THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 605/2016

In the matter between:

NEOTEL (PTY) LTD	**APPELLANT**
and	
TELKOM SA SOC LTD	**FIRST RESPONDENT**
MOBILE TELEPHONE NETWORKS (PTY) LTD	**SECOND RESPONDENT**
CELL C (PTY) LTD	**THIRD RESPONDENT**
DIMENSION DATA (PTY) LTD T/A INTERNET SOLUTIONS	**FOURTH RESPONDENT**
DR STEVEN MNCUBE NO	**FIFTH RESPONDENT**
MS KATHARINA PILLAY NO	**SIXTH RESPONDENT**
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	**SEVENTH RESPONDENT**
VODACOM (PTY) LTD	**EIGHTH RESPONDENT**
INTERNET SERVICE PROVIDERS' ASSOCIATION	**NINTH RESPONDENT**
THE WIRELESS ACCESS PROVIDERS' GROUP	**TENTH RESPONDENT**
CRYSTAL WEB (PTY) LTD	**ELEVENTH RESPONDENT**
SEPCO COMMUNICATIONS (PTY) LTD	**TWELFTH RESPONDENT**
VSNL SNOSPV PTE LIMITED	**THIRTEENTH RESPONDENT**
NEXUS CONNEXION SA (PTY) LTD	**FOURTEENTH RESPONDENT**
MINISTER OF COMMUNICATIONS	**FIFTEENTH RESPONDENT**
MINISTER OF TELECOMMUNICATIONS	

AND POSTAL SERVICES **SIXTEENTH RESPONDENT**

(HUGE TELECOM (PTY) LTD and **HUGE GROUP LIMITED** intervening**)**

Neutral citation: *Neotel (Pty) Ltd v Telkom SOC & others* (605/2016) [2017] ZASCA 47 (31 March 2017)

Bench: Maya AP and Majiedt JA and Fourie, Gorven and Coppin AJJA

Heard: 17 March 2017

Delivered: 31 March 2017

Summary: Appeal : Appealability : appeal against reasons for substantive order and not the order itself: appeal struck from the roll for lack of jurisdiction: confirmed that an appeal does not lie against reasons for an order or decision, but against the substantive decision itself : application to intervene to support appellant dismissed.

ORDER

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

The following order was made on 17 March 2017:

1. The appeal is struck from the roll.

2. The application to intervene in the appeal is dismissed.

JUDGMENT

Coppin AJA (Maya AP and Majiedt JA and Fourie and Gorven AJJA concurring):

[1] Immediately after hearing counsel on the issue of appealability, the appeal was struck from the roll and an application to intervene in the appeal, brought by Huge Telecom (Pty) Ltd (Huge Telecom) and Huge Group Limited (Huge Group) (the intervention application), was dismissed. The reasons for those orders were to follow. These are the reasons.

[2] The Independent Communications Authority of South Africa (seventh respondent) (ICASA) approved an application of Neotel (Pty) Ltd (the appellant) and Vodacom (Pty) Ltd (eighth respondent) (Vodacom) for the

transfer of control of certain individual electronic communication service licences and radio frequency spectrum licences, held by the appellant, pursuant to an acquisition by Vodacom of the entire issued share capital of the appellant. ICASA's decision approving the transfer was taken on 11 June 2015 and published on 2 July 2015.[1]

[3] Telkom SA SOC Limited (first respondent) (Telkom) and other parties[2] brought applications in the court a quo impugning the lawfulness of ICASA's decision on the application on several grounds and sought to have it reviewed and set it aside. One of the grounds raised related to the interpretation of s 9(2)(6), read with s 13(6), of the Electronic Communications Act[3] (ECA). It relates, particularly, to the requirement of equity ownership to be held by persons from historically disadvantaged groups in entities applying for the transfer of a licence, or the transfer of control of a licence, contemplated in those sections of the ECA (the Black Economic Empowerment (BEE) requirement).

[4] It was common cause that the appellant and Vodacom did not comply with the BEE requirement at the time of the application and that ICASA had, nevertheless, approved the transfer, subject to a condition that there be compliance at some future date that still had to be determined.

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[1] The decision was published in Government Gazette 38951, 2 July 2015; Notice 684 of 2015.
[2] Mobile Telephone Networks (Pty) Ltd (MTN) (second respondent), Cell C (Pty) Limited (Cell C) (third respondent), Dimension Data Middle East & Africa (Pty) Ltd t/a Internet Solutions (fourth respondent).
[3] Electronic Communications Act 36 of 2005.

[5] One of the main contentions was that ICASA had erred in its interpretation of s 9(2)*(b),* i.e. the BEE requirement, and that there had to be compliance with the requirement from the outset.

[6] All the applications for review were heard together and the court a quo gave one judgment in respect of all of them. It found that a case had been made in respect of the BEE requirement ground and certain other grounds,[4] and granted an order reviewing and setting aside ICASA's decision. It specifically upheld the argument that s 13(6) of the ECA, read with s 9(2)*(b),* required compliance with the BEE requirement at the outset. The court a quo held that ICASA's approach, which was tantamount to permitting compliance with that requirement in due course (after having approved the application), was irreconcilable with the clear wording of s 9(2)*(b)*. It consequently held that ICASA had been materially influenced by an error of law as contemplated in s 6(2) of the Promotion of Administrative Justice Act[5] (PAJA) and that its decision was unlawful.

[7] The appellant brought an application for leave to appeal against the order of the court a quo, and specifically also against its finding in respect of the BEE requirement issue. In the meantime the transaction between the appellant and Vodacom, which necessitated the transfer of control of the licences, lapsed and the court a quo's order was rendered moot. At the

[4] A 'competition' ground, namely, that ICASA's failure to consider competition and to defer to the Competition Commission was materially influenced by an error of law, and a procedural ground, namely, that ICASA was reasonably suspected of bias in making the impugned decision.
[5] The Promotion of Administrative Justice Act 3 of 2000.

hearing of its application for leave to appeal the appellant no longer sought leave against the order, but only against the court a quo's findings concerning the BEE requirement in s 9(2)*(b),* read with s 13 of the ECA. The court a quo in its judgment, in respect of the application for leave to appeal, states that 'leave to appeal is not sought against the [o]rder, but only with regard to paragraphs 75 to 80 of the judgment.' Those paragraphs contain the court a quo's findings concerning the BEE requirement issue.

[8] Although adamant that it was not granting leave against its order, the court a quo was persuaded that leave could be granted in respect of the 'contents' of, and the 'reasons and findings' in the said paragraphs of its judgment. This was on the basis that it was in the interests of justice, and that because its reasons relating to the BEE requirement will be relevant to each and every application before ICASA in future and even if the order itself was moot, it raised a discrete issue of public importance that will have an effect on future matters of similar nature. The court a quo accordingly granted the appellant leave to appeal to this court, and made no costs order.

[9] Save for the appellant and Mobile Telephone Networks (Pty) (second respondent) (MTN), none of the other parties that were cited, as either applicants or respondents in the applications before the court a quo, indicated a willingness to participate in this appeal. A number of them, including ICASA, indicated that they would abide by the decision of this court in respect of the appeal. Despite its indication to the appellant that it would be participating in

the appeal, MTN did not participate and also did not file any heads of argument. Only the appellant filed heads of argument and was pursuing this appeal on its own, until about a week before the hearing when Huge Telecom and Huge Group brought the intervention application with the stated intention to support the appellant.

[10] After it was granted leave to appeal by the court a quo, as is evident from the main heads of argument filed on its behalf, the appellant proceeded from the basis that the only obstacle that it still had to confront in this court was that of the mootness of the court a quo's order, in respect of which it was not granted leave. It sought, in its original heads of argument, to persuade this court to exercise its discretion[6] and deal with the merits of the appeal as it constitutes 'a discrete legal issue of public importance'[7] which would affect matters in the future. This was the same argument that it made in the court a quo in support of its application for leave to appeal, albeit in a different context.

[11] The spectre of the appealability of 'the contents' of, and of the 'reasons, and findings' in, certain paragraphs of the court a quo's judgment, was not raised by the appellant, despite its obviousness. This court *mero motu* raised it and requested the appellant to address the issue in supplementary heads of argument. More specifically, the appellant was requested to deal with the issue of appealability and, in particular with the

[6] *Centre for Child Law v Hoërskool Fochville & another* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) at 129 para 11, where the approach in the case of mootness of an order on appeal, is summarised.
[7] Ibid at 130 para 14.

following: (a) whether it was contended by the appellant that there is a distinction between a 'decision' contemplated in s 16(1)*(a)* of the Superior Courts Act,[8] and a 'judgment or order' contemplated in s 20(1) of the Supreme Court Act,[9] (b) whether the 'content, reasons and findings', in respect of which leave was granted to appeal to this court, is a 'decision' in terms of s 16(1)*(a)* of the Superior Courts Act; and (c) on what basis, if any, it is contended that the said 'content, reasons and findings' are appealable.

[12] The appellant correctly conceded in argument that there was no difference in the meaning that was assigned to the phrase 'judgment or order' in s 20 of the Supreme Court Act and a 'decision' in s 16(1)*(a)* of the Superior Courts Act. This has been held to be so.[10]

[13] If a decision did not constitute a 'judgment or order' the decision was not appealable under the Supreme Court Act.[11] Since there is no conceptual difference between such a judgment or order and the 'decision' contemplated in s 16(1)*(a)* of the Superior Courts Act, the same would hold true under the Superior Courts Act. The 'judgment or order' was held to refer to a substantive judgment or order in terms of which the court granted or

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[8] Superior Courts Act 10 of 2013.
[9] Supreme Court Act 59 of 1959 which was repealed by and replaced with the Superior Courts Act 10 of 2013.
[10] S v *Van Wyk* [2014] *ZASCA 152; 2015* (1) SACR 584 (SCA) at 591 footnote 6 and the majority judgment in *Firstrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (24 November 2016) paras 10-15.
[11] *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 42H-43C.

refused the relief sought.[12] The same meaning has to be given to the 'decision' contemplated in s 16(1)*(a)* of the Superior Courts Act.

[14] The appellant correctly conceded that, what was before this court, was not an order in that sense, but the reasons for such an order. The order itself was not before this court as no leave to appeal against it was granted by the court a quo.

[15] While accepting the trite position[13] that an appeal does not lie against the reasons for the order, it was argued on behalf of the appellant, in essence, that this case presented an opportunity for this court to find that, in exceptional circumstances, an appeal may lie against the reasons for an order.

[16] Counsel for the appellant argued that this ought to be found in light of the following: that in *Philani–Ma–Afrika & others v Mailula & others*[14] (*Philani- Ma- Afrika*) and *Nova Property Group Holdings Ltd & others v Cobbett and another*[15] (*Nova Property*) this court held that a more flexible

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[12] See: *Dickinson & another v Fisher's Executors* 1914 AD 424 at 427 and 429*; Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355; Smit v Oosthuizen* 1979 (3) SA 1079 (A) at 1087*; SA Metal Group (Proprietary) Limited v The International Trade Administration Commission & another* (267/2016) [2017] ZASCA 14 (17 March 2017) para 15.

[13] See: *Western Johannesburg Rent Board* supra at 355; *ABSA Bank Ltd v Mkhize and two similar cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64; *SA Metal Group (Proprietary) Limited* supra para 15 ;

[14] *Philani–Ma–Afrika & others v Mailula & others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) at 579 para 20.

[15] *Nova Property Group Holding Ltd v Cobbett & another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA) at 323 para 8.

approach was called for and that the interests of justice ought to be the main consideration in determining appealability. Further, that the word ‘decision’ in s 16(1)*(a)* of the Superior Courts Act ought to be interpreted as including the reasons for an order or judgment, where there were exceptional circumstances present.

[17] Counsel for the appellant contended that the following were exceptional circumstances, namely, that the court a quo’s interpretation of s 9(2)*(b),* read with s 13(6), of the ECA, was part of the *ratio decidendi* of its order and was binding, not only on the appellant, ICASA and the other parties, but generally. Further, that it will affect the future conduct of everyone bound by it and that no one may ever again have an opportunity to challenge the court a quo’s interpretation of s 9(2)*(b),* read with s 13(6), of the ECA. Meaning, effectively, that neither the appellant, nor others affected by the interpretation, such as the parties seeking to intervene, would be able to transfer control of licenses, unless the BEE requirement in s 9(2)*(b)* of the ECA was met at the outset. It was also submitted that the BEE issue that was raised in this appeal was of great public importance.

[18] Counsel for the appellant submitted that the finding it was urging this court to make, regarding the appealability, would not result in a piecemeal consideration of matters; that even though this court was being asked, in essence, to create an exception to the general principle that appeals do not lie in respect of the reasons for a judgment or order, the exception would be a

narrow one and there was no danger of this court being inundated with appeals against reasons, as a result.

[19] Counsel readily conceded that he could not cite any authority directly in support of this 'novel' approach, but seemed to suggest that there was some indirect support for it in a dictum of Moseneke DCJ in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[16] (*ITAC*). There, the learned Deputy Chief Justice stated; '[w]hilst it is true that *ordinarily* an appeal lies against an order and not the reasoning in a judgment...' [17](emphasis added).

[20] The appellant's reliance on the decisions in *Philani-Ma-Afrika* and *Nova Property* is misplaced. In both matters the appeals were against substantive orders. In *Philani-Ma-Afrika* the appealability of an execution order for eviction, pending the final determination of the appeal by this court, was considered. This court held that the belief that the execution order was not appealable was erroneous and that it was clear from cases such as *S v Western Areas Ltd & others*[18] *and Khumalo & others v Holomisa*[19] that what was of paramount importance in deciding whether a judgment was appealable, was the interests of justice.[20] In *Nova Property* the appealability of an order to compel discovery was considered. This court held that even

[16] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd (ITAC)* [2010] ZACC 6; 2012 (4) SA 618 (CC).
[17] At 646A para 71.
[18] *S v Western Areas Ltd & others* 2005 (5) SA 214 (SCA); 2005 (1) SACR 441 (SCA) paras 25 and 26.
[19] *Khumalo & others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at 411 A-B para 8.
[20] At 579 B-E para 20.

though such an order was not appealable under the traditional test laid down in *Zweni v Minister of Law and Order*[21] that test, as held in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[22] was not exhaustive. Referring to *Philani-Ma-Afrika,* this court concluded that even though the interlocutory order was not appealable under the traditional test laid down in *Zweni,* it was appealable in terms of s 17(1) of the Superior Courts Act. But, of significance is that none of those decisions support the approach advanced by the appellant in the present matter.

[21] The appellant's reliance on the dictum in *ITAC* is also misplaced. The Constitutional Court was not considering the issue of appealability, but mentioned that it was permissible and sometimes necessary for a court to look at the reasons for an order to fully grasp the reach and effect of that order.[23] The dictum was obiter and, read in context, makes it clear that Moseneke DCJ was not implying that in exceptional cases an appeal lies against the reasons for an order.

[22] The contentions of the appellant's counsel effectively required this court to jettison a sound principle which has been confirmed in numerous

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[21] *Zweni v Minister of Law & Order* 1993 (1) SA 523 (A).
[22] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10 E-G.
[23] *ITAC* supra at 646A-B para 71. The basic principle is applicable to the interpretation of a judgment or order: *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H.

decisions,[24] including decisions of this court[25] over a long period and as recently as the same day on which the present matter was heard.[26]

[23] While it is so that this court has in recent times, as is evident from the decisions referred to above, adopted a more flexible and pragmatic approach in determining whether interlocutory orders are appealable, that did not extend to making reasons of judgments, or orders, appealable.

[24] The approach contended for by the appellant not only holds the potential of 'opening the floodgates', with its inherent challenges, but also the undesirable prospect of matters being disposed of in a piecemeal fashion. And, even more concerning, the 'hollowing-out', or erosion, of the substratum of judgments and orders that are not before this court, and the negative consequences accompanying such a process.[27]

[25] In any event, I am not persuaded that there are any exceptional circumstances present that would justify what would be a radical departure from a sound, tried and, doubtlessly, trusted principle. The contention that the

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[24] See, the *locus classicus*, *Western Johannesburg Rent Board supra* at fn 9, 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 Deysel* 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).

[25] *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) at 198 I-J para 39; *ABSA Bank v Mkhize* supra para 64.

[26] *SA Metal Group (Proprietary) Limited* supra para 15.

[27] There are some significant similarities between the facts of the present case and those in *Molteno Bros v South African Railways* supra fn 22. In that matter an exception to a declaration had been upheld by the court of first instance on the basis that the declaration was deficient on three grounds. The plaintiffs noted an appeal to this court in which they, inter alia, stated that they were not questioning the correctness of the order of the court a quo in respect of two of the grounds, but only in respect of the third ground. By a majority this court struck the appeal from the roll on the basis that since there was no intention to reverse the order of the court a quo it had no jurisdiction to hear the appeal.

appellant and others, who may have to comply with s 9(2)*(b)* of the ECA, would not be able to do anything about the binding effect of the court a quo's interpretation of that section and s 13 of the ECA, is, in my view, grossly exaggerated. There is nothing preventing anyone affected from challenging the correctness of that interpretation in a matter where it is properly raised. It was not for this court, in a matter such as the present, to anticipate what may or may not be faced by those that are required to comply with the BEE requirement, and to act precipitately and thereby unleash the undesirable consequences referred to above, which, until thus far, have been restrained by the sound principle that reasons for judgments and orders are not appealable.

[26] In truth the appellant was requesting this court to give an opinion on the meaning of s 9(2)*(b),* read with s 13(6), of the ECA, in circumstances where the substantive order made by the court a quo is not before this court, and which, consequently, is incapable of being altered or substituted. That is not in the interests of justice.

[27] This court does not have jurisdiction in the present matter, and that conclusion also sealed the fate of the intervention application.[28]

[28] Since the parties who sought to intervene had no interest in the order of the court a quo, but only in the reasons the appellant sought to advance in this court, their application to intervene was also dismissable on the ground of a lack of a direct and substantial interest in that order: see *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) at 392-393, paras 84-87.

[28] Accordingly, the following order was made on 17 March 2017:

1. The appeal is struck from the roll.

2. The application to intervene in the appeal is dismissed.

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P Coppin

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	S Budlender (with him M Musandiwa) Instructed by: Bowman Gilfillan, Johannesburg Honey Attorneys, Bloemfontein
For the Intervening Parties:	R Bhana SC Instructed by: Norton-Rose Fulbright, Johannesburg Honey Attorneys, Bloemfontein