

To: Parliament of Republic of South Africa
Parliamentary Portfolio Committee of Trade and Industry
Committee Secretaries: Mr André Hermans & Mr Tenda Madima
Parliament Street, Cape Town
PO Box 15, Cape Town, 8000
Telephone: (021) 403-2911
Fax: (021) 403-8219
By email: ahermans@parliament.gov.za; tmadima@parliament.gov.za

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Additional submissions by the South African Guild of Actors

I INTRODUCTION

1. This supplementary submission on the Performers Protection Amendment Bill 2016 (“PPAB”) is made following the oral submissions made by the South African Guild of Actors (“SAGA”) to the Parliamentary Portfolio Committee of Trade and Industry (“Committee”) on 13 September 2018.
2. These submissions are intended to deepen the Committees understanding of SAGA’s position especially with regard to issues and questions raised by the Committee regarding SAGA’s oral submissions.
3. These submissions address the following issues:
 - 3.1. A brief description of SAGA;
 - 3.2. The labour issues faced by performers;
 - 3.3. The tax issues faced by performers;
 - 3.4. The need for interdepartmental reform;
 - 3.5. Proposals for strengthening the PPAB; and
 - 3.6. Comments on the new amendments.
4. The SAGA thanks the Committee for the opportunity to make further submissions with regards to the PPAB.

II ABOUT SAGA

5. SAGA is a non-profit organisation (NPO number 119-128 NPO) constituted on 23 July 2009.
6. SAGA's mandate is to represent and protect the legal and economic rights of professional performers in the film, television, stage, commercial and corporate sectors. SAGA was elected as a member of the International Actors Federation ("FIA") in 2012, alongside Actors' Guilds and Unions from 68 countries around the world including Screen Actors Guild - American Federation of Television and Radio Artists ("SAG-AFTRA") in the United States of America, Canada's Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA") and Equity which is the UK trade union for creative practitioners.
7. SAGA has been a member of South African Screen Federation ("SASFED") since 2009. SASFED includes Producers, Writers, Editors, Agents, Animators and Actors' organisations that promotes collaboration in the Independent Production Sector to ensure the sector remains professional and retains standards.
8. The uncertain 'Status of the Actor' lies at the heart of the problems SAGA's members face. This uncertainty is embedded primarily within the labour legislation and income tax legislation; although some of the remedies will be found in the broadcast legislation and the enabling legislation of the Department of Social Development. It is vital that the suggested adjustments are cross-referenced with other statutes.

III LABOUR PROBLEMS

9. SAGA believes that adjustments are to be made to extend the scope of statutory protection to include *atypical workers* and *non-standard employees*, as defined by the International Labour Organisation.³
10. Performers' uncertain status has implications for areas of labour law from the Labour Relations Act 66 of 1995 ("LRA"), the Basic Conditions of Employment Act 11 of 2002 ("BCEA"), the Occupational Health and Safety Act 85 of 1993 ("OHSA"), and the Unemployment Insurance Fund and Contributions Act, 4 of 2002.

³ International Labour Organisation *Non-Standard Employment Around the World Understanding challenges, shaping prospects* (2016) at 8, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_534326.pdf.

11. The status of the performer as a non-standard worker needs to be acknowledged in both the LRA and the BCEA. This would afford SAGA the status of a union, which would allow SAGA to make a meaningful contribution in other areas. Performers should have the right to certain collective bargaining provisions as any attempt to explore and discuss ‘minimum rates’ currently risks being sanctioned under the Competitions Act.

PROPOSAL:

12. Performers should be recognised as non-standard workers in terms of section 83A of the BCEA as the conditions of their work are directly described in terms of section 83A (1) (a) and (b).

13. At present, any agreement around minimum fees would be inconsistent with the Competition Act because performers – and other professionals working in the film industry – are not recognised as professionals in Schedule 1 of the Act. If performers were to be recognised in Schedule 1, along with a professional regulatory body, it would allow minimum fees that would be consistent with the Competition Act and would greatly benefit performers. This regulatory body could function as a regulator of the organisations who embark on collective bargaining on behalf of performers.

14. While some producers see fit to engage performers on fixed term contracts as ‘employees’, these engagements are generally of a short duration with the weekly wage often set just above the threshold defined by the BCEA. This effectively excludes performers from the minimum protections offered by the BCEA.⁴

15. The status of the performer currently prevents performers from unionising. The OHSA defines workplace safety as a *shared* responsibility, with workers playing their part through the involvement of their unions. Performers are not currently afforded the opportunity to participate in safety concerns as they have no representation. The exploitation of the performer in the work environment is not consistent with the right to fair labour practices in s 23(1) of the Constitution.

16. SAGA, not being recognised as a union, cannot participate in enforcing workplace safety regulations. This leaves the performer in a position where they do not have the bargaining power to insist on a safe working environment. Moreover, section 17 of the OHSA specifies that safety representatives “must be full-time workers who are familiar with the workplace”. Although not fulltime, many performers have decades of experience of the workplace dynamics and potential hazards they are not afforded the authority to give input.

⁴ The BCEA in terms of sections 9, 10, 11, 12, 14, 15, 16, 17(2) and 18(3).

17. The tragic death of Odwa Shweni is a case in point. Performers (including SAGA members) were cut off from civilisation in the Drakensberg. Over a number of days they raised concerns with the producers over safety on set. Without a proper process for recourse, their concerns fell on deaf ears and being disempowered, they were effectively held hostage by the producers. As a result of the lack of proper workplace safety, Odwa Shweni fell to his death.
18. Were SAGA given the authority to intervene, we have no doubt that our members would have called on us to come to their assistance and the death of Odwa Shweni could have been averted.
19. The legal deficit in this regard is unnecessary and the extension of mandatory occupational health and safety standards within the performance sector is not an unregulatable ideal.

PROPOSAL:

20. Amend the BCEA or the Regulations to the BCEA to make it clear that the earnings threshold excluding protections does not apply to employees employed for less than one year.

IV TAX LEGISLATION

21. The uncertainty in the status of the performer has implications for performers in both the Income Tax Act 8 of 1962 ("ITA") and the Unemployment Insurance and Contributions Act 4 of 2002 ("Unemployment Insurance Act"). We identify four problems.
22. First, as independent contractors, performers have to make provision for their own retirement funding and medical aid contributions, among the other overheads that are entailed in running a business, such as transport to and from auditions ("job-seeking" opportunities), maintaining presentable wardrobes and general appearance, gym fees, specialist classes to maintain dance skills, vocal skills, and so on.
23. Performers are taxed a flat rate of 25% of their earnings, in addition to their agents' commission of between 15 and 20%. While SARS makes provision for independent contractors to deduct such expenses from their taxable earnings under the 3616 Tax Code,⁵ some producers insist on deducting Pay As You Earn ("PAYE") under the 3601 Tax Code.⁶ This effectively places the performer under section 23(m) of the ITA which denies deductions from taxable earnings.

⁵ Tax code for Independent Contractors, <http://www.sars.gov.za/TaxTypes/PIT/Tax-Season/Pages/Find-a-Source-Code.aspx> .

⁶ Tax code for Income - Taxable, <http://www.sars.gov.za/TaxTypes/PIT/Tax-Season/Pages/Find-a-Source-Code.aspx> .

24. Second, a related problem is that some producers who, although engaging a performer on a short-term project, deduct PAYE strictly according to the tax deduction tables. The performer's rate is extrapolated to an annualised figure which sees the performer sacrificing as much as 41% of their remuneration.
25. Third, freelance performers are specifically excluded from benefits under the Unemployment Insurance Fund ("UIF") as independent contractors. However, where a producer engages a performer on a fixed term 'employment' contract a contribution for UIF is deducted, any possible claim from the UIF is effectively nullified by section 13 of the Unemployment Insurance Act which governs the calculation and limitations of benefits.
26. Fourth, often producers would, rather than carrying the appropriate liability insurance, engage performers on fixed term employment contracts. This shifts their business risk burden onto the State through the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), while at the same time shielding the producers from any legal claim from a performer injured (or killed) on the job.
27. Each of these requires amendments to specific legislation in order to address the problems faced by performers.

V THE INTERDEPARTMENTAL NATURE OF THE PROBLEM

28. While the 'status of the performer' has direct bearing on the statutory domains of the Department of Labour and the Department of Finance outlined above, the PPAB envisages protections for performers that can be maximised through integration with other areas of legislation under the jurisdiction of the Department of Arts and Culture and the Department of Communications in particular.
29. SAGA requests that the Committee takes special care for the interdepartmental nature of the plight of the performer. This means that the PPAB must be cohesive with pre-existing legislation or envisage mechanisms by which different government departments can work together. The difficulties that performers face with regard to their uncertain status is cross cutting and often times insurmountable.

VI STRENGTHENING THE PPAB

30. This section of this supplementary submission will be based on our initial written submission, but will provide further specific detail and clarity, while responding to questions raised by members

of the committee. It will also address some of the objections introduced by broadcasters and producers. We address the following specific areas:

- 30.1. Mandatory collective management;
- 30.2. The categorisation of actors;
- 30.3. The retrospective application of the PPAB; and
- 30.4. Prescriptive clauses and contractual freedom.

Collective Management must be mandatory to be meaningful.

- 31. The PPAB should include a definition for Collective Management Organisations (“CMO”). In terms of the definition provided for by the World Intellectual Property Organization collective management is “*the exercise of copyright and related rights by organizations acting in the interest and on behalf of the owners of rights.*”⁷ These CMOs protect the creators of the rights and ensures that payment is received.
- 32. It is established by the PPAB that performers have rights to their work, but in many contexts the individual management of those rights is practically impossible. The CMO structure would be able to safeguard these interests on behalf of its members. This also adds a level of protection for performers who are often coerced into agreeing to unfavourable conditions due to unequal bargaining power, (protection in this regard will be discussed below).
- 33. CMO’s could fulfil another important and protective role with regard to performers. In the absence of collective bargaining mechanisms for performers in labour legislation (as discussed above). CMO’s could take on the role of collective bargaining entities. This would be achieved through collective agreements on behalf of its members. SAGA submits that the PPAB should create collective bargaining powers to CMO’s in order to make their role more meaningful.
- 34. SAGA can propose that, in the absence of social security protections for performers, funds generated by CMOs can be invested in a financial instrument to provide the necessary social safety net. This could follow the funding model of other professional bodies such as the Law Societies which are funded through interest generated by their members trust accounts. The CMO’s could collect interest accrued in their accounts from monies not yet claimed which would then form the basis of a social security system. This could be further clarified by regulations.
- 35. These funds could be supplemented by statutory contributions by producers, in lieu of UIF contributions. While CMOs could be governed by the Companies Act 71 of 2008, the rules which govern the internal working of the CMO’s could be self-regulated, subject to appropriate regulatory oversight.

⁷ <http://www.wipo.int/copyright/en/management/> .

Categorisation of Performers

36. Calculation of profit share and benefits due under the above suggestion should be formularised according to the category of performer. Categorisation of performers could be devised in regulations later promulgated by the Minister after the PPAB is signed into law.
37. There are objective mechanisms for distinguishing a lead performer from a support performer and from a featured regular/day player. These would ideally be defined by the character's role in driving the narrative arc but could also be defined by relative screen-time. It is perhaps best to devise a hybrid method that caters to both, as ensemble casts could blur the distinction between lead/support.
38. Background performers, or 'extras', tend to be employed by labour brokers who contract to the production company; they are governed by existing statutes and should be clearly defined so as not to confuse them with lead performers and supporting performers.
39. These distinctions could be created in regulations of the PPAB so as not to delay promulgation or create undue difficulties in the legislative drafting process.

Retrospectivity of the PPAB

40. The retrospective application of the PPAB should be addressed unequivocally. Clarity with regard the retrospectivity of the PPAB within the core of the legislation would create certainty.

PROPOSAL:

41. SAGA's proposal is as follows: Performers should be remunerated when producers or royalty right holders are still generating a profit from earlier, pre-PPAB fixations. There is no reason to exclude a production that is still generating a flow of income down the value chain due to the original fixation having been made prior to the introduction of the PPAB.
42. The creation of retrospectively applicable legislation is permissible in South African law so long as it passes the test of reasonableness and rationality; is just and equitable in an open and democratic society and the rights affected are done so in justifiable purpose.⁸
43. In this case the performers' moral rights and exploitation rights have been infringed and therefore the direct remedy is for legislation to have those performers made whole through legislative means.

⁸ *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and Another* [2017] ZAGPPHC 231; [2017] 4 All SA 175 (GP); 2017 (6) SA 435 (GP).

44. SAGA proposes that the only limitation should be that imposed by the 25-year prescription on remunerative rights. CMOs should therefore be empowered to continue collecting on behalf of deceased performers and to transfer funds collected to the performer's heirs.

Prescriptive clauses versus contractual freedom.

45. Just as any employment contract is subject to provisions of the labour laws, a performer's contract should be subject to certain statutory provisions without infringing on the freedom to contract.

46. Freedom of contract should not be abused in an environment of asymmetrical bargaining power. SAGA submits that the PPAB should include the recognition of the unequal contracting powers between producers and performers and that there should be express protection rendered to performers for this reason.

47. A mandatory contractual provision does not imply a 'standard or fixed contract'. The contractual provisions envisaged as being mandatory should be designed to ensure *basic minimum* protections. Examples of this is the non-waiver of specific rights that performers possess.

48. The issue that some members of the Committee raised is that the right to freedom of contract is something that some view as beyond the remit of legislature. This is not always the case. The courts have recognised that there are unconscionable contracts,⁹ clauses in contracts that are unconstitutional and where unequal bargaining power is present.¹⁰ It is common for legislation to enforce some minimum protections for rights.¹¹ That is the whole purpose of the BCEA.

49. With regards to the rights of performers or performers certain rights – especially royalty and exploitation rights – should be unassailable while the other terms of the contracts can be variable and subject to contractual negotiation.

VI COMMENTS ON FURTHER AMENDMENTS TO THE PPAB

50. Clause 3 at Sections 3A (3)(a) and (b): The legislation should go further to explain what the standard and compulsory contractual terms should be. It seems that the legislature intends for performers not to be able to waive certain rights but without certainty in this clause it would be difficult to challenge the invalidity of a contract that is subject the PPA once enacted. The fact

⁹ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA); [2011] 3 All SA 345 (SCA) [2011] ZASCA 45 at para 21.

¹⁰ *Afrox Healthcare Ltd v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) [2002] 4 All SA 125 (SCA).

¹¹ Consumer Protection Act, 68 of 2008 at section 48.

that there is acceptance for the reality that there is an inequality of bargaining power in between producers and performers puts the onus of the drafters to ensure there is certainly in that protection. As this section currently stands there is no certainty.

51. Clause 4(c) – section 5(1)(1A) and (1B): While SAGA agrees that reporting must not be an onerous process there must still be consequences for those that negligently fail to register an act in terms of section 5(1). As much as knowingly failing to register an act is an offence there must be some corresponding consequence for negligence in this regard.
52. SAGA feels that it is also necessary for the PPAB to introduce penalties for parties who negligently fail to report acts contemplated in section 8 for commercial purposes. SAGA envisions that this penalty should not be in the form of an offence but, an administrative penalty. The negligent failure to report leaves those with an interest in the royalties or other rights associated with those acts prejudiced. There should be a financial penalty against the person who fails to report the acts, in order to incentivise compliance.
53. The responsibility to decide on penalties for the failure to report such acts would rest on the Copyright Tribunal. The patrimonial and non-patrimonial damage that can occur as a result of the failure to report acts contemplated in by this section should be issued in the form of a fine or penalty. The fine or penalty must be calculated in such a way as to be restorative for the prejudiced person or persons and punitive so as to create an incentive for parties to report matters.
54. Clause 2 — Section 3(1): The scope of protection provided under this section does not comply with the most international treaties, as it limits the protection to performances taking place, broadcast without a fixation or first fixed in South Africa, regardless of other criteria that is provided under most International Treaties.
55. Lastly, SAGA suggests that, in order to comply with international treaties, there should also be inclusion for the following:
 - 55.1. performers who are nationals of another country but have their habitual residence in the Republic;
 - 55.2. foreign performers when so provided by an International Treaty or Convention to which the Republic is a party;
 - 55.3. foreign performers who are nationals of a country whose legislation grants South African performers the same protection as it grants to its own nationals;
 - 55.4. performers, regardless of their nationality or place of residence, in respect of their performances —

- 55.4.1. taking place;
- 55.4.2. broadcast without a fixation;
- 55.4.3. first fixed,

in the Republic or in any other country when so provided by an International Treaty or Convention to which the Republic is a party.

VII CONCLUSION

SAGA welcomes the steps taken by the Department of Trade Industry towards enhancing the status of the performer. SAGA wishes to reiterate that legislative measures should be directed at both protecting performers and equipping and protecting them to adequately address the unequal power dynamics that are pervasive in the performance industry.

Should you require any further information regarding these submissions, please feel free to contact us via Adrian Galley on vicecpt@saguildofactors.co.za; or 082 901 5884.

Yours Sincerely



Adrian Galley
SA Guild of Actors Vice Chair