

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **050968/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

A handwritten signature in black ink, appearing to read 'De Vos'.

Date: 20 September 2023

In the matter between:

PRETORIA FM NPC

Applicant

and

**THE CHAIRMAN OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA**

Respondent

JUDGMENT

[1] DE VOS AJ

[1] The applicant seeks leave to appeal against the judgment and order of this Court handed down on 16 January 2023 penned by Her Ladyship Justice Madam

Mngqibisa-Thusi. On 18 July 2023, the applicants requested the reconstitution of a new bench to hear the matter. In response, the Court was reconstituted, and the matter was heard on 4 August 2023. The parties raised no objection to the reconstituted bench.

- [2] The applicant seeks leave to appeal to the Supreme Court of Appeal. The application concerns the Court a quo's dismissal of the applicant's urgent interim relief. The applicant sought urgent relief in the context of a dispute about radio frequency licenses. The first respondent ("ICASA") had disqualified the applicant from pre-registering for community sound broadcasting service and radio frequency spectrum licenses ("ITPR"). The applicant had innocently short-paid the registration fee. The applicant paid R 2776 for each of its 17 applications when it was required to pay R 4118 for each of the applications. On this basis ICASA disqualified the applicant. The applicant complained that ICASA could have condoned the non-compliance with the registration fee and wished to review ICASA's decision. In the interim, to halt ICASA from continuing with the process, the applicant sought urgent interim relief, interdicting ICASA from considering the other applications. This urgent relief was dismissed by the Court a quo. The applicants now ask leave to appeal against the dismissal of their urgent interim relief.
- [3] The first issue which confronted the urgent Court was ICASA's point in limine that there had been a material non-joinder. The issue was that the applicant was one of a host of other entities who had applied for pre-registration. In fact, 105 entities had applied, of which 49 were disqualified. The effect is that 56 entities had applied and had been approved for pre-registration. These 56 were not cited, joined or given notice of the applicant's intention to seek urgent relief. The Court upheld ICASA's point of non-joinder.
- [4] The judgment of the Court a quo does not end there. The Court, concerned with providing the parties and a potential appellate court with a full set of reasons, considered the merits of Part A of the application. The Court concluded that the applicant had not met the requirements for an interim interdict and dismissed Part A. The effect is that despite finding a fatal non-joinder, the Court also considered the other issues raised in the application.

- [5] This Court now has to decide whether another Court would come to a different conclusion on appeal. The test is whether there “exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”¹ The test has to be a realistic chance of success on appeal’ and an arguable case is insufficient,² otherwise, scarce judicial resources will be wasted.³
- [6] I conclude that there are no such prospects. There are various grounds on which ICASA contends no other court would come to a different conclusion. Fatally, however, to any application for leave to appeal is the issue of non-joinder. Regardless of the merits of any other ground of appeal, the issue of non-joinder stands in the way of the applicant’s leave to appeal.
- [7] The applicant did not join the other parties who had responded to the invitation to pre-register. The interdict sought by the applicant would, if granted, halt⁴ the entire process for other invitees who had complied with the requirements of the invitation. Worse, as some of the invitees had complied with the requirements and had been so pre-registered, they had acquired a vested right in the evaluation process. ICASA tells the Court there are 56 such applications. Their pre-registration is affected by the relief sought by the applicant. The applicant’s relief, if granted, would prohibit ICASA from furthering these other invitees’ applications. In short, the relief sought by the applicant would affect the other invitees and the finalisation of the entire process. These other invitees had a direct and substantial interest in the relief sought by the applicant.
- [8] ICASA raised the issue of non-joinder in its answering affidavit. ICASA pleaded that
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¹ Ramakatsa and Others v African National Congress and Another [2021] ZASCA 31 (31 March 2021) at para 10.

² MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176 (25 November 2016) at para 17.

³ See also Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at para 34 and S v Smith 2012 (1) SACR 567 (SCA) at para 7

⁴ See, for example, Independent Newspapers (Pty) Ltd v Minister For Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC) at para 17 and SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) at para 9

“these parties have a direct and substantial interest in the outcome of this application, In part A, Pretoria FM seeks an order for ICASA to be interdicted and restrained from considering the pre-registration for prospective community sound broadcasting services and radio frequencies. This relief is far-reaching in that it does not only affect Pretoria FM, it affects all applicants to the ITP-R process.”

- [9] ICASA even provided the applicant with the names of all invitees in a detailed annexure. The annexure indicated who had been disqualified and which entities had not been disqualified. After receiving ICASA's answering affidavit, the applicant knew who the other affected parties were, and it was alerted to their interest in the matter. The applicant did not seek their joinder.
- [10] ICASA raised the issue again in its written submissions before the urgent hearing. The applicant could, at this stage, seek the joinder of the other invitees. The applicant did not do so. The effect is that when the matter arose in the urgent Court, ICASA raised the non-joinder of a necessary party.
- [11] The applicant contends in its grounds of appeal that the Court a quo erred in finding that the other invitees were necessary parties and had to be joined. The applicant contends that the issue of joinder would only arise when Part B is heard. That is not so, as the other invitees' rights would be halted – with their applications prohibited from finalisation as a result of the relief sought in Part A.
- [12] The law is clear: a court must refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation have been joined as parties.⁵ As this was a joinder of necessity, there is no prospect another Court would come to a different conclusion; in fact, it is the type of joinder in respect of which a court has no discretion.⁶
- [13] The Court has spent time considering whether a finding of non-joinder ought to have resulted in an order which permitted the applicant an opportunity to join the necessary parties. However, that is not the relief which the applicant persisted with before this Court in the application for leave to appeal. The applicant contended that it had prospects of success on appeal. The Court is not comforted by the merits of

⁵ City of Johannesburg v SALA (2015) 36 ILJ 1439 (SCA); see also Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA); and Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA).

⁶ Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA) at para 9, citing also Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

the appeal in the absence of any of the necessary parties being joined. It would also not be in the interest of justice for the matter to be heard by the Supreme Court of Appeal – only to be confronted with a fatal non-joinder.

[14] The Court a quo followed a belts and braces approach to the matter. It considered the further points raised by the applicant. The Court limits its considerations to the non-joinder point, not only as it is dispositive of the application for leave to appeal, but it also ensures that no finding from this Court interferes with Part B of the application.

[15] As to the issue of costs, the Court is mindful of the Biowatch-principle in which a person seeking to enforce constitutional rights ought not to be ordered to pay costs if they have not litigated frivolously or vexatiously. There is no basis for concluding the applicant has litigated vexatiously.

Order

[16] As a result, the following order is granted:

- a) The application is dismissed.
- b) There is no order as to costs.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	FJ Labuschagne
Instructed by:	Hurter Spies Inc
Counsel for the Respondent:	T Motau SC

Instructed by:

Date of the hearing:

Date of judgment:

M Musandiwa

Motsoeneng Bill Attorneys

4 August 2023

22 September 2023