THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 402/03

In the matter between:

RADIO PRETORIA Appellant

and

THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA 1st Respondent

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA 2nd Respondent

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Coram: *Mpati DP, Streicher, Navsa, Heher et Van Heerden JJA*

Date of hearing: **16 August 2004**

Date of delivery: **2 September 2004**

Summary: **Application of s 21A of the Supreme Court Act 59 of 1959 – consideration of s 21A(3) – whether exceptional circumstances present justifying a hearing of the appeal – repeated warnings by Court against persisting with appeals that will have no practical effect or result being ignored.**

JUDGMENT

NAVSA JA:

[1] On 16 August 2004 this appeal was heard and dismissed in terms of s 21A(1) of the Supreme Court Act 59 of 1959 (the SC Act). The following order was made:

'1. The appeal is dismissed.

2. Appellant is to pay:

(a) all costs occasioned by the application for amendment of the Notice of Appeal.

(b) all costs in relation to the appeal incurred after 30 June 2004.'

Reasons for the order were to follow. These are the reasons.

[2] Subsections 21A(1) and 21A(3) of the SC Act provide as follows:

'(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

…

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

[3] There have been too many appeals in the recent past which have been dismissed by this Court on the basis set out in the statutory provisions referred to in the preceding paragraph. This unfortunately appears to demonstrate that a number of appeals that have no prospect of being heard on the merits are being persisted in: *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA), *Western Cape Education Department and Another v George* 1998 (3) SA 77 (SCA), *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA), *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA), *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA).

[4] The primary question in this appeal was whether a judgment by this Court would indeed have any practical effect. An answer in the negative, absent the exceptional circumstances referred to in s 21A(3) of the SC Act, would mean that the appeal was destined to be dealt with like those referred to above.

[5] The background facts against which this question fell to be decided are set out briefly in the succeeding paragraphs. As will become apparent the path to the appeal before this Court was protracted and convoluted.

[6] Second respondent, the Independent Communications Authority of South Africa (ICASA), is in terms of the Independent Communications Authority Act 13 of 2000 (the Act) presently the statutorily entrenched authority that issues radio broadcasting licences. ICASA came into being on 1 July 2000. The first respondent is its chairperson.

[7] The appellant company (Radio Pretoria) was incorporated in 1994 in terms of s 21 of the Companies Act 61 of 1973. In 1995 the Independent Broadcasting Authority (the IBA), the second respondent's immediate statutory predecessor, granted Radio Pretoria a temporary one-year licence to conduct business as a community radio station and broadcaster.

[8] In 1996, 1997 and 1998, further one-year licences were granted by the IBA to Radio Pretoria to continue broadcasting as a community radio station.

[9] When Radio Pretoria applied for its fifth consecutive temporary licence for the period 30 April 1999 to 29 April 2000, a dispute arose with the IBA concerning signal distribution licences for twelve relay stations. As a result of negotiations a licence was issued in terms of which Radio Pretoria could continue broadcasting via its Kleinfontein transmitter as well as through twelve signal distribution stations.

[10] On 10 February 2000 Radio Pretoria applied to the IBA for a temporary community sound broadcasting and signal distribution licence to continue as a radio broadcaster for the period 30 April 2000 to 29 April 2001 on the same terms and conditions as had applied in the previous year.

[11] After the preliminary statutory procedure was followed ICASA, which (as stated above) succeeded the IBA from 1 July 2000, set up a committee, duly delegated, to deal with the application. The committee, consisting of three ICASA members, conducted a hearing during September and October 2000 at which Radio Pretoria made oral and written representations.

[12] Subsequent to the hearing the committee wrote to Radio Pretoria asking it to further address, in writing, questions that had been raised during the hearing, namely *inter alia,* the question of community involvement in the election of its board of directors and its stated strict policy of employing only Boere-Afrikaners.

[13] Radio Pretoria responded in writing, contending that it acted in accordance with its articles of association and that it had done all it could to actively encourage the communities it served to become members. It was unrepentant concerning its employment practices, which it stated were necessary to preserve its cultural and overall identity.

[14] After having regard to the report of the committee that considered Radio Pretoria's application, the Council of ICASA decided to refuse the application for a temporary licence. On 28 February 2001 ICASA wrote to Radio Pretoria informing it of that decision.

[15] On 10 July 2001 ICASA supplied reasons for the refusal. It stated that, in terms of Radio Pretoria's articles of association, not every member of the community it served was *entitled* to become a member, and that, as

only persons nominated or appointed by the board of directors by majority vote could become members, for all practical purposes membership of Radio Pretoria was restricted to those persons invited by the Board to become members. The Board of directors of Radio Pretoria was, in turn, elected by members at its annual general meeting. Simply put, ICASA took the view that, since the directors nominate or appoint the members and the members elect the directors, the form of governance followed by Radio Pretoria was undemocratic and in contravention of s 32(3) of the Broadcasting Act 4 of 1999 ('the BA Act'). This section provides that a licencee must be managed and controlled by a board that must be democratically elected from members of the community in the licensed geographical area.

[16] In respect of Radio Pretoria's practice of employing only Boere-Afrikaners, the following was stated by ICASA as a ground for refusing the application:

'31.1 The applicant's policy of only employing Boere-Afrikaners amounts to discrimination against other persons on the basis of race, ethnic or social origin, colour, religion, belief, culture and language, as contemplated in section 9(4) of the Constitution. In terms of section 9(5) of the Constitution, discrimination on one or more of these grounds is unfair, unless it is established that the

discrimination is fair. In the Authority's view, the applicant has not established that its discriminatory employment policy, referred to above, is fair.

31.2 It may be an inherent requirement of some of the positions at the applicant's radio station that such positions should be filled by Boere-Afrikaners. For example, in view of the fact that the applicant has been granted a licence to serve the interests of the Boere-Afrikaner community, which is defined in terms of its language, cultural and religious characteristics, it is arguable that management positions should be filled by Boere-Afrikaners (or, at least, by persons who identify with the ideals of the Boere-Afrikaner community) and that announcers should speak the form of Afrikaans generally spoken by Boere-Afrikaners. However, it does not follow that it is an inherent requirement of every position that it should be filled by a Boere-Afrikaner person. For example, there is no reason why sound technicians or cleaning staff should be Boere-Afrikaners.'

[17] ICASA advised Radio Pretoria that it was to terminate its broadcasting services and those of its relay stations within thirty days after receiving the reasons for the refusal.

[18] Subsequent to the refusal of its application and facing the termination of its broadcasting services, Radio Pretoria applied to the Pretoria High Court to have the decision by ICASA reviewed and set aside and to have the matter remitted to ICASA for reconsideration.

[19] The review application was heard by Bosielo J. Radio Pretoria contended, *inter alia,* that in requiring it to make written representations rather than permitting it to make further oral representations, ICASA unlawfully negated the *audi alteram partem* principle, rendering the hearing unfair and the decision null and void. It contended further that ICASA construed the words 'democratically elected' as they appear in s 32(3) of the BA Act too narrowly. According to Radio Pretoria, its Constitutional rights to freedom of expression and lawful administrative action were infringed and ICASA acted beyond its statutory powers when it based its decision to refuse the licence application on the employment practice referred to above and on its narrow interpretation of s 32(3) of the BA Act.

[20] It was contended on behalf of ICASA before Bosielo J, that since the period in respect of which the temporary licence had been applied for had expired, the application was academic and should for that reason alone be dismissed.

[21] The learned judge, however, considered the merits of the review application. He had regard to the two separate bases on which the application for a licence had been refused and held that ICASA had acted

properly and within its powers. On 21 February 2003 he dismissed the review application with costs. The judgment is reported as *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2003 (5) SA 451 (T). The present appeal is directed against that judgment.

[22] It is clear from the scheme of the Act and the regulations made thereunder that it is envisaged that community broadcasting licences are to be granted for a four year 'permanent' term. It is common cause that the system of successive annual temporary licences was an interim measure to deal with the enormous volume in applications for radio broadcasting licences that first the IBA and thereafter ICASA, each with its limited resources, was struggling to process and bring to finality.

[23] Radio Pretoria submitted an application for a four-year licence during March 1998 which was refused by ICASA on 30 September 2003, approximately seven months after the decision by Bosielo J.

[24] In its application before Bosielo J, Radio Pretoria sought an order merely reviewing and setting aside ICASA's decision, alternatively,

correcting it. The court below delivered its judgment long after the envisaged temporary licence period had expired. Indeed, as can be seen from what is set out above, that period had already expired by the time ICASA had supplied reasons for its refusal.

[25] In its notice of appeal, dated 2 September 2003 (prior to ICASA's refusal of its application for a four-year licence), the order sought on appeal by Radio Pretoria was that ICASA's decision be set aside and that the matter be remitted to the latter for reconsideration.

[26] In April 2004, probably with an eye on a review of ICASA's refusal of the four-year licence, Radio Pretoria gave notice that, at the hearing of the present appeal, it would move an amendment to its notice of appeal in the following terms:

'2.2.1 The present authorisation by the Second Respondent, in terms of which the Appellant is broadcasting on the same terms and conditions as their 2000/2001 licence [including 12 additional frequencies for signal distribution] is extended until final adjudication or decision, successful or unsuccessful, of all remedies available to the Appellant to obtain a four-year Community Broadcasting Licence.

2.2.2 Such extended broadcasting will be subject to the lawful regulatory powers of the Second Respondent as intended by the provisions of section 192 of the Constitution and the empowering Statutes and Regulations applicable to the Second Respondent.'

[27] ICASA objected to the proposed amendment, *inter alia* on the basis that the temporary licence period had expired and that the review application was thus moot.

[28] Events have subsequently overtaken that proposed amendment.

[29] In May 2004 ICASA supplied Radio Pretoria with reasons for the refusal of the four-year licence application. On 24 May 2004 ICASA informed Radio Pretoria that, in the light of the decision, it was required to terminate its broadcasting activities by midnight on 23 June 2004.

[30] Radio Pretoria resorted to further litigation. An application was then launched in the Pretoria High Court for an order permitting it to continue broadcasting pending the outcome of the present appeal. De Vos J who heard the application refused it on the following basis:

'I am of the view that the Applicant can therefore not succeed with the current application before me. To my mind, the Applicant, who wants to protect its rights to

broadcasting which it claims it has, must ask for interim relief pending the outcome of the review application of the four-year licence, and, in doing so, will have to place the merits of that review application before the Court.'

[31] An urgent application on the basis suggested by De Vos J was launched by Radio Pretoria. It was heard in the Pretoria High Court by Preller J, who, on 30 June 2004, granted an order permitting Radio Pretoria to continue broadcasting on the same terms and conditions as set out in its last temporary licence, pending final determination of a review of ICASA's decision in respect of the four-year licence application. Final determination included such appeal as might be prosecuted by either party. In terms of the order by Preller J, Radio Pretoria was given 180 days after 14 May 2004 within which to institute the review proceedings.

[32] Before us, Radio Pretoria abandoned its proposed amendment, contending that the matter should now be determined on the merits, namely, the correctness of the bases on which the application for a temporary licence was refused.

[33] In its affidavit in reply to ICASA's opposition to its proposed notice of amendment, the deponent on Radio Pretoria's behalf had

made the following, somewhat cryptic, statements:

‘Respectfully, I am advised to also notify the Honourable Court that the reasons offered by the Respondents for refusing the Appellant’s application for a four-year community broadcasting licence, are substantially the same as those presently under attack and to be considered by this Honourable Court. The reasons are those dealing with the composition of the Board of Directors, and the employment policies of the Appellant. This much was common cause in the proceedings before Preller J. There were two other reasons of a more peripheral nature which were not seriously relied upon before Preller J.’

[34] Throughout the period from ICASA’s refusal of Radio Pretoria’s last application for a temporary licence, namely 28 February 2001, until the present time, Radio Pretoria has continued its radio broadcasting, in the main in terms of extensions by ICASA or by arrangements between the parties or through a court order. In terms of the order made by Preller J, that will continue until the review of ICASA’s decision in respect of the four-year application is finally determined.

[35] That review application has not yet been launched. We do not know the bases of Radio Pretoria's challenge to the decision or the details of opposition. The reasons for ICASA's refusal were not placed before us.

[36] We invited counsel for Radio Pretoria to give us an assurance that the facts in respect of these two issues as they were to be presented to the review court would be identical to those presented to us and that a decision by this Court would put an end to the disputes between the parties. Such an assurance was not forthcoming. We were informed from the bar that, to the best of counsel's recollection, during the ICASA hearing on the four-year licence application there was an indication by Radio Pretoria that it might give consideration to some of ICASA's concerns in respect of its employment practices. We were also informed that, in respect of the issue of community participation in the governance of Radio Pretoria, there were additional facts placed before the ICASA hearing concerning geographical location and regional participation that might impact on the question of the election of members and of the Board. We were informed that there might be a change in emphasis or accent in respect of aspects of Radio Pretoria's challenge to the refusal of its application for a four-year licence. The specifics were not supplied.

[37] Counsel for Radio Pretoria submitted that a decision by us on an interpretation of s 32(3) of the BA Act and on the correctness of ICASA's refusal in respect of the employment practice referred to earlier would be useful as a guide for the court reviewing ICASA's decision in respect of the four-year licence application and to other broadcasters who might experience similar problems. We were referred to remarks by Bosielo J when he granted leave to appeal on certain issues (leave in general terms was granted by this Court). The learned judge said the following:

'… I have no doubt ... that this matter involves issues of substance and great importance, not only to the parties themselves but to the broader broadcasting community, and the public in general.'

[38] The learned judge no doubt had in mind a fixed set of facts against which a decision by this Court might be made and an ensuing practical effect or result. He was speaking without the knowledge of the events that overtook his judgment.

[39] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), Ackermann J said the following at para [21]

(footnote 18) with reference to *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC):

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

[40] Assuming without deciding, as this Court did in the *Western Cape* and *Rotek* cases, supra, at 83E-F and 63C-E respectively, that the practical effect or result referred to in s 21A(1) of the SC Act is not restricted to the parties *inter se* and that the expression is wide enough to include a practical effect or result in some other respect, there is no clear indication that another case on identical facts will surface in the future. Furthermore, the parties themselves have indicated that a decision by us will not resolve the issues between them.

[41] It is clear that the question of a temporary licence is no longer a live issue. That question is moot. No order by us will impact on Radio Pretoria's ability to continue broadcasting until the litigation concerning ICASA's decision to refuse the four-year licence application has been finally resolved. Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not

speculate or theorise (see the *Coin Security* case, supra, at para [7] (875A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.

[42] We were referred by counsel for Radio Pretoria to the judgment in *Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere* 2001 (2) SA 806 (SCA) as support for his submission that, in the circumstances of the present appeal, Radio Pretoria was entitled to rely on s 21A(3). In terms of this subsection, the question whether a judgment or order by a court of appeal would have a practical effect or result may in *exceptional* circumstances be decided with reference to considerations of costs. It was submitted on behalf of Radio Pretoria that the circumstances that prompted the present appeal were, as in the *Oudebaaskraal* case, exceptional.

[43] I disagree. The *Oudebaaskraal* case is distinguishable. Apart from a costs order the appeal became academic as a result of the repeal of the Water Act 54 of 1956 at a time when the appeal was ripe for hearing. This Court held in respect of an argument that the

appeal should be dismissed in terms of s 21A (at 812D):

‘In die onderhawige geval het die saak in die Waterhof etlike dae geduur. Die oorkonde beslaan 2 379 bladsye. Die appellante is verteenwoordig deur ‘n senior en ‘n junior advokaat, die respondente deur ‘n prokureur en die Departement deur ‘n senior advokaat. Verskeie deskundiges is as getuies geroep. Die verhoorkoste is dus ‘n wesenlike faktor. Verder was die appèl gereed vir verhoor op die stadium wat die Waterwet herroep is. Ten minste nege kopieë van die oorkonde, bestaande uit 35 volumes elk, moes voorberei word. Hoofde van argument was ook reeds geliasseer. Die voormelde oorwegings stel na my mening buitengewone omstandighede soos bedoel in art 21A(3) daar. Ingevolge die artikel kan die vraag of die uitspraak of bevel van hierdie Hof ‘n praktiese uitwerking of gevolg sal hê dus bepaal word met verwysing na oorweging van koste. Op dié basis sal die uitspraak van hierdie Hof, indien die appèl sou slaag, wel ‘n praktiese uitwerking of gevolg hê en is hierdie Hof, indien die appèl sou slaag, wel ‘n praktiese uitwerking of gevolg hê en is hierdie nie ‘n geval waar die appèl ingevolge die artikel van die hand gewys behoort te word nie.’

In the present matter the appeal is against a judgment in motion proceedings and the appeal record consists of eight volumes. The *Oudebaaskraal* case and the present appeal are not comparable at all.

[44] In the *Groblersdalse Stadsraad* case, supra, Olivier JA said the

following at 1143A-C:

'…Die bedoeling van art 21A van die Wet op die Hooggeregshof is klaarblyklik om die drukkende werklas van Howe van appèl te verlig. Appèlle behoort slegs vir beregting voorgelê te word as daar 'n werklike, praktiese uitwerking of gevolg van 'n uitspraak van die Hof van appèl sal wees. Praktisyns behoort dus deurgaans die doel van art 21A voor oë te hou; in die besonder by 'n aansoek om na 'n hoër Hof te appelleer en by die voortsetting, voorbereiding en beredenering van die appèl.'

[45] In the *Rotek* case, supra, at 63H-I the following appears (at para 26):

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle spelt out in the *Groblerdalse Stadsraad* case, above, namely that Courts will not make determinations that will have no practical effect.'

These statements by this Court continue to be ignored.

[46] The costs order made by us and set out in para [1] was arrived at after considering what is set out hereafter. By the time ICASA supplied reasons for refusal of the application for the temporary licence, the period contemplated therein had already expired and the relief sought in the notice of motion had been rendered redundant. At that stage the parties' attitudes were such that a new application for a temporary licence would probably have met with the same response. Although Radio Pretoria's proposed

amendment (now abandoned) was misconceived in that the relief sought was more appropriately within the province of a court of first instance, it did require some form of interim protection pending a resolution of its dispute with ICASA and its persistence in the appeal at that stage is understandable. However, when it received the interim order from Preller J on 30 June 2004, pending a final resolution of the dispute concerning the four-year application it must have been abundantly clear that no purpose would be served by persisting in this appeal.

[47] These were the considerations on which the dismissal of the appeal and the related costs order were based.

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MS NAVSA

Judge of Appeal

CONCUR: Mpati DP

Streicher JA

Heher JA

Van Heerden JA