills Development Act”)

The Acts objectives are the implementation of workplace and sector strategies to develop and improve the skills of the South African workforce as a whole, by offering assistance through learnerships and other forms of financing to realise this objective. In the Report on Press Regulation in South Africa prepared by the Press freedom Commission²⁶, a strong recommendation of considerations for media diversity through skills development and training, a media charter and support for community newspapers was made. This way formerly marginalised communities would benefit from procurement of skills. This would advance the objects of active democratic discourse through the media, this is one of the benefits that will be brought about by media diversity

The Labour Relations Act and Basic Conditions of Employment Act

A work force that is more inclusive in the print media industry would accommodate and have to be regulated by labour laws as set out in The Labour Relations Act 12 of 2002 (“The LRA”) and employers would have to observe further Acts such as the Basic Conditions of Employment Act 76 of 1997 (“The BCEA”) and the Employment Equity

²⁶ Which, was set up by the SA National Editors’ Forum and Print Media South Africa, to conduct a review of the recommendations of the Task Team set up by the Press Council of South Africa to interrogate the structures, rules and codes of the press.

Act 55 Of 1998 (“The EE Act”). Jointly these Acts regulate the relationship of the employer-employee relationship in South Africa. The EE Act in particular falls in line with the demands of source diversity. This is shown in its attempt towards redressing former marginalisation and remedy for discriminatory practices and the disparities in the employment, occupation and income within the national labour market. The Act seeks to achieve the following objectives to:

1. Promote the Constitutional right of equality and exercise true democracy;
2. Eliminate unfair discrimination in employment;
3. Ensure implementation of employment equity to redress the effect of discrimination;
4. Achieve a diverse workforce broadly representative of our people;
5. Promote economic development and efficiency in the work force;

The LRA ensures that labour relations between employer and employee are regulated it is very observant of the workers’ rights of collective bargaining at the workplace, the right to strike, the regulation of trade unions and the promotion of employee participation in decision making.

The BCEA’s major purpose is to ensure the advancement of economic development and social justice and thereby realising fair labour practices as envisaged in the Constitution. This is legislation to which all employers must subscribe and observe and print media is no exception.

DISCUSSION

Ownership ceilings

As noted in previous sections of this paper, ownership ceilings speak to thresholds that are put in place to curb investor concentration in the sector. These restrictions then have the effect of those in ownership having control over audience sizes and geographic markets that their products reach, thereby allowing them to dominate the market share of the industry. The South African print media industry has been heavily criticized in recent time for a concentration of power in a select few in particular four major publishing companies as referred to earlier in this paper.²⁷ The criticism levelled against this trend refers specifically to the ownership concentration, presenting the possibility of control of the industry at large through monopolistic behaviour. This has shown to have the effect of excluding potential entrants into the industry through colluding to engage in anti competitive behaviour such as fixing purchase and selling prices or even trading conditions as well as diving markets by allocating customers, suppliers, territories, or specific types of goods and services²⁸ amongst other things. This is evidently undesirable for the advancement of freedom of expression as it advertently closes out other sectors of society from making a worthy contribution to the advancement of freedom of expression through print media. This is because the lack of source diversity as well as print media diversity result in an uninformed public and an unformed public cannot positively contribute to democracy.

One of the challenges facing the South African Media Industry is that ownership and control of the print media houses is skewed towards the big corporations. In spite of various state interventions: promotion of transformation processes and BEE, the majority of print media in South Africa remains in the hands of a few companies and individuals. The issue is one of concentration which is when large media groups own several publications in the print media industry which enables them to bring down costs of production through bulk discounts in their operation (this is the trend in the South African print media industry).²⁹ These large media groups are also often

²⁷ (ANC, 2011)

²⁸ Vick, C. (2013). Freedom of the press belongs to those who own one. Available from <http://www.dailymaverick.co.za/opinionista/2013-03-01-freedom-of-the-press-belongs-to-those-who-own-one/> Accessed: 9/06/2013

²⁹ Duncan, J. (2011). The print media transformation dilemma. Available from http://www.academia.edu/2033700/The_print_media_transformation_dilemma (Accessed 02 09 2013)

vertically integrated, owning their own printing presses and distribution agencies, and are also susceptible to conglomeration, offering content across several platforms to maximise exploitation of the content.³⁰ These practices often make it extremely difficult if not impossible for smaller print media groups to survive therefore closing them out of the industry. The PFC Commission considered the issue of “media transformation” (structural and content) and in doing so found ownership as having an influence on content thus it should be noted that the situation as it stands is linked to the nature of the media content that is received by print media consumers.

Vick³¹ sums it up well in his heading “Freedom of press belongs to those who own one” this links well to the view that is put forth that lack of diversity affects content. Vick in this article makes the point that the benefit of freedom of press is accessible to the inner circle as they, through collusive behaviour drive the market. To quote Vick, he states that “It appears, Freedom of expression may only have belonged to those who were part of their cartel – and their managements could have collaborated actively and across many parts of their business to ensure they were able to shut other voices out”.

An example of the provisions of the Competition Act in action is the on-going investigation by the Competition Commission of all four of the country’s major newspaper publishers namely; the Independent Newspapers, Caxton, Media 24 and Avusa media. Kagiso Media is also implicated as the allegations attach to media buying agency Media mark which 50% is owned by Kagiso.³² What the Commission is concerned with is the collusion amongst these groups to the effect of;

1. Agreeing amongst themselves on what kind of discount to give advertisers who settle their accounts early.
2. Exchanging information on competitive data such as unaudited newspaper circulation and advertising rates-including their thinking on changes of advertising rates.

³⁰ Ibid

³¹ Vick, C. (2013). Freedom of the press belongs to those who own one. Available from <http://www.dailymaverick.co.za/opinionista/2013-03-01-freedom-of-the-press-belongs-to-those-who-own-one/> Accessed: 9/06/2013

³² Ibid

3. Dividing up the market amongst themselves for printing and publishing community and knock and drop newspaper.

The effect of these practices is simply unfair competition. Vick³³ puts as “killing of the competition”. How this is done is by controlling the print media market the way they do, they make it impossible for smaller competitors to compete for advertisers, and are eventually forced to exit the market.

The MDDA Act’s mandate is particularly to address the prevalent situation. The Act seeks to redress the marginalization and exclusion of disadvantaged communities and particularly mentions that one of the ways this may be done is through encouraging “ownership and control...” by historically disadvantaged groups. One realizes that this mandate ties closely to that as set out by the objectives of the Broad Based Black Economic Empowerment Act, Strategy and Codes of Good Conduct in that, although the BEE Act, Strategy and Codes are targeted to a specified group of people classified by race, the similarity between these Acts is that their aim is to allow greater access to opportunities where there was previously none. In this case we make reference to the print media industry.

The realisation of the objective of greater access to participation in the form of ownership and control by previously marginalized groups in the media industry would see to it that even objectives of the Competition Act are realised of all South Africans being afforded an equal opportunity to participate fairly in the national economy. The objective to realize opportunities that allow fair participation in the economy finds practicality in the Companies Act. The Act similarly regulates the incorporation of companies to allow all people to do so, if they so wish, so as to allow free participation in the economy. The allowance by the Companies Act 71 of 2008 to incorporate a company by any person (inclusive of historically disadvantaged groups) seeking to do so in as a means to realize the objectives echoed by both the MDDA Act and the Competition Act.

The legislative frameworks reviewed above make it clear that, firstly there is a realizable problem of lack of equitable ownership of economic entities such as companies by previously marginalised groups and secondly that there is a need to rectify that problem. The MDDA speaks directly to this being the case in the media industry to

³³ S22 of the Constitution of the Republic of South Africa Act 108 of 1996

which print media is a significant part and calls for the promotion of active participation in the national economy (which includes the print media industry) by all sectors of society, with some paying particular attention to previously marginalised groups. The constitution supports this view in S22 where it confers on all citizens the right to freedom of trade occupation and profession.³⁴

Audience Size

The size of the audience mostly determines the value of a programme, station, channel and/or website to the media as well as advertisers.³⁵ It is clearly evident that the majority of the audience size that consumes print media is claimed by the large print media companies that dominate the industry. This is because these corporations own a wide variety of publications that are popular amongst the print media consumers in South Africa. The collusive behaviour explained under ownership ceilings has a negative impact on the industry in that it limits new entrants into the market, this is the main aim of companies engaging in monopolistic behaviour. The limiting of new entrants into the market will have an effect on the diversity of the content which reaches the consumers. The monopolistic behaviour may also have an undesirable impact on the distribution and circulation of print media products which may exclude certain consumers and communities in the sector

This is antithetical to the provisions of the Competition Act which seeks to achieve markets in which consumers can have access to and freely select, the quality and variety of goods and services they desire. Because variety is limited only to the publications that the large media groups provide, therefore the audience choice is limited to what is on offer by the large media groups. This is also seen to hinder content diversity in that it can lead to a reduction in the plurality of media outlets and limits diversity of opinion which leads to homogenised of media content. The prioritisation of the views of an elite minority becomes the norm and the dominance of commercial interests over the public interest all these negative effects can result in a poorly informed public,³⁶ which is then unable to fully participate in democratic discourse.

³⁴ S22 of the Constitution of the Republic of South Africa Act 108 of 1996

³⁵ Bornman E. 'Measuring audience sizes' at Chapter 12. <http://uir.unisa.ac.za/bitstream>

³⁶ Duncan, J. (2011). The print media transformation dilemma. Available from http://www.academia.edu/2033700/The_print_media_transformation_dilemma (Accessed 02 09 2013)

The MDDA further recognises that there still lies an issue of access to media by some sectors of society, since over and above encouraging ownership and control it specifies access to media by historically disadvantaged communities. One may argue that the audience size that is reached by the large media groups is the targeted audience size to meet their business demands this however leaves out certain sectors of society such as the historically diminished indigenous language and cultural groups,³⁷ as asserted by the MMDA Act.

The Skills development Act is evidently of bearing in this regard. Since for realisation of the ideals of reaching wider audiences which are inclusive of those not typically included presently, development of skills in print media would be crucial. The Skills Development Act seeks to assist in ensuring that amongst other things, it improves the prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education as well as promote self-employment. These objectives realised would realise the alleviation of ownership ceilings that impact on audience size in the South African print media. The importance of proper skills development in this area is that different audiences have different information needs, thus it requires audience research to cater for such needs.³⁸ Borman states that audience research today needs to address a variety of complex information needs of a wide range of interested parties with different motivations, interests and levels of sophistication. The objects of the Skills development Act are echoed by the MDDA Act in its object to promote media development and diversity by providing support primarily to community and small commercial products.

Comparatively these Acts, being the Competition Act, The MDDA Act and the Skills development Act have a positive bearing on the concept of audience size in print media. Though they impact on the issue of audience size differently i.e. the Competition Act speaks to remedying the limitation to access to a variety of products which can only be achieved by a variety of service providers, the MDDA Act seeks to ensure that those previously not exposed to media (including print) access it and the Skills Development Act serves to assist in the guaranteeing that the necessary training required to reach these ideals is obtained.

³⁷ S3 (a)(b)(i) of the MMDA Act.

³⁸ Borman E. 'Measuring audience sizes' at Chapter 12. <http://uir.unisa.ac.za/bitstream>

Market share

Market share in print media relates to the share a media company has in the market in relation to the total number of the market of consumers of print media products. One can immediately note therefore that by virtue of the ownership ceilings in place and media concentration as explained, that the market share with respect to print media is dominated by the large media groups. This simply means that smaller role players and potential role players are inadequately accessing participation in the market share if at all.

The print media industry has also seen a growth in revenue and in new titles. However this growth has seen few entrants into the market as the four major companies continue to have a stronghold over the industry. These four main companies do not only have the major market share in terms of distribution and circulation of print media products but they also have large stakes in the printing and publishing of these products. In essence they control the entire production chain of these products and are not only in control of the retailing end. In controlling the whole production chain these companies also have a large influence on which content they choose to distribute and in which manner they distribute it.

One also can immediately contemplate the Acts as previously mentioned that seek to remedy the situation. Acts such as the Broad Based Black Economic Empowerment Act and Strategy and the MDDA Act seemed to be drafted with this dynamic in mind. These Acts are antithetical of the concentration of power in certain groups but rather encourage more active participation³⁹ in various industries by the historically disadvantaged as well as encourage the more equitable distribution of income⁴⁰ and moreover encourage ownership and control historically disadvantaged groups.⁴¹ Further the Competition Act encourages that ownership be open to a greater number of South Africans.⁴²

³⁹ Broad Based Black Economic Empowerment Act

⁴⁰ Broad Based Black Economic Empowerment Strategy

⁴¹ Media Diversity and Development Agency Act

⁴² Preamble to the Competition Act 39 of 2002

It is crucial that the concentration in the print media ceases to be a barrier to entry into the industry by those that concentrate it, in order to realize the ideals of the following Acts; MDDA Act; to promote media development and diversity by providing support primarily to community and small commercial products. This ideal echoes the need for smaller media role players to be allowed to make a contribution and thereby participate in the market share of the overall industry. Broad Based Black Economic Empowerment Act ('BEE Act') 53 of 2003, read with the Broad Based Black Economic Empowerment Strategy of 2003; seeks to realize economic transformation in order to enable meaningful participation of black people in the economy; increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training.⁴³ Though it demarcates black people as the group to be empowered the idea is to improve the economic stature and participation by historically disadvantaged groups in line with the MDDA Act and the Skills development Act.

The Companies Act in allowing all who intend on incorporating a company to do so can be seen as a facilitation tool towards the realisation of the ideals of the Acts mentioned above. Companies will be the facilitation tools to realize the ideals of ownership and control of print media entities and thereby participation in the market share in the print media.

It is clear that the legislation cited bear the similarity that they have the effect of promoting a much more distributed rather than concentrated market share in the print media industry. The implementation of the objectives and ideals of the said Acts could and should have the effect of deconcentrating the market share in the print media industry and allowing more participation in the market share of the print media industry.

It should be noted again that the participation in the market share by previously marginalized groups will again have the effect of realisation of the right to trade, occupation and profession as conferred by the constitution. As, it could be argued that the major groups' concentration of the market share, which has the effect of closing out the smaller players and potential players, is an indirect infringement of their right to these rights as conferred by S22 of the Constitution.

⁴³ Act S2 (a) and (c) of the Broad Based Black Economic Empowerment Act

Geographical Markets

Geographic markets are one of the variables a media company considers for the purposes of the successful operation of their business. Bornaman⁴⁴ explains this variable as follows;

Geographic variables - in as much as people differ with regard to demographic attributes, they also differ in terms of where they live. Geographic variables often used in audience research are country of residence, province, and residential areas as well as rural versus urban areas. Newspapers, radio stations, television channels and other media are often directed at specific geographical areas. Living in particular residential areas can furthermore reflect a person's income, lifestyle and/or station in life. It can be assumed for example that people living in and around central business districts will have a relatively middle income, and consequently uphold a particular lifestyle⁴⁵ and therefore a publication would be designed that would cater for issues and areas of interest to them and they would fall as part of that publications target audience.

South Africa has over 400 newspapers and magazines targeted to local communities⁴⁶. Those in urban areas tend to be free distribution and large circulating. Those in rural areas tend to be sold and smaller circulating. Many local urban newspapers have increased circulation in line with increases in population urbanisation and wealth. Small "grassroots" publishers are entering the market but their failure rate is high. Most of the community newspapers are owned by small companies usually located within the province where they are published and or circulated. For these small companies competition from major newspapers and larger publishers is fierce, and many go bankrupt within a short period of time due to cash flow and working capital challenges. Hence, many of these newspapers are constantly changing as some close their operations while others open their doors.⁴⁷

⁴⁴ Bornman E. 'Measuring audience sizes' at Chapter 12. available from <http://uir.unisa.ac.za/bitstream>

⁴⁵ Bornman E. 'Measuring audience sizes' at Chapter 12. Available from <http://uir.unisa.ac.za/bitstream>

⁴⁶ http://www.omb.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf

⁴⁷ MDDA (2009). MDDA Submissions. Trends of Ownership and control. Available from <http://www.mdda.org.za/Trends%20of%20Ownership%20and%20Control%20of%20Media%20in%20South%20Africa%20-%20Ver%203.3%20%20Final%20-%2015%20June%202009.pdf> (Accessed 27 August 2012)

The geographical location of the head offices of the major print media groups is in itself an indication of their target geographical markets. The targeted readership clearly steers away from the outskirts but rather is centred in commercial hubs. This is as if the right to freedom of press and other media, as well the freedom to receive or impart information or ideas is confined to those in the urban areas. It is apparent that the provinces in South Africa which are economically strong receive more titles which are in circulation than those which aren't and therefore account for the highest readership rates in the country. This in effect excludes certain areas in the country from receiving certain publications. There is a great need in South Africa to broaden the availability of newspapers to under-served parts of the country (MDDA: Trends of ownership and control). The major print media publishers have also made most of their publications available online but there is a long way to go to make these online resources available to more rural communities. (MDDA: Trends of ownership and control)

This phenomenon brings into focus the need for the implementation of the objectives of Acts such as the Skills Development Act, wherein communities not in reach of print media are equipped to initiate print media projects that would service the locations that do not have adequate access to print media. The eradication of ownership ceilings and allowing of potential role players into the print media industry would allow the access to print media by such groups (historically diminished indigenous language and cultural groups) since widening the scope of ownership would mean that even potential role players from where these groups are located would begin to operate publications within reach of these groups.

This view to enable access of media to the communities that are not currently adequately serviced, if serviced at all, is a significant part of the MDDA Acts mandate. The objective as stated in section 3 of the Act speak to the encouragement of ownership and control of, and access to, media by historically disadvantaged communities. The development of human resources and training, encourage the channelling of resources to the community media and small commercial media sectors and to raise public awareness with regard to media development and diversity issues: support initiatives which promote literacy and a culture of reading.

The positive angle of these provisions is that it highlights the concept that freedom

expression as conferred by S16 of the constitution is a freedom for all. Not only certain geographic markets. In that, it seeks to promote literacy among the illiterate and raise awareness about media development and diversity issues and most significantly channel resources to the community and small commercial media sectors, this in realization of the existing inequity of media such as print media being accessible majorly to those based in commercial hubs.

This speaks to these communities inability to access the rights that the Competition Act seeks to afford all South Africans. Particularly that of “provision for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire”. When the major media groups service only urban settings, this goes against the above ideal and highlights unfairness that comes about when monopolistic behaviour occurs.

The impact it seems that the legislation such as Competition act, Skills development Act and the MDDA Act seeks to ensure access by geographical markets that are currently deprived of media products in particular print media, as it seems to be the most ridden with behaviour that is antithetical to the access of the media by all.

CONCLUSION

It seems the idea of the media in South Africa being a self-regulatory one and the absence of a codified framework that regulates the operations of the media and monitors the operations of media bodies at large has had the result of the media being the most susceptible behaviour that is less visible in other markets that are regulated. This has led to a piece of legislation that focuses mainly on remedying the situation, the MDDA Act which has as one of its primary objective to redress the situation. However in the wake of it alone not being sufficient to explain the current trends that remain in the media, it is important to then consult other statutes that may be of impact. Interestingly, the legislation reviewed in this paper which is seen to be of relevance generally reflects negatively on the status quo of the media, particularly print media. In that, all these pieces of legislation speak to the liberalism of access to the media by all, either through access, control or consumption, yet this is not entirely the case. Together the Competition Act, the MDDA Act and the Broad Based Black Economic Empowerment Act read with the strategy support a broader based participation in the economy regardless of industry such as print industry.

From the expansive studies conducted, the PFC concludes and therefore suggests that an independent co-regulatory mechanism, not including state participation, will best serve press freedom in the country. This will also enhance the role, accountability and responsibility of the press in the promotion of the values of a free and democratic South Africa, and in upholding the rights, dignity and legitimate interests of the people. To be an effective and responsible regulatory system, this mechanism must manifest administrative fairness and institutional independence from the industry it is to regulate. The PFC Commissioners recommend a system of co-regulation, composed mostly by persons drawn from various sections of the public outside of the press industry. This is designed to ensure the system's independence from the subjective inclinations and sentiments of the press profession and business. The preference for this mechanism is in response to the expressed public dissatisfaction with the current system and with the public's rejection of government involvement in press regulation. Independent co-regulation can be defined as: a system of press regulation that involves public and press participation with a predominant public membership but without State or government participation. It is accountable to the public. (PFC Report) It is hoped that suggestions like these would materialize and bring about change in the print media industry. In particular afford attention to issues relating to ownership ceil-

ings, audience size, market share as well as geographical markets in their mandate.

Acts reviewed in this paper such as the Competition Act, the MDDA Act and the Broad Based Black Economic Empowerment Act read with the strategy thereto, all speak to the realisation of equal access to participation in the South African Economy as well as equal reach to products and services in this case print media services. Also of importance is proper skills development in this area because different audiences have different information needs, and require audience research to cater for such needs. With all these legislative enactments in place one hopes that it is only a matter of time before the print media industry is compelled to tow the line in this regard and do away with the monopolistic behaviour that has led to access to print media being denied to other sectors of society.



About the Freedom of Expression Institute

The Freedom of Expression Institute (FXI) is a not for profit non-governmental organization which was established in 1994 to protect and foster the right to freedom of expression. The FXI envisions a society where everyone enjoys freedom of expression and the right to access and disseminate information and knowledge. The FXI's primary objectives are; to fight for and defend freedom of expression, to oppose censorship, to fight for the right of equal access to information and knowledge, and to promote access to media and a free press.

Programmes

The FXI currently is engaged in the following programmes; Anti-censorship Programme, Access to Information Programme, Media and ICTs Programme. The Anti-Censorship Programme has been monitoring the South African environment for freedom of expression violations and lobbies against censorship and its causes. The Access to Information programme aims to address practical problems in ensuring much greater usage of the Constitutional right of access to information. The Media & and ICTs programme advocates for universal service and access, in addition to plurality of the media, broadcasting and telecommunication; and policy regulation and access.

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