

SOUTH AFRICA / JUDGMENT

WRFM (Non-Profit Company) v Independent Communications Authority of South Africa (059684/2022) [2024] ZAGPPHC 1376 (18 November 2024) [2024] ZAGPPHC 1376

COURT

North Gauteng High Court, Pretoria

BEFORE

G Ally

CASE / FILE NUMBER

059684/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO: 059684/2022

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES:NO

REVISED: YES

Date: 18 November 2024

In

the matter between:

WRFM
(NON-PROFIT COMPANY)
APPLICANT
and
INDEPENDENT
COMMUNICATIONS AUTHORITY
RESPONDENT
OF
SOUTH AFRICA

JUDGMENT

ALLY AJ

- [1] This is an opposed review application to adjudicate Part B thereof, Part A[1] having been resolved by an order of Court.
- [2] The applicant is represented by Adv. B. Hack and the Respondent by Adv. A.M. Mtembu.
- [3] At the outset, the point of the citation of Dr Charley Lewis instead of ICASA was abandoned by the respondent.

BACKGROUND

AND FACTUAL MATRIX

- [4] The application revolves on the expiry of the applicant's licence. The licence was issued on 15 December 2017 and valid for a period of 5 years. Thereafter the licence was effective from 23 January 2018 for another 5 years and it is common cause that the said licence expired on 22 January 2023.
- [5] It is further common cause that the applicant submitted its renewal of licence application late.
- [6] As a result of the non-renewal of its licence, the applicant launched this application.

CONTENTIONS BY APPLICANT

- [7] The applicant contends that whilst it admits that its renewal application was late the decision not to renew the licence by the respondent was unreasonable, unfair and irrational, and accordingly falls to be reviewed and set aside.

CONTENTIONS BY RESPONDENT

- [8] The respondent contends in a nutshell that the granting and renewal of licences are governed by statute and it is therefore not authorised to accept nor renew the licence of the applicant.
- [9] In this regard, the respondent submits that Section 19(2) of the Electronic Communication Act, 36 of 2005, as amended and hereafter referred to as 'the Act' read with Regulation 9
- (2) of the Licensing Processes and Procedures of 2010, hereinafter referred to as 'the Regulations' governs the process and procedure for licence holders to renew licences.

LEGAL FRAMEWORK

- [10] Section 19 of 'the Act' provides:

"Renewal of class licence

19.

- (1) All class licenses must have a term of validity not exceeding 10 (ten) years, unless specified to the contrary by the Authority.
- (2) Class licensees seeking to renew their class licenses must, in writing and not less than six months prior to the expiration of their class licence, notify the Authority of their intention to continue to provide the services.
- (3) The renewal notice contemplated in subsection (2) must be submitted to the Authority in the manner prescribed as contemplated in section 5(7).
- (4) Within sixty (60) days of the receipt of the written notice submitted in accordance with subsection (2), the Authority must update the register of class licences referred to in section 16(3) to reflect the renewed licences.
- (5) Where the Authority fails to update the register referred to in section 16(3), the class licence is considered to have been renewed on the 61st day following receipt by the Authority of the class licensee's written notice."

[11] Regulation 9 of 'the Regulations provides:

"9. Notice to renew a class licence (section 19(2) of the Act)

- (1) A notice to renew a licence must be in the format as set out in Form F and must be accompanied by the applicable fee.
- (2) A notice to renew a licence must be submitted to the Authority no earlier than twelve (12) months and no later than six months prior to the expiry of the licence to which the notice relates.
- (3) The notice must further set out full particulars of:
 - (a) any finding by the Complaints and Compliance Committee against the applicant, as well as details of the sanction imposed by the Authority, if any; and
 - (b) any finding by a body recognised in terms of section 54 and 55 of the Act."

ANALYSIS AND EVALUATION

- [12] The important issue to determine in this application, in my view, is whether the contention by the respondent that it has no authority to condone the non-compliance with the time limits set out in Section 19(2) of 'the Act' as read with 'the Regulations'.
- [13] The basis of the respondent's contention lies, as I understand their submission, in the fact that the respondent is a creature of statute and can only act within the course and scope of the enabling legislation.

[14] The principle of being able to function and have powers provided for in the enabling legislation is sound but in our constitutional dispensation, is there leeway for a relaxation of such strict interpretation.

[15] This issue has been considered in the recent case of *Open Heaven Community Radio v ICASA and Others*[2]. This matter dealt with a similar situation wherein the applicant in that case applied for renewal and the respondent, ICASA, responded to the effect, as in this case, that it had no authority to condone non-compliance with 'the Regulations'. My sister, Janse Van Nieuwenhuizen J then examined the relevant caselaw and came to a conclusion that where the '6 month' time limit is for the benefit of the 'authority' then such authority has the power to waive the time limit[3].

[16] It is apposite to quote the reasoning of Janse Van Nieuwenhuizen J, with which I agree, in the said case:

"[45] The question then arises for who's benefit the six months' time limit in section 19(2) was intended? ICASA, without providing any reasons, simply submitted that the time limit in section 19(2) was not enacted for its benefit. A time limit is in the ordinary cause inserted for the benefit of the authority that must consider an application or claim.

[46] One such example is section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002. The section provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state, unless notice is given of the intended legal proceedings, within six months from the date on which the debt became due. The rationale being, that due to the magnitude of state operations, the notice enables the organ of state to investigate and gather information and evidence, whilst the information and evidence is still readily available. The time limit in section 3 was, therefore, clearly enacted for the benefit of the state. The aforesaid is borne out by the fact that an organ of state may elect to condone non-compliance with the time-limit.

[47] It is only when an organ of state does not condone the late filing of the notice and elects to rely thereon, that a creditor has to apply to court, in terms of section 3(4), for condonation.

[48] The most probable reason for the six months' time limit in section 19(2), is to afford ICASA sufficient time to process an application for renewal. To hold otherwise would entail that the legislature arbitrarily and for no reason at all, enacted the time limit.

[49] In the result, I am satisfied that ICASA may, in its discretion, waive the six-month time limit.
"

[17] However, this was not the end of the matter. In agreeing with the submission of the applicant in that case, Janse Van Nieuwenhuizen J then asked the question whether ICASA's decision was wrong taking into account the provisions of Section 19 of 'the Act' and decided

that ICASA was not wrong. ICASA's legislative powers are circumscribed in 'the Act' and it does not have the power to interpret 'the Act'. This power vests in our Courts.

- [18] Janse Van Nieuwenhuizen J then went further to determine whether the Court could come to the aid of the applicant in the interest of justice and concluded that she could. In so-doing the learned Judge granted an order that ICASA is empowered to condone the non-compliance with the time limits set out in Section 19(2) of 'the Act' and remitted the matter to ICASA for consideration of the condonation requested by the applicant in that case.
- [19] In my view, the facts of the Open Heaven Community Radio case are similar to the facts in this case regarding whether ICASA has the power to consider and condone non-compliance with the time limits outlined in Section 19(2) of 'the Act'. Accordingly, this Court may only differ from that judgment in circumstances where it can be shown that the decision was clearly wrong. I am unable to find that the abovementioned decision was clearly wrong and I am in agreement with the reasoning of the Court in that case.
- [20] I am of the view that the applicant in the present case has also requested the respondent to condone the non-compliance with the time limit set out in Section 19(2) of 'the Act'. In this case, the respondent had previously renewed the licence of the applicant but chose in this instance to rely on Section 19(2) to explain why the licence cannot be renewed. This approach, in my view, is inconsistent with the concept of fairness and justice and equity in the circumstances of this particular case.
- [21] Counsel for the respondent has submitted that the applicant is bound by its founding affidavit and has not made out a case for the relief it seeks. I disagree. Paragraph 25 of the founding affidavit clearly raises the issue of condoning the non-compliance with time limits. This paragraph goes further to raise the issue that the respondent has decided not even to consider the application for condonation. In my view, the facts as outlined in the founding affidavit in paragraph 25, lends itself to the Court coming to the aid of the applicant.
- [22] Accordingly, whilst the respondent was correct to indicate that it does not have the power to interpret the law, this Court is permitted to come to the aid of the applicant in the interest of justice and such decision is just and equitable. On the basis of what is stated hereinbefore, the respondent has the power to consider applicant's application for condonation contained in the letter dated 4 November 2022.
- [23] Applicant requested this Court to substitute the decision of the respondent. It has become trite that a Court is loathe to substitute the decision of an administrative body[4]. I do not deem it just and equitable to substitute the decision of the respondent.

COSTS

- [24] The applicant, in the notice of motion, has not requested costs in the event of success. It is trite that the awarding of costs rests in the discretion of the Court, which discretion must be exercised judiciously.
- [25] Applicant has been partially successful and I am of the view, that each party should pay their own costs.

Accordingly, the following Order shall issue:

- a). the respondent, ICASA, has the legislative power to consider an application for condonation for the non-compliance with the time limit contained in section 19(2) of the Electronic Communications Act, 36 of 2005;
- b). the applicant's request for condonation contained in its letter dated 4 November 2022 is remitted to the first respondent for consideration;
- c). each party is to pay its own costs.

G ALLY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected 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 hand-down is deemed to be 18 November 2024

Date of virtual hearing: 10 August 2023

Date of judgment: 14 November 2024

Appearances: Attorneys for the Applicant: COETZEE ATTORNEYS zanel@coatt.co.za Counsel for the Plaintiff: Adv.B.Hack Attorneys for the Defendant: MASHIANE, MOODLEY & MONAMA INC maphakela@m4attorneys.co.za Counsel for the Defendant: Adv. A.M. Mtembu

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Appearances: Attorneys for the Applicant: COETZEE ATTORNEYS zanel@coatt.co.za Counsel for the Plaintiff: Adv.B.Hack

[1] Caselines: Section 07- 1

[2] 2023 GPPHC

[3] Open Heaven case supra at paragraphs 45-49

[4] Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Tourism and Others
2004 15 cc

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Prepared on 11 October 2026 · Esheria