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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 30 MAY 2007
CASE NO: A571/2006

UNREPORTABLE

In the matter between:

OPTIS TELECOMMUNICATIONS (PTY) LTD	APPELLANT (APPLICANT IN THE COURT A QUO)

vs.

MINISTER OF COMMUNICATIONS	FIRST RESPONDENT
TWO CONSORTIUM (PTY) LTD	SECOND RESPONDENT
WIP INVESTMENTS 9 (PTY) LTD t/a COMMUNITEL	THIRD RESPONDENT
TRANSNET LIMITED	FOURTH RESPONDENT
ESKOM INTERPRISES (PTY) LTD	FIFTH RESPONDENT
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	SIXTH RESPONDENT
NEXUS CONNEXION SA (PTY) LTD	SEVENTH REPONDENT
TATA AFRICA HOLDINGS (PTY) LTD	EIGHTH RESPONDENT (RESPONDENTS IN THE COURT A QUO)

JUDGMENT

BOTHA, J

This is an appeal against a judgment of BOSIELO, J delivered on 3 February 2006, in which a review application launched by the appellant was dismissed.

The court *a quo* in essence found that the procedure of which the appellant complained had been unfair, but dismissed the application because of an unreasonable delay in launching the application, which it was not prepared to condone.

The appellant's application was for the review of certain decisions made by the first respondent, the Minister of Communications, in the process of awarding equity interests in the Second National Operator (SNO) who is eventually to be licensed to provide a public switched telecommunication service in competition to Telkom.

On 24 May 2002 the first respondent invited applications by way of tender for a 51% interest in the SNO.

At that stage the first respondent had already allocated a 19% interest to a Black Economic Empowerment (BEE) participant and 15% each to the fourth and fifth respondents, Transnet Limited and Eskom Enterprises (Pty) Ltd respectively.

In the end there were two applicants who responded to the invitation, the third respondent, WIP Investments 9 (Pty) Ltd, then known as Goldleaf Trading (Pty) Ltd, and the appellant. The fifth respondent, the Independent Communications Authority of South Africa (Icasa) examined the two applications and on 17 February 2003 recommended to the first respondent that neither should be accepted because they lacked the necessary financial backing.

The first respondent accepted the recommendation and declined to make an award.

On 31 March 2003 the first respondent again invited applications for a 51% interest in the SNO.

In view of the failure of its application the appellant decided that it was not worth its while to apply again.

The third respondent applied again. The other applicant was the second respondent, Two Consortium (Pty) Ltd. Icasa again evaluated the applications and once again recommended that neither should be accepted. It recommended that the application process be closed. It advised the Government to "channel collective energies toward creating real and sustainable competition to the incumbent".

Various proposals were considered and on 18 December 2003 the first respondent announced by way of a media release that she had decided to grant the second and third respondents 26% of the equity in the SNO and that the remaining 25% would be "warehoused".

On 3 February 2004 the appellant wrote a letter to the first respondent in which it expressed an interest in purchasing the 25% interest in the SNO retained by the Government. Various letters were exchanged, the last being a letter dated 19 August 2007, in which the appellant's deponent confirmed that he had the necessary financial backing for the acquisition of a 25% share.

On 31 August 2004 the appellant wrote a letter to the first respondent asking her for her reasons for her decision to make an award to the second and third respondent jointly.
The reasons were furnished on 14 December 2004. She explained that after the failure of the invitation issued on 31 March 2003 she searched for creative solutions with the assistance of Icasa.

The SNO Committee recommended that the second and third respondents be given reduced share in the SNO because each

had a solid technical model and had access to a world class skills base. She decided not to give the second and third respondents a controlling interest. She decided that a new company, Strategic Equity Partner Company (SEPco) be formed and that it should have a 51% interest in the SNO. A new financial investor should have a 51% interest in SEPco. The second and third respondents would each hold a 24,5% interest in SEPco.

In her answering affidavit the first respondent explained that on 18 December 2003 she decided to award the second and third respondent each 13% of the equity in the SNO and that 25% be warehoused. She later decided to refine the arrangement by the creation of SEPco and by not granting the second and third respondents a controlling interest in SEPco.

On 21 April 2004 she decided that 51% of the shareholding in SEPco should be held by the second and third respondents, each to hold 25.5%. The remaining 49% was to be warehoused.

On 26 August 2004 she decided that the second and third respondents should each have a 24,5% shareholding in SEPco and that the 51% shareholding should be awarded to a major investor. The 51% share holding was eventually awarded to Tata Africa Holdings (Pty) Ltd, the eighth respondent. The ultimate position was thus that SEPco held a 51% interest in the SNO. The fourth and fifth respondents each held 15% in the SNO. The seventh respondent held a 19% interest in the SNO. The shareholding in SEPco is as follows: eighth respondent 51% and second and third respondents each 24.5%.

On 7 June 2004 the seventh respondent launched an application to review the decisions of the first respondent made on 18 December 2003 and 21 April 2004.

After the 26th August 2004 the seventh respondent launched an application in which it challenged the decision made on that day.

The two applications launched by the seventh respondent were settled.

The applicant did attempt to intervene in the first application launched by the seventh respondent.

On 30 March 2005 this application was launched. The relief claimed was a review of the decision made on 26 August 2004 when an interest in the SNO was awarded to the second and third respondent as well as the prior decisions notably that of 18 December 2003 awarding an interest in the SNO to the second and third respondents. In its second prayer it asks for an order that it be allowed to participate as a bidder for the 25% interest, which presumably referred to the 25% interest that was warehoused in terms if the decision of 18 December 2003. In argument, it was made clear that what the appellant wanted was to be considered as a bidder for a minority interest on a par with the second and third respondents.

In its judgment the court *a quo* remarked that for the purposes of whether there had been an undue delay, it was important to determine whether the decision of 18 December 2003 or the decision of 26 August 2004 was the one which vitally affected the appellant's rights. If it was the former, it followed that the application was not launched within a reasonable time. The court then found that the decision of the 18th December 2003 was indeed the most important and fundamental decision that materially affected the right of the appellant. It then considered whether the unreasonable delay in launching the review of that

decision should be condoned. It remarked that the application was only launched after the negotiations for the acquisition of the 25% interest had foundered and that the appellant had in fact acquiesced in the decision of 18 December 2003 by offering to buy the 25% interest that had been held back in terms of that decision. It came to the conclusion that as a result of the lapse of time it was not practical or pragmatic to set the decision aside.

The court did, however, express the view that the decision to award the 26% interest to the second and third respondents by way of a private process, was unfair.

I shall assume that the decision to award shares of less than 51% to the second and third respondent after tenders had been invited on the basis that an applicant must apply for a 51% interest was unfair. The adverse effect of that decision on the appellant was, however, mitigated by the fact that a 25% interest was retained and available for disposal. The fact that the appellant attempted to acquire that 25% interest shows just that.

In fact, one can say that the real grievance of the appellant should be that the first respondent refused to sell the 25% interest to it. Clearly, if the appellant had acquired the 25% interest, it would have had no reason to complain.

All this may not be a defence to a decision that is flawed, but it is a factor that should be relevant when condonation for the late launching of a review application is considered.

I agree with the court *a quo* that from the appellant's point of view, the fundamental decision that affected its rights was the

decision of 18 December 2003. That was when the first respondent decided to award an interest of less than 51% and to make a split award. That was the radical departure from the procedure that was advertised when applications were invited. That was the situation, which, if the appellant had known that it would arise, would have induced it once again to submit an application.

The subsequent decision was simply a modification of detail. The principle remained the same: joint shareholding. Instead of an award to a single applicant who had the necessary financial reserves an award was made to two applicants whose joint resources were considered to be adequate.

Mr Cassim SC, who, with Mr Tee, appeared for the appellant strenuously argued that the decision of 26 August 2004 was the decisive decision. I cannot agree. That decision only had the effect of taking the controlling interest away from the second and third respondents, a modification against which the appellant has no objection.

Although the court found that the appellant at the latest by the 3rd February 2004 knew of the decision of 18 December 2003, it must be accepted on the papers that the appellant became aware of the decision when it was announced on 18 December 2003. It was never said that the appellant did not become aware

of the decision when it was announced.

If it was aggrieved by the decision it should have asked for reasons and brought a review application within a reasonable time.

The reason for the fact that the appellant only obtained the reasons for the decision on 14 December 2004 is that it spent the greater part of 2004 on its attempt to purchase the 25% interest. The chronology shows that it only asked for reasons after its attempts to purchase the 25% share had failed. In the circumstances the time wasted until 19 August 2004 must be considered to be an inexcusable delay.

Mr Cassim argued that the appellant's attempts to buy the 25% could be seen as something analogous to the exhaustion of internal remedies. He pointed out that the second and third respondents, who are the only parties affected by the relief claimed by the appellant, did not oppose the application. He also referred to the efforts made by the appellants to intervene in the first application launched by the seventh respondent.

I cannot agree that the attempts by the appellant to acquire the 25% interest that was warehoused in terms of the decision of 18 December 2003 can be likened to an internal review. The appellant did not attempt to have the decision of 18 December 2003 set aside. It in fact attempted to purchase the 25% share within the framework of that decision.

The first respondent presented evidence of prejudice which was not denied in the replying affidavit. It was not necessary for the second and third respondents to join forces with the first respondent in order to explain the prejudice to them. Obviously a possible reduction of their interest from 24.5% each, to, at best 16.3%, must have an adverse financial impact on them. The loss of confidence by the investors in the Government's effort to liberalize the telecommunications industry is a weighty consideration mentioned by the first respondent.

In a chronology supplied by Mr Cassim it appears that the

appellant launched its application to intervene in the seventh respondents' application on 3 September 2004. That was after it had asked the first respondent for her reasons. The application to intervene does not affect the vital lapse of time between 18 December 2003 and 31 August 2004.

A point that has to be made is that it is not entirely correct that in terms of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) an aggrieved party has 180 days within which to launch review proceedings. In terms of section 7(1) of Act 3 of 2000 proceedings for judicial review must be instituted **"without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reason for it or might reasonably have been expected to have become aware of the action and its reasons"**. A reasonable period could be less than 180 days, as I would be inclined to think given the commercial and political importance of the licencing of the SNO.

The court *a quo* gave a full and comprehensive judgment in which all the relevant facts are summarized and all the arguments considered. The court *a quo* did not in any way misdirect itself in

respect of the facts or the law.

In my view the finding of the court a quo that there was an unreasonable delay which cannot be condoned is unassailable. For that reason the appeal cannot succeed.

The following order is made:

The appeal is dismissed with costs which costs shall include the costs of senior counsel.

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C. BOTHA
JUDGE OF THE HIGH COURT

I AGREE

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N.M POSWA
JUDGE OF THE HIGH COURT

I AGREE

/LVS

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J.R MURPHY
JUDGE OF THE HIGH COURT

HEARD ON: 21 MAY 2007.

FOR THE APPELLANT/PLAINTIFF: MR CASSIM SC
MR TEE

INSTRUCTED BY: IAN LEVITT ATTORNEYS

FOR THE FIRST RESPONDENT/DEFENDANT:

INSTRUCTED BY: THE STATE ATTORNEY

FOR THE SECOND RESPONDENT:

DATE OF JUDGMENT: 30 MAY 2007.