

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

In the matter of:

INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

SARU's LEGAL SUBMISSIONS

INTRODUCTION

- 1 On 12 April 2019, ICASA published a Draft Findings Document on the Inquiry into Subscription Television Broadcasting Services (“**the Inquiry**”). The Draft Findings Document was published in terms of section 4B of the ICASA Act read with section 67(4) of the ECA.
- 2 Along with other stakeholders, SARU made written submissions on the Draft Findings Document. Its written submissions are dated 14 October 2019. It has been offered an opportunity to make oral submissions on 14 January 2021. This document outlines SARU's oral submissions and must be read with its written submissions dated 14 October 2019 and the slide presentation that will be submitted to ICASA for purposes of the oral presentation. This document focuses on the legal concerns raised in the slide presentation.

- 3 The Draft Findings Document (“**Draft Findings**”) proposes the imposition of the following licence terms and conditions (“**licence conditions**”) in terms of section 67(4) of the ECA that would impact on SARU:

- “1.6.1.1 Reducing contract duration and prohibiting automatic renewal of contracts – the Authority finds that competition becomes ineffective when a licensee with significant market power enters into exclusive contracts with a duration of five or more years. The Authority proposes to limit the duration of exclusive contracts entered into by a licensee with significant market power to three years.*
- 1.6.1.2 The Authority further found instances where long term exclusive contracts were renewed without the rights owner going back to the market. In order to deal with this challenge, the Authority proposes to prohibit the automatic renewal of contracts entered into by a licensee with significant market power.*
- 1.6.1.3 Rights splitting – this involves splitting content rights into packages and selling them to more than one distributor – The Authority finds that the current practice of allowing a ‘winner-takes-all’ outcome only serves to limit entry into the market.*
- 1.6.1.4 Unbundling – Similar to rights splitting, unbundling allows rights to be held by more than a single distributor. The focus of unbundling is on the modes of distribution, that is, allowing rights to be held simultaneously by subscription, free-to-air or OTT service providers. Currently, Multichoice holds the rights to all distribution platforms, thus limiting entry by other distributors. The Authority finds this to result in ineffective competition in the identified markets.*
- 1.6.1.5 Wholesale must-offer – wholesale must-offer allows or obliges a licensee with significant market power that wins rights to offer them to downstream distributors on terms and conditions imposed by the Authority. The details of a wholesale-must-offer condition will be contained in Regulations, should the Authority choose to go ahead with the remedy.”*

- 4 SARU objects to the proposed licence conditions quoted above. It summarises its objections in two parts in the slide presentation:

- 4.1 The first part, i.e., slides 4 to 20, summarise the factual basis for SARU’S objection.

- 4.2 The second part, i.e., slides 21 to 28, summarise the legal concerns that arise from the first part.
- 5 In light of the legal concerns raised, it is SARU's submission, made on legal advice, that if the licence conditions are promulgated as envisaged in section 67(4) of the ECA in their current form, they would be open to legal challenge.
- 6 We deal with each of the legal concerns below.

ICASA'S LEGAL OBLIGATIONS (SLIDE 21, "*Introduction*")

- 7 It is trite that in the conduct of the inquiry and the imposition of any licence conditions in terms of section 67(4), ICASA exercises public powers. Its acts also constitute administrative action under PAJA.¹
- 8 As a result, ICASA is obliged to comply with the following minimum legal requirements:
- 8.1 It must act within the limit of the powers conferred by the ICASA Act and the ECA; and must ensure that any licence conditions that it imposes are authorized by section 67 of the ECA.
- 8.2 It must follow a rational process prior to imposing any licence conditions.
- 8.3 It must ensure that the licence conditions are substantively rational.

¹ Promotion of Administrative Justice Act, 3 of 2000.

8.4 It must comply with the provisions of PAJA and avoid any defects or irregularities that may result in the licence conditions being reviewable in terms of section 6(2) of PAJA.

8.5 In compliance with the Constitution, it must ensure that where the licence conditions threaten or infringe constitutional rights, they are justifiable under section 36 of the Constitution.² Section 36 of the Constitution applies because section 67(4) of the ECA entitles ICASA to make regulations and *inter alia* impose pro-competitive licence conditions. Regulations constitute a law of general application.

8.6 In general, it must act to advance the public interest in terms of section 192 of the Constitution, as well as the objects of the ECA in terms of section 2 of the ECA.

9 We submit that ICASA has so far not acted in accordance with some or all of the legal obligations identified above. It should rectify this position. Our reasons appear from the legal concerns summarised in the slides.

² Section 36 of the Constitution provides as follows:

“36 Limitation of rights —

(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”*

10 We turn to discuss those concerns.

SOME OF THE LICENCE CONDITIONS ARE *ULTRA VIRES* (SLIDE 22)

11 The principle of legality requires ICASA to only exercise powers that are conferred upon it by law,³ and not to act for an unauthorised purpose.⁴

12 In this Inquiry, ICASA purports to act in terms of section 4B of the ICASA Act read with section 67 of the ECA.

13 The nature and extent of the powers that ICASA can lawfully exercise in terms of these sections depend upon a proper interpretation of the relevant provisions. That interpretation requires the words used to be interpreted in their proper context and to give effect to the purposes of the ECA, including those of section 67.⁵

14 From the words used in section 67 of the ECA, it is clear that:

14.1 the power to impose appropriate pro-competitive licence conditions is in respect of those licensees found to have significant market power in order to remedy the identified market failure;

14.2 no similar power is conferred upon ICASA to regulate the manner in which rights owners, such as SARU, that are not licensees under the ECA may sell or licence their rights to licensees.

³ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at 400D-F; *Premier Foods (Pty) Ltd v Manojm NO and others* [2016] 1 All SA 40 (SCA) para 18.

⁴ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA) para 59.

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

15 This interpretation is consistent with the relevant context and purposes of section 192 of the Constitution, the ICASA Act and the ECA.

15.1 Section 192 of the Constitution authorises ICASA to regulate broadcasting.

15.2 Section 2 of the ICASA Act is consistent with section 192 of the Constitution regarding the statutory mandate of ICASA.⁶

15.3 The objects of the ECA in section 2 do not empower ICASA to interfere in the commercial activities of rights owners that are not licensees, nor does it empower ICASA to limit their freedom of contract. Even section 60(1) of the ECA does not confer such a power on ICASA. The power granted by section 60(1) is limited to subscription broadcasting services.⁷

16 A subscription broadcasting service is provided by a licensed person. Such a licence confers on the holder the privileges, and subjects him or her to the obligations, provided for in the ECA and specified in the licence.⁸

⁶ Section 2 provides as follows:

“2 Object of Act—

The object of this Act is to establish an independent authority which is to—

- (a) regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;*
- (b) regulate electronic communications in the public interest;*
- (c) achieve the objects contemplated in the underlying statutes.”*

⁷ Section 60(1) states:

- “(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.”*

⁸ See section 5 of the ECA, especially section 5(12).

Except for services exempted in terms of section 6 of the ECA, no person may provide any service without a licence.⁹

- 17 A person that is not a licensee under the ECA does not enjoy the privileges and is not subject to the obligations provided for in the ECA and specified in any licence.
- 18 The import of the discussion above is that ICASA is not empowered under the ECA and related legislation to regulate the affairs of sports federations, including their freedom to contract on any terms that are not prohibited by law. ICASA has no general powers to impose limitations on this freedom to contract under the guise of exercising powers under section 67(4) of the ECA.
- 19 To the extent that there may be a case for interference with contractual rights of non-licensees for reasons related to competition in relevant markets, that general power is conferred on the competition authorities under the Competition Act, 89 of 1998 (“**the Competition Act**”). This is clear from the remedial powers conferred in *inter alia* section 58 of the Competition Act, especially in subsections (1)(a)(ii), (vi) and (vii).¹⁰

⁹ Section 7 of the ECA.

¹⁰ Those provisions provide that:

“58. Orders of Competition Tribunal—

(1) *In addition to its other powers in terms of this Act, the Competition Tribunal may—*

- (a) *make an appropriate order in relation to a prohibited practice or an appeal referred to in section 43F, including— ...*
 - (ii) *ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;*
 - (vi) *declaring the whole or any part of an agreement to be void;*
 - (vii) *ordering access to an essential facility on terms reasonably required; ...”*

- 20 If the legislature intended ICASA to enjoy similar powers, i.e. to interfere with the contractual rights of non-licensees under section 67(4) of the ECA, it would have said so. The legislature has limited those powers to dealing only with licensees to achieve effective competition in relevant markets, falling within the ambit of the ECA, where there is ineffective competition.
- 21 In contrast to ICASA's limited powers as discussed above, the intention, wording and effect of four of the quoted licence conditions limit the contractual rights of non-licensees, such as SARU.
- 21.1 Paragraph 1.6.1.1 limits the rights of non-licensees such as SARU by precluding them from offering and concluding exclusive contracts of a duration longer than 3 years.
- 21.2 Paragraph 1.6.1.2 is expressly intended to prohibit automatic renewal clauses in contracts between non-licensees such as SARU and licensees.
- 21.3 Paragraph 1.6.1.3 compels sellers of broadcasting rights, which are non-licensees, such as SARU, to split the rights they wish to sell or licence into packages and selling them in that form. That the intention is to regulate the conduct of rights owners in this regard is also clear from the Draft Findings at paragraph 8.3.8, page 178, where the following is stated:

“Imposing rights splitting

8.3.8 Rights splitting requires a rights owner to split content rights and sell them to more than one broadcaster. The design of the split is paramount to ensure wider access and benefit to the rights owner. ...”

21.4 Paragraph 1.6.1.4 will prohibit owners of broadcasting rights, such as SARU, from selling them to one subscription broadcasting service provider on an exclusive basis.

22 To the extent that the proposed licence conditions purport to limit or regulate the rights of non-licensees such as SARU, they exceed the powers of ICASA and are not authorised by section 67(4) of the ECA.

NO REGULATORY IMPACT ASSESSMENT CONDUCTED (SLIDE 23)

23 It is now well established that the principle of legality requires ICASA to follow a rational process in the exercise of its public powers. Such exercise of public powers include conducting the Inquiry and promulgating any regulations that impose pro-competitive licence conditions under section 67(4) of the ECA.

24 In the *DA* case,¹¹ the Constitutional Court explained the requirement for a rational process as follows:

“[36] The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.” (Emphasis added)

¹¹ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).

- 25 We submit that in the present context, a RIA or similar process is a necessary means to attain the purpose for which the power was given to ICASA under section 67(4) of the ECA. This is so because absent a RIA, ICASA will fail to investigate and inform itself of the costs and benefits of the licence conditions that it proposes to impose. If those costs exceed the benefits to be attained, then the imposition of all or some of the conditions could hinder, and even defeat, the purpose of attaining pro-competitive outcomes in the relevant markets that ICASA has identified.
- 26 ICASA itself has in the past identified and acknowledged the need for a RIA to determine the costs and benefits of regulatory interventions. It said the following in relation to fixed line local loop unbundling:

“...the costs and benefits of the unbundling of the various forms of fixed line local loop. The introduction of supplementary LLU regulations and a Market Review will be linked to the outcome of the Regulatory Impact Assessment.”¹²

- 27 As summarised in slide 23, the failure to conduct a RIA prior to imposing any licence conditions means that:

27.1 ICASA has not properly investigated and informed itself of the potential adverse effects of the proposed remedies on sports federations and consumers; and

27.2 whether the measures it wishes to adopt are likely to achieve the purposes of section 67(4) in a manner that is proportional, i.e., does

¹² Notice 889 of 2011, Independent Communications Authority of South Africa, ICASA Framework for Introducing Local Loop Unbundling, Findings Note, 29/11/2011.

not unnecessarily and adversely place sports federations such as SARU at the risk of failing in their businesses and in fulfilling their statutory obligations.

- 28 The Draft Findings refer to a Consumer Survey that ICASA commissioned in September 2018.¹³ Although the Consumer Survey elicited consumer preferences and similar matters, it notably did not involve any cost benefit research or analysis.
- 29 It is also clear from the Draft Findings that ICASA gave scant regard to SARU's written submissions of 4 October 2019. There is no evidence at all that ICASA in fact gave any or proper regard to the likely adverse financial consequences that SARU will experience if the licence conditions are imposed and what this would do to its sustainability. The Draft Findings in a page and a half simply summarises some of the issues that SARU raised in its written submissions.¹⁴
- 30 Therefore, ICASA has so far done nothing that would approximate a RIA.
- 31 The facts and concerns recorded in slides 13 to 20 show that in the unique conditions of the SA market, where SARU receives wholly negligible funding from the government, the proposed remedies are likely to cause the financial demise of SARU. If this happens, there may be no alleged premium content that SARU would be able efficiently to supply into the subscription broadcasting markets at all. The purpose of section 67(4), and indeed of the ECA itself, will have failed.

¹³ At p 30.

¹⁴ See Draft Findings pp 173-174.

- 32 For the reasons above, a decision to impose the licence conditions without any prior RIA or similar process would render such a decision unconstitutional.

THE LICENCE CONDITIONS ARE IRRATIONAL (SLIDE 24)

- 33 In addition to rationality as to process, the licence conditions must be substantively rational. If not, they would be equally unconstitutional.
- 34 The *DA* case referred to above also restated the relevant rationality test. It said:

“[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.”

- 35 The determination of the relationship between means and ends is an objective enquiry, assessed on the available evidence.
- 36 If there is no sufficient objective evidence that the means adopted, in this case the licence conditions, are likely to achieve the purpose of section 67(4), namely the introduction of effective competition in markets that have been identified to have ineffective competition, then there is no “*rational relationship*” and ICASA’s decision would be unconstitutional.

37 The facts and concerns summarized in slides 13 to 20 show that no such rational relationship exists in relation to the position of SARU in the market. On the contrary, SARU as a provider of sports broadcasting rights is likely to experience adverse financial consequences if the licence conditions are imposed as they currently stand. This may result in SARU's failing in its role. If this happens, it would defeat the very purpose of section 67(4), to the extent that rugby may be a driver of demand in subscription broadcasting services markets. The slides show that:

37.1 if implemented in their current form, the licence conditions would have dire consequences for SARU's financial well-being. This would necessarily prevent it from supplying the alleged premium content, which will in turn harm competition and ultimately the public interest; and

37.2 there is no clear evidence that the licence conditions are necessary, especially in respect of rugby, in that it is unclear that rugby is a driver of demand in subscription broadcasting markets. The Consumer Survey does not single out rugby as a driver of such demand. As SARU states at page 13 of its written submissions of 4 October 2019:

"2.3.5 The feedback of the Consumer Survey also demonstrates that it is possible to attract and retain audience without access to sports content, least of all rugby related content as consumers value a wide array of other content such as general entertainment."

38 The imposition of the licence conditions would in the circumstances be unconstitutional.

UNLAWFUL ADMINISTRATIVE ACTION (SLIDE 25)

39 ICASA exercises public powers and performs a public function in terms of section 67 of the ECA; its decision to impose the licence conditions will adversely affect the rights of *inter alia* sports federations such as SARU; and the licence conditions once promulgated will have an external legal effect, i.e. prohibiting certain contractual terms by SARU and subscription broadcasting service licensees to whom SARU sells or licences its rights.¹⁵ In the circumstances, PAJA applies to ICASA's process and its decisions in terms of section 67(4) of the ECA.

40 PAJA requires that a decision be rationally connected to:

40.1 the purpose for which it was taken;

40.2 the purpose of the empowering provision;

40.3 the information before the administrator; and

40.4 the reasons given for it by the administrator.¹⁶

41 It is also a requirement under PAJA that a decision must not contravene any law and must be authorised by the empowering provision; and not be materially influenced by an error of law.¹⁷

42 For the reasons discussed above, the licence conditions are not rational and are not authorised by section 67(4) of the ECA.

¹⁵ See the discussion in *Telkom SA Soc Limited v Mncube NO and Others; Mobile Telephone Networks (Pty) Ltd v Pillay NO and Others; Cell C (Pty) Limited v The Chairperson of ICASA and Others; Dimension Data Middle East & Africa (Pty) Ltd t.a Internet Solutions v ICASA and Others* (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93 (26 February 2016), which applies with equal force.

¹⁶ Section 6(2)(f)(ii).

¹⁷ Section 6(2)(f)(i) and 6(2)(d).

- 43 Since it must be accepted that ICASA proceeds from the premise that it is empowered to impose the proposed licence conditions, and having demonstrated that if it were to impose the licence conditions it will have exceeded its powers, it follows that a decision to ultimately impose the licence conditions as they currently stand would be materially influenced by an error of law.
- 44 PAJA further requires that administrative action not be so unreasonable that no other reasonable decision maker would have so exercised the power or performed the function.¹⁸
- 45 The requirement of reasonableness is different from that of rationality. It sets a higher threshold for decision makers to clear.
- 46 The factors relevant to determining reasonableness were usefully summarised by the Constitutional Court in *Bato Star*¹⁹ as follows:

“[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. ...”

- 47 The following factors serve to demonstrate that the decision to impose the licence conditions would be unreasonable within the meaning of PAJA and therefore unlawful:

¹⁸ Section 6(2)(h).

¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

- 47.1 The licence conditions will impact a range of persons, their lives and well-being, including at the very least of SARU, rugby players, administrators and consumers. Yet, ICASA has not conducted a RIA to properly investigate and inform itself of the costs and benefits of the licence conditions.
- 47.2 Notwithstanding that the impact on SARU was set out in its written submissions of 4 October 2019, those submissions were not given proper regard by ICASA in its Draft Findings. They were given scant regard in one and a half page (at pages 173 to 174), with no mention of the potential adverse financial consequences on SARU. This failure also implicates procedural fairness under PAJA and would render the ultimate decision procedurally unfair and reviewable under section 6(2)(c) of PAJA.
- 47.3 ICASA has not properly taken into account the competing interests affected by the licence conditions. If it had done so properly, it would have realised that SARU's interests and of those that it represents and support, including consumers, would be detrimentally affected and, critically, it would have established that the detrimental effects far outweighed the benefits which the licence conditions seek to achieve.
- 48 For the reasons above, the proposed licence conditions would also fall foul of PAJA and will be susceptible to judicial review if implemented in their present form.

THE LICENCE CONDITIONS BREACH CONSTITUTIONAL RIGHTS (SLIDES 26-27)

Section 22 of the Constitution (slide 26)

49 Section 22 of the Constitution provides as follows:

“22 Freedom of trade, occupation and profession _

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

50 The section comprises two elements: the right to choose a trade, occupation or profession freely, and the proviso that the practice of a trade, occupation or profession may be regulated by law. Though both the “*choice*” of trade and its “*practice*” are protected by section 22, the level of constitutional scrutiny that attaches to limitations on each of these aspects differs.

51 If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in section 36(1). If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights.²⁰

²⁰ *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) para 65

- 52 The financial viability of SARU's and its members' largely depends on their ability to sell or licence sports broadcasting rights to broadcasters licensed under the ECA.
- 53 The proposed licence conditions do not negatively impact upon SARU's and its members' choice of this trade. However, they significantly negatively impact upon, and regulate, the manner in which it and its members may practice that trade, i.e. how and on what terms they may sell the sports broadcasting rights to subscription broadcasting licensees. For this reason, the licence conditions will only pass constitutional muster under section 22 of the Constitution if they are rational and do not infringe any other rights in the Bill of Rights.
- 54 The rationality test requires that the licence conditions be rationally related to a legitimate governmental purpose, which is the purpose of section 67(4) of the ECA, and not infringe any of the rights in the Bill.²¹
- 55 For the reasons already advanced above, the licence conditions are irrational. If implemented in their current form they would be unconstitutional for their breach of section 22.

Section 25 of the Constitution (slide 27)

- 56 Section 25(1) of the Constitution provides that:

“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

²¹ *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) para 73.

- 57 Intellectual property rights, including goodwill and reputation, constitute property under section 25(1) of the Constitution.²² Sports broadcasting rights constitute intellectual property. They are, therefore, property under section 25(1) of the Constitution.
- 58 The licence conditions will result in the interference with the rights of SARU and its members in a significant manner.²³ They will:
- 58.1 completely limit the rights of SARU and its members to package their property rights in the most efficient and financially sustainable manner in their offers, negotiations and contracting with subscription broadcasting licensees; and
- 58.2 completely negate the ability to offer their property rights on an exclusive basis to subscription broadcasting services licensees.
- 59 Precluding exclusivity will have a devastating financial impact on SARU. Licensing of broadcasting rights on an exclusive basis attracts a significant premium. Without exclusivity, the value of the broadcasting rights would diminish by about 80% to 100%.
- 60 Therefore, if implemented, the licence conditions will produce disproportionate and irrational consequences in relation to the purposes of section 67(4) of the ECA. We have already addressed these points above.

²² *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007(6) SA 350 (CC) paras 30, 35, 36, 41-42. See also the Constitutional Court's liberal approach to property under the Constitution in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development* 2015 (9) BCLR 1052 (CC) paras 57-72.

²³ See *City of Tshwane Metropolitan Municipality v Link Africa and others (Dark Fibre Africa (RF) (Pty) Ltd and others as Intervening Parties* 2015 (11) BCLR 1265 (CC) para 167 for the requirement that the interference with property must be significant for purposes of section 25(1) of the Constitution.

61 If imposed, the irrationality of the licence conditions would lead to a breach of section 25(1) for the reasons advanced above.

REMEDIES UNDERMINE ICASA'S MANDATE (SLIDE 28)

62 Overall, if implemented the licensing conditions would undermine ICASA's mandate to regulate in the public interest because their adverse effects on SARU and the development of the sport of Rugby will be far-reaching. The public whose interests are at stake include SARU and its structures, sports persons, umpires, sports health practitioners and consumers.

63 This outcome will be contrary to section 192 of the Constitution.

64 The licence conditions will also undermine the objects of the ECA to:

64.1 encourage investment;

64.2 promote the interests of consumers;

64.3 refrain from undue interference in the commercial activities of licensees; and

64.4 promote stability in the ICT sector.

CONCLUSION (SLIDE 29)

65 The licence conditions discussed in this presentation should be abandoned in their current form as they:

65.1 exceed the statutory powers of ICASA;

- 65.2 are the product of an irrational process in the absence of a RIA or similar assessment;
 - 65.3 are substantively irrational;
 - 65.4 are not supported by evidence;
 - 65.5 diminish exclusivity, which is an internationally accepted principle;
 - 65.6 are likely to have adverse consequences for the development of rugby;
 - 65.7 are contrary to the Constitution and ECA and may undermine statutory obligations imposed upon sports federations.
- 66 If ICASA wishes to proceed with any potential remedies under section 67(4), it should at the very least:
- 66.1 first conduct a RIA or similar assessment;²⁴
 - 66.2 secondly, and in terms of section 3(4) of the ECA, consider the Draft White Paper on Audio and Audio-visual Content Services Policy Framework: A New Vision for South Africa 2020, as issued by the Minister of Communications and Digital Technologies on 9 October 2020 under Government Gazette 43797 before imposing any licence conditions.

²⁴ The Draft Findings refer to a separate regulation process at p 176 para 8.3.2. This ought to include a RIA.

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**INSTRUCTED BY WEBBER WENTZEL
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