SAGA
SOUTH AFRICAN
GUILD OF ACTORS

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For Personal Attention: Ms.Unathi Ramabulana

11 February 2020

Dear Madam

Re: Submissions by the South African Guild of Actors to Government Notice Number R1591 dated 11 December, 2019 entitled: *"Intention to Deem Persons in the Firm and Television Industry as Employees for Purposes of* Some *Parts of the BCEA and LRA".*

The South African Guild of Actors ("SAGA") is a non-profit organisation (NPO number 119-128 NPO) constituted on 23 July 2009.

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.

SAGA has been a member of South African Screen Federation ("SASFED") since 2009. SASFED includes Producers, Writers, Editors, Agents, Animators and Actors' organisations and promotes collaboration in the Independent Production Sector to ensure the sector remains professional and retains standards.

We represent actors deemed to be employed in the television, film and live performance sectors of the entertainment industry. We are encouraged that the Department of Employment and Labour is seeking to formalize the Television and Film industry as there are many barriers to employment equity amongst our members.

We thank you for the opportunity to make representations on Government Notice Number R1591 of 11 December 2019. We also thank the Department for recognising that it is necessary to make provision for actors to be deemed employees in specific circumstances and encourage

the Department to continue to consider the rights of actors, (as workers in the audio-visual and live performance industry) who may be subject to unfair labour practises and unsafe working conditions as well as other exploitative practises.

We make these representations, mindful of the Constitution of the Republic of South Africa, 1996, more specifically Section 18 of the Bill of Rights which states that everyone has the right to freedom of association, while section 23 reads:

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23. Labour relations

1. Everyone has the right to fair labour practices.

2. Every worker has the right

a. to form and join a trade union;

b. to participate in the activities and programmes of a trade union; and

c. to strike.

3. Every employer has the right

a. to form and join an employers' organisation; and

b. to participate in the activities and programmes of an employers' organisation.

4. Every trade union and every employers' organisation has the right -

a. to determine its own administration, programmes and activities;

b. to organise; and

c. to form and join a federation.

5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

6. National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Our emphasis is that actors are often disabused of their right to choose their trade, occupation or profession freely under section 22 of the Constitution. This is as a result of a lack of legislative and other measures that give effect to that right which would be applicable to actors and other performers.

There are certain issues that are germane to the film and television industry. These issues mean that the provisions of the Labour Relations Act and other labour legislation are not directly applicable. For this reason, we propose that there be a sectoral determination so that these particularities can be addressed in the appropriate manner.

Furthermore, workers of the entertainment industry are not confined to television and film; this industry extends to live performance, streaming content online and other audio-visual recording and transmissions such as radio.

The National Development Plan 2030 aims to alleviate poverty and inequality in South Africa by 2030. The recognition of actors as deemed employees in pertinent provisions contributes to the ambitions of this plan, by providing that actors have a stable and reasonable working environment where they will not be subject to marginalisation or exploitation.

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The International Labour Organisation has published numerous reports that identify actors as atypical workers who need protection and employment benefit. The ILO has also stated that atypical work is a trend which is set to increase in the future, and as a result more and more actors will be in a position where, without formal recognition of their status, they will be vulnerable to exploitative labour practise.

In pursuing formal recognition for actors we suggest that their right to contract is a necessity and we recognise that the ability for parties to enter into contractual relationships and negotiations remains vital. This is also a right that cannot be relegated, but within the ambit of the right to contract there should be a minimum recognition of dignity and protections, especially where there exists unequal bargaining power.

For the reasons mentioned above we feel that the best solution for actors is for there to be a sectoral determination for the Audio-visual and Live Performance industry that considers the peculiarities and intricacies of the sector. This sectoral determination would allow for a more robust and exact regulations for the sector so that the intended protections of labour legislation can be afforded to them.

We now turn to each proposal in terms of Minister Nxesi's notice.

The National Minimum Wage Act:

Background "extras" are minimally skilled and, as such, are most deserving of the level of statutory protection afforded to casual workers under Section 4 of the Act. Actors who would be deemed to be employees and crew members, on the other hand, are trained in specialised skills and remunerated on a "professional" scale which extends beyond the range currently defined in the Act. However, competition law is being abused to prevent actors who would be deemed to be employees, from negotiating minimum recommended scales of remuneration and better working conditions. While the National Minimum Wage Act acknowledges sectoral determinations and collective agreements, actors are precluded from negotiating collectively. As nominal employees, atypical workers in the audiovisual and live performance industry thus require the right to collective bargaining. This right should be reflected in the LRA, allowing stakeholders to benchmark rates in line with a range of factors that apply uniquely to this industry.

Regarding professional actors as deemed employees; we believe that there should be higher benchmarks in terms of minim wages. For this reason, a sectoral determination would be beneficial. Actors need to reserve the right to contract and negotiate on rates based on role, experience and profile.

The provision of sectoral determination for workers in the audio visual and entertainment industry would allow for specific wage scales for different workers in the industry.

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Compensation for Occupational Injuries & Diseases Act 130 of 1993:

In the entertainment industry, the provisions of Section 89(1) (b) and 89(2) are mutually incompatible: freelance actors who would be deemed to be employees and crew members are frequently classed as contractors, effectively absolving the 'mandator' of their responsibilities.

SAGA submits that all actors, as deemed employees under the provisions of this Act, will be afforded the necessary protection.

Basic Conditions of Employment Act 75 of 1997

Section 20 and 21

In circumstances where the engagement of an actor is less than six months in duration or where the engagement is of such a length that no leave can be taken due to the short shoot or performance time, it is proposed that actors, as deemed employees, be paid out their leave at the end of the contract/employment period. This should be done in accordance with the 17 hours/1-hour schedule within section 20 of the Act.

Remuneration for annual leave could be recalculated in a different manner if there was a sectoral determination.

Section 22

Sickness among cast members in theatre or film is currently catered for in a manner that mitigates disruption to schedules. In musical theatre, for example, there are understudies and swings already on the payroll. In film, a cast member falling ill would result in a disruption to the shooting schedule. (Freelance crew members are often able to be swapped out, which is not possible with on-camera talent). In an extreme case, a replacement/recasting would be considered. These arrangements are generally dealt with in contract, but Section 22 could be crafted to reinforce the right of the freelancer not to be penalised for falling ill.

Section 23

It is entirely reasonable for the employer to require 'proof of incapacity' when such incapacity disrupts production and impacts on budget. It can be argued that this provision would also serve as a disincentive to abuse of the system and, as such, would be welcomed by employers.

As stated above it may be necessary for there to be sectoral determination for deemed employers and deemed employees to attain more clarity.

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Section 24

This section would depend to a large extent on how actors who would be deemed to be employees are accommodated in that legislation. It would be important to ensure that the statutory interdependence is explicit as the employer may end up being liable by default: *".. except in respect of any period during which no compensation is payable in terms of [COIDA]"*. The Occupational Health and Safety Act 85 of 1993 excludes freelancers from meaningful engagement in workplace safety issues. This means that actors, who would be deemed to be employees, may be excluded from formally engaging with the production about safety concerns.

The ability for those in the audio visual and live performance industry to engage in collective bargaining would be a simple solution so that there could be coordinated and meaningful engagement on the issue of safety as well as many others.

Section 25

This section may prove to be contentious as there are some performances that cannot be accommodated if the actor is pregnant. For this reason, an actor may be compelled to state that she is pregnant at her audition. Furthermore, if the time between the audition and the production is of such a nature that the actor would put on weight as a result of her pregnancy this may render her ineligible for the role and she would then have to be replaced. If she was replaced and her contract cancelled it is unclear whether she would be able to claim maternity leave pay from the UIF. For long form productions such as television programmes this would not be as problematic but for short form productions the navigation of this issue would require further information. What is not clear is when an actor would be eligible for maternity leave and when they would not be.

A sectoral determination would allow for the differences between this industry and normal labour.

Section 41

We submit that this section should only be applicable to actors, who would be deemed to be employees, who have contracted for a period of 12 months or longer.

Labour Relations Act 66 of 1995

To give full effect to Section 198B(10) (a), would require that actors are deemed employees for the purposes of Sections 4 and 5 of the LRA. The right to unionise and engage in collective bargaining - as enshrined in Section 23 of the Bill of Rights – must be extended to freelancers (recognised by the ILO as 'atypical workers').

It would be beneficial for the Department to further incorporate actors as deemed employees for the purposes of dispute resolution. Actors are often barred from approaching the CCMA by virtue of the fact that they are considered contractors or of freelancers. If they were able to approach the CCMA for relief this would have a diminishing effect

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on exploitative practises within the sector.

By virtue of the nature of the type and duration of work actors do, it is necessary for them to retain the tax benefits of Freelancers. Actors are currently deemed employees for the purposes of PAYE under the Fourth Schedule of the Income Tax Act 58 of 1962, but still recognised as independent under Section 23(m). This enables them to offset expenses incurred against income received in the course of a tax year. Should actors be considered ordinary salaried employees and subjected to the restrictions of Section 23(m), they may not be able to afford to work in the sector.

Again, a sectoral determination for the audio-visual and live performance sector could address these issues.

SAGA is concerned that if actors are deemed to be employees, they may lose their moral rights, exploitation rights and rights over the ownership of their image. This would be conflict with Performers Protection Amendment Bill and the Copyright Amendment Bill. Both bills have been passed at the National Assembly and the National Council of Provinces and are awaiting signature by the president.

South African Guild of Actors ("SAGA"), in conjunction with the UASA - The Union, has pioneered a voluntary bargaining forum with other industry stakeholders. The following stake holders were engaged:

Personal Managers Association (PMA); Animation South Africa (ASA),The Official South African Casting Association–Extras (OSCASA), Writers Guild of South Africa (WGSA), National Modelling Association (NAMA), South African Performing Artists Manager's Association (SAPAMA), Independent Producers Association (IPO), Sisters Working in Film TV & Theatre (SWIFT), South African Editors Guild (SAGE), The Independent Black Filmmakers Collective (IBFC), Documentary Filmmaker's Association (DFA) and SASC, the South African Society for Cinematographers.

The purpose of this voluntary process was and remains to create a Formal Bargaining Forum within the sector. Participants in the forum have met on numerous occasions and the parties have expressed a desire to establish a bargaining forum with the main purpose of creating collective agreements for the industry.

A draft Bargaining Forum Constituency is in the making. Our request to the Minister is to intervene in support of this voluntary process.

In conclusion, it is our considered view that this will be a tailor-made vehicle to build on the Minister's initiative. The creation of a Sectoral Determination would be best suited once the collective bargaining process is underway and having provided minimum standards.

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Should further clarification be sought by the Minister, we are most willing and eager to assist in the process.

Yours Sincerely

Jack Devnarain
South African Guild of Actors Chairman