



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

33963/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 12 JANUARY 2023
SIGNATURE

In the matter between:

WALKING ON WATER TELEVISION (PTY) LTD

Applicant

and

INDEPENDENT COMMUNICATIONS AUTHORITY

OF SOUTH AFRICA

First

Respondent

KEABETSWE MODIMOENG N.O

Second Respondent

DEUKOM (PTY) LTD

Third Respondent

Summary: Administrative Law – PAJA review launched 5 years after the administrative action – undue delay – condonation for launching review beyond the 180 day period contemplated in section 7(1) of

PAJA and extension of time as provided for in section 9 of PAJA refused.

ORDER

1. The application for the extension of the 180 day period contemplated in section 7 of the Promotion of Administrative Justice Act 3 of 2000 is refused.
2. As a consequence, it is declared that this court has no authority to entertain the merits of the review application.
3. The application is therefore refused with costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 18 February 2016 the Independent Communications Authority of South Africa (ICASA) refused an application by Walk on Water Televison (Pty) Ltd (WoWtv) for the authorization of nineteen video and eight radio channels. On 9 July 2021 WoWtv launched an application for the review of the refusal

decision and sought an order for the extension of the 180 day period contemplated in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) until date of delivery of the application.

Chronology

[2] In any application where condonation is sought for a procedural delay or where an extension of time is sought in respect of a prescribed period, the chronological history of the matter is of prime importance. In this case, it can be summed up as follows:

- | | |
|-------------------|--|
| 27 August 2006 - | WoWtv applied for a broadcasting licence on the basis of it being an “uncompromisingly Christian – based television station”, airing “a majority of local content”. It proclaimed itself to be a broadcasting station that cater for and “is safe for the whole family”. The contents of its programs would be “packaged” in South Africa and it had “no involvement” with any non-RSA interest. |
| 7 June 2007 - | ICASA held public hearings in respect of WoWtv’s application for a broadcasting licence. |
| 15 March 2011 - | WoWtv is granted a broadcasting licence. A condition thereof was that “... <i>the licensee is licensed to provide a subscription broadcasting service (and the) licensee shall provide a God-based service which targets all people without exception</i> ”. |
| 16 January 2015 - | ICASA received a letter from the attorneys of a licensed broadcaster, Deukom (Pty) Ltd, alerting it to |

allegations that an unauthorized German broadcaster intended using the licence of an existing authorised broadcaster to offer its channels. ICASA was warned that WoWtv would be the targeted broadcaster and that an application by WoWtv for additional channels was imminent. Criminal and civil proceedings had already been instituted against the German broadcaster, but to date of the answering affidavit, to no avail.

- 15 April 2015 - WoWtv applied for additional channel authorization in terms of Regulation 3 of the Subscription Broadcasting Services Regulations¹. The additional channels proposed German content and corresponded to the channels referred to in the letter from Deukom's attorneys.
- 22 June 2015 - Although not required to do so, but in view of the letter from Deukom's attorneys, ICASA resolved to publish WoWtv's application for public comment. This was done by way of publication in the Government Gazette.
- 25 June 2015 - Two objections to WoWtv's application were received. One from Deukom and one from Multichoice/M-Net.
- 28 July 2015 - WoWtv responded to the objections but, in the opinion of ICASA inadequately so. Consequently

¹ Notice 152 of 2006 published in Government Gazette No 28452 of 31 January 2006.

ICASA required WoWtv to address certain issues at a public hearing. These included concerns as to how German programmes would appeal to the South African population given that German is a minority language in this country, concerns regarding the impact such channels on WoWtv's local content obligations and concerns expressed by Deukom that some of the proposed channels contain content which is profane and obscene and which are contrary to the Christian values previously espoused by WoWtv.

- 30 October 2015 - The public hearings were conducted. Extracts from the transcript of the hearings form part of the record in these review proceedings.
- 19 November 2015 - WoWtv was afforded a further opportunity to submit responses to the concerns raised.
- 18 February 2016 - ICASA communicated its decision to refuse the application for additional channel authorization to WoWtv.
- 24 May 2016 - ICASA furnished reasons for its decision.
- 9 July 2021 - The review application was lodged.

The law regarding the timing of review applications

[3] Section 7 of PAJA provides that “*proceedings for a judicial review*” of an administrative act must be instituted “... *without reasonable delay and not later than 180 days*” after the date of the reasons furnished for the decision.

[4] Should a party not be able to comply with the 180 day requirement, such a party may apply to a court for an extension thereof as provided for in section 9 of PAJA, which extension may be granted “*where the interests of justice so require*”.

[5] At the outset, the importance of the 180 day cut-off period needs to be emphasised. It is a statutory codification of the “delay rule” which has been in existence prior to the promulgation of PAJA².

[6] In *Gqwetha v Transkei Development Corporation & Others*³ the court found as follows in its majority decision at [22] – [23]:

“It is important for the efficient functioning of public bodies that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale of the longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions Underlying the latter aspect of the rationale is the inherent potential for prejudice, both to the effective functioning of the public body and to those who rely on its decisions, if the validity of its decision remains uncertain ...”.

² See inter alia *Harnaker v Minister of the Interior* 1965 (1) SA 3 72 (C).

³ 2006 (2) SA 603 (SCA).

[7] The above decision was quoted with approval in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited (OUTA)*⁴. The court of appeal then went further (at [26]): “At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an undue delay and, second, if so, whether the delay should in all the circumstances be condoned ... Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature’s determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is predetermined by the Legislature: it is unreasonable per se”.

[8] What then is the remedy for an applicant if it exceeded the 180 day period? The answer, already given in para 4 above, lies in an application for the extension of time. In *OUTA* (above) the Supreme Court of Appeal has dealt with what the position would be in a case where no extension is granted (also at [26]): “It follows that the court is only empowered to entertain the review application if the interests of justice dictates an extension in terms of section 9. Absent such an extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters”.

[9] This jurisdictional aspect was the subject matter in *Passenger Rail Agency of South Africa v Siyangena Technologies (Pty) Ltd (PRASA)*⁵.

⁴ [2013] 4 All SA 639 (SCA).

⁵ *Passenger Rail Agency of South Africa (PRASA) v Siyangena Technologies (Pty) Ltd* (7839/2016) ZAGPPHC (3 May 2017

[10] In *PRASA* the court found that, for purposes of adjudicating the considerations referred to in section 9 of PAJA, a “*focused application is required*”.

[11] In *PRASA*, reference was also made to *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*⁶ and *City of Cape Town v Aurecon SA (Pty) Ltd*⁷ wherein it has been confirmed that knowledge of improprieties (if any) is irrelevant for purposes of calculating the starting date for the section 7(1)(b) 180-day period. The starting date is when knowledge of the decision and the reasons for it is acquired or “*ought reasonably to have become known*” to the applicant.

[12] In making an application for extension of time, a party doing so, in similar fashion as a party applying for condonation for a delay in taking steps within a prescribed period, must furnish full and reasonable explanations for the delay, covering the entire period of delay, deal with the effect of the delay on administrative justice and the rights of other parties, the importance of the issues raised in the review proceedings and the prospects of success⁸.

The grounds for extension of time

[13] WoWtv’s sole reason for not having launched the review application in time, is simply that it did not have money to do so. It further blames ICASA for the delay occasioned between the lodging of the application for authorization of the proposed channels and the final determination thereof.

[14] WoWtv formulated its grounds as follows:

“The reasons for the delay

⁶ 2017 (6) SA 360 (SCA).

⁷ 2017 (4) SA 223 (CC).

⁸ *Deltatex Holding Ltd v Exxaro Coal (Pty) Ltd* (166/2012) [2019] ZAGPPHC (6 June 2019) at para 37.

62. Had ICASA not delayed its processing of the channel authorisation application, WoWtv may well have had the financial resources needed to take the impugned decision on review. But by the time the written reasons were published, more than 14 months after the application had been submitted, WoWtv was simply unable to proceed, by that stage (sic), the serious financial sacrifices that WoWtv's founders had made had come to naught".

[15] The reasoning contained in this paragraph somewhat defies logic. It is premised on a lack of funds, which situation could presumably have been remedied, had the authorization been granted. But, if the authorisation had been granted, there would have been no review. No other particulars have been furnished as to what occurred between the time of lodging of the application and the determination thereof. WoWtv's claim that the delay has left WoWtv too destitute to pursue a review application, must then presuppose that it had no funds to begin with and was optimistically dependent on future revenue from the proposed German channels. It has not been disclosed what "financial sacrifices" WoWtv's funders had made (or could no longer make) which could give any substance to this contention. No evidentiary material backing this rather illogical claim had therefore been produced.

[16] The lack of particularity is exacerbated by the failure to provide any concrete figures or details of WoWtv's alleged lack of funding. In the reasons provided by ICASA for its decision, it referred (in para 5.2.3 thereof) to WoWtv's assertion in response to the concerns raised by ICASA, to the effect that "... with a single channel in operation, WoWtv has approved a monthly budget of R10 m for WoWtv studios to produce local content for WoWtv". It was not explained how a broadcaster with such a substantial monthly production budget cannot afford a simple review application.

[17] Apparently further, so WoWtv's response to ICASA went, WoWtv studios "... *had negotiated strict content acquisition measures which allows us to spread the cost of the content acquisition. This means that WoWtv will not be incurring any upfront costs in relation to the channels but has purchased these channels so that content costs obligations match subscriptions. In other words, in order to manage the costs of acquisition WoWtv pays for content on an 'on demand basis'*". This statement seemingly contradicts the subsequent founding affidavit in the review application wherein it is claimed that the refusal of the additional channel authorisation caused poverty.

[18] WoWtv also relied on complaint proceedings lodged against it in January 2018 for not having commenced its operations within the initial prescribed 12 months of the granting of its authorization in 2011⁹. This period had later been extended to 24 months but the complaint (referred to as a "charge") had been dismissed by the Complaints and Compliance Committee¹⁰ (the CCC). During those proceedings, WoWtv sought to have the refusal of its application for additional channels overturned. The CCC had no jurisdiction to do so and refused this relief. While WoWtv has since (correctly) conceded that the CCC had no such jurisdiction, it relied on those proceedings and the judgment given therein as follows: "*It was only on 6 August 2018, when the CCC released its judgment, that WoWtv realized that it had a strong case, on the merits, to have the impugned decision reviewed and set aside*".

[19] Having come to the above realization, albeit already two years after the application for authority had been refused, WoWtv again relied on an alleged lack of funding as a reason why this realization had not been acted upon. WoWtv claimed: "*But again, it was no in a financial position to embark on what would undoubtedly have been opposed proceedings. It is only now, almost*

⁹ Regulation 5(c) read with Schedule 2 of the Regulations Regarding Standard Terms and Conditions for Individual Licences as published in Government Gazette No 33294 on 14 June 2010 imposed this obligation.

¹⁰ An independent administrative tribunal of ICASA.

three years later, that we are finally in a position that allows us to initiate these legal proceedings”.

[20] What is clear from the above, is that WoWtv’s claims of poverty have been pleaded in the vaguest possible and generalized terms. This generality was also intended to cover the whole period of delay, without any specificity. For a corporate entity with, on its own version, a monthly production budge of R10 million, this is simply not good enough.

The effect of the delay on the administrative of justice and other parties

[21] WoWtv conceded that this factor “ordinarily” plays an important role in review proceedings but contended that there “is no potential” for a decision in its favour having an effect on ICASA or any other party. This mere say so, ignores the rights of Deukom, an authorised broadcaster with German content. Conceivably it positioned itself in the market and has done so in the past six years based on the position of its competitors who had been licensed. A timeous review, if successful, would equally conceivably have impacted on its projections of revenue streams. The issue of competition between channels was conceded by WoWtv before the CCC. Delays in prosecuting a review resulted in a status quo having been maintained for a substantial period of time for its competitors. Time lapse and entrenchment of circumstances therefore impact on parties other than the applicant in the review application. It is for reasons like these that our courts have found that undue delays should not easily be tolerated. The lapse of time in this case is similar to that in *OUTA* where the court has found (at para 41) as follows: *“After all is said and done, the stark reality remains that because of the delay in bringing the review application, five years had elapsed since the impugned decisions were taken and that during those five years things have happened that cannot be undone. The delay rule gives expression to the fact that there are circumstances in which it is contrary*

to the public interest to undo history". Although the circumstances of this case are different from those where a successful tenderer had proceeded for five years in terms of an administrative act which is sought to be reviewed, WoWtv's assertion that its application operates in a vacuum devoid of consequences for other licensees cannot be accepted at face value and the consequences of a delay in prosecuting a process which may impact on others, even if only indirectly, is weighted against WoWtv.

[22] The length of the delay also encroaches on the public interest element residing in the need for finality of administrative actions referred to in paragraphs 6 and 7 above.

Important questions of law

[23] WoWtv contended that its review application raised important questions of law. I agree, however with the respondent's counsel that the present application is not much different from an "ordinary" review application with little legal complexities. The only issue of some substance may have been whether it was competent for ICASA to call for public participation and whether a delay resulting from that should be tolerated or not. Insofar as WoWtv relied on an alleged need for clarity from this court in this regard, there were no indications from any of the papers that this was a vexed procedural aspect which required determination. In the five years since the decision in question, this issue has not caused any procedural uncertainty for any number of other parties. I find that the application raised no "important questions of law" which would outweigh the delay rule considerations.

The prospects of success

[24] The simple fact of the matter is that WoWtv had applied for a broadcasting licence based on the offering of wholesome "God-based" content

with high local content. Such a licence was granted, incorporating as its conditions, the basis on which WoWtv had applied for it. The application for an additional 27 broadcasting channels primarily in German and with German “packaged” content, fundamentally changed the picture even though WoWtv was not a religious channel. When WoWtv failed to address ICASA’s concerns regarding this, the application was refused. Arguments raised by WoWtv that, in effect, all content is “God-based” and ICASA’s disagreement therewith, are not grounds for review, but stray into the realm of an appeal, which falls outside a PAJA review.

[25] Had WoWtv applied for the amendment of the conditions of its original license, the matter might have had a different outcome. In furnishing its reasons, ICASA had as long ago as 24 May 2016 alerted WoWtv of this aspect, which had, to date not been pursued.

[26] The prospects of success therefore appears to be too scant to tilt the scales in favour of WoWtv to such a degree that it would compensate for a five year delay in launching the review application.

Conclusion

[27] WoWtv had failed to convince this court that this is a matter where a delay in excess of five years to launch a PAJA review should be condoned and that an extension of a time period as contemplated in section 9 of PAJA to cover the period of delay beyond the 180 days contemplated in section 7 of PAJA should be granted. The consequence is that this court is therefore precluded from adjudicating the review application. Having reached this conclusion, I find no cogent reasons why the customary consequence that costs should follow the event, should not apply.

Order

[28] In the premises the following is made:

1. The application for the extension of the 180 day period contemplated in section 7 of the Promotion of Administrative Justice Act 3 of 2000 is refused.
2. As a consequence, it is declared that this court has no authority to entertain the merits of the review application.
3. The application is therefore refused with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 9 November 2022

Judgment delivered: 12 January 2023

APPEARANCES:

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