



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

Case Number: **38665/2022**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO
 DATE: 19 July 2023
 SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

OPEN HEAVEN COMMUNITY RADIO

Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

Respondent

First

DR CHARLEY LEWIS N.O.

Respondent

Second

NKETHELENI GIDI

Respondent

Third

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] The applicant, a community radio station, claims an order in the following terms:

- “1. A declarator that the applicant’s Class Broadcasting Licence/s (**No. Class/Com/R183/Sep/12**) is valid for a term of SEVEN YEARS from the effective date and its terms of validity will expire on 11 September 2024;
2. The respondents’ instruction to the applicant embodied in a letter dated 11 July 2022 to cease broadcasting on 11 September 2022 be declared unlawful, reviewed and set aside;
3. Alternative to para 1 and 2 above, the respondents’ decision to refuse to process the applicant’s notice of renewal of its Class Broadcasting Service Licence/s (**No. Class/Com/R183/Sep/12**) be reviewed and set aside in terms of PAJA or the principle of legality;
4. The applicant’s notice of renewal be remitted back to the respondents to process on terms imposed by this Court.”

BACKGROUND

[2] Broadcasting services in South Africa are regulated in terms of the Electronic Communications Act, 36 of 2005 (“the Act”) and the regulations promulgated in terms of the Act.

- [3] The legislation provides certainty and ensures a transparent and orderly environment in which service providers provide services to the public. In order to achieve the objects of the Act, ICASA was established in terms of section 3 of the Independent Communications Authority of South Africa Act, 13 of 2000 to *inter alia* perform the duties imposed by the Act and regulations.
- [4] The Act makes provision for two types of licences, to wit: individual licences and class licences.
- [5] A service provider that wishes to provide class broadcasting services must, in terms of section 17 of the Act, submit a registration notice in the manner prescribed by the Act. The applicant duly submitted a registration notice, and a licence was issued to the applicant on 12 September 2012.
- [6] The validity period of a licence is prescribed by The Standard Terms and Conditions Regulations for Class Licences, 2010 (Notice 525 of 2010 published on 14 June 2010) (“the Regulations”). In terms of regulation 4, the validity period of the applicant’s licence was five years from the effective date and expired on 12 September 2017.
- [7] In terms of section 19(2) of the Act, a licensee seeking to renew its class licence must, in writing and not less than 60 days prior to the expiry date, notify ICASA of its intention to continue to provide services. The applicant submitted a written notification as contemplated in section 19(2) to ICASA and on 26 May 2017 the applicant received a licence with the effective date of 12 September 2017. The expiry date of the licence was, in accordance with regulation 4 of the regulations, 11 September 2022.

- [8] In the result, the applicant had to submit a notification to ICASA in terms of section 19(2) on or before 11 March 2022. The applicant, however, incurred certain regulatory difficulties, in that it did not have a fully functioning board to oversee the running of its affairs since November 2021. In order to rectify the problem, the applicant had tele-conference meetings with ICASA's broadcasting unit on 15 November 2021 and on 3 March 2022. The purpose of the meetings was to assist the applicant to hold an annual general meeting (AGM) for the purpose of electing a new and properly constituted board.
- [9] During the meeting on 3 March 2022, it was agreed that an AGM will be convened for 26 March 2022 and that the applicant will thereafter submit a written notice for the renewal of its licence.
- [10] Notwithstanding the aforesaid agreement and on 23 March 2022, ICASA informed the applicant that, due to its non-compliance with the provisions of section 19(2) of the Act, it had to cease providing broadcasting services on 12 September 2022.
- [11] The applicant proceeded to hold its AGM on 26 March 2022. On 28 March 2022 Teboho Malefane, a broadcasting compliance officer of ICASA, sent an email to the applicant requesting the minutes of the AGM and certain further documents.
- [12] On 30 March 2022, the applicant filed its notice in terms of section 19(2) with ICASA. ICASA, however, refused to process the notice on the grounds that it was out of time. On 15 June 2022, the applicant submitted a request for the condonation of the late filing of the renewal of its licence. On 11 July 2022

ICASA informed the applicant that it is bound to the provisions of the Act and that it does not have the necessary legislative or regulatory powers to condone the applicant's non-compliance with section 19(2) of the Act.

[13] The applicant did not agree with ICASA's interpretation of the Act and issued this application. The application comprised of a Part A, in terms of which the applicant claimed urgent interim relief pending the finalisation of Part B, being the relief presently before court.

[14] At the time, the relief claimed in Part B of the application was confined to the review of ICASA's decision not to process the applicant's renewal notice.

[15] Upon receipt of the rule 53 record, the applicant filed an amended notice of motion and included the declaratory relief pertaining to the validity period of the licence.

[16] In view of the aforesaid background, the relief claimed by the applicant will be discussed *infra*.

DISCUSSION

Validity period of licence

[17] The declaratory relief claimed by the applicant in respect of the validity period of its licence is premised on amendments to the Regulations that were published in Government Gazette No 33428, under Notice 131 of 2021 on 25 March 2021. Regulation 4 amended the validity period for the type of licence issued to the applicant to seven years from the "*effective date*".

[18] “Effective date” is defined in Regulation 2.2 as “the date specified in the licence which may be a past, present or future date from the date of signature.”

[19] In view of the amended Regulations, the applicant contends that its licence only expires on 11 September 2024.

[20] ICASA disagrees and submitted that the amended regulations are not retrospective and do not apply to the validity period of the applicant’s licence.

[21] In considering the opposing views in respect of the retrospective operation of the new regulations, it is apposite to have regard to the rules of interpretation of statutes. The rules were recently succinctly summarised by the Constitutional Court in *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC), to wit:

“[29] The principles of statutory interpretation are by now well settled. In *Endumeni* the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of —

(a) the language used in the light of the ordinary rules of grammar and syntax;

(b) the context in which the provision appears; and

(c) the apparent purpose to which it is directed.

[30] What this court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

© all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).' [Footnotes omitted.]

[31] *Where a provision is ambiguous, its possible meanings must be weighed against each other, given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this court.*

[32] *Allied to these factors, courts must also interpret legislation to promote the spirit, purport, and objects of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to 'lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa'.* (footnotes omitted)

[22] The new Regulations do not expressly state whether regulation 4 is applicable to existing licences or whether it is only applicable to licences that are applied for after 25 March 2021.

[23] Bearing the principles enunciated in *Unitrans* in mind, it is apposite to have regard to the legislative context in terms of which class licences are granted.

[24] Section 16 pertains to class licences and provide, *inter alia*, as follows:

“(3) *The Authority must maintain a registrar of all class licences containing the information set out in subsection (5).*

(5) *The Authority must at least once annually update and publish the list of class licensees in the Gazette, indicating for each class-*

“(a) the name of the accepted registrant;

(b) the nature of the service that the registrant proposes to provide; and

(c) the licence conditions applicable to the class licence.”(own emphasis)

[25] As set out *supra*, section 17 makes provision for the granting of class licences. Section 17(3) states that upon the granting of a class licence ICASA must update its internal records by including the information referred to in section 16(5) *supra*.

[26] The licence issued to a licensee reflects the information prescribed by section 16(5) and 17(3). In *casu*, the applicant’s licence provides the details of the licence under the following headings: “1. *Licensee*; 2. *Licence Period*; 3. *Licence Area*; 4. *Community*; 5. *Programming*; 6. *Contact details*; 7. *Notices and Addresses*; 8. *Promise of Performance*.”

[27] The licence period reads as follows:

“2. LICENCE PERIOD

2.1 The effective date of the Licence is 12 September 2017.

2.2 The Licence shall expire on 11 September 2022.”

(own underlining)

[28] Section 17(6), furthermore, stipulates that a licensee must ensure that the information contained in the register referred to in section 16(3) remains accurate during the “*term*” of the licence.

[29] From the aforesaid, it is clear that the terms and conditions of a class licence, including its duration, are determined, and published on the date when the licence is granted and remain applicable for the duration of the licence.

[30] The Act does not provide for the amendment of the terms and conditions of a licence during its period of validity.

[31] An automatic amendment of the period of a licence, as contended for by the applicant, would be in direct conflict with the express provisions of section 16 and 17 of the Act.

[32] Furthermore, section 19(2) that provides for the renewal of a class licence six months prior to the expiration of the licence is predicated on the expiry date in the licence itself. To hold that licences are automatically extended by the provisions of the new regulations, would cause uncertainty, and cause administrative havoc in the implementation of the Act.

[33] Lastly, it is trite that there is a presumption against the retrospective operation of a statute. In *Workmen's Compensation Commissioner v Jooste* 1997 (4) 418 (SCA) the court stated the following at 424 F-H:

"There is at common law a prima facie rule of construction that a statute (or any amendment or legislatively authorised alteration thereto) shall not be interpreted as having retrospective effect (National Iranian Tanker Co v MV Pericles GC [1995 \(1\) SA 475 \(A\)](#) at 483H; Protea International (Pty) Ltd v Peat Marwick Mitchell & Co [1990 \(2\) SA 566 \(A\)](#) at G 570B--C). The presumption against retrospectivity arising from this rule may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration (Lek v Estate Agents Board [1978 \(3\) SA 160 \(C\)](#) at 169F--G). In an appropriate case the language of the enactment, far from rebutting the presumption, may fortify it."

[34] Having regard to the correct interpretation of the new regulations, I agree with ICASA that the presumption is applicable in *casu*.

[35] In the result, the relief claimed by the applicant in prayers 1 and 2 stands to be dismissed.

Condonation

[36] Section 11 of the Act provides for the renewal of individual licences and section 11(9) provides that ICASA may on good cause shown, accept for filing, an application for renewal that is not submitted in time. The term "on

good cause shown” would of necessity entail an application for condonation for the late filing of the application.

[37] Section 19 does not contain a similar provision and ICASA is correct in its submission that it does not have the legislative authority or power to grant condonation for the late filing of an application for the renewal of a class licence.

[38] The applicant agrees that section 19 does not confer a discretion on ICASA to accept a renewal notice filed by a licensee outside the stipulated time frame of six months. In the result, ICASA is not empowered by the Act to consider the applicant’s request for condonation contained in its letter of 15 June 2022.

[39] The applicant, however, submits that a discretion may be express or implied and that upon a proper consideration of the Act, the court should find that the Act confers an implied discretion on ICASA to accept notices that were filed late.

[40] Once such finding is made, the refusal by ICASA to accept the applicant’s renewal notice constitutes unlawful administrative action and stands to be set aside.

[41] In support of its aforesaid submission the applicant relies, *inter alia*, on *Millenium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA). In *Millenium Waste*, the court considered the process followed by the Department of Health and Social Development, Limpopo in the awarding of a tender. The process is governed by the North Transvaal Tender Board Act, 2 of 1994. The

Department advertised an invitation to interested parties to tender for the removal, treatment and disposal of medical waste. *Millenium Waste* submitted a tender, but its tender was disqualified for failure to comply with the terms of the tender, to wit, it failed to sign a form titled 'declaration of interest'.

[42] *Millenium Waste* took the decision on review and in defending its decision to disqualify *Millenium Waste's* tender, the Department submitted that the terms of the tender documents relating to administrative compliance was couched in peremptory language which expressly stated that non-compliance would result in disqualification. Relying on the definition of 'an acceptable tender' in the Preferential Procurement Policy Framework Act, 5 of 2000, the Department submitted that *Millenium Waste's* tender did not constitute an acceptable tender and was correctly disqualified.

[43] The court did not uphold the Department's contentions and stated the following in para [16] and [17]:

"[16] I cannot accept the department's argument. On the assumption that there was a valid delegation of power from the tender board to Dr C Manzini and further to the tender committee, the answer to the question of authority lies in reg 5(c), which empowers the tender board to accept tenders even if they fail to comply with tender requirements. In these circumstances reliance on the Pepper Bay Fishing case was misplaced. In that case the issue was whether the chief director to whom the power to grant fishing licences was delegated, had authority to condone procedural defects in applications for fishing rights submitted to him. On the enquiry relating to the chief director's powers Brand JA said (para 31):

As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such

power if it has been afforded the discretion to do so. . . .The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.

With this I agree and wish to add that in the present case the tender committee was afforded the necessary discretion by reg 5(c). Therefore, it erred in thinking that it did not possess such power.

[17] Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (SA Eagle Co Ltd v Bavuma)...”

(footnotes omitted)

[44] In *SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 (A), the court stated at 49 H – 50 B that:

*“This rule has frequently been applied by our Courts in holding that statutory protection (often in the form of limitation of actions) afforded local authorities and Government departments is capable of waiver when the protection is not intended for the benefit of the public but for the benefit of the local authority or Government department itself. So, for example, it was held in *Steenkamp v Peri-Urban Areas Health Committee* 1946 TPD 424 at 429 that the protection afforded by s 172 of Ord 17 of 1939, which provided that all actions against a local authority shall be brought within six months of the time when the cause of action arose, was not intended for the benefit of the public or the ratepayers but for the protection of the local authority itself, and*

could therefore be waived. See also Durban Corporation v Lewis 1942 NPD 24 at 41; McDonald v Enslin [1960 \(2\) SA 314 \(O\)](#) at 317A - C and Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd [1971 \(4\) SA 538 \(C\)](#) at 540A.”

- [45] The question then arises for who's benefit the six months' time limit in section 19(2) was intended? ICASA, without providing any reasons, simply submitted that the time limit in section 19(2) was not enacted for its benefit. A time limit is in the ordinary cause inserted for the benefit of the authority that must consider an application or claim.
- [46] One such example is section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002. The section provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state, unless notice is given of the intended legal proceedings, within six months from the date on which the debt became due. The rationale being, that due to the magnitude of state operations, the notice enables the organ of state to investigate and gather information and evidence, whilst the information and evidence is still readily available. The time limit in section 3 was, therefore, clearly enacted for the benefit of the state. The aforesaid is borne out by the fact that an organ of state may elect to condone non-compliance with the time-limit.
- [47] It is only when an organ of state does not condone the late filing of the notice and elects to rely thereon, that a creditor has to apply to court, in terms of section 3(4), for condonation.

- [48] The most probable reason for the six months' time limit in section 19(2), is to afford ICASA sufficient time to process an application for renewal. To hold otherwise would entail that the legislature arbitrarily and for no reason at all, enacted the time limit.
- [49] In the result, I am satisfied that ICASA may, in its discretion, waive the six-month time limit.
- [50] The question then arises whether ICASA's decision was, in view of the express provisions of section 19, wrong. In my view, it was not. ICASA's legislative powers are contained in the Act. ICASA does not have the legislative power to interpret the Act. That power falls within the domain of the courts.
- [51] In the result, none of the grounds for review in the Promotion of Administrative Justice Act, 3 of 2000, have been satisfied and I do not deem the review of the decision as the correct legal remedy in the circumstances.
- [52] Having regard to the interest of justice, the fairness to the parties and the need for legal certainty, this court will, however, be failing in its duty in not granting appropriate relief.
- [53] I am of the view, that an order declaring that ICASA has the necessary legislative power to, in its discretion, condone the late filing of a notice for the renewal of a class licence in terms of section 19(2), will be just and equitable in the circumstances. Such order will achieve the actual purpose for the relief sought by the applicant, to wit; a consideration of its request for condonation for the late filing of the notice contemplated in section 19(2) of the Act.

[See: *Ex parte V N Naidoo* 1943 NDP 269]

COSTS

- [54] The applicant submitted that, should this court refuse the application, it is immunized from an adverse cost order, because it came to court to enforce its constitutional rights against an organ of state. In support for the aforesaid submission, the applicant relies on *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC). In *Biowatch*, the Constitutional Court held at para [16] that: “*The primary consideration in constitutional litigation must be the way in which costs orders would hinder or promote the advancement of constitutional justice.*”
- [55] The issues in *casu do* not fall under the auspices of “*the advancement of constitutional justice*” and do not justify a deviation from the general principle that a successful party is entitled to its costs.
- [56] ICASA was substantially successful in its opposition of the application and is entitled to a cost order in its favour.

ORDER

The following order is issued:

1. It is declared that the first respondent has the legislative power to consider an application for condonation for the non-compliance with the time limit contained in section 19(2) of the Electronic Communications Act, 36 of 2005.

2. The applicant's request for condonation contained in its letter dated 11 June 2022 is remitted to the first respondent for consideration.
3. The applicant is ordered to pay the costs of the application.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD:

15 May 2023

DATE DELIVERED:

19 July 2023

APPEARANCES

For the Applicant: Advocate M Nguta

Advocate B Zungu

Instructed by: Tsotetsi Attorneys

For the Respondents: Advocate K Tsatsawane SC

Advocate K Lefaladi

Instructed by: HM Chaane Attorneys Inc