IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED:
22/2/24	
DATE	SIGNATURE

CASE NO: 49918/2021

In the matter between:

NATIONAL COUNCIL OF AND FOR PERSONS WITH DISABILITIES Applicant

and

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Respondent

---

JUDGMENT

TOLMAY J

1. This application concerns regulations promulgated by the Independent Communications Authority of South Africa (ICASA) that set out the requirements that licensees must meet to accommodate persons with disabilities, in this instance specifically the rights of hearing-impaired people. The applicant (NCPD) is a voluntary association which advocates for the rights of persons with disabilities.

2. On 9 April 2021 ICASA promulgated the Code for People with Disabilities Regulations, 2021 (the Code). The purpose of the Code is to prescribe a Code to be adhered to by electronic communication service and television broadcasting licensees to ensure that persons with disabilities have access to these services. The crux of the complaint is that most of its submissions were not incorporated in the Code. NCPD contends that the Code fails to fulfill ICASA's mandate under s 7(2) of the Constitution[1] (the Act) to protect the rights in the Bill of Rights, in particular it fails to ensure that broadcasters make news and other broadcasts of national importance accessible to deaf and hearing-impaired people.

3. NCPD seeks in terms of the Promotion of Administration Justice Act[2] (PAJA) to review and set aside ICASA's decision to make and publish the Code and asks that it be referred to ICASA for reconsideration.

4. ICASA alleges that the court no longer has jurisdiction to entertain the review due to an undue delay in bringing the application and no full and reasonable explanation was provided for the delay.

5. The Code was published on 9 April 2021 together with the reasons for adopting it. It is common cause that the NCPD became aware of the decision on the date when the Code and reasons were published.

6. Section 7(1) of PAJA states that judicial review proceedings 'must be instituted without unreasonable delay' and 'not later than 180 days after the date' on which proceedings instituted in terms of internal remedies contemplated in s 7(1)(a) have been concluded, or on which the person concerned was informed or could reasonably be expected to have been aware of the administrative action and the reasons for it. In this instance no internal remedies were applicable.

---

[1] Constitution Act 108 of 1996.
[2] Administration Justice Act 3 of 2000.

7. The founding affidavit does not give any explanation for the delay. NCPD only says that it became aware of the fact that most of its submissions were not taken into consideration by ICASA during April 2021, but denies that it knew that it had a cause of action for judicial review proceedings at that stage. Its attorneys wrote a letter to ICASA on 11 August 2021 inquiring why their submissions were not taken into consideration, and it is alleged that it was only after ICASA failed to respond to this letter that it became aware that it had a cause of action for judicial review. In this regard it is important to note that the reasons for the decision was published at the same time as the Code and the review relief is directed at the decision to make the Code and not the decision not to adopt NCD's submissions. The review application was finally served on 8 October 2021.

8. Section 5(1) of PAJA requires that a person whose rights have been adversely affected, and who has not been given reasons, may within 90 days after the date on which that person became aware of the action request that the administrator concerned furnish written reasons. The request for reasons was delivered outside the 90-day period prescribed.

9. In *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*[3] (*OUTA*) the Supreme Court of Appeal explained the two-stage enquiry that should be embarked on. The first is whether the delay was unreasonable and the second is whether the delay should in the circumstances be condoned. When s 7(1) of PAJA finds application 'Before the effluxion of 180 days, the first inquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature: it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9'. Whether the delay was unreasonable is a factual enquiry having regard to the circumstances of the matter

[3] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* (90/2013) [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) para 26.

upon which a value judgment is made.[4] '. . . the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken'.[5]

10. Whether condonation should be granted 'involves a factual, multi-factor and context sensitive enquiry in which a range of factors, the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits, are all considered and weighed before a discretion is exercised one way or the other'.[6]

11. NCDP relied on *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*[7] (*Joubert*) where it was said that although the delay in launching a review application in less than 180 days can be unreasonable, that cases of this sort will be rare and will have exceptional circumstances and since PAJA came into being the 180-day limit has tended to be regarded 'as the dividing line between reasonable and unreasonable delay'. It was argued that if an organ of state asserts that a review brought within 180 days of an administrative decision was unreasonably delayed it must demonstrate that rare and exceptional circumstances rendered it so, and ICASA has not. However, it was also contemplated that if a delay of less than 180 days is found to be unreasonable, a court may enquire whether an acceptable explanation is given and if it has to condone it.[8] It is also true that litigants should 'be encouraged to engage with adversaries in an effort to find acceptable settlements, rather than be forced into rushing to court, lest they be non-suited for their delay'.[9] In so far as the court placed an additional onus on a state organ to prove exceptional circumstances I disagree with that view, as it is not consistent with the clear wording of the section

---

[4] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) at para 48.
[5] Ibid para 49.
[6] *Valor IT v Premier, North West Province and Others* (332/19) [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) at para 30.
[7] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* (3191/2013) [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) at para 40.
[8] Ibid para 42.
[9] Ibid para 55.

and a tendency that may have developed cannot supersede legislation. When the judgment is read in context it went on to acknowledge that the facts remain determinative of whether the delay was unreasonable or not.

12. It is also clear from the authorities referred to and others in the same vain[10] that a delay of less than 180 days could be unreasonable, depending on the specific prevailing circumstances.

13. This then must lead to an evaluation of the facts in this case. The first inquiry is into the reasons for the delay. It is common cause that NCPD became aware of the decision and reasons on 9 April 2021. Despite not being satisfied with the decision, ICASA was only requested to provide reasons on 11 August 2021. The wording of the letter is instructive, in this letter the request was not for reasons for the decision, but rather reasons as to why NCPD's submissions were not adopted. In addition this was only done four months after becoming aware of the decision and the reasons for it. NCPD then waited another two months before it launched this application.

14. The founding affidavit does not give a full explanation for the reasons for the delay or the period of the delay. There is no explanation why NCPD waited four months to ask for reasons and a further two months before filing the application.

15. In the replying affidavit the following further reasons were provided for the delay:
    a) The relief sought is the vindication of the fundamental rights of hearing-impaired persons.
    b) After publication legal advice was sought.
    c) The reasons provided were inadequate and NCDP was unable to understand the reason why most of its submissions were not included in the Code.
    d) Prior to instituting the application NCDP's attorneys sent letters to ICASA during June to enquire why most of its submissions were not included.

---

[10] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* (231/19) [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453 (SCA) at para 64.

16. The fact that the relief sought will impact on important rights does not exempt NCDP from complying with its statutory obligations. More about this later.

17. NCDP complained that there was no response to its request in terms of s 5(1) of PAJA within 90 days from the request as provided for in s 5(2), as previously stated the request was not for reasons for the decision, but only for reasons of why its submissions were not incorporated. Significantly there is no explanation for the failure of NCDP to request reasons within 90 days as required by s 5(1).

18. Unfortunately, there is no explanation why steps were not taken earlier to obtain legal advice, nor does the founding, or for that matter, the replying affidavit explain the whole period of the delay. The distinct impression is created that, for reasons that remain unclear, NCDP waited out the 180-day period deliberately and on the very last day launched the application.

19. In the answering affidavit ICASA explained why the delay was unreasonable. The Code imposed a long list of steps which licensees are required to comply with. The Code came into operation 18 months after the date of its publication in the Government Gazette. This period was intentional and allowed the licensees time to comply. ICASA says that both the public and the licensees would suffer prejudice if the implementation of the Code is delayed. In addition, the licensees would have incurred costs to comply with the Code.

20. It was also pointed out that by the time the application was heard the Code would be operational and the licensees would have changed their position to comply with the Code. The matter was only heard on 9 November 2023. The Code has come into operation; the public expects compliance and the licensees had complied and incurred irreversible costs to ensure compliance. The implementation could have been prevented by an interdict and if that was done possible prejudice to all concerned could have been limited or even prevented.

21. In *Associated Institutions Pension Fund and Others v Van Zyl and Others*[11] *(Van Zyl*) it was stressed that the prejudice that might be suffered by people and institutions who might have arranged their affairs based on the presumed validity is a primary concern when the reasonableness of the delay is considered.

22. In *Gqweta v Transkei Development Corporation*[12] (*Gqweta*) the rationale for the rule that an application should be brought without undue delay was said to be twofold firstly a delay may cause prejudice to the respondent and even more importantly 'there is a public interest element in the finality of administrative decisions and the exercise of administrative functions'.[13] The financial prejudice that institutions may suffer because they have arranged their affairs on the bases of the presumed validity of the administrative action is also relevant.[14]

23. The rights that NCPD seeks to protect are indeed important, but this fact does not give it license to delay the bringing of the application without providing a reasonable explanation, or not to take steps to limit prejudice to all effected parties.

24. As far as consideration of the prospects of success on the merits are concerned, the relief sought, is a prayer to set aside the decision, where the actual complaint is that all NCPD's submissions were not incorporated in the Code. The complaint is also not that the submissions were not considered, or that NCPD was not given the opportunity to make submissions. There is no obligation on ICASA to adopt all the submissions made. The papers indicate that NCPD's submissions were considered and reasons for not incorporating them are set out in ANNEXURE AA1 to the answering affidavit.

25. It is essential that parties interested in legislation be given an opportunity to be heard and that their submissions be given due consideration.[15] The administrator

---

[11] *Associated Institutions Pension Fund and Others v Van Zyl and Others* (268/03) [2004] ZASCA 78; [2004] 4 All SA 133 (SCA); 2005 (2) SA 302 (SCA).
[12] *Gqweta v Transkei Development Corporation* 2006 (2) SA 603 (SCA) at paras 22-23.
[13] Ibid para 22.
[14] *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA).
[15] *Doctor's for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 235; *Democratic Alliance and Another v*

is therefore obliged to receive submissions and give due consideration to it but is not obliged to adopt the submissions.[16] In the circumstances of this case there is no reasonable prospect of success on the merits.

26. In the light of the circumstances, the delay was unreasonable and the application should be dismissed.

27. Since NCPD's intention was to protect the rights of persons with disabilities the principle set out in *Biowatch Trust v Registrar Genetic Resources and Others*[17] (*Biowatch*) should be followed and no order as to costs should be made.

The following order is made:

1. The application is dismissed.

R G TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Masondo NO and Another (CCT29/02) [2002] ZACC 28; 2003 (2) BCLR 128; 2003 (2) SA 413 (CC) at paras 42-43.

[16] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) at paras 62-63.

[17] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

APPEARANCES:

Counsel for Applicant	: Adv E Webber
Attorney for Applicant	: Webber Wentzel
Counsel for Respondent	: Adv K Tsatsawane SC; Adv L Mnisi
Attorney for Respondent	: HM Chaane Attorneys Incorporated
Date of Hearing	: 9 November 2023
Date of Judgment	: 22 February 2024