REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 18519/2013

In the matter between:

JUSTICE ALLIANCE OF SOUTH AFRICA **Applicant**

And

STEPHEN SIPHO MNCUBE N.O. **1st Respondent**
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA **2nd Respondent**
ON DIGITAL MEDIA (PTY) LTD t/a TOP TV **3rd Respondent**
PETRUS FRANCOIS VAN DEN STEEN N.O. **4th Respondent**
MINISTER OF COMMUNICATIONS **5th Respondent**

And

CAUSE FOR JUSTICE **1st Applicant**
GABRIEL JACOBUS VENTER **2nd Applicant**

And

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA **1st Respondent**
STEPHEN SIPHO MNCUBE N.O. **2nd Respondent**
ON DIGITAL MEDIA (PTY) LTD t/a TOP TV **3rd Respondent**
PETRUS FRANCOIS VAN DEN STEEN N.O. **4th Respondent**
MINISTER OF COMMUNICATIONS **5th Respondent**

And

DOCTORS FOR LIFE INTERNATIONAL WC **Applicant**

And

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA **1st Respondent**
STEPHEN SIPHO MNCUBE N.O. **2nd Respondent**

ON DIGITAL MEDIA (PTY) LTD t/a TOP TV	**3rd Respondent**
PETRUS FRANCOIS VAN DEN STEEN N.O.	**4th Respondent**
MINISTER OF COMMUNICATIONS	**5th Respondent**
JUSTICE ALLIANCE OF SOUTH AFRICA	**6th Respondent**
CAUSE FOR JUSTICE	**7th Respondent**
GABRIEL JACOBUS VENTER	**8th Respondent**

Coram: **BOZALEK J**

Heard: **11 - 14 AUGUST & 13 OCTOBER 2014**

Delivered: **3 NOVEMBER 2014**

JUDGMENT

BOZALEK J:

[1] This matter involves a review of the decision of the Independent Communications Authority of South Africa (*'ICASA'*), the second respondent, taken on 23 December 2013 granting the third respondent, On Digital Media (Pty) Ltd (*'ODM'*), authorisation to carry three pay-to-view television channels containing pornographic programmes between 8pm and 5am daily. The first respondent is the chairman of ICASA whilst the fourth respondent is a business rescue practitioner, ODM being presently under business rescue.

[2] Three separate review applications were brought, two in the North Gauteng High Court, but by agreement were consolidated with the application launched in this Court. The applicants are Doctors for Life (*'DFL'*), Cause for Justice (*'CFJ'*) and the Justice Alliance of South Africa (*'JASA'*), each of which is a voluntary association constituted, broadly speaking, to advocate for chosen moral positions and values in society and, if necessary, to litigate towards such ends.

[3] Certain of the applicants sought ancillary or wider relief, namely, permission to institute the litigation in terms of section 133(1) of the Companies Act, 71 of 2008, interim relief pending the determination of the review and constitutional relief, namely, a determination of the constitutionality of regulations adopted by ICASA, alternatively of certain provisions of the Independent Communications Authority of South Africa Act, No 13 of 2000 (*'the ICASA Act'*), but all such relief has either been the subject of agreement, deferred or is no longer pursued.

[4] DFL and CFJ seek, upon a successful review, the remittal of ODM's application for authority to carry the three channels back to ICASA. JASA seeks, on one review ground only, namely, ICASA's failure to take into account that the broadcasting of the channels would *'rewire'* the brains of viewers, a substitution for ICASA's decision with one by this Court refusing to authorise ODM's three channels. In the alternative it seeks the remittal of the application back to ICASA. On all other grounds the relief sought by JASA was the remittal of the decision back to ICASA.

[5] The fifth respondent is the Minister of Communications who was cited because of the constitutional relief sought. The Minister has played no active part in the hearing since that relief is not pursued at this stage.

BACKGROUND

[6] At all material times ODM was the holder of a broadcasting licence offering a subscription i.e. pay-per-view service to its customers.

[7] In July 2011 ODM lodged an application with ICASA to broadcast three pornographic content channels on a 24-hour basis. In November 2011 ICASA published a notice in the Government Gazette inviting interested parties to submit

representations within 30 days in relation to ODM's application. It later issued a notice inviting interested parties to make oral representations at a public hearing.

[8] Various parties made written or oral representations. ODM did not attend the public hearing. In January 2012 ICASA refused to grant ODM the necessary authority and published the reasons for its refusal in March 2012. In its reasons ICASA stated that ODM's absence at the hearing had precluded it from raising concerns regarding the proposed content of the pornographic material.

[9] On 28 November 2012, ODM, under the name Top TV, lodged a new application with ICASA for authorisation to broadcast three pornography channels. On 19 December 2012 ICASA issued a notice in the Government Gazette inviting interested parties to submit representations in respect of the application. The closing date for the submission of such representations was 22 January 2013.

[10] According to ICASA a total of 569 representations were received by the cut-off date from members of the public or interest groups. A further 75 representations were received after the cut-off date but these were also taken into account by ICASA.

[11] On 31 January 2013 ICASA's Council, acting in terms of section 17 of the ICASA Act, established a special committee to consider, conduct public hearings and provide a recommendation to ICASA's Council on ODM's application. Two of ICASA's counsellors were appointed to the special committee.

[12] On 1 March 2013, ICASA gave notice in the Government Gazette of a public hearing scheduled for 14 March 2013. The notice advised that the programme for the hearing would be made available on the ICASA website.

[13] On 14 March 2013 ICASA's special committee held a public hearing at its offices in Sandton, Gauteng. The proceedings were transcribed and formed part of the review record. It was chaired by one of the two counsellors forming the special committee and it first heard short presentations from representatives of approximately ten organisations who had submitted written representations, one of which was DFL.

[14] The Film and Publications Board ('*the FPB*'), which had also filed written representations, sought to make an oral presentation. However, in the face of an objection from ODM, which had not received its written representations timeously, the chair ruled that the FPB would not be permitted to make an oral presentation.

[15] The chair advised that each of the representatives of the ten organisations would be allowed 15 minutes to make their presentation but 5 minutes thereof would be reserved for questions.

[16] After all these presentations were heard ODM presented its case. It comprised presentations from two senior managers, a brief input from a representative of Playboy TV, the producer of the material intended for broadcast, and a presentation by counsel retained on ODM's behalf on the legal framework within which the application fell to be dealt.

[17] The final part of ODM's presentation featured the views of a Dr Wasserman who described herself as a clinical couples and sex therapist and a clinical sexologist in private practice. She dealt, broadly speaking, with current research concerning the effects of pornography on viewers.

[18] On 19 April 2013 the special committee made its detailed submission to ICASA. In the recommendation section it stated:

> *'9.1. Discussions at the public hearings crystallised two important aspects of the application:*
>
> - *whether there is a law of general application that can be held to limit On Digital Media's right to freedom of expression in terms of section 16 of the Constitution.*
> - *whether there is a direct relationship between the dissemination of adult pornography and gender-based violence.*
>
> *9.2 The committee accepts that there is no law of general application prohibiting the production and distribution of adult pornography in the Republic. Only the production and distribution of child pornography is expressly prohibited by law.*
>
> *9.3 The committee accepts that there is no evidence to demonstrate that pornography is a direct cause of gender-based violence in the Republic …*
>
> *9.4 Accordingly the committee is of the view that there is no basis in law or research evidence to refuse On Digital Media's application for channel authorisation of three adult pornographic channels.'*

[19] The committee concluded its recommendations as follows:

> *'9.10 The committee is of the considered view that the Authority should authorise the applicant to broadcast three adult pornographic channels, Playboy TV, Desire TV and Private Spice within the watershed period and with the security measures outlined in the application to safeguard children's rights.'*

[20] On 23 April 2013 ICASA announced its decision to authorise ODM to broadcast the three channels subject to the condition that this could only be within the watershed period and that certain security measures, namely, a double pin (personal identification number) code and the availability of the channels only as a separate subscription from ODM's main subscription service, were to be implemented at all times.

[21] On 24 July 2013 ICASA furnished its written reasons for the decision authorising the channels.

[22] On 4 December 2013 ODM applied for authorisation to rebrand the Private Spice channel to the Brazzers TV channel. On 1 January 2014 it effected this rebranding and received final authorisation to do so from ICASA on 11 March 2014.

GROUNDS OF REVIEW

[23] The applicants relied on both procedural and substantive grounds of review.

[24] JASA's grounds of review were, in the first instance, the argument based on an alleged *'rewiring of the brain'* to which the viewers of the channels would be subjected to and, secondly, an alleged error of law on the part of ICASA in finding that there was no law of general application which prohibited the distribution of pornography with the result that, as ICASA perceived the situation, it lacked any legal basis to refuse ODM's application. JASA's third ground related to the alleged inadequacy of the security measures upon which the authorisation was made conditional, most notably the double pin code. A further ground was that ICASA had erred in concluding that there was no evidence to demonstrate that pornography was a direct cause of gender-based violence. Fifthly, it was contended that ICASA ought not to have permitted the broadcasting of pornography from 20h00 but only from substantially later at night. Sixthly, in reaching its decision ICASA ignored evidence of the addictive nature of pornography. A seventh and final ground of review was that regulatory breaches by Playboy TV UK/Benelux Ltd in the United Kingdom, ODM's partner and the supplier of material for the three channels, were not disclosed by ODM and, despite being discovered by ICASA, were ignored by it. At a later stage JASA sought to introduce a further ground of review, namely, the alleged discrepancy between the actual and the proclaimed content of the channels.

[25] As far as DFL was concerned, one of its principal grounds of review was that the administrative action taken by ICASA had not met the requirements of procedurally fair action. In this regard it took issue with and criticised the limited opportunity afforded to the public to make meaningful representations, the inadequate notice of the public hearing, the treatment of the FPB at the public hearing, the allegedly defective appointment and composition of the special committee, and the bias allegedly displayed by ICASA inter alia through treating objectors differently to ODM and the manner in which it conducted the public hearing.

[26] As far as substantive grounds of review were concerned, DFL in essence challenged ICASA's decision on the grounds that it was irrational. As an adjunct to this ground DFL contended that ICASA had failed to interrogate, investigate or make findings on the security measures applicable to the broadcasting of the three channels, and the watershed period in which such broadcast would be permitted. As a further ground it contended that ICASA, through the special committee, had failed to investigate or consider regulatory breaches by Playboy TV in the United Kingdom and had failed to properly scrutinise the content of the proposed channels. Finally, it also relied on ICASA's alleged error of law in accepting that in the absence of a law of general application prohibiting the broadcast of pornography it could not refuse the application. Its case was further that the applicable legislation could justify a decision by ICASA refusing the application.

[27] CFJ's main ground of review was that the administrative action taken by ICASA was procedurally unfair regard being had to alleged inadequate notice to the public, limited availability of relevant documentation, ICASA's failure to appoint experts and inspectors, its failure to scrutinise intended broadcast material, the

limited ambit of the public hearing, the unfair manner in which the public hearing was conducted and inadequate record keeping by ICASA.

[28] CFJ also relied on a variety of alleged errors of law which materially influenced ICASA in its decision, namely, the findings that there was no law of general application on the basis of which it could refuse the application and its misapprehension of the laws relating to freedom of expression, the protection of children and various enactments relating to broadcasters. Finally, CFJ contended that in the light of the harm which pornography causes to the dignity of persons affected thereby, ICASA's decision could not be justified.

THE APPROACH TO REVIEW

[29] It is appropriate firstly to note the limits of the power of review which the courts enjoy over administrative action and the distinction to be drawn between reviews and appeals. This distinction finds expression in the *'deference'* that is shown by the courts to such administrative action.

[30] The need for such an approach was explained by the Constitutional Court in *Bato Star*[1] where it held, at para's [46] and [48], as follows:

> *'[46] … The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself…*
>
> *[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of*

[1] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 CC,

> *government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.'*

[31] The distinction between a review and an appeal was recently highlighted in *MEC v Clairison's CC*[2] where the Court stated as follows:

> *'It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.'*[3]

[32] These observations are relevant to the present matter since much of the contents of the affidavits and annexures filed, as well as the argument, was directed at persuading the Court that ICASA had arrived at an incorrect decision on the merits of pornography being broadcast at all. In the nature of the decision which ICASA had to take, where there was a proliferation of contested evidence on the effects on adults and children of viewing pornography, most, if not all, of this material and the argument directed at the Court was misplaced.

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[2] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA)
[3] At para [18]

THE LEGISLATIVE FRAMEWORK

[33] It is appropriate also to set out the legislative and regulatory framework within which ICASA is required to exercise its functions and to take the administrative decision presently under challenge.

[34] The starting point is the Constitution which provides in section 192 for national legislation to establish *'an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society'*.

[35] Rights enshrined in the Bill of Rights which have a bearing on this matter are every person's right to *'inherent dignity and the right to have their dignity respected and protected*[4]*',* the right to privacy[5], the right to freedom of expression[6] which includes *'freedom of the press and other media, freedom to receive or impart information or ideas and freedom of artistic creativity'* and the rights of children[7] which include the right to *'be protected from maltreatment, neglect, abuse or degradation'* and the provisions that *'a child's best interests are of paramount importance in every matter concerning the child.'*

[36] Finally, there are the provisions of section 36 of the Constitution which prescribe that the aforesaid rights may be limited *'only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …'* Section 36(2) provides that no law may limit any right entrenched in the Bill of Rights save

[4] Section10
[5] Section14
[6] Section 16
[7] Section 28

as provided above and taking into account all relevant factors including certain listed factors.

[37] The ICASA Act provides in section 2 that the objects of ICASA inter alia are to:

1. regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;
2. regulate electronic communications in the public interest;
3. achieve the objects contemplated in the underlying statutes.

[38] In terms of section 4(1)(a) of the ICASA Act it must exercise the powers and perform the duties conferred and imposed upon it by the Act, the underlying statutes and by any other law. Those underlying statutes include the Broadcasting Act, No 4 of 1999 and the Electronic Communications Act, No 36 of 2005 (*'the ECA'*). The ECA provides in section 54 that ICASA must, *'prescribe regulations setting out a code of conduct for broadcasting service licensees'*.

[39] The object of the Broadcasting Act is to establish and develop a broadcasting policy in the Republic in the public interest inter alia to *'contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society'* and to *'safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa'*.

[40] On 31 January 2006 the Subscription Broadcasting Service Regulations were published in the Government Gazette. They provide in part as follows:

> *'3.1 A subscription broadcasting service licensee may not add a channel to its service unless the Authority, on application by the licensee, has authorised the channel ...*

…

3.4 Within 60 days of receipt of an application made in terms of this regulation, the Authority shall issue a certificate authorising or refusing to authorise the channel'

'6. <u>CODE OF CONDUCT</u>

6.1 Subject to the provisions of 6.2, all subscription broadcasting service licensees must adhere to a code of conduct for subscription broadcasting service licensees as prescribed.

6.2 The provisions of 6.1 do not apply to any subscription broadcasting service licensee if that licensee is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct for subscription broadcasting service licensees enforced by that body by means of its own disciplinary mechanisms and provided such code and disciplinary mechanisms are acceptable to the Authority.'

[41] It is common cause that ODM is a member of the National Association of Broadcasters (*'NAB'*), a signatory to the Broadcasting Complaints Commission of South Africa (*'BCCSA'*). ODM is thus subject to the BCCSA Code of Conduct for subscription broadcasting service licensees (*'the Code'*). In terms of that Code a licensee may not knowingly broadcast material which, judged within context, contains a scene or scenes, simulated or real, of child pornography, bestiality, incest or rape, explicit violent sexual conduct or explicit sexual conduct which violates the right to human dignity of any person or which degrades a person and which constitutes incitement to cause harm.

[42] This constraint, deriving from section 54 of the ECA, was the first of at least three constraints on content applicable to ODM's proposed channels derived either from legislation or instruments created pursuant to legislation. The second such constraint is section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007 (*'The Sexual Offences Act'*) which provides that:

'A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of –

a) Any image, publication, depiction, description or sequence of … pornography

… to a child ('B'), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of ... pornography to a child.'

[43] A similar further legislative restraint on the broadcast of pornography to minors is found in section 24A(4) of the Films and Publications Act, No 65 of 1996 ('the FPA') which provides:

'Any person who knowingly distributes or exhibits any film…

a) classified as 'X18; or

b) which contains depictions, descriptions or scenes of explicit sexual conduct, unless such film … is a bona fide documentary or is of scientific, literally or artistic merit or is on a matter of public interest,

to a person under the age of 18 years, shall be guilty of an offence and liable, upon conviction, to a fine or imprisonment for a period not exceeding 5 years or to both a fine and such imprisonment'.

[44] The legal framework was central to ODM's argument that, in considering ICASA's decision, deference had to be paid not only to the decision-maker's expertise and evaluation of the channel authorisation application but also to the law, statutory and otherwise, dealing with the distribution and broadcasting of pornography, both to adults and children. An important pillar of ODM's case was the absence from that legal framework of a law of general application which permitted ICASA to limit ODM's constitutional right to freedom of expression by broadcasting adult pornography to adults.

[45] As far as the question of procedural fairness is concerned the following statutory prescriptions are relevant.

[46] Section 4B of the ICASA Act provides as follows:

> *'1. The Authority may conduct an inquiry into any matter with regard to –*
>
> *a. the achievement of the objects of this Act or the underlying statutes;*
>
> *…*
>
> *e. the exercise and performance of its powers, functions and duties in terms of this of Act or the underlying statutes.*
>
> *2. The Authority must, in the Gazette, give notice of its intention to conduct an inquiry and such notice must indicate the purpose of the inquiry and invite interested persons to –*
>
> *a. submit written representations on or before a date specified in the notice, which date may not be less than 45 days from the date of the publication of the notice, and*
>
> *b. indicate in their written representations whether they require an opportunity to make oral representations to the Authority.*
>
> *3. Written representations made pursuant to a notice referred to in sub-section 2 must, subject to sub-section 5, be open to inspection by the public at the premises and during the normal office hours of the Authority.*
>
> *4. The Authority must, when so requested by any person upon payment of the prescribed fee, provide such person with a copy of or extract from any representation made.*
>
> *5. …*
>
> *6. …*
>
> *a. The Authority must advise persons contemplated in section 2(b) of the place where and time when oral written representations may be made;*
>
> *b. Oral representations must, subject to section 4C, be open to the public*
>
> *7. The period provided for in sub-section 2(a) may be extended if an inquiry is of a complex nature or where substantial research or analysis is required by any interested person.'*

[47] Although none of the parties drew the Court's attention to the above provisions, they clearly prescribe the standards against which the procedural fairness of the inquiry instituted by ICASA must be judged. This is confirmed by section 4 of The Promotion of Administrative Justice Act, No 3 of 2000 (*'PAJA'*) which deals with administrative action affecting the public and provides inter alia as follows:

'1. In cases where an administrative action materially and adversely effects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –

a. to hold a public inquiry in terms of sub section (2);

b. to follow a notice and comment procedure in terms of sub section (3);

c. to follow the procedures in both sub sections (2) and (3);

d. <u>where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure</u> … [my underlining]

e. to follow another appropriate procedure which gives effect to section 3

2. …

3. …

4. …

a. If it reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in sub-sections 1(a) – (e)…;

b. In determining whether a departure as contemplated in para (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

i. the objects of the empowering provision;

ii. the nature and purpose of the need to take the administrative action;

iii. the likely effect of the administrative action;

iv. the urgency of taking the administrative action or the urgency of the matter; and

v. the need to promote an efficient administration and good governance'.

<u>PROCEDURAL GROUNDS OF REVIEW</u>

[48] I turn now to consider the procedural grounds of review without attributing such grounds to any particular applicant. The first challenge was to the timing and contents of the notice published by ICASA in terms of the ECA in the Government Gazette on 19 December 2012 advising that it had received ODM's application and inviting interested parties to make representations in response. It was contended that the information given therein was completely insufficient, that making ODM's

application available only at ICASA's library in Johannesburg was unfair and that the timing, six days before Christmas, was similarly unfair.

[49] There can be no doubt that, for want of clarity and sufficient information, the notice fell far short of adequate. It referred to an application by ODM for the authorisation of three video channels without indicating in any way that they would be used to broadcast pornography. This was less than a year after ICASA had held a public hearing in January 2012 to deal with ODM's earlier application to broadcast pornography on a 24-hour per day basis and pursuant to which it had received a range of written representation from members of the public and interested bodies. ICASA must have realised that the renewed application to broadcast pornographic material on three channels would excite considerable public interest and, in many instances, opposition. Its failure to advise of this material fact in the notice is inexplicable.

[50] In its first notice ICASA did not express its intention to conduct an inquiry. Nor did it do so in its second notice, published in the Gazette on 1 March 2013, which only advised of the date of a public hearing. In terms of section 4B of the ICASA Act ICASA's first notice should have given notice of its intention to conduct an inquiry arising out of ODM's application, indicated its purpose, invited interested persons to make written representations and indicate therein whether they required an opportunity to make oral representations to the Authority. Although ICASA's notice invited interested parties to lodge written representations it did not fulfil the remaining requirements. Furthermore, ICASA truncated the period of 45 days for making representations provided for in section 4B to a period of 21 days. The initial notice was overall, in my view, grossly inadequate.

[51] I do not consider that the timing of the notice, six days before Christmas, is necessarily sinister or impacted on the fairness of the process. It is also somewhat surprising, given the obvious expected public interest in the matter, that ICASA did not see fit to publish its notices in the press as well but this was not a requirement in terms of section 4B. Fortunately for ICASA, the press did become aware of ODM's application and publicised it. It would seem that it was owing to this publicity that the flood of objections and public representations poured in to ICASA during January 2013.

[52] Given the nature of ODM's application and ICASA's recent refusal of its 2011 application, ICASA ought to have anticipated the need for a public hearing at the earliest stage and ought, in its first notice, to have detailed not only the nature of ODM's application, namely, authorisation for three channels broadcasting pornography, but also the precise nature of inquiry that ICASA intended to conduct, plus all related procedural information. This it did not do.

[53] The second focus of the challenge to procedural fairness was that the public were not afforded a meaningful opportunity to make representations. Aspects of this challenge are that publication in the Government Gazette alone was inadequate and its timing, together with the truncated 21 day period within which to submit representations, was unfair. Another aspect criticised was ICASA making ODM's written application available only at its library in Johannesburg and not, for example, on its website, or at other major centres throughout the country. These were, in my view, further shortcomings affecting the fairness of the administrative process since clearly it was necessary for interested parties to gain access to ODM's application in order to appreciate in the first place that it sought authorisation for the broadcasting

of pornography. No explanation was provided why the application could not have been made available on ICASA's website.

[54] A third point of attack was the alleged defective nature of the notice of public hearing. Notwithstanding the deadlines established earlier, this notice was only published in the Gazette by ICASA on 1 March 2013 and still did not apprise the public that the application was for authorisation to broadcast pornography on the three channels. It gave two weeks' notice of the hearing to be held in Gauteng and, ironically, stated that the programme for the hearings was available on the ICASA website.

[55] By this time ICASA has received more than 500 representations and it is a little difficult to understand why it set aside only one day for a public hearing in one centre, particularly since it had followed a similar procedure in 2011 after it had received only 15 objections to ODM's initial application. The notice also did not invite oral submissions from interested parties as also required by section 4B(2)(b) of the ICASA Act. Again ICASA did not use the press to advertise the hearing.

[56] A further procedural challenge related to ICASA's decisions concerning the appointment and composition of the special committee. This decision was taken on 31 March by the Council of ICASA in terms of section 17 of the ICASA Act when it established the special committee consisting of two Councillors to *'consider, conduct public hearings and provide a recommendation to Council'* on ODM's application.

[57] In terms of section 17 of the ICASA Act, the special committee had to consist of one or more Councillors… and *'such additional members as the Council may determine.'* A requirement for such additional members was that *'their expertise, qualifications and experience'* qualified them to serve on the relevant committee.

[58] ICASA's failure to appoint independent experts to the committee was criticised by the applicants on the grounds of the considerable public interest in the application and, as it was put, the need to *'investigate, interrogate and properly understand and appreciate all relevant information issues including the nature of the pornography, its impact on society, the medical submissions and the legal argument'*. However, neither section 4(2) of PAJA, the provisions of the ICASA Act nor the resolution which ICASA passed obliged it to appoint independent experts. Section 4(3)(m) read with 4(4)(a)(ii) and 17 of the ICASA Act, do not, in my view, oblige ICASA to appoint independent members to a special committee. The relevant section reads:

> *'[17] Standing and special committees*
>
> 1. *The Council may establish standing committees or special committees for such purposes as the Council may deem necessary with a view to assisting it in the effective exercise and performance of its powers and duties;*
> 2. *Each committee established in terms of this section must consist of:*
>
> a. *one or more Councillors or any member of staff designated by the Council; and*
>
> b. *such additional members as the Council may determine.'*

[59] In my view the power referred to in section 17(2)(b) is permissive in nature. The terms of the resolution passed by the Council, notably clauses 2.4.10 and 2.4.11, make it clear that it lay within the discretion of the special committee whether to appoint independent experts or inspectors to assist it in the performance of its functions. Nor can I find that this discretion was improperly exercised.

[60] DFL made the further submission that, judging from the manner in which the chairperson conducted the inquiry, it was clear that ICASA had not appointed suitably qualified persons to the special committee and it cited various shortcomings in this regard. CFJ argued, similarly, that it would have been useful had the special

committee appointed external experts or inspectors to assist it with the performance of its functions.

[61] These submissions, however, beg the question as to whether the two Council members of the special committee conducted the inquiry fairly and in accordance with the applicable legislation.

[62] A further challenge to the procedural fairness of the process was that ICASA's record keeping had been inadequate. This allegation related to the fact that although ICASA had recorded receiving 569 written representations, those made by Mr Ryan Smit of CFJ were neither acknowledged nor recorded, undoubtedly due to an error on the part of ICASA.

[63] I now deal, cumulatively, with all these aspects of the applicants' challenges to procedural fairness.

[64] Dealing with public inquiries in The Promotion of Administrative Justice Act – a Commentary 2nd Edition, Currie states as follows [at pages 128 – 129]:

> *'The inquiry procedure consists in essence of the publication of information about the proposed administrative action and an invitation to make submissions on these proposals to the person or panel conducting the inquiry. An inquiry must also involve a public hearing (or hearings) at which affected members of the public may attend and have their viewpoints heard…*
>
> *The Regulations on Fair Administrative Procedures prescribe the inquiry procedure in detail. Notice must be published of the inquiry; the notice must contain the names of the person or panel appointed to conduct the inquiry and the terms of reference; it must invite members of the public to submit written representations to or requests to appear before the inquiry; it must contain sufficient information about the matter to be investigated to enable the public to submit meaningful representations and, where appropriate, a way of obtaining further information about the subject matter of the inquiry'.*

[65] Dealing with the consequences of non-compliance with the procedure Currie states [at pages 132 – 133]:

> *'To insist on strict compliance with the detailed procedural rules in the PAJA and Regulations would be to elevate form over substance. The assessment of compliance with the procedures should therefore consider whether the steps actually taken by the administrator were 'effective, measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirements in particular.'*[8]

[66] Broadly speaking, the purpose of the notice and hearing procedures is to ensure that those persons likely to be affected by proposed administrative action have a reasonable opportunity to make their views known. Only if there has not been such an opportunity should the resultant administrative action be considered procedurally unfair. In *Premier, Mpumalanga and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal*[9] O'Reagan J stated as follows (at para [41]):

> '*In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'*

[67] This point was reinforced by the Supreme Court of Appeal in a different context when it stated *'even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved*.'[10])

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[8] quoting from *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) [13]
[9] 1999 (2) SA 91 (CC)
[10] *Unlawful Occupiers, Schools Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at [para 22]

[68] On behalf of ODM Mr Budlender submitted that only a party who is denied a hearing may raise a procedural challenge[11] pointing out that neither JASA nor CFJ itself (as opposed to one of its executive members) had made submissions to the special committee whilst DFL had made submissions to the special committee and had been afforded an oral hearing. On the basis of these facts Mr Budlender contended that the complaint of a lack of a fair hearing was not properly before the Court.

[69] I do not consider, however, that the argument that there was no fair hearing should be considered on such a narrow basis. The challenge by CFJ and DFL to the fairness of the hearing went further than merely claiming that they were not afforded any hearing. Both parties approached this question in a wider context having regard to how interested members of the public may have been prejudiced and raising a number of issues, including the adequacy of the notice of the hearing, the opportunity given for making representations and the truncated nature of the right to make oral representations, amongst other criticisms.

[70] Bearing all these observations in mind the question which must ultimately be asked is whether the public or, perhaps more accurately, those with an interest in the question of whether pornography should be broadcast on television on a subscription basis, had a reasonable opportunity to make their views known. In my view the principal shortcoming in the process was the inadequacy of the first notice published by ICASA in the Government Gazette. However, its deficiencies must be seen in the wider context, particularly the fact that by 11 January 2013 considerable press publicity appears to have been given to ODM's application. Such publicity,

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[11] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) (SA) 416 (CC) at paras [216 – 224])

judging by the one example thereof, an annexure to CFJ's founding papers, drew the link between ODM, its more popular working name *'Top-TV'* and its earlier unsuccessful application in 2011 to broadcast pornography on a subscription basis.

[71] On the probabilities it was primarily this and other press reports which led to the flood of representations which ICASA received. It is also significant that whereas ODM's 2011 application had attracted a total of 15 representations from the public, at least 569 were received in 2012. Some parties did experience difficulty in accessing ODM's original application but it is not clear that this problem was widespread. Further, although many written representations were received beyond the 21 day period initially announced, ICASA decided that all representations would be considered by it.

[72] The argument can be made that ICASA should have made provision for a more extended hearing to accommodate oral representations from more members of the public. Similarly, the case can be made that ICASA should have held more hearings in centres across the Republic. However, the decision to hold a one day hearing in Johannesburg represents an exercise of the special committee's discretion and, in my view, was not one which can be considered irrational or evidencing bias. Nor is it helpful to approach the decisions relating to the hearing on the basis that ICASA could not have been acting in good faith. That case was simply not made out. Finally, as far as poor record-keeping is concerned, ICASA's mislaying of Mr Smit's submissions was unfortunate but, seen in the wider context, and without any indication that his representations were so different or powerful that they could have made a decisive impact upon the final decision, this defect cannot be considered as one which alone, or cumulatively, led to material procedural unfairness.

[73] On balance, taking all the shortcomings of the process into account, and leaving aside the bias ground for the time being, I consider that the applicants have failed to make out a case that ICASA's decision must be set aside on the grounds of procedural unfairness. Notwithstanding that the process had significant defects, most importantly the lack of adequate notice, I consider that the steps taken by ICASA, together, crucially, with the press publicity ODM's application received, were ultimately effective in ensuring that interested parties had a reasonable opportunity to make their views on the matter known.

BIAS

[74] On behalf of CFJ it was alleged that the actions of the special committee and the decision of the Council reflected bias. It was submitted that even if there was no actual bias the impression of bias was created by the manner in which the hearing was conducted.

[75] DFL alleged that an indication of bias was that ICASA treated objectors differently to ODM and accepted ODM's submissions without testing them against opposing submissions. The complaint was made that DFL's representative at the hearing, Dr van Eeden, was limited to a ten minute presentation and the five minutes set aside for questions was only utilised by a single question from the chairperson of the special committee and one from the other ICASA Councillor.

[76] I cannot agree that the Councillors' interventions were, as DFL's counsel submitted, intended to ridicule Dr van Eeden or to be dismissive of his presentation. Nor can I conclude, as was urged on this very limited basis, that the only conclusion that could be drawn was that the special committee members failed to understand Dr van Eeden's submission or the importance thereof or dismissed it as being of no

consequence to the inquiry. It must be noted that the question of the linkage between the viewing of pornography and sexual violence is both complex and contentious. This was demonstrated alone by the voluminous material placed before the Court in this regard, a salient feature of which is the divide between those who conclude that there is a direct link and those who do not. This question is clearly the subject of ongoing sociological debate and research.

[77] It was further contended that ICASA's bias was manifested in the special committee allocating much greater time to ODM to present its case than to the objectors. The latter were only given a 15 minute slot each. Furthermore, it was contended, allowing Dr Wasserman to sum up the proceedings for ODM in unchallenged evidence was grossly unfair.

[78] On behalf of ICASA it was contended that when the hearing started rules of engagement were set out and no parties present raised any objection. This is borne out by the transcript of the hearing. Amongst those rules of engagement were that ODM would be first to begin its presentation which it partly completed. Thereafter approximately nine objectors made presentations of ten minutes apiece following which ODM responded and, in the last session, called Dr Wasserman as its expert witness. The fact that she would testify last was made apparent quite early in the proceedings and no objection was registered to this at the time. Furthermore, although Dr Wasserman made her presentation last, this did not necessarily give her an advantage over other presenters or render her immune to questioning from the special committee members. Although in total ODM may have been granted more time to present its case than the objectors, the disparity was not so great as to suggest that ICASA was merely going through the motions of hearing objectors to ODM's application. Given that there were so many objectors and only one day set

aside for the hearing, a rough parity of time between the two groupings was perhaps all that could be realistically hoped for.

[79] The treatment of the FPB's attempt to make an oral presentation was also raised by CFJ and DFL as a manifestation of ICASA's bias. DFL submitted that ICASA's refusals to hear the FPB's submissions and its failure to deal in its reasons with the FPB's written objections was irrational.

[80] The test for bias is whether, seen objectively, the decision-maker is actually biased or whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the decision-maker has not or will not bring an impartial mind to bear on the question at hand[12]. The onus of proving bias or a reasonable apprehension of bias lies with the party alleging bias.

[81] As the record of the hearing shows, the FPB had made a written submission to the special committee but had omitted to deliver a copy to ODM, as was required by the Government Gazette notice of 19 December 2013. Nor was the FPB initially recorded on the agenda of the public hearing as being scheduled to make oral representations. When the chairperson announced that the FPB would be making a presentation there was an objection from ODM on the basis inter alia that they had not received the FPB's written submissions timeously. After consideration the chairperson upheld the objection. She stated that ICASA would still consider the FPB's written submissions but would not afford it an opportunity to make an oral presentation. It bears noting that the FPB did not raise any objection to the ruling at

[12] See in this regard *President of the Republic of South Africa v South African Football Union* 1999 (4) SA 147 (CC) at 177B. See also *Ndlovu v Minister of Home Affairs and Another* 2011 (2) SA 621 (KZD) paras [20 – 21] albeit that the latter case was decided in the context of an application for recusal.

the public hearing and did not seek to review ICASA's ultimate decision in this or in any other respect.

[82] The challenge to procedural fairness alleging bias as manifested by ICASA's treatment of the FPB cannot be sustained. Although there was much to be said for a more flexible approach on the part of the chairperson of the special committee, the decision taken was, in my view, neither irrational nor indefensible and cannot be relied upon as proof of bias on the part of the special committee. Ironically, had the FPB been allowed to make oral presentation, a serious flaw in the legal reasoning eventually adopted by ICASA may have been avoided.

[83] In my view, taking into account the factors upon which the applicants relied for bias, either singly or cumulatively, they have failed to discharge the onus which they bore of proving bias or a reasonable apprehension of bias.

ICASA'S REASONS FOR ITS DECISION

[84] Before dealing with the substantive grounds of review it is necessary to consider in some detail ICASA's reasons for its decision to authorise the channels. In them ICASA first set out the nature of the application by ODM and then the legislative framework, most notably Regulation 3 of the Subscription Broadcasting Services Regulations, 2006 which provides that ICASA must consider such an application and *'within 60 days of receipt (thereof) … shall issue a certificate authorising or refusing to authorise the channel'* and failing which, *'the channel shall be regarded as having been authorised.'* It set out the terms of section 54 of the ECA which provide for ICASA to establish a code of conduct for broadcasting service licensees but exempts from that code any licensee which is a member of a body which has proved to the satisfaction of ICASA that its members subscribe to

and adhere to a code of conduct enforced by that body provided such code and its disciplinary mechanisms are acceptable to ICASA.

[85] It is common cause that ODM, as a member of NAB is bound by the BCCSA code of conduct, the relevant clauses of which are 9, 12 and 13. Clause 9 prohibits, insofar as is relevant, the broadcasting of material containing scenes of child pornography, rape, explicit violent sexual conduct or explicit sexual conduct which violates the rights to human dignity of any person or which degrades a person and which constitutes incitement to cause harm. Clause 12 of the Code stipulates that a broadcasting service licensee must avoid broadcasting programming material which is unsuitable for children and/or contains nudity, explicit sexual conduct before the watershed period. This is defined as the period between 20h00 and 05h00. Clause 13 states that a licensee must attempt to ensure that the more the programming material is unsuitable for children the later it is broadcast after the commencement of the watershed period.

[86] ICASA's reasons then set out the provisions of the freedom of expression clause in the Bill of Rights, section 16, and noted that section 36 provides that such a right may be limited only *'in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ….'* ICASA referred to the public hearing which was held and stated that flowing therefrom it became evident that the two questions paramount in deciding the channel authorisation application were whether there was a law of general application limiting ODM's constitutional right to freedom of expression and whether there was a direct relationship between the dissemination of adult content and gender-based violence. It proceeded with an analysis in which it dealt with the applicable legislation, the causal link between

pornography and gender-based violence and security measures pertaining to the proposed channels.

[87] Dealing with legislation it noted that none of the applicable statutes had provisions prohibiting the broadcasting of adult pornography and that it was only the production and distribution of child pornography which is expressly prohibited by law in South Africa. It further noted that in terms of section 192 of the Constitution, ICASA was required to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society. This, it stated, included also the views of the minority in a democratic society. It pointed out that, as a broadcaster bound by the provisions of the BCCSA, ODM was subject to clauses 9 – 13 of the Code which prohibited the broadcast of material including scenes of child pornography and sexual conduct involving violence or violating the right to human dignity. It noted that the material which ODM proposed to broadcast would only be X-rated but since the BCCSA's code did not deal with the category of classifications which are permissible for broadcasting, Regulation 9 of the ICASA code of conduct, which prohibited the broadcasting of any film which has an XX (and above) classification in terms of the Films and Publications Act was applicable.

[88] ICASA appeared to accept that since the proposed material for the channels was packaged outside the country ODM was not obliged to submit their content for classification. It accepted an undertaking by ODM that their content would not be violent and would comply with the BCCSA Code and the provisions of the Films and Publications Act.

[89] ICASA then dealt with the causal link between pornography and gender-based violence referring to some of the representations which had been made to it

prior to and during the public hearing. It expressed the *'considered view'* that there was no evidence to demonstrate that pornography was a direct cause of gender-based violence in the Republic. It referred to research that analysed the negative impact that pornography might have on children and stated, somewhat curiously, that *'it is the Authority's view that as much as the results of the research might be true, in the absence of the law of general application that prohibits the distribution of pornography, the Authority would have no legal basis under the Constitution, ICASA Act and underlying statutes to refuse the applicant's application.'*

[90] Finally, under its analysis, ICASA dealt with the proposed security measures and pointed out that parents also have a role in, and responsibility for, the parenting of their children to ensure that they do not bypass such measures in order to view adult pornography. It noted that only adults would be permitted to subscribe to the proposed channels upon proof of identity and further verification with regard to banking details. It concluded that ODM had demonstrated sufficient security measures to safeguard against unnecessary exposure as required by the Code.

[91] ICASA then set out its decision commencing with the following key paragraph:

> *'After due consideration, the Authority accepts that there is no law of general application prohibiting the production and distribution of adult pornography in the Republic of South Africa. Only the production and distribution of child pornography is expressly prohibited by law. A prohibition for the authorisation of channels as applied for would be an unlawful limitation of applicant and its prospective customers' rights to freedom of expression as there is no law prohibiting the broadcast of adult content material.'*

[92] ICASA went on to repeat its conclusion that there was no conclusive evidence to demonstrate that pornography was a direct cause of gender-based

violence in South Africa. It concluded *'accordingly the Authority is of the view that there is no basis in law or research evidence to refuse the applicant's application for authorisation of three adult pornographic channels.'* It added that objectors had two forms of recourse, either to approach Parliament to formulate a law of general application to prohibit the distribution of adult pornography or to monitor ODM's broadcasts to ascertain whether these complied with the BCCSA Code.

[93] ICASA's ultimate decision was to authorise ODM to broadcast three pornographic channels subject to them being broadcast within the watershed period only, with the security measures (double pin code) to be implemented at all times and the channels to be available to subscribers as a separate subscription from the main ODM's subscription service.

ERROR OF LAW / FAILING TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

[94] One of the main substantive review grounds advanced by the applicants related to ICASA's finding that *'in the absence of a law of general application that prohibits the distribution of pornography, (ICASA) would have no legal basis under the Constitution, ICASA Act and the underlying statues to refuse (ODM's) application.'* In general the applicants contended that ICASA committed an error of law in accepting ODM's submission that it only had authority to refuse the application if the broadcasting of pornography was specifically prohibited by statute and, in any event, that there was no law of general application which permitted it to refuse the application. JASA contended further that ICASA's understanding of its role, namely, that, in the absence of a law of general application, it had no discretion to refuse to authorise the channels was fundamentally flawed since in that case ICASA's function in such instances would boil down to a mere mechanistic

determination of whether the proposed broadcasting of the channels was prohibited by law or not.

[95] It was submitted instead that ICASA enjoyed a full discretion in terms of section 3.4 of the Subscription Broadcasting Services Regulations of 2006 to authorise or refuse to authorise a channel. It was further submitted that ICASA should have utilised section 28 of the Constitution which enshrines the rights of children as further authority to limit ODM's right to freedom of expression as well as section 192 of the Constitution. A further legislative measure which could or should have been employed by the ICASA was section 4(4) of the Broadcasting Act.

[96] JASA submitted that the fact that the discretion to limit the right to freedom of expression was found in abstract and general rules was no bar to ICASA refusing to authorise the channels being broadcast notwithstanding the right to freedom of expression. In conclusion it submitted that ICASA's failure to appreciate the meaning and effect of the limitation clause in the circumstances of this matter was a reviewable error and for that reason alone its decision fell to be set aside.

[97] DFL similarly relied on a material error of law as a substantive ground of review. It contended that ICASA's acceptance of ODM's legal argument had blinded it to its statutory mandate in relation to the function which it was required to perform. DFL likewise relied on section 192 of the Constitution and various rights enshrined in the Bill of Rights which were in competition with the right to freedom of expression. It also placed reliance on the provisions of the FPA, the Sexual Offences Act and section 2(a) of the Broadcasting Act, No 4 of 1999 as well as the Regulations, read together with the ECA. It submitted, in conclusion, that the application of one or more of the aforementioned laws, properly interpreted, did not

render ICASA's mandate to function in the public interest devoid of a discretion to refuse ODM's application. It submitted further that this discretion itself amounted to a law of general application as contemplated by section 36(1) of the Constitution authorising ICASA to limit the right to freedom of expression generally.

[98] CFJ advanced a similar ground of review, relying particularly on the right to dignity as a counter-weight to an unlimited right to freedom of expression. It made the point that although pornography was treated by the courts as enjoying constitutional protection, it had relatively little constitutional value and was easily outweighed by the need to protect the rights of vulnerable groups such as children and women.

[99] Section 16 of the Constitution, dealing with the right to freedom of expression, distinguishes between protected speech (section 16(1)) and non-protected speech (section 16(2)). In *Print Media*[13] the Constitutional Court held that the expression of sexual conduct is protected speech under section 16(1) of the Constitution. It follows then that such expression may only be curtailed by the limitations clause in 36 of the Constitution, the first requirement of which is that any limitation may only derive from '*law of general application'* to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

[100] In *Constitutional Law of South Africa, 2nd Edition, Vol 2*[14] Woolman et al comment as follows on the requirement that only *'law of general application'* may limit fundamental constitutional rights in the Bill of Rights:

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[13] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC)
[14] At Chapter 34 pages 48 - 50

'*When determining whether a type of law – and any token of such a type – qualifies as law of general application it is important to remember that this threshold requirement is designed to promote two primary ends:*
(1) to give effect to the rule of law;
(2) to filter out bills of attainder.

To give effect to the rule of law, a law of general application must possess four formal attributes. First, the law must ensure parity of treatment in two respects: it must treat similarly situated persons alike; and it must impose the same penalties on the governed and the governors, and accord them the same privileges. Second, the rule of law – as opposed to the rule of man – requires that those who enforce the law – the executive or the judiciary – do so in terms of a discernible standard. Our rule of law culture sets its face against the arbitrary exercise of State power. Third, the law must be precise enough to enable individuals to conform their conduct to its dictates. Laws may not grant officials largely unfettered discretion to use their powers as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension. Fourth, a commitment to the non-arbitrary exercise of power entails that the law must be accessible to the citizenry. Law must be publicly promulgated and available ex ante in order to avoid the appearance that its application and its execution are selective. Finally, as we noted above, the phrase 'law of general application' is meant to prevent any attempt at justification for bills of attainder. Bills of attainder are laws that pick out specific individuals or easily ascertainable members of a group for punishment without judicial trial.'

[101] JASA argued in effect that the *'law of general application'* requirement is met by the exercise of the discretion afforded to ICASA in terms of legislation. However, it offered only academic authority for this proposition which itself is equivocal. In *Currie and De Waal*[15] the authors state:

'It is possible for a law to authorise an administrator to exercise a discretionary power that has the effect of limiting rights. However, an empowering law will lack the quality of general application if it simply grants an administrator a wide and unconstrained discretion to limit rights.'

[15] The Bill of Rights Handbook at page 161

[102] JASA also relied upon Regulation 3.4 of the SBS Regulations. However, that clause, which provides simply that ICASA may refuse or grant a channel authorisation application, is, standing alone, also a wide and unconstrained discretion to limit rights without any guiding principles.

[103] Insofar as the applicants seek to rely on section 192 of the Constitution, it too does not appear to meet the requirements of a *'law of general application'*. Section 192 provides that *'national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society*.' It would be a strained interpretation to find that this confers any powers upon ICASA let alone a power to limit constitutional rights. Section 4 of the Broadcasting Act provided that one of its objects was the establishment and development of a broadcasting policy in the Republic in the public interest and for that purpose to contribute towards a range of values including gender equality and strengthening the spiritual moral fibre of society but it was repealed by the enactment of the ECA.

[104] ODM's counsel described the interpretation which the applicants sought to place on Regulation 3.4 as affording ICASA a *'freewheeling discretion'* and submitted that this was untenable. The argument proceeded that it would require the clearest language in the SBS Regulations before a Court could conclude that a proper construction was to confer such wide powers on ICASA. Further, an interpretation of the regulations which did not limit fundamental rights was to be preferred, in accordance with constitutional principles. Counsel for ODM ultimately contended that, at most, Regulation 3.4 conferred a limited power on ICASA to ensure that any proposed channel would not be in breach of the law or the BCCSA Code before it was broadcast.

[105] It was further contended if such a power were to be given to ICASA it would be essential that it be subjected to specified criteria laid down by Parliament which in this case were absent. Of relevance in this regard is the decision in *Dawood v Minister of Home Affairs*[16] were the Court held that it was not permissible to afford officials a discretion which could result in limitations of fundamental rights without providing any guidance on this score.

[106] In my view, however, an interpretation of ICASA's discretionary power limiting its role to a mere mechanistic determination of whether any channel authorisation application was legally compliant or not, is too narrow. On such an interpretation it is difficult to see the point of an inquiry, a public hearing or indeed soliciting the views of the public at all. It is significant, furthermore, that ICASA itself did not see its discretion as being such a narrow one. In 2012 it refused ODM's earlier similar application notwithstanding that the same legal framework applied. Dealing with ODM's second application it did not limit itself to the question of legal compliance but investigated a number of issues including the question of whether there was a link between pornography and gender violence.

[107] Furthermore, the ambit of an administrative agency's discretion is not always narrowly circumscribed. In *Dawood's* case O Reagan J, speaking on behalf the Court stated in this regard (at para [53]):

> *'[53] Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the*

[16] 2000 (3) SA 936 (CC)

discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.'

[108] Ideally, the guidelines applicable to program content should be clear as possible since they impact upon the right to freedom of expression which is so frequently a much contested area, not least where it concerns sexual conduct. The need for clear guidelines was highlighted in *Case v Minister of Safety and Security*[17] where Mokgoro J held as follows:

'One need not go so far as to accept the notion of a preference for free expression over other rights, to appreciate the danger of overbroad statutory proscriptions. It is incumbent upon the Legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in the light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural, and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.'

[109] However, for reasons which will become apparent, it is not necessary for this Court to determine either the precise scope or the sources of ICASA's discretion in authorising channels. Suffice it to state that the provisions of the BCCSA Code or any applicable code will undoubtedly play an important role in this question.

[110] Initially, at least, the applicants were not able to refer to any common law or statutory criminal prohibition prohibiting the broadcasting of ODM's proposed channels. Section 24A of the FPA deals with prohibitions, offences and penalties relating to the distribution and exhibition of films, games and publications. The FPB enforces these measures in the first place by requiring parties to register with it as a distributor or exhibitor of films thereby subjecting themselves to its classification system (section 18). However, in section 24A(2)(a) an exemption is created for broadcasters that are subject to regulation by ICASA as far as the broadcasting of

[17] *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para [63]

films not classified by the board. That exemption does not extend to films which have been classified as *a 'refused classification'* or as *'XX'* but the basis of ODM's case and the undertaking which it gave to ICASA was that none of the material to be broadcast on the channels would fall outside the class of *'X18'*. The further possible proscription which might have affected ODM's application is that contained in section 24A(4) which prohibits the distribution or exhibition of any film classified as X18, amongst other material, but which covers distribution or exhibition to persons under the age of 18 years.

[111] However, ODM's proposed channels and subscription procedures were designed to ensure that only adults could view the channels. Thus ODM's proposed broadcasts would arguably not fall foul of either section 19 of The Sexual Offences Act which proscribes the exposure or display of pornography to children, or section 24A(4) of the FPA. A key element of the former offence is the unlawful and intentional exposure of children to such pornography. In the case of section 24A(4) the prohibition is on *'knowingly'* distributing the film. Given the licence conditions relating to security features on the ODM decoder and the separate and verified subscription process which only adults could access it is doubtful whether these provisions justified a refusal of channel authorisation.

[112] It was against this background that ODM submitted both to ICASA and in the review application that its application for channel authorisation steered a careful course through all legal proscriptions relating to the distribution of pornography. The final result, it contended, was that in the absence of a law of general application prohibiting what it proposed to flight, its authorisation application could not be refused by ICASA.

[113] At an advanced stage in argument, however, in fact during JASA's reply, Mr Cooke pertinently raised for the first time the implications for the validity of ICASA's decision of the hitherto overlooked section 24A(3) of the FPA which provides as follows:

> *'24A(3) Any person, not being the holder of a licence to conduct the business of adult premises and, with regard to films and games, not being registered with the Board as a distributor or exhibitor of films or games, and who knowingly broadcasts, distributes, exhibits in public, offers for exhibition, sale or hire or advertises for sale or hire any film, game or publication which has been classified 'X18' shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.'* [my underlining]

[114] On the face of it ODM is hit by the provisions of section 24A(3) since it is not the holder of the licence to conduct the business of adult premises and is not registered with the Board as a distributor or exhibitor of films. The significance of the proscription contained in section 24A(3), furthermore, was that it apparently undermined the central thrust of ODM's argument in the presentations which it made out to ICASA, namely, that there was nothing in South African law, either common or statute, which prohibited it from displaying adult pornography falling within the X18 classification provided that this was not knowingly and intentionally shown, broadcast or made available to children, which hurdle it surmounted by virtue of its various security measures.

[115] Given the late stage at which the point was raised and the lack of detailed argument which the issue enjoyed, the Court requested ODM, to whose argument the legal framework relating to the broadcasting of pornographic material was central, to file a short note on the implications of section 24A(3), with all other parties being entitled to respond thereto.

[116] In response, however, ODM also sought leave to file a set of further supplementary affidavits dealing with the classification of the material flighted by ODM after it had received authorisation from ICASA to broadcast the three channels. The substance of these affidavits was that in regard to its one channel, Playboy TV, the programmes broadcast had not been classified by the FPB. Were they to be so classified, at least some thereof would not have been classified as X18 but in a less restrictive classification in accordance with the guidelines applicable to material unsuitable for viewing by children. That channel continues to be broadcast by ODM.

[117] As regards ODM's second channel, the Private Spice channel, it had been broadcast for one month only from 1 December 2013 to 1 January 2014. During that month approximately fifty percent of the content broadcast had indeed been classified by the Board as X18 with the remaining material unclassified. This was because the X18 content had been part of an entire library which had been classified by the FPB as X18 for DVD release. As far as the balance of the content, ODM accepted that had such material been classified by the Board, it would, at least in significant part, have fallen within the criteria for X18 classification.

[118] From 2014 onwards the Private Spice channel was rebranded as Brazzers TV channel which broadcast material not classified by the FPB but which, if classified, would also, at least in significant part, fall in the X18 classification. ODM applied for such authorisation to so rebrand the channel on 4 December 2013 and received final authorisation from ICASA on 11 March 2014. That decision by ICASA falls outside the scope of the present reviews.

[119] It was common cause that, at all material times, ODM did not use the third channel for which it had received authorisation.

[120] ODM's chief executive officer concluded his further supplementary affidavit by stating that ODM had always been of the view that section 24A(3) was not intended to apply to licenced broadcasters and that the facts he had set out demonstrated that the applicants' reliance on section 24A(3) did not establish any ground of review.

[121] CFJ objected to the filing by ODM of its further supplementary affidavits, as an irregular step and reserved its right to supplement its papers. At the Court's invitation, CFJ provisionally filed an affidavit responding to ODM's further supplementary affidavits. Notes on the implications of section 24A(3) were filed on behalf of all the parties save for ICASA and its chairman.

[122] In the light of all the submissions received and the objection to ODM's filing of a further supplementary affidavit, I directed that the Court would convene on 13 October 2014 to hear argument regarding the implications of section 24A(3) of the FPA for the decision sought to be reviewed.

[123] At the hearing neither ICASA nor any of the applicants, save for CFJ, persisted with any objection to the admission of ODM's further supplementary affidavits. CFJ withdrew its objection to the filing of ODM's affidavits subject to its affidavit responding thereto being admitted. Having regard to the fact that the point relating to section 24A(3) had only enjoyed focused attention relatively late in the hearing, and bearing in mind that all parties had enjoyed an opportunity to respond to ODM's further supplementary affidavits, the content of which bore directly on the relevance of section 24A(3), I ruled that both sets of affidavits could be admitted. In

CFJ's affidavit a member of its executive committee alleged, in some detail, that the case being made out by ODM in its further supplementary affidavits was contrary to what it had represented to ICASA and to what it had stated in its answering affidavits. In my view, however, the contents of CFJ's affidavit take the matter no further.

[124] In argument DFL contended that section 24A(3) was a law of general application which had been overlooked by ICASA and, furthermore, that ODM had sought authorisation to broadcast material classified X18 by the FPB in breach of the section. ICASA had not only understood ODM to be seeking authorisation to broadcast such material, it had unlawfully granted such authority which ODM had then proceeded to act upon. It was further contended by DFL that ICASA was obliged to give effect to section 24A(3) but had erred in law in failing to take it into account. CFJ likewise contended that section 24A(3) was a law of general application.

[125] JASA submitted that, contrary to the central thrust of ODM's arguments, both before ICASA's special committee and in the review proceedings, rather than the legal framework generally permitting the broadcasting of pornography to adults, section 24A(3) rendered it a criminal offence to broadcast such material if it had been classified X18 by the FPB. Implicit in its argument was the notion that section 24A(3) is a law of general application. JASA argued that no distinction should be drawn between material already classified as X18 and that which, if submitted to the FPB, would be classified as such. In fact, counsel contended, ODM should not be entitled to broadcast material not classified X18 but which would be classified as such if submitted to the FPB. It would be an absurdity, it was submitted, if ODM could lawfully broadcast material not yet classified X18 but not material already

classified X18. All three applicants contended that the existence and implications of section 24A(3) for the review had been properly and timeously raised in the litigation.

[126] On behalf of ODM, Mr Budlender performed something of a volte face when he conceded that section 24A(3) was, and remained, applicable to his client to the extent that it prohibited the broadcasting by ODM of material which had been classified by the FPB as X18. He conceded, furthermore, that ODM had, as set out in its further supplementary affidavits, pursuant to ICASA's authorisation, broadcast such material during the period 1 December 2013 to 1 January 2014 on its Private Spice channel, subsequently rebranded as the Brazzers TV channel. He stressed, however, that the material which ODM had broadcast since 1 January 2014 had not been classified as X18 by the FPB.

[127] In response to the applicants' arguments, Mr Budlender contended that no absurdity would follow from making a distinction between program content already classified X18 by the FPB and content which, if submitted to that body, would be so classified. He submitted that the apparent anomaly, namely that broadcasting the former material was a criminal offence in terms of section 24A(3) but not the latter, was no more than the product of a compromise made by the Legislature in a situation of competing institutional jurisdiction and constitutional rights.

[128] I understood Mr Budlender's concession that section 24A(3) was applicable to ODM's channel authorisation application to impliedly concede also that ICASA's decision was unlawful to the extent that it purported to authorise ODM to broadcast material which had been classified X18. He argued that this shortcoming could be corrected by the Court adopting an appropriate remedy, namely, reviewing and

setting aside ICASA's decision but only to the extent that it failed to impose on ODM a condition requiring it to comply with the provisions of section 24A(3) of the FPA. The Court should then add such condition, the wording of which, he ultimately submitted, should read *'in broadcasting the channels … ODM shall not knowingly broadcast any film which has been classified as X18 by the Films and Publications Board.'*

[129] In support of this approach Mr Budlender relied on the fact that ODM was no longer broadcasting material which had been classified X18 and that ICASA had conducted a full hearing process on the merits of the application. A remittal of the decision back to ICASA, he contended, would be inappropriate inasmuch as it did not have, as he put it, a *'freewheeling discretion'* to regulate the content of ODM's adult channels. Mr Budlender referred to section 8 of PAJA which affords a court wide power in arriving at an appropriate remedy. It reads in part as follows:

> *'1. The court … may grant any order that is just and equitable, including orders –*
>
> *a) …*
>
> *b) ..*
>
> *c) setting aside the administrative action and –*
>
> *i. remitting the matter for reconsideration by the administrator, with or without directions; or*
>
> *ii. in exceptional cases –*
>
> *aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; …'*

[130] He also relied on the decision in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) and *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA). In *Steenkamp* the Court held as follows at para [29]:

> *'It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.*

> *In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law… Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*

[131] In *Retail Motor Industry Organisation*, the Supreme Court of Appeal found that certain regulations should not have applied to solid as opposed to pneumatic tyres and set aside the regulations, to the extent that they also referred to and purported to deal with solid tyres. It held as follows at para [46]:

> *'The fact that the November plan deals with solid tyres as well as pneumatic tyres, does not necessarily mean that the entire plan must be set aside. If the bad can be severed from the good, the bad can be set aside and the good left intact.'*

[132] Mr Budlender also pointed to the inconvenience and prejudice which ODM, its overseas content suppliers and the subscribers to its adult content channels would suffer in the event that the decision was remitted back to ICASA to take what he contended would be the same decision but with the addition of a condition relating to section 24A(3).

[133] In the alternative, Mr Budlender contended, should the Court set aside the decision and remit it back to ICASA, it would be appropriate for the Court to issue an order suspending the invalidity of that decision pending a fresh decision by ICASA.

[134] On behalf of ICASA Mr Kennedy adopted a different position to that of ODM. He conceded that section 24A(3) was applicable to ODM's broadcasting of its adult content channels but contended, however, that this was not relevant to the review since the point had not been properly raised by the applicants. He contended in any event that section 24A(3) was not a law of general application and, furthermore, that

ICASA's failure to refer thereto either in its decision or in its reasons did not render its decision reviewable. This was because section 24A(3) did no more than state the law and implicit in any authorisation granted by ICASA to ODM was the requirement that it comply with the law. As Mr Kennedy put it, ICASA was entitled to assume that ODM would comply with all necessary legal stipulations and that appropriate action would be taken against ODM if it contravened the law. It was therefore not incumbent on ICASA to impose a condition such as that proposed by counsel on behalf of ODM.

[135] In the alternative Mr Kennedy contended that in the event of the Court nonetheless finding that the decision fell to be reviewed on this ground, this did not require that the matter to be remitted back to ICASA for a fresh decision. He advised that he was mandated by ICASA to convey that it was happy to have a condition, such as that proposed on behalf of ODM, imposed on its original decision.

[136] In reply, counsel for JASA opposed the imposition of the proposed condition as an appropriate remedy arguing that the matter should be remitted in full to ICASA. He pointed out, furthermore, that the suspension of invalidity contended for by ODM in the alternative had been raised very late in the day and without any basis being established on affidavit. A similar position was adopted by CFJ and DFL.

[137] Three issues arise from what can be termed the section 24A(3) point; firstly, whether the challenge to ICASA's decision based on its provisions was properly raised by one or more of the applicants; secondly, if so, the consequences thereof for the validity of ICASA's decision and; thirdly, if the review is successful on this basis, the appropriate remedy.

WAS THE SECTION 24A(3) POINT PROPERLY RAISED?

[138] It was submitted on behalf of the applicants that DFL's reliance upon the provisions of section 24A(3) was sufficiently foreshadowed in its founding affidavit where the deponent refers to various statutes including the FPA and states that, *'at the very least the applicable relevant legislation … above taken together and in some instances on their own, can justify the decision by ICASA in refusing ODM's application.'* He further alleged *'that ICASA has contravened the statutes … in relation to the prohibition against exposing children to disturbing or harmful to or age inappropriate for children film material. ICASA and its committee evidently dismissed and had no regard whatsoever to the Films and Publications Act' … broadcasters are only exempt from the Film and Publications Board and not the Act. As a result of not considering the application of the Film and Publications Act to ODM broadcasting pornography on three different channels this Act and its objectives were contravened by ICASA.'*

[139] These statements in DFL's supplementary founding affidavit were identified by it as grounds of review under sections 6(2)(d) and 6(2)(f)(i) of PAJA, namely, that the administrative action was materially influenced by an error of law, contravened a law or was not authorised by the empowering provision. In response to the recitation of these review grounds in DFL's founding affidavit, ICASA's chairman was satisfied to merely deny that any ground for review was established under these headings.

[140] It is also noteworthy that ODM's CEO stated in his opposing affidavit that the FPA permitted the distribution and broadcasting to adults of X18 material or material that had been classified X18. This averment was squarely denied and disputed by JASA in its replying affidavit. In any event, as JASA's counsel submitted, any prejudice which ODM might have suffered in regard to the late raising of the point

had been cured by ODM's further supplementary affidavits and the opportunity it had enjoyed to make considered submissions in respect of section 24A(3).

[141] The following extract from *Barkhuizen v Napier* 2007 (5) SA 323 (CC) is relevant[18]:

> *'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.'*

[142] Although this dictum deals with raising of a point of law on appeal, in my view the present situation is analogous. Given the many statutory provisions in the legal framework which were applicable to ODM's application, I do not consider that the applicants had to identify, section and sub-section, those provisions in the FPA which should have been taken into account by ICASA in considering ODM's application.

[143] In the result I consider that the section 24A(3) point was properly raised by the applicants, and that the respondents were afforded adequate opportunity to deal with it.

THE IMPLICATIONS OF SECTION 24A(3) FOR ICASA'S DECISION

[144] The next issue is whether the section 24A(3) point impacts on the validity of the decision taken by ICASA. In my view the concessions made by Mr Budlender on behalf of ODM correctly recognised that ICASA's failures to appreciate the import of

[18] para [39]

section 24A(3) inevitably affected the lawfulness and validity of its decision. It was a recurring theme in ICASA's reasoning that one of the two paramount questions in deciding whether to approve the channel authorisation was whether there was a law of general application that could be held to limit ODM's right to freedom of expression. ICASA concluded that *'in the absence of a law of general application that prohibits the distribution of pornography, the authority would have no legal basis under the Constitution or under the ICASA Act and the underlining statutes to refuse the applicant's application*' ICASA thus accepted ODM's submission that there was no law of general application prohibiting the production and distribution of adult pornography. In further instances it reasoned and found that there was *'no law prohibiting the broadcast of adult content material*.'

[145] In the light of the provisions of section 24A(3) it is quite clear that these assumptions, which were fundamental to ICASA's decision, were incorrect. There was a statutory prohibition on what ODM sought authority to broadcast i.e. adult pornography, some of which had been classified as X18 by the FPB, and section 24A(3) was a law of general application.

[146] In this regard there was no suggestion by ODM that section 24A(3) was not *'a law of general application'* and in my view it plainly is. In its application dealing with the applicable legal framework, ODM itself submitted to ICASA that *'the FP Act has been established as the law of general application which restricts certain rights and established pre-defined prohibitions.'*

[147] Mr Kennedy's argument that ICASA's decision had to be understood as requiring ODM to comply with the provisions of section 24A(3) of the FPA or any other applicable statutory provision, does not stand up to scrutiny. In its

authorisation application ODM referred, in an annexure dealing with channel information, to the Playboy TV channel having content *'in line with the South African Films and Publications Board R18 rating'.* It went further in relation to its Private Spice channel stating that *'many of the Private Spice titles have been cleared in South Africa by the FPB and are currently on sale as DVD's in Adult Stores with a single X-rating'.*

[148] Thus ICASA could have been under no misapprehension that, at least in respect of one channel, ODM was seeking authorisation to broadcast material which had been classified as X18 by the FPB. In the submission by the special committee to ICASA's Council the view was expressed that there was no basis in law to refuse ODM's application for channel authorisation of the three adult pornographic channels, incorrectly so. The committee ultimately recommended that the Council should grant ODM's application for authorisation and made no mention of any qualification relating to material which had been classified X18 by the FPB. As part of its reasoning, the committee stated that it *'accepts that there is no law of general application prohibiting the production and distribution of adult pornography in the Republic. Only the production and distribution of child pornography is expressly prohibited by law'*, yet another erroneous statement of law.

[149] ICASA's decision to authorise ODM to broadcast three pornographic channels did not limit the content to material which had not been classified by the FPB. Having regard to the tenor and terms of ODM's application, the only conclusion which can be reached is that, as a result of overlooking the provisions of section 24A(3) of the FPA, ICASA purported to authorise ODM to broadcast adult content, whether it had been classified X18 by the FPB or not.

[150] It follows that ICASA's decision falls to be reviewed on several grounds listed in PAJA and relied on by one or more of the applicants viz it committed a material error of law, it failed to take into account a relevant consideration (the provisions of section 24A(3)) or took an irrelevant consideration into account, the action/decision contravened a law or is not authorised by the empowering provision or it was otherwise unconstitutional or unlawful.

[151] Before considering the question of the appropriate remedy I propose to consider the remaining substantive grounds of review. I do so for the sake of completeness and having regard to the possibility of an appeal.

FURTHER SUBSTANTIVE GROUNDS

[152] JASA's main ground of review related to the *'rewiring of the brain'*. This arose out of the evidence of Dr Wasserman who, in responding to representations concerning the addictive qualities of pornography, made the following statement:

> *'Is there an impact of adult content? - Indeed.*
> *Does it rewire the brain? - Indeed.*
> *And are we looking at research today to see how does it rewire the brain and mostly what we are seeing is that is making men and women make love differently. Their ideas of how they want to make love are different and we have to make adjustments to what now is a different kind of normality. Doesn't mean pathological. So, definitely will it cause rape? - Absolutely not.'*

[153] JASA's deponent, Mr Smythe ('Smythe') alleged that it could be inferred from this evidence that the viewing of pornography on ODM's authorised channels would result in the rewiring of viewers brains i.e. the anatomy of the brain being altered. He relied on a number of other inferences which he stated arose from this portion of Dr Wasserman's submission and observed that there was no mention in ODM's authorisation application *'of the mind altering effects of pornography'.* ODM did not

undertake to inform and/or warn viewers *'that their brains will be rewired by the viewing of pornographic channels. Nor are viewers warned that the watching of the pornographic channels will cause them to change the way they have sexual intercourse.'* Smythe alleged that the broadcasting of these channels would *'erode(s) the capacity of viewers to express their own innate and personal sexual behaviour',* constituted *'a violation of the right to bodily and psychological integrity, as well as the right to security in and control over one's body'* and amounted to an infringement of the privacy and dignity of viewers.

[154] In the circumstances Smythe concluded that the decision to authorise the broadcasting of channels was plainly reviewable in that these consequences of viewing pornography were not mentioned in ICASA's reasons (nor in the special committee's submission), the decision was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision or the information before ICASA and was not one that a reasonable decision-maker could reach. Mainly on these grounds it was submitted on JASA's behalf that the authorisation of the pornographic channels was clearly wrong, that no purpose would be served in remitting the matter back to ICASA for reconsideration and that the Court should substitute ICASA's decision with one refusing to authorise the channels described in ODM's application.

[155] In an answering affidavit Dr Wasserman addressed the meaning that she sought to convey by her statements. She expressed the view that, read in context, it was apparent that what she meant by *'rewiring the brain'* was the development of new ideas of sexual intercourse and lovemaking and not any specific neurological changes that might be categorised as pathological. Be that as it may, what is of more importance is what the special committee understood her original evidence to

mean. In response to Smythe's claim, ICASA's chairman merely alleged that JASA had misinterpreted Dr Wasserman's statement. In the face of this response, it was submitted on behalf of JASA, the Court should apply *'the ordinary principles of interpretation'* and find that the inferences for which it contends are established.

[156] In my view JASA has focused unduly upon a single strand of evidence and sought to make a number of unjustified inferences from such evidence. It has argued moreover that these inferences should also have been drawn by ICASA which, acting on the strength thereof, should have refused the channel authorisation application.

[157] I consider that JASA has read far too much into Wasserman's statement which, put in simpler terms, says no more than that persons who watch pornography are exposed to new patterns of sexual behaviour which, potentially, can alter their own sexual behaviour albeit not in any pathological sense. This rather broad and unsubstantiated statement appears to have made limited, if any, impact on the members of ICASA's special committee if one is to judge by the questions put to Dr Wasserman or the contents of its submission to ICASA's Council. In my view it is a wholly exaggerated and unfounded proposition that unsuspecting adults who watch the pornography channels would find themselves exposed, without prior warning, to material which would cause them any serious neurological or social harm.

[158] In the result I consider that there is no substance to this ground of review, whether cast in terms of PAJA or as breaches of fundamental constitutional rights.

SECURITY CONCERNS RELATING TO CHILDREN

[159] The applicants contended that ICASA had failed to take into account that the proposed security measures, most notably the double pin code, could be

circumvented by children; further, that for such security measures to be effective the adults who subscribe to the channels must act responsibly and vigilantly, an assumption which ICASA should not have made. It was contended that the State had an obligation to create the necessary environment for parents to provide proper parental care, at the very least to prevent inadvertent exposure by children to pornography. It was further contended that even if the security measures were foolproof the mere existence of the pornographic channels would encourage the use of pornography by children and, in the final result, that in approaching this issue ICASA failed to take into account relevant considerations.

[160] Much of the applicants' papers were taken up with technical evidence from experts regarding these security measures including the question of how long it would take a child to *'crack'* the double pin code using a systematic trial and error approach. All this evidence was irrelevant for the simple reason that it was not initially placed before ICASA. If this Court were to take such evidence into account the process would be one not of review but appeal, one moreover where the parties were permitted to adduce further evidence.

[161] It was also contended by the applicants that the special committee had not investigated the proposed security features on the decoder but simply accepted what ODM said in this regard. This criticism is misconceived since I can see no basis on which ICASA was obliged to inspect or physically test the operation of the security features on the ODM decoder particularly when, as I understand the position, this was not pertinently challenged by any of the objectors who made representations to the special committee. Secondly, such criticism ignores the regulatory oversight function of the BCCSA. Bearing in mind that the security measures were adopted by ICASA as conditions for the broadcasting of the

channels, any alleged shortcomings in the measures or breaches of the security conditions could appropriately be the subject matter of a complaint to the BCCSA.

[162] I regard it also as unrealistic to postulate, as the applicants appear to, that if there is a reasonable possibility of children gaining access to the adult material broadcast by ODM the harm such children might suffer as a result would necessarily mean that the authorisation should not be granted. The Constitutional Court has recognised that *'a vast range of private actions will have some consequences for children'* and further that *'no constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments.'*[19]

[163] I do not consider that, in stipulating as a condition the double four digit pin code and the other provisions aimed at ensuring that only adults could subscribe to and view the service, ICASA's decision was irrational or otherwise reviewable for failing to protect the interests of children from exposure to pornography.

THE WATERSHED PERIOD

[164] ICASA gave ODM permission to broadcast its channels during the watershed period which is defined by the BCCSA code as between 20h00 and 05h00 hours. Clause 13 of the Code states that:

> *'A television or composite subscription broadcast service licensee, wherever practical must attempt to ensure that the more the broadcasting of programming material is unsuitable for children, the later that programming material must be broadcast after the commencement of the watershed period.'*

[165] Having regard to the fact that children will be routinely watching television between 20h00 and 22h30 at night JASA contended that ODM should only have

[19] *S v M* (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC) at para [20] & [25]

been permitted to broadcast pornography from substantially later than 20h00 at night. For this reason JASA submitted that ICASA‘s decision was taken without considering relevant considerations and was irrational or so unreasonable that no reasonable person could have taken it.

[166] In my view there is nothing to suggest that ICASA failed to take into account these considerations. Other conditions imposed by ICASA stipulated that only adults could subscribe to those particular channels and ensured limited access thereto through a double four digit code and related security provisions. Although many might consider that the channels should only be flighted later at night, I do not consider it to be irrational or unreasonable for ICASA not to stipulate that the channels could only be broadcast, for example, from 10pm or 11pm onwards.

[167] I therefore consider this ground of review is without merit.

REGULATORY BREACHES BY PLAYBOY

[168] ODM’s authorisation application recorded that all three channels would be compiled and supplied by Playboy TV UK/Benelux Ltd in England. At the public hearing a representative of Playboy SA assured ICASA that her company complied with the laws of all countries in which it operated. However, an internal ICASA report in the record on review noted that Playboy TV had recently breached rules in the United Kingdom and had been sanctioned by the UK broadcasting authority (OFCOM). There appeared to be several of these breaches, with varying degrees of seriousness. There was, however, no mention of these regulatory breaches in the submission made by the special committee to ICASA’s Council nor in the latter’s reasons. On this basis JASA submitted that ICASA had irrationally accepted the probity of Playboy TV at face value which had rendered its overall decision

susceptible to review on the grounds that it had not taken relevant considerations into account and its ultimate decision was not rational nor one which a reasonable decision-maker could reach.

[169] On a fair reading of the record, ODM never contended that Playboy TV, the party responsible for the production of the broadcast material, had an unblemished regulatory record in all other broadcasting jurisdictions. In any event ICASA dealt with ODM's application on the basis that ODM took responsibility for the content and compliance-monitoring itself and did not seek to rely on Playboy's reputation or record to suggest that it, ODM, would be exonerated from responsibility in that regard. In fact ODM stated that it exercised its own compliance monitoring in addition to the processes implemented by Playboy. Nor did ICASA's reasons place any weight on Playboy's compliance record. They recorded instead ODM's undertaking that it would comply with the BCCSA Code which contains its own complaint mechanism in the event of breaches.

[170] I therefore do not consider it necessary to determine the extent to which Playboy TV allegedly breached regulations in other jurisdictions or how serious these were. There is no suggestion that ICASA was materially influenced by any contention that Playboy TV always complied with regulatory standards. In the result I find that this ground of review can also not be sustained.

[171] JASA sought to rely on a further ground of review, namely, the alleged discrepancy between the description of the content of the proposed channels in the channel authorisation application and the true content of these channels. It was only in its replying affidavit that JASA produced a UK program for one of these channels which suggested, it contended, that the material being broadcast was far more

explicit and lacking in any redeeming value than was initially suggested by ODM in its channel authorisation application.

[172] Mr Cooke, for JASA, argued that the effect of this alleged misrepresentation, whether intentional or negligent, was that ICASA had been unable to properly exercise its discretion and therefore that its overall decision should be set aside. In response ODM argued that JASA had impermissibly raised this issue as a ground of review for the first time in its replying affidavit.

[173] JASA contended, however, that it had timeously raised the ground, alternatively, relying on *Pretoria Portland Cement*[20]*,* that it was entitled to raise the ground in its replying affidavit by reason of the late stage at which it discovered the alleged discrepancy between the actual and the promised channel content. Further to its main argument, JASA's counsel submitted that certain passages in its supplementary founding affidavits prefigured the issue of the alleged discrepancy between the proclaimed and the actual content of the channels. However, upon close analysis that portion of the affidavits dealt with JASA's *'rewiring of the brain'* ground of review and therefore does not assist it.

[174] Raising a ground of review in reply is irregular. See *Director of Hospital Services v Mistry*[21] and *Telcordia Technologies v Telkom SA Ltd*[22]*.* In Telcordia the Court stated as follows:

> *'The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the*

[20] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA)
[21] 1979 (1) SA 626 (A) at 635H – 636B
[22] 2007 (3) SA 266 (SCA) at para [32]

presiding officer, obviously based on the new information which had become available.'

[175] As regards the alternative basis for the belated reliance on the additional ground of review, neither *Pretoria Portland Cement* nor *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) are authority for the proposition that a ground of review, as opposed to new facts, can be raised in reply. Furthermore, when regard is had to time constraints JASA had ample time, some two months, to monitor ODM's programming schedules and content before it filed its supplementary affidavit. It could thus have raised the new ground of review at that stage so that ODM could respond thereto.

[176] In any event, JASA failed to establish that there was a misrepresentation on the part of ODM regarding its channel content, whether intentional or negligent. The language used by ODM to describe the content of the three channels for which it sought authorisation in its application might have been downplayed but no reasonable reader could have been under the misapprehension that the material would not be pornographic.

REMAINING SUBSTANTIVE GROUNDS OF REVIEW RELATING TO THE MERITS OF ICASA'S DECISION INCLUDING THE ASSESSMENT OF THE RELATIONSHIP BETWEEN PORNOGRAPHY AND SEXUAL VIOLENCE, EVIDENCE OF ADDICTION BEING IGNORED AND THE MEDICAL CASE MADE OUT BY DFL

[177] Many of the affidavits and annexures filed contained arguments, evidence and opinions, in many cases relying upon academic articles, dealing with the psychological, social and physiological effects of pornography. This material was relied upon in support of various grounds of review all of which contended that

ICASA had erred in assessing the social harm which the broadcasting of pornography would cause both to adults and children. Large tracts of this material had been canvassed either directly or indirectly in the written and oral presentations made to ICASA.

[178] In my view most if not all of this material was irrelevant to the review application and served simply to burden the papers and the Court. As stated earlier a review cannot serve as an appeal against the decision of administrative authority, whether that appeal is explicit or disguised. The reasons for this approach are well established and essentially spring from the doctrine of the separation of powers which recognises that such decisions lie in the province of the executive or other administrative decision-making authorities. Such functionaries generally have the necessary experience and expertise to take the required decisions and a court must pay due deference to the bodies seized with the task of making value-laden and, at times, polycentric decisions.

[179] The judgment in *Clairisins CC (supra)* is also significant for what it stated in regard to a ground of review heavily relied upon by the applicants in relation to various aspects of the present matter, namely, ICASA's alleged failure to take into account relevant considerations and its corollary of taking into account irrelevant considerations. The Court held that, where the true complaint is directed at the weight or lack of weight the decision-maker attached to that consideration, the ground is not an avenue for a court of review to second-guess the decision-maker at every turn[23].

> *'It has always been the law, and we see no reason to think that PAJA has altered the position, that the weight or lack of it to be attached to the various considerations that*

[23] At para [20]

go to making up a decision, is that given by the decision-maker. As it was stated by Baxter:

> *'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'*

[180] It is also material to observe, in relation to these remaining substantive grounds of appeal, that the scope for review for material mistake of facts appears to have narrowed to mistakes as to *'a fact that is established in the sense that it is uncontentious and objectively verifiable.'*[24] The scope for review on such a basis in the present matter is distinctly limited given the wide range of factors which the ICASA had to take into account, many of them of a contentious nature eg the scientific evidence regarding the effects of pornography and its relationship to violence against women. As ODM's counsel put it, the factual issues that ICASA was called upon to decide were contested and controversial. In the circumstances it would clearly be an error for a court to substitute its findings for those of the decision-maker.

[181] In the result I find that none of the above grounds of review which challenge the correctness of ICASA's conclusions regarding the effects and consequences of flighting pornography, including those I have not specifically dealt with, have any merit.

[182] This conclusion means that the only review ground in respect of which the applicants have succeeded has been the error of law point. The remaining issue is thus the appropriate remedy in the light of ICASA's invalid administrative action.

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[24] See *Dumani v Nair* 2013 (2) SA 274 (SCA) at para [32]

REMEDY

[183] The main remedy sought by ODM, namely, the Court reviewing the decision only to the extent of imposing a condition that ODM could not knowingly broadcast material which had been classified X18, was opposed by the applicants. The remedy for which they contended was the setting aside of the decision and the remittal of the matter back to ICASA for a fresh decision.

[184] Correction or substitution of an administrative authority's decision is, at common law, the exception rather than the rule[25]. This is reflected also in the provisions of PAJA which allow for the correction of a defect only in *'exceptional cases'*. In *Gauteng Gambling Board v Silverstar Development Ltd*[26] the Court gave as the reasons for this that the administrator *'is generally best equipped by the variety of its composition, by experience and its access to sources of relevant information and expertise to make the right decision. The Court typically has none of these advantages and is required to recognise its own limitations.'* In *Littlewood* Nugent JA justified a remittal back as follows '*It cannot be said in the present case that the proper decision is a foregone conclusion, nor that the Minister has disabled himself from properly making it, nor are there any other grounds for substituting our decision for his. The proper course is to remit the matter for re-consideration by the Minister.'*

[185] In Hoexter's *Administrative Law in South Africa, 2nd Edition,* Juta, the author notes that in making a choice between these two options, fairness to both sides is always an important consideration and further, that three important common law

[25] See *Littlewood v Minister of Home Affairs* 2006 (3) SA 474 (SCA) at para [18]
[26] 2005 (4) SA 67 (SCA) at para [29]

principles are relevant to a decision whether to correct or substitute an administrative decision found to be reviewable:

> *'These are that the court will be prepared to substitute the decision where the end result is a foregone conclusion and it would be a waste of time to remit the decision to the original decision-maker; where further delay would cause unjustifiable prejudice to the applicants; and where the original decision-maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its jurisdiction again.'*

[186] In my view ICASA has exhibited neither bias nor incompetence to such a degree that it would be unfair to require the parties to submit to its jurisdiction again to take a decision afresh. Nor is this an instance where further delay would cause unjustifiable prejudice to any party. The applicants seek a remittal back to ICASA. It is ODM which resists a remittal on the grounds of the prejudice it will suffer. In this regard Mr Budlender alluded to subscribers to the adult content channels who would be inconvenienced, presumably by the interruption of the service, pending any fresh decision and, in very general terms, to content suppliers, presumably Playboy TV. However, no detail was given of any of this prejudice and none of this material was conveyed by means of an affidavit which could be considered by the Court or responded to by the applicants. Furthermore, ODM had nearly two months between the two court hearings in which to reconsider its position in the light of the provisions of section 24A(3) and, if it saw fit, to place relevant material on affidavit before the Court regarding the form of a proposed order.

[187] Most importantly, however, I do not consider that this is a case where the end result is a foregone conclusion, namely, that ICASA will necessarily again grant ODM's application for authorisation to broadcast the channels but on this occasion simply adding a condition that the material to be broadcast may not be in breach of section 24A(3) of the FPA. Turning to the particular circumstances of this matter, the

error of law made by ICASA, overlooking the provisions of section 24A(3), was far-reaching also for its potential influence on ICASA's decision by reason of what it indicates about the legislature's position on the broadcasting of pornography. It is entirely appropriate, therefore, that ICASA looks afresh at the authorisation application and makes a fresh decision in the light of the correct legal perspective, namely, that the legislature has not given carte blanche for the broadcasting of pornography to adults. That decision could, quite feasibly, be different to the decision ICASA originally took or be subject to different or additional conditions. I am mindful too that ICASA is a specialist body, one which the Legislature has established to deal with the issues and concerns thrown up by ODM's application to broadcast channels containing pornographic adult content.

[188] For these reasons I consider that the appropriate order is not simply to impose the proposed condition but to set aside the decision and to remit it back to ICASA for reconsideration and a fresh decision.

[189] For much the same reasons I consider that the order sought in the alternative on behalf of ODM, namely, remittal but with a suspension of the invalidity of the order, is likewise inappropriate. To grant such an order would come uncomfortably close to assuming that ICASA will, on remittal, take the same decision as it previously did, save for the imposition of the proposed condition. Such an assumption is neither appropriate nor justified. Nor does the fact that ICASA has indicated, through its counsel, that it would be prepared to accept the imposition of such a condition make any difference to my conclusion. What is required of ICASA is for it to reconsider the matter afresh in the light of what has emerged through this application and, in that light, take a fresh decision untrammelled by its earlier flawed analysis of the legal framework.

COSTS

[190] Although the applicants succeeded on a relatively limited front or ground they have achieved substantial success. In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324(CkHC) the Court held that where in a review an independent tribunal does no more that its duty in terms of Rule 53 of the Uniform Rules of Court and abides the decision of the Court, a costs order will seldom be made against it. Where, however, it strenuously opposes the relief sought against it (and is unsuccessful) the Court will have little alternative but to award costs against it. In my view that approach is appropriate in the present matter.

[191] I consider, further, that it would be artificial to distinguish between the applicants in giving credit for the successful result. The section 24A(3) point was most pertinently raised and advanced on behalf of JASA although it was canvassed most directly by DFL in the papers. In the matter as a whole the applicants largely made common cause with each other in relation to the point and the broader review ground of which it forms part, namely, that there was a law of general application prohibiting the broadcast of at least some of the material for which ODM sought and obtained authorisation to broadcast. Nor do I consider it appropriate to fashion any costs award having regard to the not inconsiderable amount of time spent in argument on the procedural aspects and the other substantive grounds of review which were unsuccessful. Although the procedural challenges did not prevail they brought to light serious shortcomings in the notice procedure.

[192] On behalf of ODM Mr Budlender argued that ICASA, as the author of the decision successfully reviewed, should bear any costs order alone. However, both ODM and ICASA opposed the review strenuously and made common cause with each other in the review application until late in the day when ODM made

concessions, certain of which were not shared by ICASA. From the inception of its application to ICASA ODM incorrectly espoused the position, and persuaded ICASA thereof, that there was no law of general application prohibiting the broadcasting of at least part of the adult content material it proposed for the subscribers to the channels for which it sought authorisation.

[193] For these reasons I consider that the appropriate order is that the applicants are awarded the costs of the application, such costs to be jointly and severally borne by ICASA and ODM.

[194] In the result the following order is made:

1. *The decision taken by the second respondent (Independent Communications Authority of South Africa) on 23 April 2013, in terms of which it authorised the third respondent (On Digital Media (Pty) Ltd t/a Top TV) to broadcast three pornographic channels, namely, Playboy TV, Desire TV and Private Spice, is reviewed and set aside;*

2. *The matter is remitted back to the second respondent for reconsideration;*

3. *The second and third respondents are ordered to pay the applicants' costs, jointly and severally, the one paying the other to be absolved.*

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BOZALEK J

APPEARANCES

For Justice Alliance of South Africa:	Mr D Cooke Instructed by: Norman Wink & Stephens
For Cause for Justice & Mr G Venter:	Mr M Bridgman Instructed by: Smit & Viljoen Attorneys
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For Independent Communications Authority of South Africa & Mr S Mncube N.O:	Mr P Kennedy SC and Mr TC Tshavhungwa Instructed by: Damons Magardie Richardson Attorneys
For On Digital Media (Pty) Ltd & Mr Van Steen N.O	Mr S Budlender and Ms J Bleazard Instructed by: Bowman Gilfillan Inc