IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

DATE 8 NOV. 2005 SIGNATURE

CASE NO: 04/16039

In the matter between:

NAEEM JEENAH NO	First Applicant
THEMBISA FAKUDE NO	Second Applicant
ZAKIYA SERGURO NO	Third Applicant
ABBAS YUSUF ABDI NO	Fourth Applicant
FARHANA ISMAIL NO	Fifth Applicant
THOURHAAN MUSSON NO	Sixth Applicant
DOSSO NDESSOMIN NO	Seventh Applicant
RADIA RAZACK NO	Eighth Applicant

in their capacities as the Trustees of the
Muslim Community Broadcasting Trust

and

THE CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	First Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Second Respondent
THE JOHANNESBURG UNIVERSITY	Third Respondent
RAU RADIO	Fourth Respondent

JUDGMENT

FEVRIER, AJ:

A. INTRODUCTION

[1] This review has its origins in an application made by the applicants to the second respondent for a four-year community sound broadcasting licence in respect of area 26 on a frequency of 95,4 MHz. As will presently appear, second respondent refused the application and awarded the licence to a competitor, namely Rand Afrikaans University which, so it is alleged, conducts a radio station known as "*RAU Radio*".

[2] Accordingly to the applicants, this application is brought under the provisions of Rule 53 of the Uniform Rules of Court. The Notice of Motion contains the following prayers:-

> "*1 The first and second respondents are hereby called upon to:*
>
> *1.1 show cause why:*
>
> *1.1.1 the proceedings ('the proceedings') which led to the First and Second Respondent's decisions ('the decisions') of 30 September 2003 in terms of which the First alternatively Second Respondent:*
>
> *(a) refused the Applicant a four-year community sound broadcasting licence; and*

(b) *conditionally granted a four-year community sound broadcasting licence to the Third Respondent; and*

should not be reviewed and set aside; and

1.1.2 the decisions should not be reviewed and set aside; and

1.1.3 such of the respondents as may oppose this application be ordered to pay the applicant's costs hereof; or

1.1.4 alternative relief be granted."

[3] It will be observed that the applicants attack both the decision to refuse their application for the licence and the decision to award a licence to the third and/or fourth respondents.

[4] At the commencement of the hearing, counsel for the applicants advised that his clients would not be seeking an order in terms of prayer 1.1.1(a) but would confine themselves to the relief claimed in prayer 1.1.1(b). I understood counsel to make it clear that the applicants accept that second respondent had acted correctly and regularly in refusing applicants' application on the merits. The applicants, therefore, persist in seeking an order that the grant of the licence to RAU Radio be set aside.

B. THE STATUTORY FRAMEWORK

[5] The starting-point is section 192 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) which reads as follows:-

"*192. BROADCASTING AUTHORITY*

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."

[6] The Independent Broadcasting Authority Act, 153 of 1993 provided for the regulation of broadcasting activities in the public interest. An independent juristic *persona*, known as the "*Independent Broadcasting Authority*" (IBA) was established.

[7] The Independent Communications Authority of South Africa Act, No. 13 of 2000 (the ICASA Act) came into effect on 1 July 2000. In terms thereof, the IBA was dissolved and its regulatory functions were transferred to the Authority under the ICASA Act. *Inter alia*, any application pending before the IBA on 1 July 2000 would be dealt with by ICASA under the relevant provisions of the ICASA Act.

[8] Sections 32 and 39 of the ICASA Act prohibit any person from providing a broadcasting service or broadcasting signal distribution services without a licence issued by the ICASA Authority. In terms of section 47 of the ICASA Act, the Authority is authorised to consider applications for community broadcasting licences.

[9] The judicial review of administrative action, which has its origins in section 33 of the Constitution, takes place in accordance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") which seeks

to give effect to the constitutional right conferred on all people of our country to administrative action that is lawful, reasonable and procedurally fair.

[10] Section 6(1) of PAJA provides that any person may institute proceedings in a court of law for the judicial review of an administrative action. Section 6(2) confers upon a court the power to judicially review an administrative action on certain grounds detailed in sub-sections (a) to (i). The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA (*Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Others* 2004 (4) SA 490 (CC) paragraph [25] page 506I).

[11] Section 8(1) of PAJA provides that the court, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable including the orders referred to specifically in sub-sections (a) to (f).

[12] Judicial review of administrative action is now always a constitutional matter (*Bato Star* above).

Per O'Regan J at paragraph [22] page 504F-505B:-

> "*There are not two systems of law regulating administrative action – the common law and the Constitution – but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, not in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution.*

The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution."

C. BACKGROUND

[13] The applicants are the trustees of the Muslim Community Broadcasting Trust which conducts sound broadcasting under the name of "*The Voice*". This radio station serves, essentially, the Muslim community living in certain parts of the Johannesburg area.

[14] It is common cause that –

14.1 The second respondent is an "*organ of state*", as defined in section 239 of the Constitution and section 1 of PAJA.

14.2 The grant or refusal of a licence by second respondent is an "*administrative action*" as defined in section 1 of PAJA.

[15] The applicants have cited as –

15.1 The third respondent, "*The Johannesburg University*" which, it is alleged, was previously known as the Rand Afrikaans University and was established as a juristic person in terms of the Rand

Afrikaans University Act 51 of 1966 and continued to exist as such in terms of the Higher Education Act 101 of 1997.

15.2 The fourth respondent, "*RAU Radio*" which, it is alleged, is a voluntary association having a constitution and perpetual succession.

[16] In the light of the common cause facts, I will not deal with the second respondent's statutory invitation to interested parties to submit applications for the licences concerned.

[17] The applicants' limited submissions are set forth in counsel's heads of argument which I shall attempt to summarise hereunder. The applicants contend that:-

17.1 The licence was granted to an entity other than the *persona* that applied for the licence. Thus, the licence, so it was submitted, was granted to the third respondent who had not applied for the licence.

17.2 In the application submitted by the fourth respondent, the applicant is referred to as "*Rand Afrikaans University*" whilst the fourth respondent was described as a voluntary association.

17.3 Accordingly –

> "*16.4 The Applicants cannot be the Johannesburg University as the Rand Afrikaans University and the Johannesburg University have always been a statutory juristic person.*"

(Applicants' Heads of Argument, paragraph 16.4 page 9.) In other words, it was "*RAU Radio*" and not the Johannesburg University who had applied for the licence.

[18] In the event of the aforesaid contentions being rejected, then applicants contend further that –

18.1 RAU Radio intended conducting the proposed radio station and the second respondent intended to grant the licence to RAU Radio.

18.2 On 12 February 2003, the fourth respondent delivered updated documents to the second respondent.

18.3 In the aforesaid updated documentation, the applicant is referred to as the "*Rand Afrikaans University*" whose status is described as "*other*" (to the exclusion of being a section 21 company, a trust or a voluntary association). The updated information, so it was submitted, could have no effect on the identity of the applicant in the application.

18.4 The updated documentation constituted, in substance, a new application which, so it was submitted, was "*years out of time as the closing date for the application was 27 February 1998*".

[19] Based on the aforesaid submissions the applicants seek to set aside the grant of the licence to the third respondent, that is to say, the Johannesburg University in terms of prayer 1.1.1(b).

[20] The applicants cite "*The Johannesburg University*" as the third respondent. The fourth respondent is "*RAU Radio*". However, in terms of Government Notice 1702, dated 14 November 2003, the Rand Afrikaans University and the Technikon Witwatersrand were merged into a single public higher education institution to be known as "*University of Johannesburg*". The latter was, in terms of the said notice, established on 1 January 2005.

[21] In my view, the reference by applicants to the Johannesburg University in connection with the application for a licence, overlooks the fact that it was established on 1 January 2005 and could not have been a party to the procedures which took place at the relevant times. Insofar as reference was made to the Rand Afrikaans University as being a juristic person, that appears to be in order. Reference was also made to "*RAU Radio*" and the evidence before me indicates that it was the Rand Afrikaans University which broadcasts under the style of "*RAU Radio*" and sought the issue of a broadcasting licence to permit such broadcasts.

[22] In paragraph 18.4 above I referred to the complaint that, by furnishing updated information, the fourth respondent had, in effect, submitted a new application for a broadcasting licence.

[23] In my view, the fact that –

23.1 the fourth respondent's application related to a community of 117 000 persons in 2003 as opposed to a community of 36 000 persons in 1998; and

23.2 in its application, the relevant area was stated to be Melville, Westdene and Auckland Park whereas the updated information in 2003 revealed that the area had become wider,

amounts simply to the updating of the existing factual basis for the application and cannot amount to an abandonment of the application and the launching of a new application.

[24] Accordingly, there is no merit in this complaint.

D. DISCUSSION

[25] Strangely, there is no mention in the applicants' founding affidavit and heads of argument of the fact that this review is governed by the provisions of

PAJA. The applicants do not specify on which of the grounds set forth in section 6(2) of PAJA they rely.

[26] During argument, counsel informed the court that, in relation to the RAU Radio application, the applicants would contend that the decision to grant a licence to RAU Radio was "*materially influenced by an error of law*" as contemplated by section 6(2)(d) of PAJA. The error of law occurred when second respondent failed to appreciate that the Rand Afrikaans University, the Johannesburg University and RAU Radio were separate and distinct legal entities. This, so it was contended, resulted in second respondent granting the licence to an entity other than the applicant for that licence.

[27] The applicants lose sight of the fact that it was the Rand Afrikaans University which, at the time application was made for the licence, conducted the radio station under the name of "*RAU Radio*". That much is clear from the papers, including the documents relating to the application for the licence and the hearings.

[28] In my view, the second respondent's decision was in no way influenced by an error of law at all.

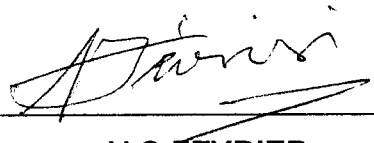
[29] However, there is a more fundamental reason why I consider that this application cannot succeed. What may be reviewed judicially in terms of section 6 of PAJA is an "*administrative action*" which, in section 1, is defined as being, *inter alia*, any decision taken by an organ of state in exercising a

31.4 Accordingly, second respondent's decision to grant the fourth respondent's application is not an "*administrative action*" within the meaning of section 1 of PAJA is not reviewable.

31.5 The aforesaid is, in my view, fatal to this review and precludes any relief being granted in terms of prayer 1.1.1(b) of the Notice of Motion.

[32] There is no reason why the costs should not follow the result. The matter was of great importance to the parties, it was complex and involved a plurality of competing interests. The fact that, on the day of the hearing, much of the applicants' case was abandoned, does not affect the question as to whether it was prudent to have briefed two counsel. In my view, the briefing of counsel was warranted.

[33] The application is dismissed with costs. The applicants are ordered to pay the costs of the respondents, including the costs attendant upon the briefing of two counsel. The applicants are ordered to pay all costs which were either reserved or which were stated to be costs in the cause.



V G FEVRIER
ACTING JUDGE OF THE HIGH COURT

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INSTRUCTED BY	ROSIN WRIGHT ROSENGARTEN
DATE OF HEARING	27 OCTOBER 2005
DATE OF JUDGMENT	8 NOVEMBER 2005