REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/19114

DATE:08/03/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

RADIO PULPIT Applicant

and

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

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Second Respondent

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J U D G M E N T

WEPENER, J:

[1] The applicant ("*Radio Pulpit*") launched an application to review and set aside a decision of the second respondent (Independent Communications Authority – "*ICASA*") in which it refused Radio Pulpit's application for a community sound broadcasting licence to broadcast in the Western Cape on 729 kHz medium wave frequency ("*the decision*") on the basis, *inter alia,* that the committee delegated by ICASA to deal with the application was not properly constituted. It also seeks an order in terms of which the decision is substituted with a decision to allow Radio Pulpit to broadcast in the Western Cape on the 729 kHz medium wave frequency and an order directing ICASA to issue a broadcasting licence to Radio Pulpit.

[2] ICASA, which has been established in terms of the Independent Communications Authority Act 13 of 2000 ("*the ICASA Act*"), consists of a council, on which the ICASA councillors sit, and various committees.[1]

[3] For the hearing of the Radio Pulpit application, the ICASA council, as it was entitled to do, constituted a committee to deal with the application and thereafter to make recommendations to the council. The ICASA council designated two councillors to sit on the committee which would deal with the Radio Pulpit applications.

[4] The council resolution appointing the committee stipulated that the two councillors had to be present for all stages of the committee's cessions:

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[1] Sections 3 and 17 of the ICASA Act.

> "*2.4 The quorum for any meeting of this committee shall be two Councillors and three Committee members.*
>
> *…*
>
> *2.7 Any member of the committee who is for any reason absent during any cession of the committee where the parties herein request the committee to make a determination with regard to substantive issues relating to the merits of the matter before it, the preliminary point or the evidence led by either of the parties, shall be disqualified from further participating on the deliberations of the committee relating to those issues that were discussed, presented or heard in his/her absence.*"

It is common cause that one of the nominated councillors did not participate at all in the deliberations of the committee in respect of Radio Pulpit's second application.

[5] ICASA concedes the review and setting aside of the decision on the basis of one of the councillor's absence from the deliberations "*as this could potentially be regarded as having been procedurally unfair*".

[6] The concession is consistent with a well entrenched line of authority going back to the decision of *Schierhout v Union Government (Minister of Justice)* 1919 AD 30 at 44 where it was said:

> "*When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can be only one adjudication, and that must be the adjudication of the entire body … and the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them … for otherwise they would not be acting in accordance with the provisions of the Statute.*"

[7] On this basis the decision taken by ICASA's council regarding Radio Pulpit's application to broadcast in the Western Cape on the 729 kHz medium wave frequency ("*the 729 kHz frequency*) based on the recommendation of an improperly constituted committee, was procedurally unfair. The decision consequently falls to be reviewed and set aside in terms of section 6(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

[8] Radio Pulpit not being satisfied with the concession, continues to press further review grounds which would, according to its argument, lead to the court substituting its decision for that of the decision of ICASA with a resultant order directing ICASA to issue the relevant broadcasting licence to Radio Pulpit.

[9] The grounds for review are "*that ICASA's decision was impermissible based on its policy that community broadcasters had to be geographically bound*" and "*that ICASA failed to take into account or properly take into account the relevant considerations in coming to its decision*". These two grounds were dealt with together in argument by Mr Kennedy on behalf of Radio Pulpit because they were said to be closely related.

[10] In order to consider the further review grounds in its proper perspective it is necessary to set out the framework within which ICASA operates as well as the regulation of broadcasting under the Electronic Communications Act, 36 of 2005 ("*ECA*").

[11] Broadcasting is regulated in terms of the ECA which came into force on 19 July 2006. It was previously regulated by the Independent Broadcasting Authority Act, 153 of 1993 ("*the IBA Act*") now repealed by the ECA and the Broadcasting Act, 4 of 1999 ("*the Broadcasting Act*").

ESTABLISHMENT OF ICASA

[12] ICASA was established in terms of section 3(1) of the ICASA Act. ICASA acts through a council contemplated in section 5 of the ICASA Act. The composition of the council is set out in section 5 of the ICASA Act. Section 5(1) makes it clear that the council consists of a chairperson and eight other members appointed by the Minister of Communications ("*the Minister*") upon approval by the National Assembly, according to the following principles: participation by the public in the nomination process; transparency and openness; and the publication of a short list of candidates for appointment, with due regard to the provisions of subsection (3) and section 6. The National Assembly may, in terms of section 5(1A)(b) of the ICASA Act, invite technical experts to assist it in the selection, evaluation and appointment of the councillors. The experts may include those set out in section 5(1A)(c)(i) to (v) of the ICASA Act. In terms of section 5(3) of the ICASA Act persons appointed to the council must be persons who:

12.1 are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of the public service; and

12.2 when viewed collectively:

12.1.1 are representative of a broad cross-section of the population of the Republic; and

12.1.2 possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting, electronic communications and postal policy or operations, public policy development, electronic engineering, law, marketing, journalism, entertainment, education, economics, finance or any other relevant expertise or qualifications.

[13] In terms of section 11(3) of the ICASA Act, the quorum for any meetings of the council is a majority of the councillors in office at the time. Section 11(4)(a) provides that a decision of the council is taken by resolution agreed to by the majority of councillors at any meeting of the council. The chairperson has a casting vote, in addition to his or her deliberate vote, in the event of an equality of votes regarding any matter.

[14] The council is entitled in terms of section 14A of the ICASA Act to appoint as many experts as may be necessary to assist it in the performance of its functions.

[15] In terms of section 17 of the ICASA Act, the council may establish standing committees or special committees for such purposes as it may deem necessary with a view to assist it in the effective exercise and performance of its powers and duties. A committee performs such functions as may be delegated or assigned to it by the council.

[16] Despite the establishment of special committees to assist the council as contemplated in section 17 of the ICASA Act, the final decision is that of the council in respect of matters that require a council decision, such as the award of a licence under the ECA.

THE REGULATION OF BROADCASTING UNDER THE ECA

[17] Section 5(2) and (4) of the ECA provides that ICASA may grant individual and class licences for the following:

17.1 electronic communications network services;

17.2 broadcasting services; and

17.3 electronic communications services.

[18] Section 5(1) of the Broadcasting Act provides that ICASA may, on such conditions as it may determine, issue a sound or television broadcasting service licence for a specified area in the following broadcasting service categories:

18.1 a public broadcasting service;

18.2 a commercial broadcasting service; and

18.3 a community broadcasting service.

[19] Applications for the above broadcasting licences must be made in terms of the applicable provisions of the ECA and any regulations prescribed thereunder. Thus the above broadcasting service licences are granted upon application in a manner prescribed under the ECA.

[20] Section 7 of the ECA prohibits any person, except for services exempted in terms of section 6 of the ECA, from providing any service without a licence.

[21] The Broadcasting Act defines a "*community broadcasting service*" to mean a broadcasting service which:

21.1 is fully controlled by a non-profit entity and carried on for the non-profitable purposes;

21.2 serves a particular community;

21.3 encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and

21.4 may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned.

[22] The Broadcasting Act defines a "*community*" as follows:

> "*'community' includes a geographically founded community or any group of persons or sector of t he public having a specific ascertainable common interest.*"

[23] In terms of section 5(5)(b) of the ECA, a class licence is required in order to provide a community broadcasting service. In contrast, an individual licence is required to provide a commercial broadcasting service in terms of section 5(3)(b) of the ECA.

[24] The process by which class licences are granted is described in sections 16 and 17 of the ECA. It is in summary as follows:

24.1 A person who intends to operate under a class licence must, in the manner prescribed, submit a registration notice in writing to ICASA.

24.2 ICASA may, upon receipt of a written registration notice in the manner prescribed, grant a class licence.

24.3 A registration for a class licence may be submitted at any time in the manner prescribed by ICASA.

24.4 Other than where grounds for refusal of a class licence (as set out in section 18 of the ECA) exist, ICASA must, within sixty days after receipt of a registration notice, grant the class licence, unless ICASA gives written notice of a delay.

[25] The procedure for the grant of individual licences is different from that of class licences and is set out in section 9 of the ECA. A significant difference is that no application for an individual licence can be made other than in response to an invitation to apply ("ITA") issued by ICASA.

[26] Section 5(7)(a)(i) of the ECA requires ICASA to prescribe regulations setting out the process and procedures to be followed when *inter alia* registering for a class licence. The Regulations which ICASA made in terms of this section set out the prescribed registration notice which prospective licensees to provide community broadcasting services must submit to ICASA. In terms of the Regulations a registration for a class licence to provide a community broadcasting service may be submitted to ICASA at any time. It does not have to be submitted in response to an ITA.

[27] Chapter 5 of the ECA deals with radio frequency spectrum. This chapter includes sections 30 to 34 of the ECA.

[28] In terms of section 30(1) of the ECA, ICASA controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34. In controlling, planning, administering, managing and licensing the use of the radio frequency spectrum, ICASA must comply with or take into account the matters set out in section 30(2) of the ECA.

[29] Section 31(1) and (2) obliges any licensee under the ECA to obtain a radio frequency spectrum licence in addition to any licence contemplated in Chapter 3 of the ECA, which includes a community service broadcasting licence, where the provision of such service entails the use of radio frequency spectrum. In this case the provision by Radio Pulpit of the envisaged community broadcasting service entails the use of the 729 kHz medium wave frequency. It requires a spectrum licence in respect of this medium wave frequency, which it currently does not have.

[30] ICASA has an obligation to develop a national radio frequency plan in terms of section 34(2) of the ECA. The section requires the Minister to approve the national radio frequency plan developed by ICASA who must also have regard to the international allotment of radio frequency spectrum and the international coordination of radio frequency spectrum usage, in accordance

with international treaties, multinational and bilateral agreements entered into by the Republic.

[31] The national radio frequency plan must set out the specific frequency bands designated for use by particular types of services (such as community broadcasting services, in contrast to commercial broadcasting services), taking into account the radio frequency bands allocated to the security services.

[32] Section 34(5) of the ECA requires that the radio frequency plan be updated and amended when necessary in order to keep the plan current. When updating and amending the plan, due regard must be given to the current and future usage of the radio frequency spectrum.

[33] ICASA is required by section 34(7) to do the following when preparing the national radio frequency plan:

> 33.1 to take into account the International Telecommunications Union's international spectrum allotments for radio frequency spectrum use, in so far as ITU allocations have been adopted or agreed by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;

33.2 to take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and

33.3 consult with the Minister for the purposes set out in section 34(7)(c)(i) to (iii) of the ECA.

[34] ICASA is required by section 34(8) and (9) of the ECA to follow a notice and comment procedure and a public hearing in the preparation of the national radio frequency plan. It is only once this public participation process is completed that the proposed national radio frequency plan is forwarded to the Minister for approval. The national radio frequency plan becomes effective upon approval by the Minister. ICASA is required to publish the approved plan in the Government Gazette.

[35] Section 34(15) of the ECA makes it clear that the provisions of section 34(6) to (14), i.e. the due process provisions, apply with the necessary changes to any amendment made by ICASA to the radio frequency plan.

[36] In consequence of the provisions of section 34(15) of the ECA, any amendments to a national frequency plan with respect to the allocations of frequency spectrum usage have to comply with the provisions of section 34(6) to (14) of the ECA. Factors that are relevant in terms of these provisions have to be taken into account and not simply current demand for a particular frequency.

[37] In considering the grant of a new community broadcasting service licence ICASA is required by section 50 of the ECA, with due regard to the objects and principles enunciated in section 2 of the ECA, amongst others, to take into account whether:

37.1 the applicant (for a licence) is fully controlled by a non-profit entity and carried on or is to be carried on for non-profit purposes;

37.2 the applicant intends to serve the interests of the relevant community;

37.3 as regards the provision of the proposed broadcasting service, the applicant has the support of the relevant community or of those associated with or promoting the interests of such community, which support must be measured according to such criteria as may be prescribed;

37.4 the applicant intends to encourage members of the relevant community or those associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and

37.5 the applicant has never been convicted of an offence in terms of the ECA or the related legislation.

[38] As section 50 of the ECA makes clear, the factors listed in subsections (a) to (e) thereof are not exhaustive. Some of the critical factors not specifically mentioned are whether the application is in respect of a community as envisaged in the ECA and that the frequency sought to be used in providing the community broadcasting service is available for community broadcasting services in the sense that is so allocated.

CHRONOLOGY OF EVENTS

[39] ICASA published a Terrestrial Broadcast Frequency Plan 2004, being the national radio frequency plan, under GN 1513 in Government Gazette 28299 of 5 December 2005 ("*the Previous RF Plan*").

[40] The Previous RF Plan was in force when Radio Pulpit submitted its application for a community broadcasting service licence and when ICASA made the decision. The Previous RF Plan was published in terms of the provisions of the IBA Act.

[41] The Previous RF Plan was replaced by a new Terrestrial Broadcasting Frequency Plan 2008 ("*the Present RF Plan*") which was published under GN 1538 in Government Gazette 32728 on 18 November 2009. The Present RF

Plan was published in terms of the provisions of the ECA, i.e. section 34 of the ECA. It was published after ICASA had made the decision.

[42] The adoption of the Present RF Plan followed a public notice and comment procedure, a public hearing (on 16, 17 and 18 September 2009) and ministerial approval as envisaged in section 34 of the ECA. Radio Pulpit was one of the interested parties that made comment on the draft RF Plan which became the Present RF Plan.

[43] Both the Previous RF Plan and the Present RF Plan set out various frequencies which have been designated for television and radio frequency broadcasting services throughout South Africa. In general, frequencies are categorised as either for purposes of public, commercial or community broadcasting services. In certain instances, however, the field is left blank to indicate that the particular frequency has not yet been assigned to any particular category of service.

[44] Annexure “C” to the Present RF Plan sets out the medium frequency assignments.

[45] It is common cause that the 729 kHZ medium wave frequency in the Western Cape which Radio Pulpit applied to use was, and still is, assigned for purposes of commercial broadcasting services. The assignment stands and remains valid until set aside by a competent court. See Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para 26.

[46] Radio Pulpit has not applied to ICASA, and does not apply to this Court, for the 729 kHz medium wave frequency in the Western Cape to be assigned for purposes of community broadcasting services by way of an amendment to the Present RF Plan.

[47] Certain points made in the second application and in the supporting documents show that Radio Pulpit was aware that the assignment of frequencies in the Previous RF Plan was crucial to whether or not its application would succeed – and that any changes to the RF Plan required ICASA to follow due process as provided for in section 34(6) to (14) of the ECA. We point out certain of these indications.

47.1 Radio Pulpit stated in the covering letter dated 5 June 2007 that in terms of the Frequency Plan published in Government Gazette No. 16764 dated 13 October 1995 under Notice 1097, the 657 medium wave frequency had been assigned to Radio Pulpit and was still indicated as such on ICASA's frequency plan today, i.e. the Previous RF Plan. Radio Pulpit repeated this statement at page 12 of the actual application. Significantly, Radio Pulpit did not make similar statements about the 729 kHz frequency in the Western Cape – indicating its awareness that this frequency was not available to it in terms of the Previous RF Plan (which applied at the time).

47.2 In a document from Sentech, and which Radio Pulpit submitted in support of the second application, the following is stated:

> "*With cognisance of the above Sentech remains aware of the expectations and sensitivities of the South African broadcasting fraternity and therefore, in the case of Radio Pulpit's application, considered it inappropriate to propose 'available frequencies' where it might be reflected in the national broadcast frequency plan but where it is reserved for broadcast categories other than community. Apart from regulatory process, such an approach would further burden that already scarce carrying capacity of broadcasting spectrum and instead Sentech followed a process of deterministic frequency identification where the capacity of the broadcasting spectrum may now be enhanced by the addition to the broadcast frequency plan of the newly identified and tested frequencies proposed for the roll-out of Radio Pulpit in the FM band. Such an approach can therefore also be seen as not to compromise the rights of any other aspiring broadcaster to access spectrum in terms of the published broadcast frequency plan and regulatory process. The proposed addition of these frequencies to the plan can be done by due process as provided for by Council.*"

[48] In the absence of an application for the reallocation of the 729 kHz frequency in the Western Cape to community broadcasting services, ICASA did not at the time commence the process envisaged in section 34(6) to (14) in order to possibly amend the Previous RF Plan by allocating the 729 kHz frequency in the Western Cape to community broadcasting services.

[49] The 729 kHz frequency in the Western Cape remains allocated to commercial broadcasting services also under the Present RF Plan. Although there is currently a process pursuant to section 34 of the ECA in progress to reconsider the RF plan, it is of no consequence to the present application as it

had not been completed or the plan amended at the time when Radio Pulpit's application was considered.

[50] I consequently agree with Mr Unterhalter that this Court, nor ICASA, is entitled to award a community broadcasting licence to Radio Pulpit notwithstanding the assignment of the 729 kHz frequency in the Western Cape for purposes of commercial broadcasting services. To do so without first effecting a valid amendment to the Present RF Plan by ICASA to assign to 729 kHz frequency for purposes of community broadcasting services will, in my view, be in conflict with the provisions of section 34 read with section 31(1) and (2) of the ECA.

[51] Without a lawful amendment of the RF Plan to allocate the 729 kHz medium wave frequency in the Western Cape to community broadcasting services as opposed to commercial broadcasting services, ICASA was precluded by the provisions of sections 31(1) and (2) and 34 of the ECA from considering and awarding a licence to Radio Pulpit to provide a community broadcasting service on the 729 kHz frequency as per the second application.

[52] Having regard to this finding this Court will not be in a position to substitute its decision for ICASA's decision until an amendment of the RF Plan has been effected and, even if it can be said that ICASA's decision falls to be reviewed for the additional reasons advanced by Radio Pulpit. In view of this finding it is not necessary to decide upon the validity of the other review grounds raised by Radio Pulpit.

[53] Counsel for Radio Pulpit argued that the allocation of the 729 kHz frequency in the Western Cape, contrary to the existing frequency plan, will not lead to an amendment of the frequency plan, which, may only be amended subsequent to procedural requirements set out in section 34 of the ECA.

[54] It is argued that such allocation would lead to a mere updating of the frequency plan and therefore does not trigger the requirements of section 34. I do not agree. Section 34(15) of the ECA provides:

> "*The provisions of subsections (6) to (14)* (the procedural requirements) *apply, with the necessary changes, in relation to any amendment made by the Authority to the radio frequency plan.*"

[55] The plan now provides that the frequency is for commercial use. In order to allow the frequency to be utilised for community use, the plan needs to be amended. "*Amended*", according to the Concise Oxford Dictionary, is "*to make minor improvements*" whilst "*update*" means "*make more modern*" or to "*gave latest information*" or "*an act of updating or an updated version*". Clearly the procedural requirements need not be fulfilled in order to update the frequency plan – by updating it with that which may be lawfully changed or inserted to be included therein.

[56] Changing the contents of the RF Plan by removing an assigned commercial use and replacing it with a new community use would be an act of

amending the frequency plan, which on the applicant's own argument requires the procedural requirements of section 34(1) to (14) to be adhered to prior to any amendment of the plan being effected.

[57] Mr Kennedy argued that ICASA contends before this Court for the first time that Radio Pulpit's application cannot be granted because the 729 kHz frequency was allocated for commercial use. This is, however, not correct. In a letter of 15 May 2007 Radio Pulpit stated:

> "*6.2 **Suggestion:** Radio Pulpit respectfully suggests that these frequencies (and perhaps certain other available FM frequencies in order for Radio Pulpit to reach its existing listeners and to provide services in under-serviced areas such as the Northern Cape) are to [be] applied for as part of its amended application. The effect of this would be that where the frequencies are either allocated to other services or do not appear on the ICASA band plan at all, ICASA will, on receipt of the amended application, be in a position immediately to commence a government gazette-initiated open and transparent process in the public interest to:*
>
> > *6.2.1 have the FM frequencies appear on the band plan, where these do not currently so appear;*
> >
> > *6.2.2 have these frequencies (both FM and AM) allocated or re-allocated (as the case may be) to 'community' alternatively to 'open' news; and*
> >
> > *6.2.3 assign the frequencies to the best candidate therefor, as part of which process Radio Pulpit is confident it will be able to compete with other applicants therefor.*"

On 19 September 2007 ICASA supplied Radio Pulpit with lists of concerns ahead of the hearing, where it is stated:

> *"The frequency identified for Western Cape is 729 kHz. This is a frequency that has been pre-coordinated and reserved as a commercial frequency and as such not available for a community broadcaster."*

[58] There can be no doubt that the process that Radio Pulpit had in mind was that required by section 34(6) to (14) read with (15) of the ECA. Any contentions in Radio Pulpit's argument to the contrary, i.e. that the process envisaged in section 34(6) to (14) need not be followed, are not correct and contrast with Radio Pulpit's own position adopted in the letters referred to.

[59] ICASA acknowledged receipt of Radio Pulpit's letter dated 15 May 2007 in a letter dated 28 June 2007. ICASA stated that it permitted Radio Pulpit to submit an amended application on the correct prescribed form, noting that Radio Pulpit allegedly acted on the advice of an official of ICASA in submitting the first application on a form prescribed for commercial broadcasting service licences. In its letter, ICASA "*noted*" the suggestion made by Radio Pulpit that it would, as part of its amended application, apply for the reallocation of radio frequencies to enable it to apply to use the 729 kHz medium frequency in the Western Cape. Radio Pulpit was consequently alive to this issue from the outset.

[60] ICASA would only initiate a process in terms of section 34(6) to (14) of the ECA for the reallocation of the 729 kHz medium wave frequency to community broadcasting services once Radio Pulpit had formally applied for such an amendment in terms of its amended application (in line with the suggestion made in paragraph 6.2 of Radio Pulpit's letter of 15 May 2007).

[61] Radio Pulpit submitted to ICASA the amended application on 5 June 2007 ("*the second application*").

[62] It submitted the second application in the form prescribed for community broadcasting service licence. It applied, *inter alia,* for a licence to broadcast on the 729 kHz medium wave frequency in the Western Cape and no application for a reassignment of the frequency from commercial use to community use was lodged.

[63] Even if it can be said that ICASA raised the question of the allocation of the frequency for the first time during these proceedings, the result would be the same in that ICASA was lawfully precluded from reassigning the frequency without following the section 34 procedural requirements.

[64] There is a further reason why this court cannot substitute its decision for that of ICASA. I have referred to the obligation of ICASA to develop a national frequency plan with regard to certain international aspects in para 30 above. Without these issues being fully canvassed before me, I will not be in a position to properly consider an amendment of the frequency plan.

[65] In addition to the public process component regarding the assignment of frequencies, there is a technical component. In its answering affidavit, ICASA explained it as follows:

> *"Both the Present RF Plan and the Previous RF Plan set out the various frequencies which have been designated for television and radio broadcasting purposes throughout South Africa, in general, frequencies are categorised as being for the purposes of either a public, commercial or community broadcasting service although in certain instances the category field is left blank to indicate that the particular frequency has not yet been assigned to any service. Annexure C of the Previous RF Plan set out the MW frequencies which*

have been assigned for sound broadcasting purposes (RJP19 to the supplementary affidavit). Annexure D to the Previous RF Plan set out the frequencies which are assigned for community sound broadcasting purposes in each province. Both Annexure C and D specified the frequency, the transmitting station name, geographical coordinates of the transmitting station (from which a broadcast signal may be transmitted on the particular frequency), maximum effective radio power ("ERP"), in the case of FM frequencies, or effective monopole radiated power ("EMRP"), in the case of AM (MW) frequencies, and dominant polarisation mode of the antenna and the status of the particular frequency (i.e. whether it is operational, has been licensed but is not yet operational or is spare). Annexure C of the Present RF Plan (attached as annexure "PM4") sets out the MW frequency assignments and, like Annexure C to the Previous RF Plan, specifies the frequency, the transmitting station name, geographical coordinates, EMRP, and dominant polarisation mode of the antenna and the status of the particular frequency. In each case, a particular frequency is transmitted from a specific transmitting station located at a specific place determined by the applicable geographical coordinates. A transmitting station is operated by a signal distributor who is, in terms of the ECA, required to be authorised in terms of the ECNS licence. A broadcasting service licensee may self-provide its own signal distribution services, provided that it holds an appropriate ECNS licence, or may contract with a provider of signal distribution services such as Sentech Limited ("Sentech"). The ERP or EMRP and polarisation ("Transmission Parameters") application to a particular frequency transmitted from a particular transmitting station delineate the geographical area to which a broadcasting signal may be transmitted. A higher ERP or EMRP value in relation to a particular transmitter will enable the broadcast service transmitted on the frequency in question to reach a wider geographical area. By contrast, where the ERP or EMRP specified for a particular frequency and transmitter is low, the geographical area to which the broadcast signal will be transmitted will be smaller. These Transmission Parameters are set by ICASA so as to allow for the greatest feasible number of frequencies for broadcasting purposes for the provision of broadcasting services without interference with each other. Determining the various available frequencies and appropriate Transmission Parameters for each is an extensive technical task."

[66] Regardless of the general rule that a court will only substitute its decision for that of the administrative body in exceptional circumstances (see section 8(1)(c)(ii) of PAJA) and having regard to the bar to any ad hoc

amendment to the RF plan caused by the procedural requirements of section 34 of the ECA, this court cannot substitute the decision.

[67] Mr Unterhalter submitted that in case of a body which is statutorily required to embody a wide spectrum of expertise relevant to the exercise of its powers, such as the council of ICASA as required by section 5(3)(ii) of the ICASA Act, courts will be slow to substitute their decision for that of the council where such decisions call for considerations which require expertise and experience that exists in the council as opposed to a court. I agree.

[68] In *Onshelf Trading Nine (Pty) Ltd v De Klerk NO*, [2] where the applicant sought an order of substitution against a decision of the Council of ICASA's predecessor-in-law, the Court declined to substitute its decision. Streicher J reasoned *inter alia* as follows, which reasoning we submit is apposite:

> *"As I have already stated, this Court has jurisdiction to substitute its own decision for that of an administrative tribunal where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. In the light of this fact it may be that this Court also has jurisdiction to take the decision in the first instance where it is obvious that, because of bias on the part of the tribunal, it would serve no purpose to apply to the tribunal first merely to have the tribunal's decision subsequently set aside and to substitute the Court's decision for the decision of the tribunal. However, if this Court does have such jurisdiction, which I doubt, it will only be in exceptional cases where it can serve no purpose to apply to the administrative tribunal first and where the Court is in a position to decide the matter.*
>
> *The present case is not such a case. In considering an application for a private broadcasting licence, the third respondent is enjoined, with regard to the objects and principles as enunciated in s 2, inter alia to take into account such factors*

[2] *Onshelf Trading Nine (Pty) Ltd v De Klerk NO and others* 1997 (3) SA 103 (W).

as the demand for the proposed broadcasting service; the need for the broadcasting service having regard to the broadcasting services already existing in the licence area; the expected technical quality of the proposed service; and, having regard to developments in broadcasting technology, the capability and the expertise and experience of the applicant. The objects and principles enunciated in s 2 include such matters as the promotion of the provision of a diverse range of sound and television broadcasting services which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information; the promotion of the development of broadcasting services which are responsive to the needs of the public; ensuring that broadcasting services viewed collectively develop and protect a national and regional identity, culture and character; ensuring that, in the provision of public broadcasting services, the needs of language, cultural and religious groups, the needs of constituent regions of the Republic and local communities and the need for educational programmes are duly taken into account; encouraging ownership and control of broadcasting services by persons from historically disadvantaged groups; encouraging equal opportunity employment practices by all licensees etc. The Legislature entrusted this function to:

> *(1) a chairperson or two co-chairpersons appointed on the advice of, first, the Transitional Executive Council and then the National Assembly taking into account the objects and principles enunciated in s 2 and according to principles such as participation by the public in the nomination process; and to*
>
> *(2) six councillors who, when viewed collectively, should be persons who are suited to serve on the council by virtue of their qualifications, expertise and experience in the fields of, inter alia, broadcasting policy and technology, media law, frequency planning, business practice and finance, marketing, journalism, entertainment and education. The councillors should also, when viewed collectively, represent a broad cross-section of the population of the Republic and be committed to the objects and principles as enunciated in s 2.*

In the light of the aforegoing it is clear that the council should consist of people who are broadly representative of the population of the Republic and who collectively possess a variety of qualifications considered necessary to deal with, inter alia, applications for broadcasting licences.

In my view a Court consisting of a single Judge is clearly not qualified to fulfil the functions of the council. Moreover, even if the council is biased, it cannot be contended that a decision by the council will serve no purpose. Once a Court has been furnished with the reasons of the council it will be in a better position to

> *substitute its own decision for that of the council if the council's decision is found to be invalid because of bias and the circumstances are such that the Court may substitute its decision for that of the council.*
>
> *The matter should therefore be referred back to the third respondent whether or not the third respondent is biased against the applicant. It follows that it is not necessary to deal with the question whether any bias on the part of the third respondent or any of its councillors has been proved."* [3]

[69] For these reasons it is not apposite for me to consider a substitution of the decision of ICASA based on the additional grounds of review raised by Radio Pulpit.

[70] In these circumstances this Court, like ICASA, is precluded from granting a community broadcasting licence to Radio Pulpit in conflict with the provisions of sections 31(1) and (2) and 34 of the ECA and in the absence of the necessary technical evidence having been fully canvassed before me.

[71] In all the circumstances I make the following order:

1. The decision of ICASA to refuse Radio Pulpit's application to broadcast in the Western Cape on the 729 kHz medium wave frequency is reviewed and set aside and referred back to ICASA to consider upon completion of its section 34 procedure presently embarked upon by it.

2. ICASA is ordered to pay the costs of the application, save that Radio Pulpit is ordered to pay the costs of the application

[3] At 112A-113D.

(including the costs of Part A of the relief claimed) from the time when ICASA's affidavit was delivered, such costs to include the costs of two counsel.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG