

**NATIONAL SOCCER LEAGUE SUBMISSIONS**

**on**

**THE DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2020**

**Tuesday 15 December 2020**

- 1 On 5 November 2020, the Independent Communications Authority of South Africa (**ICASA**) published the draft Sports Broadcasting Services Amendment Regulations, 2020 (**2020 Amendment Regulations**). ICASA has invited comment on the 2020 Amendment Regulations from interested parties. The National Soccer League, trading as the Premier Soccer League (**PSL**), is such a party and welcomes the opportunity to submit its comments on the 2020 Amendment Regulations, as set out in this document.
  
- 2 The PSL requests the opportunity to make oral and, if need be, further written submissions if ICASA decides to hold public hearings.

### **Background to comments**

- 3 The 2020 Amendment Regulations follow the draft Sports Broadcasting Services Amendment Regulations, 2018 (**2018 Amendment Regulations**) which were published by ICASA on 14 December 2018. The PSL made written submissions<sup>1</sup> and participated in the public hearings<sup>2</sup> held in respect of the 2018 Amendment Regulations.
  
- 4 The 2018 Amendment Regulations proposed a radical departure from the long-standing approach that ICASA has adopted to the identification of national sporting events. They proposed, among other things, to categorise *all* PSL 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.

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<sup>1</sup> Dated 14 March 2019.

<sup>2</sup> On 29 May 2019.

- 5 The PSL expressed its concerns with this approach. The PSL highlighted at the time that by precluding the PSL's right to balance its need for exposure, on the one hand, with its need for maximum revenue, on the other, the 2018 Amendment Regulations would have dire consequences for the PSL and the development of soccer in the country. In fact, the PSL, through its Invitation to Tender (ITT), had created opportunities for bidders to broadcast PSL content on any platform including subscription broadcasting, free-to-air broadcasting, mobile and over the internet. The PSL also raised concerns regarding the legality of the 2018 Amendment Regulations, including the extent to which they appeared to exceed ICASA's statutory powers by restricting the manner in which the PSL may sell the broadcasting rights that it owns.
- 6 Prior to the publication of the 2018 Amendment Regulations, ICASA had 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>3</sup> This was specifically recognised in the context of PSL matches<sup>4</sup> and such reasoning informed ICASA's approach to formulating the 2010 Regulations<sup>5</sup> (which regulations apply today and are now proposed to be amended by the 2020 Amendment Regulations).

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<sup>3</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>4</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.

<sup>5</sup> The Sport Broadcasting Regulations, 2010 promulgated in Government Notice No R275 dated 7 April 2010.

- 7 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. 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 are the semi-finals and finals of the PSL knock-out competitions which existed at the time.
- 8 The 2010 Regulations provide that subscription broadcasters, who acquire the rights to broadcast any of these events, are required to inform free-to-air broadcasters of the opportunity to tender for those rights. This ensures that no subscription broadcaster is 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. The effect of the obligation placed on subscription broadcasters is that free-to-air broadcasters are given access to the events on commercial terms to be agreed between the parties; however, in the event that there is a dispute between the parties about the reasonableness of those terms, they are able to have the dispute resolved expeditiously by ICASA.
- 9 ICASA's power to make regulations concerning the broadcasting of sports is derived from s 60 of the Electronic Communications Act 36 of 2005 (**ECA**). The section reads, in the 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” (emphasis added)*

- 10 The reference to the public interest in s 60(1) of the ECA is 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 national sporting 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.
- 11 The 2010 Regulations reflected an appropriate compromise between these competing interests whereas the 2018 Amendment Regulations did not.

### **Comments on the 2020 Amendment Regulations**

- 12 The PSL considers that the 2020 Amendment Regulations reflect an appropriate compromise between the competing interests identified in paragraph 10 above. In line with the approach adopted in the 2010 Regulations, the 2020 Amendment Regulations propose to confine national sporting events to cover only PSL matches that comprise semi-finals and finals of knock-out competitions (identified in the 2020 Amendment Regulations as the MTN 8, Telkom Knockout and Nedbank Cup events). As under the 2010 Regulations, the PSL accepts that this is a reasonable approach to listing national sporting events that are subject to regulation in terms of s 60(1) of the ECA.
- 13 The PSL also welcomes that, while subscription broadcasters are under an obligation to offer these rights to free-to-air broadcasters, the 2020 Amendment Regulations do not

propose to impose any restriction on the manner in which rights to these events may be sold by those who own them, including private sports organising bodies such as the PSL (which regulation would be beyond the scope of ICASA's statutory powers).

- 14 The PSL, therefore, supports the finalisation and implementation of the 2020 Amendment Regulations in their current form, insofar as they relate to events organised by the PSL. The PSL does, however, have one small comment on the 2020 Amendment Regulations, which is made in the interests of ensuring accuracy and clarity of the final regulations.
- 15 The 2020 Amendment Regulations propose to list "Telkom Knockout" under the amended regulation 5. However, the Telkom Knockout Cup does not currently exist. While this event was historically organised by the PSL, it was cancelled this season following Telkom's decision not to renew its partnership with the PSL.
- 16 The PSL accordingly suggests that "Telkom Knockout" be deleted from the list of national sporting events proposed to be included in regulation 5 of the 2020 Amendment Regulations.
- 17 Subject to this proposed amendment, the PSL considers the 2020 Amendment Regulations to reflect a reasonable approach by ICASA to the listing of national sports events in the national interest in terms of s 60 of the ECA, and accordingly supports their finalisation and implementation as final regulations.