



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no:1133/2023

In the matter between:

**INDEPENDENT COMMUNICATIONS**

**AUTHORITY OF SOUTH AFRICA**

**DR CHARLEY LEWIS N O**

**MKETHELENI GIDI N O**

**FIRST APPELLANT**

**SECOND APPELLANT**

**THIRD APPELLANT**

and

**OPEN HEAVEN COMMUNITY RADIO**

**SOUTH AFRICAN COMMUNITY RADIO**

**ORGANISATION**

**RESPONDENT**

**AMICUS CURIAE**

**Neutral citation:** *Independent Communications Authority of South Africa and Others v Open Heaven Community Radio and Others* (1133/2023) [2025] ZASCA 117 (12 August 2025)

**Coram:** DAMBUZA and MBATHA JJA and DOLAMO AJA

**Heard:** 20 November 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 12 August 2025.

**Summary:** Electronics Communications Act 36 of 2005 – whether the Independent Communications Authority of South Africa (ICASA) has statutory powers to entertain a notice of renewal of a class broadcasting licence submitted outside the period stipulated under s 19(2) of the Electronics Communications Act 36 of 2005 – whether the respondent’s class broadcasting licence was retrospectively and automatically extended by a period of two years by an amendment to the Standard Terms and Conditions Regulations for Class Licenses which came into effect on 25 March 2021.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J, sitting as court of first instance):

- 1 The appeal is dismissed.
- 2 The cross-appeal is upheld.
- 3 The order of the high court is set aside and substituted with the following order:
  - ‘(i) it is hereby declared that in terms of regulation 4 of the regulations published in Government Notice 44328 of 25 March 2021, the period of validity of a Class Broadcasting Service Licence is seven (7) years from the effective date.
  - (ii) it is hereby declared that the applicant’s Class Broadcasting Service Licence was valid for a term of seven (7) years from the effective date.
  - (iii) the respondent is ordered to pay the applicant’s costs of the application.’
- 4 The appellant is ordered to pay the costs of the appeal and cross appeal. Such costs to include the costs of the employment of two counsel.

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## JUDGMENT

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**Dolamo AJA (Dambuza and Mbatha JJA concurring):**

### Introduction

[1] This is an appeal and a cross appeal emanating from the Gauteng Division of the High Court, Pretoria (the high court). The appeal is against the judgment and order of the high court declaring that in terms of s 19(2) of the Electronic Communications Act 36 of 2005 (ECA), the first appellant, the Independent Communication Authority of South Africa (ICASA),<sup>1</sup> has the legislative power to condone a late submission of a notice of renewal of a broadcasting licence. The high court then remitted to ICASA for determination the respondent’s late notice of renewal of a broadcasting licence which ICASA had refused to consider. The cross-appeal is against the dismissal of an

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<sup>1</sup> In the high court ICASA was cited together with two of its officials as the first, second and third respondents. In this appeal they are first second and third appellants.

application by the respondent, Open Heaven Community Radio (Open Heaven), for a declarator that the validity of its broadcasting licence was extended from five years to seven years. Open Heaven is also appealing the adverse costs order made against it by the high court. The appeal and cross appeal are with the leave of the high court.

## **Background**

[2] ICASA is a statutory body, established in terms of s 3 of the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act), 'to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing the South African society', as provided in s 192 of the Constitution.<sup>2</sup> In terms of s 4 of the ECA, ICASA may make regulations regarding any matter which, in terms of the ECA, or related legislation, must or may be prescribed, governed, or determined by regulation. In this respect ICASA may make regulations regarding applications for and the grant, amendment, renewal, transfer or disposal of licences or any interest in a licence. In terms of s 19(2) of the ECA, class licensees seeking to renew their class licences must, in writing and not less than six months prior to the expiration of their class licences, notify ICASA of their intention to continue to provide the services.

[3] Open Heaven is the holder of a class community sound broadcasting service licence<sup>3</sup> granted to it by ICASA in terms of s 5 of the ECA. The licence was originally granted on 12 September 2012 and was renewed on 26 May 2017, with an effective date of 12 September 2017 and an expiry date of 11 September 2022. 'Effective date' is defined in the Process and Procedures Regulations for Class Licences promulgated in terms of s 4(2) of the ECA and published in Government Notice No 525 of 2010 (2010 regulations) to mean the date specified in the licence which may be a past, present or future date from the date of signature.

[4] In terms of the 2010 regulations the period of validity of a class community sound broadcasting licence was five years. During the currency of Open Heaven's 2017 licence, on 25 March 2021, the period of validity of that type of licence was

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<sup>2</sup> See s 2(a) of the ICASA Act.

<sup>3</sup> Broadcasting service licence means a licence granted by ICASA to a person in terms of s 5(2)(b) or s 5(4)(b) of the Electronic Communications Act 36 of 2005.

amended to seven years in terms of regulations published in Government Notice 44328 of 25 March 2021 (the 2021 regulations). The amended regulations provide as follows:

**‘4. DURATION OF THE LICENCE**

- (1) The following licences are valid for seven (7) years from effective date:
  - (a) Community Sound Broadcasting Service;
  - (b) Community Television Broadcasting Service;
  - (c) Community Low Power Broadcasting Service; and
  - (d) Commercial Low Power Sound Broadcasting Service.’

[5] During November 2021 Open Heaven started experiencing governance challenges which affected the smooth running of its affairs. These challenges made it difficult for it to comply with its licence obligations and the applicable regulatory framework. As a result, it sought advice from ICASA on how to regularise its affairs. ICASA advised Open Heaven to hold an Annual General Meeting (AGM) for purposes of, inter alia, electing a new and properly constituted board. The board would enable Open Heaven to comply with its constitution as well as with ICASA's regulations. Acting on this advice Open Heaven made preparations to hold its AGM on 26 March 2022. Before the AMG could be held ICASA advised Open Heaven, in a letter dated 23 March 2022, that it (Open Haven) had failed to renew its licence timeously and that it had to cease broadcasting on 11 September 2022. Notwithstanding that letter ICASA still wrote to Open Heaven requesting the minutes of the AGM and other related information, which the latter duly furnished.

[6] On 30 March 2022, Open Heaven gave notice in the prescribed manner for the renewal of its licence, but ICASA refused to accept the application. This was on the ground that the application was out of time, precisely 14 days out of the six month period within which it should have been filed. On 15 June 2022, Open Heaven wrote to ICASA pleading for condonation of the late filing of its renewal notice. ICASA's response was that it has ‘no legislative authority or regulatory discretion to condone non-compliance in the event that a licensee fails or has failed to file its renewal application within the stipulated time frame...’. Consequently, Open Heaven launched the application in the high court seeking, in Part A, an urgent interdict against ICASA restraining it from interfering with its broadcasting services, including seizing its

broadcasting/electronic equipment, interfering with its allocated broadcasting spectrum, or de-registering its broadcasting licence. In Part B, Open Heaven sought an order reviewing and setting aside ICASA's refusal to process the notice of renewal of its broadcasting service licence.

[7] In its amended notice of motion, after the rule 53 record of decision was filed, Open Heaven sought an order in the following terms:

'1 A declarator that the Applicant's Class Broadcasting Service Licence/s (NO. Class/Com/R183/Sep/12) is valid for a term of SEVEN YEARS from the effective date and its term of validity will expire on 11 September 2024;

2 The Respondents' instruction to the Applicant embodied in a letter dated 11 July 2022 to cease broadcasting on 11 September 2022 be declared unlawful, reviewed and set aside;

3 Alternative to para 1 and 2 above, the respondents' decision to refuse to process the applicant's notice of renewal of its Class Broadcasting Service Licence/s (No. Class/Com/R183/Sep/12) be reviewed and set aside in terms of PAJA or the principle of legality;

4 The applicant's notice of renewal be remitted back to the respondents to process on terms imposed by [the court];

5 The respondents be ordered to pay the applicant's legal costs including costs of two Counsel; and

6 Further and/or alternative relief.'

[8] ICASA opposed the application. In the first instance, it contended that s 19(2) of the ECA does not empower it to extend the duration of a class licence by regulation. Secondly, that when the amendment extending the period of validity of a class licence from five to seven years was promulgated Open Heaven was already in possession of its licence which, in clause 2, expressly provided that the licence would expire in five years. Thirdly, it contended that it was factually and legally incorrect to argue that the duration of Open Heaven's class licence was extended from five to seven years because the amended regulation did not automatically extend the period of validity of existing licences.

[9] On the question of condonation for the late filing of the renewal of Open Haven's licence, ICASA contended that it is not empowered to entertain late renewal applications. The fact that the relevant legislation was silent on condonation or

acceptance of late renewal notices meant that it was not authorised to entertain late renewal application.

[10] The high court (Mdlovane J) dismissed part A of the application. However, Open Heaven's station was not closed down. It continued to operate. Part B then came before Van Nieuwenhuizen J (the high court). That court held that indeed, the 2021 regulations do not expressly state whether regulation 4 thereof is applicable to existing licences or whether it is only applicable to licences approved after 25 March 2021 (the date of their promulgation). The court found that the terms and conditions of a class licence, including its duration, are determined and published on the date on which the licence is granted and remain applicable for the duration thereof. It held further that the ECA does not provide for the amendment of the licence terms and conditions during the period of its validity; and an automatic amendment of the period of a licence, as contended for by Open Heaven, would be in direct conflict with the express provisions of ss 16 and 17 of the ECA.

[11] Regarding condonation for the late application for renewal of the licence, the high court held that ICASA does not have the legislative authority or power to grant condonation for the late filing of a renewal application for a class licence. It consequently rejected the contention by Open Heaven that, on a proper construction of s 19(2) of the ECA, the court should find that the ECA confers an implied discretion on ICASA to accept notices of renewal that were filed out of time. The high court, however, recognised that our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body for whose benefit the powers were enacted.<sup>4</sup> The high court held that the most probable purpose for the six months' time limit in s 19(2) of the ECA is to afford ICASA sufficient time to process an application for renewal. Holding otherwise would mean that the legislature arbitrarily and for no reason at all enacted the time limit, the court reasoned. It held that ICASA may, in its discretion, waive the six-months' time limit. It further held that none of the

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<sup>4</sup> *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others* [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481 (SCA); 2008 (5) BCLR 508 para 17.

grounds for review in PAJA had been satisfied by Open Haven. Consequently, no proper basis was established for a review of ICASA's decision.

[12] Having held that ICASA did not err in refusing to accept the late application for renewal, the high court nevertheless held that ICASA does not have the legislative power to interpret the ECA and that this power falls within the domain of the court. It consequently granted an order, which it deemed to be just and equitable in the circumstances, declaring that ICASA has the necessary legislative power to, in its discretion, condone the late filing of a notice for the renewal of a class licence in terms of s 19(2) of the ECA. Such an order, according to the high court, would achieve the actual purpose of the relief sought by Open Heaven, which was a reconsideration of its request for condonation for the late filing of its notice of renewal. The high court remitted Open Heaven's request for condonation back to ICASA for consideration but ordered Open Heaven to pay the costs of the application.

[13] It is against the above order that ICASA is appealing. Open Heaven, on the other hand, is cross-appealing against what it considers to be an implied dismissal of its application for a declarator. It had sought a declarator that its class broadcasting service licence is valid for seven years from the effective date and would expire on 11 September 2024.

[14] The first question which arises for determination in this appeal is whether ICASA has statutory powers to entertain a request to condone the non-compliance with the provisions of s 19(2) of the ECA. Arising from the cross appeal is the second question, whether the 2021 regulations automatically extended Open Heaven's class broadcasting licence by a period of two years.

[15] When the appeal was heard, Open Heaven's broadcasting licence had already expired, even on its own case that its licence had been extended by virtue of the 2021 regulations. The question arose as to whether the matter had since become moot. A matter is moot if it no longer presents an existing or live controversy. Generally, courts should not decide matters that are abstract or academic, and which do not have any practical effect, either on the parties before court or the public at large. However, the answer to the question whether the 2021 regulations applied to existing licences is not



of interest only to ICASA and Open Heaven, it is important to other existing licensees as well. In addition, ICASA's interpretation of s 19(2) will continue to affect other community broadcasters who are in a position similar to Open Heaven. The interests of justice require determination of the appeal despite its mootness.<sup>5</sup>

[16] In the appeal ICASA contends that there is no legal basis for the high court to grant the order declaring that it has the legislative power to consider the request to consider notice of renewal. It was common cause that the notice was submitted outside the time limit prescribed in s 19(2) of the ECA. It contends that the refusal decision remains of full force and effect. Consequently, it was improper of the high court to remit the matter back to ICASA for reconsideration, ICASA contends.

## Discussion

[17] This argument by ICASA is not correct. ICASA's refusal to process Open Heaven's licence renewal is what gave rise to Open Heaven approaching court. The essence of Open Heaven's argument in the high court was that ICASA has the power to condone the lateness and consider renewal notices that are submitted to it outside of the prescribed period. The issue of condonation was therefore pleaded and argued in the high court. In its order the high court compelled ICASA to consider Open Heaven's notice of renewal despite it being out of time.

[18] Did ICASA have the power to consider Open Heaven's late notice of renewal? Section 19(2) of the ECA provides that:

'Class licensees seeking to renew their class licences must, in writing and not less than six months prior to the expiration of their class licence, notify the Authority of their intention to continue to provide the services.'

In its argument that it had no power under the section to condone non-compliance with the prescribed time limit, ICASA relied on the judgments of the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (Fedsure)*<sup>6</sup> and *Pharmaceutical Manufacturers*

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<sup>5</sup> *Member of the Executive Council for Cooperative Governance and Traditional Affairs KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46; (2022) 43 ILJ 50 5(CC); 2022 (8) BCLR 959 (CC) para 16.

<sup>6</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374; 1998 (12) BCLR 1458 para 56.

*Association of South Africa and Another: in re ex Parte President of the Republic of South Africa and Others (Pharmaceutical Manufacturers)*<sup>7</sup>. ICASA submitted that if it were to purport to exercise powers not vested upon it by law, its conduct would violate the principle of legality and its conduct or decision would be liable for review.

[19] Our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body for whose benefit the provision was enacted.<sup>8</sup> Even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal.<sup>9</sup> In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Social Security Agency and Others (Allpay)*,<sup>10</sup> the Constitutional Court held that:

‘Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O’Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. This is not the same as asking whether compliance with the provisions will lead to a different result.’

[20] In this case, the question whether ICASA has a discretion to condone late submission of the notice of renewal of broadcasting licences is dependent on the purpose of its empowering provision, s 4(3A)(a) of the ICASA Act. That section states that:

‘The Authority, in exercising its powers and performing its duties-

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<sup>7</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; 2000 (3) BCLR 241 para 17.

<sup>8</sup> Op cit fn 4 para 17.

<sup>9</sup> *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA); 2005 (4) SA 199 (SCA) para 22.

<sup>10</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 30.

(a) must consider policy made, and policy directions issued by the Minister in terms of the Act, the underlying statutes and any other applicable law.

It is trite that ‘any other applicable law’ includes statutes, subordinate legislation, the common law, judicial precedents, as well as indigenous and customary law.<sup>11</sup> Section 19(2), in my view, was enacted for the benefit of ICASA. The six-month period, within which to submit a notice of renewal of a licence, is to afford ICASA time to deal with its internal administrative tasks, such as updating its register of licences and taking decisions regarding the allocation of radio spectra. The beneficiary of the time stipulation is ICASA. Consequently, ICASA has a discretion to condone late notices of intention to renew licences where there has been substantial compliance with the object of the statutory provision. ICASA should have considered Open Heaven’s request for consideration of its late notice of renewal, which was out of time by a mere 14 days. ICASA’s appeal against the order of the high court remitting Open Heaven’s application back to it for reconsideration stands to be dismissed.

[21] In support of its contention that s19(2) of the ECA does empower it to condone late applications for renewal of community sound broadcasting licences, ICASA contrasted the provisions of this section with those of s 11(9) of the ECA. It submitted that contrary to s 19(2), the former section clearly demonstrates empowerment to condone late notices of renewal. Section 11(9) provides that:

‘The Authority may on good cause shown by the applicant, accept for filing, an application for renewal that is not submitted within the time period prescribed by the Authority in terms of subsection (2).’

This contention is without merit. Apart from the argument regarding the express mention under s 11(9), ICASA does not provide any reason why the provisions of s 19(2) should not be interpreted consistently with the principles set out in *Allpay*. I can find none. While the principle *expressio unius est exclusio alterius* still applies in our law, its application is somewhat limited and it is considered within the parameters of the context and overall purpose of the document under interpretation as explained by the Constitutional Court in *Allpay*. Within the context of both the ICASA and the ECA, ICASA does have the power to condone the late submission of a notice of renewal of a class broadcasting licence in an appropriate case.

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<sup>11</sup> Op cit fn 7 para 47.

### **Retrospective application of regulation 4 of the 2021 regulations**

[22] On the interpretation of regulation 4 of the 2021 regulations ICASA contends that the effect of the extension of the period of validity from five to seven years, properly construed, is that at the end of the existing five years of a licence a qualifying class licence holders' licence would be renewed for a period of seven years. New licences, issued after 25 March 2021, would be valid for seven years, it argues. This interpretation, according to ICASA, takes into consideration that there is a presumption against retrospectivity. It contends that the words used in the amendment do not permit an interpretation of retrospectivity. It submits that an interpretation in terms of which the amendment applied to existing licences would be in conflict with existing laws. It relies as support for this proposition the judgment in *Adampol (Pty) Ltd v Administrator, Transvaal*<sup>12</sup> where it was held that laws and decrees give shape to future matters and are not applied to acts of the past, unless express provision is made for past time and for matters which are still pending.

[23] Open Heaven, on the other hand, contends that there is no provision in the amended regulations which limits the new term of validity to licences which were granted or renewed after the regulations came into effect. It submitted that if that was the intention one would expect to find such an express provision in the regulations themselves.

[24] Our law recognises a general presumption against the retrospective application of laws. This, however, is no more than a presumption which may be rebutted either by express words in a statute showing that the provision is intended to be retrospective, by necessary and distinct implication demonstrating such an intention,<sup>13</sup> or by provisions or indications to the contrary, in the enactment under consideration.<sup>14</sup> It is trite that a presumption against retrospective application is intended to protect against the invasion of a vested right by a new legislative enactment.<sup>15</sup> It is not

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<sup>12</sup> *Adampol (Pty) Ltd v Administrator, Transvaal* [1989] 4 All SA 776 (AD); 1989 (3) SA 800 (A) at 805E-J.

<sup>13</sup> *Ibid* at 805E-J.

<sup>14</sup> *Workmen's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA); [1997] 3 All SA 157 (A) at 162.

<sup>15</sup> *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman of the National Transport Commission and Others, Transnet Ltd (autonet Division) v Chairman of the National Transport Commission and Others* [1999] 3 All SA 365 (A) para 12.

intended to exclude the benefit of rights sanctioned by the new piece of legislation.<sup>16</sup> The presumption against retrospectivity would not apply where the consequences of holding an Act to be non-retrospective will lead to an absurdity or practical injustice.<sup>17</sup>

[25] I turn attention to the interpretation of the 2021 regulations to determine whether expressly or by necessary implication are intended to apply retrospectively. The starting point in interpreting any document is to give consideration to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its enactment.<sup>18</sup> This approach has been endorsed by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another*.<sup>19</sup> There the Court held, inter alia, that the fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.’

[26] The purpose of the 2021 regulations, which were drafted by ICASA, are to extend the validity of class community sound broadcasting service licences from five years to seven years. The amended regulations define the new period of validity by express reference to the effective date specified in a licence. The 2021 regulations are not limited to new licences granted after their publication or to those renewed after the amended regulations came into effect. The wording of the regulation therefore does not admit of an interpretation contended for by ICASA: that the extended period of validity would only apply to new licences.

<sup>16</sup> *S v Mhlungu and Others* 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (*Mhlungu*) para 38.

<sup>17</sup> *Lek v Estate Agents Board* [1978]3 All SA 604(C) at page 611.

<sup>18</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

<sup>19</sup> *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[27] Furthermore, the 2021 regulations are clearly intended to confer a benefit by increasing the period of validity of a licence from five years to seven years. The Constitutional Court held in *S v Mhlungu and Others*<sup>20</sup> that the presumption against retrospectivity is not intended to exclude the benefits of rights sanctioned by the new legislation. The presumption against retrospectivity would therefore not apply in this case, where the period of validity of all class licences is extended, in terms of the amended regulations, to a period of seven years. In the circumstances the high court erred in holding that the presumption against retrospectivity limits the application of the 2021 regulations to new licences issued after 25 March 2021. Consequently, the cross appeal ought to be upheld.

### Costs

[28] An award of costs is a matter wholly within the discretion of the trial court.<sup>21</sup> An appeal court will not generally interfere with a court of first instance's decision on costs. However, in *Sublime Technologies (Pty) Ltd v Jonker and Another*<sup>22</sup> this Court held that an appeal court will only interfere with the discretionary orders granted by a lower court where it is shown that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the effects, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. In this case the high court erred in its reasoning in relation to ICASA's power to accept and consider late notices of renewal. Its award of costs against Open Heaven was obviously influenced by its finding that ICASA had no authority under the circumstances. Since Open Heaven ought to have been successful in the high court on the basis of interpretation of s 19(2) of the ECA, rather than a just and equitable order, the appropriate costs order is that ICASA must pay the costs of the application in the high court, the costs of the appeal as well as that of the cross-appeal.

[30] In the result I make the following order:

- 1 The appeal is dismissed.

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<sup>20</sup> *Mhlungu* fn 16 above para 38.

<sup>21</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 11.

<sup>22</sup> *Sublime Technologies (Pty) Ltd v Jonker and Another* [2009] ZASCA 149; 2010 (2) SA 522 (SCA); [2010] 2 All SA 267(SCA) para 2.

- 2 The cross-appeal is upheld.
- 3 The order of the high court is set aside and substituted with the following:
  - (i) it is hereby declared that in terms of regulation 4 Government Notice 44328 of 25 March 2021, the period of validity of a Class Broadcasting Service Licence is seven (7) years from the effective date.
  - (ii) it is hereby declared that the applicant's Class Broadcasting Service Licence is valid for a term of seven (7) years from the effective date.
  - (iii) the applicant's notice of renewal is remitted back to the respondents to be processed.
  - (iv) the respondent is ordered to pay costs.'
- 4 The appellant is ordered to pay the costs of the appeal and cross appeal. Such costs to include the employment of two counsel.

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M J DOLAMO  
ACTING JUDGE OF APPEAL

**Appearances**

For the appellants:	K Tsatsawane SC with K Lefaladi
Instructed by	HM Chaane Attorneys, Pretoria Honey & Partners Inc, Bloemfontein
For the respondent:	M Nguta with B Zungu and T Segage Tsoetsi Inc Attorneys, Johannesburg Mhlokonya Attorneys, Bloemfontein
For the amicus curiae:	F J Erasmus SC with N Magwa Hurter Spies, Pretoria Hendre Conradie Attorneys, Bloemfontein.