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GENERAL NOTICE

NOTICE 1596 OF 2009



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton

Private Bag X10002, Sandton, 2146

**REGULATIONS ON THE COMMISSIONING OF INDEPENDENTLY PRODUCED
SOUTH AFRICAN PROGRAMMING IN TERMS OF SECTIONS 4 AND 61(1) OF
THE ELECTRONIC COMMUNICATIONS ACT NO 36 OF 2005, READ WITH
SECTION 4(3) (j) OF THE ICASA ACT NO 13 OF 2000.**

I, Mr. Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), hereby confirm that the regulations contained herein were made in terms of sections 4 and 61(1) of the Electronic Communications Act No 36 of 2005, read with section 4(3) (j) of the ICASA Act No 13 of 2000, and approved for final publication by the Council of the Authority.



PARIS MASHILE
CHAIRPERSON

Regulations on Commissioning of Independently Produced South African Programming, 2009

1. Definitions

In these Regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned.

- (a) **"Approval"** means that upon receipt of the commissioning protocol the Authority will confirm whether or not a particular protocol contains all the minimum requirements contained in Annexure 1 of these regulations, and will not interfere with the content of the policies themselves;
- (b) **"the Act"** means the Electronic Communications Act, 2005 (Act No. 36 of (2005));
- (c) **"commissioning protocol"** means a set of policies that broadcasting service licensees develop in terms of these regulations;
- (d) **"independent producer"** means a television content producer who conducts business within the Republic of South Africa and who is not directly or indirectly employed by, and is not controlled by, and is not in control of, any broadcasting service licensee;
- (e) **"Licensee"** means a broadcasting service licensee as defined in the Act
- (f) **"Small and medium independent producers"** means small Business as defined in the National Small Business Act 102 of 1996
- (g) **"terms of trade"** means the minimum terms and conditions of trade which a broadcasting service licensee would ordinarily apply in the procurement of independently produced South African programming from independent producers.

2. Purpose

The purpose of these regulations is to:

- (a) ensure that broadcasting service licensees submit commissioning protocols to the Authority for approval;
- (b) monitor the commissioning practices of independently produced South African programming;
- (c) ensure that commissioning practices of independently produced South African programming are conducted in a manner that is fair, transparent and non-discriminatory, without hampering the:
 - (i) flexibility of licensees to deal with pertinent commercial issues in any manner they deem appropriate,
 - (ii) independent producers' entrepreneurial, creative, managerial and financial flexibility and control.

3. Commissioning Protocol

- (a) A licensee must;
 - (i) compile and maintain a "Commissioning Protocol for Independently Produced South African Programming", hereinafter referred to as "the Protocol";
 - (ii) within 120 days of promulgation of these regulations, submit its proposed protocol to the Authority for approval and will be advised of the outcome thereof within 30 days of submission; and
 - (iii) ensure that copies of the Protocol are always available on their websites and to independent producers on request and may charge independent producers or their agents, a reasonable fee for the printing and/ or copying thereof.

- (b) A licensee may, from time to time, amend its Protocol subject to approval by the Authority.
- (c) Any proposed amendment of the protocol must be submitted to the Authority for approval 30 days prior to the effective date of such amendment.
- (d) Subject to the specific operational features and licence conditions of each licensee, the Protocol must at the minimum contain the details specified in Schedule A hereto.
- (e) A licensee must comply with its Protocol in dealings with independent producers.

4. Annual Reporting

A licensee must submit an annual report to the Authority setting out its respective procurement activities in respect of independently produced South African programming from independent producers for the year preceding the date of the report. The report will include, inter alia:

- (a) a list of the names of independent producers from whom programmes were commissioned;
- (b) the number of programmes and episodes commissioned from independent producers;
- (c) the number of programmes commissioned from historically disadvantaged individuals and small and medium independent producers in the production industry;
- (d) the total amount spent by the licensee on independently produced South African programming; and

(e) details of any disputes which occurred between the licensee and independent producers and the manner in which they were resolved.

5. Contravention and fines

In terms section 17E (2)(b) of the ICASA Act, the Authority may impose a fine not exceeding:

- (a) One Million Rands (R1 000 000, 00) for contravention of regulations 3 and 4.
- (b) One Hundred Thousand Rands (R100 000, 00) for contravention of the regulations not specified in regulation 5 (a).
- (c) One Million Rands (R1 000 000, 00) for repeated contravention of the regulations.

6. Short Title and Commencement

These Regulations are called Regulations on the Commissioning of Independently Produced South African Programming, 2009, and shall come into operation on the date of publication in the Gazette.

7. Amendment and Repeal of Regulations

The Authority may amend or repeal these Regulations by notice in the Government Gazette.

ANNEXURE

1 Terms of Trade

- (1) A licensee must set out its terms of trade with sufficient detail and particularity.
- (2) The terms of trade must be fair, transparent and non-discriminatory and should be structured in a manner that seeks to achieve, among others, the following objectives:
 - (a) to improve the relationship between the independent producers and the licensee;
 - (b) to promote innovation and creativity in the production of South African programming;
 - (c) to raise the quality of independently produced South African programming;
 - (d) to advance competition in the procurement of independently produced South African programming;
 - (e) to promote diversity in the broadcasting and independent production sectors;
 - (f) to promote development of skills and the creation of a sustainable independent production sector; and
 - (g) to advance the transformation of the independent production sector.

2 Commissioning Process

- (1) A licensee must ensure that its commissioning processes are simple and transparent;
- (2) A licensee must provide details of its commissioning processes, which must include the following:
 - (a) major commissioning objectives and process;

- (b) names and contact details of personnel responsible for the commissioning of independently produced South African programming;
- (c) a clear process for the submission and handling of unsolicited program proposals;
- (d) timetables, which the licensee will follow, during the commissioning process with details such as:
 - (i) the interval between submission of a brief and acknowledgement;
 - (ii) the interval between submission of a brief and the initial response;
 - (iii) the interval between submission of a brief and the commissioning decision;
 - (iv) the interval between the commissioning decision and the commencement of the contractual negotiations;
 - (v) the interval between the conclusion of contractual negotiations and notification to the commissioned independent producer;
 - (vi) reasonable time frames for delivery of programmes;
 - (vii) reasonable time frames for payment of completed programmes; and
 - (viii) desired response times to requests for progress reports.

3 Editorial Standards

- (1) A licensee must set out in clear and concise terms the technical and editorial standards required from the independent producers for specific types of programmes;
- (2) A licensee must provide clear and concise information on the process to be followed where an independent producer seeks to deviate from the agreed editorial specifications;
- (3) A licensee must provide clear and concise guidelines on the delivery of programming for viewing before broadcast, and technical standards required of such programming in order for the acceptance of delivery of such programming.

4 Program Fees

Licensees must make available to independent producers when commissioning them, the factors they take into account when determining their program prices, such as movements in the retail prices index, the changes in technology or production techniques and/or any other factor which might impact on the fee payable for a program.

5 Distribution Arrangements, Archival Usage and Rights

- (1) A licensee must stipulate a clear and transparent framework for the distribution and payment for programming acquired from independent producers;
- (2) The framework contemplated in (1) above must take into account standard industry distribution practices and should stipulate processes and terms for:
 - (a) re-runs;

- (b) on-selling of programs to other broadcasting service licensees;
 - (c) exploitation of secondary rights through other platforms such as DVDs or merchandising;
 - (d) rights of the broadcasting service licensees to make such programmes available for research; and
 - (e) broadcast archival.
- (3) A licensee must stipulate the various contracting options pertaining to intellectual property rights which the broadcasting service licensee offers to independent producers in respect of the various types of programming procured.
- (4) Notwithstanding sub-regulation 3 above and consistent with the Copyright Act No 98 of 1978, any trade in intellectual property must be based on mutual agreement between the concerned broadcaster and the independent producer.

6 Procurement and Ethical Standards

- (1) A licensee must adhere to the highest ethical standards in the conduct of its business, through clear codes of conduct and anti-corruption policies.
- (2) A licensee must incorporate in the Protocol its procurement policies as are applicable to the independent production sector.

7 Complaints Handling Mechanism

A licensee must outline mechanisms to deal with complaints from independent producers concerning commissioning practices and shall provide names and contact details of personnel to handle such complaints.