



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 581/2024

In the matter between:

**NATIONAL COUNCIL OF AND FOR PERSONS
WITH DISABILITIES**

APPELLANT

and

**INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

RESPONDENT

Neutral citation: *National Council of and for Persons with Disabilities v
Independent Communications Authority of SA (581/2024) [2025]*
ZASCA 161 (24 October 2025)

Coram: SCHIPPERS, KATHREE-SETILOANE and COPPIN JJA, STEYN
and HENNEY AJJA

Heard: 29 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 24 October 2025.

Summary: Administrative law – unreasonable delay in instituting review proceedings – explanation not reasonable – no basis to interfere with discretion of the high court refusing condonation for unreasonable delay – new relief sought on appeal – declaring regulations unconstitutional and invalid – not in the interests of justice to consider new relief – unfair and prejudicial to regulator – no opportunity to justify limitation of rights – interested parties not given rule 16A notification of constitutional challenge to regulations – other necessary parties not joined – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay J, sitting as a court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Kathree-Setiloane JA (Schippers and Coppin JJA, Steyn and Henney AJJA concurring):

[1] In 2021, the appellant, the National Council of and for Persons with Disabilities (NCPD), applied to the Gauteng Division of the High Court, Pretoria (the high court) to review and set aside a decision of the respondent, the Independent Communications Authority of South Africa (the Authority) to promulgate the Code for Persons with Disabilities Regulations (the 2021 Code), in terms of s 4(3)(j) of the Independent Communications Authority Act 13 of 2000 (the ICA Act) read with ss 4(1), 4(4) and s 70 of the Electronic Communications Act 36 of 2005 (the EC Act), hereafter referred to as ‘the impugned decision’. The 2021 Code sets out the requirements that broadcast licensees must meet in order to accommodate persons with disabilities. Regulation 3 of the 2021 Code is directed at those who are deaf and hearing-impaired.¹

¹ Regulation 3 of the 2021 Code provides:

‘3. Basic Standards for Broadcasting Service Licensees

(1) Accessibility Services

A television broadcasting service licensee must implement the following Accessibility Services on Applicable Channels:-

[2] The basis for the review application was that the Authority failed to consider the NCPD's submissions made prior to the promulgation of the Code. The high court (per Tolmay J) dismissed the review application on the ground that the NCPD had unreasonably delayed in bringing it. The appeal is before this Court with its leave.

Factual background

[3] The promulgation of the 2021 Code by the Authority was preceded by the publication, on 12 June 2020, of the 'Draft Code for Persons with Disabilities Regulations for Further Public Comments' (the Draft Code).² The Authority invited interested parties to submit written representations on the Draft Code within 30 days

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- (a) Audio Description;
 - (b) Sign Language;
 - (c) Subtitles; and
 - (d) Closed Captioning.

(2) Audio Description

(a) The objective of Audio Description is to aid the understanding and enjoyment of a television programme.

(b) A television broadcasting service licensee must maintain quality access to Audio Description, which is essential for ensuring that audiences using broadcasting services benefit from same.

(3) Sign Language

A television broadcasting service licensee must:

- (a) ensure that the viewer can see not only the hands but also, where applicable, the facial expressions of the interpreter;
- (b) monitor the effectiveness of the service through annual consultations with organisations representing hearing-impaired persons, and
- (c) ensure that sign language interpreters employed have a recognised sign language qualification from an accredited institution.

(4) Subtitles

A television broadcasting service licensee which provides Subtitles must:

- (a) provide Subtitles as near synchronous to speech as is practicable;
- (b) reflect the spoken word with the same meaning;
- (c) construct Subtitles which contain easily read sentences, and commonly used sentences in a tidy and sensible format; and
- (d) give proper contrast between foreground and background colours.

(5) Closed Captioning

A television broadcasting service licensee which provides Closed Captioning must ensure the following:

- (a) Closed Captioning must match the spoken words in the dialogue and convey background noise and other sounds to the fullest extent possible.
- (b) Closed Captioning must coincide with their corresponding spoken words and sounds to the greatest extent possible and must be displayed on the screen at a speed that can be read by viewers.
- (c) Closed Captioning must fully run from the beginning to the end of the program possible.
- (d) Closed Captioning should not block other important visual content on the screen, overlap one another or run off the edge of the television screen.'

² The process of creating satisfactory regulations had been ongoing since 2007, when the Authority called for written submissions from interested parties on various iterations of the Draft Code.

of the date of its publication. The Authority received written submissions from, amongst others, the NCPD, a voluntary association which advocates for the rights of persons with disabilities, including those who are deaf and hearing-impaired.³

[4] On 10 July 2020, the NCPD made comprehensive submissions to the Authority on the Draft Code. The nub of the NCPD's submissions is that by only providing for closed captioning⁴ (and not open captioning),⁵ the Draft Code did not afford adequate protection or promotion of the rights of hearing-impaired or deaf persons to access important and essential news broadcasts. A summary of the NCPD's written submissions appears in paragraph 5 below.

[5] On 9 April 2021, the Authority published the 2021 Code together with a 'Reasons Document' which provided 'reasons for amendments' to the Draft Code (the reasons). According to the NCPD, the reasons did not provide sufficient clarity on why its submissions were substantially ignored. Consequently, on 16 June 2021, the NCPD's attorneys wrote to the Authority requesting all the written submissions made by the interested parties on the Draft Code. On 21 June 2021, the Authority provided the NCPD with a website link to the submissions. There were 15 in total.

[6] On 11 August 2021, the NCPD's attorneys wrote to the Authority requesting reasons purportedly in terms of s 5(1) of the Promotion of Administrative Justice

³ The NCPD is a leading disability organisation with over 80 years' experience in enabling, supporting and enhancing the quality of life for persons with disabilities. Its work on hearing impairment and deaf affairs include facilitating access to information, advice on assistive device and communication support and hearing protection mediation. The NCPD has extensive knowledge and experience on issues affecting deaf and hearing-impaired persons.

⁴ 'Closed captioning' is defined in the 2021 Code to mean 'a process of converting the audio content of television broadcast or other production into text and displaying the text on a screen or monitor'. It is not embedded in the visual presentation and can be turned off by the viewer.

⁵ 'Open captioning' is text that is permanently part of a video or broadcast. It is embedded in the visual presentation and cannot be turned off by the viewer. This means that when the broadcast is screened, the captions or subtitles will automatically appear on the screen of all devices.

Act 3 of 2000 (PAJA) – as to why the NCPD’s proposals were not adopted. The letter conveniently summarises the NCPD’s submissions on the Draft Code. It also indicates whether, and to what extent, the NCPD’s proposed amendments were adopted in the 2021 Code. The summary reads as follows:

- ‘6.2.1 The definition section did not adequately include definitions that are inclusive enough, particularly in relation to accessibility, universal design and universal access (item 4 of our client submissions). This problem persists in the 2021 Code.
- 6.2.2 The exclusion of third-party channels from the “applicable channels” definition means that important live news events are not accessible to persons with disabilities (item 4 of our client’s submissions). The definition was not amended in the 2021 Code.
- 6.2.3 The definition of disability did not accord with the White Paper on Rights of Persons with Disabilities (WPRPD) (item 4 of our client’s submissions). This definition was not amended in the 2021 Code.
- 6.2.4 The distinction between captioning and subtitling as well as when captioning and subtitling are open, closed and live (item 5.1 of our client’s submissions). This formed a substantial part of NCPD submissions especially the fact that open live captions or subtitles are essential for news broadcasts for persons with hearing impairments to gain adequate access to news. NCPD’s submissions on open and live captioning/subtitling seem not to have been taken into account at all in the 2021 Code. The 2021 Code only provides for closed captioning and subtitles (and the definitions have been mixed up in the 2021 Code) and does not distinguish between captions or subtitles that are opened or closed or take account of the fact that this distinction speaks to the type of device and technology the person has access to. This means that the 2021 Code does not fairly cater for persons with disabilities who do not have access to internet or technology that can facilitate closed captions
- 6.2.5 NCPD made submissions on improving accessibility by Broadcast Service Licensees (items 6.1 and 6.3 of our client’s submissions) and these have not been incorporated into the 2021 Code.
- 6.2.6 NCPD submitted generally that the 2020 Draft Code did not go far enough in ensuring that persons with disabilities are given equal access to broadcasts and that this infringed on their

rights to equality (item 10 of our client’s submissions). The 2021 Code was not changed substantially in order to make [it] adequate.’

[7] The Authority did not respond to this letter. As a result, on 5 October 2021, the NCPD launched the review application in terms of s 6(1) of PAJA.⁶ It also sought an order ‘[r]emitting the decision back to the Authority and directing it to draft and publish the 2021 Code taking into account the NCPD’s submissions’.

[8] The NCPD founded its challenge to the impugned decision on PAJA, amongst others, on the grounds: (a) that irrelevant considerations were taken into account, or relevant considerations were not considered (s 6(2)(e)(iii) of PAJA); (b) that it is not rationally connected to the information before the Authority (s 6(2)(f)(ii)(cc) of PAJA); and (c) that it is not rationally connected to the reasons given for it by the administrator (s 6(2)(f)(ii)(dd) of PAJA). As stated, the high court dismissed the application on the ground that the NCPD had unreasonably delayed in launching it.

Unreasonable Delay

[9] I deal first with the question of whether the high court was correct regarding the unreasonable delay. The promulgation of the 2021 Code (regulations) by the Authority constitutes administrative action.⁷ Section 7(1)(b) of PAJA provides that, where there are no internal remedies, ‘any judicial review proceedings in terms of s 6(1) must be instituted without unreasonable delay’ and ‘not later than 180 days after the date’ ‘on which the person concerned was informed of the administrative

⁶ Section 6(1) of PAJA provides:

‘Judicial review of administrative action

(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.’

⁷ *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; 2010 (3) SA 589 (SCA); 2010 (1) All SA 1 (SCA) para 10 (*Cable City SCA*). *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA); [2021] 2 All SA 357 (SCA) para 84 (*Esau*).

action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons'. Since no internal remedies existed, the NCPD was required to institute the review application without unreasonable delay and not later than 180 days from the date on which it became aware of the publication of the 2021 Code and the reasons.

[10] The NCPD became aware of the publication of the 2021 Code and the reasons on 9 April 2021. It launched its application on the 180th day from that date. The NCPD contends that it had a reasonable explanation for the delay, and that the high court's finding, that it had unreasonably delayed launching the review application, is unsustainable on the facts and the law. The NCPD maintains that, having regard to the investigatory steps it undertook prior to instituting the application, its approach was eminently reasonable and did not result in any delay in launching the review.

[11] The NCPD seeks support for this conclusion in *Joubert Galpin Searle Inc v Road Accident Fund and Others (Joubert Galpin Searle)*,⁸ where Plaskett J dismissed the respondent's argument that the application was unreasonably delayed despite being initiated within the 180-day period. In that case, the court held that after learning of the decision, the applicant did not sit idle but requested reasons for the decision.⁹ And when it found that the reasons provided were inadequate to assess whether to litigate, it continued in its effort to request adequate reasons. The court held that a delay for those reasons was acceptable,¹⁰ as it cannot be expected of a

⁸ *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPHC 19; 2014 (4) SA 148 (ECP); [2014] 2 All SA 604 (ECP) (*Joubert Galpin Searle*).

⁹ *Ibid* para 47.

¹⁰ *Ibid* para 55.

litigant to rush to court to review and set aside a decision ‘without investigating and attempting to determine whether he or she has a case’.¹¹

[12] The test for determining whether there has been an undue delay in instituting review proceedings under s 7(1) of PAJA is two-fold.¹² Where the application for review is made before the lapse of the 180-day period referred to in s 7(1) of PAJA, as is the case in this appeal, then the first inquiry is whether the delay (if any) was unreasonable. The court is required to consider the reasonableness of the delay by having regard to the applicant’s explanation for it. The explanation must cover the whole period of the delay.¹³ Once the court finds that the delay is unreasonable, it must proceed to the second inquiry, which is whether the delay should be condoned. In exercising its discretion to grant condonation, a court must take into consideration the following factors: ‘the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits...’.¹⁴

[13] Section 5 of PAJA¹⁵ provides that any person whose rights have been adversely affected by administrative action, and who has not been given reasons for

¹¹ Ibid para 52.

¹² *Opposition to Urban Tolling Alliance and Others v Sanral and Others* [2013] ZASCA 148; [2013] All SA 639 (SCA) para 26 (*OUTA*).

¹³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 52 (*Asla Construction*).

¹⁴ *Valor IT v Premier North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA (SCA) para 30.

¹⁵ Section 5 of PAJA provides:

‘Reasons for administrative action

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing or the administrative action.

the action, may within 90 days after the date on which the person became aware of the action, or might reasonably have become aware of it, request that the administrator concerned furnish written reasons for the action. On 11 August 2021, the NCPD requested the Authority to provide it ‘with reasons, in terms of s 5(1) of PAJA, for why its core submissions were not adopted in the 2021 Code’. That, however, is not the purpose of s 5(1). Nor is its purpose to clarify ‘why the NCPD’s core submissions were not included’ in the 2021 Code.

[14] A person whose rights are adversely affected by administrative action may only seek reasons under s 5(1) of PAJA if he or she has not been given reasons. Notably, a request made under s 5(1) of PAJA must relate to reasons ‘for the administrative action’. In its letter requesting reasons, the NCPD did not ask for reasons for the administrative action, but rather for reasons why the Authority had not adopted its core submissions in the 2021 Code. Properly construed, the NCPD had no right to invoke s 5(1) to request reasons for this purpose. Even if s 5(1) was available to the NCPD to request reasons from the Authority for why its submissions were not adopted in the 2021 Code, it did so long after the lapse of the 90-day period prescribed in the section (90 days from 9 April 2021). The NCPD does not explain this delay.

[15] In an attempt to justify the delay in instituting the review application, the NCPD suggested that its letter of request was for ‘further reasons’, as those provided by the Authority were inadequate to determine whether it had a case to review the 2021 Code. This step, according to the NCPD stopped the ‘proverbial clock’ in s 7(1)

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.’

of PAJA from running. I disagree. The Constitutional Court as well as this Court have repeatedly held that ‘the proverbial clock only starts to tick’ from the date on which the applicant becomes aware of the reasons for the administrative action or ought to have become aware.¹⁶ The NCPD does not dispute that it became aware of the publication of the 2021 Code and the reasons for the impugned decision on 9 April 2021.

[16] In *Centre for Child Law and Others v SA Council for Educator and Others (Centre for Child Law)*,¹⁷ this Court emphasised the importance of investigating matters before launching a review application. It said:

‘The appellants, before launching the application made repeated requests for reasons to no avail ... The importance of investigating matters before launching review applications to set aside administrative action in order to avoid unnecessary litigation was stressed in *Joubert Galpin Searle Inc* ... The appellants cannot be faulted for attempting to obtain reasons before proceeding with litigation. In the absence of reasons, the 180-day period did not even commence before the application was launched. The court of first instance misdirected itself when finding that there was an unreasonable delay in the launching of the application.’¹⁸

[17] The facts in this matter are distinguishable from those in both *Centre for Child Law* and *Joubert Galpin Searle*, where the affected parties were either not provided with reasons for the administrative action or were given inadequate reasons. In this case, the NCPD became aware of the decision and accompanying reasons on 9 April 2021. It was therefore unnecessary to seek further clarification or submit additional

¹⁶ *Commissioner, SA Revenue Service v Sasol Chevron Holdings Ltd* [2022] (ZASCA) 56; 85 SATC 216 para 30 (*Sasol Chevron SCA*); *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 41. *Centre for Child Law and Others v SA Council for Educators and Others* [2024] ZASCA 45; 2024 (4) SA 473 (SCA) para 10. *OUTA* para 26; *Asla Construction* para 49.

¹⁷ *Centre for Child Law and Others v SA Council for Educators and Others* [2024] ZASCA 45; 2024 (4) SA 473 (SCA) (*Centre for Child Law*).

¹⁸ *Ibid* para 11.

requests for reasons. In so far as *Joubert Galpin Searle* seems to suggest that the 180-day period in s 7(1) of PAJA does not begin to run until adequate reasons are received, this interpretation is inconsistent with what the Constitutional Court subsequently held in *Sasol Chevron Holdings Ltd v Commissioner, SA Revenue Service (Sasol Chevron CC)*.¹⁹ There, the Constitutional Court stated that:

‘If this Court were to hold that the 180 days in section 7(1) of PAJA only begins to run when a reviewing party is satisfied with the reasons given to it, this would enable parties – especially well-resourced parties – to indefinitely extend the period in section 7(1) by simply requesting additional reasons. This is counterintuitive to the purpose of section 7(1), which is to promote certainty regarding the lawful status of administrative decisions.’

[18] Contrary to its contention, the NCPD’s explanation for the undue delay is manifestly unreasonable. It does not cover the entire period of the delay. In its replying affidavit, the NCPD explains that after the publication of the 2021 Code and the reasons (presumably in April), it sought legal advice from Webber Wentzel on its rights. Webber Wentzel wrote to the Authority some nine weeks later, on 16 June 2021, requesting to review all submissions made on the Draft Code. The Authority provided Webber Wentzel with a link to the submissions within three days. Just short of two months later (11 August 2021), it requested reasons from the Authority as to why it did not adopt its proposals in the 2021 Code.

[19] This was only done four months after the 2021 Code was published. The NCPD does not explain when it first consulted with Webber Wentzel. Nor does it explain why it took more than two months from becoming aware of the publication of the 2021 Code and its reasons to request written submissions from the other

¹⁹ *Sasol Chevron Holdings Limited v Commissioner for the South African Revenue Service* [2023] ZACC 30; 2023 (12) BCLR 1525 (CC); 2024 (3) SA 321 (CC); 86 SATC 456 para 22 (*Sasol Chevron CC*).

stakeholders. Furthermore, it fails to provide a reasonable explanation for why it took four months to request reasons from the Authority, and an additional two months to then institute proceedings. The NCPD's failure to provide a reasonable explanation for the delay is unsurprising. This is because its complaint has always been that the Authority ignored its submissions when drafting the 2021 Code. This was clear to the NCPD from the outset. In the circumstances, it could have launched the review application well before the 180th day.²⁰ Its omission in doing so demonstrates a lack of diligence in protecting the rights it sought to vindicate in the review application.

[20] In a further bid to justify the undue delay, the NCPD referred to the decision of *Mostert NO v Registrar of Pension Funds and Others (Mostert)* where this Court remarked that: '[N]ot all the provisions of PAJA, and particularly s 7, are tailored for the review of a regulation'.²¹ According to the NCPD this is a well-founded doubt, as regulations are different in nature to ordinary administrative decisions (such as the granting of a permit or the award of a tender), since they have an ongoing effect and are laws of general application.

[21] This contention is without substance for three reasons. The first is that this Court, in *Cable City SCA*,²² has held that 'the making of regulations by a Minister constitutes administrative action' as contemplated in PAJA. Leave to appeal against that decision was refused by the Constitutional Court.²³ In *Esau* this Court stated that although some judgments had expressed misgivings on the issue, it was bound by

²⁰ *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others* 2020 (6) 428 (GJ) para 77.

²¹ *Mostert No v Registrar of Pension Funds and Others* [2017] ZASCA 108; 2018 (2) SA 53 (SCA) para 10.

²² *Cable City (SCA)* para 10.

²³ *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZACC 34; 2010 (5) BCLR 445 (CC) (*Cable City CC*).

Cable City unless it was convinced that the judgment was clearly wrong.²⁴ The second reason is that the date of promulgation of the 2021 Code is irrelevant to any future challenge to its constitutionality. The only reason why the date of promulgation of the 2021 Code (the administrative decision) is relevant in this appeal, is because the NCPD became aware of its publication on that date. And the third reason is that the NCPD's review was squarely founded on the provisions of PAJA, and the high court could not entertain the review because the NCPD had delayed unreasonably in launching it.

[22] In conclusion, I find that the delay in the institution of the review application was unreasonable, as the NCPD failed to provide a reasonable explanation for why it only did so six months after becoming aware of the publication of the 2021 Code and the reasons. A delay of six months in the circumstances of this case was unduly long because the NCPD was aware of the reasons for the decision from the beginning.

Condonation

[23] Having found that the length and explanation for the delay was unreasonable, the issue of prejudice must be considered. Was the high court correct in concluding that, due to the unreasonable delay in instituting the review proceedings, the Authority and the television broadcasting service licensees would suffer prejudice if the 2021 Code was set aside? The 2021 Code came into effect 18 months after the date of its publication in the *Government Gazette*. This period was to allow television broadcasting service licensees to put in place measures to comply with the requirements under the 2021 Code. By the time the review application was heard in

²⁴ *Esau* para 84; See C Hoexter and G Penfold *Administrative Law in South Africa* 3ed (2021) at 232-234.

the high court, the 2021 Code had come into operation. The licensees would have, by that stage, incurred costs in making the necessary arrangements to comply with the 2021 Code. The prejudice that they were likely to suffer by having arranged their affairs on the basis of the validity of the 2021 Code, is a factor that weighed in favour of the high court's refusal to grant condonation.²⁵ This is a relevant consideration. Thus, the high court did not err in taking it into account in the exercise of its discretion not to grant condonation.

[24] A further consideration is the potential uncertainty that the setting aside of the 2021 Code would cause in relation to the regulatory framework and the television broadcasting service licensees that rely on it. Integral to this is the efficient functioning of the Authority. To mitigate this, review proceedings must be brought without undue delay. The 'public interest element in the finality of administrative decisions and the exercise of administrative functions' demands as much.²⁶ On whether proof of actual prejudice is required, this Court in *Gqwetha v Transkei Development Corporation Ltd and Others*²⁷ said:

'...[T]he rationale [for the rule that it can be contrary to the administration of justice and the public interest to allow a decision to be set aside after an unreasonably long period of time has elapsed] is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. *It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight.*' (Emphasis added.)

²⁵ *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA); [2004] 4 All SA 133 (SCA) para 53.

²⁶ *Gqwetha v Transkei Development Corporations Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 9SCA) para 22 (*Gqwetha*).

²⁷ *Ibid* para 23.

[25] On the prospects of success of the review application, the high court found there were none, as there was no obligation on the Authority to adopt the proposals of the NCPD in the 2021 Code. I agree. As indicated, the making of subordinate legislation such as regulations is administrative action.²⁸ Subordinate legislation generally requires notice and comment. This ensures that the principle of participatory democracy applies to delegated legislation made by an executive functionary or statutory agency in terms of legislation.²⁹ The process ensures fairness by giving a voice to those who are likely to be affected by the regulations, thus allowing them to meaningfully participate in, and influence, its development.

[26] The executive functionary or statutory agency empowered to make regulations must give adequate notice of the proposed regulations, its nature, and purpose, to those who are likely to be affected by it. It must also give affected parties a reasonable opportunity to submit written comments. The executive functionary or statutory agency must genuinely consider all comments received, and decide whether or not to adopt them. However, due to competing or divergent submissions, this obligation does not extend to accepting the submissions. There is, therefore, no duty on an executive functionary or a statutory agency to accept the submissions of an interested or affected party when making regulations.³⁰

[27] The record reveals that the Authority considered and took into account the written submissions of the NCPD. It, therefore, cannot be concluded that because the Authority did not accept all the submissions of the NCPD, its decision was

²⁸ See *Cable City SCA* para 10 above.

²⁹ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) para 129.

³⁰ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) para 27.

procedurally unfair; arbitrary or that it did not take into account relevant considerations. The review application accordingly lacked prospects of success. In the circumstances, I find no basis to interfere with the discretion of the high court against granting condonation for the unreasonable delay of the institution of the review application.

New Case on Appeal

[28] It is important to bear in mind that when the high court assessed the prospects of success of the review application in determining whether to grant condonation, it did so in the context of the relief that was sought in the notice of motion. However, at the inception of the hearing in this Court, counsel for the NCPD handed up a draft order which, he submitted, was intended to streamline the relief sought. The draft order reads:

- ‘1. The appeal is upheld with costs, including the costs of two counsel.
- 2. The order of the High Court is set aside and replaced with the following order:
 - “1. The [2021 Code] is declared unconstitutional and invalid to the extent that it fails to make provision for mandatory “open” captioning or subtitling on news broadcasts (both taped and live) and other broadcasts of national importance.
 - 2. The [2021 Code] is remitted to [the Authority] for amendment, to cure the above defect.
 - 3. [The Authority] is ordered to pay the costs of the [NCPD], including the costs of two counsel where so employed.”’

[29] This is new relief. It was not sought in the high court. And no case was made out for it in the founding affidavit. The purpose of the review application, as explained in the founding affidavit, was to set aside the Authority’s ‘omission and/or subsequent decision, published on 9 April 2021, to prescribe [the 2021 Code] but where the Authority did not consider properly the information before it’. Consistent with that purpose, the NCPD requested the high court to direct the Authority to

deliver the record of the decision not to adopt its written submissions in the 2021 Code; and to remit the matter to the Authority ‘to reconsider drafting and publishing of the Code, and in doing so directing the [Authority] to consider the NCPD’s submissions’.

[30] The case the NCPD made in its founding affidavit is the case that the Authority was called upon to answer in the high court. That the 2021 Code is unconstitutional ‘to the extent it fails to make provision for mandatory “open” captioning or subtitling on news broadcasts (both taped and live) and other broadcasts of national importance’, was not the case the Authority was required to answer in the founding affidavit. Nor did the NCPD take any issue with regulation 3 of the 2021 Code or the extent to which it is unconstitutional. This complaint was raised for the first time in the NCPD’s heads of argument filed in this Court.

[31] The NCPD’s principal argument in the heads of argument and oral argument, was that regulation 3 of the 2021 Code is inadequate and ineffective in ensuring access to broadcasts by deaf and hearing-impaired persons because it does not mandate the use of open captions/subtitles by broadcasting licensees. Access to broadcasts, argued the NCPD, implicates a number of constitutional rights, including the right to freedom of expression, cultural life; freedom of religion and opinion; dignity and equality. To promote the constitutional rights of hearing-impaired and deaf persons, the Authority is required to take reasonable and effective steps in terms of s 7(2) of the Constitution.³¹ By failing to make open captions/subtitles mandatory for licensees, the 2021 Code violates the constitutional rights of hearing-impaired

³¹ Section 7(2) of the Constitution states that ‘[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

and deaf persons to freedom of expression, as well as a range of associated rights. The 2021 Code is deficient and unconstitutional to that extent.

[32] *DHB v CSB*,³² a recent decision of the Constitutional Court, emphasised the need for fairness and prejudice to be considered where a party raises an issue for the first time on appeal. The Court said:

‘The purpose of pleadings is to define the issues for the other party and for the court. The court is called upon to adjudicate the disputes that arise from the pleadings and those disputes alone. There are instances where the court may *mero motu* raise the question of law that emerges fully from the evidence and which is necessary for the determination of the matter, provided its consideration on appeal involves no unfairness to the other party against whom it is directed. It is however impermissible for a court to decide issues falling outside the pleadings, without determining issues of fairness and prejudice. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial.

This principle is equally applicable, and perhaps more so to appeals. A party should generally not be allowed to argue new issues on appeal that were not raised or considered by the lower court. There are exceptions and circumstances when a party may be allowed to rely on an issue which was not covered in the pleadings.’

[33] One exception is when the issues have been canvassed fully by both sides in a trial or on application papers.³³ Another, is when a constitutional breach has been established on the evidence. In the latter case, it is well-established that a court ‘is mandated to grant appropriate relief’, and that ‘a claimant in such circumstances is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued’.³⁴ However, this is subject to an important

³² *DHB v CSB* [2024] ZACC 9; 2024 (5) SA 335 (CC); 2024 (8) BCLR 1080 (CC) paras 44-45. *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) paras 48-49.

³³ *DHB v CSB* para 45.

³⁴ *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (187/03, 213/03) [2004] ZASCA 47 (27 May 2004) para 18.

qualification. In *Zealand v Minister of Justice and Constitutional Development and Another*³⁵ the Constitutional Court has held that before amended relief is considered against a party who has committed a constitutional breach, prejudice to that party must be considered. In the current matter, no constitutional breach is established on the papers. Significantly, on this score, the challenge underlying the new relief has its source in the Bill of Rights. Where a constitutional breach of a right in the Bill of Rights is raised, a party must raise it appropriately on the pleadings or in the founding affidavit. This is to enable the other party to provide facts that justify the limitation of the fundamental right/s. Since a declaration of invalidity of the 2021 Code was sought for the first time in this Court, the Authority has not been given the opportunity to raise a limitation defence, and the facts or policy considerations that may support it. It would, in the circumstances, be unfair and prejudicial to the Authority to entertain the new relief sought by the NCPD on appeal.

[34] A further reason against declaring legislation, or delegated legislation, unconstitutional on appeal is that interested parties, some of whom made written submissions on the 2021 Code, have neither been joined as respondents in the application, nor been notified in terms of rule 16A of the Uniform Rules of Court of the constitutional challenge to the 2021 Code. Had the constitutionality of the 2021 Code been raised in the high court, the NCDP would have been obliged to comply with rule 16A. In essence, rule 16A(1)(a) provides that ‘any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading’. Rule 16A(b) requires that the notice contain a clear and succinct description of the constitutional issue concerned. The requirements of rule 16A are peremptory. Its purpose was articulated

³⁵ *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC); 2008 (4) SA 458 (CC) paras 24-26. (*Zealand*).

by the Constitutional Court in *Shaik v Minister of Justice and Constitutional Development and Others*.³⁶ It stated:

‘The purpose of [rule 16] ‘is to bring the case to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a Chapter 2 right and adduce evidence in support thereof.’

By seeking new relief on appeal, the NCPD has effectively deprived persons or entities that may be affected by, or have a legitimate interest in the constitutional case to take steps to protect their interests.

[35] A further impediment to considering the new relief on appeal, is the non-joinder of the television broadcasting service licensees who have made submissions and are bound by the 2021 Code. During argument, it was put to the parties that it was not appropriate to deal with the new relief on appeal, as the television broadcasting service licensees have a legal interest in it, but have not been joined in the proceedings. After the hearing, the NCPD requested permission to file supplementary heads of argument on joinder, which was granted.

[36] In its supplementary heads, the NCPD argues that it was not necessary to join the licensees because, as a species of subordinate legislation, the 2021 Code has an ongoing effect on a vast and indeterminable number of interested persons. It argues that the joinder of all potentially affected parties in cases concerning the

³⁶ *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC); 2004 (1) SACR 105 (CC) para 24.

constitutional validity of statutes or regulations would render such cases unmanageable. These parties, it is submitted, include:

- (a) The members of the South African public who watch television and are deaf or hearing-impaired; who listen to broadcasts and are blind or visually impaired; and who use (or will use) the devices and systems regulated by the 2021 Code;
- (b) Any broadcasters who have not yet been licensed but may be licensed by the Authority in the future;
- (c) Any members of the public who do not yet have disabilities, but may become deaf, blind or otherwise disabled in the future and will be affected by the 2021 Code at that point;
- (d) Other licensed broadcasters, who did not comment on the Draft Code but will be impacted by the 2021 Code's provisions.

[37] Cognisant of this difficulty, the Constitutional Court in *Gory v Kolver NO and Others (Starke and Others Intervening)*, observed:

‘This Court would not be able to function properly if every party with direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.’³⁷

It is accepted that it is neither possible nor practical to join all parties who have a potential interest in the constitutional validity of the 2021 Code. To insist upon this requirement would make any constitutional challenge to it logistically impossible. However, in matters concerning the constitutional validity of legislation and subordinate legislation, a pragmatic approach should be adopted in identifying the necessary parties to be joined.³⁸ At a minimum, the television broadcasting licensees

³⁷ *Gory v Kolver NO and Others (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) para 12. See also *Equal Education and Another v Minister of Basic Education and Others* [2018] ZAECHC 6; [2018] 3 All SA 705 (ECB); 2018 (9) BCLR 1130 (ECB); 2019 (1) SA 421 (ECB) paras 26-29.

³⁸ *Economic Freedom Fighters and Others v Speaker of National Assembly and Others* [2016] 1 All SA 520 (WCC) paras 35 and 38.

have a more immediate legal interest in the constitutional relief now sought on appeal and should have been joined. They are easily identifiable.

[38] To counter this, the NCPD argued that the constitutional validity of legislation (including subordinate legislation) must be determined objectively, and not with reference to the subjective effect on particular individuals.³⁹ It is accepted that the subjective circumstances of the television broadcasting service licensees are irrelevant to the constitutional validity of the 2021 Code. However, since they are bound by the provisions of the Code, and at least three of them have made submissions on closed captioning (but not open captioning), they do have a right to make submissions on why the limitation of the fundamental rights, implicated in the constitutional challenge to the 2021 Code, are reasonable and justifiable in terms of s 36 of the Constitution. They have, however, been denied that opportunity as a declaration of constitutional invalidity of the 2021 Code is sought for the first time on appeal.

[39] In addition, the new relief that the NCDP seeks is at odds with what is stated in the founding affidavit. The new relief includes a declaration that the 2021 Code is unconstitutional ‘to the extent that it fails to make provision for mandatory open live captioning or subtitling on news broadcasts’. However, the founding affidavit states that open live captioning in news broadcasts ‘may not currently be achievable in South Africa’, and ‘will have to be a long-term goal’, because it requires advanced technology and specific skills.

³⁹Ibid para 47.

[40] The new relief has the potential to side-step important procedural safeguards provided by the rules. It is, therefore, not in the interests of justice to entertain the new relief for the first time on appeal.

[41] For all these reasons the appeal falls to be dismissed. Since the NCDP seeks to vindicate the constitutional rights of persons who are deaf and hearing-impaired, it is prudent not to make a costs order against it in the appeal.

[42] In the result the following is ordered:
The appeal is dismissed with no order as to costs.

F KATHREE-SETILOANE
JUDGE OF APPEAL

Appearances:

For the appellant:	GJ Marcus SC with E Webber
Instructed by:	Webber Wentzel, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For the respondent:	K Tsatsawane SC with L Swandle
Instructed by:	HM Chaane Attorneys, Centurion Honey Attorneys Inc, Bloemfontein.