

SOUTH AFRICA / JUDGMENT

Forest Deep (Pty) Ltd and Another v Media Development and Diversity Agency and Others (20641/21) [2022] ZAWCHC 202 (19 October 2022) [2022] ZAWCHC 202

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

20641/21

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 20641/21

In the matter between:

Forest Deep (Pty) LTD

First Applicant

Bongivangeli Buthelezi

Second Applicant

And

Media Development and Diversity Agency

First Respondent

Mzuvukile Kashe

Second Respondent

(MDDA Executive Manager: Projects)

Jimmy Ngwenya

Third Respondent

Judgment:

19 October 2022

LE GRANGE, J

- [1] This is a review application in terms of which the Applicants seek to have a purported decision in respect of an application for funding taken by the Respondents in terms of the Media Development and Diversity Agency Act 14 of 2002 (“Media Agency Act”) to be reviewed and set aside.
- [2] The Applicants in paragraph 2 of its “Corrections of Notice of Motion” records the decision they seek to have reviewed as follows –
- ‘2. The Applicants requests the court to review the decision by the respondents in relation to the application for funding made by the applicants for an online radio station’.
- [3] The applicants in paragraphs 3, 4 and 5 of the said Notice of Motion listed three further grounds upon which they rely to have the purported decision be reviewed. In paragraph 6 of the Notice of Motion the following is recorded:
- ‘6. Relief sought: The court is requested to set aside the decision- remitting the matter for reconsideration with directions.’
- [4] The factual matrix underpinning the application as set out in the founding affidavit of the Applicants can be summarised as follows: the First Applicant (“Forest Deep”) is registered as a media company, for profit, operating as an online radio. The Second Applicant, is the director and shareholder of Forest Deep.
- [5] In email correspondence dated 27 August 2021 the Second Applicant contacted the First Applicant (“MDDA”) by email on behalf of the First Applicant. The purpose of the email was to enquire about available funding from the MDDA and the process that needs to be followed in applying for funding. On 14 September 2021, the Third Respondent replied that the MDDA does not provide funding to online radio stations.
- [6] The Second Applicant was unhappy with the response and the funding policy of the MDDA which resulted in several email correspondence between the Second Applicant and Second and Third respondents.
- [7] As a result of the different views that were expressed in the correspondence, the issues between the parties could not be resolved and litigation ensued.
- [8] In the current proceeding there were a number of interlocutory applications which I need not to deal with.

[9] In the present instance, the Respondents have raised two points in limine. The first is that the applicants' founding 'affidavit' is defective and does not constitute an affidavit for the purposes of Rule 6(1) of the Uniform Rules of this Court. The second point is that the Applicants seek to challenge a non-existent decision. According to the Applicant they have applied for funding from the MDDA.

[10] I will only deal with the second point in limine because if the Respondents are correct, then it will be dispositive of the matter.

[11] The statutory framework of the MDDA can be summarised as follows: The MDDA is a statutory body established in terms of the Media Agency Act[1]. Section 2 of the Media Agency Act provides that the MDDA 'acts only through' its Board[2]. Section 3 makes provision for the 'Objective of the Agency' and provides that –

"The objective of the Agency is to promote development and diversity in the South African media throughout the country, consistent with the right to freedom of expression as entrenched in section 16(1) of the Constitution, in particular –

...

(iii) encourage the channelling of resources to the community media and small commercial media sectors..."

The Media Act defines 'community media' as 'any media project that is owned and controlled by a community where any financial surplus generated is reinvested in the media project '[3]. Section 1 also defines 'small commercial media' as 'independent media enterprises or initiatives that are run for personal gain as micro, very small or small businesses as classified in the National Small Business Act, 102 of 1996'.

Section 14(1)(b) of the Media Act states that the board of the Media Agency 'must...select projects in accordance with the criteria prescribed in terms of section 19(3) to receive support.'

Section 19(3)(a) states that the board of the Media Agency 'must prescribe detailed criteria for selecting –

- (i) Community media projects;
- (ii) Small commercial media projects; and
- (iii) Research projects.'

[12] The Media Agency Act, empowers the board to determine the selection criteria for the projects that will receive support. The Regulations[4] in terms of section 22 of the Media Agency Act stipulate that the general criteria for selecting community media and small commercial projects include 'compliance with media laws and codes of conduct applicable to the media industry.'[5]

- [13] Regulation 9 provides in no uncertain terms the procedure that needs to be followed to apply for funding from the MDDA[6].
- [14] It is common cause the board of the MDDA adopted a Funding Policy.[7]In clause 7 thereof, the Board determined eligibility criteria for projects. Clause 7.11 requires ‘compliance with the media laws and codes of conduct applicable to the media industry.’ Clause 8.2 requires that qualifying applications must submit compliant and requisite documents to be considered for assessment which essentially encapsulates the requirements as set out in Regulation 9.
- [15] In view of the MDDA Funding Policy, clause 8.2.9 stipulates that a broadcaster must include ‘compliant and requisite documents to be considered for assessment’ which include a ‘broadcast license (Class License and Spectrum) and print media applicants must according to clause 8.2.13 include ‘compliant and requisite documents to be considered for assessment’ which include the ‘editorial policy (affidavit on adhering to Press Code)’.
- [16] In addition to the abovementioned requirements, clause 12.1.2 stipulates that a project is required to have ‘a valid Broadcast license, for broadcast projects. The licence is valid for the duration of the MDDA contract with the project.’
- [17] It is evident having regard to the legislative framework, section 18 of the Media Agency Act[8] prioritizes direct funding to community media projects as opposed to small commercial projects and the MDDA has the legislative authority to determine the selection criteria which it has done as reflected in the Regulations and its Funding Policy
- [18] Given the definitions of a small commercial media project, on the facts before me the first applicant’s operations is a small commercial media project that it is privately-owned and operates for private gain. It is therefore not in the true sense of the word a community media project which is controlled by ‘a community’ and where financial surplus is ploughed back into the project.
- [19] There can be no doubt that the nature of the activities of the first applicant, in running an online radio station, it is that of a broadcaster.
- [20] Against this backdrop the question to be answered is whether the Applicants applied for funding from the MDDA. The short answer is no.
- [21] On the Applicants’ own version, they did not apply to the MDDA for funding.

In paragraph 4 of the ‘corrected’ founding affidavit, the Second Applicant recorded that he sent an email on 27 August 2021 to the MDDA ‘to enquire about available funding from the’ Media Agency and the process to be followed ‘in relation to application for funding’. In the said affidavit it was further recorded that ‘we would like to explore funding options and opportunities with the Media Development & Diversity Agency.’[9]

- [22] In response to the latter email, Third Respondent addressed an email to the Second Applicant on 4 September 2021 in which he was informed that the MDDA only funds electronic media projects ‘which are compliant with ICASA regulations’, and that ‘unfortunately MDDA doesn’t fund unlicensed electronic media.’
- [23] On 13 September 2021 the Third respondent explained further that the MDDA ‘funds licensed Electronic media (Community TV and Radio stations). MDDA also funds Community and Small Commercial Newspapers. When it comes to Small Commercial, we only fund Print not Electronic Media.’
- [24] The Second Applicant was clearly not impressed with the information provided by the MDDA and its funding model and was adamant that he did not ‘see any category by which [the applicants] are disqualified according to both the MDDA act and the’ applicable regulations. He further recorded that: –

‘I do not believe that my application or even the enquiry about an application has been treated with fairness, so it is at this stage where I will like to request is the anyone else that I can speak to in regards to this in the organisation, I ask this as I have to exhaust the due process within the agency first before I seek a judicial review on this matter. I suppose if I don't receive a response I will be left with no choice but to take this matter up for judicial review as envisioned by the Promotion of administrative justice act of 2000.

I’m actually saddened by how ...your treatment has been of my enquiry..’

- [25] The Second Applicant during argument persisted with the view that the Respondents took a decision via its Policy Funding which is capable of being reviewed. It is apparent from the Second Applicant’s argument that by enquiring about ‘exploring the funding options and opportunities’, this enquiry converted into an application for funding capable of being rejected or accepted by the MDDA.
- [26] The argument advanced by the Second Applicant is misguided and untenable. The MDDA is governed by the Media Agency Act. Furthermore, regulations were promulgated in terms of that Act. In fact, Regulation 9(1) obliges any person who wishes to apply for support from the Board to complete the relevant application form provided by the MDDA. Regulation 9(2) lists eleven items of information and documents that must be provided with the application ranging from the project’s founding documents, the objectives of the project, details of the ownership of the enterprise when it is a commercial project, (as in the present instance with the first applicant), the proposed budget and the qualifications and experience of the key personnel. It is only after such an application is lodged that the MDDA is faced with having to make a decision in respect of an application.

- [27] The existence of a decision as a pre-requisite for any judicial review thereof is trite. In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[10] the court held that "At the core of the definition of administrative action is the idea of action (a decision) "of any administrative nature" taken by a public body or functionary". This matter is no different.
- [28] The Promotion of Administrative Justice Act, no 3 of 2000 ('PAJA') defines an administrative action as meaning 'any decision' taken by the relevant entity that 'adversely affects the rights of any person and which has a direct, external legal effect'.[11]
- [29] In turn, a 'decision' is defined in section 1 of PAJA as 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision...'
- [30] It follows that the MDDA as an organ of state in terms of an empowering provision has not made a decision. The Applicants other than the email enquiry of 27 August 2022 failed to submit an application at any stage prior to, on or after 13 September 2021 as required by the Regulations. This is not a case where s 6(2)(g) of PAJA refers to the failure to take a decision. The latter refers to a decision that the administrator in question is under some obligation to take and is directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling.[12]
- [31] The suggestion by the Second Applicant that the Respondents have already decided that in the event the Applicants lodge an application for funding, such application will be rejected on the basis of the position intimated by the officials at the MDDA, is also unsustainable. In *Offit Enterprises*[13] the court was called upon to intervene in a potential expropriation process yet to be embarked upon, but in respect of which the

authorities did not make a decision. In refusing to intervene, the Supreme Court of Appeal held at paragraph 44 the following:

"...the administrative action sought to be condemned is action that can only occur in the future. In other words, we are asked to condemn as unfair something that has not yet happened and may not ever happen, and, if it does happen, may take place in a different legislative and economic environment. For all we know, if expropriation is decided upon in the future, the process will be a model of

administrative fairness, with the appellants being given every opportunity to make representations, to claim adequate compensation

and the like. We simply do not know."

- [32] In the present instance, the latter is apposite because if the applicants wish to apply in future, the outcome is not a foregone

conclusion.

[33] The second point in limine raised by the Respondents is therefore not without merit. It follows that the Applicants application is fundamentally flawed and falls to be dismissed.

[34] Costs ordinarily follows the result. The Respondents although a statutory body did not persist to ask for costs and in view of the background of this case, it was a salutary decision to make.

[35] In the result the following order is made.

1. The Application is dismissed. There is no order as to costs.

Le Grange, J

[1] Act 14 of 2002

[2] Establishment of Agency . 2. (I) A juristic person known as the Media Development and Diversity Agency is hereby established:

(2) The Agency acts only through the Board;

[2] Establishment of Agency .

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(2) The Agency acts only through the Board;

[3] Section 1.

[4] See: GN1460 of 10 October 2003 made in terms of section 22 of the Media Agency Act.

[5] Regulation 2(i).

[6] Regulation 9. Procedure for applying for support

(1) Any person who wishes to apply for support from the Board as contemplated in section 17 of the Act must:

(a) complete the relevant application form provided by the Agency; and (b) provide the Agency with the information required in sub-regulation (2).

(2) The applicant must submit the following information together with, the application ~ , - form- , (a) the project's founding documents; (b) the objectives and goals of the project; (c) in respect of a community media project, the composition of its governing body; (d) in respect of small commercial media projects, details of the ownership of the enterprise or initiative; (e) a business plan for the project, including measures for future sustainability; (f) an effective plan to evaluate the outcomes of the project; (g) the project's proposed budget; (h) the project's tax clearance certificate; (i) where applicable, any licence 'or other authorisation required under any law regulating the media industry; (j) the qualifications

and experience of key personnel of the project; and (k) where possible, the project's financial statements for the previous financial year, certified by an accountant or auditor who is independent of the project. (3) The applicant must submit the form together with the required information at the offices of the Agency. (4) Any document required in terms of sub-regulation (2) must be an original or a certified copy of the original.

[6] Regulation 9. Procedure for applying for support

(1) Any person who wishes to apply for support from the Board as contemplated in section 17 of the Act must:

- (a) complete the relevant application form provided by the Agency; and
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- (a) the project's founding documents;
 - (b) the objectives and goals of the project;
 - (c) in respect of a community media project, the composition of its governing body;
 - (d) in respect of small commercial media projects, details of the ownership of the enterprise or initiative;
 - (e) a business plan for the project, including measures for future sustainability;
 - (f) an effective plan to evaluate the outcomes of the project;
 - (g) the project's proposed budget;
 - (h) the project's tax clearance certificate;
 - (i) where applicable, any licence or other authorisation required under any law regulating the media industry;
 - (j) the qualifications and experience of key personnel of the project; and
 - (k) where possible, the project's financial statements for the previous financial year, certified by an accountant or auditor who is independent of the project.
- (3) The applicant must submit the form together with the required information at the offices of the Agency.

- (4) Any document required in terms of sub-regulation (2) must be an original or a certified copy of the original.
- [7] MDDA Projects Funding Policy 2019/2020 to be reviewed annually.
- [8] Allocation of support
18. (1) Direct subsidies referred to in section 17(a)(i) may be granted to community media projects.
- (2) Community media projects may also receive any other support contemplated in the Act.
- (3) Small commercial media projects primarily receive low interest rate loans referred to in section 14(1)(d)(ii) and may receive, subject to subsection (1), any other support contemplated in this Act.
- [8] Allocation of support
18. (1) Direct subsidies referred to in section 17(a)(i) may be granted to community media projects.
- (2) Community media projects may also receive any other support contemplated in the Act.
- (3) Small commercial media projects primarily receive low interest rate loans referred to in section 14(1)(d)(ii) and may receive, subject to subsection (1), any other support contemplated in this Act.
- [9] MK2 attached to AA p192
- [10]
- [2005] ZASCA 43; 2005
- (6) SA 313 (SCA) at para 22
- [11] PAJA, Section 1
- [12] Offit Enterprises (Pty) Ltd v Coega Development Corporation 2010 (4) SA 242 at para 43
- [13] Ibid

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