



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

Case No: **050968/2022**

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:


SIGNATURE

DATE

3 APRIL 2025

In the matter between:

**THE CHAIRMAN OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
(ICASA)**

Applicant

and

PRETORIA FM NPC

Respondent

IN RE:

PRETORIA FM NPC

Applicant

and

**THE CHAIRMAN OF THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
(ICASA)**

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 3 April 2025.

JUDGMENT

RETRIEF J

INTRODUCTION

[1] The applicant, the Chairman of the Independent Communications Authority of South Africa [ICASA] applies for leave to the Supreme Court of Appeal alternatively to the Full Bench of this Court against the whole of the judgment and order (including costs) handed down on the 11 December 2024 in which the applicant's decision to disqualify the respondents 6(six) applications for the pre-registration of community sound broadcasting services and radio frequently spectrum licences [respondents' applications] in terms of the Electronic Communications Act. 36 of 2005, as amended [ECA], was declared unlawful and set aside. The 6(six) applications were remitted back to the applicant for reconsideration.

[2] It is common cause that on the 14 December 2021, Dr Keabetswe Modimoeng [Dr Modimoeng] in the Government Gazette of the 15 December 2021, published an invitation for pre-registration for Community Sound Broadcasting

Services and Radio Frequency Spectrum Licences in terms of section 17, 31(1) and 31(2) of the ECA read with regulation 4(5) of the Community Broadcasting Regulations, of 2019. Dr Modimoeng stated that: *“All pre-registration notices will be considered based on the requirements set out in the invitation to pre-register “ITP-R”, read with the ECA Act (own emphasis) and applicable regulations.”*

[3] In consequence the invitation informed applicants that it was a call for class licences (section 17) for the transmission of signals by radio or radio apparatus in accordance with a radio frequency spectrum licence (section 31(1) and (2)) of the ECA Act. Furthermore, Dr Modimoeng confirmed that all pre-registration notices would be considered based on the ITP-R (invitation) read with the ECA Act and applicable regulations. The use of the words *“-read with-“* implying that the basis for consideration was not only confined to the ITP-R nor to sections 17, 31(1) and (2) of the ECA as suggested by the applicant in its application for leave to appeal.

[4] Be that as it may, the ITP-R itself too included certain guidelines which were to be read by each the pre-registration notice. The guidelines marked “Schedule A” echoed the same message as that announced by Dr Modimoeng in that it stated:

“NON-COMPLIANCE WITH PROVISIONS OF THE ECA ACT, THIS ITP-R AND/OR ANY APPLICABLE REGULATIONS WILL RESULT IN THE REJECTION BY THE AUTHORITY OF SUCH NON-COMPLIANT PRE-REGISTRATION NOTICE”

[5] Non-compliance was to be considered having regard to the provisions of the ECA Act, considering the ITP-R and/or considering any applicable regulations.

[6] Furthermore the guidelines at Paragraphs 14 and 19 of schedule A stated that:

“14. Every pre-registration notice must be accompanied by proof of payment (own emphasis) of the non-refundable application fee of Four Thousand One Hundred and Eighteen Rand (R4 118.00). The payment must be made by an electronic funds transfer or via a direct

deposit into the following bank account of the Authority prior to the submission closing date and time indicated in paragraph 16 below: (the applicant's bank account follows).

19. *The Authority reserves its right not to consider (own emphasis) a pre-registration notice should applicants not meet the requirements as set out in this ITP-R or applicable legislations and regulations. (own emphasis)”*

[7] Having regard to such guidelines, it was a common cause fact that the Committee of the applicant, before the closing date for submissions (30 June 2022) of pre-registration applications, communicated with pre-registration applicants. These applicants, *inter alia*, included PundaMaria FM, Lakazi FM and South West Township Radio. In the communique the Committee requested such pre-registration applicants to submit their proof of payments of their non-refundable pre-registration fee of R4,118.00. Such proof of payment was required in terms of paragraph 14 of schedule A. The need for the communication was that such proof of payments did not accompany their pre-registration notices. The applicant contended that notwithstanding the omission it did not view these applications as deficient. No matter how the applicant viewed the applications the Court accepted that the Committee must have considered the pre-registration notices, pick-up the oversight and took action. Whether such action would remedy the omission, at that stage was unknown. The action taken was to notify PundaMaria FM, Lakazi FM and South West of the missing proof of payment and to urged them to remedy the same by return mail with their proof of payments before the closing date. The facts demonstrated that no proof of payments were forthcoming, the omission remained and these applications disqualified.

[8] It too is common cause that the respondent omitted to pay the full non-refundable fee of ' R4,118.00 in respect of each application it submitted before the closing date. The respondent contents that this was done in error. However, proof of such erroneous payments did accompany each application notice. The Committee made no attempt to communicate with the respondent in any way to

remedy the omission before the closing date as they had with PundaMaria FM, Lakazi FM and South West.

[9] In consequence, the applicant disqualified the respondents' applications on the basis of their non-compliance with paragraph 14. The respondent however, after receiving notice of its disqualification and the reason, rectified the non-compliance by paying the balance owing in respect of such fees [top-up fee]. Notwithstanding the disqualification the applicant did not tender the repayment of the top-up fee.

[10] The Court found that having regard to the wording of paragraph 14 of schedule A and its application in particular, the actions taken by the Committee of the applicant in respect of PundaMaria FM, Lakazi FM and South West before the closing date compared to the inaction of the Committee in respect of the respondents' applications, the disqualification based on the same paragraph 14 of Schedule A was not only procedurally unfair on the facts but unreasonable. It was unreasonable the court found having regard to the object of the ECA Act itself which, *inter alia*, is to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society, as required by section 192 of the Constitution. On the facts, no other applicants had applied for licences in the territories applied for by the respondent. On that basis as raised in terms of section 6 Promotion of Administrative Justice Act, 3 of 2000 [PAJA] the Court set aside the applicant's decision to disqualify the applications and remitted it back to the applicant for reconsideration.

GROUND OF REVIEW

[11] The applicant grounds of appeal are not specifically pegged on the Court's findings of procedural unfairness nor unreasonableness brought in terms of PAJA having regard to the common cause fact that the Committee sent a communique to PundaMaria FM, Lakazi FM and South West before the closing date and the reasons therefore. The thrust of the appeal lies as against the Courts regard of sections 18(1)(a) and sections 31(7) of the ECA Act. The applicants too, did not

raise a specific ground relating costs nor did it deal with the manner in which this Court exercised its discretion regarding costs.

[12] Sections 18(1)(a) and sections 31(7) of the ECA Act in context, was considered by the Court as a means to test the applicant's own assertion in its pleadings that the ITP-R did not provide a discretion to condone a clear non-compliance and, to the extent necessary, no other legislation which it was bound to afford it such a discretion [the assertion]. The Court tested the assertion as against the common cause facts and the applicant's own evidence. The applicant in its answering affidavit confirmed that the communique was, *inter alia*, sent “-to satisfy itself of the payment status and if there had been compliance with the requirement“

[13] Bearing the evidence in mind, if the assertion is correct and the Committee sent the communication to remedy a non-compliance, then the applicant's decision must surely be unlawful and stands to be set aside. Notwithstanding the Court in an attempt to test the veracity of the assertion considered the specific wording of the ITP-R, the ECA Act as invited to do by the applicant itself by the assertion and applied it to the facts and the evidence.

[14] The applicant is now unhappy that the Court applied the ECA Act and in doing so, confined its grounds of appeal on the basis that the Court's erred in considering the provisions of the ECA Act, namely sections 18(1)(a) and sections 31(7), instead of only “-specified sections-“ of the ECA Act (namely only section 17, section 31(1) and (2)) contending that the Court was bound to “specific terms or wordings of the ITP-R-.” arguing that it was not open for the Court to consider other subsections of 31 and that it this went beyond the ITP-R and the pleadings. In so far as the Court did consider sections 18(1)(a) and sections 31(7), the applicant stated that the Court failed to adhere to the *audi alteram partem* principle to afford it an opportunity to make further submissions.

[15] In considering section 31(7) the Court tried to ascertain if there as any statutory justification for the applicant's actions namely, the Committees communication to PundaMaria FM, Lakazi FM and South West at that stage. In so

doing the Court reasoned that such justification was to be found in terms of the provisions of section 31(7). In considering section 18(1)(a) the Court tried to ascertain the weight of the applicant's assertion having regard to paragraph 19 in the ITP-R guidelines. The Court found that the reverse was true, that the applicant may refuse to accept a registration for a class licence if the registration did not contain information prescribed by the applicant. In consequence the Court now understood why the applicant included paragraph 19 in the ITP-R, namely to affirm that it reserved its right to refuse in such circumstances.

[16] Having regard to the provisions of sections 18(1)(a) and sections 31(7) in context, this Court found that the applicant's assertion was flawed and rejected it. In consequence, the respondent's argument based on paragraph 19 of schedule A became plausible. The Court did not go beyond the wording of the ITP-R nor the scope of the pleadings but tested both versions by applying the law and the ITP-R to the common cause facts and the evidence.

[17] The applicant was the author of its own pleadings and argument, it made the bald assertion and relied on it. The Court accepted, as it correctly should have, that if the assertion was made under oath that the applicant must have made it having regard to all legislation binding it, including the ECA Act. In that way, the Court correctly accepted that the applicant had regard to all the applicable sections, including all the relevant sections in the ECA Act. Furthermore paragraph 19 and the respondent's argument pertaining thereto was fully ventilated and the applicant remained steadfast with its assertion. No further submissions were required. In fact the assertion remained a theme in argument at the hearing. Any suggestion that the Court did not afford the applicant the *audi alteram partem* in these circumstances is misguided. The applicant gave no indication that its assertion was false or misguided.

[18] Of further consideration sections 18(1)(a) and 31(7) assisted the applicant in that its Committees actions and the wording of the ITP-R appear within the legislative purview but, what it can't argue away is that it did not afford the respondent the same courtesy when an omission was evident which, is procedurally unfair, as reasoned.

[19] The scope of the applicable sections for consideration of the pre-registration notices of the ECA Act was not confined by the ITP-R, such ground is raised at variance with the ITP-R itself. The Court was not prohibited from applying the ECA Act and the regulations as it applied to the material facts.

[20] The Court considered the judicial review applying the provisions and grounds raised in terms of PAJA and found that the decisions were to be set aside not because of section 18(1)(a) and 31(7) but on the basis of the grounds of review raised by the respondent in terms of PAJA as reasoned.

[21] Having considered the arguments, the grounds raised and revisiting the reasoned judgment this Court is of the opinion that the applicant has not met the threshold of Section 17(1)(a)(i) or (ii) of the Superior Courts Act 10 of 2013. The application for leave to appeal must fail.

[22] As far as costs are concerned the Court is mindful that although the respondent's Senior Counsel did not argue the matter on the date of this hearing, Junior Counsel submitted that his Senior was the author of the heads of argument. Having regard thereto the costs of two Counsel are to be confined to circumstances when *de facto*, both Counsel were employed to attend to an instruction/s, this includes the appearance before this Court on the date of the hearing. The cost order is to be applied having regard hereto.

[23] The following order:

1. The application is dismissed with costs, such costs to include the costs of two Counsel in so far as two Counsel were so employed, taxed on scale C



L.A. RETIEF

Judge of the High Court

Gauteng Division

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