

**NATIONAL SOCCER LEAGUE SUBMISSIONS**

**on**

**THE DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2018**

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## INTRODUCTION

- 1 On 14 December 2018, the Independent Communications Authority of South Africa (ICASA) published draft Sports Broadcasting Services Amendment Regulations, 2018 (*the Amendment Regulations*). The Amendment Regulations propose, among other things, to categorise all Premier Soccer League matches as *national sporting events* and to require that the rights to broadcast those matches be sold on a non-exclusive basis and under sub-licensing conditions.
  
- 2 ICASA has invited comment on the proposed Amendment Regulations from interested parties. Should public hearings be held, the National Soccer League (NSL) requests the opportunity to make oral, and if need be, further written submissions at such hearings.
  
- 3 The National Soccer League, which was established in 1985, is a Special Member of the South African Football Association (SAFA). Since 1996, the NSL, a private organisation trading as the Premier Soccer League (PSL), is the only body in charge of professional soccer in this country. As such, it is the owner of all broadcasting rights to the PSL matches and is an interested party for purposes of the Amendment Regulations. What follows is the PSL's response to ICASA's proposals as contained in the Amendment Regulations.
  
- 4 The Amendment Regulations propose a radical departure from the long-standing approach that ICASA has adopted to the identification of *national sporting events*. Until the publication of the Amendment Regulations, ICASA has consistently maintained that *national sporting events* should be confined to those sporting events that are national in

character and not merely based on the popularity of a particular activity.<sup>1</sup> This was specifically recognised in the context of PSL matches.<sup>2</sup>

- 5 In a departure from this position, the Amendment Regulations now envisage that all matches of the PSL be listed as *national sporting events*. This will preclude the PSL from selling the rights to broadcast those events to subscription broadcasters on an exclusive basis. If this change is implemented, there will be dire consequences for the PSL and the development of soccer in the country. In the 2018 financial year, the PSL generated revenue of R940 million. Of this, around 64% was generated from the sale of broadcast rights, 35% from sponsorships, and the balance of 1% from supplier contributions and competition gate takings. Since the PSL is a private organisation, it receives no public funding. The PSL's revenue stream therefore depends heavily on revenue from the sale of broadcasting rights and the sponsorships linked to that broadcasting.
- 6 If the Amendment Regulations are promulgated, the PSL's principal revenue stream will come under threat. This will have knock-on effects on employment in the industry. It will make it more difficult to attract and keep our top players in the country. And it will severely undermine the development of soccer in this country.
- 7 The PSL therefore makes these submissions in order to highlight to ICASA the policy and legal reasons why the proposed amendments should not be promulgated.

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<sup>1</sup> ICASA's Findings and Reasons Document on the Sport Broadcasting Services Regulations, 2010 published in Government Gazette No 33108 of 12 April 2010 ("2010 Findings and Reasons") page 40.

<sup>2</sup> See page 40 of the 2010 Findings and Reasons, as well as page 35 of ICASA's Preliminary Findings and Conclusions Document on the Regulation of Sport Broadcasting Rights published in Government Gazette No 32949 of 12 February 2010 – where the Kaizer Chiefs / Orlando Pirates derby is used as a specific example of an event that has high attendance but which would not on that basis alone qualify as a national sporting event.

8 These submissions are structured in three main parts.

8.1 In the first part, we set out the relevant statutory framework and discuss the nature of ICASA's regulatory powers under it.

8.2 In the second part, we set out the policy rationale for not listing the majority of PSL matches as *national sporting events* under section 60 of the Electronic Communications Act 36 of 2005 (*the ECA*).

8.3 In the last section, we deal with the text of the Amendment Regulations and identify numerous legal flaws in the proposed amendments.

## PART I: STATUTORY FRAMEWORK

### Interpretation

- 9 There are three important inter-related riders to the general principle of statutory interpretation that the words in a statute must be given their ordinary grammatical meaning, unless it results in an absurdity: first, the statutory provision should always be interpreted purposively; second, it should be properly contextualised; and finally, all statutes must be constructed consistently with the Constitution.<sup>3</sup>
- 10 To this may be added the explanation by Ngcobo J (as he then was) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*.<sup>4</sup>

*“The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders Association v PriceWaterhouse the SCA* has reminded us that:*

*“The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the facts of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A) at 904 D-E*:*

*“I am of the opinion that the words of s3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in*

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<sup>3</sup> *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC), para 28.

<sup>4</sup> 2004 (4) SA 490 (CC), para 90.

*the light of the subject matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.”*

## **The Constitution**

11 In terms of s 192 of the Constitution national legislation has to establish an independent authority to regulate broadcasting *in the public interest*, and to ensure fairness and a diversity of views broadly representing South African society. The phrase in italics is pivotal to interpreting the relevant statutory backdrop to regulating *national sporting events*.<sup>5</sup>

12 ICASA is an *organ of state* as that term is defined in s 239 of the Constitution, being an institution exercising a public power and performing a public function in terms of legislation.

## **The ICASA Act**

13 The object of the ICASA Act includes the establishment of ICASA to regulate broadcasting in the public interest;<sup>6</sup> the functions of ICASA include: to make regulations on any matter consistent with the objects of the Act and the underlying statutes or that are incidental or necessary for the performance of the functions of ICASA.<sup>7</sup>

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<sup>5</sup> Section 2(a), read with section 4(3)(j) of the Independent Communications Authority of South Africa Act, 13 of 2000 (“the ICASA Act”), and in particular, s 60(1) of the Electronic Communications Act, 36 of 2005 (“the ECA”).

<sup>6</sup> Section 2(a).

<sup>7</sup> Section 4(3)(j).

## The ECA

- 14 The ECA was promulgated to make new provision for the regulation of broadcasting services.<sup>8</sup>
- 15 The phrase *in the public interest* appears in the introductory portion to s 2, where the objects of the ECA are spelt out. These objects include:
- to promote the development of, *inter alia*, commercial broadcasting services which are responsive to the needs of the public;
  - to protect the integrity and viability of public broadcasting services; and
  - to refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public.
- 16 ICASA may grant individual licences for broadcasting services,<sup>9</sup> and may, as part of the terms and conditions for licences, include terms and conditions to serve the public interest in ensuring the distribution of broadcasting services and in facilitating the dissemination and development of a diverse range of sound and television broadcasting services on a national level.<sup>10</sup>

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<sup>8</sup> See the definition of *broadcasting*, *broadcasting service* and *commercial broadcasting* in s 1 of the ECA.

<sup>9</sup> s 5(2)(b).

<sup>10</sup> s 8(2)(k) and (l).



- 17 ICASA's power to make regulations concerning the broadcasting of sports is derived from s 60 of the ECA. The section reads, in relevant part, as follows:

*“(1) Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority*

*(2) In the event of a dispute arising concerning subsection (1), any party may notify the Authority of the dispute in writing and such dispute must be resolved on an expedited basis by the Authority in accordance with the regulations prescribed by the Authority”*

- 18 There are three important aspects of this section.

### **The prohibition**

- 19 The section contains a prohibition. It says that subscription broadcasting services may not acquire exclusive rights that prevent or hinder free-to-air broadcasting of national sporting events. The section does not prohibit exclusive rights to broadcast national sporting events being given to subscription broadcasting services. It only prohibits such exclusive rights being given to subscription broadcasting services where they “prevent or hinder free-to-air broadcasting of national sporting events”.

## The listing of national sports

20 The section empowers ICASA to identify which sporting events constitute “national sporting events in the public interest”. This means that there are two legislative requirements for a sporting event to be considered for listing by ICASA. The first is that it must be of a “national” character and the second is that it must be in the public interest to list it.

21 “*National sporting events*” is not defined in the ECA. In the 2010 Regulations<sup>11</sup>, it was simply explained by reference to certain events listed in reg 5. The criteria for identifying *national sporting events* were explained thus in reg 4:

“4(1) *The Authority has used the following criteria in determining national sporting events that are of public interest:*

(a) *a confederation sporting event involving a national team or an individual;*  
*or*

(b) *a semi-final and final of a national knock-out competition; or*

(c) *an opening game, semi-final and final of a confederation sporting event.”*

22 As to what the public interest encompasses,<sup>12</sup> the following dictum by O’Regan J in *Rail Commuters Action Group v Transnet Ltd t/a Metro Rail*<sup>13</sup> finds application:

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<sup>11</sup> The Sport Broadcasting Regulations, 2010 promulgated in Government Notice No R275 dated 7 April 2010.

<sup>12</sup> The phrase also appears, for example, in s 2 and s 8 of the ECA.

<sup>13</sup> 2005 (2) SA 359 (CC).

*“As this Court has said previously, our Constitution constructs and restrains the exercise of public power in our democracy. Determining the scope of public power, therefore, and any duties attached to it requires an analysis not only of the statutory provisions conferring the power, but also of the social, political and economic context within which the power is to be exercised and a consideration of the relevant provisions of the Constitution. If this approach is followed, the ambit of public duties of organs of State will be drawn in an incremental and context-driven manner.”<sup>14</sup>*

- 23 The reference to the public interest in s 60(1) is therefore an important indicator that ICASA must strike a balance between the competing interests at stake in such a listing exercise. On the one hand, there is a desire to enable sports fans to watch sports events on a free-to-air basis. On the other hand, this desire must be balanced against the need for the organisers of sports events to derive sufficient revenue from the broadcasting of those events to be able to invest in and develop the sport in question.

### **Dispute resolution**

- 24 Subsection (2) provides that where there is a dispute concerning subsection (1), this may be referred to ICASA and must be determined by ICASA on an expedited basis. This subsection is important because there is no way that ICASA can know, in advance of the terms on which a subscription broadcaster makes the broadcasting of a national sporting event available to a free-to-air broadcaster, whether the free-to-air broadcaster is thereby prevented or hindered in its ability to broadcast the event.

- 25 The combined effect of subsections (1) and (2) is therefore to empower ICASA to list national sporting events in the public interest and then to regulate the broadcasting of

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<sup>14</sup> Para [85].

those events by subscription broadcasters in order to ensure that they do not prevent or hinder the free-to-air broadcasting of the events.

26 ICASA's powers under s 60 are therefore limited in three important respects:

26.1 First, it must identify sporting events that are national in character and it must determine whether it is in the public interest to list those events.

26.2 Second, ICASA may not prohibit exclusive broadcasting rights to those events being granted to subscription broadcasting services. At most, ICASA may regulate in order to ensure that the free-to-air broadcasting of national sports events is not prevented or hindered.

26.3 Third, s 60(2) of the ECA provides the mechanism for resolving disputes about whether free-to-air broadcasting of national sports events will be prevented or hindered by subscription broadcasters. This leaves it to subscription broadcasters and free-to-air broadcasters to regulate their commercial dealings with each other. Only in the event of a dispute, does ICASA become involved.

**PART II: THE POLICY RATIONALE FOR NOT LISTING THE MAJORITY OF PSL MATCHES  
AS NATIONAL SPORTING EVENTS**

27 The position of the PSL raises additional policy considerations in a debate on the Amendment Regulations. In this section we deal with three important policy considerations that ICASA should take into account when it considers the Amendment Regulations:

27.1 The PSL is critical to the survival and continued development of soccer in South Africa. Placing the PSL at risk jeopardises the game of soccer in the country and the substantial cascading social and economic benefits that result from its work.

27.2 The sale of broadcasting rights comprises the primary source of revenue for the PSL. The PSL has until now been able to self-regulate the manner in which it structures and offers these rights for sale to broadcasters. This has allowed it to optimise the balance between exposure and revenue. The Amendment Regulations will have a substantial adverse impact on the revenue that the PSL is able to derive from the sale of its broadcasting rights, as well as the sponsorship deals that it is able to secure. This risks the financial viability of the PSL with the potential adverse consequences identified above.

27.3 A large number of PSL matches are already provided to free to air broadcasters – more than they have the capacity to broadcast. The Amendment Regulations would not likely increase access or exposure to soccer in South Africa, which are already high.

## The social and economic benefits of the PSL

- 28 As a sporting code, soccer remains the most participated in sport amongst adults in South Africa (according to the BMI Adult SportTrack 2018). There are 3.1 million players. Soccer remains the top sport with 14.1 million adult followers. Of this, 11 million are black adults. The BMI Junior SportTrack 2018 states that amongst juniors (aged 13 to 18 years) soccer is the top participation sport with 1.6 million participants and 3.9 million junior spectators.
- 29 In keeping with the fact that soccer is the most watched sport in South Africa, it is also the most affordable for spectators. The PSL has managed to maintain gate admission fees to its league matches at R40 per adult, while children under the age of 12 are allowed free entry. The PSL is only able to maintain such low gate admission fees by ensuring that its other revenue streams, and in particular the PSL's income from broadcasting rights, continue to grow.
- 30 The PSL has 16 professional clubs in the Premier Division and 16 professional clubs in the National First Division. The mandate and responsibility of the PSL is to create and administer leagues and competitions to provide and cater for domestic professional soccer. The PSL derives its mandate from its Handbook. The main objectives as prescribed in the Handbook are, *inter alia*:
- 30.1 to promote, organise, control and administer professional football;
  - 30.2 to co-ordinate and facilitate the development of professional football;
  - 30.3 to promote the interests of the clubs;

30.4 to foster friendly relations amongst officials, clubs, teams and players of the PSL;

30.5 to concern itself with matters affecting professional football; and

30.6 to utilise its funds in the pursuit of its objectives.

31 The PSL administers: (i) the premier professional league in the country, which is known as the ABSA Premiership; (ii) the National First Division, which is the second tier of professional football; and (iii) Cup Competitions known as the MTN8, the Nedbank Cup and the Telkom Knockout. Whilst the ABSA Premiership and the National First Division league competitions are played on a home and away basis, the various Cup Competitions have their own competition-specific rules and regulations. The National Reserve League (the Diski Challenge) is tailored for youth development and has already produced a number of young players who feature in the National Age-Group Teams and Premier Division teams. The success of the Diski Challenge has resulted in the PSL having also introduced the Diski Shield in 2017 to complement the National Reserve League.

32 The PSL takes football to provinces and communities that would otherwise not have direct access to the sport at stadiums. Provinces and communities in which no PSL team is based now host PSL Reserve League matches with no gate admission charges for spectators. By hosting matches in these provinces and communities, the PSL generates attendance and contributes to the local economy. It makes soccer more accessible to the youth, in contrast to many other countries where the cost of attending a live soccer match as a spectator in a stadium is prohibitively high.

- 33 In the pursuit of its objectives, the PSL has to generate sufficient revenue. This revenue is essentially secured through the sale of the right to broadcast soccer matches played in its various competitions. In this regard, the PSL was able to secure a substantial increase in the revenue that it derives from broadcasting rights when it first awarded these rights to SuperSport in 2007 (see paragraphs 38 to 48 below for a more detailed discussion on this arrangement). This allowed the PSL to invest in soccer and the subsequent improvements in the quality of its offering has meant that the revenue derived from the sale its broadcasting rights has continued to grow (along with the revenue secured through various sponsorship deals).
- 34 This revenue that the PSL derives from the sale of its rights is critical to the continued existence of the PSL. Through its competitions, both directly and through its 32 clubs, it provides a source of livelihood for professional players and their families. It is an important source of entertainment for millions of spectators. Without the revenue from its sale of rights the viability of the PSL and of professional soccer in South Africa will be compromised. With broadcasting rights having accounted for 59 percent and 64 percent respectively of its revenue in the 2017 and 2018 financial years, the PSL is able to provide significant benefits to a wide range of beneficiaries that would not have been possible if it could not generate vastly improved income from the sale of its broadcast rights. These benefits include:

#### *Benefits to the PSL*

- 34.1 The increase in income from the sale of rights has resulted in the PSL being ranked in the commercial top 10 of football leagues in the world in terms of revenue (prior to 2007 it was ranked below 30th). Increased broadcast platforms have attracted more sponsors to the PSL given the further visibility of the product.



All competitions attained record-setting sponsorship deals with broadcasting being the key driver. The league and cup competition sponsorships and supplier values rose from less than R110m per annum in 2007 to in excess of R350m. The PSL has attracted a pan-African audience to its content, with it being particularly popular in Southern Africa. This pan-African exposure has contributed to a wider reach for the PSL across the continent and the ability of the PSL to attract players from other countries; thus enhancing the quality of the PSL. Under the Amendment Regulations, the PSL is unlikely to be broadcast to a pan-African audience.

#### *Benefits to the 32 Clubs*

34.2 Clubs now receive substantially higher revenues because of the PSL's increased revenue from broadcast rights. In the past, PSL clubs received grants of R400 000 per month but are now receiving R2m a month plus up to R10m per annum in service fees (in total R496m in 2018). First Division clubs receive R50 000 per month and a monthly grant of R500 000 plus up to R3m per annum in service fees (R120m in 2018).

34.3 The increase in revenue has the following benefits:

34.3.1 Club values have risen from R6 - R8 million to a current market value of ± R50 million per club, attracting high profile owners.

34.3.2 There is higher player retention by clubs who are financially able to retain their star players which in turn increases competitiveness amongst the clubs in the PSL.

- 34.3.3 The PSL has more multiple league and cup competition winners than any of the top leagues in Europe and Africa where typically 2 or 3 clubs dominate all the competitions.
- 34.3.4 The PSL attracts talented players from across Africa as it can compete with leagues around the globe in quality and revenue.
- 34.3.5 Currently the percentage of PSL clubs with sponsors is at an all-time high (11 out of the 16 clubs have sponsors). These sponsors are attracted to the PSL as they have in recent years been able to achieve a better return on investment through the additional broadcast exposure of PSL matches that the current SuperSport deal provides.

#### *Benefits to the players*

34.4 Players receive substantially higher incomes as a result of the PSL receiving significantly more for its broadcast rights than it did prior to the arrangement with SuperSport. Average wages for footballers have increased from R3 000 - R5 000 per month to R40 000 - R60 000 per month. The top footballers' income bracket has moved from R80 000 per month to over R400 000 per month. This increase in incomes has the following benefits :

- 34.4.1 Players have longer playing careers as older players are now affordable to clubs participating in the National First Division.
- 34.4.2 Many foreign-based South African players have returned to South Africa, as they now get competitive salaries. This contributes to raising the standard of football generally.

34.4.3 The PSL contributes R15m+ per season to the Players Medical Insurance Fund. As a result more clubs have been able to offer medical aid cover to players and their families.

34.4.4 The South African Football Players Union has been given R10m+ by the PSL as part of a Collective Bargaining Agreement, where previously they failed to get a recognition agreement signed.

*Benefits for South African Football and the South African National Teams*

34.5 The SAFA development fund has received more than R82m from the PSL since 2007.

34.6 The PSL has spent R15m+ on Training Programmes and Development Workshops for SAFA referees; assistant referees; fourth officials and match commissioners including electronic headsets and communication devices to assist refereeing standards to be globally competitive. The PSL has set up infrastructure that allows referees to have post-match access to recorded matches to assess referees' performances.

34.7 Referees' and match officials' fees have increased 400 percent.

34.8 The PSL has introduced Ground Maintenance Training Programmes for stadium and facility managers throughout the country.

34.9 The PSL's self-regulating compliance processes including its Club Licensing Regulations, have been praised by CAF and FIFA as a role model for Africa.

34.10 The PSL Reserve League catering for under 23 players, is the only competitive Reserve League on the African continent and has introduced scores of fresh,

young talent into the National Age-Group Teams, ABSA Premiership and National First Division ranks, showcasing players throughout the continent.

*Benefits to soccer supporters*

- 34.11 Ticket prices at R40 have remained affordable for all PSL games. Some clubs do not charge for entrance to certain matches, as clubs are less reliant on income from entrance fees due to the income received from broadcast rights (which the PSL distributes to them through grants).
- 34.12 Soccer supporters in provinces and areas where there is no top flight football team are able to go to the stadiums and watch live football of the PSL National Reserve League free of charge. The Amendment Regulations mean that the PSL and its Clubs will have to generate income from other sources. One such source is to possibly charge and/or increase gate admission fees at stadiums. This will have a negative effect on match attendances and will be unaffordable to a substantial portion of fans who currently attend matches free of charge.

*Other benefits*

- 34.13 The PSL not only benefits key stakeholders and partners who are directly involved, but also other beneficiaries such as:
- 34.13.1 Small vendors who depend on football, especially at major matches to generate an income through the sale of foodstuffs and drinks.
- 34.13.2 Small entrepreneurs and the unemployed in communities around stadiums benefit both directly and indirectly from revenue and employment opportunities, including temporary jobs created by PSL

clubs at matches. According to research conducted by Grant Thornton in 2014 on the economic impact of professional soccer in South Africa, the sport contributed towards the creation or sustainment of approximately 10 400 temporary and permanent jobs in the national economy. If the average income of these jobs were to be annualised, the payroll would amount to R956.9 million a year.

34.13.3 Skilled young footballers who show the potential benefit from soccer academies of the PSL's clubs.

34.13.4 Many clubs pay for the schooling, accommodation and training of young soccer players in their academies.

### **The PSL's reliance on revenue received from the sale of broadcasting rights**

#### *The financial position of the PSL*

35 In the 2018 financial year, the PSL generated revenue of R940 million compared to revenue of R885 million in 2017. Of the revenue generated in the 2018 financial year, 64 percent was generated from broadcast rights; 35 percent from sponsorships with the balance of 1 percent made up from supplier contributions and competition gate takings.

36 Sponsorship revenue is essentially driven by the PSL's ability to achieve a level of television exposure that will be attractive to its sponsors. These two revenue streams are thus closely interlinked. Any interference with the PSL's ability to balance its need for exposure, on the one hand, with its need for maximum revenue, on the other, is likely to threaten the future of professional football in South Africa. The need for this balancing act by the PSL is critical for its commercial and financial viability and hence, in much the

same way as other sports federations, the PSL is best-placed to make the determination of how to sell its rights.

- 37 Without this support from the PSL, most clubs would not be able to participate in professional football at all. They would not be able to meet the financial burdens of running a professional club which includes the onerous and costly governance and compliance of the NSL and mandatory legal requirements. This includes the Safety at Sport and Recreational Events Act, 2010 (Act No 2 of 2010) (SASREA) which amongst others, provide for measures to safeguard the physical well-being and safety of persons and property at sports events held at stadiums as well as to provide for accountability of event role-players. The costs to clubs to implement the regulations and requirements of SASREA amount to an estimated R300 000 per home match depending on the categorisation of the event. With clubs having 16 home league matches and additional cup competition home matches, the implementation of this Act is costly to clubs. Any reduction in broadcast rights revenue would threaten the PSL's financial sustainability and viability.

#### *The sale of broadcasting rights*

- 38 It is helpful to consider how the present dispensation in respect of the sale of broadcasting rights developed contractually between the main protagonists. Prior to 2007, the PSL was obliged to sell its content to the SABC. The SABC had exclusive rights to all of the PSL's content. The SABC sub-licensed some of those rights (approximately 30 games per season) to SuperSport International. Because of this, the PSL was obliged to accept a price from the SABC that was much lower than the commercial value of that content.

39 The situation was unsatisfactory for the PSL, which developed an Invitation to Tender for the broadcasting rights of its soccer matches that it opened for bidding on 16 February 2007 (the "2007 ITT"). The SABC failed to bid in response to the 2007 ITT and, as a result, bidding was opened to all broadcasters. The rights ultimately were awarded to SuperSport.

40 The SABC did not bid in the 2007 ITT as it believed that it already had the exclusive right to all the rights, and referred this dispute to arbitration. The SABC was unsuccessful in the arbitration. SuperSport subsequently entered into a tripartite agreement with the PSL and the SABC, as required by the ITT, pursuant to which SuperSport sub-licensed to the SABC the right to broadcast a number of free-to-air matches in South Africa. The result of this tender was that more matches were shown on free-to-air television and pay television per season than ever before. Whereas before, only approximately 130 matches had been shown on the two platforms, now more than 250 matches were shown. Increased broadcasting led to a significant increase in sponsorships because of greater visibility for the sponsors. In addition to the commercial benefits, the increased broadcasting revenues led to immeasurable improvements and benefits for spectators, soccer players, football clubs and the game as a whole as illustrated earlier. The quality of coverage also improved, in particular:

40.1 broadcast graphics;

40.2 number of cameras per match;

40.3 better editing and presentation (for example, viewing angles and replays);

40.4 better analysis before and during games; and

40.5 new content.

- 41 Given the unqualified success of the competitive bidding process conducted in 2007, the PSL issued another ITT for the acquisition of the rights to broadcast PSL content to commence on the first day of the 2012/2013 soccer season.
- 42 Successful bidders for any of the above rights were also entitled to broadcast the content on any platform of their choosing, including subscription/pay broadcasting, free-to-air broadcasting, mobile and over the internet. The 2012 ITT set out its own technical production and broadcast quality standards and requirements as well as certain requirements related to the promotion and development of PSL brands and those of its sponsors that would have to be met by successful bidders.
- 43 SuperSport was again successful in the tender and concluded Heads of Agreement with the PSL on 11 September 2012 regulating the parties' relationship for the tender period. In terms of the agreement, the PSL granted to SuperSport the exclusive broadcasting rights in relation to the PSL throughout Sub-Saharan Africa and adjacent islands for a period of five years commencing on the first day after the end of the 2011/12 season. SuperSport has a right and obligation to sub-license the rights, subject to obtaining prior written consent from the PSL, which consent shall not be unreasonably withheld. Pre-approval was granted by the PSL for such sub-licensing to the SABC.
- 44 There are also 33 matches that the PSL identified as major fixtures and which had to be made available on both free-to-air and subscription television.



45 As matters stand, SuperSport sub-licenses 140 matches per season to the SABC. These include 90 ABSA Premiership league matches and 29 cup tournament matches. Included in these fixtures are 45 "shared matches", which the PSL has identified as major fixtures and which must be shown by both SuperSport and the SABC. These matches include all fixtures between the PSL's most popular clubs: Kaizer Chiefs, Mamelodi Sundowns and Orlando Pirates. In addition, 15 National First Division league matches and 6 National First Division play-off matches are also made available to the SABC. This is considerably more than the amount of PSL matches previously broadcast by the SABC prior to SuperSport acquiring these broadcasting rights in 2007.

46 While the SABC is entitled to broadcast the select matches under its sub-licensing agreement with SuperSport, it has, similarly to the position prior to 2007, failed to broadcast many of these matches, with detrimental effect and devaluation of the PSL's broadcasting rights. For example, during the 2017/18 season, the SABC failed to broadcast 37 of its allocated matches live (despite having the right to do so) and did not broadcast 12 matches at all (i.e. in total, the SABC only broadcast 128 out of its 140 allotted matches).

47 In addition to the benefits derived by the various stakeholders set out above, the PSL's revenue generated from broadcasting revenue as at the end of its previous financial year has more than doubled as compared to the end of the 2012 financial year when the current agreement commenced. It is through this revenue that the PSL is able to distribute grants and service fees to its member clubs to keep them operating as efficient and profitable businesses that can also discharge their obligations to promote and develop soccer in South Africa. The PSL also directly expended a large proportion of its revenue towards a variety of development programmes including, for example,

workshops related to match-day security, referees as well as contributions to the South African Football Players Union.

- 48 The success of this arrangement has resulted from the flexibility that the PSL has been afforded within the regulatory framework to determine the most appropriate manner in which to structure and offer its broadcasting rights for sale to broadcasters. There is no need for regulatory intervention, which will only have a detrimental impact.

### **The capacity limitations of free-to-air broadcasters**

- 49 Neither the SABC nor e-tv has enough capacity to broadcast all events that are proposed to be listed by the Amendment Regulations live and in full.

- 50 The SABC has an extensive public broadcasting mandate, with the broadcasting of national sporting events comprising only one aspect of its public mandate. In addition to minority and developmental sport, the SABC has wide ranging obligations. As the SABC noted in its 2017/2018 Annual Report, the SABC's public service mandate "*is set out in the SABC's founding legislation. Each station has licence conditions that cover a myriad of issues such as education, national development programme, social cohesion, sports and recreation, arts and culture and much more*".<sup>15</sup>

- 51 The SABC itself has recognised the challenge that sports broadcasting presents within the context of its capacity and budget constraints. For example, the SABC's 2017/2018 Annual Report stated as follows:

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<sup>15</sup> Page 38 of the SABC's 2017/2018 Annual Report.

*"The SABC needs additional television channels to be able to fulfil its public mandate to broadcast more sport, education and entertainment programming. Our three analogue television channels cannot sustain the impact on commercial schedules from sport in particular."<sup>16</sup>*

- 52 The SABC's 2017/2018 Annual Report also notes that, due to the SABC's liquidity constraints, *"Some of the sporting events could also not be broadcasted"*.<sup>17</sup> For example:

*"During the period under review, the SABC experienced financial challenges and as a result all outbound Cricket and Rugby events could not be broadcast on TV. The Super Rugby and outbound rugby tests were only broadcast on Radio."<sup>18</sup>*

- 53 In addition, the SABC failed to meet some of its other public interest obligations in an effort to accommodate sports programming:

*"In terms of the SABC's genre quotas, SABC2 fell short of its children and educational genre mandates. These shortfalls were primarily as a result of schedule disruptions to accommodate events of national importance and sports coverage. Due to the time at which these events take place the impact was greatest on children and educational programmes."<sup>19</sup>*

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<sup>16</sup> Page 14 of the SABC's 2017/2018 Annual Report.

<sup>17</sup> Page 36 of the SABC's 2017/2018 Annual Report.

<sup>18</sup> Page 45 of the SABC's 2017/2018 Annual Report.

<sup>19</sup> Page 40 of the SABC's 2017/2018 Annual Report.

- 54 While e-tv may not have the same public mandate or degree of budgetary constraints, its capacity constraints are comparable. Even in relation only to PSL matches, it would not be able to offer the range or quality of broadcasting that the likes of SuperSport currently provides.
- 55 As a result, it is clear that the current regime is not in any manner preventing or hindering free-to-air broadcasters' ability to broadcast PSL matches (and other unlisted sporting events). At least insofar as the PSL is concerned, as has been described above, the SABC has the rights to broadcast more matches than ever before. The primary constraint to the public being able to view these matches is the SABC's own capacity and budget constraints. Listing all PSL matches would not improve these circumstances – it would not promote access. Instead, it would devalue the rights, undermine the development of the sport itself, and ultimately decrease the quality and extent of matches (if any) aired by subscription broadcasters.

## **PART III: THE AMENDMENT REGULATIONS**

### **Central role of the public interest**

56 When ICASA exercises its power to list national sporting events in the public interest it should take the following considerations into account:

56.1 Broadcasting rights to a sports event are typically owned by the entity which organises the event. So, for example, the PSL owns the broadcasting rights to professional soccer in this country.

56.2 ICASA has no jurisdiction over the sporting bodies owning the broadcasting rights to sporting events. The promulgation of sport broadcasting services regulations however has a direct effect on the value of broadcasting rights, as it may affect the ability of both free-to-air and commercial broadcasters to bid for the rights.

56.3 The sale of broadcasting rights is typically a competitive process. It could include a bid/auction, a formal tender process or bilateral negotiations. The aim is to determine the commercial value of the rights in a competitive market free from distortion.

56.4 As explained above, the income of South African sports bodies such as the PSL depends to a large extent on the sale of broadcasting rights. In the recent past, the sale of broadcasting rights has become by far the biggest source of revenue for sports bodies of major sports.

- 56.5 ICASA should encourage investment in the broadcasting industry and promote stability within that industry.
- 56.6 The main objects of the PSL are to promote, administer, control and govern all professional football in South Africa in accordance with the prescripts of FIFA, CAF and SAFA within the constraints of South African law. In this regard, the PSL has to regulate Club Licensing and Member Club registration; player registration, transfers, and training and development compensation; registration or accreditation of Member Club Officials; competitions, matches, venues, security, safety and other standards in professional football as well as misconduct and disciplinary proceedings and non-disciplinary dispute resolution. The PSL has to co-ordinate and facilitate the development of professional football; promote the interests of the Clubs and concerns itself with matters affecting professional football. All these activities are dependent on the financial ability of the PSL to provide the necessary funding.
- 56.7 A balance has to be struck between the financial viability of sporting bodies, on the one hand, and the access of citizens to *national sporting events*, on the other. As it was put in ICASA's position paper on sports broadcasting rights of 25 July 2003:

*“Without the additional incomes national sports bodies receive from the selling of sports rights, they might not be able to meet their obligations, and may be forced to reduce their budget on a number of crucial initiatives, such as development programmes and royalties paid to provincial affiliates. Additional pressure would also be placed on sports bodies and individual clubs’ ability to pay competitive salaries to players. The Authority is aware, however, that the reliance by sports bodies and clubs on money generated through the selling of*

*sports broadcasting rights needs to be balanced against the need to ensure mass audiences and support for “national sporting events”.*<sup>20</sup>

56.8 Subscription broadcasting services depend on quality sports programming which is exclusive and not widely available on free-to-air services. The need for exclusivity to support subscription broadcasting services is internationally recognised. This ensures that the broadcasting rights owned by bodies like the PSL are realistically valued.

56.9 As explained below, the requisite balance was struck in the earlier regulations but is not struck by the Amendment Regulations.

### **The Earlier Regulations**

57 In 2002 and 2003, ICASA considered the issue as to what should constitute a *national sporting event* in terms of s 30(7) of the now repealed Broadcasting Act, 4 of 1999. A discussion paper entitled “*Enquiry into Sports Broadcasting Rights*” was published on 8 August 2012, and public hearings took place between 29 November and 5 December 2002.

58 ICASA issued a final paper and issued regulations in July 2003 (“the 2003 regulations”) in which it imposed a restriction primarily on international events involving South African national senior teams and, where a national team was not involved, finals of domestic knock-out tournaments.

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<sup>20</sup> Page 28 of the Position Paper.

59 The 2003 regulations were amended in 2005, but no substantive amendments were made to the list of national sporting events.

60 In 2008, ICASA initiated a fresh review of the 2003 regulations in terms of s 60(1) of the ECA, which had by then replaced similar provisions of the Broadcasting Act. Submissions were made by interested parties, and hearings followed during December 2008. In 2010, ICASA published its preliminary findings, and its final reasons and findings followed in April 2010, along with new sports broadcasting services regulations (*the 2010 Regulations*).

### **The balance struck in the 2010 Regulations**

61 In the 2010 Regulations, ICASA elected not substantially to extend the list of national sporting events beyond what had been listed in the 2003 regulations, save to add semi-finals of knock-out competitions. As part of its rationale for not extending the regulations further, ICASA adopted the view that an event should not qualify as a *national sporting event* and be subject to regulation simply because it was a popular event.

*“Experience worldwide, including the United Kingdom, with a well-established tradition of regulating sport rights, suggest (sic) that popular sports such as the Premier League are treated as premium sport and not as national sporting events. It is therefore possible, given the outcome of the competition process, that popular sporting codes such as the PSL may be deemed as premium sport which should be subjected to the necessary competition regulation in terms of section 67 of the (ECA).”<sup>21</sup>*

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<sup>21</sup> Page 42 of the Reasons and Findings document accompanying the 2010 regulations.



62 The criteria for identifying national sporting events in the 2010 Regulations are simple and clear: a sporting event will qualify as a *national sporting event* if it is a confederation sporting event involving a national team or an individual; a semi-final or final of a national knockout competition; or an opening game, semi-final or final of a confederation sporting event.

63 An application of these three criteria then produced the list of twenty-two sporting events to be included on the list, all of which reflect a quintessentially national character. Amongst these were the semi-finals and finals of four PSL knock-out competitions:

63.1 The Telkom Charity Cup

63.2 The MTN Supa8 Cup

63.3 The Telkom Knockout Cup

63.4 The Nedbank Cup

This amounted to twelve PSL matches that were covered by the 2010 Regulations.

64 The remaining PSL matches were not included in the 2010 Regulations. There are 538 PSL matches played in a year which means that 526 of those matches were not covered by the 2010 Regulations. They were excluded because they did not meet the national criteria set in the 2010 Regulations. ICASA ultimately reasoned that it would be best to leave those sports broadcasting rights to self-regulation and to utilise its powers under s 67 of the ECA to intervene if ineffective competition were to develop in the market.

- 65 The competition paradigm has been considered during the course of ICASA's broader inquiry in to subscription broadcasting television initiated in 2016 in terms of s 4B of the ICASA Act. A discussion document was issued and the inquiry is ongoing. The PSL has been an active participant in that inquiry, including by way of written submissions.
- 66 Under regulation 5 of the 2010 Regulations, ICASA listed the national sporting events to which the regulations would apply and then in regulation 6, it provided that subscription broadcasters, who had acquired the rights to broadcast any of those events, were required to inform free-to-air broadcasters of the opportunity to tender for those rights.
- 67 This was an appropriate manner in which to regulate to ensure that free-to-air broadcasting of the listed events were not hindered or compromised. The effect of the obligation placed on subscription broadcasters to make those same rights available to free-to-air broadcasters was that they were given access to the events on commercial terms to be agreed between the parties. However, in the event that there was a dispute between the parties about the reasonableness of those terms, they would be able to have the dispute resolved expeditiously by ICASA.
- 68 The 2010 Regulations ensured that no subscription broadcaster would be granted exclusive rights to a national sporting event in circumstances where to do so would prevent or hinder the free-to-air broadcasting of those events. This was achieved by requiring any such rights acquired by subscription broadcasters to be made available to free-to-air broadcasters on commercial terms.

- 69 The 2010 Regulations were carefully framed to remain within the regulatory remit of ICASA. The 2010 Regulations did not involve the regulation of entities beyond ICASA's powers, such as holders of the rights to broadcast the games.
- 70 The 2010 Regulations did not seek to regulate the terms on which the owners of the broadcasting rights to national sports events could sell those rights. This would have been beyond the regulatory powers of ICASA. Instead, they placed an obligation on subscription broadcasters that obtained such rights, to make those rights available to free-to-air broadcasting service licensees. If there was then a dispute between the subscription broadcaster and free-to-air broadcaster about the terms on which those rights were being offered, ICASA could be called on to resolve the dispute under s 60(2) of the ECA.
- 71 The regulatory balance that was struck in the 2010 Regulations has worked because it has allowed rights holders and broadcasters sufficient flexibility within the regulatory framework.
- 72 A review of listed national sports events is envisaged in the 2010 Regulations. Regulation 7 provides:

*“Review of Listed Events*

*(1) A national sporting event may be removed from and added to the list subject to the following conditions:*

*(a) To ensure predictability and certainty, the criteria used in the listing of national sporting events and consequently the list of national sporting events will be*

*reviewed after every four years from the date of the publication of these regulations.*

*(b) Any interested stakeholder can, within the four year review period, submit an application asking the Authority to add or remove a national sporting event;*

*(c) Any application to add or remove a national sporting event shall be subjected to a public process. (sic)*

*(d) Consistent with section 60(1) of the Act, any changes to the criteria used in the listing of national sporting events and the list itself shall be effected after consultation with the Ministers; (sic)."*

73 We assume that the Amendment Regulations are a review as is envisaged in regulation 7(1)(a). There is no indication that an application by an interested stakeholder as is envisaged in regulation 7(1)(b) had been received.

74 When conducting a review in terms of regulation 7, ICASA is still confined to exercise its powers subject to the three limitations set out above. However, the Amendment Regulations are not consistent with these limitations. On the contrary, they involve ICASA in regulation-making beyond its powers. They are also unconstitutional because they will involve an arbitrary deprivation of property and they are irrational.

### **The legal flaws**

75 There are three primary flaws with the Amendment Regulations:

75.1 the regulations are beyond the powers of ICASA and therefore *ultra vires*;

75.2 the regulations constitute an arbitrary deprivation of the PSL's property and are therefore unconstitutional; and

75.3 the regulations are so vague and contradictory as to be unenforceable.

76 We deal with each of these in turn below.

*The Amendment Regulations are ultra vires*

77 The Constitutional Court has held that:

*“In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality.”<sup>22</sup>*

78 As we set out above, ICASA's powers to list national sporting events are limited in three important respects:

78.1 First, it must identify sporting events that are national in character and it must determine whether it is in the public interest to list those events.

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<sup>22</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 50.

- 78.2 Second, ICASA may not prohibit exclusive broadcasting rights to those events being granted to subscription broadcasting services. At most, ICASA may regulate in order to ensure that the free-to-air broadcasting of national sports events is not prevented or hindered.
- 78.3 Third, s 60(2) of the ECA provides the mechanism for disputes about whether free-to-air broadcasting of national sports events will be prevented or hindered. This leaves it to subscription broadcasters and free-to-air broadcasters to regulate their commercial dealings with each other and, only in the event of a dispute, does ICASA become involved.
- 79 The Amendment Regulations reflect an exercise of regulatory power beyond these constraints.
- 80 Reg 5.2 of the Amendment Regulations says that all PSL matches must be offered to a subscription broadcasting licensee on a non-exclusive basis under sub-licensing conditions. The proposed regulations therefore seek to regulate the terms on which the holder of the right to broadcast a sports event may make that event available for broadcast. ICASA has no regulatory power over the seller of the right to broadcast sports events, such as the PSL. As has been set out above, its powers to regulate broadcasting services under the ECA extend only to broadcasting licensees. ICASA may only regulate the terms on which these licensees (such as subscription broadcasters and free-to-air broadcasters) may deal with those rights once acquired from the seller.
- 81 ICASA also may not outright prohibit subscription broadcasters from acquiring exclusive rights to broadcast listed national sports events. It may only regulate to prevent exclusive

rights from being acquired if that would hinder or prevent the free-to-air broadcasting of those events.

82 The 2010 Regulations observe this limitation to ICASA's power. They employ a mechanism to ensure that the rights of the public to view listed events for free are not unduly curtailed. They do so by making it obligatory for subscription broadcasters, who acquired broadcasting rights to those events, to make them available for tender by the free-to-air broadcasters; in the event that there is a dispute about the reasonableness of the terms on which those rights were being offered, then the dispute may be referred to ICASA for (speedy) resolution. In this way, ICASA is the ultimate guardian in the event that a free-to-air broadcaster complained that the terms that were being offered to it, to broadcast the listed events, would prevent or hinder free-to-air access to those events.

83 This balanced approach is absent in the Amendment Regulations. In its place, a blunt prohibition on exclusivity is sought to be inserted. ICASA has no power to impose such a prohibition. As a result, reg 5.2 of the Amendment Regulations is *ultra vires* ICASA's powers. If it were to be promulgated, it would be liable to be set aside on the basis that it is in conflict with the principle of legality which requires ICASA to act within the confines of its powers.

*The Amendment Regulations constitute an arbitrary deprivation of property rights*

84 Reg 5.2 of the Amendment Regulations is not only beyond ICASA's powers but it will also constitute an unlawful deprivation of the property of those organisers of the sporting events listed in reg 5.2.1. The Premier Soccer League is listed in reg 5.2.1(n). Although the arguments set out in this section would apply to all organisers of the events listed in reg 5.2.1, we shall focus here on the position of the PSL.

85 As we have set out above, the PSL owns the right to broadcast the PSL games it organises. That broadcasting right is its property.

86 Section 25 of the Constitution protects everyone against arbitrary deprivations of property and expropriations of property that do not meet the requirements of s 25(2). Section 25 does not define property, other than to state that it is not limited to land.

87 In *First National Bank t/a Wesbank v Commissioner, South African Revenue Service*,<sup>23</sup> the Constitutional Court held that assigning a comprehensive definition to the term property was not appropriate.<sup>24</sup> The Court has therefore developed the contours of the property concept under s 25 as each case before it has required. For example, in *Law Society of South Africa and Others v Minister for Transport and Another*,<sup>25</sup> the Constitutional Court assumed, without deciding, that a claim for loss of earning capacity or support is property. It has also hinted that a trade-mark, despite being incorporeal, would constitute property.<sup>26</sup> In *National Credit Regulator v Opperman*, the Court held that the restitution of money paid, based on unjustified enrichment, was property under s 25(1).<sup>27</sup>

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<sup>23</sup> 2002 (4) SA 768 (CC) (“*First National Bank*”).

<sup>24</sup> 2002 4 SA 768 (CC) para 51.

<sup>25</sup> 2011 (1) SA 400 (CC) para 84.

<sup>26</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

<sup>27</sup> 2013 (2) SA 1 (CC) para 63 (“*Opperman*”).



- 88 In keeping with this broad approach to property rights, it is likely that the courts will recognise the right to broadcast sports events as intellectual property that falls within the protection of s 25 of the Constitution.<sup>28</sup>
- 89 The section draws a distinction between ‘deprivation of property’ on the one hand, and ‘expropriation of property’ on the other. It protects holders of property against both types of interference.
- 90 In order for a deprivation of property to be constitutional, it must be in terms of a law of general application and must not be arbitrary.<sup>29</sup> The Constitutional Court has indicated that the phrase “arbitrary deprivation” imports a floating test that lies somewhere between the low-level requirement of mere rationality and the high-level requirement of reasonableness.<sup>30</sup> The test requires that there be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, that it be proportionate.<sup>31</sup> A proportionality analysis assesses the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose in question.<sup>32</sup> The stronger the property interest and the more extensive the deprivation, the more compelling the State’s purpose must be to justify the deprivation at issue.<sup>33</sup>

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<sup>28</sup> Van der Walt & Shay “Constitutional Analysis of Intellectual Property” PER /PELJ 2014 Vol 17 No 1.

<sup>29</sup> s 25(1) of the Constitution.

<sup>30</sup> *First National Bank* para 100.

<sup>31</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 48.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Opperman* para 6.

91 As the owners of the rights to broadcast sporting events, sports' organisers are entitled to use, enjoy and exploit these rights.<sup>34</sup> However, clause 5.2 of the Amendment Regulations would deprive sports' organisers of the right to sell their property on an exclusive basis. This will constitute an interference with the manner in which, and the terms on which, their rights may be exploited.

92 This deprivation is significant. It is accepted internationally that the ability to sell sports rights on an exclusive basis attracts a premium (the 'exclusivity premium'). As soon as rights are offered on a non-exclusive basis only, their value to broadcasters immediately drops. The importance of exclusivity to broadcasters is widely accepted, including by various competition authorities and regulators internationally. In a report prepared in August 2002, international expert Gerry Boon of Deloitte & Touche Sports estimated that the exclusivity premium could be anywhere between 40% and 100%. The PSL itself estimates that a prohibition on exclusivity would decrease the revenue that it is able to achieve from the sale of its broadcasting rights by approximately 80%.

93 The Amendment Regulations therefore amount to a material restriction on sports organisers' rights and would deprive them of one of the key incidents of their ownership.<sup>35</sup> In order for such a deprivation of property to be constitutionally valid, it must be both non-arbitrary and in terms of a law of general application.

94 Reg 5.2 fails at the first test. It is not rational because there is no relationship between the means of prohibiting exclusive broadcasting of PSL events and attaining the aim of

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<sup>34</sup> *First National Bank* para 57.

<sup>35</sup> *First National Bank* para 57.

more free-to-air broadcasting of those events. In fact, the means employed will defeat the aim. The reasons for this are fourfold.

- 94.1 Prohibiting the sale of exclusive rights to broadcast the PSL matches will likely have a material impact on the appetite of subscription broadcasters to pay for such rights.
  - 94.2 The free-to-air broadcasters do not have the capacity nor inclination to broadcast the majority of PSL matches.
  - 94.3 The effect of these two factors will be that fewer PSL matches will be broadcast. In the event that this occurs, sponsorship (which is critically linked to broadcasting) will diminish.
  - 94.4 With diminishing broadcasting and sponsorship revenue, the PSL will be unable to invest to the same extent in the development of soccer. This will have a cascading negative effect on the game of soccer in South Africa, and with it, the public's ability to view the games.
- 95 Reg 5.2 of the Amendment Regulations does not, therefore, satisfy the first requirement for a lawful deprivation of property. If it is promulgated, it will be liable to be reviewed and set aside as inconsistent with s 25(1) of the Constitution.

*The Amendment Regulations are vague and contradictory*

96 In *Affordable Medicines*,<sup>36</sup> the Constitutional Court explained that the doctrine against vagueness is a requirement of the principle of legality. Laws must be written in a clear and accessible manner. What is required is reasonable certainty. The law must indicate to those who are bound by it what is required of them so that they may regulate their conduct accordingly. Where laws are contradictory or internally inconsistent, those bound by the law will not know what is required of them. These standards apply equally to the formulation of primary legislation and regulation-making.

97 The Amendment Regulations define the criteria for identifying a national sporting event. Clause 4 of the Amendment Regulations says that ICASA has used these criteria in determining the national sporting events that are of public interest. The clause then provides a list of these criteria. There are three:

97.1 A confederation sporting event involving a national team or a national sporting representative;

97.2 A semi-final or a final of a national knockout competition;

97.3 An opening game, semi-final or final of a confederation sporting event.

98 However, despite stipulating that these are the criteria that ICASA has used to determine which sporting events qualify as national sporting events for the purposes of listing, clause 5 then proceeds to list numerous sporting events that do not meet the criteria. For

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<sup>36</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108.

example, the vast majority of the PSL matches, which are played over the course of a season, are neither the semi-final nor the final of a national knockout competition.

- 99 Despite this, they have been included in clause 5.2.1's list of national sporting events. This creates great uncertainty because the very criteria that ICASA has supposedly used to determine the sporting events that will be listed are then not applied to the very matches listed in the next provision of the regulations.
- 100 This vagueness will render the Amendment Regulations liable to be reviewed and set aside on the basis that they violate the principle of legality.

## **CONCLUSION**

- 101 The Amendment Regulations should not be promulgated in their current form.
- 102 The Amendment Regulations do not meet the clear 'internal limitations' or prerequisites for ICASA's regulation-making power under s 60(1) of the ECA. PSL matches are not "national sporting events" within the meaning contemplated by s 60(1)
- 103 In so far as they impact on the PSL, the Amendment Regulations are undermined by numerous policy arguments that support the position adopted under the 2010 Regulations. Listing all PSL matches as national sporting events, and thereby precluding the sale of exclusive rights to broadcast the games will, if it survives legal scrutiny, bring the PSL to its knees and substantially retard the development of soccer in the country. The Amendment Regulations fail to consider the impact on the PSL (and other sports bodies) which in turn affects consumers. This is manifestly not in the public interest.
- 104 The Amendment Regulations are unlawful. They are beyond the powers of ICASA. They constitute an arbitrary deprivation of property and they are so vague as to be unlawful. If promulgated, they would be liable to be set aside on any of these grounds.
- 105 The PSL therefore respectfully submits that the Amendment Regulations require substantial revision. There is no good reason to depart from the position that ICASA adopted when it regulated in 2010. In the absence of any defensible reason to amend that position, it should be maintained.