

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case No:

In the matter between:

CAUSE FOR JUSTICE

First Applicant

GABRIEL JACOBUS VENTER

Second Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA**

First Respondent

STEPHEN SIPHO MNCUBE N.O.

Second Respondent

**ON DIGITAL MEDIA (PTY) LTD t/a STARSAT (IN
BUSINESS RESCUE)**

Third Respondent

PETRUS FRANCOIS VAN DEN STEEN N.O.

Fourth Respondent

MINISTER OF COMMUNICATIONS

Fifth Respondent

AFFIDAVIT

I, the undersigned,

DIETER PETER VON FINTEL

do hereby make oath and say:

1. I am an adult male of Sun Hill Farm, La Provence Road (corner of M12 and Vlaeberg Rd), Stellenbosch. I am a lecturer in economics at the University of Stellenbosch.

2. I am a member and serve on the executive committee of the First Applicant, Cause For Justice (hereinafter also “we, “us” or “our”).
3. I am duly authorised to depose to this affidavit on behalf of the First Applicant and to bring this application.
4. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are, to the best of my knowledge and belief, both true and correct. Where I make legal submissions I make them on the advice of my legal advisors.

The parties

Cause For Justice

5. Cause For Justice is a non-profit voluntary association constituted as a juristic person capable of suing and being sued in its own name. Its principal address is at First Floor, Old Post Office Building, Cnr Bird and Plein Street, Stellenbosch, Western Cape.
6. The objectives of Cause For Justice are detailed in clause 3.3 of its constitution. The primary objectives of Cause For Justice is:
 - To defend and actively promote constitutional justice in South Africa, especially in instances where it is threatened, denied or has not been given effect to.
 - To ensure that the exercise of constitutional rights and freedoms are not hindered in any sphere of South African society.

- To stand against the abuse and/or misappropriation of constitutional rights and freedoms, especially where it occurs at the expense of constitutionally protected persons or groups, or offends against the public interest.
7. A copy of the constitution of Cause For Justice is annexed hereto marked “DVF1”.
 8. I am advised by my legal advisors that Cause For Justice has *locus standi* in this matter deriving from section 38 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”). In accordance with its constitution, Cause For Justice is acting purely in the public interest. Cause For Justice has no financial interests in the proceedings and does not purport to represent any party who has a financial interest.
 9. The First Applicant brings this application out of an honest and sincere concern for the people of South Africa and we are accordingly acting in the public interest. We submit that the risk of harm to society from allowing pornography to be broadcast in South Africa, even in a subscription service environment, far outweighs the potential benefit to be gained by the members of our society from being able to freely choose what broadcast content they receive on their television screens. We contend, based on scientifically researched evidence which evinces a conclusive link between exposure to pornography and harm to society, that pornography should not be broadcast in South Africa.

Second Applicant

10. The Second Applicant is Gabriel Jacobus Venter who is known to me and who is also a member of the First Applicant. I refer further to his affidavit filed herewith.
11. The First Applicant fully supports the views and sentiments of the Second Applicant. All of the members of First Applicant support the Second Applicant and the thousands of nameless, voiceless people in South Africa who need an organisation like First Applicant to coordinate opposition to the broadcasting of pornography in South Africa.

ICASA

12. The First Respondent ("ICASA") is the regulatory body in respect of telecommunications and broadcasting sectors, established in terms of section 3 of the Independent Communications Authority of South Africa Act, 13 of 2000 ("the ICASA Act").
13. In terms of section 192 of the Constitution, ICASA is required to regulate broadcasting in the public interest; and ensure fairness and diversity of views will be representing South African society.
14. ICASA has its principal place of business at Block B, Pinmil Farm, 148 Katherine Street, Sandton, Gauteng.

Stephen Sipho Mncube N.O.

15. The Second Respondent, Stephen Siphon Mncube, is the chairman of the First Respondent and has been cited in that capacity. His business address is the same as the First Respondent.

On Digital Media (Pty) Ltd t/a StarSat (in business rescue)

16. The Third Respondent is On Digital Media (Pty) Ltd, trading as StarSat (previously having traded as TopTV), with its principal place of business at 28 Saddle Drive, Woodmead, Gauteng (“ODM”).
17. ODM holds an individual subscription broadcasting service licence to provide a commercial subscription broadcast service in South Africa. ODM is in business rescue proceedings, which commenced on 31 October 2012. A letter from Bowman Gilfillan dated 15 November 2013 reporting *inter alia* on the status of the business rescue proceedings is annexed hereto marked “DVF2”.

Petrus van den Steen N.O.

18. Mr Petrus van den Steen, the Fourth Respondent, was appointed as the business rescue practitioner charged with overseeing ODM during the business rescue proceedings. Mr van den Steen is a licensed business rescue practitioner, employed by V-Squared (Pty) Ltd of 916 Wexford Drive, Woodlands Village, Dainfern Golf and Residential Estate, Fourways, Gauteng.

The Minister of Communications

19. The Fifth Respondent is the Minister of Communications (“the Minister”) who has been cited inasmuch as he is the Minister responsible for the actions of the First and Second Respondents.

INTRODUCTORY SUMMARY

20. This application is brought primarily because the First Respondent failed in its administrative procedures and in its reasons dated 24 July 2013 to get to grips with and deal with four vital issues regarding pornography, namely:

20.1. Pornography is psychologically harmful to children, and the medical and scientific implications of this fact;

20.2. Pornography is addictive. It is a form of sex addiction. It is inseparable from and linked to other forms of sex addiction;

20.3. Pornography actually incites some men, those who are prone to such things, to commit violence and rape;

20.4. Exposure to so-called “soft” pornography creates a desire for viewing progressively more sexually explicit material, in the process pornography desensitises people (men in particular) to rape and gender violence and damages or destroys healthy loving relationships.

21. The scientific research underlying these four issues will be dealt with extensively in this application; however, it is appropriate to provide a succinct summary of these four main issues as the facts and issues relating to pornography overlap to some extent.

Firstly: Pornography is psychologically harmful to children

22. It is accepted by all concerned that pornography is psychologically harmful to children. It is a crime to show pornography to children. For this reason ODM has agreed to its (ineffectual) double-pin blocking mechanism and has agreed to a limitation to screen pornography only in the watershed period. It is accepted medical science that the undeveloped brain, as found in children, does not have the normal resistance to pornography that a developed adult brain has. This medical fact is expressed in terms such as, "*Pornography damages the child's sexual arousal template*" or "*Pornography is experienced by the child as a traumatic event, similar to the experience of actual sexual molestation.*" This leads to intimacy disorders and the inability to develop healthy sexuality, to the well-acknowledged detriment of society as a whole.
23. In South Africa, a child is regarded as a person under the age of 18. However, the development of the brain is not complete and does not stop at age 18. According to medical science the prefrontal cortex of the brain (the relevant part of the brain) only reaches development during the mid-twenties. Some experts say it only reaches development in the early thirties. In other words, there is a cohort of people (especially men) between the age of 18 and 25 **whose brain**

functions will be harmed by the viewing of pornography broadcast by ODM as authorised by ICASA.

Secondly, Pornography is addictive

24. It is well known that the major addictions are gambling, alcohol, tobacco, drugs and sex. One of the most common forms of sex addiction is addiction to pornography. Sex addiction and pornography are invariably linked. It is well known that the lives of those addicted to alcohol or drugs and their families are devastated by the consequences of their addiction. It is less well known that the lives of sex addicts are also devastated by their addiction. Their relationships fail due to false expectations, distrust and dishonesty (generally going together with pornography and prostitutes), hurtfulness and breach of trust. It also often goes together with the fear of sexually transmitted diseases. On the work front, a sex addict is liable to be fired for watching pornography during work hours or for absenteeism from the workplace in order to feed his or her addiction. It is not yet known precisely what causes some people to become sex addicts. However, what is clear is that there is such a thing and that it devastates lives.

25. It may be mentioned that the other addictions such as tobacco, alcohol and gambling contribute large amounts of money to the *fiscus*. Some of this money can be used to deal with the devastation that these addictions wreak on society. Pornography does not contribute in any meaningful way to the *fiscus*.

Thirdly, pornography incites violence and rape

26. This point may be called the Ted Bundy point, after the notorious serial rapist and murderer of 28 girls. Only some men are incited by pornography to commit rape and murder. It is not known why some men are susceptible to this behavioural compulsivity and it is impossible to predict in which men their proclivity towards violence will develop into full scale “acting out”.

Fourthly, pornography causes gender violence

27. This point is a broad point. In our law it could be called the *S v Engelbrecht* 2005 (2) SACR 41 WLD point. It causes men to become callous to rape and gender violence. It causes battered women to respond with violence or even murder as in *Engelbrecht's case*. Pornography contributes to the destruction of healthy sexual intimacy and families in general.

28. The particularly pernicious aspect to ICASA's decision to allow ODM to broadcast pornography on the official state authorised channels is that ICASA particularly targets men between 18 and 25 for its programmes. Once it has altered the “sexual arousal template” of such young men, it has them hooked or addicted. They will then continue to purchase its pornography channels for the rest of their lives, much the same way that tobacco advertising aimed at young people intends to get them addicted to tobacco so that they smoke for the rest

of their lives. In effect, ICASA is giving ODM a state licence to create addicts and make money out of them for the rest of their lives.

29. This affidavit is divided under the following headings:

A: THE DECISION TO AUTHORISE PORNOGRAPHIC CHANNELS

B: ICASA'S REASONS

C: RECORD OF PROCEEDINGS

D: LEGAL FRAMEWORK

E: EVIDENCE OF THE HARMFUL EFFECT OF PORNOGRAPHY

F: GROUNDS FOR JUDICIAL REVIEW

G: SECTION 133 OF THE COMPANIES ACT

A: THE DECISION TO AUTHORISE PORNOGRAPHIC CHANNELS

30. The ICASA was established as a juristic person in terms of section 3(1) of the ICASA Act. Section 3(2) of the ICASA Act states that "the Authority acts through the Council contemplated in section 5" of the ICASA Act.

31. On 28 November 2012 ODM submitted an application to ICASA for the authorisation of three pornographic channels, namely Playboy TV, Desire TV and Private Spice ("ODM's application" / "the application").

32. The Council of ICASA ("the Council") resolved on the 13th of December 2012 to subject ODM's application "to a public process....and that the application was going to be gazetted for public comments". (Paragraph one on page 3 of

hearing transcript). We do however not have possession of the previously mentioned resolution.

Notice and Comment procedure

33. On 19 December 2012 ICASA published a notice in the Government Gazette (“the notice”) affording the public an opportunity to submit representations in response to ODM’s application. To the best of my knowledge these details were not published anywhere else. I annex a copy of the notice hereto marked “DVF3”. Importantly the notice did not give a description of the content of the proposed channels, the application was available only at ICASA’s library during their normal office hours (Paragraph 2), and interested parties were invited to lodge written representations on ODM’s application within 21 working days from the date of publication of the notice. (Paragraph 3);

34. Mr Craig Snyders, one of the executive members of Cause For Justice, became aware of ODM’s application and ICASA’s invitation to lodge written representations on 11 January 2013 via a news article posted by Channel24 News. According to the article ICASA confirmed to Channel 24 that ODM filed its second application for porn channels at ICASA just before Christmas. Mr Craig Snyders subsequently informed all the executive members of Cause For Justice of ICASA’s invitation. Find attached hereto the news article marked as Annexure “DVF4”.

35. It is important to mention that the notice was published during the traditional December holiday period when a large portion of the South African population is out of office. The notice afforded interested parties 21 working days to lodge written representations. Taking into account the public holidays, the deadline for lodging written representations was 22 January 2013.

36. It is remarkable that ICASA gave no particulars of the proposed application by ODM. The only description of ODM's application given by ICASA was that the application was for the authorisation of three "video channels". I submit that if it were not for the news article published on 11 January 2013, members of the public would not have known of ODM's application to broadcast pornographic channels.

37. Due to the fact that we only became aware of the notice on 11 January 2013 we only had seven working days within which to submit written representations to ICASA and ODM. Given the short period of time available to draft written representations in response to the application, the period of seven days was simply too short for us to draft a thorough and proper response. I drafted a short standard letter to be used by everyone in our personal network to make them aware of the notice and in particular to allude them to ICASA's invitation to submit written representations. We also requested them to consider lodging written representations of their own and to consider using the content of my written representation to the extent that they agreed with it. Many of those we approached decided to express their grievances by signing and sending our

draft letter to ICASA and ODM, with some of them making minor amendments thereto.

38. On 17 January 2013 I emailed my written representation to both ODM and ICASA. I am also aware of the fact that Mr Wynand Viljoen and Mr Ryan Smit both sent similar written representations to ODM and ICASA, with both of them submitting it on 21 January 2013. I annex hereto the written representations of myself and Mr Ryan Smit, marked as “DVF5” and “DVF6”.
39. Mr Ryan Smit sent his letter on 21 January 2013 by email and I refer the Honourable Court to the parts of his letter which are relevant for the purpose of this application, as follows:

“2 In my opinion the time allowed to comment on the application is insufficient for at least the following reasons”;

“2.1 ODM has lodged a comprehensive application and is sure to have spent several months in preparing it. It takes time to consider all the material (e.g. case law and other materials they have cited) and to prepare a response that can address all aspects contained in their documentation.”

“2.2 The timing of the application is also appalling as it fell over the period when many South Africans have a prolonged holiday break.”

“3 In light of the abovementioned ICASA should have provided a longer period for public comments. As far as I know ICASA has not extended the period for comments on its own initiative. I therefore hereby request–

3.1 ICASA to extend the period for public comment with a further 21 working days or 30 (calendar) days from 22nd January 2013;

3.2 If the request in 3.1 is not allowed, that ICASA organise a public hearing for all parties to make representations in person.”

“4 Also, as I live in Cape Town I had to ask a friend who lives in Johannesburg to obtain a copy of ODM's application. The quality of the copies I have been able to acquire is appalling, which is due to poor photocopying facilities of ICASA. I have therefore not been able to read all parts of ODM's application documentation.”

40. As mentioned above, it was difficult to draft a proper response because of the inadequate time at our disposal. Our attempt to draft meaningful written representations was further also hampered by the fact that the application was only available for inspection at ICASA's library in Sandton, Gauteng. Since all of the executive members of Cause For Justice reside in the Western Cape, we could not visit ICASA in Sandton, Gauteng. The only persons who could reasonably have been expected to gain access to the application were those staying in the vicinity of Sandton.

41. On 15 January 2013 Mr Ryan Smit did however email an acquaintance of his, Mr Herkie Sandenbergh, who lives in Johannesburg, requesting him to obtain a copy of ODM's application from their library in Sandton, Gauteng. On the same day Mr Herkie Sandenbergh visited ICASA and obtained copies of the application which he subsequently scanned and emailed to us. We received it on the same day.
42. As mentioned by Mr Ryan Smit, ODM's application was comprehensive and I agree that ODM must have spent a substantial amount of time and resources to prepare it. After receiving the application we realised that it would take more time than allowed by ICASA to consider all the material and to prepare a response that addressed all aspects contained in it. None of the executive members of the First Applicant had sufficient time to prepare a comprehensive response to the all the aspects of the application.
43. Furthermore, the quality of the copies Mr Ryan Smit acquired was dreadful, to say the least. Mr Herkie Sandenbergh confirmed to us that this was due to the poor photocopying facilities at ICASA. Therefore, even if we had more time at our disposal, we would not have been able to respond adequately to the application since large parts it were simply unreadable.
44. Because of the insufficient time period alluded to above, Mr Ryan Smit in his written representations requested ICASA to extend the period for public comment with a further 21 working days or 30 (calendar) days from 22nd

January 2013, and in the alternative requested that the ICASA organise a public hearing for all parties to make oral representations in person.

45. In this regard it is notable that the notice did not contain an invitation to members of the public to indicate in their written representations whether they require an opportunity to make oral representations to ICASA. Notwithstanding the aforesaid, Mr Ryan Smit still requested ICASA to create an opportunity for the public to make oral representations at a public hearing. I am however told by Mr Ryan Smit that he did not receive any response to his written representations, except for ODM's general, non-specific response to the representations submitted by the public, which he received on 11 February 2013.
46. ICASA indicated that they received a total of 644 written representations, 569 before or on 22 January 2013 and 75 thereafter.
47. The Council of ICASA subsequently passed a resolution on 31 January 2013 whereby it established a Special Committee in terms of section 17 of the ICASA Act ("the Committee") "to consider, conduct public hearings and provide a recommendation to Council on application for authorisation of channels (i.e. Playboy TV, Desire and Private Spice) lodged by On Digital Media (Pty) Ltd on 28 November 2012." (the "resolution") A copy of the resolution is annexed hereto marked "DVF7".
48. The resolution furthermore provided as follows:

- 48.1. “The Committee must perform such functions as are delegated to it in terms of 2.1 above and must do all such other things necessary for or reasonably incidental to the proper performance of this delegation.” (paragraph 2.4.1);
- 48.2. “The Committee must ensure that the functions undertaken and tasks executed are conducted in accordance with the Electronic Communications Act, the Postal Services Act, as amended, ICASA Act, as amended, The Promotion of Administrative Justice Act, and any other applicable legislation or regulations.” (paragraph 2.4.4);
- 48.3. “The Committee must consider all the relevant information and representations and make appropriate findings of fact and make decisions as contemplated by the enabling legislation.” (paragraph 2.4.6);
- 48.4. “All decisions of the Committee must be submitted to Council as a recommendation for consideration by Council, before they are made known or announced to the members of the public.” (paragraph 2.4.7);
- 48.5. The Committee may appoint experts as may be necessary including experts from other countries with a view to assisting the Committee in the performance of its functions.” (paragraph 2.4.10);

48.6. The Committee may, in accordance with section 17(F) of the ICASA Act, appoint inspectors to assist it with the performance of its functions and the fulfilment of its mandate as set out herein.” (paragraph 2.4.11);

48.7. The Committee must report to Council on a regular basis on the implementation by the Committee of this delegation.” (paragraph 2.4.12);

48.8. “Procedures and operational rules must be established by the Chairperson of the Committee.” (paragraph 2.4.13);

49. On 11 February 2013 ODM sent Mr Ryan Smit, Mr Wynand Viljoen and myself an email attaching their general response to each of the written representations submitted by the public, a copy of which is attached hereto marked “DVF8”.

50. On 1 March 2013 ICASA published a notice in the Government Gazette (“the public hearing notice”), giving notice of a public hearing to be held in relation to ODM’s application on 14 March 2013. To the best of my knowledge these details were not published anywhere else.

51. The content of the public hearing notice briefly informed the public that ICASA would conduct “public hearings in relation to the application by On-Digital Media Pty (Ltd) (“ODM”), for the authorisation of three “video channels” published on 19 December 2012.”

52. The public hearing notice also specified that the public hearing would be held on Thursday 14 March 2013 at ICASA's offices in Sandton, Gauteng at 09h00 and that the programme for the public hearing would be made available on ICASA's website. Find attached hereto the public hearing notice, marked "DVF9".
53. On 12 March 2013 ICASA posted a media release on their website, informing visitors to their website of the public hearing held on 14 March 2013, including the hearing schedule. To the best of my knowledge these details were not published anywhere else. A copy of the hearing programme is attached hereto marked "DVF10".
54. In a news article on 13 March 2013, posted on Business Day Live, a spokesman for ICASA, Paseka Maleka, reportedly said that ICASA "decided to hold hearings because of public interest in the matter." Despite the acknowledged public interest, ICASA decided to hold only one public hearing in only one city in South Africa with a duration of only one day. Find attached hereto the media report marked "DVF11".
55. I do not know who was invited to make oral representations, but it is clear from the record of the public hearing that at least the eight organisations attending the public hearing were invited. I also do not know whether individuals were invited or allowed to make oral representations. It is, however, very disappointing that none of the executive members of Cause For Justice were

invited especially in the light of the fact that Mr Ryan Smit expressly requested this opportunity in his written representations.

56. We also find it remarkable that the public hearing notice did not invite those who made written representations to submit oral representations at the hearing or to attend the public hearing.
57. It is noteworthy that ICASA did on a previous occasion, during ODM's previous unsuccessful application to ICASA, publish a notice in the Government Gazette containing an invitation to members of the public who submitted written representations to attend the public hearing.
58. The public hearing was held on 14 March 2013 at ICASA's office, as indicated in the public hearing notice. Apart from ODM, the following eight organisations made oral submissions:
 - 58.1. Family Policy Institute;
 - 58.2. African Christian Democratic Party;
 - 58.3. Free Society Institute;
 - 58.4. Doctors for Life;
 - 58.5. African Christian Action;
 - 58.6. Shofar Christian Church;
 - 58.7. Active for Jesus; and
 - 58.8. Evergreen Parenting.

59. Free Society Institute, the only organisation making a submission in favour of ODM's application, was the only organisation out of the eight to be given two time slots to make submissions during the hearing. The other seven organisations had only one timeslot each.
60. We respectfully submit that it appears from the record that the approach to the public hearing followed by ICASA shows blatant bias.
61. In amplification of the aforesaid, ODM was in total given 90 minutes to make its submissions and respond to each of the submissions made by the different organisations. Each of the seven organisations that opposed the application were given 10 minutes to present their submissions and ICASA had a further 5 minutes to put questions to each presenter. The only organisation in favour of the application, Free Society Institute, was given two 10-minute time slots.
62. ICASA did not allow anyone to submit questions to ODM but ODM was given an opportunity to respond to issues raised after all other organisations had made their submissions. None of the other organisations was given an opportunity to respond to ODM's submissions.
63. The seven organisations opposing the application had no opportunity to respond to the submissions made by Dr Marlene Wasserman, purportedly presenting expert evidence based upon research on behalf of ODM. Dr Marlene Wasserman made her submissions after all of the eight organisations had concluded their submissions.

64. Importantly, the public was not notified of what Dr Wasserman was going to say. The public had no opportunity to refute her questionable submissions. In this regard it is also of concern that ICASA did not obtain its own expert as allowed for in its resolution dated 31 January 2013.

65. On 24 April 2013, ICASA issued a press release to the effect that they had authorised ODM to broadcast three pornographic channels subject to the conditions that:

65.1. The channels are to be broadcast within “the watershed period” only;

65.2. The security measures (double pin code) as outlined in the application were supposed to be in place to safeguard children’s rights; and

65.3. The channels are to be made available to subscribers as a separate subscription from ODM’s main subscription service. A copy of this press release is annexed hereto marked “DVF12”.

(“the decision”)

B: ICASA’S REASONS

66. The reasons for the decision were published on or about 24 July 2013 (“the reasons”). A copy of the reasons is annexed hereto marked “DVF13”.

67. ICASA identified the proposed content that ODM wants to broadcast with reference to ODM's application (emphasis added):

“7. According to the applicant the proposed content is *designed to appeal, entertain and satisfy men, women and couples*. The service showcases *sensitive, erotic and sensual plot driven sex scenes, alongside evocative educational programming and entertaining parodies.*”

68. The abovementioned content description falls within the definition of “pornography”. Pornography is said to be notoriously difficult to define. There are many definitions.

69. The Oxford Dictionary defines it as “printed or visual material containing the explicit description or display of sexual organs or activity, *intended to stimulate sexual excitement*”

70. An academic definition also exists: Allen, M., D'Alessio, D. & Brezgel, K., 1995, 'A meta-analysis summarizing the effects of pornography II: Aggression after exposure', *Human Communication Research* 22(2), 258–283.

“media material *used or intended to increase sexual arousal*. Such material generally has verbal or visual images of exposed sexual organs and depictions of sexual behaviours”

71. Pornography is defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 31 of 2007 as follows:

“pornography’ means any image, however created, or any description of a person, real or simulated, who is 18 years or older, of an explicit or sexual nature that is *intended to stimulate erotic feelings*, including any such image or description of such person –

- (b) engaged in an act of sexual penetration;
- (e) displaying the genital organs of such a person in a state of arousal or stimulation;
- (g) displaying any form of stimulation of a sexual nature of the female breasts;
- (h) engaged in sexually suggestive or lewd acts;
- (j) engaged in any conduct or activity characteristically associated with sexual intercourse;”

72. The BCCSA’s Code of Conduct for Subscription Broadcasting Service Licensees contains a definition of “child pornography”. The reference in the definition to “a person ... who is shown as being under the age of 18 years” distinguishes it as a definition of “**child** pornography”. The remainder of the definition affirms that pornography is images of sexual conduct “which viewed in context and objectively by a reasonable viewer has as its *purpose to stimulate sexual arousal in the target audience.*”

73. The origin of the word is from the ancient Greek *porne graphos*, interpreted as 'writing about prostitutes' as it derives from *porne* 'prostitute' and *graphein* 'write'. It is clear from the abovementioned definitions that the content that ODM wants to broadcast is pornography.

74. The following passages in the reasons are relevant for present purposes (emphasis added):

"13. During the hearings it became evident that the following legal and scientific questions were paramount in deciding whether or not to approve the channel authorisation:

(i) *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; and*

(ii) *Whether there is a direct relationship between the dissemination of adult content and gender-based violence.*

14.1 ... The EC Act and the Broadcasting Act, 1999 (Act No. 4 of 1999) do not have provisions prohibiting the broadcasting of adult content. It is only the production and distribution of child pornography which is expressly prohibited by law in South Africa. *The Authority as a statutory body is required in terms of section 7(2) of the Constitution to "respect, protect, promote and fulfil" the rights in the Bill of Rights, including freedom of expression.*

15.1 According to the applicant, there is research work which was done by Dr Rachel Dukes (sic), who is a leading researcher in South Africa on violence and women and domestic violence and her findings has not established adult content as one of the variables. The applicant indicated that what does come up is that *if there is a huge amount of exposure to adult content by men who already have a proclivity towards violence, they are more likely to go out and create sexual violence towards women,* however, it is not any man who watches adult content who is going to be prone to that.⁸ [⁸ Hearing transcript – page 136 and 193.]

15.2 The Authority also considered the fact that even some representor/s admitted that not everyone who looks at pornography is going to turn into a rapist, but *there is a significant risk and many of serial rapists were involved with pornography.*⁹ [Hearing transcript – page 54.]

15.3 The Authority is of the considered view that there is *no evidence* to demonstrate that pornography is a direct cause of gender-based violence in the Republic a law of general application to prohibit the distribution of adult pornography (sic). Those opposing the applicant's channel authorisation were not able to provide evidence to demonstrate a *conclusive link* between pornography and gender-based violence. The applicant did present evidence to demonstrate that the distribution of pornography is not indicated as a cause of gender-based violence in the Republic.

15.4 There was also reference made to research that analysed the negative impact pornography have on children¹⁰. [¹⁰ Hearing transcript – Page 7 - 74] *It is the Authority 's view that as much as the results of the research might be true, 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, ICASA Act and the underlying statutes to refuse the applicant's application.*

16.1 Section 6.2 of the Code requires broadcasters to have adequate procedures in place in order to comply with the Code.

16.2 The applicant emphasised that a 'mandatory 4 digit PIN must be entered every time a subscriber wishes to unlock these channels.¹¹ [¹¹ Top TV presentation – strict safeguards in place to protect children.] ...

16.4 The applicant indicated that it will only allow individuals who are over the age eighteen (18) to subscribe to the proposed channels. ...

16.5 The Authority is also of the considered view that the applicant has demonstrated security measures to safeguard unnecessary exposures as required by the Code. ...

17. 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. ...

21. ... The purpose of the public hearings is to provide a forum for the clarification and deliberation on issues that affect the public interests of citizens and consumers in the Republic of South Africa. It is an essential part of the Authority's legal and constitutional mandate to regulate broadcasting in the public interest. ...”

C: RECORD OF PROCEEDINGS

75. We obtained legal advice on the 8th August 2013 to obtain and carefully consider ICASA's record of all documentation relating to the decision, before coming to a decision on whether to institute these judicial review proceedings.

76. Our attorneys first requested ICASA's record from them on the 5th August 2013. ICASA was not amenable to a request for supplying information in electronic format. After having to request certain documents for a second time, we eventually obtained paper copies of all of the documents as set out in the Index of Record annexed hereto marked “DVF14”, via a correspondent in Johannesburg, on or about 10 October 2013.

77. I do not know if there is more to the record than that contained on the Index and I will compare the record to be supplied by ICASA in terms of Rule 53 of the Uniform Rules of Court with that already in our possession.

78. One of the documents ICASA supplied to us is an Interoffice Memorandum dated 21 August 2013 from GM: Licensing and Compliance to Acting GM: Legal & CCC, annexed hereto marked “DVF15”. The purpose of the

memorandum is noted in paragraph 1 thereof, namely “to refer the requests in relation to the authorisation of Top TV adult content channels from Smit and Viljoen Attorneys and Justice Alliance of South Africa to Legal for consideration, accordingly.” In the Conclusion of the memorandum the documents or records considered in respect of Top TV channels authorisation application are listed as follows:

- “Top TV channel authorisation application;
- Hearing transcript;
- Gazettes (notices for the public comments on the application and the hearing notice);
- Representations received;
- Top TV response to representations;
- Presentations at the hearing from: a) Family Policy Institute; b) Shofar Christian Church; c) Free Society Institute; d) Active for Jesus Media Mission; e) Evergreen Parenting; f) Free Society Institute, African Christian Democratic Party; and g) Doctors for Life;
- Internal benchmark report with other countries;
- Letters from Smit and Viljoen Attorneys;

- Email from Justice Alliance of South Africa;
- ICASA 's letters to Smit and Viljoen Attorneys;
- Council Resolution establishing the Council Committee;
- Committee Recommendation to Council; and
- Reasons for Decision

Analysis of ICASA record

Written representations

79. The documents supplied to us by ICASA included 550 written representations and 57 duplicated copies of representations. Of the 550 representations, 31 were made by organisations and 508 were from individuals. A total of 37 of the written representation documents were incomplete, which made it impossible for us to determine the basis of these representations, whether against or in favour of ODM's application. One of 31 organisations was in favour of ODM's application and 28 individuals were in favour thereof. In the case of 11 of the representations it was not possible to determine whether it was against or in favour of ODM's application.
80. The vast majority of representations, 510 (94.62%), were against the ODM application. We know from the reasons that ICASA had received 569 written

representations by 22 January 2013 and another 75 thereafter. There are accordingly between 19 and 94 written representations that have not yet been supplied to us.

81. Of the 550 written representations we have had sight of, the following four are of particular relevance:

81.1. Written representation by Dr J V Larsen MB, ChB, FRCOG, sent to ODM and ICASA on 16 January 2013, annexed hereto marked "DVF16".

81.2. My personal written representation, sent to ODM and ICASA on 17 January 2013, annexed hereto marked "DVF5".

81.3. Written representation by Elsie du Toit, sent to ODM on 17 January 2013 and forwarded to ICASA on 11 February 2013, annexed hereto marked "DVF17".

81.4. Written representation by Braam Visser, sent to ODM and ICASA on 18 January 2013, annexed hereto marked "DVF18".

Dr Larsen

82. Dr Larsen identified himself as "a gynaecologist who has worked all [his] 50 year career in public hospitals". He noted that he had "personal experience of looking after rape survivors" and that "the children and women who are victims carry emotional scars for life".

83. He noted that “[o]ur nation has one of the highest rape rates in the world” and also “very high levels of violence against women – most of it in intimate relationships”.
84. Dr Larsen stated that “[t]he evidence that regular viewing of pornographic material promotes rape, the sexual abuse of children and intimate partner violence by objectifying women and children of both sexes is no longer contestable”.
85. Dr Larsen also noted that “[r]egular viewing of sexually explicit material also leads to sexual addictions in vulnerable men”.

My personal representation

86. In my personal representation I made the following statements:

“One may suggest that it is my private choice to refrain from subscribing to the service, and that this is of no concern to anyone else. However, as Economics 101 suggests to us: private decisions often have public impacts, the costs towards others which individuals do not fully take into account when making decisions for themselves.

What concerns me more, is that the choice of these young men affects **others negatively**: it spoils marriages, it deteriorates relationships with real people (by replacing true intimacy with images), it establishes a culture of lust rather than love, and indirectly affects spouses, children and families. ... It does not seem

right to cater for a current market, and at the same time negatively change a healthy family culture of people at the fringes of that market.

Potential users become desensitised, while those around them also bear the consequences.”

Elsie du Toit

87. The representation by Elsie du Toit referred to a number of academic studies or articles. One reference was to a url <http://www.mincava.umn.edu/documents/arpornography/arpornography.html>, which contains a report by Robert Jensen titled “Pornography and Sexual Violence”, July 2004, mimeograph: National Resource Center on Domestic Violence. It also contained a reference to “Pornography and attitudes supporting violence against women: revisiting the relationship in nonexperimental studies” Hald GM, Malamuth NM, Yuen C, available [online]: <http://www.ncbi.nlm.nih.gov/pubmed/19862768>. Elsie du Toit also cited the url [http://www.socialcostsofpornography.com//Layden Pornography and Violence .pdf](http://www.socialcostsofpornography.com//Layden_Pornography_and_Violence.pdf), which directs to a study by Mary Anne Layden, PhD, Director of the Sexual Trauma and Psychopathology Program Center for Cognitive Therapy, Department of Psychiatry, University of Pennsylvania, titled “Pornography and Violence: A New Look at Research”.

Braam Visser

88. Braam Visser attached a document titled “Violence Against Women in South Africa Fact Sheet” as well as an article by Janet Hinson Shope (Goucher College), titled “When Words Are Not Enough – The Search for the Effect of Pornography on Abused Women”, published in “Violence against Women”, January 2004, © 2004 Sage Publications. The abstract states that “[r]esults of a logistic regression indicate that pornography use significantly increases a battered woman’s odds of being sexually abused”.

Oral submissions

Doctors for Life

89. Doctors for Life, represented by Dr Van Eeden, made an oral submission and provided ICASA with a written record of its submission, annexed hereto marked “DVF21”. Doctors for Life made the following submissions:

“Summary of Doctor’s for Life Presentation to ICASA

The scientifically proved damaging effect of pornography on the psychopharmacology of the brain of children requires that the constitutional right to freedom of expression be limited in order to protect the child.

...

Presentation by Dr. Albu van Eden of Doctors for Life:

A. The importance of science in the debate

...

New information on the effects of pornography are obtained amongst other things through new developments in brain imaging (MRI, PET, sPect, and DAT scanners) and developments in neurobiology and genetics.

...

B. Different part of the brain that is relevant:

...

When watching pornography the brain produces non-physiologically larger amounts of dopamine which is similar to the molecular structure of cocaine, and latches on to the same receptor sites, serotonin which is similar to LSD, and enkephalins that are similar to morphine. So a person watching porn is producing his own cocktail of multiple drugs.

...

C. Pornography and Minors

...

A child exposed to sexual material often re-experiences the toxic alarm from time to time and experience the original exposure as an ongoing traumatic event.

D. Neuroscientific Proof That Pornography Is Addictive”

90. In respect of the abovementioned point “D.”, Dr Van Eeden’s submission as recorded in the Transcript of the Public Hearing held on 14 March 2013 (the “Transcript”), included the following (pages 72 to 73):

“So, that’s why we need to take into account how minors and teenagers experience pornography if they are exposed and whether we should not protect them against that. Now, slowly through the years, since 2001, the evidence the neurobiological evidence of the addictive effect of pornography has been increasing. It started off with those two studies, 2001 and 2003. Then a very watershed court case research piece by Dr Eric Nessler – is there a common pathway to addiction; the treatment of porn addiction by substances that help for morphine addiction; morphological changes in the cells, the brain cells; downgrading of the dopamine system.

These are all studies that came out. People who are addicted to pornography have a shrinking of the frontal part of the brain, which is your thinking brain. It’s

been proven beyond any doubt physically through brain scanning. It's not just thinking or imagining."

African Christian Action

91. MS Kupe of African Christian Action made the following statements (pages 77 and 78 of the Transcript):

"And so freedom of expression will never be an absolute right, it has to be balanced against other rights.

What are some of the other important rights? Well according to our Constitution, children's rights are very important. ... women's rights and the right to dignity is of paramount importance.

...

And as somebody who was a prosecutor myself for 12 years, privileged to be a criminal prosecutor, I can definitely tell you of the cases, cases, numerous cases which I had to prosecute which showed that pornography was a very big contributing factor, not only to rape, but also to murder cases."

92. Mr Vapabili also made an oral submission to ICASA (pages 82 to 87 of the Transcript), including the following:

“Hi everybody. I’m just going to be straight and forward and I was sexually molested at the age of 13 by my cousin, who used to stay awake every night watching porn on e.tv. He did introduce us to the porn and that’s when I actually was firstly exposed to porn. But from there, but just watching it, it went from him watching it to him cherry-picking us and then molesting us at night while we slept. So you’ll wake up and your pants are halfway down and you can feel that someone has been basically having sex on you while you’re asleep.

It has such a traumatic reaction to me that I became very sexually active in the young age. By the time I was 18 myself, I was also a porn addict. And you know, I tell people, you don’t really know what addiction is until you are addicted to porn, because I’ve been ... I used to smoke, it’s the same urge that you get to smoke that you will get to watch porn. And it’s so consuming that you will do anything, your study time becomes a time you watch porn. Currently I counsel kids, because I’m very vocal on face book, I’m always say guys, if you need help, come through. Just this year alone I’m seeing over 15 kids who are struggling with porn and one of the biggest things is, especially during exams, you find to ease the pressure you become addicted to porn.

And I feel like as adults we need to make decisions that protect the younger generation and also give them a step to make their own decision. One of the guys who used to supply us with porn, he was the rich kid in school and they had porn channels and he record it and make it accessible to us as school. We’ve watched porn in class. Kids who were not exposed to it got exposed to it then. And I feel like you know, why make something easily available that will

end up in other kids hands that will also in turn act out to kids that are vulnerable? You know, I was a victim. I now help others and I feel that anyone coming here and prioritising the making of money over the children's lives is a really a lost case, they need help. Thank you.

...

... but I'm also afraid of the fact that the one who is not watching could fall victim to the one who has free access to it, like I was, you know.

...

... my mom was a nurse so most nights I spent at home and she was at work doing night duty. So what am I saying? I'm saying that as long as that possibility is there, that kids will get access to the porn and we're now bringing it into their households, that is somehow irresponsible, I would say.

If we can do something to limit the access of porn, I believe we should, because there are already other means that are harmful that are being exploited. And when we consider the rape cases in our country, I mean I was telling Reverend Pill, two nights back I was up the whole night trying to keep a girl from committing suicide, also a rape victim and she was also raped by a family member who is a porn addict. So it's not things we can take lightly."

93. Mrs Brittz made the following submissions with reference to a study by the Bergman Centre for Internet and Society of the Harvard Law School and work done by Dr Diana E.H. Russell:

“Things I would like to highlight are that she has talked about a causative role of pornography, highlighting that you will never find a single cause pornography argument to float. We will never be able to say pornography directly causes rape, but there is such a thing as multiple causation, which means we can clearly demonstrate that given a certain set of circumstances definitely there will be a significant causal factor because of the use of pornography. That is described in this article for you to have a look at.” (page 119 of the Transcript)

94. Mrs Brittz also made the following submissions (pages 120, 121, 124, 126 and 127 of the Transcript):

“Another point, it creates an appetite for increasingly stronger material, You will be sitting in you will be coming increasingly hungry and then you will eat, but you won't eat an unlimited amount of food because you physically cannot digest a kilogram of food. Pornography does not work in this way, and she has scientifically proven that if Top TV were granted these channels they will make an unlimited amount of money.

...

Objectifying women, and here I would like to read a paragraph, the first way in which pornography undermines some males internal inhibitions against acting

out their desires to rape, is by objectifying women. Objectification makes it easier to rape them and now she quotes a rapist: *"it was difficult for me to admit that I was dealing with a human being when I was talking to a woman, one rapist reported."* Because if you read men's magazines you here about your stereo, your car, your chick. After this raper had hit his victims several times in her face she stopped resisting and begged, all right just don't hurt me. When she said that he reported, *"all of a sudden it came into my mind my God this is a human being. I came to my senses and saw that I was hurting this person."*

...

I have encountered over the past 3 years since my rape, in work with women, countless women telling me what they are having to do to please their husbands and they directly link it to, this is what my husband saw. My unwillingness to do what my husband saw, translates into his mind as my unwillingness to love him, my unwillingness to please him, my unwillingness to be what I have already agreed to be, his wife.

...

I want to ask you if you'd still have that argument if it were your child? Or say many, much fewer children will see porn on your 3 channels than anywhere else, how many children are not too bad, I ask you? How many children will we offer, sacrifice on the altar of freedom, so called, of rights, of freedom to choose.

I work with families everyday who are trying their very best to protect their children, they are not succeeding, because everybody else is saying it will be the parents responsibility, we won't take responsibility. Let it fall on the parent. The parent is the one paying on every level to keep this country going, but the parent cannot expect any support from government, there seems to be a discrepancy there.

As to the statistics that say that 50% of people watching pornography were doing so with their partner, I think it is probably true. I've spoken to those women saying, my husband forces me to watch pornography with him."

Other contents of ICASA record

95. The ICASA record also contained copies of three articles that discuss the negative effects for children of exposure to pornography, namely:

95.1. Sabina, C., Wolak, J., and Finkelhor, D., 2008., "The Nature and Dynamics of Internet Pornography Exposure for Youth", *CyberPsychology & Behaviour*, Volume 11 (6).

95.2. Owens, E.W., Behun, R.J., Manning, J.C. and Reid, R.C., 2012. "The Impact of Internet Pornography on Adolescents: A Review of the Research", *Sexual Addiction & Compulsivity*, 19:99-122.

95.3. Ybarra, M.L. and Mitchell, K.J., 2005, "Exposure to Internet Pornography among Children and Adolescents: A National Survey", *CyberPsychology & Behaviour*, Volume (5).

96. The ICASA record also contains an internal benchmark report with other countries, which discusses (primarily) how the United Kingdom, United States, Australia and Canada regulate the broadcasting of pornography.

ICASA's recorded interaction with and consideration of the information before it

Committee Recommendation to Council

97. The Chairperson of the Committee, Miki Ndhlovu, purportedly sent a recommendation document to the ICASA Council on or about 19 April 2013 (the "recommendation"), annexed hereto marked "DVF20", to recommend that the ICASA Council authorise On Digital Media to broadcast three adult pornographic content channels as applied for. The recommendation was prepared by Thabo Ndhlovu (Project Leader) and was approved by William Currie (Councillor). The recommendation was however not formally approved by signature by Miki Ndhlovu.

98. The recommendation contains the following references evincing consideration of and attempts to deal with objections levelled against ODM's application:

"5.11 The applicant further acknowledged representations from individuals and various organisations. However it disputed the notion that

consumption of adult content can lead to rape and family breakdown. 'These are the men who have grown up in a culture in South Africa of violence which has got nothing to do with how much adult content they are consuming'.²³ [²³ Hearing transcript – page 133]

5.12 The applicant believes that the 'objectification of women' comes from advertising, music, sitcoms, romance movies and so forth. The applicant disputed and challenged a presentation done by Doctors for Life whose presentation talked largely about addictions and challenged the way it is presented as ' a very strong association with a mythology that is associated with porn or adult content...unfortunately he just left out certain features that are very important'. Evidence left out the applicant points out. 'The so-called addiction to porn is dependent on the amount of exposure that a man spends in front of a computer or television as well as the kind of content to which he is exposed. There is evidence that violent porn violent adult content is going to make a man who already had a proclivity towards violence be more likely to go out and create sexual violence towards women, it is not any man who watches adult content who is going to be prone to that'.²⁴ [²⁴ Hearing transcript – page 135]

5.13 The applicant further makes an argument that other risk factors like bullying, belonging to a gang, coming from a home with violence and heavy consumption of certain sexual material usually violent can lead to violence, not rape, so adult content on its own does not generate

violence in men. This is not the content that Top TV plans to view...these are couples that are loving...there are certain features we look for ...eye gazing...there is a relationship that exists...the bodies of the women that are being portrayed in this particular adult content are healthy bodies. ²⁵ [²⁵ Hearing transcript – pages 138 – 139]

7. REPRESENTATIONS

- 7.1 Most of the representations made were based on moral arguments. The applicant argues that there is no basis or law that could be used for such. An example is that one of a presentation done by Africa Christian Network. 'Pornography depicts women in a degrading, humiliating ways and as sex objects- existing only for men's sexual pleasure. Women are also called derogatory names and subject to violent acts.'
- 7.2 On the other hand submissions from the Free Society Institute strongly believes that 'each person has the right to contribute in the manner of her choosing to the prevailing moral climate, so long as that contribution does not undermine other values enshrined in the Bill of Rights...right to moral independence through their choices, including their choices around what to watch on television.'
- 7.3 As already stated the applicant's argument is that there is no research that shows pornography per se causes damage to marriages or the family.

9. Recommendation by the Committee

9.1 The discussion 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. Those opposing the applicant's channel authorisation were not able to provide evidence to demonstrate a conclusive link between pornography and gender-based violence. The applicant did present evidence to demonstrate that the distribution of pornography is not indicated as a 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.
- 9.6 The Authority should accept the applicant's modification from a 24 hour channel to a watershed period in order to comply with the BCCSA's Code of Conduct.
- 9.7 The Authority should accept the modification from the proposed XXX to X18 of the Private Spice channel.
- 9.8 The Committee noted the applicant's undertaking to adhere to the rules in clause 9 and 10 of the BCCSA code that address the broadcast of sexually explicit material. ²⁸ [28 Hearing transcript – page 184]"

The reasons

99. The reasons only contain references to the Transcript and to ODM's presentation at the Public hearing. There is no record of ICASA's interaction with or scrutinising of information placed before it in written or oral representations, except that ICASA seems to have dismissed submissions noting the harmful effect of pornography with reference to Dr Marlene Wasserman's testimony at the Public hearing. There is no record of ICASA's own research into the harmful, detrimental and destructive effects of exposure to pornography. There is also no record of any action taken by ICASA to corroborate or verify the testimony of Dr Marlene Wasserman through

consultation with at least one independent expert in the field of psychology and sex/sexuality.

D: LEGAL FRAMEWORK

100. ICASA was established in fulfilment of the constitutional mandate in section 192 (under Chapter 9) of the Constitution of South Africa, Act 108 of 1996 (“the Constitution”) that National legislation must establish an independent broadcasting authority. The purpose of ICASA therefore is “to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”

ICASA Act

101. The ICASA Act, Act 13 of 2000, provides in section 2 that the objects of ICASA *inter alia* are to:

101.1. 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;

101.2. Regulate electronic communications in the public interest; and

101.3. Achieve the objects contemplated in the underlying statutes.

102. In terms of section 3(3) and 3(4) of the ICASA Act, ICASA is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice and must function without any political or commercial interference.

103. In terms of section 4(1)(a) and (c) of the ICASA Act, ICASA

103.1. must exercise the powers and perform the duties conferred and imposed upon it by the ICASA Act, the underlying statutes and by any other law; and

103.2. subject to section 231 of the Constitution, must act in a manner that is consistent with the obligations of the Republic under any applicable international agreement.

104. In terms of section 4(3)(b), (h) and (m) of the ICASA Act, ICASA

104.1. Must monitor the electronic communications sector to ensure compliance with the ICASA Act and the underlying statutes;

104.2. May conduct research on all matters affecting the communications sectors in order to exercise its powers and perform its duties; and

104.3. May undertake inquiries on any matter within its jurisdiction.

105. The “underlying statutes” includes the Broadcasting Act, Act 4 of 1999 and the Electronic Communications Act, Act 36 of 2005.

Electronic Communications Act

106. Section 54 of the Electronic Communications Act provides that:

- (1) The Authority must, as soon as reasonably possible after the coming into effect of this Act and subject to this Act, review existing regulations, and prescribe regulations setting out a code of conduct for broadcasting service licensees.
- (2) Subject to the provisions of subsection (3), all broadcasting service licensees must adhere to the code of conduct for broadcasting service licensees as prescribed.
- (3) The provisions of subsection (2) do not apply to a broadcasting service licensee who 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 enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.

Broadcasting Act

107. Section 2(a), (b) and (e) of the Broadcasting Act provides that the object of the Broadcasting Act is to establish and develop a broadcasting policy in the Republic in the public interest *inter alia* to:

107.1. Contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society;

107.2. Safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa; and

107.3. Cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled.

108. Section 3(1)(a) and (b) of the Broadcasting Act provides that the South African broadcasting system:

108.1. Serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa; and

108.2. Operates in the public interest and strengthens the spiritual and moral fibre of society.

Subscription Broadcasting Services Regulations

109. On 31 January 2006 the Subscription Broadcasting Services Regulations (“the Regulations”) were published in Government Gazette number 28452, General Notice 152 of 2006. The relevant parts of the Regulations provide as follows:

“1. Preamble

The objectives of these regulations are to:

1.1 Regulate subscription broadcasting services in South Africa;

1.3 prescribe the procedure and the appropriate conditions for the authorisation of channels in a multi-channel environment for subscription broadcasting services;

The provisions of the IBA Act, the Broadcasting Act and other pieces of legislation pertaining to broadcasting and telecommunications are applicable to these Regulations.

3. Authorisation of Channels

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 sixty 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. Code of Conduct

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.”

BCCSA Code of Conduct (section 54(3) of the Electronic Communications Act)

110. ODM is a member of the National Association of Broadcasters (“NAB”) and is a signatory of the Broadcasting Complaints Commission of South Africa (“BCCSA”). ODM is subject to the BCCSA Code of Conduct for Subscription Broadcasting Services Licencees (“the Code”). The current version of the Code purportedly came into operation on 1 January 2011, annexed hereto marked “DVF21”. It would appear that ICASA accepts that the NAB or BCCSA is a body

which meets the requirements of section 54(3) of the Electronic Communications Act and regulation 6.2 of the Regulations. ICASA's manner of dealing with the Code in the reasons suggests that the Code is "acceptable" to ICASA, for purposes of section 54(3) of the Electronic Communications Act. However, I do not know if this is indeed so.

111. The following provisions of the Code are relevant for present purposes:

"Application of the Code

5 This Code applies to all subscription broadcasting service licensees who are members of the NAB.

6 All these subscription broadcasting service licensees must –

6.1 comply with this Code; and

6.2 have adequate procedures in place in order to comply with this Code.

Content which may not be broadcast

Child pornography, bestiality, incest, rape, sexual conduct and violence

9 A subscription broadcasting service licensee may not knowingly broadcast material which, judged within context, contains a scene or scenes, simulated or real, of any of the following –

- 9.1 child pornography;
- 9.2 bestiality, incest or rape;
- 9.3 explicit violent sexual conduct;
- 9.4 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; or
- 9.5 the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm.

...

Exemptions

- 11 Clauses 9 and 10 do not apply to –
 - 11.1 Broadcasts of *bona fide* scientific, documentary, artistic, dramatic, literary or religious programming material, which, judged within context, is of such nature;
 - 11.2 broadcasts which amount to a *bona fide* discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

11.3 broadcasts which amount to a *bona fide* discussion, argument or opinion on a matter of public interest.

Parental control mechanism

21 A subscription broadcasting licensee must, whenever practicable, implement adequate mechanisms to enable a subscriber, using a reasonably secure mechanism, such as a PIN number selected by the subscriber, to block a programme, based on the classification of the programme, or a channel, included in its service.

23 A subscription broadcasting service licensee must ensure that any decoders which it promotes or sells are capable of allowing a subscriber to block any programme, based on the classification of the programme, or channel included in its service.

Interpretation and amendment of the Code

29 This Code is subject to interpretation in the light of changing circumstances.

30 This Code may be amended in accordance with clause 11 of the BCCSA Constitution.”

ICASA Code of Conduct (section 54(1) of the Electronic Communications Act)

112. Regulation 7 of the “Regulations regarding the Code of Conduct for Broadcasting service licensees’ (Government Gazette number 32381, Notice 958 of 2009) (the “ICASA Code”) provides that broadcasting service licensees must not broadcast explicit sexual conduct (subregulation (1)(d)). This prohibition is subject to the caveat that it does not apply to *bona fide* scientific, documentary, artistic or dramatic programming material, which, judged within context, is of such nature, provided it is broadcast with due audience advisory after the watershed on a sliding scale according to its content. A copy of the ICASA Code is annexed hereto marked “DVF22”.

Criminal Law (Sexual Offences and Related Matters) Amendment Act

113. In terms of section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 31 of 2007, a person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of:

113.1. any image, publication, depiction, description or sequence of pornography (subsection (a)); or

113.2. any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for

children, as contemplated in the Films and Publications Act 65 of 1996, or in terms of any other law (subsection (c)),

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.”

Freedom of Speech

114. It is also our case that pornography is not a “core value” protected by section 16 of the Constitution. Core values are “the search for political, artistic and scientific truth, the protection of individual autonomy and self-development and the promotion of public participation in the democratic process”. This case is not one in which ODM is wanting to educate or express relevant political views, or irrelevant views for that matter. This case is about a commercial enterprise seeking to make profit out of pornography. This will entail making money out of the addictions of certain segments of society. It entails enticing and encouraging people to watch its pornographic programmes by advertising. It will also inevitably cause harm to other segments of society such as women and children as set out herein.

115. The Applicants fully support the Constitutional right to the freedom of speech. Inasmuch as freedom of speech is relevant to this case, it is relevant in a peripheral manner only.

E: EVIDENCE OF THE HARMFUL EFFECT OF PORNOGRAPHY

Pornography and Harm to Society

116. ICASA in their reasons did not respond adequately to the many calls in submissions to show how pornography can be good for *society* as a whole. The focus has remained on whether *individual* consumers are benefitted (for instance, when consumers perceive that their sex lives improve) and on whether pornography has a direct negative effect on viewers and their actions; however, the effects of pornography are wider: it influences people who do not have the choice to engage in the activity, and has social costs, which are not born completely by the individuals who consume it. The Witherspoon Institute has issued an extensive summary of findings¹, highlighting various costs of pornography to society (even to those not directly engaged in its usage), which outweigh the benefits that some users perceive that they enjoy. In the paragraphs that follow we investigate the costs and benefits of pornography for individuals who view it, and also people who do not choose to watch it.

¹ Eberstadt, M. and Layden, M.A., (2010), *The Social Costs of Pornography: A Statement of Findings and Recommendations*. Princeton: Witherspoon Institute.

Perceived Harms and Benefits of Pornography for Self

117. While some representations (such as that of the Free Society Institute) refer to literature², which suggests that consumption of hard-core pornography improves individuals' perceptions of their *own* sex lives, it does not take into account that perceptions are often clouded, or that individuals do not consider whether their own actions could affect others. The same study refers to "third person effects" which suggest that people are prone to think that they themselves are relatively immune to (negative) influence by media, while they perceive *others* to be at greater risk. Individuals therefore also tend to underestimate the potential risks of pornography consumption on themselves, for which some men have reported negative effects². While each person can have a choice to harm him or herself, the discussion of research findings presented herein below shows how these choices also influence others, and that ICASA has not taken these effects into full account in their decision.

118. For instance, the same study² reports that individuals who perceive pornography to portray realism of sexuality were less likely to experience positive effects of its consumption, confirming that pornography promotes fantasy rather than realism. Men's fantasies in this study were more inclined to be volatile, as they reported greater positive, but also larger negative effects of consumption than women. Pornography is therefore an escape that promotes non-realistic expectations of true sexual encounters. As explained below,

² Hald, G.M. and Malamuth, N. (2008), Self-perceived Effects of Pornography Consumption, *Archive of Sexual Behaviour*. 37:614-625.

unrealistic perceptions also extend to other individuals, and also affect them through men's attitudes towards rape.

Harm to others

119. Expert evidence put before ICASA by ODM suggests that consumption of pornography by someone who chooses to do so, does not harm *others* by way of a causal link between its consumption and sexual violence. This tenuous link has been explored extensively in a non-experimental setting, with many authors finding no support for the hypothesis. Experimental evidence, however, finds that there is a link between pornography consumption and aggression *causally*³, and is arguably the better method to be used in social science applications, though this type of evidence is more difficult to find due to ethical considerations. The evidence that does exist has also been overlooked during the public hearings. However, the most recent review of the literature adds new non-experimental evidence³ and corrects problems with previous overviews: the result is that the non-experimental evidence agrees with experimental studies, and that pornography (and importantly in this context, *even pornography of the non-violent type*) is associated with increased aggressive attitudes. In a society already plagued by violence, we should be pursuing measures that avoid this type of activity – even if it means avoiding the risk of just one rape, the net

³Hald, G.M., Malamuth, N.M. and Yuen, C., (2010). Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies. *Aggressive Behaviour*. Vol 32: 14-20

benefit to society is large: one rape avoided is larger than the pleasure of fantasy, which many individuals pursue.

120. The evidence goes beyond the known conclusions that pornography draws out violence only in those who are prone to violent behaviour. However, even if only this specific risk is considered to be true, this is a problem in South Africa, where rates of violence are high, and where pornography could trigger a greater proclivity to such misconduct within the home. ODM has not suggested how and whether it wishes to screen known violent offenders from subscribing to the channel, but only differentiates potential subscribers by age. This is a serious shortcoming of ICASA's decision.

121. Furthermore, studies that tend to find zero to positive effects of pornography on individuals, are often conducted in settings where society is more likely to be equal or trusting, as also noted by Mr Rousseau of the Free Society Institute (FSI) during the public hearings. Hald & Malamuth (2008)² argue that many studies that do not find a link between pornography and violence are conducted in societies with low violence levels to start with, and where trust between citizens is high. The authors² warn explicitly that in violent societies, perceptions of pornography will likely lean towards negative views. Even in societies where the general population shows no link between pornography and violence, small groups may be affected negatively (where, for instance, trust between genders is weak). It is imperative that ICASA takes the risk to even small sections of the population into account, and not just "general results", which are dominated by groups and countries that do not face the same risk.

122. ODM presented evidence by Rachel Jewkes (who is referred to incorrectly as Rachel Dukes in ICASA's reasons) who suggested that gender roles (especially a lack of female empowerment) are more important than pornography in determining sexual violence in South Africa. However, ODM did not show that pornography has no influence on South Africans' views of gender power relations, and that pornography therefore has no indirect effect on sexual violence. Indeed, Jewkes⁴ herself advocates the reduction in pornography as one factor in combatting violence between partners; she proposes that pornography objectifies and disempowers women. ICASA should have also considered the harmful *indirect* effects of pornography.

123. Judging by the immense negative public interest generated by ICASA's public participation process (despite a short notice period and poor means of giving notice to the public), the observation that countries with lower trust levels would view pornography negatively, is relevant to South Africa. South Africa is indeed a country that has decidedly low levels of interpersonal trust⁵. Based on Hald and Malamuth's (2008) contention², the public responses in respect of ODM's application themselves fit the pattern, in that South Africa is both a country with low levels of trust and higher opposition to pornography. ICASA should therefore not ignore the negative sentiment (in excess of 94% of all submissions) that was submitted to them, many of them being based on the fear that violence and rape could result from more widespread availability of pornography. ICASA therefore wrongfully dismissed these submissions as only

⁴ Jewkes, R., 2002. Intimate partner violence: causes and prevention. *The Lancet*. Vol 359.

⁵ Posel, D. & Hinks, T., (2012). Trusting Neighbours or Strangers in a Racially Divided Society: Insights from Survey Data in South Africa. *Journal of African Economies*. 22(1): 136-162.

containing a “moral basis”, but the concerns expressed are valid and point to potential danger that has been ignored by ICASA.

124. ODM and Mr Rousseau of the FSI (one of the few supporters of ODM’s application) both admitted to the harm of pornography during the public hearing. Mr Rousseau admits that pornography can be demeaning to actors, but that the equality implicit in “viewer choice” trumps that consideration. ODM suggests that individuals should receive professional help if they experience harm. Both of these submissions suggest that individuals should have the right to choose harm. However, as argued below, pornography is often not a rational choice, but a problem into which people are lured and become addicted. The issue is therefore not purely about ODM’s right to freedom of expression, but the likelihood that ODM will create new victims of addictive behavioural patterns.

Attitude Changes and Harm Towards Others

125. One particular factor that is influenced by pornography is attitudes towards rape and intention to commit sexual assault, both of which signal potential dangers to *others*. These are significantly influenced even by *mainstream*, non-violent pornography⁶, though the effects are more severe for individuals who viewed

⁶ Foubert, J.D., Brosi, M.W. and Bannon, R.S., 2011. Pornography Viewing among Fraternity Men: Effects on Bystander Intervention, Rape Myth Acceptance and Behavioral Intent to Commit Sexual Assault. *Sexual Addiction and Compulsivity*. Vol 18(4): 212-231

sadomasochistic and rape content. Given the context of this study (in the USA, where rape statistics are considerably lower than in South Africa), the fact that transition to actual sexual abuse after viewing pornography is not widespread, is no surprise, but potentially a higher risk exists in South Africa, where altered attitudes are also likely to move into violent action. While some evidence concludes that pornography has positive impacts on individuals' attitudes about their *own* well-being and sex lives (as noted above), this ignores that people unknowingly (and involuntarily) also change their attitudes towards *others*, as noted by Foubert *et. al.* (2011). Given that "third person effects" are known to be operational in individuals' perception formation based on media intake, it is no surprise that individuals tend to underestimate the negative effects of pornography on themselves, and simultaneously are subject to desensitisation in their attitudes towards others.

126. The same work⁶ suggests that pornography is associated with divorce and infidelity. Reviews of the literature⁷ confirm that pornography usage by one partner reduced sexual intimacy and leads to women to feel objectified, and in many cases distressed when male partners use pornography. The research confirms that while pornography cannot be isolated as the direct cause of many divorces, it triggers behaviour that has traditionally led to the failure of marriages. Figures quoted by lawyers state that a majority of divorce cases

⁷ Manning, J.C., The Impact of Internet Pornography on Marriage and the Family: A Review of the Research. *Sexual Addiction & Compulsivity: The Journal of Treatment & Prevention*, Vol 13(2-3): 131-165.

involve the use of pornography⁷. This underscores that even if individuals are not negatively affected in their *current* perceptions of well-being, they influence family structures and others poorly in the *long-run*. Evidence shows that women who are already battered, had a greater risk of being sexually abused once their partners used pornography; this effect is present even when alcohol abuse was absent⁸. In the South African context the case of *S v Engelbrecht* 2005 (2) SA SACR 41 WLD provides a vivid example. While ODM's evidence does acknowledge that pornography leads to violence among a group that is already prone to this misconduct, the seriousness for spouses in violent relationships (which is highly prevalent in South Africa) has not been taken into account adequately. The right of an individual to harm him or herself therefore also negatively affects those in immediate contact with that person. In the process, ICASA should have investigated this issue, but failed to do so. Had ICASA properly carried out its role, it should have refused ODM's application.

Physiological Harm, Addiction and the Inability to Make Rational Decisions

127. If individuals attach high benefits of pornography to themselves while inducing a negative change in attitude towards others, it is necessary to understand how these perceptions are formed. Evidence presented by Doctors for Life during the hearings notes that pornography stimulates an impulsive part of the brain rather than a thinking part. Recent research confirms this: Cambridge University neuroscientist, Dr Valerie Voon, has recently shown that pornography effects the brain in similar ways as alcohol and drug use would,

⁸ Shope, J.H., When Words Are Not Enough: The Search for the Effect of Pornography on Abused Women. *Violence Against Women*. Vol 10: 56-72

with behavioural impulses rather than rational decisions dominating. This work has been featured widely in the media⁹. Peer reviewed evidence also supports the finding that the brain changes physiologically in response to these stimuli and fuels addictive behaviour. D.L. Hilton¹⁰ notes that:

“Instead of wanting that which will enhance survival, the addicted are motivated to want even when it is clearly harmful, a neuroplastic process that recalibrates the hedonic set point.”

128. Furthermore, Dr Nora Volkow, who heads the USA’s National Institute on Drug Abuse, has advocated for pornography to be added to the list of addictions with which her organization is concerned, thereby acknowledging that this fits into a similar medical category as addictions such as drugs and alcohol¹¹. In fact, addictions cause changes in the physical properties of the brain, with reductions in volumes of frontal lobe regions of the brain that primarily regulate reason and judgment. Pornography has been shown to be no different, in that the brain is plastic and subject to the same transformations as for other addictions.

⁹ See for instance <http://www.natureworldnews.com/articles/4107/20130923/porn-addiction-alcoholism-substance-abuse-study.htm>

¹⁰ Hilton, D.L., (2013), Pornography addiction - a supranormal stimulus considered in the context of neuroplasticity. *Socioaffective Neuroscience & Psychology*. Vol 3

¹¹ Hilton, D.L. and Watts, C., (2011), Pornography addiction: A neuroscience perspective. *Surgical Neurology International*, Vol 2:19

129. We accordingly contend that pornography reduces individuals' ability to critically assess harm (at the very least in attitude) towards others, while focusing on the impulsive benefit to themselves. This type of argument was countered by Dr Marlene Wasserman in the public hearing, who notes that the re-wiring of the brain by pornographic stimuli simply changes people's perceptions of sexuality, without inducing any form of harm; however, this argument does not take into account the research findings that individuals tend to believe that their risk exposure to influence by media intake is low, while simultaneous effects of changes in attitudes towards others are registered. It also does not take into account that the regions of the brain that regulate reason and judgment are affected by pornography consumption. Due to the compulsive neurological stimuli that result from this type of activity, it is not necessarily true that individuals can rationally assess this misalignment in attitude. Furthermore, ICASA has not taken into account the research which underlines the addictive behaviour brought about by pornography, and the harm that this causes to the viewer, but the potential harm that may result from lower levels of rationality. In particular, individuals who are 18 and above, and who have effectively been granted permission by ICASA to subscribe for these channels, but are still too young to have "mature brains" that are more resistant to these addictive patterns, are being harmed without knowing this.¹² This does not constitute "choice" or "freedom of expression". If ICASA favours evidence which suggests that pornography improves individuals' sex lives, they are

¹² Reisman, J.A., (2003), *The Psychopharmacology of Pictorial Pornography: Restructuring Brain, Mind & Memory & Subverting Freedom of Speech*. Mimeograph, The Institute for Media Education. This work suggests that the younger the brain, the more sensitive it is to the processing of images – even in the case of teenagers and young adults.

ignoring that these individuals also stand the risk of harming themselves and others involuntarily.

130. A 2009 study by Johnson, Blum and Giedd in the *Journal of Adolescent Health* concludes that the frontal lobes which are responsible for impulse control are not fully developed until individuals reach their mid thirties. The study noted that it was of particular relevance that even young adults are susceptible to changes in their brains which could reduce impulse control. The study looked at criminal responsibility, but these findings are equally relevant to the damaging effect of pornography on the brain of the young adult. At the very least, it is the responsibility of ICASA to research and understand the best and most relevant modern science in informing its decisions.¹³

Protection of Children and ODM's proposed PIN system

131. Although ODM's application to ICASA makes provision to protect children from viewing pornography channels with a PIN mechanism, based on the information contained in aforementioned application, this mechanism does not ensure adequate protection. This view is shared in the written submission of the Film and Publications Board annexed hereto marked "DVF23"). They were unfortunately denied oral submissions at the public hearing, due to their written submission not having reached ODM in time. However, this information appears not to have been adequately addressed by ICASA (neither in the reasons, nor the rest of the record they supplied us with), which constitutes a

¹³ Johnson, Blum and Giedd (2009), Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy. *Journal of Adolescent Health*. Vol 45 (3): 216 - 221

basis for judicial review of the decision all on its own.

132. A further relevant consideration in protecting children is the type of decoders that ODM will use to supply the pornographic channels to subscribers. PVR decoders enable subscribers to record programmes for viewing at a later time, whilst Dual View decoders allow households to watch different broadcasts from the same subscription service on more than one television set.

133. The PIN security system proposed by ODM would only be effective in protecting children if, in the case of a Dual View decoder system, the PIN will be specific to the television channel on which the adult/parent wants to watch pornographic content. If by entering the PIN the whole decoder, i.e. each of the Dual View channels, is unlocked, children, who may be watching television in a separate room from their parents, would be able to access and be exposed to pornography.

134. Similarly, if ODM supplies subscribers with PVR decoders, the PIN system would only be effective in protecting children if -

134.1. The recorded programme stored on the hard drive of the decoder, would itself also be PIN blocked; or

134.2. Recorded programmes from the pornographic materials are stored on a separate, inaccessible part of the decoder's hard drive.

135. There is no record in the documents we have received from ICASA that ICASA

had considered the abovementioned concerns, which we submit are relevant in order to make an informed decision about whether to authorise or refuse ODM's application.

136. In the next paragraphs we will show that, based on the details of the PIN mechanism outlined in ODM's application, a simple procedure can be followed that allows children to bypass the security PIN. Tighter specifications are required to ensure that the PIN mechanism provides adequate protection of children.

137. ODM's application only specifies a four digit PIN mechanism. It does not, first of all, specify the character set (the number/set of various characters that each digit may assume). For example, if the character set only has two variations of characters, a four digit PIN will only have 16 combinations. A child will have a one in 16 chance of guessing the correct PIN. We submit that a channel application lacking the character set details, may not be approved, as any approval so given would not have properly considered the protection of children.

138. The second deficiency in ODM's application in respect of the PIN is that no details are specified regarding how incorrect PIN entries are dealt with by the system. If incorrect PIN entries do not stop any additional attempts at entering PINs, it may be possible for children to work through all possible PIN combinations to arrive at the correct combination. If the viewer is free to enter incorrect PIN numbers immediately after each other, a child can test a different PIN every 2-3 seconds. ICASA should not have authorised ODM's application

in the absence of specifications for the process after incorrect PINs have been entered.

139. A third major specification that is not addressed is the lifetime of a PIN. If the PIN is not regularly changed, children may have enough time to discover the correct PIN combination and obtain indefinite free access to pornographic channels. The frequency of mandatory PIN renewal must be specified before ICASA can be sure that the system is safe for children.
140. Televisions and decoders usually only have buttons with the numbers 0-9. Assuming a four digit PIN number, which can take the characters 0-9, the correct PIN can be one of 10000 combinations. If a child tests a different PIN every 3 seconds, the correct PIN can be entered at any time in the following 8 hours and 20 minutes (0-500 minutes). Thus, within the details provided in ODM's application, which ICASA has authorised, a PIN mechanism will be implemented, where children will be able to unblock pornographic channels in an average of 4 hours. Additionally, without PIN renewals, children will have indefinite access to pornographic channels after relatively easily bypassing the PIN mechanism.
141. A possible solution is to completely block the entry of a PIN number for a certain time (e.g. 20 minutes), when three incorrect PIN numbers have been entered. If every third incorrect PIN number entry is halted for 20 minutes, it will take a child two months to test all PIN combinations. This is a better solution than what is currently in place, since it means that a child can only, on average, discover the correct PIN after a month of testing. A much safer

mechanism is to require that the adult subscriber be required to intervene to unblock the PIN, should it have been entered incorrectly multiple times; the subscriber will have to unblock the PIN by communicating with the service provider.

142. It is also important that the PIN is renewed once a month. People do not regularly change passwords, and many corporate internal networks force users to renew their passwords at certain time intervals. PIN renewal should be enforced for the pornographic channels, to ensure that children are guarded from material that is harmful. Additionally, it could also have been considered whether a randomized PIN must be generated and supplied to the adult viewer, in order not to compromise the true randomness of the PIN. If PIN revisions are not truly random, the risk exists that children may discover patterns in the PIN revisions and simply predict the new month's PIN number.

143. This raises the issue of the origin of the PIN. If the PIN is provided by the service provider, the service provider itself must put the monthly PIN revision on the decoder device. This solution has many complications. If the device generates the PIN number, a system must be put into place to handle the case where the subscriber loses the PIN. If the service provider holds any PIN numbers (e.g. reset PIN numbers), details must be provided on how the PIN numbers are protected from children obtaining such PIN numbers. The Film and Publication Board additionally raises the concern that the PIN should be able to identify the person involved, as well as their age. By additionally requiring One Time Pins sent to the adult user's cell phone, a further layer of

protection could be added. Based on the abovementioned, we submit that many crucially relevant details regarding the safeguarding of children were omitted from ODM's application.

144. Finally, ODM's application proposes that a "double layer" PIN will be put into place. This is another detail that is neglected in their explanation. If the "double layer" refers to two separate PIN mechanisms that must be crossed in a serial fashion, the time taken for a child to work through the PIN mechanisms will, at the most, double. An improvement from four hours, to eight hours, may not be enough to protect children.

145. In their internal benchmarking report with other countries, ICASA noted that Playboy TV has suffered from signal bleed in the USA. This entails that households that did not subscribe to the service did not need a PIN to access the pornographic content. Such errors have been described by ICASA as a potential danger, but their reasons for granting the license do not address this concern. The risk for signal bleed is potentially detrimental for involuntary users, especially children.

146. We submit that ODM's application lacks important details regarding the protection of children from exposure to pornography. The design of the PIN mechanism is an important part when hazardous material is supplied to the public. We are concerned that the design of the PIN mechanism may be greatly neglected. By authorising ODM's application for the broadcasting of pornographic channels before the PIN mechanism has been designed and analysed by a professional body, and without it having been described in detail

in the application documentation, ICASA has failed to take into account relevant circumstances in relation to the protection of children from harmful content.

Validity of ODM's Market Research

147. In their application, ODM dismisses the written responses received from the public on the basis that the sample was self-selected, so that bias may arise in making conclusions – they claim that only opponents were likely to air their views in a public forum. This raises the question why proponents did not register their views at the hearings or in written representations, given that they were not more limited in time and capacity than opponents. This raises the question whether users of pornography prefer the secrecy of pornography at home, and do not wish to share their behaviour publicly.

148. However, the process of collecting data through the public hearings was transparent relative to other figures provided. ODM offers their own figures from a survey administered by Ipsos Markinor, for which they provide some background information in their original application, though which is not sufficient to make a fully informed decision. The sample consists of 501 individuals, which is fairly small to be representative of the South African population. As sampling design theory dictates, sample sizes in any study can only be small if there is very little variation in the effects that are to be measured in the population of interest. This entails that for a small sample size to suffice, an overwhelming section of the population should have the same opinions.

149. More importantly, however, ODM does not give any indications of the degree of non-response in this survey. ODM did not indicate whether non-response was, for example, systematically determined by individuals who did not watch adult content. They acknowledge that the questions in the survey were sensitive, and also screened respondents by asking whether individuals regularly consume pornography or not. It is not clear from their submission how many people declined to respond because they do not regularly watch pornography, which is information which they freely have, based on their screening question. If individuals that prefer not to engage with topics related to sexual content did not answer the survey, the problem of sample selection bias arises, and this evidence should also be dismissed by ICASA as inconclusive and biased towards a group that would already be willing to watch pornography.
150. ODM compared results with the Youth Sex Survey of 2012, where they at least acknowledge that sample selection bias is likely to have occurred. Nevertheless, they continue to place large emphasis on these results, while dismissing the evidence in the formal submissions to ICASA, based on the same flaws that exist in the survey evidence that they quote.

F: GROUNDS FOR JUDICIAL REVIEW

The conclusions of ICASA do not follow from the facts found

151. It is evident from paragraphs 15.1, 15.2 and 18 of the reasons that ICASA accepted the following:

- 151.1. Certain men are more likely to be sexually violent towards women if they are exposed to substantial amounts of pornography.
- 151.2. Many serial rapists were involved with pornography.
152. Notwithstanding these factual findings, ICASA concluded that there is no evidence to demonstrate that pornography is a direct cause of gender-based violence in South Africa. This conclusion appears to have played a material role in the decision.
153. ICASA further concluded that those opposing ODM's application were not able to provide evidence that demonstrates a conclusive link between pornography and gender-based violence, and that ODM had presented evidence to demonstrate that the distribution of pornography is not indicated as a cause of gender-based violence in the Republic.
154. However, the conclusions above are not rationally connected to the information before ICASA (referred to in 81 to 99 herein above) and/or the reasons given for the conclusions (referred to in paragraphs 151.1 and 151.2 above) and, to the extent that the decision was based on this conclusion, the decision was taken arbitrarily and because irrelevant considerations were taken into account and/or relevant considerations was not considered.
155. It is unsettling and we submit, unacceptable, irresponsible and unconstitutional for ICASA to acknowledge that certain men with a proclivity towards violence are likely to react to exposure to pornography by creating sexual violence

towards women, and authorise ODM's application without putting precautionary measures in place to protect women and children from such men.

156. In the circumstances the court has the power to review the decision in terms of, inter alia, sections 6(2)(e)(iii), (e)(vi), (f)(ii)(cc) and/or (f)(ii)(dd) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

Failure to find a relevant law of general application

157. The second ground of review concerns the finding in paragraph 17 of the reasons that ICASA accepts that there is no law of general application prohibiting the production and distribution of adult pornography in the Republic and as such a prohibition of the authorisation of channels as applied for would be an unlawful limitation of applicant and its prospective customers' rights to freedom of expression.

158. ICASA accepted in paragraph 15.4 of the reasons that research suggests that pornography has a negative impact on children. ICASA was however of the view that notwithstanding the truth of the research, there is no legal basis upon which it may refuse an application to broadcast channels which harm children, as there is no law of general application that prohibits the distribution of pornography.

159. It is evident from paragraph 13 of the reasons that this finding was one of two "paramount" issues considered by ICASA in deciding whether or not to approve ODM's application to broadcast the pornographic channels.

160. In making the findings in paragraphs 157 and 158 above, ICASA failed to take into account the following considerations:

161. First, section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act makes it a criminal offence to expose, display or cause the display of pornography to a child. We submit that by making it a criminal offence, the legislature in substance effectively prohibits all legal subjects from committing an act or omitting to do an act, which causes the display of pornography to a child. This Act therefore is a law of general application that prohibits the broadcasting of pornography to the extent that the broadcast content would be viewed by a child.

162. ICASA's conclusion in paragraph 158 above is therefore incorrect, constituting an error of law that resulted in a failure on its part to consider the implications of the Criminal Law (Sexual Offences and Related Matters) Amendment Act for ODM's application.

163. Second, there are other laws of general application that govern the decision.

164. The Regulations are a law of general application, which empowers ICASA to refuse permission for the broadcasting of a channel. It accordingly provides ICASA with discretion in respect of channels to be added to existing subscription services. ICASA's authority to refuse permission for the broadcasting of a channel flows from the powers and duties set out in the Broadcasting Act, the ICASA Act and the Electronic Communications Act. Each of these Acts is, likewise, a law of general application. The powers and duties

ascribed to ICASA in the Broadcasting Act, ICASA Act and Electronic Communications Act derives its authority from Section 192 of the Constitution, which provides that an independent authority, i.e. ICASA, must regulate broadcasting in the public interest and must ensure fairness and a diversity of views broadly representing South African society. Section 22 specifically allows for the practice of a trade to be regulated by law. The Constitution itself is a law of general application.

165. ICASA's conclusion that there is no law of general application prohibiting the distribution of adult pornography in South Africa is therefore incorrect, as the legislature has given ICASA discretion to determine whether to prohibit or to allow new channels to be broadcast in South Africa, in the fulfilment of its statutory obligations and its constitutional mandate. It is implicit, if not explicit, in the discretion given to ICASA that the Regulations, specifically with reference to the Code (regulation 6), authorise the limitation of the right to freedom of expression based on content.
166. Third, ICASA has misunderstood and/or misapplied the basis upon which it ought to exercise its discretion under regulation 3 of the Regulations. Specifically the Regulations provide guidance on how ICASA exercises its discretion, specifically in regulation 1 (the Preamble) and regulation 6 (Code of Conduct). In exercising its discretion ICASA therefore has to promote and achieve the objects and provisions of the Broadcasting Act, the ICASA Act, the Electronic Communications Act and the Constitution.

167. Having regard to section 192 of the Constitution, and section 2(a) of the ICASA Act, we submit that ICASA must (or at least may) refuse an application if the broadcasting of the proposed channel is not in the public interest or does not ensure fairness or does not ensure a diversity of views broadly representing South African society. We submit that the broadcasting of channels which are harmful to viewers, both adults and children, and to adults and children in society who come into contact with viewers (refer research evidence referred to in paragraphs 116 to 147 herein above), is self-evidently neither in the public interest, nor is fairness ensured thereby.

168. Specifically, in terms of the Broadcasting Act, ICASA should have had regard to the requirement that broadcasting policy in South Africa ought to contribute to the development of society, gender equality and the strengthening of the spiritual and moral fibre of society. We submit that the broadcasting of pornographic channels does not contribute to the development of society and in fact serves to undermine gender equality and weaken the spiritual and moral fibre of society.

169. In deciding whether to authorise or refuse a new channel application ICASA would have had to consider what impact its decision would have on the following constitutional rights and freedoms contained in the Bill of Rights:

169.1. The Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The rights in the Bill of Rights are subject to the limitations

contained or referred to in section 36, or elsewhere in the Bill. (section 7(1), (2) and (3))

169.2. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (section 8(1))

169.3. Equality (section 9)

169.4. Human dignity (section 10)

169.5. Freedom and security of the person (section 12)

169.6. Freedom of expression (section 16)

169.7. Freedom of trade, occupation and profession (section 22)

169.8. Children (section 28)

170. The abovementioned rights in the Bill of Rights are all laws of general application, which if properly considered and balanced may result in ICASA exercising its discretion in regulation 3 of the Regulations to refuse ODM's application.

171. By virtue of section 54 of the Electronic Communications Act and regulation 6 of the Regulations, ICASA must also consider the Code in deciding whether to authorise or refuse a new channel application.

- 171.1. The Code contains provisions designed to protect constitutional rights, *inter alia* the rights of children, the human dignity of persons and people's right to privacy.
- 171.2. As provided in section 54(3) of the Electronic Communications Act and regulations 6.2 of the Regulations, the Code is only valid and enforceable to the extent that it is "acceptable" to ICASA. The Code accordingly is not an inviolable legal instrument and ICASA may retract its acceptance thereof as and when new information comes to light or as circumstances, view or attitudes change. It is therefore implicit in ICASA's consideration of a new channel application that it is also at the same time considering whether the Code is still acceptable in the sense that it is both lawful, i.e. achieves the objects of the Broadcasting Act, ICASA Act and Electronic Communications Act, and constitutional, i.e. promotes and protects constitutional rights and freedoms.
- 171.3. In order to determine whether the Code is still acceptable in the sense described directly herein above and whether to authorise or refuse a new channel application, we submit that ICASA would have to critically and properly consider all relevant considerations. It would have to consider the merits of the concerns raised and research evidence supplied by those opposing the application. It would have to scrutinise the applicant's rebuttal of the abovementioned concerns and research evidence, not merely accepting it without further

investigation. It would have to do its own research and/or consult further expert(s).

- 171.4. Upon concluding from its fact finding work, ICASA may come to a conclusion that because of new evidence that has come to light since the acceptance of the current version of the Code, certain parts of the Code are no longer acceptable in terms of the applicable legislation and the relevant constitutional provisions.
- 171.5. It is therefore conceivable that an applicant may apply for channels that are not expressly prohibited by the current version of the Code, which ICASA would be entitled, lawfully to refuse in the exercise of its discretion, because the Code itself may have become outdated. Paragraph 29 of the Code provides expressly that the Code is subject to interpretation in the light of changing circumstances.
- 171.6. In the circumstances, we submit that ICASA was authorised to refuse the application by at least the following laws of general application: the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Regulations, read with section 192 of the Constitution, the ICASA Act, the Broadcasting Act, the Electronic Communications Act and all relevant provisions of the Bill of Rights.
- 171.7. Therefore, if ICASA had decided to refuse ODM's application, it would have been not only a lawful exercise of its discretion, but also a proper exercise of its discretion.

172. It is clear from a reading of ICASA's reasons for refusing ODM's previous application (annexed as "DVF24"), that ICASA appreciates the abovementioned basis and framework for exercising its discretion to either authorise or refuse new channel applications. It must also be noted that as ODM had knowledge of ICASA's reasons for refusing its previous application, it also had knowledge of the basis and guidelines applicable to the exercise of ICASA's discretion.

173. We thus submit that the findings at paragraphs 17 and 15.4 of the reasons are legally untenable, and accordingly the decision was materially influenced by an error of law and/or was unconstitutional or unlawful. In addition, the decision was taken because irrelevant considerations were taken into account and/or relevant considerations were not considered. In the circumstances the court has the power to review the decision in terms of, inter alia , sections 6(2)(d), 6(2)(e)(iii) and/or 6(2)(i) of PAJA.

Failure by ICASA to scrutinise and interrogate information submitted to it and to do research *mero motu* in order to make findings of fact

174. In paragraphs 79 to 93 herein above I have referred to information that was placed before ICASA indicating the detrimental, destructive and harmful consequences of exposure to pornography. In our analysis of ICASA's record, the extent of ICASA's interaction with and interrogation of the abovementioned information has been outlined in paragraphs 97 to 98 herein above.

175. We submit that the extent of ICASA's scrutiny of the information referred to in paragraphs 79 to 94 herein above is insufficient for purposes of making

informed findings of fact in order to come to a decision to either authorise or refuse ODM's application.

176. In brushing aside the information submitted by myself, Dr Larsen, Elsie du Toit, Braam Visser, Doctors for Life, African Christian Network and Evergreen Parenting, ICASA relied on the testimony of Dr Marlene Wasserman. Refer paragraph 98 herein above, with reference to pages 133 to 139 of the Transcript. ICASA's record does not contain evidence of proper scrutiny on the part of ICASA to investigate and confirm the reliability of Dr Wasserman's testimony, with reference to an independent expert or further research of its own. ICASA's failure to corroborate Dr Wasserman's testimony, to the extent that the decision is based on ICASA's reliance on it, entitles this Honourable court to judicially review the decision.
177. We have submitted Dr Wasserman's testimony for scrutiny to an expert in the field of psychology, Dr George Malek. Dr Malek's findings are to the effect that Dr Wasserman's testimony contains inconsistencies, unsubstantiated statements and is not *per se* reliable. I annex his affidavit filed herewith.
178. We submit that ICASA's knowledge of the concerns and risks pointed out to it by those opposing ODM's application (inter alia those referred to in paragraphs 79 to 94 above) and the statistics on gender violence and intimate partner/domestic violence against women in South Africa, exacerbates the need and obligation for *mero motu* research and proper scrutiny of the information before ICASA.

179. Had ICASA done research of its own into the detrimental consequences of exposure to pornography, it would have found the research evidence materials I refer to herein above. We submit that the consideration of these materials, in conjunction with the information referred to in paragraphs 79 to 94 herein above, are material to the exercise of ICASA's discretion and to the reaching of an informed and reasonable decision that is justifiable with reference to all relevant facts.

180. Taking into account section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, ICASA should not merely have asked the question whether their decision affords adequate protection to children. It should have considered whether their decision is adequate to prevent the commission of criminal offenses. ICASA's error of law in not considering section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act was material and caused it to not consider a relevant consideration.

181. Based on the abovementioned, we submit that the decision was taken –

181.1. because irrelevant considerations were taken into account and relevant considerations were not considered;

181.2. because of the unwarranted dictates of another person; and/or

181.3. arbitrarily and capriciously.

182. Based on the fact that ICASA had not considered all relevant considerations, it is impossible that the decision could be rationally connected to the purpose for which it was taken or the purpose of the empowering provision. The purpose of both the decision and the empowering provision is *inter alia* to regulate broadcasting *in the public interest*.

183. In the circumstances the court has the power to review the decision in terms of, *inter alia*, sections 6(2)(d), 6(2)(e)(iii), (iv) and/or (vi), 6(2)(f)(ii)(aa) and/or (bb), and/or section 6(2)(i) of PAJA.

Procedural Unfairness and Mandatory Procedure not Complied with

184. We respectfully submit that **the notice of 19 December 2012** failed to comply with the provisions of procedural fairness contained in the ICASA Act, as well as the provisions of PAJA and its regulations and the common law, especially in the following respects:

184.1. Except for publishing in the Government Gazette, ICASA did not give notice of the public hearing in a newspaper which is distributed, or in newspapers which collectively are distributed throughout South Africa. This is especially important since the decision to allow pornography on television affects the rights of the public throughout South Africa;

184.2. ICASA did not publicise the information contained in the notice by way of communications through the printed or electronic media,

including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets;

- 184.3. ICASA did not give proper notice of its intended inquiry and the purpose of the inquiry;
- 184.4. ICASA did not afford the public at least 60 days from the date of publication within which to submit written representations, alternatively afforded the public a reasonable opportunity to make representations;
- 184.5. The notice did not caution that the comments received after the closing date may be disregarded;
- 184.6. The notice did not contain sufficient information about the proposed application and decision to be made by the ICASA, to enable members of the public to submit meaningful comments;
- 184.7. The notice failed to give proper access to the information about the application and ICASA failed to give proper access to the information thereof;
- 184.8. The notice was drafted in only one of the official languages of South Africa;

- 184.9. The notice did not contain an invitation to members of the public to indicate in their written representations whether they require an opportunity to make oral representations.
185. Because of the above stated reasons we respectfully submit that our right/s to procedurally fair administrative action have been affected and/ or violated by ICASAs aforesaid failure to comply with the relevant legislation.
186. Furthermore, we also respectfully submit that the **public hearing notice** failed to comply with the provisions of procedural fairness contained in the ICASA Act, as well as the provisions of PAJA and its regulations, especially in the following respects:
- 186.1. It failed to give notice of the public hearing in at least a newspaper which is distributed, or in newspapers which collectively are distributed throughout South Africa, since the decision to allow pornography on television affects the rights of the public throughout South Africa;
- 186.2. It failed to publicise the information contained in the public hearing notice by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

186.3. It failed to hold more than one public hearing and to also hold it in some of the other provinces in South Africa;

186.4. It was drafted in only one of the official languages of South Africa;

186.5. It gave no particulars of the matter that is being investigated;

186.6. It did not invite members of the public to attend or make oral representations at the public hearing.

187. We respectfully submit that **the procedure followed at the public hearing** failed to comply with the provisions of procedural fairness contained in the ICASA Act as well as the provisions of PAJA and its regulations, the common law and the Constitution, especially in the following respects:

187.1. The procedure decided upon by ICASA was manifestly biased since it did not afford those opposing the application an equal opportunity to adequately respond to the case presented by ODM;

187.2. The procedure decided upon by ICASA was manifestly biased since it did not afford those opposing the application the same amount of time as the single organisation in favour of the application, within which to present each of their respective cases;

187.3. ODM was given more time than the objectors;

- 187.4. ODM was able to respond to the submissions of the objectors;
- 187.5. The public hearing was rushed and far too short;
- 187.6. It failed to hold more than one public hearing and also to hold it in some of the other provinces in South Africa.

G: SECTION 133 OF THE COMPANIES ACT

188. In terms of section 133(1) of the Companies Act 71 of 2008:

“During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except–

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable; ...”

189. We submit in the first instance that this application does not constitute legal proceedings against ODM. The proceedings lie against ICASA and its chairman. Inasmuch as it is necessary, we apply for leave in terms of section 133 of the Companies Act.

190. In this regard I point out that our attorneys sent a letter to Mr van den Steen on 7 November 2013 requesting him *inter alia* to provide his consent to the commencement of this application. The letter is annexed hereto marked "DVF25".
191. Our attorneys received a response to the abovementioned request by way of a letter from Bowman Gilfillan on 15 November 2013, refusing our request. A copy of this letter is annexed hereto marked "DVF2".
192. We submit that this is an appropriate case for leave to be granted for the commencement of proceedings inasmuch as ODM has started broadcasting the pornographic channels, notwithstanding the fact that it is under business rescue.
193. Inasmuch as there is evidence that the broadcasting of the pornographic channels will be harmful, we submit that it would not be just and fair for these proceedings to be delayed until after the business rescue proceedings are completed.
194. In addition, in terms of section 7(1) of PAJA, we are obliged to institute these review proceedings without unreasonable delay and not later than 180 days after the date on which we were: *"informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons"*.

195. The reasons were published on or about 24 July 2013. This date therefore marks the earliest date on which the 180 period could start running. It is by no means clear that the business rescue proceedings will be completed before the 180 day period has expired.

196. I point out that section 133(3) of the Companies Act provides that: *“If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company’s business rescue proceedings.”* In the event that the court refuses leave to commence proceedings, then we will ask, in the further alternative, that the court declares that the time limits in section 7(1) are suspended during ODM’s business rescue proceedings.

CONCLUSION

197. For the reasons given above, on behalf of Cause For Justice, I pray for an order as set out in the notice of motion.

DIETER PETER VON FINTEL

I certify that:

The deponent has acknowledged to me that:-

He knows and understands the contents of this affidavit;

He has no objection to taking the prescribed oath;

He considers the oath to be binding upon his conscience.

The deponent thereafter uttered the words "I swear that the contents of this affidavit are true, so help me God".

The deponent signed this affidavit in my presence at the address set out hereunder at on the day of December **2013**.

COMMISSIONER OF OATHS