

SOUTH AFRICA / JUDGMENT

Pretoria FM NPC v Chairman of the Independent Communications Authority of South Africa (ICASA) (050968/2022) [2024] ZAGPPHC 1340 (11 December 2024) [2024] ZAGPPHC 1340

COURT

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

050968/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case No: 050968/2022

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

DATE

11 DECEMBER 2024

SIGNATURE

In the matter between:

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 11 December

2024.

JUDGMENT**RETIEF J****INTRODUCTION**

[1] The applicant brings a judicial review in terms of the Promotion of Administrative Justice Act, 3 of 2000 [PAJA] seeking, inter alia, to review and set aside the respondent's decisions made on the 17 November 2022, alternatively on the 18 November 2022 to disqualify six pre-registration applications it submitted for both prospective community sound broadcasting services and radio frequency spectrum licenses [collectively licenses] in terms of the call for invitation published by the respondent in the Government Gazette on the 15 December 2021 [ITP-R] [impugned decisions]. In short, the applicant erroneously short paid the mandatory fees payable in respect of the pre-registration applications for licenses it duly submitted, as a result of which, all the applications it submitted were disqualified from the licensing process [the non-compliance]. The applicant now seeks that the impugned decisions are to be remitted back to the respondent for reconsideration and pre-registration.

[2] The impugned decisions taken by the respondent related to the following six pre-registration applications:

- 2.1. Afrikaans FM – Kalahari (Kuruman);
- 2.2. Afrikaans FM – Langkloof (Kouga Local Municipality);
- 2.3. Afrikaans FM – Outeniqua (George Local Municipality);
- 2.4. Afrikaans FM – Swartland (West Coast District Municipality);
- 2.5. Afrikaans FM – Tuinroete (Garden Route Local Municipality); and
- 2.6. Afrikaans FM – Witteberg (Bethlehem).

(Collectively “six applications”)

[3] The applicant moves for its amended relief in respect of prayers 1 and 2, foregoing the necessity of the declaratory relief in prayer 3 during argument. Procedurally, the applicant, on an urgent basis, initially sought to obtain urgent interim interdictory relief pending the final relief to review and set aside seventeen (17) duly submitted pre-registration applications by it in terms of the ITP-R. All of which were disqualified by the respondent for the same reason as the six applications, the non-compliance. The applicant now, to escape a non-joinder complaint raised by the respondent, amended its relief and only moves for the review of the impugned decisions taken in respect of six out of the seventeen applications. The reason being that the remaining six applications concern licenses which are sought in territories in which no other applicant applied. In consequences, the sting has been taken

out of the respondent's non joinder complaint in that no other applicant in such territories exist who, may be affected by the order. This Court therefore does not need to deal with this point.

- [4] The applicant in its papers relies on several grounds of review catered for in PAJA, such grounds were duly expanded in its filed supplementary papers filed in terms of uniform rule 53(4). The grounds relied on are section 6(2)(e)(ii) that the impugned decisions was taken for an ulterior purpose or motive, section 6(2)(c) and (d), that the impugned decisions were not reasonable nor procedurally fair, section 6(2)(e)(iii) in that irrelevant considerations were taken into account, or relevant considerations were not considered, section 6(e)(h) and (iv) of PAJA that the decision was unreasonable and/or taken by unwarranted dictate. Notwithstanding all the grounds of review, the thrust of the applicant's case is that the respondent at the material time, in law, possessed a discretion to condone the non-compliance with the provisions of the ITP-R and allow the applicant to take corrective steps. This the respondent failed to exercise which, the applicant contends, that it should have been informed of this non compliance before the closing date in order to allow it to remedy any non-compliance. The respondent conversely argues that the wording of the ITP-R was unambiguous regarding what was materially required for all applicants and as such the provisions of the ITP-R are binding, not only the applicants, but on the respondent itself. Furthermore, the respondent contends that the respondent does not posses a discretion to condone a clear non-compliance with the provisions of the ITP-R in law, because the ITP-R does not provide for this to the extent necessary and furthermore that no other legislation that is binding on the respondent affords the respondent such discretion. In consequence, the applications were rightfully disqualified and communicated to the applicant via the impugned decisions.
- [5] In order to consider the grounds of review in context necessitates the consideration of the facts and the applicable law through the Constitutional prescripts, values, and norms.

FACTS

- [6] On the 14 December 2021, the chairperson, Dr Keabetswe Modimoeng [Modimoeng] of the respondent in the Government Gazette of the 15 December 2021, published the Invitation for pre-registration for Community Sound Broadcasting Services and Radio Frequency Spectrum Licenses in terms of section 17, 31(1) and 31(2) of the Electronic Communications Act, 36 of 2005, as amended [ECA] read with regulation 4(5) of the Community Broadcasting Regulations, 2019. In the published notice, Modimoeng stated that "All pre-registration notices (own emphasis) will be considered based on the requirements set out in this Invitation to Pre-Register "ITP-R", read together with the ECA Act and applicable regulations." This invitation bears significance to the framework within which all submitted applications during the pre-registration or licensing process must be dealt with by the respondent.

- [7] The ITP-R includes certain guidelines which were to be read by each applicant before completing the pre-registration notice. Such guidelines are marked “Schedule A”. Over and above Schedule A, the applicant’s attention is also drawn to a number of legislative provisions and guidelines which are applicable to the ITP-R. The importance of such legislative provisions and regulations as well as highlighting the Schedule A was to inform the applicant of the following:

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

- [8] Schedule A to which the impugned decisions refer highlighted paragraph 14 and paragraph 19. Paragraph 14 states:

“14. Every pre-registration notice must be accompanied by proof of payment 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 a pre-registration notice should applicants not meet the requirements as set out in this ITP-R or applicable legislations and regulations.”
- [9] According to Schedule A, the licensing process has two phases. The first phase is the actual consideration of the pre-registration notice which would be concluded in 90 days from the closing and receipt of the pre-registration notice. It is common cause that the applicants’ six applications were disqualified from phase 1 of the licensing process. The second phase pertained to the process of the submission of registration for class and frequency licenses and the decision to award the same.
- [10] It is common cause that on the 9 June 2022 the applicant attended a workshop offered by the respondent at the Licensing Framework for Community Radio and Television Broadcasting Services explaining the licensing process. On the 9 June 2022, the applicant addressed an email to Bongiwe Shabane [Shabane], an official of the applicant, requesting confirmation of the frequency spectrum registration fee for Form P applications. On the same date Shabane responded and attached administrative fees applicable for 2022, thus confirming the current administrative fees. On the 13 June 2022, the applicant for further clarification then responded to Shabane’s email, and enquired again about the payment of the frequency applications fees and where such application forms should be submitted. At this stage, no specific reference is made to the pre-registration notice fee payable. According to the founding papers the deponent stated “I was certain about the amount payable in terms of Form B a class community broadcasting license” but she was uncertain about the amounts payable in terms of Form P (frequency application).

- [11] On the 21 June 2022, the applicants' pre-registration applications were duly submitted, and the payment amounts in respect of both the fees Form B and P were paid and confirmed, including the proof of payments. The total fees paid by the applicant, per application, was R2 776.00 each. It is common cause that the ITP-R indicated that the non-refundable pre-registration payable per application was R4 118.00. This is the origin of the non-compliance.
- [12] In terms of regulation 4(3) read together with regulation 4(7) of the Community Broadcasting Regulations, 2019, the applicant is required to submit a notice for pre-registration before a registration is submitted in terms of section 17 read with section 18 of the Electronic Communications Act 36 of 2005 [ECA]. This is to will allow the respondent to, amongst others, assess and ensure the sustainability of the applicant.
- [13] The content of paragraph 14 of schedule A which deals with the payment of the pre-registration fee is common cause. The content stipulates that both the proof of payment and the payment of the required application fee is a compulsory requirement. It is for this reason that the Committee submitted the following to reasons to the Council for its consideration when it tried to ascertain if certain applicants had complied with paragraph 14:
- "4.5 Three (3) of the 85 applications did not submit proof of payment (POP), therefore the finance division is unable to trace the payment for confirmation (own emphasis). The stations are PundaMaria FM, Lakazi FM and South West Township Radio. The committee sent communiqué to the applicants requesting them to submit POP, which was made on or before the closing date (own emphasis), within three (3) working days. No POP was received from the three (3) applications by deadline ("the 30 June 2022" – own emphasis). The table below indicates the applicants that failed to provide POP. These applications are recommended for disqualification."*
- [14] It is common cause that the Committee did not send the applicant any communication, written or otherwise requesting them to comply with the paragraph 14 on or before the closing date. Instead

on the 15 November 2022, the Committee general meeting submitted a recommendation to disqualify the six applications amongst

certain others. The Council adopted the Committees recommendations. During this general meeting, the Council also requested certain other information from the Committee. At 11.9 of the minutes, the Council sought clarity on whether the process itself allows applicant's

recourse to fix their errors. In answer, the Committee explained that in an effort to assist the interested parties, the respondent had conducted five workshops on how to complete the application and furthermore that the online application process does not allow for corrective measures as per the ITP-R, thus no corrective action could be considered. This the Committee stated in direct contrast to the corrective measures it factually took to assist PundaMaria FM, Lakazi FM and South West Township Radio when it considered their applications and noted their errors in not attaching proof of payments together with their respective applications. Clearly, it

was impossible to correct the online post submission and that is why the record indicates that the Committee requested PundaMaria FM, Lakazi FM and South West Township Radio to send proof of such payments to and email address and not online before the closing date.

[15] The review application and the steps taken by both the applicant and the respondent were triggered by the impugned decisions. The material extract from the impugned decision as communicated to all the applicant in respect of all the 17 applications was, in material content identical. The applicant in its papers attached the following decision in respect of the application for Afrikaans FM-Witteberg. It is common cause that the impugned decisions and the reason set out in the attached annexure is identical to the correspondence sent the 17 November 2022, to the six applications counsellor Luthando S. Mkumatela [Mkumatela], the committee chair of the respondent. The relevant portions as follows:

“RE: APPLICATION FOR PRE-REGISTRATION OF COMMUNITY SOUND BROADCASTING SERVICES AND RADIO FREQUENCY SPECTRUM LICENSES –

PRETORIA FM t/a AFRIKAANS FM – WITTEBERG

1. –
2. The Independent Communications Authority of South Africa (“the Authority”) has considered Afrikaans FM – Witteberg (“the applicant’s”) pre-registration application in response to the Invitation to Pre-Register for a Community Sound Broadcasting Service (“CSBS”) and Radio Frequency Spectrum (“RFC”) licenses (“the ITP-R”) published on the 15th of December 2021.
3. The Authority would like to advise that the applicant’s pre-registration application has been disqualified from the ITP-R licensing process and will therefore not be admitted and considered in phase one (1) of this licensing process based on the following reason(s);
 - 3.1. Non-Compliance with Schedule A – Paragraph 14 of the ITP-R
 - 3.1.1. Schedule A, paragraph 14 of the ITP-R provides as follows:

“Every pre-registration notice must be accompanied by proof of payment of the non-refundable application fee (own emphasis) 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...”
 - 3.1.2. The Applicant paid a fee of R1 388.00 per CBS and RFS Application, totalling to R2 776.00, which is less than the stipulated application fee.
 4. Schedule A, paragraph 19 of the ITP-R asserts that the Authority reserves the right not to consider an application should it not meet the requirements set out in the ITP-R, applicable legislation, and regulations.

5. Following the abovementioned reason(s), the Applicant has been disqualified from the ITP-R licensing process.

6. Section 7 of the ECA provides that:

“... No person may provide any service without a license”.

[16] The applicant having received the impugned decisions immediately then via their attorneys Messieurs Hurter Spies Incorporated and, on the 18 November 2022 responded by tendering and paid the shortfall in respect of each application, being the shortfall of R1 342.00 per application, it provided proof of the payment for the shortfall for each application and explained that the non-compliance was a bona fide oversight. It was explained that the amounts paid with each application accorded with the representations made by the respondent's officials from whom the applicant in June 2022 had sought direction in respect of the fees payable.

[17] The applicant, too in this letter, requested the respondent to reconsider its decisions and to include the applications for admission and consideration in phase 1 of the licensing process. The applicant furthermore requested the respondent to provide an undertaking that it would not proceed with the licensing process, phase 1, without all the applications it duly submitted, including the six

(6) applications being duly admitted to the process.

[18] The respondent on the 21 November 2022 acknowledged receipt of the 18 November 2022 response and, on the 23 November 2022, Mkumatela responded as follows in writing:

“RE: APPLICATION FOR PRE-REGISTRATION OF COMMUNITY SOUND BROADCASTING SERVICES AND RADIO FREQUENCY SPECTRUM LICENSES // PRETORIA FM t/a AFRIKAANS FM – BOLAND AND SIXTEEN OTHERS

1. The Independent Communications Authority of South Africa (“the Authority”) acknowledges the receipt of the letter from Hurter Spies Incorporated, dated the 18 November 2022.

2. The Authority is reviewing the contents of your letter (own emphasis) and will respond in due course.”

[19] The following day on the 24 November 2022, and before the respondent had the opportunity to review the content of the letter of the 18 November 2022 and respond in writing to the applicant as it had undertaken, the applicant launched this application on an urgent basis, seeking the interim interdictory relief. The respondent has not tendered the return of the top up paid by the applicant in respect of all the 17 applications it paid to ensure compliance.

GROUND OF REVIEW

[20] Since the adjudication of the pre-registration notices, constitutes administrative action, the process must be conducted in the manner which promotes administrative justice rights, and it must satisfy the requirements of PAJA.[1] It is the Constitution which provides the principles and values and sets the standards to be applied in the advancement of administrative

justice rights. The question which then arises is whether the Committee's proposal to the Council to disqualify the applicants' six applicants for the non-compliance should have been mechanically applied with no regard to the applicants' constitutional rights, alternatively applied without notifying them of such non-compliance before the 30 June 2022 in circumstances when they had notified other applicants of their own non-compliance. The answer must surely be yes as on the facts, such disqualification for an innocent omission, is not only procedurally unfair having regard to the corrective steps taken by the Committee in respect of the non-compliance of paragraph 14 in the applications for PundaMaria FM, Lakazi FM and South West Township Radio, but unreasonable.[2] Suffice to say that on the facts the respondents too, after the applicant attempted and 'remedied' the non-compliance by paying the balance, the shortfall, the respondent accepted the payment and did not tender the top up amounts back to the applicant after the closing date.

[21] Furthermore, considering the impugned decisions against the backdrop of the object of the, as amended being, inter alia, 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,[3] it was unreasonable to take the impugned decision without sending the applicant a communique requesting them to make full payment of the required fee before the closing date. It is not as if it could be argued that the applicant did not wish to pay the pre-registration

fee nor that they had not tried to comply beforehand. The omission was bona fide and was self-corrected, albeit after the closing date. The six applications pertain to territories in which no such licenses have

been applied for nor registered. Such communique would illustrate that the respondent had not only acted fairly but that it was

committed to fairness, freedom of expression, openness and accountability as, statutorily mandated by the ECA.

[22] Section 18(1) of the ECA which applies to section 17 applications referred to in the public notice, clearly sets out that the respondent does possess a statutory discretion in terms of their refusal to accept a registration for a class license and more importantly, that it also has the mandatory obligation to provide the registrant with an opportunity to correct and re-submit the registration. This aspect is of particular importance in these set of facts since the Council did enquire about such ability to fix/correct applications. The respondent's discretion too, extends to section 31 applications as referred to in the public notice, in that

section 30(1)(7) of the ECA states that the respondent, on its own initiative may make appropriate action to ensure compliance with the provisions of this chapter.[4] Any argument by the respondent that it, in law, does not possess a discretion is flawed. This would explain why in the ITP-R in at paragraph 19, the respondent reserved its right not to condone non-compliance. If no such right existed to reserve in the first place, then a provision in the ITP-R not to exercise it would be a futile exercise. Notwithstanding, the facts clearly demonstrate that the respondent did exercise a discretion to condone non-compliance of the applications for PundaMaria FM, Lakazi FM and South West Township Radio by assisting them to correct the non-compliance before the closing date.

Furthermore, the respondent, when it, on the 23 November 2022, communicated with the applicant that it would consider its letter of response dated the 18 November 2022 by reviewing its content and would revert, it too illustrates that it, at that material time, accepted it could consider the content before it made a further decision. Otherwise, the respondent would simply have not entertained the applicants' requests and explanations.

[23] Considering all the facts and applying the law, the respondent by insisting to disqualify the applicants' six pre-registration applications by relying on the fact that it did not have a discretion as pleaded, amounts to a failure to comply with the conditions envisaged in terms of the ECA both in respect of the community and frequency license applications and consequently its decision was materially influenced by an error of law as contemplated in section 6(2)(d) of PAJA, a ground of review relied on by the applicant. The fact the respondent communicated with other applicants who had not complied with paragraph 14 of the ITP-R requesting them to comply with paragraph 14 prior to the closing date and by providing them with a means, via email, is procedurally unfair as against the applicant who was procedurally dealt with differently. Such is apparent in terms of section 6(2)(c) of PAJA, yet another ground relied on by the applicant.

[24] In consequence, considering the aforementioned, the process itself relied on by the respondent is inconsistent with PAJA and in light of that finding the necessity to delve into all of the other grounds is not necessary in that the applicant succeeds on more than one of the grounds raised in PAJA. Furthermore, the identifiable interests of the community connected with the six applications aligns with the objects of the ICASA Act and furthermore, the respondent is not prejudiced in that it has already received the full pre-registration fee in respect of all six applications. The application must succeed.

[25] There is no reason why the costs should not follow the result.

[26] In consequence, the following order:

1. The Respondent's decisions of the 17 November 2022, alternatively the 18 November 2022 to disqualify the pre-registration applications of:

1.1 Afrikaans FM – Kalahari (Kuruman);

1.2 Afrikaans FM – Langkloof (Kouga Local Municipality);

- 1.3 Afrikaans FM – Outeniqua (George Local Municipality);
- 1.4 Afrikaans FM – Swartland (West Coast District Municipality);
- 1.5 Afrikaans FM – Tuinroete (Garden Route Local Municipality); and
- 1.6 Afrikaans FM – Witteberg (Bethlehem) [collectively: six application]
- are unlawful and set-aside.

2. The Applicants' applications in respect of the six applications in respect of the districts mentioned as referred to in prayer 1 hereof, are remitted back to the respondent for reconsideration and

pre-registration pursuant to GN 728 of 2021 dated 15 December 2021.

3. The Respondent is ordered to pay the Applicants costs including the cost of two Counsel if so employed, one a Senior Counsel, taxed on scale C.

L.A. RETIEF

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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- [1] Du Toit v Minister of Transport 2006 (1) SA 297 (CC).
- [2] Millennium Waste Management v Chairperson Tender Board [2007] (SCA) 165 (SCA) at par 21.
- [3] See section 2(a) Independent Communications Authority of South Africa Act, 13 of 2000.
- [4] Chapter 5 of the ECA.

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