MEMORANDUM:

PROPOSED APPROACHES FOR LITIGATION AGAINST ICASA'S 2021 OWNERSHIP REGULATIONS

THE REGULATIONS

1. The Regulations require an individual licensee to comply with the following:

    1.1. Regulation 3(4) provides that an individual licensee must have at least 30% of its ownership equity held by historically disadvantaged groups ("HDG"), to be determined using the flow through principle ("the HDG Equity Requirement").

    1.2. Regulation 4(1) goes even further and provides that, in addition to complying with the HDG Equity Requirement, an individual licensee must also comply with a 30% Black Equity Requirement, in terms of which a minimum of 30% of an individual licensee's equity ownership must be held by black people ("the Black Equity Requirement") – the operation of this is, however, suspended until a future commencement date to be published by ICASA by virtue of Regulation 7(5) and further consideration of the Black Equity Requirement is thus not required at this stage.

    1.3. Finally, Regulation 4(4) requires that an individual must have a minimum B-BBEE contributor status level of four ("the Contributor Status Requirement").

Time periods

2. In order to determine by when it is necessary to comply with the Regulations, one must have regard to Regulation 7 which provides for certain transitionary periods. In particular, Regulation 7(3) provides that large individual licensees must comply with the Regulations within a period of 36 months of the promulgation of the Regulations (as the Regulations were promulgated on 31 March 2021, this allows for a transitional period to apply until 31 March 2024). However, it is important to note that Regulation 7(4) states that during the transitional period, licensees must achieve and comply with certain set B-BBEE targets as per Appendix 2 of the Regulations and must submit annual progress reports to ICASA indicating compliance with the set targets.

Penalties

3. Regulation 6 makes provision for the following penalties, should an individual licensee be unable to comply with the targets as set out in the Regulations:

    (1) A person that submits false, misleading or inaccurate information to the Authority is guilty

of an offence and subject, on conviction to a fine of less than R50 000 but not exceed R5 million.

(2) An Individual Licensee that contravenes regulations 3(4) and/or 4(1) is liable to a fine of whichever is greater between an amount not exceeding R5 million or 10% of the Licensee's annual turnover of its licensed services. The CCC shall, on a case by case basis recommend the time period within which the Licensee ought to remedy the non-compliance with regulation 3(4) and/or 4(1).

4. It is clear that although the Regulations make provision for a penalty in the case of noncompliance with the HDG Equity Requirement (as well as the Black Equity Requirement once this comes into operation), no explicit provision is made for a penalty where an individual licensee fails to meet the Contributor Status Requirement which this gives rise to the question of what repercussions such a failure may have.

5. The Regulations themselves are silent on this aspect, however, it seems that a failure to comply with the targets set for the Contributor Status Requirement may have an impact on the renewal of an individual licensee's existing licences. However, as the Regulations do not deal with this, it may be possible to argue that a renewal should not be prohibited. This is potentially a matter that litigation would have to provide clarity on as, according to our information, clear communication is not forthcoming from ICASA.

LITIGATION PROSPECTS AND URGENCY

6. Bearing in mind that the relevant parts of the Regulations are set to become enforceable on 30 March 2024 and that the industry has been aware of the looming requirements and deadline for a long time, it is unlikely the courts would entertain an application on the basis of urgency and deliver judgment before 30 March 2024.

7. The possible forfeiture of judicial urgency notwithstanding, Sakeliga believes that the Regulations should be challenged, albeit in the normal course, to prevent the proliferation of BEE in the telecommunications and internet services industry. We are particularly concerned about the linkage of BEE requirements to licence conditions which if not met can occasion penalties and other disadvantages for license holders in the industry. This is a practice that needs to be upended before it becomes a settled precedent for the industry, with likely increases of the 30% requirement over time.

8. We have held discussions with companies in the internet services industry and based on advice from our attorneys and a preliminary opinion of counsel we are satisfied that litigation against the Regulations can succeed on various grounds.

9. While we are of the view that the case has reasonable prospects of success, we are mindful of the reality that there is no guarantee of success. We also realise that the case may progress to the Supreme Court of Appeal and Constitutional Court.

10. Notwithstanding the aforesaid, we believe that it is pivotal for the industry and businesses and consumers in South Africa that the Regulations be meaningfully challenged in court.

THE PROPOSED APPROACHES IN LITIGATION

11. Subject to the advice of the lead counsel in the matter, we propose to mount the following constitutional challenges against the Regulations in court:

    11.1. The offences and penalties in the Regulations are *ultra vires* empowering legislation and therefore unlawful and unconstitutional ("*ultra vires* approach");

    11.2. The Regulations contravene ICASA's obligations to implement the ICT Sector Code, and are unlawful to the extent of its inconsistency with the ICT Sector Code ("Sector Code approach");

    11.3. The April 2022 amendments to the Regulations were undertaken in a procedurally unfair manner and are unlawful ("amendments approach");

    11.4. The Regulations unreasonably interfere with the right to choose a trade, occupation, or profession freely ("unreasonableness approach").

    11.5. The Black Equity Requirement unfairly interferes with the vested rights and legitimate expectations of existing license holders, and its promulgation constitutes unfair administrative action ("existing rights approach").

The *ultra vires* approach

12. The most harmful aspect of the Regulations is the ostensible powers that ICASA arrogates for itself to impose penalties for non-compliance with the empowerment requirements.

13. We are firmly of the view that an argument can be made out that the contraventions and penalties imposed in the Regulations are *ultra vires* the ICASA Act. The powers to create contraventions and penalties in regulations related specifically to the failure to promote empowerment goals are not clearly sourced in law. It appears that neither the ICASA Act or Electronic Communications Act ("ECA") permit contraventions and penalties of this nature to be created in Regulations.

14. Even, thus, if a court were to uphold the constitutionality of the Regulations, we would like to see at least the contraventions and penalties struck out for being *ultra vires* and unconstitutional.

The *Sector Code approach*

15. ICASA is a "public entity" for the purpose of the B-BBEE Act and it must accordingly comply with section 10(1) of the B-BBEE Act which provides that a public entity must apply any relevant code of good practice issued in terms of this B-BBEE Act when determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law, *inter alia*.

16. In our view, an argument can be made that ICASA is bound by its existing obligations in the ICT Sector Code, which was promulgated in terms of section 9 of the B-BBEE Act.

17. On ICASA's own admission in litigation against SMS Portal (Pty) Ltd, the Regulations deviate substantially from the empowerment scheme provided for in the ICT Sector Code. In particular, the Regulations:

    17.1. Place an undue emphasis on the ownership aspect of B-BBEE, while "as a general rule one element cannot be prioritized over another" (ICASA's own submission).

    17.2. Go beyond only requiring a specific B-BBEE contributor status level, and additionally impose a direct black ownership percentage stand-alone condition for individual licensees.

    17.3. Deviate from the use of the modified flow-through principle in the ICT Sector Code and employs invariably the flow-through principle to determine shareholding by Black people through legal entities.

    17.4. Exclude from the definition of "B-BBEE Contributor Status Level" certain statements from the ICT Sector Code that provide for *inter alia* deemed ownership at asset sales.

18. Viewed in totality, in prescribing the HDG Equity Requirement, and Contributor Status Requirement and Black Equity Requirement (the latter only applying to Individual Licensees), the Regulations adopt empowerment requirements selectively from both the ECA and the ICT Sector Code. The result is an enhanced and tailor-made B-BBEE regulatory scheme that deprives licensees of prominent relief mechanisms ordinarily found in the ICT Sector Code.

19. An argument can be made that in making empowerment regulations ICASA is obliged to tend to its requirements in section 10 of the B-BBEE Act, including applying the ICT Sector Code. Applying the ICT Sector Code precludes designing and imposing a similar but more onerous scheme on licensees than the one envisaged in the Sector Code itself.

20. The Sector Code attack is attractive because ICASA has made notable concessions in the SMS Portal case with regard to their obligation to not create Regulations outside the bounds of the ICT Sector Code.

The amendments approach

21. ICASA amended the Regulations in April, 2022, allegedly to correct *errata* in the initial regulations. The opportunity was then also used to make substantive changes to the Regulations, including changing the definition of "B-BBEE Contributor Status Level" to allow ICASA to only consider certain Statements in the ICT Sector Code, leading to more onerous requirements in the Regulations.

22. These changes were affected without any form of a public participation process and without consulting stakeholders in the industry. We accordingly propose that the changes were undertaken in a procedurally unfair manner and that the court might likely be inclined to agree.

The unreasonableness approach

23. At the hand of factual evidence by individual licensees demonstrating that it would be unfeasible to comply with the Black Equity Requirement, we propose that an argument could be made that the Black Equity Requirement constitutes unreasonable infringements of Constitutional rights, in particular the right to choose a trade, occupation or profession freely.

The existing rights approach

24. Lastly, we propose that the Regulations introduce new license conditions that have the effect of varying the license conditions that existing licensees would have undertaken to comply with before their licenses were granted.

25. We propose further to make out a case that the Regulations have a negative external impact on the rights and legitimate expectations of at least some existing individual license holders. It could successfully be argued that the promulgation of some of the requirements in the Regulations constitutes unfair administrative action.

CONCLUSION

26. We have outlined five different approaches which we propose should be employed in litigation against the Regulations. Our legal team is ready to appoint senior counsel and move ahead with the case. The costs of the court case should be in the region of R1.2 million, excluding possible appeals.

19 December 2023

Tian Alberts

Legal and Liaison Officer: Sakeliga