



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No.: 183/CAC/Apr20
CT Case No: CR228DEC18/DSM258FEB19

In the matter between:

Competition Commission

Appellant

and

Shoprite Checkers (Pty) Ltd

First Respondent

Computicket (Pty) Ltd

Second Respondent

DISSENTING JUDGMENT

[1] I have read the judgment of my colleague Vally JA and I am grateful for his succinct contextualization of the particular problems and the facts of this appeal and I have relied thereon. I concur in the orders in respect of the application for condonation and costs but I would dismiss the appeal.

[2] To my mind, the sound general principle that appeals do not lie in respect of the reasons for an order or judgment which has been confirmed in numerous decisions over

a long period¹ must be applied by this Court in relation to decisions of the Tribunal. An application of this principle militates against the order of the majority setting aside paragraphs [28], [36], and [37] of the Reasons for the Decision.

[3] While it is so that the Constitutional Court² and the SCA³ have been inclined to a more flexible approach in determining whether interlocutory orders are appealable, that has not extended to making reasons of judgments, or orders, appealable⁴.

[4] This is for good reasons. Allowing the setting aside of findings made in the course of reasoning would have challenges for a court of appeal and would lead to the piecemeal disposal of matters and, as found in *Neotel*,⁵ in 'the 'hollowing-out', or erosion, of the substratum of judgments and orders that are not before [the appeal court], and the negative consequences accompanying such a process.¹⁵

[5] I do, however, share with the majority the disquiet as to the anomalies which emerge in the reasons of the Tribunal and the ultimate order. As pointed out by Vally JA,⁶ the manner in which the impugned paragraphs in the Tribunal's Reasons for Decision have been cast, suggests a final determination of the issues whereas the order provides for the Commission to amend on these very issues.

[6] To my mind, the order which is under appeal reflects that the Tribunal did not intend to make binding determinations the issues in question. If it had, what would be the point of granting leave to amend the case? I thus agree with Mr Trengove SC who appeared

¹ See: *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* (605/2016) [2017] ZASCA 47 (31 March 2017); *SA Metal Group (Proprietary) Limited v The International Trade Administration Commission & another* (267/2016) [2017] ZASCA 14 para 15; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) at 198 I-J; *Western Johannesburg Rent Board* supra at 355; *ABSA Bank Ltd v Mkhize and two similar cases* [2013] ZASCA 139; which followed *Molteno Bros v South Africa Railways* 1936 AD 408; *Haviland Estates (Pty) Ltd & another v McMaster* 1969 (2) SA 312 (A) at 335C-F; *Holland v Deyssel* 1970 (1) SA 90 (A) at 93 E-F; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 529G; *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm).

² See: *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09). [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³ See: *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A).

⁴ *Neotel* n 1 above at para 23.

⁵ *Ibid* at para 24.

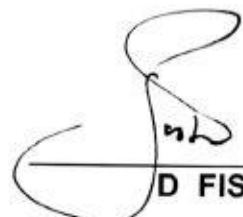
⁶ Majority judgment at [14].

for the respondents, that the 'findings' made in the paragraphs in issue are not intended to be final determinations but are rather an infelicitous and perhaps overly robust expression of a view on the issues which are to be decided in due course.

[7] Thus, I would hold that the 'findings' in paragraphs [28], [36], and [37] of the Reasons for the Decision of the Tribunal must be regarded by this Court and for the purposes of further hearings of the case in the Tribunal, as the irrelevant opinions of the Tribunal, expressed in the course of the making of an interlocutory order which is not subject to appeal.

[8] I would make the following order:

- a. The delay in filing the record of the appeal is condoned and the appeal is reinstated.
- b. The appeal is dismissed.
- c. The conditional cross-appeal is dismissed.
- d. Each party is to pay its own costs.



D FISHER
Acting Judge of Appeal