



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 9047/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	
(2) OF INTEREST TO OTHERS JUDGES: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	
(3) REVISED <input checked="" type="checkbox"/>	
4/9/2020	<i>U. F. ...</i>

In the matter between:

LESEDI AFRICA PRODUCTIONS CC

Applicant

And

INDEPENDENT COMMUNICATIONS AUTHORITY

1st Respondent

OF SOUTH AFRICA

COMPLAINTS AND COMPLIANCE

2nd Respondent

COMMITTEE

CHAIRPERSON, INDEPENDENT

COMMUNICATIONS AUTHORITY

3rd Respondent

OF SOUTH AFRICA

CHAIRPERSON, COMPLAINTS AND

4th Respondent

COMPLIANCE COMMITTEE

JUDGMENT

FABRICIUS J

- [1] In this application the applicant seeks an order that the “judgment and recommendation” by the second respondent dated 17 June 2019, be reviewed and set aside, as well as the decision of the first respondent to approve such recommendation on 1 August, be reviewed and set aside.
- [2] Applicant is a close corporation duly registered in terms of the Close Corporation Act 69 of 1984 (the “CC Act”). It is a small enterprise as defined in s1 of the National Small Enterprise Act 102 of 1996.
- [3] The first respondent is “ICASA” established in terms of s 3 of the Independent Communication Authority of South Africa Act 13 of 2000 (“the ICASA Act”) and s 192 of the Constitution of South Africa.
- [4] The second respondent (the “CCC”) is an independent administrative tribunal at ICASA, established in terms of s 17A of the ICASA Act, with its functions set out in terms of s 17B. The second respondent inter alia decides disputes referred to it by ICASA or filed with it in terms of the Electronic Communications Act 36 OF 2005 (“the ECA”).
- [5] The other respondents are the Chairpersons of the above mentioned bodies.
- [6] Applicant basis its case on various provisions of the Promotion of Administration of Justice Act 3 of 2000 (“PAJA”) and in particular s 6(2)(d), 6(2)(e)(iii),(iv), s6(2)(f)(ii), s6(2)(h) and s6(2)(i).

- [7] There is in my view little to be said for respondents' view expressed in their answering affidavit that PAJA does not apply to these proceedings. The decision in Islamic Unity Convention v Minister of Telecommunications and Others 2008 (3) SA 383 (CC) at 405 E-H par [46] and [47] says otherwise. The Broadcasting Monitoring and Complaints Committee that referred to therein is equivalent to the CCC. The latter is an administrative function, and its decision is similarly receivable under PAJA. If that decision is set aside the decision of the first respondent cannot stand either.
- [8] In his heads of argument respondents' counsel did not contend otherwise.
- [9] The facts of the matter are actually straight-forward and so is the legal position in my view.
- [10] On 18 November 2010 ICASA granted 2 individual licences to applicant. At that time a certain Appolis and Kolensie were the members of the applicant. Delport, who signed the founding affidavit states that during 2010 Kolensie resigned and he became a member. The relevant CIPC documents, were not updated correctly, and he did not annex them.
- [11] On 27 August 2013 Appolis resigned as a member. A copy of this resignation letter was before 2nd respondent. Delport is and was of the view that since that day he was the sole member of applicant.
- [12] Applicant was charged with contravening s13 (1) of the ECA which states as follows:
"An incidental licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual license may not be assigned, ceded or in any way transferred, to any other person without the written permission of the authority."

- [13] The relevant amendment to s13 of the ECA took effect on 21 May 2014, and it was thus applicant's case that the section did not apply to him as he (Delport) had become the sole member of Applicant during August 2013. The charge against him was therefore erroneously instituted against him.
- [14] However, applicant's submission and argument loses sight of the provisions of s15(2) of the Close Corporation Act 69 of 1984 which provides that if there is a change in the Founding Statement of a close corporation, which serves especially the same purpose as the memorandum of incorporation of a company, such an amended founding statement must be lodged with the CIPC and that "any such change shall only take effect when such statement has been so registered in the relevant registers".
See: Law of South Africa, 2nd Ed, Vol 4 Part 3 and par 314 and par 342 which deals with the formalities for transfer of an interest,
- [15] The only time that applicant notified ICASA of any change of membership interest was in September 2016.
- [16] It is thus clear that the statutory requirement referred to above with reference to s15(2) of the CC Act was not complied with at the time of the "resignation" of Appolis nor at the time that the said amendment of the ECA Act had taken effect.
- [17] In Geaney v Portion 117 Kalkheuwel Properties CC and Others 1998 (1) 622 (T) the court also confirmed that a resignation by a member of a CC will only take effect when an amended founding statement is registered.
- [18] Section 13 of the ECA deals with the transfer of individual licenses or change in ownership. The prohibition in s13(1) of the ECA is against the transfer of individual license or change of ownership of the license as a result of which control of a license is transferred from one shareholder to another shareholder member in a close corporation. Section 13(1) must be

given ordinary grammatical meaning. The following words were added to s13 (1) with effect from 21 May 2014:

“...and the control of an individual licence may not be assigned, ceded or in any way transferred to any other person without prior written permission of the Authority.”

It is in my view clear, given the context also, that the prohibition is not only against the transfer of a license itself, but also the change of control of an entity to which a license has been granted. The reasons for this are also apparent from sections 2,4(3) of 8 of the ECA which deal with various relevant licensing provisions and conditions. Context is relevant and an important consideration: See: Road Traffic Management Corporation v Waymark (Pty) Limited [2019] SA 29 (CC).

[19] It is clear that on Delport's own version he took control not only of Applicant himself but also of the licenses, which he previously did not have, without however complying with the mentioned statutory requirements.

[20] In my view the respondents therefore acted within their powers on the common cause facts, and no basis for a review of their decisions has been established. The blanket prohibition introduced by the said amendment, which however does not provide for a penalty for contravention, is indicative of the legislature's intention to invalidate the prohibited conduct according to respondents' counsel. I agree with him, with reference to the relevant *dicta* in Standard Bank v Estate Van Rhyn 1925 AD 266, Pottie v Kotze 1954 (3) SA 719 (A) and Metro Western Cape (Pty) Ltd v Ross 1986 (3) SA 181 (A). This would particularly be so where recognition of the particular act would defeat the purpose of the statute. Section 17B (b) of the ICASA Act empower the committee to make “ any recommendations to the Authority necessary or incidental to... achieving the object of this Act or the underlying statutes”.

[21] The application is dismissed with costs including the costs of senior counsel.



H FABRICIUS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: NO ORAL HEARING

DATE OF JUDGMENT: 4 SEPTEMBER 2020

FOR THE APPLICANT: ADV GVR FOUCHÉ

**INSTRUCTED BY: MAKDA CULL KOTZE INC. ATTORNEYS C/O JACOBSON &
LEVY INC.**

FOR THE RESPONDENT: ADV K TSATSAWANE SC

INSTRUCTED BY: HM CHAANE ATTORNEYS INC.