IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO 56/2003

In the matter between

TRINITY BROADCASTING, CISKEI **Appellant**

and

INDEPENDENT COMMUNICATIONS AUTHORITY OF SA **Respondent**

CORAM: **HOWIE P, SCOTT, MTHIYANE, BRAND JJA et MOTATA AJA**

Date Heard: 3 November 2003

Delivered: 21 November 2003

Summary: **Judicial review – rationality test – community television licence conditions**

J U D G M E N T

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[1] The appellant is the sole licensed community television broadcaster in South Africa. It has been so since 1986. Its designated area of operation was initially the former 'homeland' territory of Ciskei. Later it was extended to include the adjacent territory of Transkei. In November 2000 the appellant applied to the respondent, the Independent Communications Authority of South Africa, for renewal of its licence for four years. Encompassed by the application was the request that the appellant's area of operation be extended to include the Nelson Mandela metropole comprising Port Elizabeth, Uitenhage and Dispatch. The application was eventually granted, with effect from 22 April 2002. However, the new licence was subject to a number of conditions which had not been imposed before. In addition, the broadcast area remained restricted to the Ciskei and Transkei regions.

[2] The appellant applied in the High Court at Johannesburg for the review of certain of the conditions and their substitution by appropriate conditions imposed either by the court or by the respondent upon remittal. The matter was heard by Jajbhay J who dismissed the application but granted leave for this appeal. The judgment of the Court *a quo* is reported in 2003 (5) SA 97.

[3] The appellant is an association not for gain, incorporated in South

Africa at the instance of its parent organisation which is based in the United States of America. The appellant has always been predominantly funded by that organisation. The appellant operates a Christian television service known as Trinity Broadcasting Network. Its broadcast rights were originally acquired in terms of the laws of the so-called independent states of Ciskei and Transkei. After 1994 statutory provisions, including some specifically for the appellant's benefit, enabled it to continue as a licensed broadcaster until the time of the application presently in issue.

[4] The respondent was established under the Independent Communications Authority of South Africa Act 13 of 2000 (the 'ICASA Act') with effect from 1 July 2000. It is in all relevant respects the successor to the Independent Broadcasting Authority ('the IBA') established under the Independent Broadcasting Authority Act 153 of 1993 ('the IBA Act'). The respondent is now the body responsible for regulating broadcasting countrywide and must, among other things, perform the duties imposed, and exercise the powers conferred, upon the IBA by the IBA Act. In terms of s 21(2) of the ICASA Act any order ruling or direction of the IBA is deemed to have been given by the respondent.

[5] The object of the ICASA Act is, in terms of s 2, to establish an authority that regulates broadcasting in the public interest, ensures fairness and diversity of views broadly representing South African society and achieves the objects contemplated in, among other statutes, the IBA Act.

[6] Section 2 of the IBA Act, in turn, states that its objects are to

'(a) promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information;

(b) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;

(c) ensure that broadcasting services, viewed collectively –

  (i) develop and protect a national and regional identity, culture and character;

  (ii) provide for regular –

    (aa) news services;

    (bb) actuality programmes on matters of public interest;

    (cc) programmes on political issues of public interest; and

    (dd) programmes on matters of international, national, regional and local significance;

(d) protect the integrity and viability of public broadcasting services;
(e) ensure that, in the provision of public broadcasting services –
(i) the needs of language, cultural and religious groups;
(ii) the needs of the constituent regions of the Republic and local communities;
and
(iii) the need for educational programmes,
are duly taken into account;
(f) encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
(g) encourage equal opportunity employment practices by all licensees;
(gA) promote the empowerment and advancement of women in the broadcasting services;
(h) ensure that broadcasting services are not controlled by foreign persons;
(i) ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
(j) impose limitations on cross-media control of commercial broadcasting services;
(k) promote the most efficient use of the broadcasting services frequency bands;
(l) ensure that public broadcasting licensees, commercial broadcasting licensees and signal distribution licensees comply with internationally accepted technical standards;
(m) ensure that broadcasting signal distribution facilities are made available in respect of all licensed broadcasting services;
(n) refrain from undue interference in the commercial activities of licensees, whilst at the same time taking into account the broadcasting needs of the public;
(o) ensure fair competition between broadcasting licensees;
(p) promote and conduct research into broadcasting policy and technology;
(q) encourage investment in the broadcasting industry;
(r) promote the stability of the broadcasting industry;
(s) ensure equitable treatment of political parties by all broadcasting licensees during any election period;
(t) ensure that broadcasting licensees adhere to a code of conduct acceptable to the Independent Broadcasting Authority; and
(u) encourage the provision of appropriate means for disposing of complaints in relation to broadcasting services and broadcasting signal distribution.'

[7] These, then, subject to some changes which are presently irrelevant, were the statutory criteria to be considered by the relevant authority in relation to all licence applications made by the appellant since the inception of the IBA Act.

[8] It is pertinent by way of further background to refer to some of the appellant's earlier licence or licence related applications and the relevant authority's responses.

[9] When the appellant applied for its previous licence in December 1996 it sought extension of the broadcast area to cover the entire province of the

Eastern Cape, its reason being that the existing broadcasts were confined to impoverished communities who could offer the appellant's primary fundraising efforts, by way of voluntary donations, little, if any, enhancement. To become self-supporting it therefore wanted access to the more affluent population in the Port Elizabeth – Uitenhage area.

[10] The licence was granted but the extension refused. The reason given for the refusal was that broadcast frequencies, especially those necessary for television, were a scarce national resource and the IBA had not yet finalised policies and regulations in respect of any private or community television services. The authority went on to express the view that it was not possible at that stage to grant a community television licence for an extended area until policies on community television were in place. That was in August 1997.

[11] The application for the area extension had been coupled with an application for extension of broadcast time. Dissatisfied with the IBA's response in that regard as well, the appellant pursued its quest for more area and time. By letter in September 1998 the IBA conveyed its resolution to allow more time but, again, no area extension. In both respects it relied on the absence of policies on community television as well as the recommendations of a then current White Paper on Broadcasting Policy.

[12] In February 1999 the appellant applied for an amendment of its licence conditions. It had all along been using its assigned channel – channel 24 – and now wished to use channel 49, which the IBA had already earmarked for community television, and which would enable it to broadcast into the greater Port Elizabeth area. In making this application the appellant undertook that if the channel was needed by another broadcaster the appellant would cease using it. The application was refused but no reasons were given for the refusal.

[13] In October 2000 the president of the appellant's parent organisation wrote to President Mbeki asking that he support the appellant's efforts to broadcast more widely. That letter was answered by the respondent's chair in January 2001. He explained that there was no developed policy on licences for community television but that an enquiry into the issue would be held in the 2001/2002 financial year and that the policy process could not be pre-empted by increasing the appellant's broadcast area at that stage.

[14] In the meanwhile, on 14 November 2000, the application now in issue was submitted to the respondent. It was followed by a letter to the respondent written by the Premier of the Eastern Cape, the Rev M.A. Stofile, expressing his and the provincial government's strong support for the application and especially the appellant's endeavours to broadcast in the Port

Elizabeth area.

[15] A formal hearing in respect of the application was held before a panel of councillors of the respondent at East London on 25 April 2001 at which the appellant's case was orally presented. A transcript of what was said there is contained in the appeal record. During the proceedings the panel invited later written submissions from the appellant regarding the subject of the area extension. Subsequent correspondence between the parties is also before us in which answers were provided to various questions posed by the respondent as to *inter alia* the appellant's structure and broadcast service. I shall refer to the relevant contents of the transcript and the correspondence in due course where relevant.

[16] The appellant was notified of the grant of the new licence by letter dated 29 November 2001 which contained the following:

'We refer to previous correspondence herein and are pleased to advise that the Council of the Authority has resolved to grant to Trinity Broadcasting Network a Community Television Broadcasting Licence. The broadcasting licence will be subject to certain specific conditions that are based on the representations made and undertakings given by Trinity Broadcasting Network to the Authority and which inter alia reflect the spirit and ethos of the Broadcasting Act No. 4 of 1999.

We are in the process of finalising the licensee's new licence conditions. These will be furnished to you in due course.'

[17] The conditions were conveyed under cover of a letter dated 19 April 2002 containing the following sentence:

'Some of the members of the [respondent's] Council are not available to adopt and finalise the reasons due to other pressing matters of the authority.'

Shortly afterwards the respondent furnished reasons for imposing the conditions.

[18] In the application before the Court below there was a general review ground based on the passage quoted above from the respondent's letter of 19 April 2002 and there were individual grounds aimed at certain specific conditions.

[19] Before dealing with the review grounds in issue it is appropriate to refer to the standard of review of administrative action which must be applied in deciding this appeal. Section 33(1) of the Constitution (the Constitution of the Republic of South Africa Act, 108 of 1996) affords everyone the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) demands the enactment of national legislation to give effect *inter alia* to that right. Such legislation exists in the shape of the Promotion of Administrative Justice Act 3 of 2000. Section 6(2) confers the power to review administrative action judicially if

' …

(f) the action itself –
  (i) …
  (ii) is not rationally connected to –
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator; or
    (dd) the reasons given for it by the administrator;
  …
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) …'

[20] In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*[1]. As made clear in *Bel Porto*, the review threshold is rationality[2]. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational[3]. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h)).

[21] We were invited by the respondent's counsel to adopt, instead of rationality, the test of perversity in the sense, so suggested counsel, of utter irrationality. In this regard reliance was placed on the respective passages in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689 (CA) at 706e and *R v Radio Authority, ex parte Bull and another* [1997] 2 All ER 561 (CA) at 578 a-b. The first formulates the following test:

'was [the authority's] decision … one which no reasonable authority could have made? In simpler terms, did they make a perverse decision?'

[1] 2002 (3) SA 265 (CC) at 282-3 [46]; and *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC) at 315 [31] and [32]

[2] At 292 [89].

[3] *Pharmaceutical Manufacturers Association of SA and Another: In re: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 708 [86]

The second reads

'The task of a supervisory court in a case of this kind is not to concern itself with the merits of the decision … unless that decision can be properly stigmatised as perverse or utterly irrational.'

A reading of those cases reveals that the review ground involved was that of unreasonableness, as developed and expounded in the leading English case of *Wednesbury Corporation*[4]. The passage quoted from the second of the two cases cited by counsel is contained in the judgment of Brooke LJ. In the judgment of Aldous LJ at 577 h the test is put as follows:
'Is the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it?'
It is clear that the standard expressed in those cases approximates, to all intents and purposes, to the one constituted by s 6(2)(h) of the Promotion of Administrative Justice Act. The word 'perversity' may be appropriate (I need express no opinion on the subject) to the standard set by s 6(2)(h) and *Wednesbury Corporation* but it has no bearing on the rationality test set by s 6(2)(f)(ii) and explained in *Pharmaceutical Manufacturers, Bel Porto* and *Carephone*. It is the latter test with which we are concerned in the present case. In the application of that test the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision maker between the material made available and the conclusion arrived at?[5]
[22] I shall proceed now to consider the various review grounds and the facts material to them.

[23] The first review ground challenges all the conditions on the basis of the quoted contents of the respondent's letter of 19 April 2002[6]. The appellant alleges in its founding affidavit that the passage concerned reveals,

[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, [1948] 1 KB 223 (CA).
[5] *Carephone (Pty) Ltd v Marcus NO and Others,* supra, at 316 [37] (1998) 19 ILJ 1425; 1998 (10) BCLR 1326 read with the provisions of s 6(2)(f)(ii)
[6] Para [17] above

as a fact, that the conditions could not have been properly considered and determined because reasons were to be adopted and finalised after their imposition. The respondent's answer is to deny that the fact that the written reasons post-dated the conditions indicates that the conditions were not properly determined or that all councillors did not apply their minds to the conditions. In addition, the respondent describes its usual procedure whereby it formulates conditions at the time of deciding to grant a licence but only finalises its written reasons later. The appellant's reply points out that the respondent fails to allege that the usual procedure was followed in this instance. Given this factual dispute, counsel for the respondent argued that, apart from others considerations, the appellant's success was barred by the application of the *Plascon Evans* rule.

[24] I think that the quoted sentence on which the appellant relies for proving a reviewable irregularity is slender material indeed. Everything depends on the construction of just a few words. It was not contended that there was anything amiss in giving written reasons later. The question is whether the words show that no reasons existed at the time of the decision, or no reasons that had been agreed on by all the councillors. Firstly, it is contextually important to point out that the immediately following sentence reads:

'We shall be pleased if (you) would grant us an indulgence to furnish you with the said reasons for Council's decision on or before 30 April 2002.'

Reading the two sentences together, it is clear enough that the reasons to be furnished existed, even if not finally formulated, when the decision was made granting the licence and imposing the conditions. At least the earlier sentence is capable of bearing that meaning read in isolation.

Consequently, even assuming in the appellant's favour that the respondent's denials were not sufficiently specific to attract advantage from the *Plascon*

Evans rule, this ground of review was not established.

[25[The first individual condition attacked is that which limits the broadcasting area. The respondent's reasons for refusing the requested extension may be summarised as follows. Until policies on community television had been implemented it was the respondent's view that it was not possible to extend the appellant's broadcast area. The same attitude had been taken in 1997 and no new reasons or argument compelled a different response. The shortage of frequencies would be dealt with in a position paper on community television. There had to be orderly frequency management in the public interest and the respondent needed to compile a frequency plan in order to identify frequencies, particularly for regional community television. *Ad hoc* concessions to the appellant would impair the planning of such management and a proper assessment would probably first necessitate enquiry in all relevant regions.

[26] In this Court counsel for the appellant submitted that the refusal breached the respondent's statutory duty to promote community television; that there was no rational link between the absence of an existing policy on community television and maintaining the appellant's area restriction; and that inviting further submissions on area while persisting in its anti-extension view showed bad faith on the respondent's part. Counsel said that respondent was adhering blindly to the absence of a broadcast policy when such absence was due to its own failure to act with responsible expedition. The respondent could, so it was argued, have allowed the appellant to broadcast to the Port Elizabeth region for the period of the new licence on the same condition that had been offered by the appellant in relation to its request to use Channel 49. This was that if it was eventually decided to grant some other broadcaster the licence to broadcast in the Mandela metropole area, the appellant would terminate broadcasts to that region.

[27] Dealing with those submissions in the same order in which I have summarised them, it is not, in my opinion, contrary to the respondent's statutory duty that it intends to work towards the establishment of a broadcasting policy in terms of which licences and frequencies will be dealt with in an orderly way and with the advantages inherent in its having undertaken an overall assessment of the public's needs and interests in all the relevant regions of the country. The appellant, through nobody's fault, finds itself in an historically advantaged position as the only community television broadcaster. It would make good sense, and be fair to the appellant, to let the *status quo* remain in the interim, but it would be a rational approach for the respondent eventually to allocate community

television licences only on considered implementation of its eventual policy and after evaluating the respective capacities of the aspirant broadcasters who will no doubt compete for those opportunities.

[28] As to a rational link between the current absence of a policy and the maintenance of the *status quo*, this has partly been dealt with in what I have just said. In addition, there can be no doubt that if the appellant were to be allowed to broadcast in the Mandela metropole area *pro tempore* it would entail financial outlay for the appellant which would occasion complications in the unravelling process were the eventual licensee under the newly established policy to be some other broadcaster. It would not be a situation from which one envisages the appellant simply walking away. It is readily imaginable that the appellant, in future competition with others, would want to emphasise the fact of its already incurred expenditure and its established viewership in an endeavour to enhance its own chances of obtaining the licence. This is not what a responsible authority, acting rationally, would want to cope with if it sought to select a licensee for the Port Elizabeth region at that future stage on the basis of performances on a level playing field.

[29] As regards bad faith, the invitation to the appellant at the East London hearing to advance additional submissions on the present topic runs counter to any possible inference of bad faith. Despite its view in the earlier years that the absence of an overarching policy warranted refusal of the area extension, the respondent's invitation to make further submissions was indicative of a preparedness to ascertain whether changed circumstances might not warrant an extension after all. Its readiness to entertain further representations also disposes, in my view, of the blind adherence argument.

[30] It is true that the respondent has had since 1994 to formulate a broadcasting policy and has not yet done so but its explanation is that its attention has had to be given to other matters which in its assessment warranted priority. Provided the respondent acts within the boundaries set by the applicable legislation, it is entirely its decision what matters get priority and how and when to focus on community television. It has not been suggested that, reasonably viewed, it could have progressed more quickly. The delay in policy formulation is therefore not a factor which advances the appellant's case.

[31] For the reasons given I consider that the refusal to extend the broadcast area was a rational decision and that this ground of review must fail.

[32] Before moving on to the next ground it is appropriate to refer to the letter of support expressed by the Premier of the Eastern Cape for the

appellant's entry into the Port Elizabeth area. There is also in the record a letter of support addressed by the Speaker of the Eastern Cape Legislature. (The appellant was irritated by the respondent's patently incorrect and dismissive reference in the papers to the writers as 'government officials' but be that as it may.) The letters were not written solely in the writers' respective personal capacities but very obviously also on behalf of the provincial government. Admittedly one does not know, if there had been a competing application, whether the government of the Eastern Cape would in that instance have supported one candidate above another but in my view it is not acceptable that government support should be given or even expressed in applications such as this. The relevant legislation declares the respondent to be an independent arbiter and it must be left to act independently, without governmental pressure, real or apparent, of any kind. If, in time, community television is the subject of an implemented policy and there are competing licence applications to broadcast in the Mandela metropole area none of the competitors should be burdened, or advantaged, by past or present government support for one of them.

[33] The next condition to be considered is that requiring the appellant to broadcast in English for no more than 50% of the broadcast period, in isiXhosa for no less than 20% and in Afrikaans for no less than 20%. The reason given by the respondent for the imposition of this condition is that the appellant gave an undertaking to that effect.

[34] At the hearing at East London the appellant's Director of Operations explained that its programme make-up was 75% foreign – all in English – and 25% local content and that making local programmes was extremely expensive. In its letter of 3 May 2001 the respondent required 'in clear measurable terms Promise of Performances (sic)' in various respects. One was:

'Kindly specify what would be the maximum on foreign programming. What is the proposed language breakdown of the broadcasting service?'

The answer contained in the appellant's reply of 16 May 2001 was:

'75% on foreign programming, 50% English, 30% Xhosa, 20% Afrikaans.'

(This exchange presumably reflected the undertaking referred to.)

[35] Counsel for the respondent defended the imposition of the condition on the basis that it reflected the appellant's answer to a direct question,

alternatively, the respondent's understanding, which was not irrational, of the meaning of the answer. Significantly, counsel did not rely on the suggestion in the respondent's opposing affidavit that it would not be unreasonable for the respondent to assume that even if 75% of programming was foreign, some of the foreign programmes could be dubbed into Afrikaans or isiXhosa. It seems to me that this suggestion was opportunistic. There is no allegation in the papers that the respondent did so assume. Dubbing was not raised at the hearing or in any exchange of letters.

[36] Apart from the fact that there is correspondence in the record which shows that the 50:30:20 language breakdown applied to local content only and that local content constituted 25% of appellant's programmes, there is no feasible basis on which the respondent could possibly have thought (absent dubbing) that foreign programmes would be in isiXhosa or Afrikaans. It is unnecessary, however, to pursue the question as to what the respondent's understanding might have been. The reason for the condition was simply that the appellant gave a specific undertaking. It did no such thing. Its answer was perhaps thoughtlessly compiled and the respondent would have been justified in requiring clarification but there is, in my view, no rational connection between the condition and the information before the respondent. This ground of review must therefore succeed.

[37] The condition to be considered next is one requiring the appellant, after the first six months of the licence period, to 'broadcast during prime time, at least 10 minutes of news packaged as a single programme daily'. The respondent's reasons do not deal with this condition at all. In the respondent's opposing affidavit, however, the deponent, Mr Ncetezo, a councillor of the respondent, states that the authority is required to ensure that broadcasting services provide for regular news services and that the appellant is not exempt. In particular, the deponent bases this approach on the provisions of s 2(c) of the IBA Act. The Court *a quo* relied on that reasoning in holding against the appellant on this issue.

[38] At the East London hearing the question of a news broadcast was raised. The appellant's representatives said then that it did not have a specific news 'spot' such as that of the SABC which gave the latest news of the day. What it did was to focus on national and regional news in its community programmes.

[39] The appellant was later asked in the respondent's letter of 3 May 2001 'How much time will the service set aside for News? What provision will you make for newsgathering? What staff do you propose to engage? And whether there is a budget set aside for news. The Applicant to provide the Authority with a clear commitment to generate its own news.'

[40] The appellant's response in its letter of 16 May 2001 was that it was not clear to it what the respondent meant by news as opposed to own news. It said that on its understanding of news, most of its local content programmes contained news but largely community news.

[41] Subsequently the respondent indicated that what it wanted to know was whether the appellant had its own reporters and own news department. The appellant did not answer this query but the information before the respondent showed clearly enough that the appellant is a small organisation, with a staff of only 11 people and a limited budget, and that what news it broadcast was included in local community programmes.

[42] The respondent's conclusion in respect of all this is stated in the opposing affidavit to be that the appellant failed to make a commitment to provide news in its programming and that the respondent was entitled to impose a condition not inconsistent with the IBA Act.

[43] In my opinion the respondent took a misdirected view of the facts and of relevant provision of the IBA Act. The appellant did not fail to make a commitment to provide news in its programming. It said that it had provided, and would go on providing, regional news in its community based local content programmes. Moreover, s 2(c) of the IBA Act does not require every broadcaster to have a programme specifically devoted to news. All it must do as regards news is to ensure that all existing broadcasting services, 'viewed collectively', provide for regular news services. It follows that the condition in question was not rationally connected to the empowering provision or the information before the respondent. The review on this point ought therefore also to have succeeded.

[44] The penultimate challenge launched by the appellant relates to two conditions concerned with employment equity. It is convenient to deal with them together. They required that within three days, that is to say by 22 April 2002 (the conditions having been conveyed to the appellant on 19 April) 40% of its employees at all levels had to be from historically

disadvantaged backgrounds and 40% had to be women. The only relevant comment in the respondent's reasons in this respect is that the appellant 'currently has a small staff complement'.

[45] The relevant exchanges in the correspondence contain the following. In a letter of 20 September 2001 the respondent said

'The applicant is further requested to stipulate (again as a measurable promise of performance) how it proposes to ensure that the following structures: management, programme committee and any other committees it may establish, are representative of the demographics of its community in the coverage area'.

The answer by letter of 17 October 2001 was this

'Our client undertakes to have a minimum of 40% of the composition of the various structures referred to in your [letter] from members of previously disadvantaged groups. There are certain areas however (particularly technical) where this will be difficult initially.'

[46] The respondent's approach to that undertaking and to the appellant's objection to the conditions, is revealed in its opposing affidavit. As far as the respondent is concerned the three day compliance period was inconsequential; the appellant had not set a time frame and once it gave the undertaking it did, it was required to comply with it.

[47] The grant of the licence was made known to the appellant in November 2001 but the conditions were only conveyed on 19 April 2002. In these circumstances it was misplaced for the respondent to think that the appellant would take measures in the interim that might not be required at all or that might be different from any that might eventually be required. The three day compliance period is therefore not objectively understandable. Nor was it based on anything that could be inferred from the appellant's representations. In addition, the appellant's limitation of the undertaking to certain structures, and its reservation that there would be difficulty implementing it initially as regards technical personnel, were both ignored by the respondent. In any event, apart from those considerations, the respondent sought to hold the appellant to an undertaking it did not actually give.

[48] It must follow that the conditions were not rationally linked to the conditions under discussion and that this review ground ought to have been upheld.

[49] By reason of the last condition under attack, the appellant is obliged to spend R2 000 per staff member per year on training. The issue of training was merely mentioned, in non-specific terms, at the East London hearing. Later, in its letter dated 17 October 2001 the appellant said it performed in-house training and external training. The latter was performed at the appellant's expense but did not yet apply to cleaning and maintenance staff.

The relevant passage ended with the sentence –
'Our client budgets a minimum of R2 000,00 per person per year of training'.
The appellant maintains that this expenditure relates only to external training and that its letter conveyed as much.

[50] Counsel for the respondent argued that whatever the appellant intended to say, the respondent was reasonably entitled to construe the letter as meaning that that sum would be expended on all staff. This submission cannot prevail. It is not a question of what was reasonably to be understood. The opposing affidavit does not allege that the respondent relied on its own interpretation. From what the deponent says it is plain that the respondent arrived at R2 000 per staff member entirely on the face value of what it calls the appellant's undertaking in the letter of 17 October 2001. The fact is that no such undertaking is contained in the letter. What it sets out is a summary of the appellant's training activities and the express statement that external training does not apply to all staff. Once again there is no factual basis for saying that the supposed undertaking was given and therefore there is no rational connection between the information placed before the respondent and the condition is question. Here, too, the review application ought to have succeeded.

[51] The conditions which therefore fall to be set aside, according to the numbering in the Schedule containing the licence conditions, are 11, 15, 22.1, 22.2 and 22.7.

[52] By the end of the hearing before us counsel for the parties were agreed that reconsideration and substitution of the conditions that had to be set aside entailed an exercise more properly to be performed by the respondent than by this Court.

[53] As to costs, it was urged on behalf of the respondent that the appellant's success only on some of the grounds involved in the appeal would warrant an evaluation of the weight of each ground so as to determine an appropriate order as to costs of appeal and costs in the Court below. Counsel for the respondent sought to contend in this regard that the area question was really the focal point in the case and that the respondent's success on that issue should materially influence the making of a fair costs order.

[54] There is no doubt that the matter of the broadcasting area has all along been of major importance but none of the conditions to be set aside now were conditions in earlier years or even seriously mooted before their imposition. Until they were conveyed to the appellant on 19 April 2002 they could not have been as much debated or as contentious as the matter of area. What is more, there is no indication in the papers that had the area

issue fallen away in this case the respondent would probably have conceded any of the other grounds in either Court. In addition, the language condition could only be achieved by dubbing foreign programmes into Afrikaans and isiXhosa. The record reveals that this would involve the appellant in expenditure of a sum four times its annual budget. Compliance would put the appellant out of business. A specific news programme would also entail substantial expenditure.

[56] In all the circumstances I am satisfied that the success which the appellant has achieved in the appeal makes it appropriate to award it the costs of appeal and the costs in the Court below.

[56] The following order is made:

1. The appeal is allowed with costs, including the costs of two counsel.
2. The order of the Court *a quo* is set aside and substituted for it is the following.
   '1. The application is allowed with costs including the costs of two counsel.
   2. In the Broadcasting Licence Conditions contained in Schedule A to the respondent's letter to the appellant's attorneys dated 19 April 2002 the following conditions are set aside:
      2.1 Condition 11
      2.2 Condition 15
      2.3 Condition 22.1
      2.4 Condition 22.2
      2.5 Condition 22.7
3. The matter is referred back to the respondent to consider and impose substitute conditions, where deemed appropriate, after receipt of such representations as the appellant may wish to make.'

CT HOWIE

PRESIDENT
SUPREME COURT OF APPEAL

CONCURRED:
Scott JA
Mthiyane JA
Brand JA
Motata AJA