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

CASE NO: 18519/2013

In the matter between:

JUSTICE ALLIANCE OF SOUTH AFRICA	Applicant

and

STEPHEN SIPHO MNCUBE N.O.	First Respondent
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second Respondent
ON DIGITAL MEDIA (PTY) LTD t/a STARSAT	Third Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Fourth Respondent
MINISTER OF COMMUNICATIONS	Fifth Respondent

And:

DOCTORS FOR LIFE INTERNATIONAL NPC	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	Third Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Fourth Respondent
MINISTER OF COMMUNICATIONS	Fifth Respondent
JUSTICE ALLIANCE OF SOUTH AFRICA	Sixth Respondent
CAUSE FOR JUSTICE	Seventh Respondent
GABRIEL JACOBUS VENTER	Eight Respondent

And:

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	Third Respondent
PETRUS FRANCOIS VAN DEN STEEN N.O.	Fourth Respondent
MINISTER OF COMMUNICATIONS	Fifth Respondent

REPLYING AFFIDAVIT

I, the undersigned,

NORRIS CRAIG SNYDERS

do hereby make oath and say:

1. I am an adult male of 2 Pinegrove Place, 50A Drama Street, Somerset West. I am an Attorney at Heunis Law Group Inc., Somerset West.

2. I am a member and serve on the executive committee of the First Applicant, Cause For Justice (hereinafter also “we, “us”, “our” or “CFJ”).

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.

5. We respond herein firstly to the answering affidavit of the First and Second Respondents ("ICASA") at pages 3 to 65 and thereafter to the answering affidavit of the Third and Fourth Respondents ("ODM") at pages 65 to 96.

6. To the extent that I do not specifically admit or deny an allegation contained in ICASA or ODM's answering affidavits, I deny such allegation.

***In re* ODM's ANSWERING AFFIDAVIT**

AD PARAGRAPH 7

7. We deny the content of this paragraph and specifically maintain that there is merit in the grounds of review raised by us.

8. Although it is admitted that we are dissatisfied with the merits of ICASA's decision, we deny that we seek that the Court revisit it as stated by ODM. On the contrary, our application to review and set aside ICASA's decision is based solely on the principles of administrative justice, as set out in in our founding and replying affidavit. We emphasise that this is an application for judicial review of ICASA's decision. The relevance of research and other evidence regarding the harmfulness or not of pornography, for purposes of adjudication of this case, is therefore limited to answering the question whether the evidentiary material we refer to in our founding affidavit is relevant to the merits of ICASA's decision. The Honourable Court is not called upon to replace ICASA's decision with its own decision. It is our

case that pornography is harmful and that ICASA did not properly consider this issue.

9. In amplification of the aforesaid, we note that ODM goes to great lengths in answering our grounds of review as comprehensively as possible, in our view in acknowledgement of the fact that this is an application for review of ICASA's decision.

AD PARAGRAPH 8

10. We deny that our entire application falls to be dismissed for the reasons already mentioned and hereby repeat that ICASA's decision must be set aside, with costs, and request the relief as set out in our notice of motion.

AD PARAGRAPHS 11 TO 14

11. We note the content of this paragraph. We do not have any, alternatively very limited knowledge (to the extent pleaded in our founding affidavit) of the facts contained therein and accordingly cannot admit or deny same.

AD PARAGRAPHS 15 TO 17

12. We deny the content of these paragraphs for the reasons stated in our founding affidavit.[1]

13. In amplification of the above, we note that ODM admits in its answering affidavit that sampling bias may have occurred in the survey referred to in ODM's application for authorisation of the pornographic channels, as

[1] CFJ FA Par 147 to 150.

was administrated by Ipsos Markinor, and that they have been unable to confirm the accuracy of the market surveys conducted.[2]

14. In addition to the above, we also point out that ODM does not take the court into its confidence, by failing to provide the Honourable Court with indications of the degree of non-response in its surveys, which is information they freely have, based on their screening question and which was pointed out in our founding affidavit.[3]

AD PARAGRAPHS 18 TO 19

15. Save to specifically deny that we, or the public, were informed of the authorisation of Brazzers TV (Europe), we plead that we do not have any knowledge of the facts contained in this paragraph and accordingly cannot admit or deny same.

AD PARAGRAPHS 20 TO 32

16. We vehemently deny the content of these paragraphs.

17. Although we concede that we did not expressly allege that the ODM channels are in breach of the BCCSA Code in our founding affidavit, we had not done so as we had not been in a position to consider the programme schedules, actual programme information and material broadcast on the ODM channels. Also, the channel description of Playboy TV, as presented by ODM to ICASA in their channel application, did not cause any immediate concern to investigate the probability of alleging that the Playboy TV content breaches the BCCSA's Code. In relation to Private Spice and its replacement channel, Brazzers TV (Europe), the channel descriptions presented to ICASA had been very cagey, overly brief and vague. Viewed on its own, the channel descriptions did not prompt us to allege that the

[2] ODM AA Par 191 to 191.2.
[3] CFA FA Par 149.

material broadcast on ODM's adult channels breaches or might be in breach of the BCCSA Code.

18. However, upon perusing ODM's answering affidavit we became aware of the replacement channel to Private Spice, namely Brazzers TV (Europe). Mr Wynand Viljoen attempted to obtain information of the programme schedule of Brazzers TV (Europe) via the internet on Saturday 12 July 2014, Tuesday 15 July 2014 and Friday 25 July 2014 by accessing the website of Brazzers TV (Europe) at www.brazzerstveurope.com. Mr Viljoen learned that the website of Brazzers TV (Europe) contains two sections, namely "Europe" and "South Africa". The "South Africa" section contains no content at present and the programme schedule and programme information are accordingly inaccessible. In the "Europe" section however, the daily programme schedule is available, together with descriptive programme synopses and images. The images Mr Viljoen accessed and saw in relation to programmes presumably broadcast to European countries, alerted him to the probability that the content of Brazzers TV (Europe), currently being broadcast to ODM's subscribers in South Africa, do not accord with the channel description ODM presented to ICASA in their channel application and in addition are in breach of the BCCSA Code. We annex hereto print screens of the programme schedule and descriptive images of specific programmes from the "Europe" section of Brazzers TV, as shown on its webpage on 15 July 2014 and on 25 July March 2014, marked as **"NCS 1"**.

19. In addition to the above, paragraph 31 of ODM's answering affidavit contains references to programmes broadcast on Playboy's "TVfor2", amongst others "Foursomes". Without closer scrutiny of the programmes, it is impossible to determine with any certainty whether it advocates infidelity and/or promiscuity, which in the context of a country like South Africa, would definitely not be in the public interest.

20. Having consequently been made alive to the risk that ODM's channels may in fact be in breach of the BCCSA Code as it now stands, we requested (amongst others) sample programme schedules, programme information and broadcast material in respect of Brazzers TV (Europe) and Playboy TV from ODM by way of a Rule 35(12) notice served on 10 July 2014. Upon receipt of the requested documents and material we should be in a better position to determine with greater certainty –

20.1.1. whether there are clear discrepancies between the channel descriptions ODM presented to ICASA in their channel application and the actual content that ODM broadcasts on their adult channels; and / or

20.1.2. whether the material broadcast on ODM's channels is in breach of the BCCSA Code;

20.1.3. which would form the basis of an allegation of misrepresentation by ODM and would make ICASA's decision reviewable as it would have been based on a material mistake of fact; and/or

20.1.4. whether the actual broadcast material, which we submit constitutes relevant considerations that ICASA failed to consider in making their decision, is of such a nature that no reasonable administrator in the position of ICASA could have authorised ODM's channel application with full knowledge of all the relevant information.

20.2. As at the date of deposing to this affidavit ODM had not complied with our Rule 35(12) notice and are we in the process of compelling them to comply with the Uniform Rules of Court.

20.3. From what we have thus far seen, namely the programme names, short programme synopses and images we have a reasonable suspicion and accordingly allege that –

20.3.1. ODM's channels are in breach of the BCCSA Code, since it contains 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, explicit violent sexual conduct and /or the explicit infliction of or explicit effects of extreme violence which constitutes incitement to cause harm;

20.3.2. ODM's channel content falls within the definition of 'refused classification' in terms of the Films and Publications Act, 1996 since it incites imminent violence and / or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.

20.3.3. In the alternative to paragraph 20.3.2, if the Honourable Court finds that the channel content does not fall within the refused classification, ODM's channel content falls within the 'XX' classification, since it depicts –

20.3.3.1. explicit sexual conduct which violates or shows disrespect for the right to human dignity of any person;

20.3.3.2. bestiality, incest, rape or conduct or an act which is degrading of human beings;

20.3.3.3. conduct or an act which constitutes incitement of, encourages or promotes harmful behaviour; or

20.3.3.4. explicit infliction of sexual or domestic violence.

20.4. In any event, we submit that the actual broadcast material of ODM's pornographic channels constitutes relevant considerations for purposes of ICASA's decision. We accordingly allege that ICASA failed to obtain sufficient information from ODM regarding the proposed channels, which failure renders their decision reviewable, as set out herein and in our founding affidavit.

AD PARAGRAPHS 33 TO 35

21. We note the content of these paragraphs. We do not have any knowledge of the facts contained in these paragraphs and accordingly deny same and put ODM to the proof thereof.

AD PARAGRAPHS 36 TO 40

22. We do not have any knowledge of the facts contained in these paragraphs and accordingly cannot admit it.

AD PARAGRAPHS 41 TO 43

23. We admit the contents of these paragraphs, save to deny that the conditions imposed by ICASA are sufficient for the reasons set out in our founding affidavit and herein below.

AD PARAGRAPHS 44 TO 45

24. These paragraphs correctly quote PAJA.

AD PARAGRAPH 46

25. We admit that we contend that ICASA's decision is vitiated by procedural unfairness, as set out in our founding affidavit.

26. We deny that the complaints raised by DFL *concerning bias* are the same as the complaints raised by us, since our allegations in this regard are exclusively limited to the unfairness of the procedure followed by ICASA during the public hearing, as alluded to in our founding affidavit.[4]

AD PARAGRAPHS 47 TO 47.3

27. Save to deny that our arguments and objections in respect of the procedural unfairness of ICASA's decision are limited to the grounds mentioned in paragraphs 47.1 to 47.3, we admit the allegations contained therein. The remainder of our objections in regards the procedural unfairness of ICASA's decision are extensively dealt with in our founding affidavit and herein below.

AD PARAGRAPHS 48 TO 48.5

28. We persist that ICASA's decision is vitiated by procedural unfairness, as set out in our founding affidavit and herein below.

29. We point out that our case differs widely from the case made out by DFL, particularly on the point of bias. This issue will be addressed in argument if necessary.

AD PARAGRAPH 49

[4] CFJ FA Par 60 to 65; CFJ FA Par 187 to 187.2.

30. We strongly deny the contents of this paragraph and specifically ODM's allegation that we presented a skewed presentation of the facts and that we do not appreciate the legal standards of procedural fairness. We respectfully submit that in the circumstances of this case there was procedural unfairness, as set out in our founding affidavit and elsewhere herein.

31. In amplification of the above, and for the reasons already stated, in respect of ICASA's *bias* our allegations are limited to the unfairness of the procedure followed by ICASA during the public hearing as is evident from the relevant paragraphs in our founding affidavit and herein above.[5]

Adequate notice and opportunity to make representations

AD PARAGRAPHS 50 TO 50.1

32. We admit the content of these paragraphs, but deny that 21 working days was adequate and fair given the circumstances of this case, as alluded to in our founding affidavit.[6]

AD PARAGRAPH 50.2

33. We note ODM's attempt to justify ICASA's failure to specify the content of the proposed channels by their reliance on the information given by ICASA in the Government Gazette ("the notice")[7], namely that the notice provided that ODM's application 'will be made available and open for inspection by interested parties in the Authority's library during the normal office hours'. We specifically deny that the notice contained sufficient information about the proposed application and decision to be made by the ICASA, for the following reasons:

[5] CFJ FA Par 30 to 64; Par 184 to 187.
[6] CFJ FA Par 33 to 44; Par 184.4.
[7] The Notice attached to CFJ's FA as Annexure "DVF3".

33.1. It did not enable members of the public to submit meaningful comments in the circumstances of this matter, as described in our founding affidavit.[8]

33.2. The availability of ODM's application was limited to the premises of ICASA (namely the library) and only for the limited purpose of inspection, not for collecting purposes.[9] It also deserves to be mentioned that the notice failed to indicate the address of the library.[10]

33.3. ICASA was aware of the widespread public interest during ODM's first application for the authorisation of pornographic channels in 2011.

33.4. We deny that any member of the public (including ourselves) would have known who ODM was since, when ODM applied for the authorisation of the pornographic channels (during 2011 and 2012 respectively), it was at all times trading under the trade name TopTV and not as ODM.

33.5. Although we admit that ODM and ICASA's contact details were provided for in the notice, we deny that it could reasonably be expected of the public to contact ICASA every time a prospective broadcaster applied for the authorisation of channels, in order to ascertain the nature and content of the channels applied for.

33.6. It is clear from the record that none of the written representations submitted by the public were submitted prior to 11 January 2013 (7 court days prior to the deadline of 22

[8] CFJ FA Par 33 to 46; Par 184 to 184.9.
[9] CFJ FA Par 33; Par 40 to 44; Para 2 of the Notice attached to CFJ's FA as Annexure "DVF3";
[10] CFJ FA Par 33, 40 and 41

January 2013), the date on which the media reported on ODM's application.[11]

33.7. The little time afforded to the public to submit written representations, namely 21 working days from 19 December 2013 until 22 January 2014. In this respect we emphasise that the aforesaid limited time period must be evaluated in the following context and circumstances, present at the time:

33.7.1. The fact that the notice was advertised in the Gazette during the traditional December holiday period when a large portion of the South African population is out of office;[12]

33.7.2. The sheer size and substance of the application brought by ODM (46 pages);[13]

33.7.3. The date upon which the public became aware of the notice through the media, namely 11 January 2013 (7 court days prior to the deadline of 22 January 2013).[14]

AD PARAGRAPH 50.3

34. The content of this paragraph is admitted to the extent that it accords with ICASA's actual figures, which may differ from what is contained in the Rule 53 record, as pointed out in the confirmatory affidavit of Mr Ryan Smit.

AD PARAGRAPH 50.4

[11] CFJ FA Par 34; Par 36
[12] CFJ FA Par 35.
[13] CFJ FA Par 37; Par 39; Par 42.
[14] CFJ FA Par 34; CFJ FA Par 36.

35. Save to deny that the reason for ICASA's decision to conduct a public hearing was because of Mr Smit's letter, the remainder of the allegations contained in this paragraph are admitted. In amplification of the aforesaid, ICASA did not respond or engage with Mr Smit's letter and there is no indication in Rule 53 record that ICASA was moved by Mr Smit's letter in deciding to conduct a public hearing.

36. We also note ODM's failure to allude to the fact that Mr Smit requested *"ICASA [to] organise a public hearing for all parties to make representations in person"* and that notwithstanding this request, Mr Smit was not invited to make oral representations at the hearing.[15]

AD PARAGRAPHS 50.5 TO 50.7

37. The content of these paragraphs are admitted.

38. As mentioned in our founding affidavit, we 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 especially in the light of the fact that ICASA, during ODM's first application in 2011, published a notice in the Government Gazette containing an invitation to members of the public who submitted written representations to attend the public hearing.[16] Find attached hereto the 2012 public hearing marked as **"NCS 2"**.

39. In addition to the above, we refer the Honourable Court to the relevant paragraphs of our founding affidavit.[17]

AD PARAGRAPH 50.8

40. We admit the content of this paragraph.

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[15] CFJ FA Par 39; Par 44. Mr Smit's letter appears as annexure "DVF6" to CFJ's founding affidavit, not "DVF5" as mentioned in ODM's AA at footnote 18.
[16] CFJ FA Par 56 to 57.
[17] CFJ FA Par 50 to 65.

41. In addition to the above, we refer the Honourable Court to the relevant paragraphs of our founding affidavit.[18]

42. We specifically draw the Honourable Court's attention to the fact that we still do not know who were invited to make oral representations and also do not know the basis upon which ICASA decided to invite or not invite some organisations and members of the public. It is noted that ICASA fails to respond to our founding affidavit in this regard sufficiently.

43. In addition to the above, on Friday 11 July 2014 Ms Taryn Hodgson (from Africa Christian Action and one of the parties who attended the public hearing) provided us with an email which was sent to her by ICASA dated 11 February 2013 (attached hereto and marked as "**NCS 3**"). The aforesaid email confirms our suspicion that only certain organisations were approached and invited to the public hearing by ICASA. It is however disappointing that we still do not know the criteria or basis for ICASA's decision to invite or not invite individual members of the public as well as the organisations concerned.

44. In addition to the aforesaid, it is even more disappointing that none of the now executive members of CFJ who submitted written representations were invited to make oral representations.[19] It also seems as though none of the individual members of the public were invited to the public hearing since only organisations made oral representations at the public hearing.

45. Furthermore, it is surprising that ICASA invited Africa Christian Action to the public hearing on 11 February 2013, long before the public hearing was advertised in the Government Gazette on 1 March 2013. We submit that this is patently unfair towards those who were informed of

[18] CFJ FA Par 50 to 59; Par 186 to 187.7.
[19] CFJ FA Par 55.

the public hearing by Government Gazette or were approached by ICASA to make oral representations some days after 1 March 2013.

AD PARAGRAPH 51

46. We deny the content of this paragraph.

47. We respectfully submit that the public were denied just and fair administrative action given the circumstances of this matter, as referred to earlier as well as in the relevant paragraphs of our founding affidavit.[20]

AD PARAGRAPH 51.1

48. The content of this paragraph is denied.

49. In amplification of this denial, we submit that the only reason for the public being aware of ODM's application was due to the media coverage on 11 January 2013, subsequent to which the public apparently submitted 644 written representations. The aforesaid is supported by the fact that none of the written representations submitted to ICASA were submitted prior to the date upon which the media reported on ODM's application on 11 January 2013.

50. Further to the above, we respectfully submit that the 644 written representations submitted is not an indication of the adequacy of the opportunity afforded the public to make representations, nor of the fact that ICASA allowed for a fair procedure. We submit that a better standard against which to measure the effectiveness of the notice, is the extent to which the 644 written representations engaged with the information presented by ODM in their application.

[20] CFJ FA Par 30 to 64; Par 184 to 187.

51. Furthermore, it is an open question how many more written representations would have been submitted had ICASA published the opportunity for written representations more widely, presented sufficient information in the notice as well as the public hearing notice and afforded the public adequate time to engage meaningfully with the information in ODM's application.

AD PARAGRAPH 51.2

52. The content of this paragraph is denied.

53. We again deny that the convening of a public hearing was fair to the extent referred to in our founding affidavit and herein above.[21]

54. To the extent that ICASA did not communicate that it would allow written submissions after the closing date, we deny that ICASA acted fairly. For instance, if Mr Smit and the rest of the now executive members of CFJ, had known about the additional time allowed for the submission of written representations, we could and would have supplemented our written representations in order to engage and address ODM's application meaningfully. The aforesaid is well summarised in our founding affidavit as well as Mr Smit' letter.[22]

55. In addition to the above, we again state that we still do not know who were invited to make oral representations and also do not know the basis upon which ICASA decided to invite or not invite some organisations and members of the public. It is noted that ICASA fails to answer these questions sufficiently in their answering affidavit.

AD PARAGRAPH 51.3

56. The content of this paragraph is denied.

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[21] CFJ FA Para 50 to 59; Par 186 to 187.7.
[22] CFJ FA Para 37 to 45.

57. In amplification of the above, we again state that we still do not know who were invited to make oral representations and also do not know the basis upon which ICASA decided to invite or not invite some organisations and members of the public. It is noted that ICASA fails to answer these questions sufficiently in their answering affidavit.

58. It is denied that the mere submission of written representations allowed for meaningful engagement in the circumstances of this case, as mentioned herein above.

The public hearing

AD PARAGRAPH 52

59. Save to deny that the hearing was systematic, balanced and inclusive, on the bases set out in our founding affidavit, the remainder of this paragraph is admitted.[23]

AD PARAGRAPH 53

60. We deny that the fact that none of the parties present at the hearing objected during the public hearing must be interpreted to mean that a fair procedure was followed, especially in the light of the fact that those who were not invited to the public hearing could not object to the procedure followed during the hearing and they could do so only by written representations, as was done by our Mr Smit. In Mr Smit's letter he expressly mentions that he 'does not have enough time to consider whether both ICASA and ODM have complied with all and the correct procedural requirements…'[24]

[23] CFJ FA Par 60 to 65; CFJ FA Par 187 to 187.2.

[24] CFJ FA Annexure "DVF6" p 2 of letter.

61. In addition to the above, the fact that none of the parties present at the hearing objected during the public hearing does not mean that the parties present at the hearing were satisfied with the procedure followed. For instance, Ms Taryn Hodgson of Africa Christian Action sent an email to Ndondo P. Dube of ICASA on behalf of her and three other organisations on 13 March 2013 (a day before the public hearing) in which Africa Christian Action objected to the procedure followed by ICASA as follows (find email attached hereto and marked as **"NCS 4"**).

"Dear Ms Dube
It has come to our attention that the Free Society Institute has been given 2 different 15 minute slots at tomorrow's hearings. This is unfair as the other organisations presenting have only been given one 15 minute slot each. The undersigned organisations want to express our objection to this… Family Policy Institute…Doctors for Life…Shofar Christian Church…Africa Christian Action."

62. On the same day Ndondo P. Dube of ICASA responded to Ms Taryn Hodgson by stating that 'two individuals from the same organisation submitted two and separate representations, hence their request to do their oral submission separately' (See annexure "**NCS 4**").

63. We respectfully submit that this is again indicative of the unfair process followed since the other organisations were not informed about their right to present separate submissions.

64. In amplification of the above, the fact that each party were only afforded ten (10) minutes to present their respective oral representations could possibly have contributed to them limiting their submissions to the merits rather than spending their time on the unfairness of the procedure.

AD PARAGRAPHS 54 TO 54.1

65. We deny that the time was divided fairly. In amplification of the aforesaid, we respectfully submit that the manner in which the time was divided was patently unfair in the circumstances of this matter for the following reasons:[25]

65.1. There is a clear difference between one party making oral representations over a period of 90 minutes as opposed to seven organisations making representations over a period of 105 minutes (of which only 70 minutes was allowed for making presentations and 35 minutes for questions from ICASA). The apparent injustice caused by dividing the available time in such a manner is best illustrated by way of an example. If a court would limit a prospective litigant to present his/her case for 90 minutes and simultaneously restrict each of the seven parties opposing him/her to reply and present their own cases within 10 minutes each, that would be seen as patently unfair since it violates the very essence of procedural fairness, namely the *audi alteram partem* principle.

65.2. In addition to the above, due to the fact that each of the eight organisations only had 10 minutes to present each of their respective presentations, it could not reasonably have been possible for them to present each of their respective presentations and simultaneously also respond to the written application of ODM, their general response dated 11 February 2013 as well as the 30 minute presentation of ODM. We therefore respectfully submit that the other eight parties were not afforded the opportunity to respond and engage with the evidence and representations made by ODM.

AD PARAGRAPH 54.2

[25] CFJ FA Par 61.

66. We note that ODM fails to mention that ICASA did not only put questions to ODM but also allowed ODM to 'respond to all the presentations that have been done'.[26]

67. In amplification of the above, the hearing transcript makes it clear that Adv S. Budlender was allowed to respond 'to the legal contentions or the legal flaws that emerged from the responding parties.'[27] Adv Budlender then proceeded to respond to the legal contentions as aforesaid. It is therefore clear that ODM was also afforded the opportunity to respond to the representations made by all the parties present at the hearing and not only to the written representations made.

68. We deny that affording Free Society two time slots was fair in the circumstances of this case for the reasons alluded to herein above.[28]

AD PARAGRAPH 54.3.2

69. We deny that the strict time constraint applied to the public was fair since in doing so ICASA effectively shut their minds to the submissions received from the public. In amplification of the aforesaid, the Chairperson's approach was overly strict since she did not allow the public to exceed the 10 minutes afforded, even when requested to do so by Ms Hettie Britz.[29]

AD PARAGRAPHS 54.4 TO 54.4.3

70. We deny that ICASA acted fairly in upholding ODM's objection to the Films and Publications Board ("FPB") making of oral representations, for the following reasons:

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[26] Hearing Transcript, p130, lines 5-9 and lines 10-13.
[27] Hearing Transcript, pg149, lines 10-12.
[28] CFJ FA Par 60 to 64.

[29] Hearing Transcript, p 127, lines 7 to 18.

70.1. The purpose of the FPB is to protect children from exposure to disturbing and harmful materials and from premature exposure to adult experiences; and to make the use of children in and the exposure of children to pornography punishable.[30] In the light of the fact that the *Films and Publications Act 65 of 1996* was enacted to give effect to various rights in the the South African Constitution, 1996 ("the Constitution"), including the right of the child, ICASA's disallowance of FPB to make representations violates the rights in the Constitution, and especially the state's obligation to respect, protect, promote and fulfil the rights contained in the Bill of Rights.[31]

70.2. In the light of the State's aforesaid mandate to respect, protect, promote and fulfil the rights contained in the Bill of Rights, we strongly deny that it does not avail us to complain of procedural unfairness on the FPB's behalf, given the fact that children's rights are at stake.

70.3. Further to the above, from the hearing transcript it seems as though the reason why ICASA allowed FPB to make oral representations at this late stage was because FPB did not receive an invitation to attend the public hearing.

70.4. In amplification of the above, FPB was not allowed the opportunity to present reasons as to why they only joined the proceedings at this stage (by not being included in the agenda) and were also not afforded the opportunity to respond to ODM's objection. This is with all due respect astonishing in the light of the overarching rights of the child and the state's constitutional mandate to promote, protect, respect and fulfil those rights. We submit that a reasonable approach would have been to postpone the proceedings for ODM to look at FPB's submissions and to respond thereto. It again seems that

[30] Films and Publications Act 65 of 1996, section 2(b) and (c).
[31] Section 7(2) of the Constitution 108 of 1996.

ICASA's seemingly rushed approach was caused by its obsession with making the 60 day deadline to the detriment of the various rights at stake of the different parties.

70.5. We note ODM's reliance on the fact that the Chairperson did not bar FPB from participating altogether, but deny that this was fair given the circumstances of this case, as alluded to herein above. We also emphasise that 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 basis for judicial review of the decision all on its own.[32]

AD PARAGRAPHS 54.5 TO 54.5.3

71. It is denied that allowing Dr Wasserman to present after all other presentations was fair and are we surprised by ODM's insistence thereon, for the following reasons:

71.1. Although it is accepted as a fair procedure in court proceedings for an applicant to reply to submissions made against its application, it is most certainly not accepted as fair court proceedings to allow an applicant to bring in expert witnesses giving expert evidence for the first time in reply to submissions made against its application;

71.2. We respectfully submit that allowing Dr Wasserman to present expert testimony at the end of the public hearing, and not allowing those opposing ODM's application to respond to the evidence presented by her, is evidence of the unfairness of the procedure decided upon by ICASA.

[32] CFJ FA Par 131.

71.3. This point is particularly trenchant in the light of the extremely controversial nature of Dr Wasserman's evidence. This application bristles with controversy around the issues dealt with by Dr Wasserman.

72. In amplification of the above, the public were denied the opportunity to engage and/or respond to the oral evidence presented by Dr Wasserman, by allowing her to respond to the submissions made during the public hearing.

73. We also deny that it could have been expected of those opposing ODM's application to have known that they have a right to answer to Dr Wasserman's evidence after the hearing, as proposed by ODM, for the following reasons:

73.1. As a matter of fact, it did not occur to any of the representatives of CFJ to make written representations after the hearing. We did not realise this was an option open to us.

73.2. It seems as though none of the parties opposing ODM's application were represented by lawyers, and therefore they could not have been expected to have known that they could have requested to respond to Dr Wasserman's evidence afterwards;

73.3. In the light of the fact the ICASA was rushed to finish the hearing for the reasons set out herein above and in ICASA's answering affidavit, we submit that it is unlikely that ICASA would have afforded those opposing ICASA's application a further delay in order for them to submit additional representations;

73.4. The suggestion that written submission could have been made after Dr Wasserman's testimony is theoretical rather than

practical and merely goes to highlight the rushed and flawed process by which ICASA granted ODM's application.

AD PARAGRAPH 55

74. We deny that the reasons given by the Council and the Committee's recommendation engage with the representations made at the hearing for the reasons set out in our founding affidavit.[33]

AD PARAGRAPHS 56 TO 57

75. We deny the content of these paragraphs for the reasons mentioned in our founding and replying affidavits.

76. We strongly deny that ICASA has complied with the requirements of a procedurally fair administrative action in the circumstances of this matter as set out in sections 3 and 4 of PAJA. In amplification of the aforesaid, we respectfully submit that our allegations in this regard are supported by the circumstances of this matter, as set out in our founding and replying affidavits.

AD PARAGRAPHS 58 TO 58.4

77. We strongly deny that our allegations of bias are based on the perceptions of hypersensitivity and suspicious observers as set out in ODM's answering affidavit.

78. In amplification of the above, we maintain that our allegations are objective and balanced for the following reasons:

    78.1. As mentioned before, we have always maintained that ICASA's bias is limited to the unfairness of the procedure followed by

[33] CFJ FA Par 66 – 74, 174 – 183.

ICASA during the public hearing, as is evident from the relevant paragraphs in our founding affidavit.[34] We respectfully submit that our allegations in this regard can be sustained on an objective and balanced assessment of the facts, as set out herein above and our founding affidavit.

78.2. In amplification of the aforesaid, bias or partiality has also been found to occur when a tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submission We have in this respect indicated why we submit that ICASA has shut their minds towards some of the submissions in the public hearing.

AD PARAGRAPHS 59 to 61

79. We note the categorisation by ODM of the Applicants' allegations of the effects of pornography in paragraph 59.1 to 59.5, security issues regarding protection of children in paragraph 60.1 to 60.3 and irrelevant considerations taken into account by ICASA in paragraph 61.1 to 61.3. Although this categorisation may be helpful to ODM in answering certain aspects of the cases made out by the Applicants which ODM perceives as overlapping, we deny the correctness and completeness of these categorisations. It is not nuanced enough to take cognisance of both the stark and subtle differences in the cases made out by each of the Applicants.

AD PARAGRAPH 59

80. We deny ODM's assertion that the substantive grounds of review are at the heart of our challenge to ICASA's decision. We maintain that the grounds of review in terms of PAJA, contained in paragraphs 151 to

[34] CFJ FA Par 30 to 64; Par 184 to 187.

187 of our founding affidavit, are at the heart of our challenge to ICASA's decision.

81. We have alleged various harms and adduced evidence in substantiation of our allegations in the following paragraphs of our founding affidavit:

81.1. Paragraph 20 to 28 (Introductory Summary)

81.2. Paragraph 81 to 95 (Written and oral submissions received by ICASA)

81.3. Paragraph 116 to 130 (Evidence of the harmful effect of pornography)

82. As alleged in paragraph 20, 117, 120, 123, 126, 129 and 130 of our founding affidavit, "ICASA failed to get to grips with and deal with", "has not taken these effects into full account in their decision", "ICASA therefore wrongfully dismissed these submissions as only containing a 'moral basis'", "ICASA should have investigated this issue, but failed to do so", "they are ignoring that these individuals also stand the risk of harming themselves and others involuntarily" and "[a]t the very least, it is the responsibility of ICASA to research and understand the best and most relevant modern science in informing its decisions."

83. Paragraph 175 to 179 of our founding affidavit contains our allegations and conclusions regarding ICASA's failure to scrutinise and interrogate information submitted to it and to do research *mero motu* in order to make informed findings of fact.

84. The risks of exposure to and of the use of pornography to the viewer and others coming into contact with the viewer, referred to in the paragraphs of our founding affidavit cross-referenced in paragraphs 81.1 to 81.3 above, have accordingly not been alleged in order to attack

the merits of ICASA's decision. It is included because it is relevant to the merits or substance of ICASA's decision and had either not been considered at all by ICASA or had not been given proper consideration. Certain other information placed before ICASA, accordingly had been considered and weighed in the absence of the abovementioned information on the harms of pornography, alternatively in the absence of proper consideration of such information.

85. To the extent that the cross-references to our founding affidavit in the footnotes to subparagraphs 59.1 to 59.5 are correct, we admit the contents of the aforesaid subparagraphs.

AD PARAGRAPH 60

86. We admit that the effectiveness or otherwise of the PIN security mechanism on ODM's decoder to prevent children from accessing adult content is a relevant consideration in deciding whether to and the basis upon which to approve or reject ODM's adult channels application.

87. We deny the assertion in footnote 47 on page 35 of ODM's answering affidavit that paragraph 146 of our founding affidavit contains an allegation that the PIN security mechanism on ODM's decoder "had not been properly tested".

88. We deny the assertion in footnote 48 on page 35 of ODM's answering affidavit that paragraphs 136 to 144 of our founding affidavit contain an allegation that "children are technologically savvy". The point is rather that ODM's PIN mechanism is inadequate.

89. We admit that children would be able to bypass a PIN code as alleged in paragraphs 136 to 144 of our founding affidavit.

90. We deny the assertion in footnote 49 on page 35 of ODM's answering affidavit that paragraphs 132 to 134 of our founding affidavit contains

an allegation that "the ODM decoder allows for duel-viewing or PVR-based recording".

91. We admit the contents of paragraph 60.1.4.

92. We note the contents of paragraphs 60.2 and 60.3.

AD PARAGRAPH 61

93. We admit that, as set out in paragraphs 176 and 177 of our founding affidavit, ICASA should have done a minimum level of work to scrutinise, confirm and corroborate the reliability of Dr Wasserman's expert testimony. To the extent that ICASA did not have an expert in the field of sex therapy on its decision-making panel, it is unclear how ICASA could have done so without recourse to external resources. We accordingly deny the allegation in paragraph 61.1 that we contended in our founding affidavit that the evidence of Dr Wasserman is unreliable.

94. However, it should be noted that on 26 July 2014 Mr Ryan Smit accessed an article entitled "My battle with Porn" on Dr Wasserman's website at http://www.dreve.co.za/2013/04/28/my-battle-with-porn/. We attach hereto a printed version of this article, marked as **"NCS 5"**.

95. In the article Dr Wasserman expresses her concerns about and the harms associated with pornography, stating *inter alia*:

"I didn't quite get what all the fuss was about – so what if people watched other people having sex? ***There was no evidence at that stage to prove porn was harmful*** *so I fought on in my belief that adults and adults only, have the right to view porn within the privacy of their homes.*

Until *the Internet,* ***better research methodology, that includes MRI brain scans, and a practice full of people who simply love porn too***

much. ***Now I understand the power porn has over people who have other proclivities. People who have other obsessive compulsive tendencies*** *and hook into porn as one of their attractions. People who need clinical intervention.*

And I am scared. Not of porn. But of every day people's use of it and the consequences thereof. I'm scared of what the women look like , the women who men choose to see: www.jasminelive.com Breast augmented, young looking, designer vaginas. *I'm scared of people who seek out child porn, the people who make it and the many children who are abused for life in the making thereof .*

I'm scared that men and women think this is real sex as so many other images of real sex are lost in the mass of porn online. Im afraid when I learn that men prefer masturbating to porn rather than investing time it takes to make love to a partner. Partners nag, need time to orgasm and desire interaction. Men choose the quick fix of porn . Porn viewing changes the face of relating.

And I'm most scared that our children walk around with porn in their hands. Mobile phones bring them into a world, for which they are unprepared, which is inappropriate for them and their sexuality and loving relationships.

This is my battle with porn. ***I am less afraid of porn on TV, porn that is well secured. I know kids will try to break the codes and work the system to view this porn.*** *I am afraid you , an adult, a teacher, a parent , will not be there, as my parents were there for me: to educate , converse and create a basket of values for them which will enable them to keep porn as porn – a recreational activity to up the ante on sexual pleasure and curiosity and bring an educational, arousing element into adult lives.*

Let this be a call to you as parents to take up the battle of porn within your own home. You have little choice. Whether or not you have a TopTV decoder , your child will access porn . Be a warrior, Prepare yourself for battle. And ***prevent your child from being sexually and relationally at risk. And as for your own relationships, it is the secrecy of porn that hurts. Negotiate privacy for porn viewing as adults. Mostly build relationships that are worth spending time in so real sex beckons as a beacon of light at the end of the day rather than the glow of porn on your laptop.***" (own emphasis)

96. We find Dr Wasserman's admissions regarding the harms of pornography use, both for adults and children, and her grave concerns for all involved to be more in line with the submissions of those who objected to ODM's channel application, than with her own testimony at the public hearing.

97. The contradictory nature of her own views are similarly evident within the abovementioned article: On the one hand she expresses the grave dangers for adults (and adult relationships) and children alike. She acknowledges the research evidence and lived experiences of people she treats in her practice.

98. For some reason however Dr Wasserman is of the opinion that pornography on television only places children at risk, not adults. Her view, which is unsubstantiated, seems to be that when it comes to adults, viewing pornography is only harmful when viewed on a laptop (online), but not when viewed on a television set (via a subscription broadcasting service).

99. We find her conclusions to be unconvincing and her views expressed at different times to be contradictory.

100. We note the contents of paragraphs 61.2 and 61.3.

AD PARAGRAPHS 62 to 64

101. We admit the contents of these paragraphs.

AD PARAGRAPH 66

102. We note the contents of this paragraph, specifically ODM's admission that at least some of the applicants' allegations and/or evidence were placed before ICASA at the relevant time.

AD PARAGRAPH 67

103. We deny the allegations of ODM in this paragraph. Our allegations in respect of relevant considerations not taken into account relates to ICASA's constitutional and statutory obligations and the implications thereof in the context of a decision of considerable public involvement and importance. We will address these matters by way of argument.

AD PARAGRAPH 68

104. We deny the allegations of ODM in this paragraph. We specifically note the limited relevance for purposes of judicial review proceedings, of allegations by both Applicants and Respondents regarding the impacts of pornography on people and society, as discussed elsewhere in this replying affidavit.

AD PARAGRAPH 69

105. We deny that any of the research we relied on is unreliable and note ODM's admission that some of the research we relied on is indeed reliable. I deny that the official statistics drawn on by Dr Milton Diamond

and Dr Marty Klein ("Diamond and Klein") are relevant to South Africa without transplanting it properly and indicating why and how it is also relevant in the South African context.

AD PARAGRAPH 70

106. We note the contents of this paragraph.

AD PARAGRAPH 71

107. We note the contents of this paragraph. We further note that this matter is one of judicial review of ICASA's decision. The relevance of research and other evidence regarding the harmfulness or not of pornography, for purposes of adjudication of this case, is therefore limited to answering the question whether the evidentiary material we refer to in our founding affidavit is relevant to the merits of ICASA's decision. We submit that it is. The Honourable Court is not called upon to replace ICASA's decision with its own decision. It is our case that pornography is harmful and that ICASA did not properly consider this issue.

108. The expert opinion of Diamond and Klein is therefore only relevant to the question whether the evidentiary material referred to in our founding affidavit *could* have influenced ICASA's decision. It is not the duty of the Honourable Court to conclude whether, on a consideration of the evidentiary material referred to in our founding affidavit and of Diamond and Klein's expert opinion, ICASA *would* have come to a different or the same conclusion/decision. We submit that Diamond and Klein do not show that the evidentiary materials we refer to in our founding affidavit are irrelevant to the merits of ICASA's decision, nor do they show that such evidentiary materials are completely flawed in the sense that ICASA would have been obliged to discard it for purposes of making their decision. We refer to the comments from Doctor John Foubert, an expert in the fields of sexual assault prevention, the harms of

pornography and college student development in this regard, annexed hereto and marked as **"NCS 6"**.

109. In as much as ODM relies heavily on the Diamond and Klein report in these paragraphs and criticized ASAM for being a "trade organisation delighted to have as wide a tent as possible for its potential patients" we point out that the converse also applies. ODM and Diamond and Klein seek to promote and assimilate pornography. The pornography industry is a multi-billion dollar industry, notorious for its rapacity and abuse and exploitation of the desperate and weak.

110. We note also that ODM takes a side swipe at Mr Mansel-Pleydell because he makes money at treating pornography addicts (a condition they seem to deny exists) yet they neglect to state how much Diamond, Klein and Dr Wasserman were paid to produce their respective reports. We place on record that Mr Mansel-Pleydell received no money for drafting his affidavit.

AD PARAGRAPHS 72 to 106

111. In addition to our replies herein below, we also specifically refer to the comments of Foubert (see annexure **"NCS 6")**, addressing paragraphs 74, 78, 80, 81, 82, 84, 85, 86, 87, 88, 89, 91, 92, 93, 98, 102 and 189 of ODM's answering affidavit.

AD PARAGRAPHS 72 to 73

112. We note the contents of these paragraphs. We note that the difference of opinion regarding the official classification of excessive and/or uncontrollable use ("over-pursuit") of pornography does not equate conclusive proof that it is not harmful or does not have addictive qualities.

AD PARAGRAPH 74

113. We note the contents of this paragraph.

AD PARAGRAPH 75

114. We note the contents of this paragraph, specifically that the work of Grubbs is not able to prove conclusively that only religious people suffer from or struggle or claim to so suffer or struggle with 'pornography addiction'. In addition, it is also possible that a clinician or researcher who is against the idea of 'pornography addiction' may be under-ready or not willing at all to diagnose for self-interested purposes.

AD PARAGRAPH 76

115. Diamond and Klein have not shown that there is a single study on PubMed that demonstrates conclusively that pornography consumption does not cause meaningful brain changes. We note that although Diamond and Klein submit that in their opinion there is no conclusive evidence of the harm of pornography, however they fail to provide evidence showing conclusively that pornography is harmless.

AD PARAGRAPH 77

116. We note the contents of this paragraph and deny that it in any way provides evidence that viewing of pornography is not addictive.

AD PARAGRAPH 78

117. We deny that *all* the scientific research on pornography use is weak and is compromised by definitional and methodological imprecision. I deny that it is impossible at present to discuss and make conclusions about "pornography addiction" and the neurological effects of pornography consumption, based on the research currently available.

AD PARAGRAPH 79

118. We note the contents of this paragraph, specifically ODM's acknowledgment that there are people who experience problems of over-use of pornography. As Diamond and Klein are unable to account for people who -

118.1. do not realise -

118.1.1. that they are over-using pornography or

118.1.2. that their over-use is a problem or

118.1.3. that their over-use of pornography is a cause of other problems or

118.2. accept their problems of over-use or

118.3. for whatever reason do not report their problems of over-use we deny that they are able to express an unqualified opinion regarding the fraction, whether big or small, of pornography users who experience problems of over-use of pornography.

119. Diamond and Klein have also not provided any substantiation for their assertion that "these difficulties have been successfully treated by psychologists and clinicians for years without them being labelled and treated as "addictions", which assertion we dispute.

120. No suggestion is made of who should pay for these psychologists and clinicians. They use USA and New Zealand figures and statistics. There is no information on the number of South Africans who experience problems with over use of pornography. It is not rational for ICASA to have taken a decision in such a vacuum of information.

121. We note in addition that even on the 1.5% to 3% figure suggested by Diamond and Klein in respect of the adult population of the USA, the number of people who are compulsive pornography users amounts to a staggering 4 742 234 (1.5% as at 3 June 2013; 1 January 2011:

4 658 158) to 9 484 469 (3% as at 3 June 2013; 1 January 2011: 9 316 316) people.[35]

AD PARAGRAPH 80

122. We note the contents of this paragraph and deny that it in any way provides evidence that viewing of pornography does not in any way contribute to the perpetration of sexual violence.

123. Causation is an extremely difficult legal concept. No analysis is provided of what Diamond and Klein mean by causal connection and whether and how it relates to factual causation and legal causation as defined in our law. Obviously if they are referring to scientific causation it bears absolutely no resemblance to causation in our law.

AD PARAGRAPH 81

124. We deny that the official crime statistics drawn on by Diamond and Klein are relevant to South Africa without properly transplanting it and indicating why it is also relevant in the South African context.

AD PARAGRAPH 82

125. We note the contents of this paragraph and deny that the ease and volume of availability of pornography has not resulted in an increase in sexual violence, although this may impact on the *reporting* of sexual violence and crimes.

AD PARAGRAPHS 83 TO 85

126. We note the contents of these paragraphs.

[35] Accessed at www.census.gov/popclock/ on 23 July 2014.

AD PARAGRAPH 86

127. We note the contents of this paragraph and deny that it applies to the evidentiary material referred to in our founding affidavit.

AD PARAGRAPH 87

128. We deny that the findings of the official commissions referred to by Diamond and Klein are relevant to South Africa without properly transplanting it and indicating why and how it is also relevant in the South African context.

AD PARAGRAPH 88

129. We note the contents of this paragraph and affirm that we have specifically referred to the effects of both violent and non-violent pornography in our founding affidavit. I also point out that Dr Wasserman's assertion that ODM does not broadcast violent pornography is dependent on her personal view of what is violent and what is non-violent. As she has not set out what constitutes the threshold between violent and non-violent pornography in her personal view, it is impossible to determine whether her views coincide with what the law dictates or are at odds with it.

AD PARAGRAPH 89

130. We note the contents of this paragraph and deny that the assertion therein dispels the evidence showing that pornography use, where it is present in a relationship, has a negative impact on the relationship and/or on the non-using party. *All* studies fail on methodological grounds. That is science. But if there is some collective evidence it should stand until the antithesis can be proven conclusively. Diamond and Klein do not provide evidence showing that a study exists that disproves these effects.

AD PARAGRAPH 90

131. We note the contents of this paragraph, specifically that Diamond and Klein do not provide evidence of an established causal relationship between pornography and desensitization of men to women's needs, devaluation of women, misogynistic attitudes or sexual promiscuity that has a zero effect.

AD PARAGRAPH 91

132. We note the contents of this paragraph and dispute the validity of the perception data as these may in fact be clouded by addictive behaviour.

133. We do not doubt that, on occasion and in certain instances, pornography can have the positive effects described in these paragraphs, however, the positive effects must be weighed against the negative effects. It is one thing to prescribe a romantic film containing multiple pornographic references to a committed couple struggling with sexual intimacy as part of an agreed treatment regime. It is something entirely different to dump visual depictions of dehumanised sexual conduct on an unsuspecting, unwarned, unprepared society struggling with entrenched gender imbalances and polarised power divisions. We furthermore point out that the conclusions referred to have the following grave risks:

AD PARAGRAPH 91.1

134. Within relationships where one of the parties are dominant, which is especially prevalent in patriarchal cultural systems, the non-dominant party is at risk of being subjected or forced into the dominant party's newly normalised sexual behaviours which the dominant party has been empowered to exercise through the suggestion of pornography. See for example S v Engelbrecht.

AD PARAGRAPH 91.2

135. In addition to the aforementioned, where either of the parties in the relationship does not want to accept the sexual novelty that has been promoted to the other party by pornography, the first-mentioned party runs the risk of being subjected into being an unwilling play-along in order for the other party to achieve his/her increased sexual pleasure.

AD PARAGRAPH 91.3

136. Where only one of the parties to a relationship uses pornography, the pleasantness that is promoted to such party in the moment by way of orgasm achieved through masturbation is at the expense of sexual intimacy of the couple.

AD PARAGRAPH 91.4

137. Although it may be so that a person who watches pay-to-view TV pornography and gratifies sexual desires by way of masturbation is safe from STD's, HIV, date rape etc. in that particular moment, other research that we have pointed out indicates that pornography may actually be a cause or one distinct link in the causative chain that could bring about these exact harms. Apart from this, other health risks to the individual user as a result of pornography use, as referred to by us in our founding affidavit and the founding affidavits of the other applicants, should also be considered in determining the efficacy and positive features of pornography.

AD PARAGRAPH 91.5

138. We note the contents of this paragraph.

AD PARAGRAPH 92

139. We note the contents of this paragraph and deny that it in any way discredits the research and evidentiary materials referred to in our founding affidavit. We furthermore specifically note that Diamond and Klein's statistics about women viewing porn is not based on South Africa, nor has ODM demonstrated by way of valid market research that women comprise a relatively similar percentage of the pornography-viewing audience. We accordingly dispute the relevance of ODM's allegations and the correctness of their conclusions in this paragraph.

AD PARAGRAPHS 93 TO 95

140. We note the contents of this paragraph.

AD PARAGRAPH 96

141. We note the recommendations and interventions discussed by Dr Wasserman. Dr Wasserman is indeed entitled to her opinion where she states that "I do not believe that censorship is the answer. Nor is such censorship even realistic or possible in the age of the Internet." Whereas censorship may not be the answer in respect of all forms of societal messages, products and content, the particular distinguishing factors/characteristics of pornography and its effects, may make censorship the most viable option in respect thereof. There may also be others who differ from Dr Wasserman's opinion.

142. British Prime Minister, David Cameron, has expressed his preference for censorship in a speech delivered on 22 July 2013[36] (annexed hereto and marked as **"NCS 7"**).

143. Google, one of the largest online companies in the world, recently amended their AdWords policies to reflect its new Advertising policy on

[36] Accessed at https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action on 7 July 2014.

sexually explicit content[37] (annexed hereto and marked as **"NCS 8"**). In terms of their new policy, Google does not allow advertisements where the advertiser's advertisement or website includes graphic depictions of a sexual act with the intent to arouse, including genital, anal and oral sexual activity; hard-core pornography and masturbation. According to the policy, advertisements that promote language, images or videos depicting a sexual act will not be showed by Google. Advertisers are advised to resubmit their advertisement or website for review once the disallowed content has been removed, or face domain disabling or account suspension.

144. I do not know whether Dr Wasserman's statement that censorship is not realistic or possible, is valid or factually correct. The People's Republic of China has exercised internet censorship since 1998.[38] We include this statement with the extremely limited intent to point out that censorship (as a practical measure to protect vulnerable people) is factually possible. CFJ does not in any way endorse the unreasonable and unjustifiable violation of human rights, such as freedom of expression, by way of for example entrenched systemic/blanket censorship of society.

145. Pornography should be regulated just as other money making and potentially harmful industries such as gambling, fire arms, drugs, tobacco and alcohol are regulated. The answer is not the free for all, throw your hands up in the air, *laissez faire* attitude suggested by Dr Wasserman.

AD PARAGRAPH 97

146. We note the contents of this paragraph.

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[37] Accessed at https://support.google.com/adwordspolicy/answer/176004 on 7 July 2014.
[38] According to http://en.wikipedia.org/wiki/Internet_censorship_in_the_People's_Republic_of_China accessed on 7 July 2014.

AD PARAGRAPH 98

147. We deny that the research and evidentiary materials we refer to in our founding affidavit contains sweeping claims or that they are unsubstantiated. We note Diamond and Klein's proposed positive features and refer to our reply (hereinabove) to paragraph 91 of ODM's answering affidavit. Foubert

AD PARAGRAPH 99

148. We note the contents of this paragraph.

AD PARAGRAPHS 100 TO 101

149. We note the contents of these paragraphs, specifically that Diamond and Klein do not produce evidence to demonstrate that pornography has no negative causal effect on family formation and keeping families together (i.e. that it does not play a role in infidelity, which is a major cause of family split-ups). The operative word "necessarily" in paragraph 101 indicates the acknowledgement that the normalization of pornography may lead to the desire and empowerment to engage in sex with partners outside a relationship.

AD PARAGRAPHS 102 TO 102.3

150. We note the contents of these paragraphs and refer to what we have submitted above in this regard.

AD PARAGRAPH 103

151. We deny the allegations made by ODM in this paragraph. We refer to our founding affidavit with reference to the insufficiency of ODM's security features as set out in their application for channel authorisation. We deny that any alleged or actual access that children

may have to pornography via the internet has any relevance to ICASA's decision to authorise ODM' pornographic channels. Not all children may have access to the internet and even if all children did, that can never excuse ICASA from protecting children against the broadcasting of content that is harmful to them.

AD PARAGRAPHS 104 TO 104.2

152. We note the contents of these paragraphs.

AD PARAGRAPH 105

153. We note the contents of this paragraph, specifically also the incorrect cross-reference in footnote 104 to paragraph 155 of Diamond and Klein, which we assume should be a cross-reference to paragraph 154 of Diamond and Klein. The majority of the research on which Diamond and Klein base their findings about psychological harm to children and adolescents who have viewed pornography, as contained in paragraph 154.1 to 154.7 of their expert opinion, seems wholly inadequate to support a finding that viewing pornography is not a (i.e. one of many) causative fact resulting in psychological and other harms.

AD PARAGRAPH 106

154. We note the contents of this paragraph and refer to our reply to paragraph 96 of ODM's answering affidavit.

AD PARAGRAPHS 107 TO 108

155. We deny that the content of these paragraphs.

156. We note ODM's reliance on their proper assessment of the functions of their decoder, but deny that the aforesaid functions had been properly

analysed and assessed by ICASA. We submit that ICASA failed to consider the various concerns as pointed out in our founding affidavit.[39]

157. We also note ODM's reliance that ICASA was sufficiently advised on the security mechanisms for it to be able to decide ODM's application, but again deny that ICASA had taken into account the relevant considerations, as pointed out in our founding affidavit, in making its decision in this regard.[40]

158. In amplification of the above, there is no indication in the record that ICASA took into consideration the various concerns raised by the FPB in their written representations as submitted by them.

AD PARAGRAPHS 110 TO 111

159. We note the content of these paragraphs. We hereby repeat that the Honourable Court is not called upon to decide whether ICASA's decision was correct on the merits, but only whether the evidentiary materials we refer to in our founding affidavit are relevant considerations in relation to ICASA's decision and maintain that they are.

160. The expert opinion of Mr De Villiers is therefore only relevant to the question whether our allegations and the evidentiary material referred to in our founding affidavit *could* have influenced ICASA's decision and whether it was relevant material ICASA failed to take into account. It is not the duty of the Honourable Court to conclude whether, on a consideration of the evidentiary material referred to in our founding affidavit and of Mr De Villiers's expert opinion, ICASA *would* have come to a different or the same conclusion/decision.

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[39] CFJ FA Par 131 to 146.
[40] CFJ FA Par 131 to 146.

161. In addition to the above, we submit that Mr De Villiers does not show that the evidentiary materials we refer to in our founding affidavit are irrelevant to the merits of ICASA's decision, nor does he show that such evidentiary materials are completely flawed in the sense that ICASA would have been obliged to discard it for purposes of making their decision.

162. Furthermore, our founding affidavit was drafted on the basis of the information contained in ODM's application. We therefore submit that Mr De Villiers' evidence is irrelevant insofar as it refers to the additional security measures that will be introduced by ODM by 1 July 2014. The aforesaid evidence is irrelevant since it refers to security measures additional to the evidence presented by ODM in its application and public hearing. For that reasons ICASA could not take the additional security measures into account when making its decision.

163. In amplification of the above, the only relevance ODM's purported additional security measures has is to demonstrate that ODM is concerned about the sufficiency of its security measures for the purposes of this court application.

AD PARAGRAPH 112

164. We note ODM's detailed explanation of their security mechanisms, but deny that ICASA had any knowledge thereof when they made their decision since it is additional and not the same as the evidence contained in ODM's application and presented during the public hearing. The aforesaid additional evidence could therefore not have been relevant information available to ICASA to be taken into account when ICASA made their decision.

165. In amplification of the above, we deny that ICASA were aware of the fact that ODM will expand its PIN to six characters when it made its decision.

AD PARAGRAPHS 113 TO 113.4

166. We deny the relevance of these paragraphs for the reasons stated herein above.

AD PARAGRAPH 114

167. We note ODM's reliance on the warning subscribers receive, but deny that ODM presented this evidence in their application or at the public hearing. ICASA would therefore not have had any knowledge thereof at the time they made their decision and is for that reason irrelevant.

AD PARAGRAPHS 115 TO 116.3

168. We note Mr De Villiers' concession[41] that on average it would take 4 hours 10 minutes for a child to manually crack a four digit pin code and 8 hours 20 minutes to crack both the four digit CA PIN as well as the four digit parental lock.[42]

169. However, we deny that it would require sustained effort, as well as mathematical understanding to crack the various PIN mechanisms provided by ODM for the following reasons:

169.1. What might seem as sustained effort for an adult is not necessarily seen as such by a curious teenager;

169.2. If one teenager cracked the PIN and makes the information public by means of social media or otherwise, this could lead to many other children also being successful in their attempts to do so.

[41] Mr De Villiers's affidavit Par 28.
[42] CFJ FA Par 140.

170. We also deny the content of paragraph 116.2. To state that 'with such widespread and easy access to adult content on the internet (including cell phones), it is unlikely that a child with the mathematical understanding required to systematically iterate through all possible PIN codes would not have more immediate access to the Internet' is similar to arguing that with such widespread and easy access to adult content on the internet (including cell phones), it is unlikely that an adult would subscribe to ODM's pornographic channels.

171. Although it is admitted that the introduction of the automatic lock-out mechanism (as was proposed by us in our founding affidavit[43]) is a good improvement to ODM's current security measures, it is denied that ODM presented this evidence in their application or at the public hearing. ICASA would therefore not have had any knowledge of the aforesaid evidence at the time they made their decision and is for that reason irrelevant.

AD PARAGRAPHS 117 TO 120

172. We repeat herewith that our founding affidavit was drafted on the basis of the information contained in ODM's application. We therefore submit that Mr De Villiers' evidence is irrelevant insofar it refers to the additional security measures that will be introduced by ODM by 1 July 2014. The aforesaid evidence is irrelevant since it refers to security measures additional to the evidence presented by ODM in its application and public hearing. For that reasons ICASA could not take the additional security measures into account when making its decision.

AD PARAGRAPHS 121 TO 121.2

173. Although we cannot admit, deny or plead to Mr Pillay's testimony since we do not have any knowledge thereof, we deny that ODM not

[43] CFJ FA Par 141.

receiving a single complaint regarding the functioning or effectiveness of the security features is an indication of the sufficiency of the security features employed by ICASA.

AD PARAGRAPH 134

174. We note the contents of this paragraph. We further note that we have not alleged in our founding affidavit that the material presented by Dr Wasserman to ICASA prior to the making of their decision is irrelevant *per se*. We reiterate what we have stated in this regard in paragraph 93 above. Our issue is with ICASA's reliance on submissions without corroboration and verification.

AD PARAGRAPH 135

175. We note the contents of this paragraph. The issue is that there is no sign in the Rule 53 record of ICASA's work done to corroborate Dr Wasserman's submissions on Professor Jewkes' research. Due to the fact that Dr Wasserman made her submission right at the end of ICASA's public hearing and the organisations making submissions in objection to ODM's application did not have an opportunity to dispute Dr Wasserman's submissions, ICASA had an obligation to corroborate and verify Dr Wasserman's submissions. ODM's attempt now, after the fact in their answering affidavit, to indicate that Dr Wasserman's submissions were accurate, is both unallowable and irrelevant in relation to the question whether ICASA's decision is reviewable or not. There is no evidence in the Rule 53 record, apart from Dr Wasserman's submissions, that ICASA did any work to avail itself of the correctness of a conclusion that pornography is not a "*direct*" cause of gender-based violence in South Africa. In addition, there is no evidence in the Rule 53 record that ICASA enquired whether pornography, apart from being a direct cause of gender-based violence in South Africa, may be an indirect and/or contributory cause of such violence.

176. ICASA has also not indicated in their reasons for their decision, what their definition or understanding is of “violence”. It is not clear whether ICASA views violence as only being present in those cases where someone is physically assaulted or also in cases where someone is forced to perform or participate in some sexual act against their will and in cases of mental and emotional abuse, withholding of affection *et cetera*. Even if some of these forms of abuse and neglect do not qualify as or constitute gender-based violence, to the extent that they can be causally linked to pornography, it should at least have been considered what the relevance thereof is for purposes of ICASA’s decision.

177. We furthermore note that given the concerns expressed by society, the link between pornography and gender-based/sexual violence should be investigated by public inquiry in South Africa also (as has been done on several occasions abroad).

178. The fact that no causal effect is found is not equivalent to saying that a zero causal effect has been found. Quite simply: because some positive correlations do exist, a positive causal effect cannot be ruled out. Diamond and Klein should prove that the *causal* effect IS zero - not simply state that there is an absence of a proven causal effect. But of course they cannot prove this, because they face the same constraints as the anti-porn literature.

179. Just because other factors do cause violence, does not rule out pornography as another cause. Professor Rachel Jewkes in her 2002 *Lancet* paper entitled “Intimate partner violence: causes and prevention”, suggested that violence prevention mechanisms should include reducing the objectification of women through pornography. Her standpoint is therefore contradictory.

AD PARAGRAPH 136

180. We deny ODM's allegations in this paragraph with reference to what I have stated above regarding the need and obligation to corroborate submissions and the procedural irregularities present in ICASA's decision-making process. We deny that CFJ failed to take into account the fact that ICASA received written representations and had invited oral representations from some interested members of the public. We accordingly specifically deny the allegation that the applicants had adequate opportunity to address ICASA on the scientific evidence. We reiterate that ODM's attempt now, after the fact in their answering affidavit, to indicate that Dr Wasserman's submissions were sound, is both unallowable and irrelevant in relation to the question whether ICASA's decision is reviewable or not.

AD PARAGRAPH 137

181. We note the contents of this paragraph.

AD PARAGRAPH 138

182. We deny ODM's allegation in this paragraph that ICASA is not concerned with the regulation of the content broadcast on channels and that the regulation of content is subject only to the BCCSA's jurisdiction. Because of the scheme of the statutory framework applicable to subscription broadcasting, ICASA maintains an overall responsibility in respect of content and the BCCSA may only deviate from ICASA's Broadcasting Code of Conduct (Regulations in terms of section 54(1) of the Electronic Communications Act, 2005) to the extent that the BCCSA's Code of Conduct is and remains "acceptable" to ICASA.

AD PARAGRAPHS 139 TO 140.2

183. We admit the contents of these paragraphs.

AD PARAGRAPHS 141 TO 141.2

184. We note the contents of these paragraphs.

AD PARAGRAPH 142

185. We deny that there is no evidence proving a causal link (direct or indirect) or even a correlation between non-violent pornography and sexual violence. We refer to the relevant paragraphs of our founding affidavit in this regard. We note the contents of the remainder of this paragraph.

AD PARAGRAPH 143

186. We admit the first two sentences of this paragraph but deny the third and fourth sentences on the bases set out in our founding affidavit and herein.

AD PARAGRAPH 144

187. We note the contents of this paragraph and deny the correctness of the conclusions alleged therein by ODM.

AD PARAGRAPH 145

188. We deny the correctness of the conclusions alleged by ODM in this paragraph.

AD PARAGRAPHS 146 TO 146.9

189. We deny that the considerations referred to in paragraphs 146.1 to 146.9 were properly taken into consideration by ICASA in support of its decision.

190. We deny the allegation in paragraph 146.2 that there is no law of general application that is able to limit ODM's right to freedom of expression by prohibiting the broadcasting of adult content material. We refer to the relevant paragraphs of our founding affidavit in this regard.

191. We note the allegation in paragraph 146.3 and do not know whether it is true and correct.

192. We note the reference in paragraph 146.6 to ODM's undertaking that its content would not be violent and specifically point out that what is violent is a relative concept and that ODM's perception of what is violent may not necessarily accord with the South African public's perception of what is violent. Without supplying a detailed description of the content of specific programmes on its adult content channels and/or clearly describing its perception of what is violent, ODM's undertaking either cannot be verified or is *pro non scripto*.

AD PARAGRAPH 147

193. We do not know whether ICASA's Council has the necessary expertise within its own ranks to have made a decision to authorise or refuse ODM's application without recourse to external resources. We admit the allegations in the second and third sentences in this paragraph. We submit that ICASA's decision is to be treated with due deference to the experience and expertise of its councillors only to the extent that they have properly fulfilled their mandate in accordance with the applicable Constitutional and other statutory requirements.

AD PARAGRAPH 148

194. We deny the correctness of the conclusions alleged by ODM in this paragraph.

AD PARAGRAPH 149

195. We deny the allegations by ODM in the first sentence of this paragraph. It is a gross misrepresentation of the case we made out in our founding affidavit and constitutes unacceptable behaviour on the part of Counsel and the attorneys of ODM to the extent they have been involved in and/or settled ODM's answering affidavit. We maintain that there is merit in our contentions in paragraphs 157 to 173 of our founding affidavit.

AD PARAGRAPHS 150 TO 150.2.3

196. We note the contents of these paragraphs and deny its correctness to the extent that it does not agree with our allegations and contentions in paragraphs 157 to 173 of our founding affidavit.

197. We specifically note that the allegation contained in paragraph 150.2.1 is incorrect and we accordingly deny it.

198. In respect of paragraph 150.2.3, because ODM has failed to make available to the applicants and the Honourable Court proper details of the actual programmes they will broadcast (are currently broadcasting), we do not know whether the allegation in subparagraph (a) that ODM is not broadcasting any of the sexually-explicit material prohibited under sections 9 and 10 of the BCCSA Code, is true and correct. We deny the allegation in subparagraph (c) that clause 13 serves no purpose in this context. It indeed applies to ODM and it therefore binds ODM. We deny the allegation that clause 13 only applies in respect of complaint proceedings before the BCCSA. It also applies in channel authorisation proceedings due to the inclusion of regulation 6 in the Subscription Broadcasting Services Regulations, 2006.

199. In the context of ODM's allegation that the broadcast of their adult content channels do not infringe the BCCSA Code ("the current code"), it is important to take note of the contents of the penultimate Code of

Conduct of the BCCSA, annexed hereto and marked as **"NCS 9"** ("the previous code"), which applied from 7 March 2003 until the inception of the current code in 2011 or 2012. It is unclear form the BCCSA's website if, when and how ICASA approved the current code as being acceptable to it as contemplated in section 54(3) of the Electronic Communications Act, 2005. Clause 12 of the previous code, the forerunner to clause 29 of the current code, read as follows:

199.1. *This Code does not attempt to cover the full range of programme matters with which the Authority and licensees are concerned. This is not because such matters are insignificant, but because they have not given rise to the need for Authority guidance. The Code is therefore not a complete guide to good practice in every situation. Nor is it necessarily the last word on the matters to which it refers. Views and attitudes change, and any prescription for what is required of those who make and provide programmes may be incomplete and may sooner or later become outdated. The Code is subject to interpretation in the light of changing circumstances, and in some matters it may be necessary, from time to time, to introduce fresh requirements.*

200. Clause 29 of the current code reads as follows:

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

201. We respectfully submit that the correct interpretation of clause 29 of the current code accords with the wording and interpretation of clause 12 of the previous code. As a result we submit that ICASA could not have authorised ODM's application without determining, with reference to the allegations made, research and other materials produced by those

making written and oral representations, whether circumstances are changing or have changed. A determination in this regard would be required and necessary in the circumstances of ODM's application, as it could impact directly on what content is allowed or disallowed in terms of the current code, which we submit is not a static, inviolable legal instrument.

AD PARAGRAPHS 151 TO 151.2

202. We note the contents of these paragraphs.

AD PARAGRAPHS 152 TO 152.1

203. We note the contents of these paragraphs and deny the allegations and ODM's conclusions therein to the extent that it is a misrepresentation of our allegations in our founding affidavit.

AD PARAGRAPH 152.2

204. We deny the allegations and ODM's conclusions in this paragraph. ODM's assertions are based (in part) on the security features of the ODM decoder, which we have shown in our founding affidavit to be inefficient and insufficient to protect children. ICASA's omission in respect of scrutinising the security features is evident from the Rule 53 record. ODM accordingly also incorrectly conclude that they are not likely to cause children to be exposed to pornography.

AD PARAGRAPHS 153 TO 153.3

205. We admit the contents of paragraphs 153, 153.1 and 153.3. We deny the correctness of ODM's conclusions in paragraph 153.2.

AD PARAGRAPH 154

206. We deny the correctness of ODM's unqualified conclusion in this paragraph.

AD PARAGRAPH 155

207. We admit the contents of this paragraph and point out that in the context of rights and values that compete with each other, the protection of certain values and rights require a curbing of the exercise of others.

AD PARAGRAPH 154

208. We deny the correctness of ODM's conclusion in this paragraph.

AD PARAGRAPH 178

209. The first discussions about the formation of CFJ took place in November 2011 and the organisation existed informally from then on. Actions to formalise CFJ by way of a written constitution started gathering speed during the second semester of 2012 with the formulation of vision and mission statements and objectives being prioritised in November 2012. I deny that CFJ was only formed on 24 June 2013, although that was the date on which CFJ's founding members signed the written constitution, confirming their earlier oral agreement in respect thereof. Even if a court were to find that CFJ formally came into existence after ICASA's decision, such fact, if found, would in any event have no relevance for purposes of the present proceedings.

AD PARAGRAPH 179

210. We strongly deny that CFJ only acts in the interest of its members in this application, and put ODM to the proof thereof. In this regard we

also refer the Honourable Court to our founding affidavit and CFJ's Constitution attached thereto.[44]

211. In amplification of the above, neither CFJ nor any of its members, has a financial interest in the proceedings and does not purport to represent any party who has a financial interest.[45]

212. In addition to the above, we maintain that CFJ brought this application out of the honest and sincere concern for the people of South Africa and acts within the public's interest. It is in the public interest that members of the public are protected from the harmful effects of pornography.

AD PARAGRAPHS 180.1 – 180.2

213. We deny the contents of these paragraphs with reference to our comprehensive reply contained in paragraphs 104 to 155 herein.

AD PARAGRAPH 180.3

214. We note that although it may be possible that pornography contributes to the fiscus of other countries, the pornography ODM is broadcasting is unlikely to meaningfully contribute to the South African fiscus, at least not in the short to medium term. ODM's pornography will be imported into South Africa, and not stimulate the national economy, except for ODM, who is partly foreign-owned. Hence, both the inflow (of product) and outflow (profits/return on investment) is foreign (to the extent of Star Times' investment in ODM), with limited net economic benefit to South Africa. Any net benefit to South Africa will in any event depend on when ODM moves from an assessed loss position into a tax-paying position, which in the light of business rescue seems unlikely to be in the near future. We note that pornography is not subject to "sin" tax, like

[44] CFJ FA Par 5 to 9; CFJ FA Annexure "DVF1".
[45] CFJ FA Par 8.

alcohol, tobacco, gambling and narcotics. We furthermore note that if the opportunity cost of throwing a lifeline to ODM by allowing them to broadcast their pornographic channels is the moral degradation, violation of human dignity, freedom and security of vulnerable men, women and children, then it is a cost that South Africa cannot afford to pay.

AD PARAGRAPH 180.4

215. Given the horrific allegations in this paragraph and the correlations found with pornography in numerous studies, we submit that the onus is on ICASA to investigate whether the fact that a causal relationship has as yet not been conclusively established, is true. This is ICASA's role in terms of its constitutional and statutory mandate. The fact that a causal relationship has not yet been conclusive established should be considered together with the inability of ODM and Diamond and Klein to show that, despite the existence of correlations, pornography cannot be a cause of various harms.

AD PARAGRAPH 182.1

216. We deny the content of this paragraph. We submit that the in the circumstances of this matter we have shown why there was procedural unfairness in respect to the Gazetted Notices, as mentioned above.

AD PARAGRAPHS 182.1.1 TO 182.1.2

217. We deny that because CFJ was able to obtain a copy of ODM's complete application at the ICASA offices in Sandton, this fact can be construed as allowing CFJ to meaningfully engage with the content of the application for the following reasons:

217.1. Mr Smit only received ODM's application on 15 January 2014, leaving him with five (5) court days to respond to ODM's forty six (46) page application.

217.2. For the reasons set out in our founding affidavit and herein above, Mr Smit, as well as the other now executive members of CFJ did not have enough time at their disposal in order to respond meaningfully thereto. This evidence is supported by the content of Mr Smit's letter.[46]

217.3. Due to the bad quality of the copy of ODM's application received from ICASA. It can subsequently not be said that CFJ received a 'complete' copy as parts of it were unreadable.[47]

218. In addition to the above, we respectfully submit that the notice did not afford the public the opportunity to obtain the application from ICASA electronically and only allowed for the public to 'inspect' at its library. In amplification of the aforesaid, when CFJ requested ICASA's record from them on the 5th August 2013, they were not amenable to a request for supplying information in electronic format.[48] We respectfully submit that it is therefore highly unlikely that ICASA would have entertained a request from the public for supply of an electronic copy of ODM's application.

AD PARAGRAPHS 182.2 TO 182.3

219. We deny that ICASA acted fairly when they failed to expressly invite all those who had made written representations to make oral representations and/or attend the public hearing and submit that ICASA

[46] CFJ FA CFJ FA Par 33 to 44; Par 184.4; Annexure "DVF6".
[47] CFJ FA Par 43.
[48] CFJ FA Par 76.

failed to act fairly when ICASA failed to invite Mr Smit to the public hearing.

220. In amplification of the above, with ODM's first application for authorisation in 2011, ICASA published a similar notice (see **"NCS 2"** as referred to earlier) to the public hearing notice of 1 March 2013 in the Government Gazette. We point out that the stark difference between the 2012 public hearing notice and the 2013 public hearing notice is that the first notice specifically provides that "all persons who have made written representations and any other interested persons are invited to the hearing", while the last notice failed to mention this information.

221. While we agree that ICASA could not have been expected to hear each and every person and organisation that submitted a written representation if it held only one public hearing in one city in South Africa, we submit that ICASA would have acted reasonably by requesting all those who made written representations to indicate whether they would want to make oral submissions at a public hearing and to indicate in which city/town they lived. With the information obtained from such invitation, ICASA would have been in a position to decide where to hold public hearings and how many public hearings were necessary. In addition, we submit that it is highly unlikely that such an invitation by ICASA, whether in the Gazette or by personal invitation, would have resulted in a total of 644 persons as well as organisations wanting to make submissions at a hearing.

222. In the circumstances of this case 644 written responses indicates a large and substantial public interest. Instead of a hurried procedure and only one hearing in one city ICASA should have gone the trouble of involving the interested and affected public to a far greater degree.

223. We also repeat what was said above and in our founding affidavit regarding ICASA's failure to inform and disclose to the public as to who

they invited to the public hearing as well as the basis on which they chose to invite the public to the public hearing.[49]

AD PARAGRAPH 182.4

224. We deny that Mr Smit requested that CFJ make submissions at the public hearing, and confirm that he did request ICASA to attend the public hearing in his personal capacity.[50] From our founding affidavit and Mr Smit's letter it is evident that Mr Ryan Smit specifically requested ICASA to hold a public hearing for all those that submitted written representations, which, it goes without saying, included himself.[51]

AD PARAGRAPH 182.5

225. We note that the now executive members of CFJ only became aware of the public hearing on 4 March 2013 when a friend of Mr Ryan Smit informed him of the public hearing that was going to take place. None of the now executive members of CFJ were aware of the public hearing notice published on 1 March 2013.

226. It is also worth noting that Africa Christian Action were invited to the public hearing on 11 February 2013, long before it was published in the Gazette. We find it patently unfair that certain organisations knew about the public hearing long before the remainder of the public was informed thereof, affording them a lot more time to prepare oral submissions.

AD PARAGRAPH 183

[49] CFJ FA Par 55.
[50] CFJ FA Par 55.
[51] CFJ FA Annexure "DVF6".

227. We deny that the procedure followed by ICASA was unbiased, as pointed out herein above.

228. In addition to the above, we respectfully submit that ICASA's bias and procedural unfairness is evidenced by the fact that Free Society Institute was allowed two (2) time slots as opposed to only one for each of the other seven (7) organisations, for the reasons pointed out herein above and in our founding affidavit as, as well as the following reason:

228.1. There being seven organisations opposing ODM's application is merely a reflection of the attitude of the public towards the authorisation of pornographic channels.

AD PARAGRAPH 184

229. We note ODM's endorsement of our purported "concession" that pornography is notoriously difficult to define. For that reason it is difficult to understand how ODM can claim that the pornography that is going to be broadcast on their channels will only be non-violent and not in breach of the BCCSA Code.

AD PARAGRAPH 185

230. We deny that the four representations pointed out do not have particular relevance. We point out that they have relevance insofar as they are reliable and correct, but most importantly that some of them point out that pornography objectifies women. ICASA never looked at the pornography intended to be broadcast by ODM. It could therefore not decide that the pornography would not objectify women. The best information we have up to now been able to obtain from the website of Brazzers TV (Europe) is that it grossly objectifies women (as referred to earlier). ICASA's actions were unreasonable because they did not do enough to verify whether the proposed channels would objectify women, in violation of the BCCSA Code and/or necessitating a

declaration by them that the BCCSA Code is no longer acceptable and/or necessitating them to refuse ODM's application pending a proper investigation into the matter.

AD PARAGRAPH 187

231. We confirm that there is no record of ICASA's own research into the effects of exposure to pornography or that it verified the expert evidence presented by Dr Wasserman on behalf of ODM. The Committee accepts that there is no evidence to demonstrate that pornography is a direct cause of gender based violence based on what was said by the parties, but fails to show any engagement with research on this issue. This amounts to a blatant acceptance by ICASA, without corroboration and verification, of the evidence presented by ODM.

AD PARAGRAPH 188.1.3

232. The statement made by ODM, which it is not motivated purely by profiteering motives, is contradictory to its earlier statement in paragraph 180.3 "For ODM, the carrying of adult content channels has the potential to serve as an economic lifeline to the company". It can also not be said that ODM's channels are "TVfor2" as this description only relates to Playboy TV and not to the BRAZZERS TV (Europe).

AD PARAGRAPH 189

233. We deny the contents of these paragraphs with reference to our comprehensive reply contained in paragraphs 105 to 154 herein. The research done by experts appointed by ODM has not been tested by ICASA or any of the other Applicants and cannot be seen as conclusive evidence on this subject.

AD PARAGRAPH 190

234. The submission by ODM, holding that it will implement a new PIN system firstly, indicates that the current PIN system which was approved by ICASA hold insufficient protection for children and secondly, raises the question as to who will and whether the effectiveness of the new PIN system of ODM will be monitored as an effective mechanism to protect children. It is easy for ODM to say that they will implement a new PIN system, but the effectiveness of it cannot be guaranteed beforehand.

AD PARAGRAPH 191

235. We emphasise that ODM concludes that they are unable to confirm the accuracy of the market surveys that they conducted.

AD PARAGRAPH 194

236. ODM holds that ICASA received submissions with reference to literature on the subject, however ICASA does not make any reference in its recommendations that it dealt with or read any of the literature. We deny that all the submissions received were not based on scientific evidence. We further submit that the report by Diamond and Klein cannot be seen as conclusive evidence on this subject and refer to the comments of expert, Dr John Foubert (see annexure **"NCS 6"** as referred to earlier).

***In re* ICASA ANSWERING AFFIDAVIT**

AD PARAGRAPHS 8 TO 14

237. We admit the assertions regarding ICASA's nature, mandate and the statutory provisions applicable to ICASA, although the statutory provisions listed in the paragraphs are not necessary a *numerous clauses*.

AD PARAGRAPHS 15 TO 17

238. We note the contents of these paragraphs and do not know whether they are true and correct. We are accordingly unable to admit or deny the allegations and assertions contained therein.

AD PARAGRAPH 18

239. We note the contents of this paragraph. I am advised that the allegations regarding the contents and wording of clause 9 of the BCCSA Code is incorrect. We accordingly deny the allegations to the extent that they differ from the wording of the BCCSA Code.

AD PARAGRAPH 19

240. We note the contents of this paragraph and do not know whether they are true and correct. We are accordingly unable to admit or deny the allegations and assertions contained therein.

AD PARAGRAPH 20

241. We deny the content of this paragraph. I am advised to specifically point out only two specific instances of ICASA's law/rule-making authority:

241.1. ICASA may prescribe and issue Regulations in terms of section 54(1) of the Electronic Communications Act, 2005, setting out a code of conduct for broadcasting services licensees ("the ICASA Code").

241.2. ICASA may declare that a code of conduct and disciplinary mechanisms of another body (in this case "NAB") are acceptable to ICASA, thereby exempting the members of such body from compliance with the ICASA Code. ICASA's acceptance of NAB's code of conduct (the BCCSA Code) gives

it force of law, as being a conditional exemption from the ICASA Code. The BCCSA Code has also been subsumed into law by way of the Subscription Broadcasting Services Regulations, 2006, specifically regulation 6.

AD PARAGRAPHS 21 TO 24

242. We note the contents of these paragraphs and deny the allegations contained therein, to the extent that it attempts to deny that the criminalising of showing pornography to children constitutes a statutory prohibition and places an obligation on ICASA not to authorise the broadcasting of pornography to which children may be exposed to. I am advised that ICASA is obliged not to enable criminal behaviour.

243. We are unable to respond to paragraph 24 as it is incomplete and does not make sense.

AD PARAGRAPHS 25 TO 35

244. From these paragraphs we note and emphasise that:

244.1. ODM's application on 27 July 2011 ("the first application") consisted of nine (9) pages.[52]

244.2. That ICASA's notice in the Government Gazette gave interested parties thirty (30) days to respond to ODM's application.

244.3. That ICASA invited ***all*** interested parties to the public hearing in an 'issued notice', namely the Government Gazette. In this regard we note that the aforesaid notice expressly stated that 'All persons who have made written representations and any

[52] ICASA AA Annexure "SSM1".

other interested person(s) are invited to the hearing' (see annexure **"NCS 2"** as referred to earlier).[53]

244.4. That ODM did not make oral representations at the public hearing.

244.5. The reason why ODM was not authorised to broadcast the pornographic channels was because ICASA failed to interrogate some of the following issues of concern: whether women were presented in positions of sexual submission, servility or display, that women were presented as dehumanising sexual objects, things or commodities and whether woman's body parts like vaginas, breasts or buttocks were exhibited in such a way that women are reduced to those parts.

244.6. That ICASA failed to issue a certificate authorizing or refusing the pornographic channels within the sixty (60) days prescribed by regulation 3.4 of the SBS regulations and that in terms of regulation 3.5 a failure to issue a certificate would be considered as authorisation of the channels.

244.7. That ODM started to broadcast the channels, that ICASA fails to state when ODM started broadcasting the channels and that ICASA successfully stopped ODM from broadcasting by interdict.

AD PARAGRAPHS 36 TO 41

245. We deny that the public were afforded an adequate opportunity to respond and comment and/or engage meaningfully with ICASA in respect of ODM's application, for the following reasons:[54]

[53] CFJ FA Par 57.

245.1. We respectfully submit that the public were denied the opportunity to a just and fair administrative action given the circumstances of this matter, as referred to hereinabove as well as in the relevant paragraphs of our founding affidavit.[55]

245.2. In addition to the aforesaid, we emphasise that:

245.2.1. It took fifteen (15) court days for ICASA to place its notice in the Government Gazette.

245.2.2. That the scheduling of the date for the submission of written representations had to take account of SBS regulation 3.4 which requires that ICASA take a decision within 60 days of its receipt. It is however denied that ICASA had to distribute the written submissions since ICASA prohibited the public to submit the written representations without proof that it had been submitted to ODM prior to sending it to ICASA. The aforesaid prohibition was also contained in the notice.

245.2.3. That ICASA was pressured by the SBS regulations to make its decision within the sixty (60) days of receiving ODM's application.

AD PARAGRAPH 43

246. We admit the content of this paragraph.

247. We do however note that ODM was afforded fourteen court days to respond to the written representations of the public, as opposed to the

[54] CFJ FA Par 30 to 64; Par 184 to 187.
[55] CFJ FA Par 30 to 64; Par 184 to 187.

public's seven court days, if calculated from the date the public became aware of the application by ODM in the media on 11 January 2014 as set out in our founding affidavit and hereinafter below.[56]

AD PARAGRAPH 44

248. We admit the content of this paragraph, but deny that 'all provisions relating to the individuals or public rights and obligations' contained in the relevant legislation was followed, and we particularly deny that a fair procedure was followed during the notice and comment procedure employed by ICASA.

AD PARAGRAPH 45

249. We deny that the time was divided fairly, although we admit that the time was fairly evenly divided in aggregate between those making representations 'for' the application and those 'against' it. In amplification of the aforesaid, we respectfully submit that the manner in which the time was divided was patently unfair in the circumstances of this case for the reason mentioned herein above.

250. In addition to the above, the fact that none of the parties present at the hearing objected during the public hearing does not mean that the parties present at the hearing were satisfied with the procedure followed. We refer again to the email sent by Ms Taryn Hodgson of Africa Christian Action to Ndondo P. Dube hereinabove, in which Africa Christian Action and other organisations objected to the procedure followed by ICASA.

251. We respectfully submit that this again demonstrates the unfair process followed since the other organisations were not informed about their right to present separate submissions.

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[56] CFJ FA Par 43.

AD PARAGRAPH 46

252. We note the content of this paragraph and again submit that neither Mr Smit nor any of the now executive members of CFJ were invited to the public hearing, despite Mr Smit's request in his written representation as well as his submissions that he did not have enough time to thoroughly answer ODM's forty six (46) page application within the short period allowed (seven court days). In amplification we submit inviting him to the public hearing would have afforded Mr Smit the ideal opportunity to supplement his written representations.

AD PARAGRAPH 48

253. We deny that any individual was allowed to make presentations in his personal capacity. To the contrary, there is nothing from the hearing transcript that indicates that Mr Vapabili made oral representations in his personal capacity. We submit that the hearing transcript clearly indicates that he was introduced by Ms Kupe (from Christian Action) as 'part of the organisation', namely Africa Christian Action.[57]

254. In addition to the above, even if Mr Vapabili made submissions in his personal capacity, we note that he was reluctantly introduced by Ms Kupe when she requested the Commissioner to allow Mr Vapabili to also make oral representations.[58]

255. Furthermore, according to our best scrutiny of ICASA's record 508 individuals submitted representations and 31 organisations did so.[59] It is surprising that no individuals made submissions at the public hearing. We respectfully submit that the reason for none of the individuals making submissions at the public hearing is because they did not know

[57] Hearing Transcript p80, lines 12 to 16.
[58] Hearing Transcript p80, lines 12 to 16.
[59] CFJ FA Par 79.

of their right to do so since neither the notice referred to it nor were they invited directly by ICASA to the public hearing.

256. In addition to the above, the uncertainty by which Ms Kupe requested that Mr Vapabili make representations is a further indication of the uncertainty surrounding the public as to whether those not invited to the public hearing could make oral representations at the hearing.[60]

AD PARAGRAPH 49

257. We deny that ICASA acted fairly in upholding ODM's objection to the Films and Publications Board ("FPB") making of oral representations, to the extent pleaded herein above.

AD PARAGRAPHS 50 TO 51

258. It is denied that allowing Dr Wasserman to present after all other presentations was fair for the reasons mentioned herein above.

AD PARAGRAPH 54

259. We deny that the Commissioner permitted ventilation and debating of the various issues raised by the public for the following reasons:

259.1. Ten (10) minutes was <u>not</u> enough for each of the organisations to present each of their respective presentations and simultaneously also respond to the written and oral submissions made by ODM. The committee effectively shut their minds to the submissions made by the public.

259.2. When Ms Hettie Britz requested extra time for finishing her presentation she was strictly prohibited from doing so and

[60] Hearing Transcript p80, lines 12 to 16.

effectively the committee shut their mind to the submissions made by her.[61]

259.3. The public was not allowed to respond to the submissions made by Dr Marlene Wasserman;

260. In amplification of the above, there is a clear difference between one party making submissions over a period of 90 minutes as opposed to seven organisations making submissions over a period of 105 minutes (of which only 70 minutes was allowed for making submissions and 35 minutes for questions from ICASA), since it is unfair and violates the very essence of procedural fairness, namely the *audi alteram partem* principle, as alluded to herein above.

AD PARAGRAPHS 55 TO 60

261. We note the contents of these paragraphs and deny that ICASA's conclusions therein are correct.

AD PARAGRAPH 61 TO 63

262. We admit the contents of these paragraphs to the extent that they present a correct interpretation of the law and contain an accurate reflection of our contentions in our founding affidavit and of the other two Applicants.

AD PARAGRAPH 64

263. We deny the allegations in this paragraph and affirm that we are submitting ICASA's decision to the courts for purposes of judicial review on the grounds provided for in PAJA and set out in our founding affidavit.

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[61] Hearing Transcript, p 127, lines 7 to 18.

AD PARAGRAPH 65

264. We deny the allegations in this paragraph and dispute the conclusions made by ICASA. We did not only refer to additional research and evidence which was not presented to ICASA or its committee during its decision-making process. Refer to paragraphs 80 to 84 herein above in relation to the evidence referred to in our founding affidavit. Materials and submissions made to ICASA regarding the harmfulness of pornography were dismissed by ICASA with reference to a submission from a single alleged expert, Dr Marlene Wasserman, who was not independent. Certain other relevant materials that ICASA either did not consider or did not properly take into account for purposes of making their decision as referred to and summarised in our founding affidavit, are not new. We point out that these relevant materials existed at the time of ICASA's decision-making process and that the Rule 53 record either contains no record thereof or does not evince any proper consideration thereof.

AD PARAGRAPH 66

265. Although we admit that the proceedings before the court is a judicial review of ICASA's decision which do not involve an appeal, we deny that fresh material on the merits cannot be entertained by the Honourable Court for the limited purposes of review.

266. In amplification of the above, we deny that ICASA had discharged its constitutional and statutory mandate by dealing with the submissions, research and other materials in the way that it did. We submit that failure by ICASA to give proper consideration to materials relevant (although not part of the notice and comment procedure) to the application they were tasked to consider, makes their decision reviewable on a number of grounds as set out in our founding affidavit.

AD PARAGRAPH 67

267. We do not know whether the allegations in the first sentence in this paragraph are true and correct and accordingly we are unable to admit or deny it.

268. It should however be noted that this allegation does not agree with the breakdown given by ODM in their response to written submissions in their letter dated 11 February 2013. According to ODM the three main reasons for people's objections to ODM's application were "Family breakdown/[e]ffect on marriage/[e]ffect on kids" at 61%, "Leads to violence/sex crimes/abuse against women and children" at 40% and "Moral reasons/[e]ffect on moral structure of society" at 38%.

269. "Religious reasons" were in a distant fifth position at 17%. Even by adding up the percentages of "moral reasons" and "religious reasons", totalling 55%, that would still not make the combination the majority reason why people objected to ODM's application.

270. We point out that either ODM's breakdown, as discussed above, is incorrect or ICASA's allegation in the first sentence of the paragraph is incorrect.

271. It must also be noted that even if some objectors had based their objections on a moral considerations, that does not excuse ICASA from properly considering whether such objections are based on a moral code that is supported by and accords with the Constitution.

272. Only once such an exercise had been conducted, could ICASA have concluded whether some morality-based objections were indeed invalid. Valid objections would include (amongst others) those based on or confirmed by research and other evidentiary material, those based on sound legal arguments and those based on moral arguments that are supported by the internal moral code of the Constitution, i.e. the

underlying and foundational values, spirit, purport and objects of the Bill of Rights, the rights in the Bill of Rights and other rights or freedoms found outside the Bill of Rights that are nonetheless consistent with the Bill of Rights.

273. Whereas we admit that ICASA may dismiss religious considerations that are not supported by the morality of the Constitution, moral and religious considerations that are in agreement with the morality of the Constitution are valid and should be given due weight and consideration.

274. We deny that we are motivated by moral and religious considerations. In terms of our Constitution we are motivated to -

274.1. Establish and preserve a South African society in which justice is dispensed to all through the protection and promotion of the constitutional rights and freedoms of each member of society.[62]

274.2. Defend and actively promote constitutional justice in South Africa.[63]

274.3. 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.[64]

275. CFJ embraces and affirms the moral code contained within the Constitution, as set out in the founding values of the Constitution, namely human dignity, equality, advancement of human rights and

[62] See CFJ's vision statement at 3.1 of CFJ's Constitution.
[63] See CFJ's first primary objective at 3.3.1 of CFJ's Constitution.
[64] See CFJ's third primary objective at 3.3.1 of CFJ's Constitution.

freedoms, etc.[65] We accordingly admit that, seen in this light, we are motivated by the moral code contained in the aforesaid values.

276. In this regard we do however note the obligation found in section 2(a) of the Broadcasting Act, 1999, namely that ICASA is obliged to "strengthen the spiritual and moral fibre of society."

277. We admit that we are aggrieved with the result of the public hearing, but deny that we are motivated by the "similar" reasons ICASA refers to. We are aggrieved since we are of opinion that constitutional rights and values are being violated as set out in our founding affidavit and elsewhere herein.

278. In amplification of the above and of more relevance for purposes of the present proceedings, we were aggrieved, after considering ICASA's record of their decision-making process, with how the public participation process was communicated, organised, facilitated and conducted, and with the manner in which ICASA's decision was reached, as detailed in our founding affidavit.

AD PARAGRAPH 68

279. We deny the allegations in this paragraph and affirm that we are submitting ICASA's decision to the courts for purposes of judicial review on the grounds provided for in PAJA and set out in our founding affidavit.

AD PARAGRAPH 69

280. We deny that this case is about religious belief and/or morality, since we are of opinion that it is about the violation of the right of the citizens of South Africa, most manifestly the rights pertaining the best interest of

[65] Section 1 of the Constitution

the child, the right to freedom and security of the person and just administrative action. We therefore admit the allegations in the second and third sentences of this paragraph.

AD PARAGRAPH 70

281. We deny the allegations in the first and second sentences of this paragraph. The South African Bill of Rights is South Africa's absolute minimum universal moral compass (as contained in the rights and values of the Constitution) which seeks to achieve transformation of our society by promoting the values contained therein, namely dignity, equality, freedom, et cetera. In particular the Bill of Rights mandates that the state to respect, protect, promote and fulfil the rights in the Bill of Rights which includes (amongst others) acting in the best interest of children, not subjecting people to torture and respecting and protecting each other's dignity. We admit the contents of the third and fourth sentences of this paragraph.

AD PARAGRAPH 71

282. We deny that this paragraph has any relevance to these proceedings. We note the contents of this paragraph without admitting or denying same. We do not know whether the allegations are true and correct.

AD PARAGRAPH 72

283. We note the contents of this paragraph without admitting or denying same.

AD PARAGRAPH 73

284. We deny that ICASA investigated the security measures employed by ODM to the degree necessary, as set out in our founding affidavit and herein below.

285. In amplification of the above, ODM admitted that each of its PIN codes can be cracked on an average of approximately four (4) hours per PIN and that they have now added additional security measures.

AD PARAGRAPH 74

286. We deny the allegation that we disregard or seek to avoid the fact that parents and guardians have primary responsibility to give guidance to children and monitor children's television viewing. We neither admit nor deny the allegation in the third sentence of this paragraph as we do not have any knowledge thereof and cannot confirm whether it is true and correct. We admit the allegations in the remainder of this paragraph, although we deny that anything contained therein can excuse ICASA from acting with reasonableness, diligence and in accordance with applicable legislation in performing its constitutional obligations and its constitutional mandate.

AD PARAGRAPH 75

287. We deny that the fact that children can watch pornography on the internet has any relevance to the proceedings before the court. The fact that a child can watch pornography on the internet cannot justify ICASA's decision to authorise three pornographic channels on state regulated and licensed television if it should contain scenes which violates any legislation and/or the rights in the Bill of Rights. The point is that two wrongs do not make a right.

288. We admit the remainder of the contents of this paragraph, but deny that anything contained therein can excuse ICASA from acting with reasonableness, diligence and in accordance with applicable legislation in performing its constitutional obligations and its constitutional mandate.

AD PARAGRAPH 76

289. We admit the contents of the first two sentences of this paragraph, but respectfully submit that where someone's choice places or may place him/herself and/or others in harm's way, ICASA as regulator and custodian of electronic communications (including broadcasting) has an obligation to investigate properly, take reasonable steps and put reasonable protective measures in place in discharging its obligations in terms of the Constitution and other applicable statutory provisions. We admit the last sentence of this paragraph.

AD PARAGRAPH 77

290. We deny that ICASA had properly considered the various arguments of objectors. We deny ICASA's allegation that the merits of objectors' arguments are adequately addressed by the safeguards provided in terms of the conditions imposed by ICASA. We submit that ICASA did not act reasonably in placing reliance on ODM's security access code mechanism, nor have they taken reasonable steps to discharge their constitutional and statutory obligations towards the public of South Africa, most importantly women, children and their parents.

291. We submit that ICASA's assertion that "whatever the merits of those arguments may be from a scientific/medical/social point of view" is disconcerting as it does not speak of conclusions that were drawn after the proper consideration of the merits, but rather is indicative of putting measures in place to address the arguments notwithstanding their merits.

292. We deny the allegations in this paragraph and affirm that we are submitting ICASA's decision to the courts for purposes of judicial review on the grounds provided in terms of PAJA and as has been set out in our founding affidavit.

293. We vehemently deny that the 'right to dignity of women' can ever be completely safeguarded by the conditions imposed by ICASA. For instance, a women's right to human dignity, as referred to in the BCCSA Code, can be violated during any pornographic film, depending on, for example, whether the film contain scenes where women are being objectified or not.

294. We also deny that the 'right to dignity of women' and the fact that pornography projects women as sex objects are 'arguments…from a scientific/medical/social point of view'. To the contrary, this is a legal argument.

AD PARAGRAPH 78

295. We note the contents of this paragraph.

AD PARAGRAPH 126.1

296. The first discussions about the formation of CFJ took place in November 2011 and the organisation existed informally from then on. Actions to formalise CFJ by way of a written constitution started gathering speed during the second semester of 2012 with the formulation of vision and mission statements and objectives being prioritised in November 2012. We deny that CFJ was only formed on 24 June 2013, although that was the date on which CFJ's founding members signed the written constitution, confirming their earlier oral agreement in respect thereof. Even if a court were to find that CFJ formally came into existence after ICASA's decision, such fact, if found, would in any event have no relevance for purposes of the present proceedings.

AD PARAGRAPH 126.2

297. We deny that we resorted to rehashing the submissions made by other parties during the hearing.

298. We deny that CFJ is appealing against ICASA's decision since CFJ is bringing this application in review of ICASA's decision on the grounds provided for in PAJA, as set out in CFJ's founding and replying affidavits.

AD PARAGRAPH 126.3

299. We note the contents of this paragraph. Three of the founding members of CFJ made written representations to ICASA and ODM in their personal capacities. Not one of them was invited to present oral submissions at the public hearing held by ICASA. We deny that CFJ is making representations against ODM's application to the Honourable Court.

300. In amplification of the above, with ODM's first application for the authorisation in 2011, ICASA published an identical notice ("2012 public hearing notice") to the public hearing notice (1 March 2013) in the Government Gazette (see **"NCS 2"** as referred to earlier). We point out that the stark difference between the 2012 public hearing notice and the 2013 public hearing notice is that the first notice specifically makes provision for "all persons who have made written representations and any other interested persons [to be] invited to the hearing", while the last notice failed to mention this information.

301. Unlike ODM's first application, ICASA did not invite those who made written representations to present at the hearing in the notice of 1 March 2013, nor was any provision made in the programme of the public hearing for oral representation(s) by person(s) who were not invited to make representations. We confirm that none of the executive members of CFJ, who submitted written representations in their personal capacities, were invited to make oral representations at the public hearing.

AD PARAGRAPH 130.2

302. As explained in paragraph 296 above, CFJ was in the process of being formally constituted at the time when ODM's application came to my attention. CFJ existed as an informal association of person from November 2011 until adoption of its constitution during June 2013. At the time when I contacted the now executive members of CFJ, they were representatives of an organisation which had to be formally constituted.

AD PARAGRAPH 130.3

303. We note the contents of the first sentence of this paragraph without admitting or denying same as we do not know whether it is true and correct. We note ICASA's reference to the relatively short decision-making period prescribed by the SBS Regulations, 2006, namely 60 days. Despite receiving ODM's application on Wednesday, 28 November 2012, it took ICASA 21 days to issue its first notice on Wednesday 19 December 2012. Presumably that is how long it took ICASA to work through and consider ODM's application, which would be understandable seeing as it was a comprehensive document. Nonetheless, one third of their allowed decision-making period expired by the time the first notice was issued. ICASA issued its second notice on 1 March 2013 indicating therein that the public hearing would take place on 14 March 2013. ICASA reached a decision on 23 April 2013, 146 days after ODM's application was lodged - 86 days later than the prescribed 60 days requirement.

AD PARAGRAPH 130.4

304. We deny the content of this paragraph. We submit that in the circumstances of this matter we have shown why there was procedural unfairness in respect to the Gazetted Notices, as mentioned herein.

305. In addition to the above, we admit that CFJ's now executive members became aware of the invitation for public comment before the expiry date, namely on 11 January 2013. The time available was however insufficient

to prepare a proper and comprehensive response, which is why Mr Ryan Smit requested an extension of the period for public comment. ICASA never responded to his request and they did not invite him to the public hearing to make an oral submission. Despite his indication that he lives in Cape Town, ICASA held only one public hearing – in Johannesburg.

AD PARAGRAPH 130.5

306. CFJ acts "[t]o 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", as stated in clause 3.3.1. of CFJ's Constitution. The submissions of some of the other parties raise serious issues and concerns that affect the public interest and is it necessary to bring this to the attention of the Honourable Court. This is necessary to show the gravity of the allegations of harm that was made before ICASA and to contrast it with the absence in the Rule 53 record of work (e.g. research and consulting with independent external experts *et cetera*) done by ICASA to flesh out the levels of risks associated with pornography. CFJ have not instituted these proceedings to request the court to appeal against the merits of ICASA's decision, which is not allowed.

AD PARAGRAPH 130.6

307. We deny the contents of this paragraph. Specifically, that it was not I, but Mr Smit who asked for an extension of the deadline for representations. It is not Mr Smit' actions which are disconcerting. Mr Smit, as a full-time tax consultant with a professional services firm, late on 15 January 2013 received a very difficult to read copy of ODM's comprehensive 46 page application and needed time to consider the substance and scope of its contents, to request, as he did 6 days later on 21 January 2013, an extension to prepare a comprehensive representation to answer all the facets of ODM's application. ICASA's attitude that it gave sufficient time

for interested and affected parties to respond on this contentious issue is highly disconcerting.

AD PARAGRAPH 130.7

308. It is unclear what is meant by this paragraph. We note that Mr Smit did not receive any feedback from his letter requesting an opportunity to make oral submissions and that the neither the notice nor the public hearing notice contained information informing the public that they may request an opportunity to make oral submissions.

AD PARAGRAPH 130.8

309. We admit the contents of the first sentence of this paragraph. We deny the allegation that ICASA did not grant the request for extension of the closing date for submission of representations. Mr Ryan Smit also made the following requests and statements in his written representation of 21 January 2014, annexed to CFJ's founding affidavit marked "DVF 6":

"I would need more time to consider all the relevant procedural requirements." (paragraph 5, page 2)

"Please note that the time allowed for comment has not been enough for me to consider the constitutional arguments made by ODM and to respond thereto in any detail. I would appreciate the opportunity to further consider this and to make representations in respect thereof." (paragraph 7, page 2)

"Please keep me informed of further developments in this matter." (final paragraph, page 6)

310. ICASA did not respond to Mr Ryan Smit's request for extension and did not inform him of the public hearing. We accordingly submit that ICASA did not consider or engage Mr Ryan Smit's request for extension. The

request for extension came with the alternative that ICASA should "organise a public hearing for all parties to make representations in person" (paragraph 3.2 of Mr Ryan Smit's written representation, annexed to CFJ's founding affidavit and marked as "DVF 6"). ICASA is correct in that they did organise a public hearing but they invited neither Mr Ryan Smit nor *all* the parties who made written representations.

AD PARAGRAPH 130.9 – 11

311. We are unable to either admit or deny the allegation in paragraph 130.9 as we do not know whether it is true and correct.

312. We deny that we contend that CFJ had to be invited to the public hearing since the now executive members of CFJ submitted written representations in their personal capacity. We note the allegation in the second sentence of paragraph 130.10 and deny that the now executive members of CFJ knew at the time that it was open to them to enquire as to who was eligible to attend and participate in the hearing since the public hearing notice did not afford us that right. We strongly deny the allegation in the third sentence of paragraph 130.10 that ICASA's notice invited the public to attend the public hearing. As stated herein-before, ICASA in 2012 during ODM's first application specifically invited all persons who made written representation to attend the public hearing, but did not invite such persons in its notice of 1 March 2013. ICASA's hearing programme (annexed to CFJ's founding affidavit marked "DVF 10") further did not provide a time slot(s) for persons/organisations to make representations other than the eight organisations listed in the programme. "DVF 8" annexed to CFJ's founding affidavit, a letter from ODM, reads that sixteen (16) groups submitted written representations to ICASA. ICASA did not explain why only eight (8) received an opportunity to make oral representations at the public hearing nor how these groups were selected.

313. We again deny that the convening of a public hearing was fair on the basis set out in our founding affidavit and herein above.[66]

314. We deny the allegation in the first sentence of paragraph 130.11 for the reasons stated in paragraph 310 above. We note the contents of the second sentence of paragraph 130.11, but deny that it is relevant to the question whether ICASA's conduct was reasonable and procedurally fair.

AD PARAGRAPH 131.1

315. We deny that CFJ is remodelling the application made by DFL as it is patently incorrect, because CFJ issued their judicial review application about six (6) weeks before DFL. The fact that CFJ and DFL raised similar allegations of bias, merely reiterates the seriousness of the allegation.

316. In addition to the above, we deny that the complaints raised by DFL concerning bias are the same as the complaints raised by us, since our arguments in this regard are exclusively limited to the unfairness of the procedure followed by ICASA during the public hearing, as alluded to in our founding affidavit.[67]

AD PARAGRAPH 131.2

317. We note the contents of this paragraph. CFJ did not present at the public hearing and we can therefore not explain, on behalf of the other organisations that were present at the hearing, why any of them did not raise an objection against the time allocated to each party. In any event, we submit that ICASA's allegation in this regard is not conclusive in answering the question whether they acted reasonably and procedurally fairly.

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[66] CFJ FA Para 50 to 59; Par 186 to 187.7
[67] CFJ FA Par 60 to 65; CFJ FA Par 187 to 187.2

318. Whilst we are unable to admit or deny that either of the participants requested extension of the allocated time, we point out that one of the presenters, Ms Brittz, requested the chairperson of the public hearing to allow her to use the full 15 minutes allocated to her in order to finish her presentation. This request was refused. The request and refusal appears at page 127 of the transcript of the public hearing.

319. In addition to the above, the fact that none of the parties present at the hearing objected during the public hearing does not mean that the parties present at the hearing were satisfied with the procedure followed. This has been dealt with at paragraphs 61 to 64 above.

AD PARAGRAPH 131.3 – 6

320. We confirm, as per our founding affidavit, that it appears from the record that the approach of ICASA shows bias in respect to the procedure followed and was therefore unfair. ICASA's argument, that little time was afforded to the parties as ICASA and ODM were already in possession of the written representations of the parties, fails to take into account that the parties at the hearing were not merely there to restate their written representations, but may also have wanted to comment on ODM's general response of 11 February 2014 (if they had received it) and would want to comment on the oral representations made by ODM at the hearing, especially to the extent that it may have differed from ODM's application. We respectfully submit that ten (10) minutes was not sufficient for allowing each of the parties opposing ODM's application to engage and respond thoroughly to the aforesaid oral submissions made by ODM, as well as their 46-page application document and general reply document dated 11 February 2013.

321. We note the contents of paragraph 131.4 and deny that it contains an acceptable reason for the differentiation/discrimination between ODM and other presenters. In addition to the aforesaid, we respectfully submit that ten (10) minutes was not sufficient for allowing each of the parties

opposing ODM's application to engage and respond thoroughly to the aforesaid oral as well as written submission made by ODM.

322. We furthermore note that the number of representations from the public seems to fluctuate, sometimes quoted as 644 (paragraph 38 of ICASA's answering affidavit), other times as "more than 569" (paragraph 64 of ICASA's answering affidavit), at another place as "more than 634" (paragraph 143.1 of ICASA's answering affidavit) and in paragraph 131.4 as "more than 614". It is unclear whether ICASA knows how many representations were submitted to it.

323. We point out in this regard that of Mr Ryan Smit's first written representation dated 21 January 2013 (DVF 6 to CFJ's founding affidavit) only his covering e-mail appears at page 434 of the Rule 53 Record. His actual representation that was attached to the covering e-mail and the other two attachments are not in the Rule 53 record. Mr Ryan Smit's second written representation dated 22nd January 2013, referred to in his supporting affidavit forming part of these replying papers, does not appear in the Rule 53 record at all. The Rule 53 record accordingly is incomplete. The incompleteness of the Rule 53 record also raises a big question mark over whether ICASA in fact considered and engaged with all representations made to it.

324. We deny the allegations and conclusions contained in paragraph 131.6 for the reasons set out in our founding affidavit and elsewhere herein.

AD PARAGRAPH 131.7

325. We admit the contents of the first and third sentence of this paragraph, but deny the allegation that ICASA's approach did not amount to or result in unfairness. We note that ICASA fails to answer our concern regarding their failure to appoint or consult their own independent expert. Even if the committee engaged with Dr Wasserman at the hearing, the procedure followed by ICASA was biased as the organisations were not made aware

that she would be present at the hearing and accordingly did not have the opportunity to bring their own experts.

326. It is denied that allowing Dr Wasserman to present after all other presentations was fair and are we surprised by ODM's insistence thereof, for the following reasons:

326.1. Although it is accepted as a fair procedure in court proceedings for an applicant to reply to submissions made against its application, it is most certainly not accepted as fair court proceedings to allow an applicant to bring in expert witness for the first time in reply to submissions made against its application.

326.2. We respectfully submit that allowing Dr Wasserman to present expert witness at the end of the public hearing, and not allowing those opposing ODM's application to respond to the evidence presented by her, is evidence of the unfairness of the procedure decided upon by ICASA.

326.3. For example, there was wholly insufficient time or opportunity to interrogate Dr Wasserman's controversial evidence at the hearing.

AD PARAGRAPHS 132.1 TO 132.2

327. We note the contents of these paragraphs.

AD PARAGRAPH 133

328. We deny the allegation that no documents were hidden from the Applicants. As indicated in paragraph 323 above, the two written representations from Mr Ryan Smit do not form part of the Rule 53 record. Although the incompleteness of the Rule 53 record may not be due to a

wilful act of hiding, but may be due to a bona fide oversight, it does raise a question over ICASA's consideration of and engagement with the representations they received.

AD PARAGRAPHS 134 TO 135

329. We note the contents of these paragraphs.

AD PARAGRAPHS 136.1 – 136.3

330. We note ICASA's interpretation of their reasons although we do not agree with such interpretation. We note the contents of the remainder of these paragraphs. We confirm that there is no record of ICASA's own research into the effects of exposure to pornography or that it verified the expert evidence presented by Dr Wasserman on behalf of ODM. The Committee accepted that there is no evidence to demonstrate that pornography is a direct cause of gender based violence based on what was said by the parties and failed to engage with research on this issue.

331. The most telling example of this is the reproduction of a typographical error in the transcript of the public hearing into ICASA's reasons document: Dr Wasserman's reference to "Rachel Jewkes" was incorrectly recorded by the transcriber as "Rachel Dukes" at page 192 of the transcript. ICASA refers to Rachel Jewkes as "Dr Rachel Dukes", whilst ODM refers to her as "Professor Rachel Jewkes" in the supporting affidavit of Dr Marlene Wasserman at page 439 of ODM's answering affidavit. We leave it to the Honourable Court to draw its own inferences and conclusions in this regard. We submit that even the most basic search (internet) to confirm the existence of Professor Rachel Jewkes / Dr Rachel Dukes would have resulted in the transcriber's mistake not being reproduced in ICASA's reasons.

AD PARAGRAPHS 136.4 – 136.5

332. We deny the allegation that ICASA had no obligation to conduct its own research and its decision that it was not necessary is unreasonable, irrational and unlawful.

333. ICASA is mandated in terms of section 192 of the Constitution and the ICASA Act to "regulate broadcasting in the public interest". We submit that to ensure that the authorisation of the pornographic channels is in the public interest ICASA would have had to conduct its own research and verified the correctness and truthfulness of the submissions and information presented to them.

334. In addition, we submit that the question of ICASA's fulfilment of their constitutional and statutory obligations and the reasonableness, rationality and lawfulness of their decision not to conduct their own research should be considered in the light of Mr Ryan Smit's specific requests in his two written representations, for example:

> *"I urge ICASA to consult the internet and any other sources regarding the destructive consequences of exposure to visual references of explicit sexual conduct, such as pornography."* (paragraph 7.11 of Mr Ryan Smit's first representation to ICASA dated 21 January 2013 annexed to CFJ's founding affidavit marked DVF 6)

335. We deny the allegation that there was no reason justifying ICASA's refusal of ODM's application.

AD PARAGRAPHS 137.1 – 137.2

336. We deny the allegation that the relevant provisions of the Sexual Offences Act do not find application. We submit that ICASA had an obligation to conduct its own research and its decision that it was not necessary is unreasonable, irrational and unlawful.

AD PARAGRAPHS 138.1 – 138.2

337. We agree that ‘cultural, moral and religious practices of each person remain his/her [choice’ and that it cannot be used as a barometer on how other people should live or behave’. We however deny that freedom of choice is absolute, since no right in the Bill of Rights is absolute and all can be limited in terms of the limitations clause.

AD PARAGRAPH 138.3

338. We note the contents of this paragraph and note that none of the rights in the Bill of Rights are absolute and all are subject to limitation in terms of section 36 of the Constitution and the exercise of a particular right may be restricted in order to protect certain other constitutional rights.

AD PARAGRAPHS 138.4 – 138.6

339. We deny that CFJ had been oblivious of the fact that ODM’s adult content channels form part of a subscription service.

340. We deny that in a violent country like South Africa, the broadcast of channels showing certain types of pornography may only be refused if it is a *root* cause of violence.

341. ICASA in its reasons documentation on ODM’s first application in 2011, annexed to their affidavit as “SSM2”, holds that “the mere fact that there may be other factors influencing sexual violence against women does not show that the consumption of pornography cannot also be able to play a role.” It is accepted that pornography can be a contributory factor toward the advancement of gender-based violence, as pointed out in our founding affidavit.

342. Persons who subscribe to ODM’s pornographic channels choose to watch these channels. CFJ are concerned for them, as well as those persons

who do not choose to watch these and are directly impacted and harmed by persons who subscribed and watch these channels.

343. We deny the allegations that CFJ's evidence of harm is misplaced, irrelevant and of no assistance to the Honourable Court.

AD PARAGRAPH 139.1

344. ODM in its first application also held that it would introduce a double pin system. ICASA in "SMM2" held that "the double pin system is commendable however, it can never be said that this mechanism is 100% full proof". ICASA now states that it is satisfied with the implementation of the dual pin system, yet it was not satisfied with this in 2011.

AD PARAGRAPHS 139.2 – 139.3

345. ICASA submit that the chairperson of the Council Committee placed on record that they would consider the written representations of FPB. However, the information contained in the FPB written representations 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 basis for judicial review of the decision all on its own. This issue has been addressed in paragraph 70 above.

AD PARAGRAPHS 140.1 – 140.2

346. We note the contents of these paragraphs.

AD PARAGRAPHS 141.1 – 141.5

347. We deny that CFJ is oblivious of the fact that pornography is readily available anywhere. In addition, we deny that pornography is readily available anywhere. In addition, even if it were so that pornography was readily available anywhere, if ICASA accepts that some men are prone to

attacking women after exposure to pornography (which they do not deny in their answering affidavit) the availability of pornography in other places cannot excuse them from taking reasonable steps and putting in place reasonable measures in their area of responsibility (broadcasting) to protect women.

348. In respect of paragraph 141.3, if it is indeed the case that ICASA authorised ODM's application in full appreciation of the risk to women (which we deny) and that they found that these allegations were not enough to refuse the application(which we deny) their actions to authorise the application with its current conditions were unconstitutional and/or grossly negligent as contemplated in section 6(2)(h) and (i) of PAJA and/or irrational as contemplated in section 6(2)(f)(ii) of PAJA.

AD PARAGRAPHS 142.1 – 142.5

349. We deny the correctness of the conclusions alleged by ICASA.

AD PARAGRAPHS 143.1 – 143.6

350. We note the contents of these paragraphs and refer to the comments I have already made hereinabove in respect of ICASA's consideration of ***all*** representations, which on the evidence seems unlikely, and ICASA's failure to employ or consult an independent expert(s). We deny that the appointed members of ICASA's Council Committee were more than capable to deal with the subject matter of ODM's application. We deny the correctness of the conclusions drawn by ICASA in paragraphs 143.5 and 143.6 based on the facts and conclusions alleged in our founding affidavit.

AD PARAGRAPHS 144.1 – 145.2

351. We deny the correctness of the conclusions alleged by ICASA in paragraphs 144.2 and 145.2 based on the facts and conclusions alleged in our founding affidavit.

CONCLUSION

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

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NORRIS CRAIG SNYDERS

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 July 2014.

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COMMISSIONER OF OATHS