

ICASA FIXES INCORRECT “HISTORICALLY DISADVANTAGED PERSONS” CLAUSE IN REGULATIONS IN PREPARATION FOR SPECTRUM AUCTION

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The Independent Communications Authority of South Africa is crossing its “t’s” and dotting its “i’s” to ensure that any grounds for legally challenging or reviewing its anticipated high-demand frequency spectrum auction, are minimised.

It published an amendment to the Radio Frequency Spectrum Regulations, 2015 (“**the Regulations**”) on Friday 1 November 2019, correcting what was clearly a mistake related to the empowerment of historically disadvantaged persons (“**HDPs**”).

Regulation 7 of the Regulations sets out the requirements that will most likely be included in the invitation to those prospective bidders who want to apply (“**ITA**”) to participate in the spectrum auction. Regulation 7(3)(d), was however evidently irrational and incorrect, as it went contrary to the objectives of the Electronic Communications Act (“**the EC Act**”), which seek to empower historically disadvantaged persons. In this regard, section 9(2)(b) of the EC Act says that an ITA must:

...include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;

So, in order to provide for HDPs, the original version of Regulation 7(3)(d) of the Regulations said:

An applicant shall be disqualified from the application process where such applicant has a minimum 30% (thirty percent) equity ownership held by persons from Historically Disadvantaged Groups; alternatively, in instances where an Applicant does not have such 30% equity ownership, must be a level 4 and above contributor (BBBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the BBBEE Act;



This was clearly wrong and contradicted the EC Act, because what it meant was that any applicant who had 30% or more equity ownership held by Historically Disadvantaged Groups would be disqualified. Further, it provided that anyone who had a level 4 and above BBEEE status (e.g. level 5, which is worse), would qualify, which again contradicted the EC Act.

ICASA evidently picked-up that this was a problem and has wisely remedied it by replacing the original version of Regulation 7(3)(d) with a new version which says:

An applicant shall be disqualified from the application process where such applicant has less than 30% (thirty percent) equity ownership by Historically Disadvantaged Persons (HDP) or is below a level 4 contributor (B-BBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the B-BBEE Act;



Whilst this seems to have resolved the problem, and whilst we certainly know what is intended when ICASA says anyone who "is below a level 4 contributor (B-BBEE status)" will be disqualified from applying, it still leaves room for a litigious unsuccessful spectrum licence applicant, who has nothing to lose, to challenge this aspect of the Regulation. This is because, just like "level 4 and above" in the original version could be argued to mean that anyone with level 5 would qualify, the new version could be argued to mean that anyone below level 4 i.e. level 3, will be disqualified. It would have been clearer to say, "or has a B-BBEE status greater than a level 4 contributor" alternatively "or has a B-BBEE status inferior to a level 4 contributor".

What is important though, is that the new version of the Regulations is clearer than the original and is likely to discourage any litigious, unsuccessful spectrum licence applicant from challenging ICASA's award of any frequency spectrum, when it does so through the anticipated spectrum auction.

Given ICASA's focus on ensuring that the HDP aspect of the Regulations is correct, prospective spectrum licence applicants need to ensure that their B-BBEE credentials will be able to withstand what is likely to be thorough scrutiny by ICASA's bid adjudication committee.

Here's [a link to the new version](#) of Regulation 7(3)(d).