CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 38/04

RADIO PRETORIA Applicant

versus

THE CHAIRPERSON OF THE
INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA First Respondent

THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA Second Respondent

Decided on : 8 December 2004

JUDGMENT

THE COURT:

[1] Radio Pretoria seeks leave of this Court to appeal against the decision of the Supreme Court of Appeal (SCA). On 2 September 2004, the SCA dismissed its appeal against the judgment and order of the Pretoria High Court (High Court), which had refused to make an order setting aside the decision of the Independent Communications Authority of South Africa (ICASA) not to grant Radio Pretoria a temporary sound broadcasting licence.

[2] Radio Pretoria is a community broadcaster founded for the purpose of serving the needs of what it describes as the "Boere-Afrikaner" community. It began operating in 1993 on a temporary broadcasting licence issued under the previous dispensation. Before 1995, it interrupted its broadcasting activities in order to apply for a new licence under the new dispensation. In 1995 Radio Pretoria was granted its first one-year temporary community broadcasting licence. In the years between 1996 and 1999, the Independent Broadcasting Authority (IBA) granted it temporary community broadcasting licences annually and later issued additional broadcasting signal distribution licences to twelve signal distribution points.

[3] ICASA and its Chairperson are the respondents. The respondents do not oppose the application for leave to appeal. They have filed a notice stating that should leave to appeal be granted they would exercise their option to oppose the appeal. ICASA is an independent authority established in terms of the Independent Communications Authority of South Africa Act[1] (the ICASA Act). One of its primary mandates is to issue radio broadcasting licences. From 1993 that power vested in the IBA. However, from 1 July 2000, ICASA assumed that role.

[4] In March 1998, Radio Pretoria applied for a permanent four-year community broadcasting licence. The application was not considered then. Seemingly, neither the IBA nor ICASA had enough resources to handle properly the large volume of

[1] Act 13 of 2000.

applications for radio broadcasting licences. Both regulatory bodies resorted to an interim arrangement of granting annual temporary licences.

[5] In February 2000, Radio Pretoria applied for its sixth temporary community broadcasting licence for the year ending April 2001. By the effective date, ICASA had neither refused nor granted the application. To meet this difficulty, it issued a series of short licence extensions and set up a small committee from among its members to evaluate the application. The committee arranged oral hearings at which Radio Pretoria made oral and written presentations. Later, at the invitation of the committee, Radio Pretoria made additional written submissions on issues which arose during the hearing. They related to the involvement of the broader community in the election of the board of directors and the policy of employing only "Boere-Afrikaners". In its submissions, Radio Pretoria made it plain that it had acted within the requirements of its articles of association and that it had done all that it could to encourage the communities it served to become its members. It stoutly defended its exclusive employment practices, which it stated, were necessary to preserve its cultural purpose and identity.

[6] On 28 February 2001, ICASA had regard to the report of the committee and refused to grant Radio Pretoria a sixth annual temporary licence. It required Radio Pretoria to terminate its broadcasting service and those of its relay stations within 30 days of receiving the reasons for the refusal. The reasons for the refusal were furnished on 10 July 2001. However, the parties agreed that whilst awaiting the

decision on the review proceedings to be brought in the High Court, Radio Pretoria would be permitted to continue broadcasting.

In the High Court

[7] Radio Pretoria approached the High Court for an order to review and set aside the decision of ICASA not to grant it an annual temporary broadcasting licence for the year ending April 2001. The application was heard only in January 2003. It was brought on several substantive and procedural grounds. Let it suffice to mention a few. Radio Pretoria argued that the decision of ICASA was irrational, offended the principle of legality and was taken without a proper hearing. It contended that ICASA misconceived and exceeded its power under the Broadcasting Act[2] by, first, failing to recognise that the board of directors of Radio Pretoria is chosen democratically by members of its holding company as permitted under company law and, second, by conducting an enquiry into its employment policy and practices.

[8] After hearing the merits of the attack, the High Court dismissed the review application.[3] It is self-evident that the High Court's decision was delivered long after the envisaged temporary licence period had expired. Nevertheless, it granted Radio Pretoria leave to appeal to the SCA on the grounds that the matter involves issues of great importance to the parties, the broadcasting community, and the broader public

[2] Act 4 of 1999.

[3] The judgement of the High Court is reported as *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2003 (5) SA 451 (T); 2003 (4) BCLR 421 (T).

and that there was a reasonable prospect that another court might arrive at a different outcome.

In the Supreme Court of Appeal

[9] On 2 September 2003 Radio Pretoria filed its notice of appeal in the SCA. The notice sought an order setting aside the impugned decision and remitting it to ICASA for reconsideration. Clearly, when the notice was drawn the applicant did not know of the outcome of its four-year licence application which was heard on 9 May 2003 and refused on 30 September 2003.

[10] In April 2004 Radio Pretoria gave notice that at the hearing of the appeal it would move for an amendment of its notice of appeal in the following terms:

> "2.2.1 The present authorisation by the Second Respondent, in terms of which the Appellant is broadcasting on the same terms and conditions as their 2000/2001 licence [including 12 additional frequencies for signal distribution] is extended until final adjudication or decision, successful or unsuccessful, of all remedies available to the Appellant to obtain a four-year Community Broadcasting Licence.
>
> 2.2.2 Such extended broadcasting will be subject to the lawful regulatory powers of the Second Respondent as intended by the provisions of section 192 of the Constitution and the empowering Statutes and Regulations applicable to the Second Respondent."

[11] The notice of amendment seems to anticipate another judicial review and a final decision on ICASA's refusal of the four-year community broadcasting licence. Be that as it may, ICASA opposed the proposed amendment, on the basis that the

temporary licence period had expired and that a decision on it would not serve any practical purpose.

[12] Ahead of the hearing in the SCA, in May 2004, ICASA furnished reasons for the refusal of the four-year licence application. On 24 May 2004, ICASA informed the applicant that in light of the decision, it was required to terminate its broadcasting activities by midnight on 23 June 2004. From then until presently Radio Pretoria continued broadcasting but on the strength of successive court orders of the High Court granting it interim relief pending the final adjudication of the temporary licence and the four-year permanent licence.[4]

[13] However, during the hearing before the SCA, Radio Pretoria did not persist with its proposed amendment. It urged the SCA to dispose of the appeal on the basis of the decision of ICASA to refuse the temporary broadcasting licence. Radio Pretoria also invited the SCA to decide the correctness of the decision of ICASA on the four-year broadcasting licence.

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[4] See *Radio Pretoria v The Chairperson of the Independent Communications Authority of South Africa and Another* (SCA) Case no 402/03, 2 September 2004, as yet unreported, at para 30, refer to the order by De Vos J in the Pretoria High Court:

> "I am of the view that the Applicant can therefore not succeed with the current application before me. To my mind, the Applicant, who wants to protect its rights to broadcasting which it claims it has, must ask for interim relief pending the outcome of the review application of the four-year licence, and, in doing so, will have to place the merits of that review application before the Court."

On 30 June 2004, Preller J, granted an order permitting Radio Pretoria to continue broadcasting on the same terms and conditions as set out in its last temporary licence, pending final determination of a review of ICASA's decision in respect of the four-year licence application. In terms of this order Radio Pretoria was given 180 days after 14 May 2004 within which to institute the review proceedings.

[14] The SCA declined the invitation and dismissed the appeal in terms of section 21A(1) of the Supreme Court Act, 59 of 1959.[5] The provision empowers the SCA to dismiss on that ground alone a civil appeal in which the judgment or order sought will have no practical effect or result.

[15] The SCA[6] cited Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[7] where it was observed that:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

The SCA held that its judgment on the refusal of the temporary one-year broadcasting licence would not have any practical effect. It found that the issue of a temporary licence was no longer a live issue, it was moot. It concluded that no order it makes would impact on Radio Pretoria's ability to continue broadcasting until the litigation concerning ICASA's decision to refuse the four-year licence application was finally resolved.

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[5] Section 21A(1) of the Supreme Court Act provides:

> "Powers of court of appeal in certain civil proceedings—
> (1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[6] Above n 4 at para 39.

[7] 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21 with reference to *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC).

[16] The decision of the SCA appears to rest on three considerations. The first is that at the time the appeal was heard, the review application to set aside the decision of ICASA on the four-year licence had not been launched. Therefore, the grounds of the envisaged challenge and of the respondents' opposition were unknown as were the reasons furnished by the respondents for its refusal of the four-year licence application. Second, counsel for Radio Pretoria was invited to give the SCA an assurance that the facts relevant to the review of the decision on the four-year licence were materially the same to those applicable to the temporary one-year licence and that a decision by the SCA would put an end to the disputes between the parties. None of the parties was able to furnish the assurance sought by the court.[8] Third, the SCA considered but dismissed the submission of Radio Pretoria that a decision on the interpretation of section 32(3) of the Broadcasting Act[9] and on the correctness of ICASA's attitude towards its employment practices would serve as a useful guide for the court which would in time review the decision of ICASA on the four-year licence and to other broadcasters who might face a similar difficulty.

Before this Court

[17] The applicant seeks leave to appeal the decision of the SCA on the ground that the dismissal of appeal has resulted in a violation of its fundamental rights under

[8] *Radio Pretoria* (SCA) above n 4 at paras 36 and 40.

[9] Section 32(3) of the Broadcasting Act provides:

> "The licensee referred to in subsection (2) must be managed and controlled by a board which must be democratically elected, from members of the community in the licensed geographic area."

sections 9(1), 16, 34, 36 and 38 of the Constitution. The applicant asserts that its equal protection and benefit of the law right under the Constitution has been infringed; that it was denied the right to have "a real dispute . . . resolved in a fair public hearing before a Court" as promised by section 34 of the Constitution; that in terms of section 16 of the Constitution it has the right to apply for a licence to broadcast, and that the licence application may only be refused if it is justified under section 36 of the Constitution and that ICASA has not established that it acted in a manner the Constitution allows in refusing the temporary licence application.

[18] The applicant contends that the proper construction of the broadcasting legislation that confers licensing powers on ICASA read with sections 192, 16 and 36 of the Constitution is a constitutional matter. It argues that the judicial review of ICASA's exercise of public power, given the provisions of the Promotion of Administration of Justice Act (PAJA)[10] is a constitutional issue under section 33 of the Constitution. Lastly, the applicant submits that it is in the interests of justice for this Court to entertain its application for leave to appeal.

Merits of application for leave to appeal

[19] The requirements for an application as the present one for leave to appeal to this Court are now well settled in several decisions of this Court.[11] The application

[10] Act 3 of 2000.

[11] See *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC); *S v Bierman* 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC); *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC); *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC).

must raise a constitutional matter, in other words an issue which involves the interpretation, protection or enforcement of the Constitution. Further, it must be in the interests of justice to grant leave to appeal.[12] Whether it is in the interests of justice to grant the application involves a careful and balanced weighing up of all relevant factors.[13] The considerations could be varied and are often case specific but informed by the broad requirement of whether by hearing the case the interests of justice will be advanced.

[20] There can be no doubt that this application raises very important constitutional issues. Section 192 of the Constitution anticipates and authorises the establishment of a broadcasting authority. It provides:

> "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

Therefore the Broadcasting Act and the ICASA Act comprise the legislative framework that gives practical effect to a constitutional requirement and more importantly the protection of the fundamental right of freedom of expression. The

[12] Section 167(6)(a) and (b) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

[13] See *Fraser* above n 11; *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening*) 1998 (11) BCLR 1345 (CC); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC); *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

scope of the protection relevant here is found in section 16(1)(a) and (b)[14] of the Constitution.[15] The issues which arise sharply in this case are the permissible limits to the freedom of expression in the context of public broadcasting and electronic media and the character and boundaries of licensing conditions that a broadcasting authority envisaged in the Constitution may impose on a broadcaster. The judicial review of these powers in itself raises a constitutional issue of administrative justice foreshadowed in section 33 of the Constitution. Therefore, the application does indeed raise important constitutional matters. We however refrain from expressing any view on their merits.

[21] However, the difficulty which the applicant faces before this Court is insurmountable. As before the SCA, the review application challenging the decision of ICASA on the four-year permanent licence is not before us. That is so because Radio Pretoria has not, in any court, initiated such a claim. The facts were not before the SCA and are now not before us. The applicant received reasons for the refusal of the four-year licence several months before the SCA hearing but chose not to commence a review of the decision. As the SCA correctly found, there are no review proceedings to attract a decision nor is there a compelling reason to decide so grave a matter without a proper claim and defence.

[14] Section 16(1)(a) and (b) of the Constitution provides:

> "Everyone has the right to freedom of expression, which include—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas".

[15] See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC); *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC); *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W).

[22] Clearly, the appeal before the SCA was limited to the decision on the temporary licence for the year ending April 2001. We cannot find any practical purpose to which a decision on the temporary licence may now be put. The applicant argues that a decision on the constitutional issues related to the temporary licence would serve a useful purpose for the broadcasting industry and wider community. There may indeed be instances where it is in the interests of justice for this Court to decide a constitutional matter for the benefit of the broader public or to achieve legal certainty or other public purpose, even if the decision is of no practical value to the litigants themselves.[16] This is not such a case. Even if the temporary licence is favourably decided, the applicant would not be in a position to carry on broadcasting and the disputes between the parties on the four-year licence would remain unresolved until the decision is reviewed or otherwise changed.

[23] We do not think it is in the interests of justice to grant this application. The application should be refused. Nobody has sought a costs order against the applicant. No order as to costs is made.

Order

[24] The following order is made:

"The application for leave to appeal is dismissed."

[16] See *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC); *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC); *JT Publishing* above n 7.