



**PULPIT MEDIA GROUP**

**Attention:** Mr Peter Mailula  
**Email:** PMailula@icasa.org.za

4 May 2020

Dear Mr Mailula

**THE PULPIT MEDIA GROUP: FORMAL RESPONSES TO THE DRAFT REGULATIONS IN RESPECT OF LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE**

1. INTRODUCTION

1.1. Radio Pulpit and Radio Cape Pulpit are both class community of interest (Christian) sound broadcasters (collectively the Pulpit Media Group (PMG)) and make the following submission in response to the Draft Regulations in respect of Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code (the Draft Regulations) contained in Notice 91 published in Government Gazette No. 43021 dated 14 February 2020.

1.2. PMG thank ICASA for the opportunity of providing it with these submissions and request the opportunity to participate at its oral hearings in relation to the Draft Regulations in due course.

2. THE POSITION OF CLASS LICENSEES SUCH AS CAPE PULPIT AND RADIO PULPIT IN THE ECA

2.1. Both Cape Pulpit and Radio Pulpit are proud of the strides they have made to become certified Level Four Broad-based Black Economic Empowerment (BBBEE) companies in terms of the ICT Sector Code provided for in terms of the Broad-based Black Economic Empowerment Act, 2003 (the BBBEE Act).

2.2. Further, PMG considers itself a leader in providing multi-lingual programming on the Radio Pulpit and Cape Pulpit sound broadcasting services.

2.3. However, it is of the opinion that the Draft Regulations do not cater for non-profit entities such as Cape Pulpit and Radio Pulpit and would be open to legal challenge were they to be prescribed into law as currently drafted.

2.4. The licensees in respect of both Cape Pulpit and Radio Pulpit are both non-profit companies incorporated in terms of section 4 of Schedule 1 to the Companies Act, 2008 (the Companies Act) as non-profit companies without members.

2.5. The effect of this is that there are no members, shareholders, or owners, in either Radio Pulpit or Cape Pulpit as is in keeping with a non-profit company without members as is provided for in terms of the Companies Act.

2.6. The effect of this is that “ownership” of a non-profit company without members cannot be determined.

2.7. The statutory licensing processes for individual and class licences are very different. Section 5(8) of the Electronic Communications Act, 2005 (the ECA) refers to “applicants” for individual licences or “registrants” for class licences.

2.8. Applications for individual licences are dealt with in section 9 of the ECA and section 9(2)(b) specifically provides for an invitation to apply for an individual licence to include the percentage of equity ownership to be held by persons from historically disadvantaged groups (HDGs) which must not be less than 30% (emphasis added).

2.9. Registrations for class licences are dealt with in section 16 of the ECA and it provides that ICASA may issue a class licence to a registrant upon receipt of a written application in the manner prescribed and which satisfies the conditions provided for in section 5(8). Section 5(8) of the ECA provides, in its relevant part, that when applying for a licence, a registrant must demonstrate that the registrant... in the case of:

(a) A natural person, is a citizen of the Republic; or

(b) A juristic person, is registered under the laws of the Republic and has its principal place of business located within the Republic.

2.10. There is no requirement, in the ECA, for a class licence registrant to comply with the percentage set asides as is required in terms of section 9(2)(b) of the ECA for individual licence applicants. This is undoubtedly because of the nature of class vs individual licences and the differences in the scope of services that can be provided thereunder.

### 3. AD SECTION 3 OF THE DRAFT REGULATIONS

It is undoubtedly as a result of the fact that section 9(2)(b) of the ECA does not apply to class licences that ICASA has excluded class licences from the application of the 30% HDG ownership requirement as is expressly provided for in section 3(1) of the Draft Regulations.

### 4. AD SECTIONS 4 AND 7 OF THE DRAFT REGULATIONS

- 4.1. Section 4 does not specify whether or not it is applicable to class and/or individual licences. Consequently it must be assumed that it was intended to apply to both class and individual licences. If PMG is wrong about this and it is intended to apply to individual licences only, then PMG respectfully requests ICASA to make this clear in the final regulation to be prescribed.
- 4.2. Sections 4(1) and 4(4) purport to require, *inter alia*, that licensees are to have an equity ownership interest by Black people of at least 30% at all times.
- 4.3. The ECA, at section 50(1), specifically requires community broadcasting licensees to be “fully controlled by a non-profit entity”. Further the very definition of a “community broadcasting service” in section 1 of the ECA provides that this means “a broadcasting service which (a) is fully controlled by a non-profit entity...”.
- 4.4. As has been set out above, the ECA expressly requires class community broadcasting service licensees such as Cape Pulpit and Radio Pulpit to be non-profit entities and the Companies Act makes express provision for not-for-profit companies to not have members. The effect of this is that the “ownership” of such a not-for-profit entity does not arise. Both Cape Pulpit and Radio Pulpit are such entities. Neither of these licensees (as is the case with all similarly-situated not-for-profit companies without members) can speak of their shareholders or owners as such, as these do not exist in terms of the legal requirements of their corporate structures as provided for in the Companies Act.
- 4.5. As ICASA is fully aware, Radio Pulpit and Cape Pulpit comply with these non-profit requirements and indeed have been specifically structured in terms of the Companies Act to be so compliant. In doing so, it does not have owners because it is incorporated in accordance with the provisions of the Companies Act dealing with not-for-profit companies without members.
- 4.6. Section 7 of the Draft Regulations specifically provides that “[i]n line with section 10 of the BBBEE Act, the applicable ICT Sector Codes will apply in the granting of Individual and Class licences.” However, the prescribed ICT Sector Code contained in Notice 1387, Government Gazette No. 40407 dated 7 November 2016 (the ICT Sector Code) expressly states, in section 2.5 that “Non-Profit Companies... generally do not have any beneficial ownership and are *incapable of evaluation of Black ownership* under Code Series AICT100.” (Emphasis added).
- 4.7. Consequently, ICASA’s purported reliance on the ICT Sector Code (as referenced in section 10 of the BBBEE Act) as a basis for a 30% Black-ownership requirement for all licensees, is *ultra-vires* the provisions of the ICT Sector Code itself which specifically recognises that licensees that are not-for-profit companies without membership “are incapable of evaluation of Black ownership” under the Code.

4.8. PMG recognises the importance of BBBEE in transforming South Africa's society and economy and supports the social justice and equality demands underpinning the national BBBEE policy and ICASA's own policies in this regard. However, the 30% Black ownership requirement is simply *ultra vires* ICASA's powers in terms of the ECA and BBBEE Act when read with the ICT Sector Code as is required in terms of section 10 of the BBBEE Act.

4.9. Both Pulpit Radio and Cape Pulpit are proud of their status as Level 4 BBBEE companies and welcome the opportunity contribute to the transformation of the sound broadcasting sector. However, the provisions of section 4 require amendment to deal with class community broadcasting licensees that operate as non-profit companies without membership. In this regard, PMG suggests the following substitutions of sub-sections (1) and (4) of section 4 of the Draft Regulations:

4.9.1.4(1) to read: "On application, all applicants must have a minimum level 4 BBBEE status and must, with the exception of a not-for-profit company without members, have a minimum of 30% ownership by black people."; and

4.9.2.4(4) to read: "a licensee, except a not-for-profit company without members, must ensure that its ownership equity held by black people is not lower than 30% at any given time during the licence period."

## 5. AD SECTION 8: CONTRAVENTIONS AND PENALTIES

5.1. PMG notes the provisions of section 8(1) but queries the legality of the provisions that allow for a jail term for the submission of false, misleading, or inaccurate information. In this regard, section 17H(1)(c) read with section 17H(2)(a) of the ICASA Act, 2000, (the ICASA Act), provides that the penalty for a making a false statement is a fine not exceeding R5 000 000.00. The ICASA Act does not make provision for a sentence that includes imprisonment for such an offence.

5.2. Consequently, PMG is of the respectful view that the provisions of section 8(1) are *ultra vires* the provisions of the ICASA Act and so section 8(1) would therefore be unlawful if enacted as is. We respectfully submit that the section 8(1) be amended by putting a period after the words "(Five million rand)" and deleting the rest of that section which deal with the proposed periods of imprisonment.

6. PMG thanks ICASA for the opportunity of making these submissions. Please do not hesitate to contact the writer should you have any queries.

**Kind Regards  
Yours Faithfully**



**Dr R Petersen  
Executive Director**



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LP McCrystal (Chairperson), RJ Petersen (Managing Director), M Schalekamp, PA Botha.