



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION JOHANNESBURG)

Case No: 41672/12

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

5 August 2014

EJ Francis

In the matter between:

KZN TALK RADIO (PTY) LIMITED

Applicant

And

INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA

First Respondent

ONE GOSPEL KNI FM (PTY) LIMITED

Second Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant, KZN Talk Radio (Pty) Limited (KZN Talk) brought an application to review and set aside two decisions made by the first respondent - the Independent Communications Authority of South Africa (ICASA), after it had awarded a single commercial sound broadcasting licence on the FM frequency 103 MHz in the Durban area to the second respondent – One Gospel KNI FM (Pty) Ltd (One Gospel) and the granting of the Durban licence to One Gospel. KZN Talk's application for a broadcasting licence was

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unsuccessful. It relies on four grounds of review and seeks to have the decisions reviewed and set aside and to have the matter remitted to ICASA for reconsideration.

2. The application was opposed by One Gospel on the grounds that there is no merit in the application and should the application succeed, that the relief sought should not be granted.

The background facts

3. On 27 March 2009, ICASA published an “Invitation to Apply” (ITA) for individual commercial free-to-air sound broadcasting service licenses in certain markets. The closing date for the submission of applications was 30 September 2009 which was later extended to 30 November 2009. The ITA included amongst others a list of FM and AM frequencies that were available for commercial sound broadcasting services in the three primary markets of Gauteng and the metropolitan areas of and surrounding Cape Town and Durban.
4. On 28 July 2009, ICASA clarified and amended the ITA, stating that it would only issue one FM licence in each of the three primary markets. The three available FM frequencies were 98.9 MHz (Gauteng), 103 MHz (Durban) and 90.4 MHz (Cape Town).
5. KZN Talk applied to ICASA on 30 November 2009 for a single commercial

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sound broadcasting service licence in the Durban area. Section 2 of the ITA document, dealing with corporate status, lists and describes KZN Talk's shareholders at the time of the application. Amongst other things, it reflected that Primedia has a 24.9% shareholding in the company and MSG Afrika has a 20% shareholding in the company. Since then, Imbewu Capital Partners (Pty) Ltd (Imbewu) has disposed of its 10.5% shareholding in the company. These shares were reimbursed *pro rata* to the remaining shareholders with the exception of Primedia.

6. On 14 June 2010 ICASA gave notice that it had received 14 applications in response to the ITA. It listed the particulars of the applications in a schedule to the notice and invited interested parties to submit written representations by 7 September 2010 which was extended to 21 September 2010. On 21 October 2010, ICASA published the dates for the public hearings in respect of the licence applications. The hearings were held at ICASA's offices from 15 to 18 November 2010.
7. On 15 December 2011, following a lengthy adjudication process, ICASA awarded the broadcasting licence to One Gospel. ICASA furnished written reasons for its decision on 21 May 2012. ICASA issued the licence to One Gospel on 25 May 2012.
8. ICASA found that certain requirements – such as limitations imposed by section 64, 66(2) and 66(3) of the Electric Communications Act 36 of 2005

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(the ECA) and the employment of historically disadvantaged persons were satisfied. Other aspects of the application – including but not limited to programming; format; new; current affairs; demand, need and support; and financial means, business records and commercial viabilities were recorded.

9. KZN Talk's application for a licence was rejected by ICASA for two reasons. ICASA found that section 2(v) of the ECA enjoins it to 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. It said that KZN Talk was deemed to be controlled by Primedia which already controls four other commercial radio services in South Africa. In addition MSG Afrika which has a controlling interest in another FM radio station, is also a shareholder in KZN Talk. In ICASA's assessment, if the commercial FM radio broadcasting service licence for Durban were to be granted to KZN Talk, this would not contribute to a diversity of ownership of broadcasting services in South Africa and, given that FM frequencies are in scarce supply, would limit the scope for the ownership of radio services to be diversified in future. Primedia and MSG Afrika have 24.9% and 20% shareholding in KZN Talk respectively. Primedia's shareholding in KZN Talk was deemed to constitute control and given that Primedia already controls the four FM broadcasting service licences in South Africa, if KZN Talk were to be awarded the Durban radio licence, it would by virtue of its Primedia's shareholding, be in breach of section 65(2)(a) of the ECA. KZN Talk was deemed to be controlled by Primedia. MSG Afrika was

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deemed to control KZN Talk on the basis of its 20% shareholding.

10. ICASA did not oppose the application but filed heads of arguments dealing with why it believes that its interpretation of section 65 of the ECA was correct. It made no submission on the remainder of the grounds of review.

The first ground of review

11. In the first ground of review, KZN Talk contends that ICASA's basis for rejecting its application for the Durban licence was materially affected by an error of law. ICASA was incorrect to base its decision on the view that a 20% shareholding constitutes control for the purposes of 65 of the ECA. Instead, it should have proceeded on the basis that the common law definition of control applies to section 65 of the ESA which – absent any specific provisions built into a shareholders' agreement that result in control being achieved with a lower level of shareholding – means a shareholding of more than 50%. KZN Talk contended that if this interpretation is correct, the rejection of its application was unsustainable as a matter of law as neither Primedia nor MSG Afrika could be said to be in control of KZN Talk. ICASA's interpretation was wrong as a matter of law.
12. ICASA had rejected KZN Talk's application for a licence given that Primedia already controls the four FM broadcasting service licences in South Africa and if it were to be awarded the Durban radio licence, it would by virtue of the Primedia's shareholding, be in breach of section 65(2)(a) of the ECA. It also

found that MSG Afrika which has a controlling interest in another FM radio station, is also a shareholder of KZN Talk.

13. It is common cause that ICASA's decision to reject KZN Talk's application rests squarely in its interpretation of the ECA that a 20% shareholding in a licence (whether direct or indirect) is deemed to be control of that licensee for the purposes of section 64, 65 and 66 of the ECA. Three different interpretations of the meaning of control in section 65(2) of the ECA were presented to ICASA when it was considering who to award the licence to. The first interpretation is the one ultimately adopted by ICASA, namely that where a party holds a 20% shareholding in a given licensee that amounts to deemed control. The second interpretation was that advanced by KZN Talk before ICASA during the hearings that a party would be deemed to be in control when it had a 25% shareholding. The third interpretation was that contended for by the National Association of Broadcasters (NAB), which was to the effect that there was no deeming provision in respect of control under section 65 of the ECA and accordingly the common definition of control applied. This would mean that a party would only be in control of a licensee if it was in a position to determine the destiny of the licensee and its assets. This would in general require that a party held more than a 50% shareholding of the licensee unless there were some specific provisions built into the shareholders' agreement which resulted in control being achieved with a lower level of shareholding.

14. In this application, ICASA contended that the deeming provision in section 66(5) of the ECA applies to section 65 and accordingly that a 20% shareholding constitutes control in terms of section 65. In the alternative ICASA contended that a shareholding of 50% or a special provision in a shareholders' agreement are not the only bases on which control may be established as contended by KZN Talk. Control may take other forms, including indirect shareholding or the right to appoint a majority of the board of directors. This court should not narrow the meaning of control in section 65 and elsewhere on the basis suggested by KZN Talk.
15. One Gospel contended further that the stark duality which KZN Talk tries to force this debate – either the deeming provision in section 66(5) of the ECA applies to provision of control in section 65 of the ECA, or the common law definition of control applies was ill conceived and incorrect. Control can mean any number of things, depending on the circumstances and context in which it is being assessed. What amounts to control is very much context specific. The meaning of the word control must be ascertained in the context of the section and the statute as a whole, bearing in mind the objects of the statute. In the light of this interpretative framework, ICASA's interpretation of control in section 65 of the ECA best accords with the objects of the ECA, whilst KZN's interpretation is furthest removed from the objects of the ECA.
16. KZN Talk no longer relies on the interpretation that it had advanced and relies on the interpretation contended for by the NAB at the hearings i.e. that the

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common law definition of control should be applied in the context of section 65(2) of the ECA. It contended that ICASA wrongly took the view that a shareholding in a licence amounted to 'control' of that licence whereas on a proper construction of the ECA that is not the case. Three reasons were advanced why ICASA's interpretation constitutes an error of law. The first is the location of section 66(5) of the ECA and the heading of section 66. KZN Talk contended that the fact that the deeming provision that appears in section 66(5) of the ECA is not replicated in section 65 suggests that it was not intended that the 20% shareholding rule embodied in section 66(5) was intended to apply only in the context of section 66. The fact that no definition of control appears in section 65 or in section 1 suggests that it was intended that the word 'control', as used in section 65, should be construed in accordance with the ordinary meaning. It also relied on the heading of section 66, which refers to 'cross-media' control.

17. The second argument advanced by KZN Talk was that the provisions of the Independent Broadcasting Authority Act 153 of 1993 (IBA Act) contained a general definition of control (a shareholding) but also contained a specific deeming provision providing that, for cross-media licences, a 20% shareholding would constitute control. It observed that the ECA contains no general definition of control but retained the IBA Act deeming provision in respect of cross-media control in section 66(5).
18. The third argument advanced by KZN Talk was that if section 66(5) of the

ECA applies to section 64, but this would render section 64 superfluous. It contended that section 64 prohibits two things in relation to foreign broadcasting services: first section 64(a) provides that a foreigner may not directly or indirectly exercise control over a commercial broadcasting licensee and secondly section 64(1)(b) provides that a foreigner may not directly or indirectly have a financial interest or an interest in voting shares or paid-up capital in a commercial broadcasting licensee exceeding 20%. It argued further that if the deeming provision applies and control in terms of section 64(1)(a) is present when there is a 20% shareholding, section 64(1)(a) will mean exactly the same as sub-section (1)(b) and is superfluous.

19. KZN Talk submitted that if the deeming provision in section 66(5) does not apply to section 65, the common law approach to 'control' would apply. The common law approach is 'in a position to determine the destiny of the licensee and its assets. It argued that in practical terms, the control would in general require that a party held more than 50% of the licensee, unless there were some special provisions built into the shareholders agreement that secured control despite a lowering shareholding.
20. Section 64 of the ECA deals with limitations on foreign control of commercial broadcasting services. It provides that a foreigner may not whether directly or indirectly exercise control over a commercial broadcasting licensee; or have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent. It provides

that not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners.

21. Section 65 of the ECA deals with the limitations on control of commercial broadcasting services. It provides, *inter alia*, that no person may directly or indirectly exercise control over more than one commercial broadcasting service licence; be in a position to exercise control over more than two FM commercial broadcasting service licences; be in a position to control two FM commercial broadcasting service licences which either have the same licence areas or substantially overlapping licence areas; be in a position to exercise control over more than two AM commercial broadcasting service licences; be in a position to control two AM commercial broadcasting service licences which either have the same licence areas or substantially overlapping licence areas.
22. Section 66 of the ECA deals with limitations on cross-media control of commercial broadcasting services. It provides, amongst other things, that no person who controls a newspaper may acquire or retain financial control of both a commercial television broadcasting service licence and a commercial sound broadcasting service. No person who is in a position to control a newspaper may be in a position to control either a commercial television broadcasting service licence, in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps

substantially with the circulation area of the newspaper concerned. The Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt affected persons from any of the limitations provided for in this section.

23. It is apparent from section 64 of the ECA which deals with limitations on foreign control of commercial broadcasting services that a foreigner may not have a financial interest or an interest either in voting shares or paid up shares or paid-up capital in a commercial broadcasting licensee exceeding 20%. Not more than 20% of the directors of a commercial broadcasting licensee may be foreigners. Unlike section 65, which does not specify the circumstances that are to be regarded as constituting 'control', section 66(5) provides that a 20% shareholding in a commercial broadcasting service 'is considered as constituting control'. Thus, for the purposes of the application for cross media limitations imposed by section 66, a 20% shareholding in an entity that holds a commercial broadcasting service licence will be regarded as conferring control of that entity.
24. The concept of 'control' is a central to an understanding and application of the limitations imposed by section 65. However, neither section 65 nor section 1 of the ECA provides a definition of control. The question to be determined is whether the deeming provision contained in section 66(5) of the ECA is applicable to section 65. KZN Talk contended that it does not apply.

25. Our courts have consistently held that in interpreting the meaning of any provision of a statute, other parts of the statute may have a direct role to play. This principle was put beyond doubt by Schreiner JA when he stated in *Jaga v Donges; Bhana v Donges* NO 1960 (4) SA 653 (A) that:

“[c]ertainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context.
...
[T]he object to be attained is unquestionably the ascertainment of the meaning of the language in its context.
...
[T]he legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.”
26. Schreiner JA accepted the “contextual scene” as constituting at least “the language of the rest of the statute.” His dictum was followed with approval in, *inter alia*, *Aetna Ins Co v Minister of Justice* 1960 (3) SA 273 (A) at 284 where the remarks of Lord Greene MR in *Re Bidie* 1949 Ch.121 were quoted with approval:

“The real question that we have to decide is, what does the word mean in the context in which we here find it, both in the immediate context of the subsection in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy.”
27. In *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 913 J to 914 A Rabie CJ held as follows:

“I would stress ... that it is also a well-known rule of construction that words used in a statute should be read in the light of their context.”

28. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18 – 9, the SCA held as follows:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between the interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the ‘emerging trend in statutory construction’. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by E Schreiner JA in Jaga v Donges NO and Another; Bhana v Donges NO and Another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

‘Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to

interpretation insist that context ne considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be though to arise.’”

29. The point of departure is to ascertain the meaning of the word in the context of the section and the statute as a whole, bearing in mind the objects of the statute. In the light of the interpretive framework, ICASA’s interpretation of control in section 65 of the ECA best accords with the objects of the ECA whilst the applicant’s interpretation is further removed from the objects of the ECA. Some of the primary objects of the ECA are to ‘promote competition within the ICT sector’; ‘promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities’; and to “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”.

30. Another object of the ECA is to promote and facilitate the achievement of the objects of the ‘related legislation’ which is defined as including the Broadcasting Act 4 of 1999 (the Broadcasting Act). The objects of the Broadcasting Act are *inter alia*, to ‘encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups’; to ‘ensure plurality of news, views and information and provide a wide range of entertainment and education programmes’; to ‘ensure that the commercial and community licences, viewed collectively, are controlled by person or groups of persons from a diverse range of

communities in South Africa’; and to ensure ‘that the broadcasting system is controlled by persons or groups of persons from a diverse range of communities in South Africa and within each element promotes ownership, control and management of broadcasting services by persons from historically disadvantaged groups’.

31. These objects of the ECA of promoting diversity and competition in ownership in the broadcasting sector can best be achieved if the notion of control (in sections precluding concentration and promoting diversified ownership and competition) is read expansively and widely as possible. In that way, the net of section 65 of the ECA is opened up to ensnare and preclude as many instances of ‘control’ as possible, thus promoting a wider base of ownership and thus competition. In my view, applying the deeming provision of 20% achieves these objectives of the ECA as best as possible. On the spectrum of meanings that can be afforded to the word ‘control’ in section 65, the common law definition put forward by KZN Talk would not achieve the primary objectives of the ECA because it narrows the definition of ‘control’ considerably.
32. KZN Talk had contended that if the 20% deemed control definition from section 66(5) was also applied to section 64, it would render sections 64(1)(a) and section 64(1)(b) tautologous. This is incorrect. If the 20% deemed control definition in section 66(5) is also applied to sections 64 to 66, the two subsections of section 64(1) would not read identically or mean the same thing

as contended by KZN Talk. They have distinct and different meanings. Section 64(1)(a) provides that a foreigner may not directly or indirectly exercise control over a commercial broadcasting licensee. Applying the 20% deemed control definition to this subsection would mean that an effective shareholding of 20% of the issued share capital would amount to control, irrespective of the voting rights attaching to such shares. Section 64(1)(b) provides that a foreigner may not directly or indirectly have a financial interest or an interest in voting shares in commercial broadcasting licensee exceeding 20%. Section 64 (1)(b) does not contain the word ‘control’. Instead it refers to a ‘financial interest’ or an ‘interest’. This is even wider than the notion of share ownership underpinning the 20% deemed control definition. Therefore section 64(1)(b) clearly could not mean the same thing as section 64(1)(a). The deeming provision in section 66(5) of the ECA applies to section 65(2) and control as used in section 65(2) should be interpreted to include a 20% shareholding.

33. The applicant has failed to prove that ICASA committed an error of law in its interpretation of section 65(5) of the ECA. This ground of review fails.

The second ground of review

34. In the second ground of review it is contended that ICASA’s decision was procedurally unfair because while it afforded One Gospel an opportunity to remedy what would otherwise have been a breach of section 65(2)(b) of the ECA, it afforded no such an opportunity to KZN Talk. It ought also to have

afforded KNZ Talk an opportunity to adjust its shareholding to ensure compliance with section 65(2)(a), as interpreted by ICASA. ICASA did not give any explanation for the disparate manner in which it treated KZN Talk and One Gospel.

35. One Gospel contended that the two situations are not in the least bit alike. It had provided an undertaking in relation to overlapping directorships, which undertaking was accepted by ICASA. ICASA was entitled to accept such an undertaking which it did. Section 9(7) of the ECA provides that the Authority - ICASA, may impose on an applicant any other specific terms and conditions resulting from undertakings made by such an applicant. One Gospel contended that this is precisely what occurred in the present instance. KZN Talk did not provide any undertaking in relation to the question of the meaning of control. It can therefore not complain of unequal treatment as it does now. The fact that the interpretation of the meaning of control for purposes of section 65 of the ECA may have been subject to extensive debate, does not detract from the simple reality that it provided no undertaking at all. It denied that there was any procedural unfairness in the form of unfair and unequal treatment or in any other form in the process and that this ground of review is contrived.

36. It is common cause that at the time when One Gospel's application was considered, one of its directors was also a director of Kagiso, which exercised control over more than two commercial broadcasting service licences in the

FM sound broadcasting service. This was contrary to section 65(2)(b) of the ECA which provides as follows:

“No person may ... be a director of a company which is, or two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service.”

37. Since this was contrary to the provisions of section 65(2)(b) of the ECA, One Gospel was given the opportunity by ICASA to have its director resign. The director in due course did so, but only after ICASA had already decided to award the licence to One Gospel. This is clear from the following passage from the reasons:

“As already mentioned above, the concerns regarding Ms Motanyane’s directorship were raised during the public hearings and [One Gospel] gave an undertaking, which was later confirmed in writing, that should [it] be successful, Ms Motanyane would resign as a director of [One Gospel]. The undertaking was not contested by any of the parties and [ICASA] is satisfied that no other aspect of the application gave rise to material concerns on [ICASA’s] part, having regard to the factors to be considered in evaluating a licence application.”

38. While One Gospel was given the opportunity to bring its management structure into line with the ECA, by ensuring that a director resigned after its licence was granted, KZN Talk was not given a similar opportunity to commit to bringing its shareholding structure into line with the provisions of the ECA as interpreted by ICASA. There is no evidence either from the transcript or the affidavits filed with this court that KZN Talk was provided with such an undertaking to dilute their shareholding to less than 20%.

39. There is a critical distinction between the issues of overlapping directorships

and deemed control. The statutory provisions regarding overlapping directorship are clear. In contrast there was considerable confusion on the meaning of ‘control’ under the relevant provisions of the ECA, as demonstrated by the varying interpretations offered by KZN Talk and the NAB. As the replying affidavit explained at paragraph 39:

“One Gospel had no option but to make the ‘unequivocal and unqualified undertaking regarding [Ms Motanyane’s] resignation’. In contrast, the issue of deemed control remains unresolved and, indeed, ICASA’s ruling on this came as a surprise to virtually the entire industry. As set out in the founding papers, it was inconsistent with ICASA’s past approach and inconsistent with the approach urged by the National Association of Broadcasters, the industry body which represents broadcasters.”

40. It is plain that the decision of ICASA to award the licence to One Gospel rather than KZN Talk or the other applicants amounted to administrative action in PAJA. That being the case, ICASA was required to act in a manner that was procedurally fair in dealing with the multiple applications or the licence. In an analogous context, the awarding of tenders, the SCA has made clear that in *Metro Project CC and Another v Klersdorp Local Municipality and Others* (2004) 1 ALL SA 504 SCA at paragraph 13, it is not permissible to treat different bidders in a unfair and unequal manner:

“Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender, it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness.

Was the tender process followed in the present case fair? A high-ranking municipal official purported to give the ninth respondent an opportunity or augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped

the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.”

41. ICASA effectively allowed One Gospel an opportunity to remove a difficulty which would have disqualified it. It gave One Gospel an opportunity of augmenting its application so that its offer might have a better chance of acceptance and that in doing so it stripped the licensing process of an essential element of fairness: the equal evaluation of the application. There is no explanation from ICASA for the disparate manner in which it treated One Gospel and KZN Talk. The decision was therefore procedurally unfair as contemplated by section 6(2)(c) of PAJA and falls to be reviewed and set aside.
42. Since, KZN Talk has succeeded with the second ground of review, it is not necessary to determine the third ground of review.

The fourth ground of review

43. It was contended that if ICASA’s finding that a shareholding of more than 20% in a company is to be recognised as control of that company for purposes of section 65(2)(a) of the ECA, then it should have rejected One Gospel’s application as well, on the basis of the effective control that Kagiso Media Limited (Kagiso) had over Urban Brew (Pty) Ltd (Urban Brew) in terms of section. At the time the licence was awarded, Kagiso held a 50.1% shareholding in Urban Brew, whose wholly-owned subsidiary holds a 24%

shareholding in the second respondent. On the basis of Kagiso's shareholding in Urban Brew at the relevant time, Kagiso was effectively in deemed control of Urban Brew, which itself was in control of One Gospel on the basis of ICASA's view of a 20% shareholding which constitutes control. Kagiso owns 100% of East Coast Radio, which is not only a radio station based in Kwazulu-Natal, but also holds an FM licence in respect of substantially overlapping licence area with the Durban licence. As such, Kagiso's effective control of Urban Brew at the relevant time constituted a breach of section 65(3) of the ESA.

44. Since I have upheld's ICASA's finding that a shareholding of more than 20% in a company is to be recognised as control, One Gospel's application for a licence should also have been rejected for the same reasons that the applicant's application was rejected. By failing to have done so, ICASA committed a reviewable irregularity. This ground of review succeeds.

An appropriate relief

45. ICASA does not take issue with KZN Talk's proposed relief. They contended that should its grounds of review be upheld, the matter should be remitted to it, to be determined *de novo*. One Gospel as can be expected, contended the court should not review and set aside ICASA's decision because of the consequences that would follow were a court to declare the licence awarded to it be set aside for redetermination by ICASA. They seek to make out a case of financial prejudice, loss of goodwill, loss of employment for its staff and the

impact on its listenership and the local gospel music industry.

46. This court has a discretion under PAJA regarding the grant of appropriate relief. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at paragraphs 84 – 85 the Constitutional Court made clear that the principle of legality requires administrative action to be declared unlawful and it is only thereafter that questions of discretionary remedy can arise:

“It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the ‘desirability of certainty’ needs to be justified against the fundamental importance of the principle of legality.

The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful and administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent of the materiality of the breach of the constitutional right to just administrative action in each particular case.”

47. It is clear from the above that even where a third party such as One Gospel has

acted on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, this still needs to be weighed and justified against the fundamental importance of the principle of legality.

48. One Gospel has not made out a proper case for it to be allowed to continue operating under the licence that was unlawfully awarded to it. Its case for prejudice rests on an erroneous assumption that if the review succeeds, it licence would immediately and permanently be terminated. This is not correct. KZN Talk does not seek any order awarding the licence to it but an order that the matter be referred back to ICASA for it to take a fresh decision. This may take some time and there is no reason why I cannot direct that One Gospel's licence remain valid until ICASA awards the new licence. It is possible in relation to a fresh decision to be taken by ICASA that One Gospel could be re-awarded with the licence. It will remain open to One Gospel to seek to persuade ICASA that its application remains the best of those that qualify. Such an order would take care of all or any of the difficulties that may arise.

49. One Gospel has not made out a proper case of financial prejudice to it. Whilst it may suffer some degree of prejudice should the orders sought be granted, both the extent and direct cause of such prejudice remains unclear. It has not provided information on when many of the identified costs were incurred and commitments were made. It has also refused to provide copies of the contracts which would result in the alleged financial prejudice. It has also failed to

specify the duration of the contracts and whether they have early termination clauses for the benefit of One Gospel. This is despite the fact that these are directly relevant to the extent of any financial prejudice.

50. The prejudice to One Gospel's employees and to the public carries little weight in this remedial enquiry. One Gospel points to the prejudice its employees may suffer if it were forced to cease operating. This is not relevant to the present application. The employees will be entitled to the ordinary remedies under the Labour Relations Act. One Gospel has also raised the prejudice to its listeners and the local gospel industry. The interests of other groups of listeners have been prejudiced by the fact that One Gospel was unlawfully awarded the licence. There is no reason in this case why the interests of one group of listeners should be preferred over those of another or why the interests of the local industry and in particular gospel music should be elevated above the public interest served by for example talk radio.
51. One Gospel's approach is untenable due to the nature of this matter. This application concerns the award of a scarce resource namely a commercial FM radio licence. This case is not like those concerning tender awards which generally last for the relatively short duration of approximately two years. In the contrary, the licence unlawfully awarded to One Gospel is valid for a ten year period until March 2022. Thereafter, ICASA would then inevitably receive a renewal for ten further years at the end of that period. This is because when a licence expires, there is no competitive process where the

incumbent licensee and potential licensees compete for the fresh licence. Instead there is only a renewal process governed by section 11 of the ECA and regulation 10 of the relevant regulations, in terms of which ICASA would have a very limited power to issue such refusal. Section 11(7) of the ECA entitles ICASA to do so only where it determines that the licensee has materially and repeatedly failed to comply with the terms and conditions of the licence; the provisions of this Act or of related legislation or any regulation made by the Authority. For this reason the refusal to renew such a licence is virtually unprecedented. It cannot be consistent with the rule of law that One Gospel be allowed to operate under an unlawfully awarded licence for ten or likely twenty years. There are no exceptional circumstances justifying the withholding of a remedy to KZN Talk.

52. This case is analogous to the decision of the SCA in *Eskom Holdings Limited v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at paragraph 18 where the court held that there was no basis for refusing to review and set aside the tender award:

“The position is that the award of the tender to Kwanda was fatally flawed. An order setting the award aside would accord with what Moseneke DCJ said in Steenkamp NO v Provincial Tender Board, Eastern Cape:

‘Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts at a broader level, to entrench the rule of law.’

On the other hand, the order sought by Kwande should the review be upheld – namely, a declaratory order that the award of the tender was invalid, suspended until the contract had run its course – would not fulfil any of these purposes.”

53. The conclusion is equally apposite in the present case. The relief sought by KZN Talk would afford it as the prejudiced party administrative justice, advance efficient and effective public administration compelled by constitutional precepts and at a broader level entrench the rule of law. One Gospel's approach would not fulfil any of those purposes.
54. The application stands to be granted. There is no reason why costs should not follow the result except against the first respondent. However the costs are limited to 50% of the costs of the application.
55. In the circumstances I make the following order:
- 55.1 The decision of the first respondent of 15 December 2011 to reject the applicant's application for an individual commercial free-to-air sound broadcasting service licence to broadcast in Kwazulu-Natal on the FM frequency 103 MHz (the Durban licence); and granting the Durban licence to the second respondent; is reviewed and set aside.
- 55.2 The award of the Durban licence is remitted to the first respondent for reconsideration.
- 55.3 Pending the first respondent's reconsideration of the matter and for a period of 180 calendar days after the first respondent has announced the award of the Durban licence, the second respondent is authorised to

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continue broadcasting as if it were in possession of a valid licence.

55.4 The second respondent is to pay 50% of the costs of the application which costs include the employment of two counsel.

FRANCIS J

HIGH COURT JUDGE

FOR THE APPLICANT	:	G MARCUS SC WITH S BUDLENDER & J BERGER INSTRUCTED BY ROSIN WRIGHT ROSENGARTEN
FOR FIRST RESPONDENT	:	J BRICKHILL INSTRUCTED BY BOWMAN GILFILLAN
FOR SECOND RESPONDENT	:	A BHAM SC WITH F I ISMAIL INSTRUCTED BY CLIFFE DEKKER HOFMEYER
DATE OF JUDGMENT	:	5 AUGUST 2014