

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



Case number: 42817/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED
19/5/2021.....
DATE SIGNATURE

In the matter between:

PRIMEDIA (PTY) LTD

Applicant

And

**INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

First Respondent

**ACTING CHAIRPERSON, INDEPENDENT
COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA**

Second Respondent

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The applicant (Primedia) brought an application seeking the issuing of a declaratory order declaring that the exemption granted by the first respondent, The Independent Communications Authority of South Africa ("ICASA"), to Primedia on 23 March 2006 in terms of which section 49 of the Independent Broadcasting Authority Act 153 of 1993 did not cease to exist or expire upon expiry of the commercial broadcasting licences controlled by Primedia. Secondly an order was also sought that when renewing the commercial broadcasting licences, the respondents are obliged to only have regard to the factors set out in section 11 of the Electronic Communications Act 36 of 2005 ("ECA") and may not require Primedia to apply for the exemption. This prayer was however not proceeded with. Thirdly an order was sought that, the decision taken by ICASA on 13 March 2019, requiring Primedia to make a fresh application in terms of section 65(6) of the ECA before the respondents would consider Primedia's application to renew its commercial broadcasting licence in respect of Radio 702, should be reviewed and set aside.

- [2] The issues that required determination were, firstly, whether ICASA could raise new reasons for its decision in the answering affidavit, and if it could, whether these reasons have any merit. The other issues requiring determination were the duration of the exemption granted, whether the review was brought prematurely and whether a declaratory order should be issued.
- [3] Primedia is a broadcaster and holds three commercial FM sound broadcasting licences in terms of the ECA. These licences are for three radio stations, namely 94.7, Radio 702 and K-FM. The Radio 702 licence was due to expire on 16 December 2018. Primedia accordingly applied to ICASA for a renewal of the licence on 13 March 2018. ICASA took a year to respond to the renewal application. In its response, ICASA indicated that Primedia had to submit an exemption application in terms of section 65(6) of the ECA, before it would consider the renewal application. Primedia was of the view that the exemption granted in 2006, was unconditional and would remain valid, whilst ICASA took the view that the exemption would lapse when the existing Radio 702 licence expired.

THE LEGISLATIVE FRAMEWORK

- [4] The Independent Broadcasting Authority Act 153 of 1993 ("the IBA Act") came into effect on 30 March 1994. Section 46(2)(a) of the IBA Act states that any person who, prior to 30 March 1994, provided a private

broadcasting service under a valid licence, was deemed to be a holder of a licence under the IBA Act.

- [5] Section 49 of the IBA Act provides for limitations of the control of a commercial broadcasting service. In particular, sections 49(2) and (3) provides as follows:

“(2) No person shall –

- (a) be in a position to exercise control over more than two private FM sound broadcasting licences;*
 - (b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two private FM sound broadcasting licences; or*
 - (c) be in a position to exercise control over two private FM sound broadcasting licences and be a director of any company which is in a position to exercise control over any other private FM sound broadcasting licence.*
- (3) A person referred to in subsection (2) shall not be in a position to control two private FM sound broadcasting licences which either have the same licence areas or substantially overlapping licence areas.”*

[6] The effect of the aforesaid sections was that no one could exercise control over more than two commercial FM sound broadcasting licences in total and only one commercial FM sound broadcasting licence, in a specific licence area.

[7] However, the Independent Broadcasting Authority ("IBA") was empowered, under section 49(6), to grant an exemption from the limitations in sections 49(2) and (3), subject to terms and conditions. Sections 49(6)(a) and (b) provided as follows:

"(6)(a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections.

(b) An exemption in terms of paragraph (a) may be made subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstances."

[8] The Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act") substituted the IBA and the South African Telecommunications Regulatory Authority, and ICASA was created as the regulator for both telecommunications and broadcasting. The ECA came into operation on 19 July 2006 and repealed both the IBA Act and

the Telecommunications Act 103 of 1996. The result was that a single piece of legislation governed broadcasting and telecommunications.

[9] Existing licences were converted in terms of section 93 of the ECA, which provides that ICASA must convert pre-existing licences by granting one or more new licences that comply with the ECA on no more favourable terms than the pre-existing license.

[10] The exemption provisions are contained in section 65 of the ECA. These provisions are substantially similar to the exemption provisions contained in section 49 of the IBA Act. Section 65 provides, in relevant part, as follows:

“...

(2) *No person may—*

- (a) *be in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;*
- (b) *be a director of a company which is, or of 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;*

(c) *be in a position to exercise control over two commercial broadcasting service licences in the FM sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting licence in the FM sound broadcasting service.*

(3) *A person referred to in subsection (2) must not be in a position to control two commercial broadcasting service licences in the FM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.*

...

(6) *The Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from the provisions of subsections (1) to (5)."*

[11] As a result, section 65 precludes a person from, controlling more than two FM licences in total, controlling two FM licences in the same licence area, or substantially overlapping licence areas; and permits ICASA to grant on application, an exemption from these limitations.

[12] The ECA also provides for the renewal of licenses. Section 11 of the ECA provides, in relevant part, as follows:

(1) *A licensee may, subject to the conditions of his or her individual licence, apply for the renewal of his or her individual licence in the manner prescribed by the Authority.*

...

(6) *Subject to subsection (7), the Authority must renew the individual licence on no less favourable terms and conditions as were applicable during its preceding period of validity except where the amendments meet the requirements set out in section 10.*

(7) *Subject to subsection (12), the Authority may refuse to renew a licence or may renew the licence on less favourable terms and conditions than those that were applicable during the preceding period of validity or renew the licence with terms and conditions that are not applicable to similar licences if the Authority determines that the licensee has materially and repeatedly failed to comply with—*

(a) the terms and conditions of the licence;

(b) the provisions of this Act or of the related legislation; or

(c) any regulation made by the Authority.”

[13] Section 11 of the ECA makes it clear that ICASA is required to renew an individual licence subject to the limited circumstances provided for in section 11(7) of the ECA.

THE FACTUAL BACKGROUND

- [14] In the founding affidavit the history of Radio 702 was set out and the history seemed to be common cause between the parties. The radio station was founded in 1980, and in the 1980's and 1990's provided an independent voice in broadcasting. The aim was to counterbalance the radio stations operating under the South African Broadcasting Corporation, which were regarded as mere mouthpieces for the apartheid state at the time. Radio 702 set out how it still continues to play an important role in providing political education.
- [15] During the course of the late 1990's and early 2000's, Primedia Broadcasting (Pty) Ltd, which held the Radio 702 licence, came to hold additional licenses, bringing it to the maximum permissible limit under section 49 of the IBA Act. It controlled two MW licences, which were not in overlapping areas, and two FM licences, which were also not in overlapping areas.
- [16] However, in 2005, it began to experience problems regarding the medium-wave signal on which the Radio 702 service was being transmitted. This resulted in a significant decrease in listeners. It therefore applied to ICASA, in terms of the IBA Act, for an amendment to the Radio 702 licence, whereby it would migrate from the MW frequency band to the FM band at 92.7 MHz in Johannesburg and 106 MHz in Pretoria.

[17] At the time it sought the licence amendment, it also applied, in terms of section 49(6) of the IBA Act, for an exemption from the requirements of section 49(2) and (3). This would allow it to hold three FM licences (in respect of K-FM, 94.7 and Radio 702), two of which were in an overlapping coverage area (94.7 and Radio 702). On 23 March 2006, while the Radio 702 renewal application was still pending, ICASA granted the exemption.

[18] Following a process of internal restructuring, Primedia became the holder of all four licences in November 2008, and this has been the case ever since. On 17 December 2008, in terms of section 93 of the ECA (which required ICASA to convert all pre-existing licences issued under the IBA), ICASA issued Primedia with an individual commercial sound broadcasting service licence and a radio frequency spectrum licence in respect of Radio 702. Primedia's current Radio 702 licence was due to expire on 16 December 2018. On 13 March 2018, prior to its expiry, Primedia submitted an application to renew the licence. ICASA gave notice of the application in the Government Gazette. No objections or comments were received. ICASA failed to attend to the application for a year. In terms of section 15 of the ECA, a licence whose renewal application is pending may continue to provide broadcasting services, as a result Radio 702 has been able to continue broadcasting. On 13 March 2019, ICASA held that Primedia was required to submit a fresh exemption application in terms of section 65(6) of the ECA, in order for its licence

renewal application to be considered. Following this, Primedia's legal representatives wrote to ICASA requesting reasons.

THE REASONS PROVIDED BY ICASA

[19] On 16 April 2019, ICASA provided its reasons. It stated that the exemption previously granted, was granted "under a licence" and accordingly ceases to exist upon the expiry of that licence and ICASA could therefore lawfully decide to require Primedia to apply for a valid exemption before renewing its licence.

[20] However in the answering affidavit the reasons raised for the first time, were that an exemption from sections 49(2) and (3) of the IBA Act was never actually granted in 2006. The exemption granted was in terms of section 49(1) of the IBA Act. ICASA further alleges that no "decision" had yet been taken in respect of Primedia's renewal application, as a result whereof it was argued that the review was premature.

[21] Section 49(1) of the IBA provides as follows:

"(1) No person shall

(a) directly or indirectly exercise control over more than one private television broadcasting licence; or

(b) be a director of a company which is, or of two or more companies which between them are, in a position to

exercise control over more than one private television broadcasting licence; or

(c) be in a position to exercise control over a private television broadcasting licence and be a director of any company which is in a position to exercise control over any other private television broadcasting licence.”

[22] This argument by ICASA is both wrong and opportunistic. Primedia never applied for, or held a television broadcasting licence. Primedia also never applied for an exemption from section 49(1) of the IBA Act, this much is clear from a perusal of the exemption application, which explained that if the amendment was approved, Primedia would control three commercial FM broadcasting service licences. This was also clearly understood by ICASA as an application under section 49(2), if one considers the correspondence exchanged in this regard.

[23] In its reasons for the impugned decision, ICASA understood itself to have granted Primedia an exemption from section 49(2) and (3). As it stated:

“In 2005, PRIMEDIA submitted a request for (i) Talk Radio 702 to be migrated from its use of a Medium Wave Frequency to the FM band and (ii) an exemption from the restrictions imposed on the number of FM stations that can be held by one licensee. The Authority granted both requests and as a result

PRIMEDIA currently holds three (3) 1-CSBS licences in the FM sound broadcasting service which are due for renewal."

[24] ICASA proceeded to consider that application, on its merits, by listing and considering each reason advanced. The crux of the reasoning by ICASA was that "[t]he Authority considers that the only realistic and financially feasible option to ensure that Radio 702 remains on-air in the medium to long-term and does so with transmission of reasonable quality, is migration to the FM band".

[25] It is clear that the reference to section 49(1) of the IBA Act, in the document granting exemption, could only be a typographical error as the application never referred to a television broadcasting licence. ICASA clearly intended to grant Primedia's application in terms of section 49(6) of the IBA Act to be exempted from sections 49(2) and (3).

[26] Apart from the aforesaid, the subsequent facts also indicated that the exemption was granted in terms of sections 49(2) and (3) of the IBA Act, as Primedia has been operating in the broadcasting sphere for the last fourteen years, without ICASA ever raising the alarm that it was acting unlawfully, which would have been the case if the exemption was granted under section 49(1).

- [27] It has been held by our courts that administrators are bound by the reasons they give at the time of their decisions, and it is not permissible to, after the fact, provide a new reason as a justification for a decision.¹ It is accordingly not permissible to, after the fact, provide a new reason as a justification for a decision.² Any further reasons are irrelevant³ and “an *ex post facto* rationalization of a bad decision.”⁴
- [28] The aforesaid rule was endorsed by the Constitutional Court in *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and others*⁵ where it was stated that “. . . reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful.”⁶
- [29] It must be noted that state organs are under a constitutional and statutory duty to review and set aside an exemption if it was unlawful. This much was made clear by the Constitutional Court and the Supreme Court of Appeal (“SCA”).
- [30] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*⁷, the Constitutional Court held that state

¹ National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA) (National Lotteries Board); Van Zyl and others v Government of the Republic of South Africa and others 2008 (3) SA 294 (SCA) at para 55.

² National Lotteries Board, *ibid* at paras 24-28.

³ PG Group Ltd and Others v South African Education and Environment Project 2018 (5) SA 150 (SCA) at para 41.

⁴ National Lotteries *supra* fn 1, at para 27, Minister of Defence and Military Veterans v Motau and others 2014(5) SA 69 (CC) at para 55.

⁵ 2020(1) SA 450 (CC) at para 39.

⁶ *Ibid*.

⁷ 2014(5) SA 579 (CC).

functionaries are subject to a duty to rectify their own unlawful decisions. This follows from the fact that the rule of law is a founding value of our constitutional democracy.⁸ It also follows from section 195 of the Constitution of the Republic of South Africa, 1996 ("Constitution") which provides for accountable public administration.⁹

[31] The Constitutional Court therefore upheld the Labour Appeal Court's finding that the MEC *"was not only entitled but also duty bound to approach a court to set aside her irregular administrative act."*¹⁰

[32] In *Merafong City Local Municipality v AngloGold Ashanti Limited*,¹¹ the Constitutional Court restated the position as follows:

"This court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help'. What is more, in *Khumalo* this court held that state functionaries are enjoined to uphold and protect the rule of law by inter alia seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty 'to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public

⁸ *Ibid* at para 29.

⁹ *Ibid* at para 33.

¹⁰ *Ibid* at para 34 read with para 38.

¹¹ 2017(2) SA 211 (CC) (Merafong).

administration, in the context of employment or otherwise, seek to redress it'. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public."¹²

[33] In *MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd*¹³ itself, the majority of the Constitutional Court held that where the state has taken a defective decision, "*government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.*"¹⁴

[34] As a result ICASA cannot be allowed to raise new reasons belatedly, and had a duty to rectify the situation if the licence was indeed dealt with under section 49(1). As a result not only is ICASA not allowed to rely on new reasons in the answering affidavit, but even if one considers those reasons they have no merit.

[35] ICASA also contended that the review application was not ripe for hearing, as a final decision was yet to be made. ICASA therefore contended that Primedia must wait for its renewal application to be

¹² *Ibid* at para 61.

¹³ 2014(3) SA 481 (CC) (Kirland).

¹⁴ *Ibid* at para 64.

determined and rejected, before applying to review and set aside the decision.

[36] However, this is not a requirement under the principle of legality.¹⁵ Primedia accordingly argued, and correctly so, that even if the decision did not constitute an administrative action, it did constitute the exercise of public power and was accordingly subject to review.

[37] Under the principle of legality “*every exercise of public power, including every executive act is subject to review.*”¹⁶ The Constitutional Court declared that “*the exercise of all public power is subject to constitutional control.*”¹⁷

[38] As a result, it was argued that the only question that remained was whether the review is ripe for challenge and this question should be answered by looking at the aspect of prejudice. The appropriate criteria by which ripeness is to be determined is “*whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.*”¹⁸ The SCA in *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others*,¹⁹ cited the aforementioned

¹⁵ *Electronic Media Network Limited and Others v E.tv (Pty) Ltd and Others* 2017 (9) BCLR 1108 (CC).

¹⁶ *Ministry of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

¹⁷ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) 223 (CC) at para 64.

¹⁸ L Baxter, *Administrative Law* (1984) at 720.

¹⁹ 2012 (2) SA 16 (SCA) at paras 17-20.

approach with approval and also pointed out that the question whether a decision is ripe for challenge is a question of fact and not of dogma.

[39] Primedia argued that, on the facts, prejudice as a result of the impugned decision is inevitable, as ICASA required Primedia to submit an application for exemption in terms of section 65(6) of the ECA. Accordingly it is clear that, if Primedia does not submit an exemption, its licence renewal application will be unlawfully refused and the result will be that Radio 702 will go off air, resulting in economic prejudice and job losses. Primedia estimated that the revenue loss for a period of one year off air is estimated at R230 million, adjusted to R200 million as a result of the Covid-19 pandemic. Radio 702 employs 162 full time employees and 43 freelancers. Of the fulltime employees, 35 are station specific, the rest constitutes shared human resources within Primedia. Furthermore, if Primedia should lose Radio 702's contribution, various departments are likely to be scaled back in terms of staff resulting in more job losses. It was also argued that there will also be the further prejudice that the public will suffer if Radio 702 is taken off air.

[40] It was further pointed out that ICASA itself considered the impugned decision as a "decision". This is so, Primedia argued, because in response to Primedia's request for reasons on 20 March 2019, ICASA stated that it was providing reasons for its decision. Therefore, Primedia argued that the decision has external legal effect and affects the rights of Primedia adversely, accordingly the decision amounts to an

administrative action. Alternatively due to the prejudice discussed earlier, the review is ripe under the principle of legality.

[41] In *Sneller*²⁰ the following was said:

“Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process ... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.”

[42] Thus, even for the purposes of administrative action under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), it is not necessary that such action actually affects the party’s rights. The courts have repeatedly confirmed that it is enough that it has the capacity to affect legal rights.²¹

[43] That is why the SCA held that parties are entitled to challenge not only a tender award, but a tender advertisement, and are not required to await the award of the tender before instituting review proceedings. Relying on the above dicta in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social*

²⁰ Para 21.

²¹ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA (SCA); *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC)

*Security Agency and Others*²² and *Sneller*, the SCA held in *Airports Company South Africa SOC Ltd v Imperial Group Ltd*²³ that Imperial could not wait until after ACSA had made a final award because it would, upon its disqualification from the bid, have to vacate ACSA's premises.²⁴ Furthermore the automatic disqualification of Imperial and the first hurdle of the evaluation process would have an external effect and adversely affect Imperial's legal rights, because "[e]xpecting Imperial to wait until it was formally notified of the outcome before resorting to judicial review in terms of PAJA would indeed be tantamount to putting form above substance."²⁵

- [44] Notably, the above dicta applies to administrative action, which must have direct, external legal effect. Even on that heightened test, ICASA's decision in this case is reviewable for precisely the reasons set out in that matter.
- [45] A lower bar for ripeness applies under the principle of legality. This was made clear by Cameron J (albeit in the minority) in *Electronic Media Network*,²⁶ where he explained that "review under the principle of legality does not require, as PAJA does, that the decision has direct, external, legal effect for it to be reviewable". For purposes of legality review, the only question is whether the review is ripe for challenge. This is a

²² 2014 (1) SA 604 (CC).

²³ 2020 (4) SA 17 (SCA).

²⁴ *Ibid* at para 16.

²⁵ *Ibid* at para 18.

²⁶ *Supra* fn15, at para 122.

question primarily of prejudice, whether prejudice has already resulted or is inevitable.²⁷

- [46] ICASA's suggestion that Primedia can avoid prejudice by submitting an exemption application does not have any substance. If there is no obligation in law to apply for an exemption, then ICASA's stipulation that Primedia must do so is a reviewable irregularity. As a result the decision cannot be rendered unreviewable by requiring Primedia to do that, which is unlawful.
- [47] Considering the facts and the law, it is in my view clear that a decision was taken in terms of PAJA and as a result the decision constitutes an administrative action and therefore it is reviewable, but even if I am wrong on that score the decision is reviewable under the principle of legality and therefore the review was not brought prematurely as argued by ICASA.
- [48] Regarding the question of whether a decision was taken, it is clear that a decision was taken. The decision was that ICASA would not consider Primedia's application, unless an exemption application was filed. While ICASA claimed that Primedia mischaracterized its 13 March 2019 letter as containing a decision, both Primedia and ICASA considered the letter

²⁷ Rhino Oil and Gas Exploration SA (Pty) Ltd v Normandien Farms (Pty) Ltd & another [2019] ZASCA 88 at para 33.

at the time to contain a decision, that much was clear from the correspondence between the parties.

[49] It is important to note that section 11 of the ECA regulates the renewal process. Sub-sections (6) and (7) empower ICASA to refuse applications only on a limited set of specified grounds.

“(6) Subject to subsection (7), the Authority must renew the individual licence on no less favourable terms and conditions as were applicable during its preceding period of validity except where the amendments meet the requirements set out in section 10.

(7) Subject to subsection (12), the Authority may refuse to renew a licence or may renew the licence on less favourable terms and conditions than those that were applicable during the preceding period of validity or renew the licence with terms and conditions that are not applicable to similar licences if the Authority determines that the licensee has materially and repeatedly failed to comply with-

(a) the terms and conditions of the licence;

(b) the provisions of this Act or of the related legislation;

or

(c) any regulation made by the Authority.”

[50] In light of the aforesaid, ICASA is under an obligation to renew licences, upon application, unless one of the grounds in sub-section 7 of the ECA applies. Sub-section 7 sets out the limited bases upon which the renewal may be refused, as is clear from the wording of the section.

[51] It was not disputed that ICASA is limited to consider the grounds in section 11 of the ECA and there is no evidence that Primedia materially and repeatedly failed to comply with the law or the licence. ICASA argued that it may nevertheless require an applicant to re-apply for exemption, when it decides a renewal application, because section 11(6) of the ECA permits it to renew licences on “*less favourable*” terms, provided that the amendments meet the requirements of Section 10.

[52] Section 10 of the ECA sets out the circumstances under which ICASA may amend a licence. ICASA argued that where those factors are present, it is entitled to renew the licence on less favourable terms and conditions. Section 10 provides as follows:

“(1) The Authority may amend an individual licence after consultation with the licensee—

(a) to make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type;

- (b) for the purpose of ensuring fair competition between licencees;*
- (c) to the extent requested by the licensee provided it will not militate against orderly frequency management and will not prejudice the interests of other licencees;*
- (d) to the extent necessitated by technological change or in the interest of orderly frequency management;*
- (e) in accordance with a decision made by the Authority in terms of section 17E of the ICASA Act following a finding and recommendation by the Complaints and Compliance Committee;*
- (f) where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of this Act;*
- (g) if the amendment relates to universal access or universal service and is necessary, in the opinion of the Authority, as a result of—*
 - (i) changed circumstances in the market; or*
 - (ii) lack of electronic communications network services, broadcasting services, or electronic communications services in specifically identified areas of the Republic.*
- (h) if the amendment is in accordance with Chapter 10 and any regulations that have been made under it.*

(2) The provisions of section 9 (2) to (6) apply, with the necessary changes, to the amendment of an individual licence.”

[53] However, Primedia argued correctly, that what ICASA failed to do is to explain how any of the factors in section 10 of the ECA apply to Primedia, or, more importantly, how any of them could conceivably justify requiring the submission of a fresh exemption application, when determining the Radio 702 renewal application.

[54] Even if ICASA was considering a decision on whether to renew the Radio 702 licence on less favourable terms, the submission of an exemption application seems to be an irrelevant consideration to the decision on whether to do so. It is accordingly unlawful for ICASA to require such an application, before granting the renewal.

THE DURATION OF THE EXEMPTION

[55] According to Primedia the exemption does not expire upon the expiry of the licence. ICASA on the other hand is of the view that the exemption granted does not exist in perpetuity and ceases to exist on expiry of the licence term for which it was granted.

- [56] Counsel for Primedia argued that there is nothing in the relevant statutory provision which automatically ties the duration of an exemption to the duration of a licence, as a result the duration of the exemption will therefore only be limited or tied to a licence when the exemption itself makes this clear. A perusal of the papers provides clarity in that the 2006 exemption did not contain any limit on the duration of the exemption, nor did it link the exemption to the duration of Primedia's licence, despite the Act making provision for conditions to be set.
- [57] ICASA advanced an argument based on a broad statutory interpretation, during which reference was made to ICASA's broad and polycentric powers. ICASA further stated that Primedia's interpretation was contrary to the language and purpose of the ECA and would render ICASA unable to perform its statutory duties and would furthermore undermine the Competition Act 89 of 1998 ("Competition Act"), and would divest ICASA of its regulatory powers.
- [58] Counsel for Primedia however pointed out that Primedia did not suggest that all exemptions are of an unlimited duration, or that ICASA is prevented from granting exemptions for a limited duration. The argument was that section 49 of the IBA Act did not constrain ICASA either way and an exemption of limited or indefinite duration could have been granted. Section 49(6)(b) of the IBA Act provides that ICASA could grant an exemption "*subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstances.*" It is

accordingly clear that the IBA Act gives effect to ICASA's discretionary powers, and leaves it free to impose constitutionally compliant and administratively just conditions on the exemption. In this instance such a discretion was not exercised

[59] Counsel for Primedia argued that as a result the duration of the exemption must be determined with reference to the specific terms and conditions which ICASA chose to impose on it. As a result, so the argument went, an exemption would only be limited in duration, or tied to a licence, when the exemption itself made it clear. There was nothing in the papers to indicate this, nor did ICASA argue, that the exemption itself was subject to any limitation as to its duration.

[60] It was argued by counsel for Primedia that *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd*²⁸ provides the guidelines that needs to be applied in circumstances like this. In that matter the Private Industry Regulation Act 56 of 2001 ("PSIRA") prohibited the provision of security services by unregistered persons. The PSIRA thus required the respondent, which provided in-house security services, to register, and to comply with various other statutory requirements. The Respondent accordingly applied for two exemptions, one for itself and one for its employees, in terms of section 20(5) of the PSIRA. The Minister granted the exemptions, without any terms and conditions as to the duration of the exemptions. The Minister

²⁸ [2007] 1 All SA 154 (SCA).

subsequently promulgated regulations, which provided that any exemption granted before the regulations came into force would lapse after a year. The Respondents challenged the validity of those regulations, and also sought an order declaring that the exemptions were valid and of an indefinite duration, and that the Respondents did not need to apply for the renewal of the exemptions.

[61] In *Private Security* two questions required determination, the first one was whether the Minister was empowered to issue exemptions of an indefinite duration; and the second was whether the exemptions in question were, in fact, of a limited or indefinite duration. The Authority argued, along the same lines as ICASA did in this matter, that “*indefinite exemptions militate against the main object of the Act, which is to regulate the security industry, since the Authority would lose its power to control a security service provider ‘indefinitely and forever’ once the exemption was granted.*”²⁹ The SCA however did not agree with this submission, it held as follows:

“The Act clearly does not prohibit the grant of indefinite exemptions. As previously indicated, s 20(5) empowers the Minister to grant an exemption from the provisions of the Act, ‘either generally or subject to such conditions as [he may specify]’. Clearly, the Minister has the power to grant an exemption with or without condition. Contrary to submissions made on the Authority’s behalf in this regard, ‘condition’ must

²⁹ *Ibid* at para 19.

include the duration of an exemption, where one is fixed. If that be the case, one must then ask why the Minister should not have the power to impose an exemption without term. The answer must be that he does not have that power. This is precisely what he did in the instant matter. The exemptions are indefinite.³⁰

[62] Section 20(5) of the PSRIA is cast in materially similar terms to section 49(6)(b) of the IBA Act. Section 20(5) empowers the Minister to exempt any security service provider, "*either generally or subject to such conditions as may be specified in the notice*", from the operation of the PSRIA. Section 49(6)(b) of the IBA Act empowers ICASA to issue an exemption subject to "*such terms and conditions as the Authority deems appropriate and equitable in the circumstances.*"

[63] It was argued that ICASA was empowered to impose conditions in the same way that the Minister could impose conditions in *Private Security*, but chose not to, resulting in an exemption of indefinite duration. Similarly, in this instance ICASA did not impose any conditions on Primedia's exemption, resulting in Primedia having an exemption for an indefinite duration.

[64] ICASA sought to persuade the Court that Primedia's interpretation of section 49 of the IBA Act and section 65 of the ECA is contrary to section 9 of the Constitution, however as illustrated above, the interpretation

³⁰ *Ibid* at para 21

proposed by Primedia does not violate the Bill of Rights, nor does it limit ICASA's regulatory powers or discretion. Once that is unaffected there can be no argument that the interpretation is unconstitutional.

- [65] ICASA sought further to distinguish *Private Security* from the present matter and it was argued that the decision was concerned with an exemption to private security legislation which was granted under entirely different legislation, namely the Private Security Industry Regulation Act 56 of 2001 ("the Security Act"), and by an entirely different functionary, namely the Minister of Safety and Security ("the Minister of Security"). The decision was, so it was argued, furthermore concerned with an entirely different legal question, namely, whether regulations promulgated by the Minister of Security were intended by the Minister to be of an indefinite duration.
- [66] Another important distinction, it was argued, was that the Minister of Security, as the decision-maker, was not a party to the proceedings. The Court was required to interpret the legal import of the exemption he had previously granted in his absence.
- [67] It was pointed out by counsel on behalf of ICASA that when the Minister of Security in *Private Security* granted the prior exemption, he did so in the exercise of "*quite different powers*" to the powers vested in the Minister to promulgate regulations. That, it was argued, was

diametrically opposed to the present case, because in this case, Primedia's exemption and its licence are "*integrally connected*". However, the wording of the Act does not bear this argument out. Nowhere in the act is a link created between the licence, the duration and the exemption granted.

- [68] It was also argued that the Court in *Private Security*, held that the exemptions were indefinite because (a) indefinite exemptions were not prohibited in terms of the Security Act; and, because (b) an interpretation that the exemptions were intended to be indefinite would not absolve the beneficiaries of the exemption from mandatory compliance with the security-related obligations under the Security Act.
- [69] The argument that this matter should be distinguished from *Private Security* need some more scrutiny in order to determine its validity. It is true that *Private Security* involved different legislation and functionaries, one should however not lose sight of the fact that the crux of the matter should be the legal principle involved, and not the parties who were involved. As a result, a comparison of the statutory provisions in this matter and that of *Private Security* is appropriate. The relevant finding in *Private Security* was that because the relevant provision empowered

the Minister to grant an exemption, “*either generally or subject to such conditions as may be specified.*”³¹

- [70] Section 20(5) of PSRIA empowers the Minister to exempt any security service provider or security service provider, either generally or subject to such conditions as may be specified in the notice, from the operation of the PSRIA. Similarly, section 49(6)(b) of the IBA Act empowers ICASA to issue an exemption subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstances.
- [71] An analysis of the above reveals that the power exercised by the Minister was identical to the power exercised in this matter. It was argued, on behalf of ICASA, that if the exemption is indefinite it will compromise ICASA’s regulatory power. This argument however was based on the assumption that all exemptions granted under section 65 of the ECA will be indefinite, which is clearly not the case as ICASA may grant an exemption with or without conditions as set out above.
- [72] In *Private Security* the same objection was raised as in this present case, namely indefinite exemptions militate against the main object of the Security Act, which is to regulate the security industry, since the Authority would lose its power to control a security service provider ‘indefinitely and forever’ once the exemption was granted.³² In this case,

³¹ *Ibid* at para 11.

³² *Ibid* at para 19.

ICASA submitted along similar lines that the perpetuity of an exemption effectively creates a loophole in ICASA's regulatory power and would undermine ICASA's obligation under the ECA to promote stability in the ICT sector and ensure fairness.

- [73] This argument was rejected in *Private Security* by the SCA. Indefinite exemptions were found not to be in conflict with the objects of that Act. The court found that the argument ignored other measures contemplated by the Act to regulate the sector, such as the obligation of individual employees to register, and the application of the Code of Conduct.³³ The SCA's reasoning on this score applies with even greater strength in the present case.
- [74] The exemption at issue in *Private Security* was an exemption from the operation of the Security Act. It allowed the beneficiary of the exemption to practice as a private security company and render security services without being registered. The exemption in the present case is far more limited in scope. It merely exempts Primedia from the prohibition on controlling multiple licences. As a licensee, Primedia remains bound by the balance of the ECA in all others respects.
- [75] It was also argued that if the exemption exists in perpetuity it will undermine the purpose and provisions of the Competition Act, as Primedia would have an unfair advantage in the commercial and

³³ *Ibid* at paras 22 – 23.

broadcasting sector, which may facilitate an abuse of dominance, as it could prevent new entrants from entering the market as radio band frequencies are limited. It is not impossible that such a situation may in the future arise. However, at this point no factual basis was set out to support the argument that any new entrants are attempting to enter the market, and that those entrants are disadvantaged by Primedia's exemption or that the Competition Act should find application. A court should not be tempted to decide an issue which is, at present, based on vague speculation, courts are empowered to determine live disputes and should not venture into the realm of speculation.

- [76] ICASA also argued that the 2006 exemption and the reasons given, record that the application for exemption is integrally connected to the amendment of Primedia's licence and therefore the decision linked the exemption to the licence. In considering the statutory provision there is nothing that automatically tied the duration of the exemption to the duration of the licence. One needs to interpret the exemption itself. A perusal of the exemption, despite the section making provision for conditions to be put, reveal none.

REVIEW

- [77] A perusal of all the facts and the law set out above clearly illustrates that PAJA applies, but the impugned decision also amounts to the exercise of public power and therefore is subject to the principle of legality.

[78] Seeing however that PAJA was promulgated as a result of section 9 of the Constitution, this Court should review the matter under PAJA in light of the fact that the requirements of PAJA were met, however nothing much turns on this, even if I am wrong on this score the principle of legality will still apply.

[79] ICASA derives its power to renew licences from section 11 of the ECA. It may not lawfully exercise any power in relation to the renewal of licences not conferred on it by section 11. In deciding not to consider Primedia's renewal application, until it has submitted an exemption application, ICASA acted in a manner that section 11 of the ECA does not permit.

[80] In doing so ICASA contravened section 6(2)(a) of PAJA as it was not authorized to take the impugned decision by the empowering provision. It also contravened section 6(2)(f)(i) of PAJA in that the impugned decision is not authorized by the empowering provision. In terms of the principle of legality the impugned decision was both unlawful and *ultra vires*.

[81] In *Democratic Alliance v the President of South Africa and others*³⁴ the Constitutional Court states as follows:

³⁴ 2013(1) SA 248 (CC) (Democratic Alliance). See also Pharmaceutical Manufacturers Association of South Africa & another: In Re Ex Parte President of the Republic of South Africa & others 2000(2) SA 674 (CC).

“The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred.”³⁵

[82] Therefore, in order for the exercise of public power to be rational, there must be a rational connection between the exercise of that power and the purpose for which the power was granted.³⁶ However, there is no rational connection between the impugned decision and the purpose of ICASA’s power to renew a licence.

[83] In light of the aforesaid ICASA contravened section 6(2)(e)(i) of PAJA as the impugned decision was taken for a reason not authorized by the empowering provision and section 6(2)(f)(ii) of PAJA in that the impugned decision was not rationally connected to the purpose for which it was taken, the information before ICASA, or the reasons given

³⁵ *Ibid* para 33, See also *Van Der Merwe v Road Accident Fund* 2006(4) SA 230 CC.

³⁶ *Ibid* at para 85. See also *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) (Democratic Alliance) at para 36.

for it. In terms of the principle of legality the decision was both irrational and unlawful.

- [84] The decision was for the reasons set out above also based on material errors of law, took into account irrelevant considerations and failed to take into account relevant considerations.
- [85] Section 6(2)(d) of PAJA permits judicial review where “*the action was materially influenced by an error of law.*” Material errors of law are also grounds for review under the principle of legality. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,³⁷ the Constitutional Court held that an error of law will be material where it affects the outcome of a decision.
- [86] ICASA failed to recognize that as a matter of law, an exemption granted under section 49 of the IBA Act does not automatically expire upon the expiration of the licence and failed to recognize that its election not to impose a time limit on the validity of the exemption, meant that the exemption was of an indefinite duration. It also failed to recognize that under section 11 of the ECA it is obliged to renew the licences, without insisting on a new exemption application.

³⁷ 2010 (6) SA 182 (CC) para 91.

[87] Moreover, taking into account irrelevant considerations, and failing to take into account relevant considerations, are also grounds of review under section 6(2)(e)(iii) of PAJA. It is subsumed under legality review, as an incident of rationality. As the Constitutional Court stated in *Democratic Alliance*:

“[t]here is ... a three-stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.”³⁸

[88] The only considerations that are relevant to the determination of the renewal of the licence are those set out in section 11 of the ECA. ICASA however considered the provisions of section 65(2) and (3) of the ECA, which are irrelevant in a licence renewal process.

[89] As this is a constitutional matter, the relief must be approached with due consideration of section 172 of the Constitution. When a court considers

³⁸ *Supra* fn 39, at para 39

a remedy, the starting point, as a matter of constitutional principle, is that invalid administrative decisions must be declared unlawful.³⁹

[90] As the Court held in *AllPay I*, “Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful.”⁴⁰

[91] Following a declaration of invalidity, the consequences must be dealt with in a just and equitable order in terms of section 172(1)(b). The default position is that the just and equitable relief granted must be aimed at correcting or reversing the consequences of an invalid administrative action. As was stated in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*⁴¹

“This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public-procurement

³⁹ *Bengwenyama Minerals (Pty) Limited v Genorah Resources (Pty) Limited* 2011 (4) SA 113 (CC) at para 84; *Supra* fn22, at para 25) (“*AllPay I*”).

⁴⁰ Para 25.

⁴¹ 2014 (4) SA 179 (CC) (“*AllPay II*”).

matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social-security matters.”⁴²

[92] Therefore, having found that the administrative action is constitutionally invalid, a court must grant appropriate relief that is corrective of the consequences of the unlawfulness found. Ordinarily, this entitles an applicant to call for the unlawful action to be set aside.⁴³ Under certain circumstances, courts have permitted deviations from this “*corrective principle*”.⁴⁴ But they have stipulated that relief that does not give “*full effect*” to the finding of invalidity must be justified by the circumstances of the case,⁴⁵ giving primacy to the public interest and balancing the parties’ interests.⁴⁶

[93] In this case ICASA seeks a deviation from the corrective principle. It suggests that any declaration of invalidity of the impugned decision

⁴² *Ibid* at para 32.

⁴³ Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd [2009] ZASCA 8, 2009 (4) SA 628 (SCA) at para 11.

⁴⁴ *Supra* fn 46 at paras 32 and 34.

⁴⁵ Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011(4) SA 113 (CC) para 84.

⁴⁶ Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA) at paras 22, 28-9, 32; *AllPay II* at paras 32-34.

should be suspended. This, it says, is because a suspension would *“obviate the otherwise inevitable waste of time and resources that the complete setting aside of ICASA’s renewal process would entail”*

- [94] This submission is based on a misunderstanding of what it was that Primedia sought to set aside. If the review succeeds, only the decision reflected in the letter of 13 March 2019, which requires Primedia to submit an exemption application in terms of section 65(6) of the ECA before its licence renewal application will be processed, will be set aside. No time or resources will be wasted in simply setting that impugned decision aside. ICASA will then be free to determine the renewal application on a proper and lawful footing and without Primedia being required to submit a fresh exemption application.

THE DECLARATORY ORDERS

- [95] As far as the declaratory orders are considered, Primedia conceded that there is no need for prayer 2. At this point the only declaratory relief that is sought, is that contained in prayer one.

- [96] The granting of declaratory relief is discretionary. The court should have regard to several factors, including the existence, or absence of a live dispute; the utility of the declaratory relief; and whether, if

granted, it would settle the question in issue between the parties.⁴⁷
 Courts generally will not grant declaratory relief in respect of an issue that is moot, abstract, hypothetical and academic.⁴⁸

[97] It is in my view abundantly clear that there is a live *bona fide* dispute between the parties and declaratory relief will bring clarity to this dispute.

[98] It was argued by Primedia that the declaratory relief will provide important guidance to ICASA as to the proper exercise of its functions. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,⁴⁹ O'Regan J explained that this is an important purpose served by declaratory orders:

“It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief,

⁴⁷ See *Minister of Finance v Oakbay Investments (Pty) Ltd and others*; *Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre* 2018 (3) SA 515 (GP) at para [59]; Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed), 2009 at 1438–1440. See also *Smith v National Lotteries Commission and another* [2018] JOL 40345 (LC) at para 9.

⁴⁸ *Pheko and others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) at para 32; *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 (3) SA 514 (CC) at para 15; and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) 205 (SCA).

⁴⁹ 2005 (2) SA 359 (CC) (*Metrorail*) paras 107 – 108.

such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.”

[99] In this instance the declaratory relief sought in prayer one would resolve the dispute between the parties and will provide guidance to ICASA regarding the ambit of its decision making powers.

[100] In the light of the aforesaid the prayers one and three should be granted.

[101] An order is made in terms of the following:

- 1. It is declared that the exemption granted by the First Respondent to Primedia Broadcasting (Pty) Ltd on 23 March 2006, in terms of section 49 of the Independent Broadcasting Authority Act 153 of 1993 (the “exemption”) does not cease to**

exist or expire upon the expiry of the commercial broadcasting licences controlled by the Applicant.

2. The decision taken by the First Respondent on 13 March 2019, requiring the Applicant to make a fresh application for exemption in terms of section 65(6) of the ECA before the Respondents will consider the Applicant's application to renew its commercial broadcasting licence in respect of Radio 702 is reviewed, set aside and declared unlawful and invalid.

3. The Respondent are ordered to pay the costs of the Applicant, jointly and severally the one paying the other to be absolved, which costs will include the costs of two counsel.



R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING: 11 FEBRUARY 2021

DATE OF JUDGMENT: 19 MAY 2021

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