

20 January 2022

**Independent Communications Authority of South Africa**

Attention: Miss Meera Lalla – Project Leader

Per email: [mlalla@icasa.org.za](mailto:mlalla@icasa.org.za) | [jmalimavhi@icasa.org.za](mailto:jmalimavhi@icasa.org.za)**DRAFT AMENDMENTS TO THE REGULATIONS GOVERNING ASPECTS OF THE PROCEDURES OF THE COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA 2021**

1. ISPA refers to the Regulations governing aspects of the procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, 2010 (“the CCC Regulations 2010”) and to the draft amendments thereto published for public comment on 26 November 2021 (“**the draft amendment regulations**”).
2. ISPA welcomes the attention being paid to streamlining the operation of the CCC and sets out its submissions on the draft amendment regulations below.

**Role of the coordinator**

3. ISPA is uncertain as to the role of the CCC Coordinator. ISPA members have indicated that the Coordinator assumes a prosecutorial role in proceedings. ISPA submits that this position should be a neutral one with an administrative function.
4. In a complaint or a dispute there will always be two parties: consumer vs licensee | licensee vs licensee | ICASA vs licensee. Each of these parties represents itself before the CCC and is entitled to have a legal or other adviser present. In such circumstances it is incorrect for the Coordinator to, for example, perceive his or her role to prosecute on behalf of the CCC.

**Distinction between complaints and disputes**

5. ISPA has noted the reasons advanced for proposed amendments to regulation 2 and supports the intention to ensure that there is a clear distinction between the filing of a complaint and the referral of a dispute given “the distinct nature and procedures of a complaint vis-à-vis a dispute”.

6. ISPA submits that the continued use of “Complainant” to mean “any person who has lodged a complaint with or referred a dispute to the Authority” is likely to result in continued confusion of the kind the proposed amendments seek to remedy. There may be merit in distinguishing between a “complainant” and a “licensee” given that it is only the latter than can lodge a dispute with the Authority of the CCC.
7. The definition of “dispute” in regulation 1 of the CCC Regulations 2010 references disputes contemplated in five different sections of the Electronic Communications Act 36 of 2005 (“the ECA”). An analysis of these sections indicates that disputes may be referred or notified to the CCC only by ICASA itself or by an affected licensee.

#### **Proposed amendments to Regulation 1**

8. Insertion of definition of “CCC Assessor”:
  - 8.1. Noting that the term “Office of the CCC” is not defined or used elsewhere in the Regulations or proposed amendments, ISPA suggests the following amendments to the proposed definition:

“CCC Assessor” means an employee of the Authority, employed in the Office of the CCC, whose job profile includes ~~the, among others, is to~~ assessment and investigation of all broadcasting, ~~tele~~ electronic communications and postal services complaints and disputes on behalf of the CCC”
9. “Days” and calculation of time periods:
  - 9.1. ISPA welcomes and supports the proposed amendment, noting that “days” are defined in both the ECA and the ICASA Act as referring to working days unless otherwise specified. It would therefore be sufficient to simply delete the existing definition as what is in the primary legislation does not need to be restated.
  - 9.2. ISPA also wishes to highlight the manner in which a period of a number of days is to be reckoned as prescribed by the Interpretation Act 33 of 1957:

*4. Reckoning of number of days.—When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.*
  - 9.3. In ISPA’s experience the CCC has previously failed to exclude public holidays falling on a weekday when calculating a period of days, which is inconsistent with the Interpretation Act.

10. ISPA supports the insertion of a definition specifying the quorum required for the CCC to hold a hearing, pre-hearing or meeting.
11. Substitution of definition of “vexatious complaint or dispute”:
  - 11.1. ISPA notes that there is a considerable body of precedent setting out the grounds under which a person may be regarded as a vexatious litigant. This will be directly relevant to the decisions the CCC makes under sub-regulation 3(2).
  - 11.2. ISPA supports the proposed amendment, noting that sub-regulation 3(2) also provides for the CCC to reject a complaint which is “frivolous” or where there have been insufficient attempts made to resolve the complaint.

#### **Substitution of Regulation 2**

12. ISPA supports redrafting to make explicitly clear the differences between lodging a complaint and referring a dispute to the CCC. In ISPA’s view, however, these terms are not used consistently or correctly.
13. ISPA submits that all formal documents forming part of the record of a complaint or dispute should be in affidavit form.
  - 13.1. In making this submission ISPA considered whether a requirement that consumers submit complaints in affidavit form would create an unreasonable barrier to consumers exercising their rights to bring complaints to the CCC.
  - 13.2. ISPA’s view is that requirements to submit documents in affidavit form are common-place and a normal part of commercial engagement in South Africa.
  - 13.3. Against this, licensees are put to considerable expense in defending formal complaints brought to the CCC given the potential sanctions which apply.
  - 13.4. Further, a requirement to file in affidavit form substantially reduces the probability of receiving frivolous, vexatious and false complaints.

#### **Proposed amendments to Regulation 3**

14. ISPA supports the deletion of the word “brief” in sub-regulation 3(3).
15. ISPA requests the Authority to consider deleting the reference to “insufficient attempts were made at settling the complaint” as a ground for the rejection of a complaint or dispute in sub-regulation 3(2).
  - (2) If the CCC is of the view that the purported complaint or the purported dispute is vexatious or frivolous or insufficient attempts were made at settling the complaint, then it may reject the complaint or dispute.

- 15.1. There is no guidance on what constitutes sufficient or insufficient attempts to settle a complaint and a corresponding danger that this ground can be used as a delaying tactic by a party to a complaint or dispute.
- 15.2. If this ground is retained there should be opportunity for each party to make representations prior to the CCC forming its view.

#### **Substitution of Regulation 4**

16. ISPA submits that formal documents forming part of the record of a complaint or dispute should be in affidavit form.

#### **Insertion of Regulation 4A**

17. ISPA submits that the heading of the regulation to be inserted should not refer to “pleadings” but rather to “documents”:

4A Close of Document Exchange ~~Pleadings~~, Withdrawals, Settlements and Postponements

18. ISPA submits further that:

- 18.1. The process of exchanging documents or affidavits needs to be clear: there should not be a discretion for further documents to be exchanged as is implied in sub-regulation 4A(1). The documents to be exchanged are those as set out in Regulation 4 and no basis is laid out for an exercise of discretion by the CCC regarding additional documents. ISPA suggests the following amendment:

(1) Once the documents are filed by both parties in terms of Regulation 4 ~~and/or any further documents where applicable~~, and the Chairperson directs that a hearing be held, and the Co-Ordinator notifies the parties of the hearing date in terms of regulation 5(1), the document exchange is ~~pleadings are~~ deemed to have closed unless otherwise stated by the CCC.

- 18.2. A Complainant should be allowed to withdraw a complaint or dispute up until the time of a hearing. The Authority is referred to the text of sections 40(2) and 46(2) of the ECA which stipulate that a dispute raised under sections 40(1) and 46(1) respectively may be withdrawn by notice in writing “at any time”. ISPA submits that any limitation to this right of withdrawal situated in regulation will be *ultra vires* the ECA.
- 18.3. More fundamentally, the objective of any dispute resolution process should be to encourage settlement and resolution: this is in the interests of all parties and in the interests of the efficient administration of justice.
- 18.4. ISPA has noted the rationale advanced for the insertion of regulation 4A but submits that it is incumbent upon the Authority to ensure that the CCC is adequately funded and resourced and

that the rights of complainants and licensees should not be restricted because this has not happened.

- 18.5. It is incorrect to characterize costs incurred in preparation which is not utilized due to a settlement or withdrawal as being “wasted costs” within the meaning of the Public Finance Management Act. It is also not clear how the withdrawal of settlement of a matter shortly before the hearing would open up “the floodgates of liability for wasteful expenditure by the CCC”. ISPA is unable to imagine how the Authority would attract liability in these circumstances.
- 18.6. A proper exercise of the CCC’s discretion in weeding out vexatious and/or frivolous complaints together with a requirement that documents be submitted in affidavit form will mitigate this issue.
- 18.7. The following amendments to sub-regulations (2) and (3) is suggested:  

4A(2) A Complainant may withdraw a complaint or dispute ~~before close of pleadings~~ at any time prior to the hearing by delivering a notice advising the other party and the CCC of his or her intention to withdraw a complaint or dispute.

4A(3) If the parties reach a settlement agreement before the commencement of the hearing of a matter ~~close of pleadings, such settlement agreement must be filed with the CCC for consideration within five (5) days of reaching settlement unless otherwise stated by the CCC~~ they shall immediately inform the CCC in writing of such settlement and provide a copy of the settlement agreement.
19. ISPA supports the need for a procedure governing requests for postponements but submits that the other party to the complaint or dispute is clearly an affected and potentially prejudiced party and should be afforded an opportunity to oppose or otherwise make representations in respect of such a request.

#### **Proposed amendments to Regulation 5**

20. ISPA notes that no amendment is proposed requiring that proof of service be obtained and retained by the Coordinator and any party required to service notices or documents on the CCC or the other party. In ISPA’s view this is an oversight as it is a critical element of a quasi-judicial process to be able to verify service of documents and notice of hearings and other events. ISPA members have indicated that notifications from the Coordinator have in some instances not been received which is highly problematic.
21. ISPA submits that sub-regulation 5(1) should explicitly reference regulation 6 which deals with urgent complaints or disputes. As it is proposed, sub-regulation 5(1) appears to give the Chairperson of the

CCC a separate discretion to decide on urgency and what would constitute appropriate notice to the other party. Regulation 6 makes it clear that there is a specific procedure to be followed.

22. ISPA suggests the following amendments:

5(1) The Co-ordinator must give the parties to the complaint or the dispute at least twenty (20) days' notice – or such shorter period as determined by the Chairperson under sub-regulation 6(4) - in writing of the date, time and venue of the hearing. ~~If the Chairperson decides that the matter is urgent, he or she may set a shorter time period.~~

#### **Insertion of Regulation 5A**

23. ISPA submits that it would be more practicable for witness notices to be lodged within 10 days after close of exchange of documents and before the date of hearing whether they intend to call witnesses, to allow assessment of the probable duration of the hearing.

#### **Proposed amendments to Regulation 6**

24. ISPA supports the proposed substitution of sub-regulation 6(1), subject to the below.

25. ISPA requests that the Authority consider amending sub-regulation 6(2) to make it compulsory to deal with an application motivating for urgency on affidavit. ISPA suggests the following amendments:

“(1) A Complainant may request that the complaint or dispute be dealt with on an urgent basis and must file an application together with an affidavit motivating the reasons for urgency.

(2) Upon receipt by the CCC of a complaint or dispute in which the complainant requests that it be dealt with on an urgent basis, the chairperson must provide the licensee against whom the complaint is made or the party against whom the dispute is declared an opportunity to respond in the form of a written affidavit to the request that the matter be dealt with on an urgent basis. ~~provided that the chairperson may require that affidavits be filed to substantiate or deny allegations of urgency~~

#### **Proposed amendments to Regulation 7**

26. ISPA supports the proposed amendments.

#### **Insertion of Regulation 8A**

27. ISPA supports the inclusion of this clause, noting that the lack of jurisdiction to award costs implies that the CCC should vigorously vet complaints and disputes against the standards set out in regulation of the CCC Regulations 2010.

### **Deletion of Regulation 9**

28. ISPA submits that this regulation should not be deleted. This flows from the current process relating to amendments to the CCC Regulations 2010 (and this provision should not be deleted from the CCC Regulations 2010).

### **Short title and commencement**

29. ISPA submits that this paragraph misconstrues the nature of the current process, which is to amend the CCC Regulations 2010.
30. ISPA submits further that the Authority should consider inserting wording which caters for complaints or disputes under way when the relevant Government Gazette is published.
31. ISPA suggests the following amendments:

“These regulations are called the First Amendment to the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, 2021 and shall come into operation upon publication in the Government Gazette and apply in respect of any complaint or dispute initiated after such date of publication.”

### **Conclusion**

32. ISPA trusts that the above will be of assistance to the Authority in finalising the proposed amendments.
- \_\_\_\_\_