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**THE DISCUSSION DOCUMENT ON ICASA'S DISCUSSION DOCUMENT:
OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE
APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR
30 JUNE 2017
PUBLISHED IN GOVERNMENT GAZETTE NO. 40759, NOTICE 274 OF 2017**

1. INTRODUCTION

- 1.1. We refer to Notice Number 274, published in Government Gazette No. 40759 dated 31 March 2017 in terms of which ICASA's Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of The ICT Sector Code in the ICT Sector was published for public notice and comment ("the Notice"), the submission date for which was extended to 30 June 2017 by Notice 460 published in Government Gazette 40915 dated 13 June 2017.
- 1.2. Kagiso Media (Pty) Ltd ("Kagiso Media") is a black-controlled media company which has several commercial broadcasting interests and is therefore well placed to comment on issues of concern regarding the contents of the Notice.
- 1.3. As Kagiso Media is not active in all aspects of the ICT sector, it will not necessarily make submissions on all the issues canvassed in the Notice.
- 1.4. In this submission, Kagiso Media will refer to previous policy pronouncements on ownership and control related matters by ICASA or its predecessor, the Independent Broadcasting Authority ("the IBA"), namely:
 - 1.4.1. the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences by the IBA, 2004 (the 2004 Position Paper);
 - 1.4.2. the Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communication Networks Services by ICASA, 2011 ("the 2011 Findings Document");
 - 1.4.3. the ICASA Final Report: Review of Broadcasting Regulatory Framework Towards a Digitally Converged Environment in South Africa, 2013; (the 2013 Final Report)

2. THE PROCESS

- 2.1. Kagiso Media wishes to point out that ICASA has been trying to make progress on ownership and control reform for many years. Sadly, none of the policy positions provided for in the 2004 Position Paper, the 2011 Findings Document or the 2013 Final Report have in fact been implemented.
- 2.2. ICASA understands ownership and control provisions (except for those relating to Broad-Based Black Economic Empowerment ("BBBEE")) have not been updated since the passage of the Independent Broadcasting Authority Act, 1993 ("the IBA Act"), this has resulted in a stultifying of the commercial broadcasting sector for nearly a quarter of a century.

- 2.3. Consequently, Kagiso Media is delighted that ICASA is once again, looking to address these issues and urges ICASA to ensure that, this time, its recommendations arising out of the process provided for in the Notice are taken forward by ensuring that:
- 2.3.1. recommendations to amend section 65 of the Electronic Communications Act, 2005 (“the ECA”) are made to the Minister of Communications (“the Minister”) in accordance with section 65(7);
 - 2.3.2. recommendations to the Minister to table such proposals in the National Assembly within 14 days of receipt thereof in accordance with section 65(8) of the ECA; and/or
 - 2.3.3. any proposed resultant regulations that ICASA’s recommends be prescribed as soon as possible.

3. AD PARAGRAPH 2.8 OF THE NOTICE:

- 3.1. Kagiso Media notes and agrees with ICASA’s assertions that:
- 3.1.1. the Broad-Based Black Economic Empowerment Act, 2003 (“the BBBEE Act”) applies only to Black people as defined in the BBBEE Act;
 - 3.1.2. the ECA requires equity ownership of at least 30% by persons from historically disadvantaged groups (“HDGs”) when licensing an individual licensee in terms of section 9(2)(b) of the ECA;
 - 3.1.3. the term HDG is not defined in the ECA but is defined in the Process and Procedures Regulations for Individual Licences, 2010 (as amended) as: “South African citizens who are Black people, woman or people with disabilities and that black people are defined to include Africans, Indians and Coloureds.” Kagiso Media submits that the effect of this is that all Black people, as well as White women and White people with disabilities, count as HDG. While Kagiso Media appreciates and supports the objective of broadening the definition of HDGs to empower white women and white disabled people as they were also disadvantaged during Apartheid, Kagiso Media is of the view that the definition of HDGs should rather be limited to Black people as defined by the B-BBEE Act. The reality in South Africa is that the needle for ownership of media that is representative has not moved significantly in favour of racial diversity to warrant a broader scope in definition for HDGs to include white people irrespective of gender and disability.
- 3.2. Consequently, Kagiso Media is of the respectful view that ICASA ought to continue applying the HDG equity requirement for all individual licences and, further recommends that ICASA amends the definition of “HDGs” in the Process and Procedures Regulations for Individual Licences, 2010 to bring it in line with the definition of “black people” in the BBBEE Act, for the reasons set out above.
- 3.3. The effects of this will be to:
- 3.3.1. confirm that the key transformation agenda in the Information Communications Technology (“ICT”) sector is driven by the need for racial transformation; and

3.3.2. massively simplify the process of monitoring and enforcement of transformation requirements for ICASA and for all individual licensees.

4. AD PARAGRAPHS 5.1.2, 5.1.4, 5.2 and 8.1 OF THE NOTICE

- 4.1. Kagiso Media is of the view that ICASA is legislatively required to keep step with ICT Sector Charter as amended from time to time (“the ICT Charter”). While the ICT Charter (and the Codes of Good Practice and ownership targets contained therein) are voluntary for the ICT sector, section 10(1)(a) of the BBBEE Act specifically requires ICASA as an “organ of state” to “apply any relevant code of good practice issued in terms of this Act in determining qualification criteria for the issuing of licences... in terms of any law”.
- 4.2. The current ICT Charter and the BBBEE ICT Sector Codes are contained in Notice 1387 published in Government Gazette No. 40407 dated 7 November 2016. One of the most important priority elements thereof is ownership which is set at 40% (see clause 3.3.1 of the Amended BBBEE ICT Sector Code Series AICT0000, on page 13 of the ICT Charter).
- 4.3. On the one hand Kagiso Media is of the view that all licensees ought to contribute to BBBEE, but on the other, different considerations may well apply to a registration process as is provided for in the ECA for class licences (whether for Electronic Communication Services (“ECS”), Electronic Communication Networks Services (“ECNS”) or Broadcasting Services (“BS”)). Consequently, Kagiso Media is of the view that there should be a sliding scale of HDG equity ownership requirements up to 40% for class licences too depending on factors such as: the size of the operation (if it is an SMME for example the HDG equity ownership requirement ought to be lower) and whether the operation is in a start-up phase.
- 4.4. Kagiso Media supports the racial transformation of all broadcasting entities. Consequently, Kagiso Media is of the view that listed companies, that is, companies whose shares are traded on the JSE, must also meet the 40% HDG equity ownership requirement. On a day-to-day basis, this might be difficult to calculate given that shares are traded openly and it is not possible “to pierce the corporate veil” to determine the race of the individuals behind private companies or blind trusts and the like. Consequently, Kagiso Media, supports that Black-owned shares be ring-fenced through BBBEE share schemes to safeguard BBBEE shareholder value. Kagiso Media submits that the Authority should make it a requirement for publicly traded companies to provide the policy for such BBBEE share schemes for approval by the Authority prior to registration with the JSE for listing.
- 4.5. Further, Black people who subscribe to the BBBEE share schemes must also demonstrate a level of influence in the management and control of the operations of a listed company, perhaps through board representation for BBBEE shareholders whether these participate by way of a special purpose vehicle, a Trust or similar. This can be achieved through a mandatory requirement from the Authority for policies of BBBEE share schemes to be constituted with a special purpose vehicle or a Trust or similar where its members can nominate board representatives to the company board.

5. AD PARAGRAPH 6.4.1, 6.4.2 and 8.3:

- 5.1. Traditionally, Kagiso Media has had a very difficult time with ICASA due to the confusion that surrounds appropriate confirmation of compliance with HDG requirements. In an application made by Kagiso TV Proprietary Limited (“Kagiso TV”) in 2012, the Authority insisted on Identity Documents for every single Black beneficiary of the Kagiso Trust. The Authority was of the view that the information provided by Kagiso TV on HDGs was not sufficient, despite Kagiso TV providing ICASA with a list of schools in rural areas in the Free State province that are Beneficiaries of the Kagiso Charitable Trust. ICASA then requested Kagiso TV to provide a letter from the Free State Department of Education indicating the names of the schools, the total number of learners in each school and confirmation of the number of learners that are from HDGs. In response, Kagiso TV, on 10 March 2015, provided the Authority with a letter from the Free State Department of Education indicating that the schools sponsored by the Kagiso Charitable Trust are schools in rural areas as well as the students being 100% black students
- 5.2. Moreover, Kagiso Media respectfully disagrees with the Authority’s requirement that individual beneficiaries be identified when assessing HDG ownership in the case of a charitable trust, which is how the Kagiso Trust is categorized. ICASA has often referred to the Beneficiaries as being akin to the shareholders of a company. However, our law specifies that charitable trusts are usually created with the achievement of an impersonal object in mind and the founder need not, therefore appoint ascertainable beneficiaries under the trust. The object of a trust of this nature is to dispose charity, not to benefit individual beneficiaries (*Deadapt v The Master* 1995 (2) SA 377 (A)). It can therefore be argued that the identification of a group of individuals, in this case, HDGs, is sufficient for these purposes.
- 5.3. Kagiso Media submits that the proof which the Authority requires to confirm compliance with the HDG requirements for a Trust should be the requirements which the Authority has published in the Composite Invitation to Apply for Individual Commercial Free to Air Television Broadcasting Service and Radio Frequency Spectrum Licence for Mux 3 Frequencies contained in Notice 162, Government Gazette No. 40652 dated 3 March 2017 at page 17.

6. AD PARAGRAPH 7

- 6.1. Kagiso Media respectfully disagrees with the characterization of “control” of broadcasting services being the 20% shareholding in a commercial licensee referred to in section 66(5) of the ECA, as is stated in paragraph 7.2 of the Notice.
- 6.2. ICASA is well aware that:
 - 6.2.1. *de facto* control of a private (commercial) broadcasting services licensee was defined in section 1 of Schedule 2 to the IBA Act but Parliament neglected to the provisions of this schedule into the ECA;
 - 6.2.2. *de facto* control of a newspaper was defined in section 2 of Schedule 2 to the IBA Act but Parliament neglected to the provisions of this schedule into the ECA;

- 6.2.3. deemed control of a company was defined in section 3 of Schedule 2 to the IBA Act but Parliament neglected to the provisions of this schedule into the ECA;
- 6.2.4. the provisions declaring a 20% shareholding in a broadcasting licensee to constitute deemed control arose ONLY in the context of the cross-media control provisions of the IBA Act.
- 6.3. ICASA (and its predecessor, the IBA) has always recognised that the appropriate threshold ought to be a 25% shareholding to trigger deemed control. In this regard:
- 6.3.1. in the final recommendations of the 2004 Position Paper, the IBA recommended that **“a person shall be regarded as being in control of a company if he or she holds, directly or indirectly, issued share capital equal to or exceeding twenty-five percent of the issued share capital in the company, irrespective of whether or not such issued share capital confers de facto control”**¹;
- 6.3.2. at paragraph 14.3 on page 13 of its 2011 Finding Document, ICASA states:
- The Authority’s position is that control should be viewed from a multidimensional perspective²..., not simply on the basis of financial interest..[ICASA] is of the view that control should comprise 25% of the shareholding or the right or the ability to direct or otherwise control the majority of the votes attached to the shareholders’ issued shares, or the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the Board of directors, or the right to control the management of the enterprise.;***
- 6.3.3. in paragraph 3.1.11 of its 2013 Final Report, ICASA reaffirmed that it is pursuing its 2011 recommendations (that is, those set out above) regarding ownership and control;
- 6.3.4. paragraph 7.3 of the Notice also contains reference to the Limitation of Ownership and Control of Telecommunications Services Regulations and these too set deemed control at “twenty-five percent of the
- 6.3.5. issue share capital”. However, these are of limited relevance to broadcasting services as they were never applicable to broadcasting;
- 6.3.6. as ICASA is aware, the 20% shareholding-as-deemed-control-position only came about as a result of the judgment in the Gauteng Local Division of the High Court in *KZN Talk Radio (Pty) Ltd v ICASA and Another*³ in which Francis J, (at paragraph 32) held that “[t]he deeming provision in section 66(5) of the ECA applies to section 65(2) and control as used in section 65(2) [which section determines the number of FM stations a person may control] should be interpreted to include a 20% shareholding”; and

¹ Paragraph 17 of the Final Recommendations.

² ICASA quotes Cilliers and Benade *Company Law* (2000) summarising four categories of control, namely: complete control, majority control, minority control, and management control or control of proxy voting machinery.

³ Case No. 41672/12 [2014] ZAGPHC 396, handed down on 5 August 2014. (Unreported)

- 6.3.7. the ruling in the *KZN Talk Radio* case was handed down long after a few stakes of between 19.99% and 24.99% (hitherto non-controlling stakes) of the shareholding in licensees had been acquired. Therefore, the Court's Ruling failed to consider, in any detail, the legacy position established pursuant to the threshold of control prescribed in the IBA Act and further failed to consider how adopting this interpretation of control would impact the parties that have historically proceeded on the basis of the legacy position.
- 6.4. Kagiso Media agrees that the position adopted by ICASA in 2011 and as confirmed by it in 2013 as set out above ought to be implemented such that outside of the context of cross-media control, a deemed-controlling stake in a commercial broadcasting entity ought to be pegged at 25% of the shareholding and above.
7. Kagiso Media thanks ICASA for the opportunity to make these written submissions on the Notice and requests an opportunity to make oral representations should a hearing be held.
8. Please do not hesitate to contact the writer should you have any queries or require any further information or clarification.

Thank You.

Yours Faithfully

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