

REPUBLIC OF SOUTH AFRICA



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

Case Number: 050968/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
16/01/2023	
.....	
DATE	SIGNATURE

In the matter between:

PRETORIA FM NPC

Applicant

and

**THE CHAIRMAN OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] In Part A of its application, the applicant, Pretoria FM NPC, seeks on an urgent basis, an interim order against the respondent, the Chairman of the Independent Communications Authority of South Africa (“ICASA”), restraining and interdicting the respondent from considering pre-registration applications for prospective community and sound broadcasting services and radio frequencies as advertised on 15 December 2021, pending the determination of Part B of the application.

[2] In Part B of the application the applicant seeks an order reviewing and setting aside the respondent’s decision of 18 November 2022, disqualifying, amongst others, the applicant’s 17 applications for radio licences, and other ancillary relief.

[3] The applicant grounds its application for the review and setting aside of the decision of 18 November 2022 on the following grounds:

- 3.1 that ICASA’s decision is materially influenced by an error of law;
- 3.2 that the impugned decision was irrational and unreasonable;
- 3.3 that the decision is not rationally connected to the information that served before it; and
- 3.4 that ICASA took into account irrelevant considerations and failed to consider relevant considerations.

[4] These proceedings relate to Part A of the application.

[5] The respondent is of the view that the matter is not urgent and should be struck of the roll with costs.

[6] On 15 December 2021 ICASA advertised an invitation in the Government Gazette Number 45650, under Government Notice 728 (“the ITP-R invitation”) for applications to pre-register for community sound broadcasting services and radio frequency spectrum, with a closing date of 30 June 2022.

[7] The ITP-R invitation set-out, *inter alia*, the following prescribed conditions in order for an application to pass the pre-registration threshold:

- 7.1 that non-compliance with the provisions of the ECA, the ITP-R and/or any applicable regulations will result in the rejection of the non-compliant pre-registration notice;
- 7.2 that every pre-registration notice must be accompanied by proof of payment of the non-refundable application fee of R4, 118.00, which payment must be made by an electronic funds transfer or via a direct deposit in the given bank account before the submission closing date and the time indicated.
- 7.3 that the closing date for the submission of pre-registration notices shall be 16h30 on 30 June 2022.
- 7.4 that ICASA reserves the right not to consider a pre-registration notice should an applicant not meet the requirements set out in the ITP-R or applicable legislation and regulations.

[8] ICASA received 105 pre-registration applications and held workshops for Licensing Framework for Community Radio and Television Broadcasting Services (on

16 and 17 February and 9 June 2022). During the workshops the ITP-R process was explained.

[9] On 9 June 2022 the applicant (through Linda van Schalkwyk) inquired about the amount payable in respect of Frequency Spectrum Registration Fees in relation to Form P. On the same day Ms Bongiwe Shabane of ICASA responded by sending van Schalkwyk a schedule of the administrative fees. On 20 June 2022, Schalkwyk sought clarification about the Frequency Spectrum Registration Fee and ICASA responded by email stating that:

‘It is a flat rate as Class Licence application fees, amendments and renewals are R1,388.00.’

[10] On 21 June 2022, the applicant paid the amount of R2,776.00 for each of its 17 applications.

[11] On 18 November 2022, ICASA disqualified all 17 applications of the applicant on the ground that it had failed to comply with one of the pre-registration conditions by failing to pay the full pre-registration amount of R4,118.00 for each of the applications submitted.

[12] On the day that the applicant received correspondence from ICASA informing about the disqualification of its applications, the applicant’s attorneys of record wrote a letter to ICASA in which it indicated, *inter alia*, that:

12.1 the short-payments made by the applicant were immaterial and were mainly due to the applicant being misinformed by ICASA’s officials, which

information was acted upon and that the short-payments were a bona fide error.

12.2 ICASA should reconsider its decision to disqualify the applicant's pre-registration notices and give an undertaking that it would not proceed with the consideration of applications until its intended review application is determined.

[13] On the same day, the applicant also paid the pre-registration fee shortfall amounts.

[14] On 23 November 2022, ICASA responded to the applicant's attorneys' letter by indicating that its contents were being reviewed.

[15] On 24 November 2022, the applicant launched these urgent proceedings.

[16] In considering whether to allow this matter to be heard on an urgent basis the main considerations to be taken into account are the prejudice the applicant might suffer if the order is not granted and the prejudice the respondent might suffer if the order is granted by the abridgement of the prescribed time period.

[17] It is the applicant's contention that the matter is urgent because the applicant's disqualification was an ongoing illegality which would negatively impact on any relief eventually granted in the main application.

[18] Taking into account that the decision precipitating the launching of these urgent proceedings was taken on 18 November 2021 and these proceedings were instituted on 24 November 2022, I am satisfied that there was no undue delay in bringing this

application. I am satisfied that the applicant has shown sufficient cause and grounds for the matter to be heard on an urgent basis.

[19] Besides opposing the granting of an interim interdict, the respondent has raised non-joinder as a point in limine.

[20] It was submitted on behalf of the respondent that the applicant should be non-suited as it failed to join other applicants involved in the ITP-R process even though these parties had a substantial interest in the outcome of this application.

[21] In its replying affidavit the applicant in this regard avers that it did not join the other applicants as it did not know who they were. It was further submitted that the joinder issue was only relevant with regard to those areas where there were other applicants for licences besides the applicant and not relevant in those areas where the applicant was the only applicant.

[22] In *City of Johannesburg and Others v South African Local Authorities Pension Fund and Others* said that:

“[9] As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties (see eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9). A ‘direct and substantial interest’ is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in

the first place (see eg *Amalgamated Engineering Union* at 661; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others* 2005 (4) SA 212 (SCA) paras 64-66).”

[23] As correctly pointed out by counsel for the respondent, the other applicants in the ITP-R process do have a vested interest in the issues raised and the outcome of this application and should have been joined. The fact that the applicant did not know the identity of the other applicants is no excuse and this could have easily been obtained from ICASA. Under the circumstances I am of the view that the issue of non-joinder raised by the respondent should succeed and the application should be dismissed with costs.

[24] In spite of the finding made in respect of the issue of non-joinder above, I will proceed to deal with the application for an interim interdict, in the event that the finding on non-joinder is wrong.

[25] An applicant seeking an interim interdict has to satisfy the following requirements:

- 25.1 a right which, though *prima facie* established is open to some doubt;
- 25.2 a reasonable apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- 25.3 a balance of convenience favours the granting of interim relief; and
- 25.4 there is no other satisfactory remedy available.

[26] In *Erikson Motors (Welkom) Ltd v Protea Motors Warrenton and Another*¹ the Appellate Division as it then was held that none of the above-mentioned requirements were decisive.

[27] With regard to a *prima facie* right, in *Simon NO v Air Operations of Europe AB and Others*² the court stated that:

“The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed, and to consider whether having regard to the inherent probabilities the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he cannot succeed.”

[28] If the applicant’s prospects of success in the review application are weak, the balance of convenience should favour of the granting of the interim interdict. In Furthermore, where the granting of the interim interdict will have an impact on the performance of a statutory function, an interim interdict can only be granted in the clearest of cases. In *National Treasury and Others v Opposition to Urban Tolling and Others*³ the court held that:

“[46]: “... Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state

¹ 1973 (3) SA 685 (A).

² 1999 (1) SA 217 (SCA).

³ 2012 (6) SA 223 (CC).

against which the interim order is sought.

[47]: "The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of the separation of powers harm.

...

[65] When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

[29] The Constitutional Court in the *OUTA* matter went further and stated that:

"[71] ... Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of Government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present

case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrants otherwise.”

[30] In its founding affidavit the applicant asserts that it has a *prima facie* right, if not a clear right to be granted an interim interdict. However, the applicant failed to substantiate its claim to a *prima facie* right. It was only in its replying affidavit that the applicant claimed to have a *prima facie* right in that it has a right to administrative action in order to avoid the proverbial horse from bolting. It is the applicant’s contention that its review application has prospects of success and that the balance of convenience is in favour of the interim interdict being granted. Further in argument it was submitted that the applicant has a reasonable apprehension of irreparable harm if interim interdict is not granted, in that it will suffer prejudice where the impugned administrative action continues unabated and contrary to the applicant’s rights to just and fair administrative action. It is further the applicant’s contention that should the interim interdict not be granted and the applicant becomes successful in its review application, the applicant has no satisfactory remedy available to the applicant.

[31] According to the applicant, the non-payment of the correct pre-registration fee was as a result of a bona fide mistake due to the misinformation van Schalkwyk received from ICASA’s officials. It was submitted applicant that the mistake made in not paying the full prescribed pre-registration fee is immaterial and that the decision by the respondent refusing to condone the mistake was unreasonable and procedurally unfair. In this regard reference was made to the decision in *Milleneum Waste Management*

*(Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*⁴ where the court held that:

“[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*).

...

[21] Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative justice rights while satisfying the requirements of PAJA (*Du Toit v Minister of Transport*). Conditions such as the one relied on by the tender committee should not be mechanically applied with no regard to a tenderer’s constitutional rights.”

[32] On behalf of the respondent it was submitted that the applicant has not established a prima facie right warranting the granting of an interim interdict. Further, it was submitted, with regard to the applicant’s assertion that it has prospects of success in the review, that the applicant has incorrectly relied on the Milleneum decision with regard to whether non-compliance with peremptory requirements could be condoned. In this regard counsel for the respondent made reference to the decision in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith*⁵ where the court held that:

“[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.”

⁴ 2008 (2) SA 481 (SCA).

⁵ 2004(1) SA 308 (SCA).

[33] As indicated above, the applicant did not make out its case in the founding affidavit that it has a prima facie right though open to some doubt. Nothing turn on the fact that the applicant has instituted review proceedings against the impugned decision. In the OUTA matter, the court stated that:

“[50] Under the *Setlogelo* test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision.⁶ It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.”

[34] The applicant has also not shown that a reasonable apprehension of harm exists if the interim interdict is granted and the final relief sought is eventually granted. Nothing stops the reviewing court, if the applicant is successful, from making an order for its applications to be considered. Even if the balance of convenience may favour the granting of the interim interdict, the applicant has failed to show that it has prospects of success in the review application.

[35] In the main, the applicant has placed its argument in favour of the granting of an interim interdict on the ground that its review application has prospects of success as condonation of its non-compliance with a peremptory requirement of the ITP-R invitation ought to have been granted as it was in the public interest. However, in *Dr JS Moroka*

⁶ *Setlogelo* above n 28 at 227.

*Municipality v The Chairperson of the Tender Board of the Limpopo Province*⁷the court held that:

“[18] ... Accordingly, in my respectful view, insofar as the judgment in *Millennium Waste Management* may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.”

ICASA does not have the discretion to condone the applicant's non-compliance with peremptory requirements of the ITP-R invitation.

[36] The applicant failed to deal with the issue of whether the granting of the interim interdict would violate the doctrine of separation of powers, save to say it was not applicable. As correctly pointed out by counsel for the respondent, if the interim interdict is granted, it would stymie ICASA from proceeding with the processing of the successful applicants. In view of the fact that the applicant has failed to establish a *prima facie* right in the clearest terms, I am of the view that if the interim interdict is granted it would interfere with ICASA's statutory obligations.

[37] In the result, I am satisfied that the applicant has not established the requirements of an interim interdict and that its application ought to fail.

[38] It is trite that costs follow the cause. On behalf of the applicant it was submitted that should it not be successful in its application, the *Biowatch* principle⁸ should be applied and that it should not be mulcted with costs as it was pursuing its constitutional

⁷ [2014] All SA 545 (SCA).

⁸ *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

rights to administrative action. The respondent has argued that the matter does not fall within the purview of the *Biowatch* principle and that in the event of it being successful, the applicant should be liable for costs.

[39] In *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*⁹ the court stated that:

“[77] This Court has reiterated on numerous occasions that the crucial consideration in determining whether the principle set out in *Biowatch* should apply is not the character of the parties, but the nature of the litigation at issue. This Court in *Biowatch* succinctly stated the principle as follows:

“It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken.”

[40] Taking into account that the application raised constitutional issues, I am satisfied that the *Biowatch* principle is applicable and that ordinarily, even though the applicant is unsuccessful, it should not be directed to pay the costs of this application. However, in view of the finding made with respect to the point limine, I am of the view that the applicant should be liable for the costs of the application.

[41] In the result the following order is made:

1. The application is dismissed.

⁹ 2020 (6) SA 325 (CC).

2. The applicant to pay the costs consequent on the employment of senior Counsel.



N P MNGQIBISA-THUSI

Judge of the High Court

Date of hearing : 08 December 2022

Date of judgment : 16 January 2023

Appearances

For Applicant: Adv FJ Mphahlele SC with Adv. F J Labuschagne (instructed by Hurter Spies Inc)

For Respondent: Adv T Motau SC with Adv. M Musandiwa (instructed by Motsoeneng Bill Attorneys)