



THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
Block B
350 Witch-Hazel Avenue
Eco Point Office Park
CENTURION

By email: vmolete@ICASA.org.za

15 March 2019

Dear Sir / Madam

**RE: WRITTEN SUBMISSIONS / REPRESENTATIONS ON THE DRAFT SPORTS
BROADCASTING SERVICES REGULATIONS, 2010**

Herewith our written submissions on the Draft Sports Broadcasting Services Regulations, 2010:

INTRODUCTION

1. MyPlayers (Pty) Ltd is the management entity of the South African Rugby Players' Association ("SARPA"), a trade union duly registered as such with the Registrar of Labour Relations and having acquired legal personality in terms of Section 97(1) of the Labour Relations Act no. 66 of 1995 (the LRA), with its principal place of business at Ground Floor, Table Bay Building, Tygerberg Office Park, 163 Uys Krige Drive, Platteklouf, 7500, Western Cape.

2. MyPlayers makes these submissions on behalf of SARPA. SARPA was founded in 1998 and represents the vast majority of professional rugby players in South Africa as their trade and labour relations union. We currently have approximately 900 members across South Africa. These include players from the national women's and men's teams; the national women's and men's Sevens teams; the national A teams; the Super Rugby teams from the four Franchises who currently compete in this competition (the Bulls; the Sharks; the Stormers and the Lions); the Kings and the Free State Cheetahs, who participate in the PRO14 European competition; the Currie Cup Premier Division and First Division teams from 14 provinces; the players from the Under/19, Under/20 and Under/21 provincial competitions and the national youth teams. We represent all the players who are contracted to perform rugby-playing services.
3. We regard ourselves not only as a labour organisation for our current members, but also as a custodian of rugby for future generations of players who will someday benefit from what the organisation accomplishes for players today.
4. Each of our members have mandated us to act on their behalf in all matters pertaining to their employment as professional rugby players, which includes the protection and promotion of their interests in the context of employment relationships. We are responsible for managing and executing all the day-to-day operations relating to the representation of the collective industrial rights of the players. Ancillary to this, we also actively manage, securitise, structure and commercially develop the collective intellectual property rights of professional rugby players. We also assist in managing their financial services affairs pertaining to pension funds, temporary disability insurance and medical aid.
5. We are owned and managed by the professional rugby players with senior players forming part of the active leadership and decision-making processes of our management.

6. The members of SARPA who are selected to play for the Springboks (the South African senior national rugby team), the Super Rugby teams, the PRO14 Teams the SuperSport Challenge and the Currie Cup teams, have granted the South African Professional Rugby Players Trust (the Trust) *"the rights to use and exploit the rights that each of them enjoy in respect of their persons, personalities and/or public profiles including but not limited to, their names, images, likenesses, signatures, voices, reputations and biographical information"*. The Trust, in turn, has licensed these rights to third parties, such as the South African Rugby Union (SARU), to exploit against remuneration. The licensing of these rights is required to enable these third parties, such as SARU, for instance, to lawfully contract with broadcasters in order to televise the various players' images, which inevitably form part of the broadcast of rugby matches.
7. MyPlayers is contracted for this purpose by the Trust, on whose behalf it negotiates the remuneration for the use by SARU and others of the players' intellectual property rights.
8. As such, we are an interested party, mandated by our members to comment on the Draft Sports Broadcasting Services Amendment Regulations of 2018 ("the Regulations"), proposed for introduction by the Independent Communications Authority of South Africa. For the reasons advanced herein, we hold the view that Regulations potentially hold a devastating impact on all our members and the rugby union industry as a whole.
9. In addition to these written submissions, we welcome the opportunity provided to make verbal presentations to ICASA on the proposed regulations, where we shall supplement our written submissions insofar as this may be necessary and answer questions from ICASA's side.

OUR UNDERSTANDING OF THE MOTIVATION FOR AND THE AIM OF THE DRAFT REGULATIONS

10. The stated aim of the proposed amendments to the Regulations are, as we understand, to ensure strict compliance with the provisions of Section 60 of the Electronic Communications Act, 2005 (ECA) by ensuring that subscription broadcasting services are not awarded exclusive rights to broadcast national sporting events. The intention behind this is to serve the public interest by making these events available to a wider audience, particularly those who cannot afford such subscription services.
11. In principle we have no interest in resisting these proposed changes and the aims of the Regulations are indeed laudable. The sport of rugby union can only benefit by reaching a wider audience and had it not been for the destructive consequences that will inevitably arise from the proposed changes, we would have given our full support thereto.
12. We want to state categorically that, as a rugby players' organisation, we hold no affiliation to DStv or SuperSport or, for that matter, to the SABC or any other broadcaster. Our commitment is to our current and future membership and to the game of rugby in general. We acknowledge the public interest in the game of rugby and the rights of South Africa's citizens to enjoy watching their national and provincial teams play.
13. It is our view, for the reasons that will be set out in this submission, that despite the well-intended aims of the proposed amendments, at this stage they are impractical in the circumstances prevailing in South Africa and in the rugby industry in particular. They will cause irreparable harm to the industry that is rugby and to all its role-players, including our members. This harm will ultimately and inevitably also undermine the public's interest in the sport.

BACKGROUND

14. The players' remuneration for their rugby-playing services and for the use and exploitation of their intellectual property rights, is mainly paid for by SARU and the provinces from funds generated from the sale of the broadcasting rights for the games in which the players perform.
15. In 2017, the salaries of our members totalled R479,384,849, for the year. The average age of a player was 23. The total number of professional players were 980.
16. SARU is responsible for managing the international and local rugby competitions in which the various professional South African teams participate.
17. Approximately half of SARU's revenue is generated from the sale of broadcasting rights in respect of these competitions. SARU distributes this revenue between the 14 provinces that constitute the structure of SARU. This income so disseminated makes up, in some instances, all and in other a large part of the income of these provinces. The provinces, in turn, filter it down through their structures to professional players, for their salaries, and to various club structures for the development of rugby.
18. For a variety of reasons, attendance at rugby matches have dwindled and the majority of spectators prefer to watch live television coverage of games (although these numbers have also decreased over the past years). This means that the industry has become more reliant on revenue from broadcasting as the income from ticket sales and stadium attendance have decreased.
19. What broadcasters are prepared to pay for the right to televise a rugby match is determined by the fans' interest in the matches. The degree of interest in a competition is determined by the parity between teams. The less competitive a

team becomes, the less support it enjoys and the less interest there is in a match in which it participates.

20. Not as many people would watch a match in which a team plays that is uncompetitive. Where the result of a match is a foregone conclusion, fans' interest wains. Advertisers would not pay premium prices for matches with low viewer numbers. Broadcasters would necessarily then pay less for the right to televise such matches.
21. By far the greater majority of the revenue that SARU generates from the sale of broadcasting rights comes from the broadcasting of Super Rugby, PRO14 and international (test) matches in which our national teams play. As our local teams' ability to remain competitive in these competitions decrease, interest in the teams, the matches and the competitions decrease and revenue from the broadcasting of these matches decrease.
22. The ability to compete is determined by our ability to develop local talent and retain it.

THE CHALLENGES FACED BY RUGBY IN SOUTH AFRICA

23. Government contributes little to the development of rugby in South Africa. Funding for grassroots rugby training and development come from the coffers filled with the proceeds of the sale of broadcasting rights.
24. Once a players' talent is developed, when he enters participation in the top local competitions and enjoys exposure on a global stage, SARU and the local provinces compete with international clubs (mainly from the United Kingdom, France, Italy and Japan) for the retention of those players' services. There are currently more than 200 professional South African players playing in other countries. This is mainly due to SARU and the provinces' inability to compete with the overseas clubs' lucrative offers. This inability to compete arises mainly from the inequalities created by an unfavourable exchange rate. The overseas

clubs then benefit from the talent that was cultivated through funds generated locally.

25. It is, however, not only the exchange rate that hampers SA rugby industry's inability to compete with overseas clubs, it is also the fact that only South African rugby provinces are struggling financially in the context of a faltering economy. Provinces' expenses increase and their income decreases, across the board. The Eastern Province Rugby (Pty) Ltd was sequestered in August 2016; Western Province Rugby (Pty) Ltd, the professional arm of the Union, was liquidated in December 2016; and Border Rugby Union was sequestered in April 2018 (albeit only provisionally).
26. SARU, the provinces, the unions and clubs are put under financial pressure due to a decrease in stadium attendance and television viewership. It competes not only with other sports for fans' time and money, but also with other forms of entertainment.
27. SARU itself has struggled to find sponsors to replace the huge corporate sponsorships of ABSA and BMW, which terminated in 2015. Since making an operating profit of R33 million in 2015, SARU suffered a R28.3 million loss in 2016. In the 2017 financial year its income was down a further R1.8 million and it suffered a loss of R33.3 million. These losses filtered through to all levels of the structures of professional and amateur rugby in South Africa.
28. By way of example, the New Zealand Rugby Union generated R1 027 932 930 from the sale of broadcasting rights in 2017, representing approximately 40% of its total revenue. Its total income was R2 528 777 330 for that year and it made a profit of R328 498 940.
29. As far as we could establish, in all countries against which South Africa competes on the rugby field, there is healthy competition amongst broadcasters to acquire the television rights to matches hosted by those countries' unions. In these countries, ordinary market forces determine who

is awarded the right to broadcast the matches. From what we have been able to establish, there is parity between what public broadcasters and subscription broadcasters pay for the right to broadcast sports events.

30. In South Africa, SuperSport effectively has no competition. Its only competitor for these rights, the SABC, who apart from eTV, is also the only free-to-air broadcaster of sporting events, cannot afford to compete with MultiChoice for these rights.
31. According to current information available to us, the SABC simply does not have the funding to purchase the broadcasting rights. It cannot pay the market-related value and it cannot match what MultiChoice is prepared to pay.

THE CONSEQUENCES OF THE REGULATIONS

32. Inevitably and by implication, if sports federations are forced to sell the rights to the SABC, the SABC would be able to determine the price for the rights. Normal commercial market forces will be expelled from the equation, leaving the SABC with an effective monopoly over these rights.
33. According to a recent submission to Parliament, the SABC will have a deficit of R680 million by 2021 from the sports broadcasts it currently carries.
34. William Bird, director of Media Monitoring Africa, said the Regulations would create no winners.

"It looks as if ICASA is trying to create a balance between public and commercial interests, but, in the end, this just creates an unsustainable situation for broadcasters and sports federations because exclusive broadcasting rights would be taken off the table."

35. Bird said that if MultiChoice was forced to purchase less exclusive content, it would also want to pay far less for non-exclusive rights. This will dramatically affect the income for the various sporting codes.
36. ICASA has confirmed that the Regulations would require MultiChoice to share broadcasting rights with the SABC.
37. It is widely acknowledged that MultiChoice is by far the biggest investor in South African sport, spending approximately R2 billion on broadcasting rights annually. According to public information, over the 2017 – 2018 financial year, the SABC spent R167 million on broadcasting rights. The SABC had a net loss of R622 million for the 2017/18 financial year, compared to a loss of R977 million in the previous financial year.
38. The net result of the implementation of the Regulations and the SABC's inability to pay market-related prices for the broadcasting rights, will be that the rugby industry's revenue will be dramatically reduced.
39. Even if MultiChoice were still prepared to pay for non-exclusive content, the price for such non-exclusive rights will naturally be substantially less than what it would pay for exclusive rights.
40. This reduction would immerse the industry as a whole in a financial crisis. The possibility of further liquidation and sequestration of provinces and franchises cannot be excluded. An unprecedented mass exodus of local talent would be inevitable. The heroes who inspire young people to play rugby, will appear on foreign stadiums in matches that will not be broadcasted to the South African public on free-to-air broadcasts.
41. Eventually, the players who are unable to secure contracts overseas (as there are limits to how many foreign players may participate in Japanese, UK and European competitions) will become unemployed. (It is of course not only the players themselves who will be affected by job losses, but other

administrative employees. In this submission we focus on the rugby players, however.)

The Aim of Promoting the Public Interest

42. The public interest, which ICASA seeks to serve through the draft amendment, will not benefit from the disintegration of the industry of rugby in South Africa and the damage to the brand of South African rugby that the changes will engineer.
43. The reality is that South African rugby's ability to remain competitive relies not only retaining existing income but actually significantly expanding its income base to secure contracts with top players; to fund development and training of young players; to establish infrastructure and contract coaches, doctors, physiotherapists and other specialists.
44. None of its competitors will suffer the fate that South African rugby faces in being deprived of the income from broadcasting rights. Our competitors' advantage over us will increase and we are sure to become uncompetitive.
45. Rugby fans want to see the best teams competing against each other, featuring the best players. They want to see them playing live and they want to see parity between the teams. This generates the most fan interest and ensures that advertisers pay a premium for time-slots in and around the live broadcast of these games.
46. The high premium paid for these rights rely on South African teams' ability to be competitive and attract viewers and sponsors. South African teams' performance also attracts young people to the game of rugby and ensures that the game has a future in South Africa.

47. Were the South African professional rugby teams unable to compete, it is doubtful that South Africans will watch them play regardless of whether they can watch them on the national broadcaster.
48. The heroes who inspire others to play rugby, will have left to play in overseas competitions and those who ICASA intends to expose to rugby, will never see them play. They will play in the colours of English, French, Irish, Welsh, Scottish or Japanese clubs, or clubs from the antipodes. They will be lost to the South African public.
49. All that would have been gained, would be the public's right to watch teams that cannot compete with those from New Zealand, Australia, Argentina and other rugby-playing nations. We envisage that the result will be a lack of interest from the public and a lack of interest from other countries in involving us in international competitions.
50. The brand of South African rugby will be eroded to such an extent that it will affect all the other sources of revenue, such as ticket sales for matches, merchandising, licensing royalties and sponsorships. The impact is certain to be much greater than just the loss of revenue from the market-related sale of broadcasting rights. It will result in the demise of South Africa's ability to compete professionally in international rugby union competitions. The consequence of this will be a lack of funding for and a lack of interest in all levels of rugby, from amateur to professional, from junior to senior.

The Effects of the Proposed Regulations on Players' Rights

51. The proposed regulations will affect all our members at all levels. Each and every one of them will experience a decrease or a loss of income as a result of the implementation of these measures. The prejudice that they will suffer is very real, compared to the very intangible public interest in the live viewing of the matches. There is to our knowledge little research available on how many

more people will watch the games that are included under the list in Group A of the Regulations.

The Advancement of Anti-Competitive Behaviour

52. The outstanding feature of the Regulations is its promotion of anti-competitiveness. It appears to contradict the overriding purpose and intention of the Competition Act, Act 89 of 1998. According to its Preamble and the provisions of section 2 thereof, this Act strives to maintain and promote high levels of competition in order to facilitate the realisation of a number of economic and social objectives, including the promotion of economic efficiency, adaptability and development, competitive prices and product choices for consumers, the creation of employment opportunities and the advancement of social and economic welfare, international competitiveness, market access of small and medium-sized enterprises, and the diversification of ownership particularly in favour of historically disadvantaged persons. The Regulations will undermine almost every single one of these aims.
53. It is submitted that the Competition Commission would have concurrent jurisdiction over the conduct that ICASA is striving to regulate through the Regulations and that the act of issuing the Regulations must be managed in accordance with the aims of the Competition Act. We are not aware that ICASA has entered into any agreement with the Competition Commission or the Competition Tribunal as contemplated in sections 21(1)(h) and 82(1) and (2) of the Competition Act. In any event, these Regulations promote anti-competitive behaviour that will have a significant effect on the rights of our members and we believe that Regulations violate the core aims of the Competition Act.

Violation of the Players' Intellectual Property Rights

54. In passing the Regulations, the players will effectively be compelled to dispose of their intellectual property rights (their images, their names and the brand that they have built up through excellence in performance) to the free-to-air broadcaster without achieving fair value for these rights.

55. We submit that the players cannot be deprived of these rights without their consent. It will have to be done contractually, as it is currently. The Trust to which the players' rights have been assigned, will have to be mandated by the players to agree to this. It is unlikely that the players will agree to allow SARU to sell these rights to any broadcaster unless the remuneration for such rights is market-related. This may become a very contentious issue, making it impossible for the free-to-air broadcaster to give effect to the regulations.

The Violation of the Players' Labour Law Right and Constitutional Rights

56. We submit that various constitutional rights of the players will be jeopardised by the proposed legislation, i.a. their right to choose a profession in terms of Section 22 of the Bill of Rights, their labour rights in Section 23 of the Bill of Rights and their right to property (intellectual property in this case) in Section 25, which includes a right not to be deprived of such property save under a law of general application (not arbitrarily), for a public purpose and with the payment of compensation.
57. The Regulations will make it impossible for players' employers, SARU and the various franchises and provinces, to meet their commitments to the players. Players will be retrenched, contracts will not be renewed and salaries will be decreased. This amounts to a large-scale interference with the contractual relationship between players and their employers, albeit perhaps an unintended consequence of the Regulations.
58. In depriving the industry of the income which funds social upliftment, development, social inclusion and equity, the regulations will undermine the goals they aim at achieving. It is doubtful that the sport will survive the financial setback caused by the Regulations. The opportunities that have been and can still be created by a fairly successful industry will be lost for the current group of professional players and for future generations.
59. There is nothing concrete, real and tangible to support the contention that the Regulations will achieve the aims they seek to achieve, save to secure access

to the viewing of the sport to more citizens. Too much, we submit, will be destroyed in the attainment of this goal.

60. We are firmly of the view that the Regulations will have the unintended indirect consequence of undermining the public interest as opposed to promoting it. As the rugby players' organisation, we would be compelled to challenge the impact of the Regulations on our members in court, if it were to be passed.
61. As ICASA is an organ of state, the decision to pass the Regulations will amount to an administrative decision for purposes of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA") and the decision to do so would need to pass the requirements set for fair and just administrative action by this Act. These Regulations will materially and adversely affect the rights and legitimate expectations of many people in the rugby industry, especially our members.
62. We do not believe that these requirements can be met and that ICASA can act fairly in reaching a decision, without ICASA properly considering the likely effect that the Regulations may have on the rugby industry as a whole and on our members in particular. Furthermore, serious consideration must be given to the question whether there is actually a need to pass Regulations that will accomplish little more than to destroy an industry in the interest of a goal that will probably not be attained. This is a basic tenet of PAJA and we do not believe that ICASA can reach the decision to pass the regulations in their current word after strict adherence to the requirements of PAJA.

Alternative Measures

63. Rugby is a global sport. For the game to be successful locally, we need to be successful internationally. We cannot succeed internationally without the funds generated by the sale of broadcasting rights. Every other country has the benefit of selling these rights at prices negotiated at arms' length and determined by market force. As is the case in South Africa, it is every other country's federation's largest source of income.

64. In the first place, we submit that the SABC, MultiChoice and whomever else chooses to vie for the right to broadcast rugby matches, should be prepared to pay a market-related price for this right, as with the majority of countries against which South Africa competes.
65. The content, the match and the personalities involved are, after all, a product for sale on the open market. The product is created by professional sports people who are entitled to be paid market related rates for their services, just as any other worker in this country. This will ensure that the sport and the industry that it maintains, remains healthy and is introduced to as wide an audience as possible.
66. The fact that the SABC is currently unable to compete with MultiChoice in vying for these rights, is not the making of the rugby industry. It is the result of forces completely unrelated to the sport, its participants and its administration. We should not, we submit, be made to pay for this state of facts.
67. We also suggest that a collaboration between SARU, MultiChoice and the SABC should be considered in terms whereof broadcasting rights of competitions with limited commercial broadcasting impact but with substantial public interest be made available to the SABC to broadcast to test how this would impact on viewership and awareness around the sport. The Gold Cup and the Varsity Cup could be an example of such competitions.

CONCLUSION

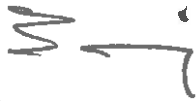
68. Making rugby available to a wider audience is to the benefit of the sport and its participants. We are in favour of broadcasting matches to all South Africans. We love this sport, we believe in its ability to unify this country and we want as many South Africans as possible to participate in it.
69. We cannot, however, support measures that are unsustainable, impractical and are sure to damage the sport irreparably in achieving this goal.

70. We maintain that the alternatives to the measures contemplated in the regulations, as proposed hereinbefore, will adequately satisfy the public interest in the sport, until such time as the public broadcaster is in a position to procure the broadcasting rights at a market-related price.

Please acknowledge receipt hereof.

Yours faithfully.

MyPlayers



Per:

Eugene Henning
CEO