

SOUTH AFRICA / JUDGMENT

Otherchoice (Pty) Ltd v Independent Communications Authority of SA and Another (19718/2003) [2006] ZAGPHC 172 (21 April 2006) [2006] ZAGPHC 172

COURT

High Courts - Gauteng

BEFORE

B. R. Du Plessis

CASE / FILE NUMBER

19718/2003

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

not

reportable

Case No: 19718

/ 2003

Date heard: 23&24/

02/ 2006

Date of judgment: 21/

04/2006

In

the matter between:

OTHERCHOICE

(PTY) LTD Applicant

and

INDEPENDENT

COMMUNICATIONS AUTHORITY OF S.A. 1st

Respondent

MULTICHOICE

AFRICA (PTY) LTD 2nd

Respondent

JUDGMENT

DU PLESSIS R:

Don't Panic Television, so counsel informed me, is based in Spain. From there it transmits, in encrypted format, explicit pornographic television programmes to a transponder it rents on a geo static satellite. The satellite transmits the programmes, still in encrypted format, to its geographic target area or "footprint" which is southern Africa, including the Republic of South Africa. Here members of the public can only view the programmes if they are in possession of a smartcard that is essential to decrypt the programme and to make it available in intelligible format. The applicant sells such smartcards to the public in the Republic of South Africa.

The first respondent is charged with the duty to regulate broadcasting in the Republic of South Africa (Section 2 of the Independent Communications Authority of South Africa Act, 13 of 2000). The first respondent contends that, by selling the smartcard for the Don't Panic TV programmes, the applicant is acting unlawfully. In the circumstances the applicant launched this application seeking the relief that I will set out in the next paragraph. The second respondent provides a digital satellite subscription television broadcasting service to the public in South Africa. It applied to be joined in these proceedings and by agreement between the parties an order so joining the second respondent was granted.

The applicant seeks an order declaring that it "is not required to obtain a licence as contemplated in section 32 or 39 of the IBA Act¹, 153 of 1993 as amended, for purposes of the sale of smartcards intended for the use in digital satellite decoders, for reception of encrypted digital satellite broadcast from countries outside the Republic of South Africa". The applicant seeks a further order declaring that its conduct does not amount to an offence under the Broadcasting Act, 4 of 1999 or under the IBA Act.

The first order that the applicant seeks has two distinct parts. In the first place the applicant seeks an order declaring that, for its activities (selling smartcards for the Don't Panic programmes) it does not require a licence in terms of section 32 of the IBA Act. Section 32 provides:

"Prohibition of broadcasting signal distribution without licence.—Subject to the provisions of section 33 (2), a person shall not provide broadcasting signal distribution unless provided under and in accordance with a licence issued to that person by the Authority under this Chapter."

By seeking this part of the order, the applicant is in essence seeking a finding that, by selling the smartcards, it is not providing broadcasting signal distribution. The latter term is defined in the IBA Act (and in the Broadcasting Act) but for reasons that will appear in due course, I find it unnecessary to dwell on the definition.

The second part of the order concerns the applicant's need, or otherwise, of a licence in terms of section 39 of the IBA Act. Section 39 provides:

“Prohibition on provision of broadcasting service without broadcasting licence.—Subject to the provisions of this Act, a person shall not provide a broadcasting service unless such service is provided under and in accordance with a broadcasting licence issued to that person by the Authority under this Chapter.”

As regards section 39, the essential finding that the applicant seeks is that it is not providing a broadcasting service, a term that is also defined in the relevant statutes.

There is much debate in the papers as to whether the applicant is providing broadcasting signal distribution or a broadcasting service. I find the debate sterile at this stage because it poses the wrong questions at the wrong time. I say that for the following

reasons.

In terms of section 19(1) (a) (iii) of the Supreme Court Act, 59 of 1959 this court's power to grant declaratory relief is discretionary. In *Clarke v Hurst N.O. and others* 1992 (4) SA 630 (D&CLD) at page 634G to H Thirion J said, regarding the discretion: “No Court would be competent to sanction the commission of a crime or a wrongful act”. With that I respectfully agree. It follows that if the applicant's conduct (by selling smartcards for Don't Panic's programmes) is unlawful, its application for a declaratory order must be refused and then it matters not whether the applicant is providing either broadcasting signal distribution or a broadcasting service.

The parties presented affidavits by several experts explaining the nature and function of the smartcard that the applicant sells. The experts do not agree but I shall proceed on the assumption that Redlinghuys, who attested to an affidavit on the applicant's behalf, is correct. According to Redlinghuys the smartcard is part of the television viewer's receiving equipment as are, for instance, the viewer's dish antenna and his decoder. The smart card is a plastic card that “has embedded into it some microelectronics such as a microprocessor, memory chips and other micro components. This component contains (an) entitlement message ... and when inserted into the (decoder), will communicate with the Entitlement Control Message ... contained in the incoming received (and encrypted) signal to ‘unlock’ the (decoder) and pass the signal on to a normal TV set for viewing”.

The Don's Panic smartcard is preactivated for a specified time and the purchaser needs only to insert it into the decoder in order for him to receive the decrypted programme for the specified time. To sum up, without the smartcards that the applicant sells no member of the public can view the Don't Panic TV programmes in South Africa. There is no doubt that by selling the smartcards, the applicant plays an indispensable part in the process of making the programmes available in intelligible format to the South African public. Therefore, if Don't Panic TV may not lawfully broadcast the programmes in South Africa, the applicant would be acting unlawfully. The first question thus is whether Don't Panic TV may lawfully broadcast in South Africa.

The Broadcasting Act and the IBA Act both deal with the licensing and lawfulness of activities concerning broadcasting. Section 42 of the Broadcasting Act provides that in “the event of conflict between the provisions of this Act and any other law relating to broadcasting, the

provisions of this Act must prevail". The Broadcasting Act and the IBA both define "broadcasting" and other terms that are now relevant. In view of the provisions of section 42 and counsel's argument that I shall deal with in due course, the definitions that I am about to consider are those in the Broadcasting Act. I should add, however, that the definitions in the two acts are practically identical for purposes of the present inquiry.

The Broadcasting Act defines "broadcasting as "any form of unidirectional telecommunications intended for the public, sections of the public or subscribers to any broadcasting service having appropriate receiving facilities, whether carried by means of radio or any other means of telecommunication or any combination of the aforementioned, and 'broadcast' is construed accordingly".

"Telecommunications" is defined as "any system or method of conveying signs, signals, sounds, communications or other information by means of electricity, magnetism, electro-magnetic waves or any agency of a like nature, whether with or without the aid of tangible conductors, from one point to another, and the derivative noun 'telecommunication' must be construed accordingly". It is clear that Don't Panic TV, assisted by the applicant is broadcasting into South Africa. Similarly, the two entities are providing a broadcasting service because that term is defined as "any service which consists of the broadcasting of television or sound broadcasting material to the public, sections of the public or to subscribers to such a service ...".

For the applicant Mr Van Rooyen contended that Don't Panic TV nevertheless does not require a licence for its activities and that, for that reason, the applicant's activities are not unlawful. The argument is based on what counsel contended is the proper construction of section 34(1) of the Broadcasting Act that provides as follows:

"All signal distribution services and broadcasting services, whether through terrestrial frequencies, satellite or telecommunication facilities within the borders of the Republic or from the Republic to other countries will be required to hold a licence issued by the Authority."

Counsel for the applicant contended that the words "within the borders of the Republic" qualify "terrestrial frequencies", "satellite" and "telecommunication facilities". Thus, so the argument went, only services that originate within the borders of the Republic need to be licensed. I do not think that, applying the ordinary canons of construction, the subsection can be read as contended for. Clearly, terrestrial frequencies and satellites are not situated within the borders of any country. The words "within the borders of the Republic" qualify the words "All signal distribution services and broadcasting services". What the section seeks to regulate are services that are rendered within the borders of the Republic and also services that originate within the borders of the Republic albeit that they are rendered in another country.

But, argued counsel, the construction of section 34(1) cannot be that a broadcaster broadcasting from e.g. Spain to South Africa, must be licensed here. Such a result would, according to counsel, trench upon the principle of international law that comity requires states not to legislate extraterritorially. Counsel further submitted that such a construction would violate section 233 of the Constitution of the Republic of South Africa, 1996 that provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with

international law over any alternative interpretation that is inconsistent with international law”.

Again, I cannot agree. By requiring a person who renders a service in this country to be licensed albeit that that person is in a foreign country while rendering the service, our legislature is not prescribing to that person what he or she may do in the foreign country. The legislature is prescribing what the effect of what the person does may be in this country. As it was put in *Treacey v Director of Public Prosecutions* [1971] AC 537 (HL) at 564E: “The rules of international comity ... do not call for more than that each sovereign state should refrain from punishing

persons for their conduct within the territory of another sovereign state where that conduct has had no harmful consequences within the territory of the state which imposes the punishment” (See also *R v Holm*; *R v Pienaar* 1948 (1) SA 925 (A) at

p. 929 where the court discusses the second point reserved in that case). In support of his contention, counsel relied on the judgment of *Malan AJA In American Natural Soda Corporation and another v Competition Commission and others* 2003 (5) SA 633 (CAC). That judgment does not support counsel’s contention however. On the contrary, it illustrates that international law does not preclude a sovereign county from regulating conduct that has an effect within its borders (See the discussion in paragraphs 7 to 20. See also the judgment of the Supreme Court of Appeal in *American Natural Soda Ash Corp v Competition Commission* 2005 (6) SA 158 (SCA) at paragraphs 24 to 29).

I conclude that section 34(1) of the Broadcasting Act requires the broadcasting service that Don’t Panic Television and the applicant render to be licensed. Counsel argued that the result is absurd because Don’t Panic TV cannot be sanctioned if it fails to obtain the necessary licence. Moreover, counsel contended, such a result would mean that television stations broadcasting unencrypted programmes that could be received here must also be licensed. I cannot agree. Firstly, the authorities in this country have a very effective sanction against Don’t Panic TV: They can interdict the applicant from unlawfully selling the smartcards. As regards programmes that can be received free on air from foreign countries, I do not know whether there is an effective means of preventing such signals from being received here in intelligible format. Assuming that there is none, I do not think that inability to prevent an unlawful activity renders lawful similar activities that can be prevented.

In the result this court must in the exercise of its discretion refuse the declaratory orders sought because it would in any event be unlawful for the applicant to sell the smartcards in question.

As regards costs Mr Stone, who appeared for the applicant with Mr Van Rooyen, contended that the applicant should not be ordered to pay costs as the application was aimed at resolving a dispute the resolution of which is in the public interest. While the public might have an interest in the resolution of the dispute, this remains an application that the applicant brought in its own commercial interest. There is no reason why the costs should not follow the result. Counsel further contended that the second respondent joined the proceedings at its own instance and that the applicant should not be saddled with the second respondent's costs. Although the second respondent launched the application to intervene, the parties agreed that an order joining it as a party must be made. The agreement and the consequent order presuppose that the second respondent has a direct and substantial interest in the relief sought. It is not for this court now to question that presupposition. The applicant must pay the costs of the respondents. There is no issue that the costs of the first respondent must include the costs of two counsel.

The following order is made:

The application is dismissed. The applicant is ordered to pay the costs of the first and the second respondents, which costs, in the case of the first respondent, shall include the costs of two counsel.

B. R. DU PLESSIS

JUDGE OF THE HIGH COURT

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1 This is a reference to the Independent Broadcasting Authority Act.

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