



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 156263/25

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
SIGNATURE	...27/08/2026... DATE

In the application for leave to appeal of:

MULTICHOICE (PTY) LTD

Applicant

and

ICASA

First Respondent

EMEDIA INVESTMENTS (PTY) LTD

Second Respondent

In re:

EMEDIA INVESTMENTS (PTY) LTD

Applicant

and

ICASA

First Respondent

AND OTHERS

APPLICATION FOR LEAVE TO APPEAL: JUDGMENT

LABUSCHAGNE J

- [1] ICASA has been conducting a market enquiry into the effectiveness of competition in subscription television broadcasting since 2016. It granted Multichoice confidentiality in respect of three portions of its submissions and incorporated redacted references to these submissions in a supplementary discussion document published in the Government Gazette 51848 of 6 January 2025. It invited Emedia to comment on the redacted references. Emedia applied for access to the unredacted confidential information, subject to a confidentiality regime , similar to what is available under the Competition Act. ICASA contended that it does not have the power to release information classified by it as confidential under sec 4D of the ICASA Act. It posited that , if the Court however has such a power, it will comply. Emedia and ICASA formulated a draft order in case I were to find that either the ICASA Act permits such a confidentiality regime (Emedia's primary contention) or that the Court has such power.
- [2] Multichoice opposed, contending that the source of ICASA's powers are in the ICASA Act, and that the sanctioning of a confidentiality regime required a challenge to the constitutionality of sec 4D of the ICASA Act, which challenge was not made.

- [3] I found that the ICASA Act does not empower ICASA to release confidential information subject to a confidentiality regime, but that the Court has such power in terms of sec 172 (1)(b), even in the absence of a finding of constitutional invalidity. Such power is to be exercised sparingly and required exceptional circumstances. I made the order Emedia and ICASA had crafted and gave my reasons for doing so.

GROUND FOR LEAVE TO APPEAL

- [4] Multichoice filed an application for leave to appeal which is based on three themes. Firstly, that the order was not competent in the absence of a constitutional challenge to sec 4D of the ICASA Act. The second was that sec 172 of the Constitution as a basis was not properly developed in the papers. The third is that there were no exceptional circumstances warranting a sec 172 (1)(b) remedy. There are further grounds based on the wording of the order, to the effect that it is limited to the facts of this matter and does not constitute a precedent.

THE TEST FOR LEAVE TO APPEAL

- [5] The application for leave to appeal was argued on 21 August 2026. The applicant contends that there are reasonable prospects on appeal on a number of points, including the question whether a court regulated confidentiality regime, as ordered by me, is competent in law. It also contends that there are compelling grounds for the appeal to be heard.

[6] The test for leave to appeal has been the subject of many judgments suggesting that a higher standard has been set in sec 17 of the Superior Courts Act, compared to its predecessor. I follow the approach set out in the SCA judgment of **Ramakatsa v African National Congress [2021]ZASCA 31** at par 10.

[7] It reads: “[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice This Court in *Caratco* concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain vitally important and are often decisive’ I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court

of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[8] The import of **Ramakatsa** is that there has not been a higher test for leave to appeal since the introduction of Act 10 of 2013. The test remains a reasonable prospect of success on appeal.

[9] Multichoice contends that a confidentiality regime in terms of section 4D of the ICASA Act can only be granted if the section is declared unconstitutional. Properly interpreted, it does not provide ICASA with the power to approach a court for a confidentiality regime and consequently, a court does not have the power to do so. In order to afford the court the power to grant a confidentiality regime, Multichoice contends that section 4D should have been subjected to a constitutionality challenge, which it was not. This is a point of law and does not require the applicant to identify a misdirection on the part of the judgment appealed against.

[10] The applicant also contends that there is a compelling reason why the appeal should be heard. This is for purposes of clarity as such matters will serve before ICASA again in future and clarity is required.

[11] ICASA has abided the proceedings all along, and this includes the application for leave to appeal. However, during argument, ICASA deviated from its aforesaid position and suggested that there are compelling reasons why the appeal should be heard by the SCA. This resulted in a strong response from eMedia, who had not been apprised of this shift in position.

[12] **DISCUSSION**

I disagree with the contention that the source of a court's power to grant an order for access to confidential information under a confidentiality regime needs to be section 4D of the ICASA Act. I found that it is a power that the court would have in terms of section 172 of the Constitution and proceeded to deal with the matter on that basis.

[13] The contention of the applicant that a just and equitable remedy in terms of sec 172(1) (b) was not properly developed in the papers is without merit. It is raised expressly and is developed.

[14] Further, the applicant's contention that a sec 172(1)(b) remedy could only be granted after a declaration of constitutional invalidity of sec 4D is contradicted by Constitutional Court authority- See **Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at [97]; Economic Freedom Fighters v Speaker of the National Assembly 2018 92) SA 571 (CC) at 210-211; Blind SA v President of the RSA 2025 (7) BCLR 757(CC) par 41.**

[15] Multichoice challenges the finding that there were exceptional circumstances justifying the exercise of the court's power under section 172(1)(b). This is

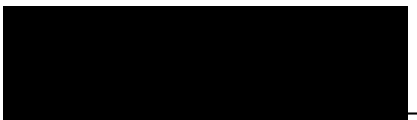
however a matter in which the court exercises a true discretion- see **Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy [2026] ZACC 33 (CC) par [86]**. The threshold for interference with such a discretion is high, and the application for leave does not rise to that level.

- [16] There is no reasonable prospect of success on appeal on these grounds.
- [17] Despite the aforesaid finding I need to determine whether there is not a compelling reason why the appeal should be heard. Due to the fact that my order has been limited, to cover the concerns of ICASA, to the facts of this matter, means that the issues raised in this matter will arise again before ICASA. That may be why it changed its stance from abiding to supporting the granting of leave to appeal. The resulting delay in granting leave will be countered by certainty if this issue is determined by the SCA. It will avert future appeals and resultant delays.
- [18] I was at ICASA's request that I limited the order to this matter. I considered that a legitimate concern and factored that concern into weighing the appropriateness of the limitation. A subsequent change of heart by ICASA cannot reopen that debate. I am not inclined to grant leave to appeal in this matter to determine whether this is the appropriate response to the interpretation that I made of section 4D of the ICASA Act and of the order made.
- [19] I have considered all the grounds for leave and the arguments raised by the parties. As I am not inclined to grant leave on the basis that there are

reasonable prospects of success or that there are compelling reasons to do so.

[20] In the premises I make the following order:

1. The application for leave to appeal is dismissed with costs
2. The costs will include the costs of two counsel, one of whom is a senior , on Scale C.

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LABUSCHAGNE J
JUDGE OF THE HIGH COURT